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## Don't Believe Everything You Read: Recent 9th Circuit Decision on Same-Sex Domestic Partner Health Benefits in Arizona More Narrow than Reported

By Neil Alexander and Wade Swanson

Earlier this week, in *Diaz v. Brewer*, the Ninth Circuit Court of Appeals agreed with a federal judge's earlier decision to strike down a state law that was intended to block state employees' domestic partners from being eligible for health care benefits. Following the announcement of the decision, several media reports incorrectly suggested that:

- The Ninth Circuit had recognized a constitutional right to healthcare for gay and lesbian domestic partners;
- Same-sex partners of all workers in Arizona were entitled to healthcare benefits; and
- The Arizona law at the heart of the controversy had been blocked from the books.

However, a closer analysis of the Ninth Circuit opinion demonstrates that the ruling is more narrow in its application than initially reported and, just as importantly, may not survive either an appeal to the U.S. Supreme Court or further proceedings, if any, in the federal district court.

### What the Ninth Circuit Really Said

In *Diaz v. Brewer*, a three-judge panel of the court, with an opinion written by Circuit Judge Mary Schroeder (herself a former State of Arizona employee), determined that the Arizona law at issue discriminated against same-sex domestic partners of state employees on the basis of sexual orientation. The adverse effect recognized by the court was the result that, under Arizona law, different-sex couples retain existing healthcare coverage by marrying, while same-sex couples are prevented from marrying and, therefore, precluded from receiving such benefits.

Judge Schroeder determined that the State of Arizona had failed to provide sufficient support that this differing treatment of same-sex and different-sex couples furthered any legitimate financial or administrative interest of the state. Thus, the court enjoined the offending Arizona law as a violation of the U.S. Constitution's equal protection clause.

The Ninth Circuit did not, however, find that the domestic partners of government workers are constitutionally entitled to health benefits. Instead, as Judge Schroeder

wrote, “when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.”

**Private Sector Employer Actions in Arizona Not Affected**

The equal protection clause only applies to government actions, not to the actions of private citizens or corporations. In other words, although the government is not allowed to treat same-sex domestic partners differently from different-sex domestic partners without a rational basis, private sector employers may make this distinction, regardless of the reason.

Thus, the Ninth Circuit ruling in *Diaz v. Brewer* narrowly applies to only government employers. Although non-government employers are free to not follow the lead of the State of Arizona and provide healthcare benefits to same-sex partners, neither Arizona law nor the Ninth Circuit’s recent decision requires them to do so.

**Round One: Diaz 1, Brewer 0**

Although the Ninth Circuit’s decision went against Arizona Governor Jan Brewer, it remains to be seen whether she appeals to the U.S. Supreme Court which, as other pundits point out, overturns decisions from the Ninth Circuit on a regular basis.

In addition, the Ninth Circuit’s ruling upheld the trial court’s *preliminary* injunction in this matter, and did so because the State of Arizona failed to provide sufficient support for the cost savings and administrative reductions that it claimed justified the statute in the first place. If a further hearing is held to decide whether a *permanent* injunction is appropriate, and Governor Brewer is able to provide additional evidence of the state’s economic interests, then the State of Arizona may be able to justify its differing treatment of same-sex and different-sex domestic partners without offending the Constitution’s equal protection clause.

Whether any of these procedural processes will occur, or Governor Brewer simply leaves the Ninth Circuit ruling undisturbed, is yet to be determined.

Regardless of the next step taken in the *Diaz v. Brewer* case, the battle over same-sex partner healthcare benefits is far from over. Similarly, the media attention that same-sex partner issues receive is only going to increase.

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