

SC92583

IN THE SUPREME COURT OF MISSOURI

KELLY D. GLOSSIP,

Appellant,

v.

**MISSOURI DEPARTMENT OF TRANSPORTATION AND
HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM,**

Respondent.

**Appeal from the Cole County, Missouri Circuit Court
The Honorable Judge Daniel R. Green**

**ADDITIONAL BRIEF OF RESPONDENT
PURSUANT TO COURT ORDER OF JUNE 27, 2013**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ARGUMENT.....	4
Introduction	4
I. <i>United States v. Windsor</i> affirms Missouri’s authority to define the marital relation.	5
II. <i>Diaz</i> and <i>Bassett</i> do not support Appellant’s contention that the subject statutes violate the Missouri Constitution.....	7
CONCLUSION	9
CERTIFICATE OF SERVICE AND COMPLIANCE	10

TABLE OF AUTHORITIES

Cases

<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992)	4
<i>Bassett v. Snyder</i> , 2013 WL 328511 (E.D. Mich. June 28, 2013).....	5, 8
<i>Diaz v. Brewer</i> , 656 F.3d 1008 (9th Cir. 2011).....	5, 7
<i>Haddock v. Haddock</i> , 201 U.S. 562 (1906).....	5
<i>Linton v. Missouri Veterinary Med. Bd.</i> , 988 S.W.2d 513 (Mo. banc 1999).....	8
<i>Ocello v. Koster</i> , 354 S.W.3d 187 (Mo. banc 2011)	8
<i>United States v. Windsor</i> , 133 S. Ct. 2675, 2013 WL 3196928 (2013)	4, 5, 6, 7
<i>Williams v. North Carolina</i> , 317 U.S. 287 (1942).....	5

Statutes, Rules and Other Authorities

1 U.S.C. §7	4
Art. I, sec. 2 Missouri Constitution	7
Section 104.140 RSMo.....	7

ARGUMENT¹

Introduction

The question presented is whether the United States Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675, 2013 WL 3196928 (2013), constitutes a change in existing law that would support reversal of the circuit court’s judgment in favor of the Missouri Department of Transportation and Highway Patrol Employees’ Retirement System (MPERS). The answer to that question is no. The Supreme Court unequivocally affirmed that each state has “essential authority to define the marital relation,” *id.* at 2692, and that the states have “ ‘virtually exclusive primacy... in the regulation of domestic relations.’ ” *Id.* at 2691 (*quoting Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring)).

Windsor invalidated Section 3 of the Defense of Marriage Act, 1 U.S.C. §7 (“DOMA”), as an “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage[.]” *Windsor* at 2693. *Windsor* does not disturb Missouri’s authority to define marriage through its statutes or its Constitution. Rather, the decision affirms the states’ “power in defining the marital relation[.]” *Id.* at 2692. Likewise, *Windsor* does not impact the General Assembly’s authority to confer benefits to married couples. Indeed, *Windsor* supports deference to the General Assembly’s

¹ Respondent adopts and incorporates herein by reference the jurisdictional statement, statement of facts and arguments contained in its brief filed on January 11, 2013.

policy choices and shows that the constitutional validity of the subject statutes should be upheld.

Finally, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (aff'g grant of preliminary injunction) and the recent preliminary injunction order in *Bassett v. Snyder*, 2013 WL 328511 (E.D. Mich. June 28, 2013), discussed in Appellant's additional brief, are not germane to this Court's decision. Because Appellant cites and discusses them, however, MPERS addresses them in Section II below.

I. *United States v. Windsor* affirms Missouri's authority to define the marital relation.

In *Windsor*, the United States Supreme Court unequivocally stated that it was not disturbing the states' authority to define marriage: "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Windsor* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to 'the protection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* "The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage ... and the Constitution delegated no authority to the Government of the United States on marriage." *Windsor* at 2691 (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).

Windsor does not diminish Missouri's authority to define marriage. While some states have made different policy choices, Missouri's authority to define marriage

includes the power to limit marriage to opposite-sex couples through its Constitution and by statute. Here, Appellant was never married to Trooper Engelhard. Vol. I LF 11.

