IN THE SUPREME COURT OF MISSOURI

No. SC 92583

KELLY D. GLOSSIP

Plaintiff-Appellant

v.

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

Defendant-Respondent.

On Appeal from Circuit Court for Cole County, Missouri

Case No. 10-CC00434

The Honorable Daniel R. Green

ADDITIONAL BRIEF OF APPELLANT PURSUANT TO COURT ORDER OF JUNE 27, 2013

Maurice B. Graham #18029
Gray, Ritter & Graham, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(312) 241-5620
Fax: (314) 241-4140

Steven Douglas Bonney, #36164
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, Missouri 64111
(816) 756-3113
Fax: (816) 756-0136

Anthony E. Rothert, #44