The principal defect in Section 3 of DOMA was that it intruded upon states' ability to extend the definition of marriage, with its attendant responsibilities and protections, to same-sex couples. Indeed, the Supreme Court concluded that "[t]he State's power in defining the marital relation is of central relevance in this case[.]" *Windsor* at 2692. The Court's equal protection holding addresses only "due process and equal protection principles applicable to the Federal Government." *Id.* at 2693.

The *Windsor* Court did not suggest that it was addressing anything more than "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," *Windsor* at 2693. The Court was particularly troubled by the fact that Section 3 of DOMA effectively created "two contradictory marriage regimes within the same State." *Id.* at 2694. The Court concluded that Section 3 of DOMA violated the Fifth Amendment's Due Process clause because the federal government refused to acknowledge same-sex marriages made lawful by certain states. *Id.* at 2695-96. The Court explicitly limited its decision to same-sex marriages made lawful by the marriage laws of the states that have chosen to recognize same-sex marriage. *Id.*

Windsor likewise did *not* decide that classifications based on sexual orientation are subject to "heightened scrutiny." The Supreme Court declined to adopt the Second Circuit's view that such classifications should be subjected to a more rigorous standard of review. Appellant fails to explain why the Second Circuit's view of the Fifth Amendment should govern this Court's interpretation of the Missouri Constitution's

equal protection clause, art. I, sec. 2. Moreover, Section 104.140 RSMo creates a classification based on marital status, not sexual orientation.

The facts and law applicable to this case do not remotely resemble those in *Windsor*. Missouri's statutes provide, as they have for many years, a death benefit to surviving "spouses," consistent with the traditional definition of that term. Judge Kennedy concluded that "until recent years, many citizens had not even considered the possibility that two persons of the same sex" might aspire to lawful marriage, "[f]or marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term," *Windsor* at 2689. *Windsor* lends no support for Appellant's attempt to invalidate the subject Missouri statutes.

II. *Diaz* and *Bassett* do not support Appellant's contention that the subject statutes violate the Missouri Constitution.

Diaz and *Bassett* are distinguishable, because each involves a challenge to legislation that took away previously existing rights that other states had chosen to grant to non-marital couples, including opposite-sex couples. As discussed in MPERS' initial brief, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), is distinguishable because it involved a legislative attempt to eliminate an *existing* right to certain benefits. (See Respondent's brief filed January 11, 2013, pp. 25-26). Specifically, *Diaz* affirmed the grant of a preliminary injunction where the Arizona legislature had sought to withdraw healthcare benefits from same-sex domestic partners of state employees by redefining the term "dependents," which previously had encompassed both opposite-sex and same-sex domestic partners. 656 F.3d at 1009-1010. The Supreme Court's decision to decline

review of *Diaz* at the preliminary injunction stage adds nothing to the discussion of the issues before this Court.

The district court's preliminary injunction decision in *Bassett v. Snyder*, 2013 WL 328511 (E.D. Mich. June 28, 2013) likewise concerned a legislative attempt to withdraw existing rights. Specifically, the Michigan legislature passed an Act that prohibited receipt of benefits by same-sex domestic partners of public employees, even though these benefits previously had been available to them. 2013 WL 328511, *2-*4. The district court's preliminary injunction order in *Bassett* is subject to review on appeal if a permanent injunction is issued in that case.

In stark contrast to the laws challenged in *Diaz* and *Bassett*, the MPERS statutes do not take an existing right away from anyone. There is no evidence that the subject statutes were motivated by an improper animus. Further, this Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Ocello v. Koster*, 354 S.W.3d 187, 202 (Mo. banc 2011). *Windsor* does not support extending an entirely new class of benefits to domestic partners outside the legislative process. Under the rational basis test, this Court does not determine "whether the legislature 'should have' done something different[.]" *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 516 (Mo. banc 1999). Ultimately, this Court should permit the General Assembly to determine whether, and to what extent, such benefits should be expanded in the future.

CONCLUSION

For these reasons, MPERS respectfully requests that this Court affirm the circuit court's judgment upholding the constitutional validity of Sections 104.012 and 104.140.3 RSMo and dismissing Plaintiff's amended petition.

Respectfully submitted,

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06 and that the brief contains 1,287 words.

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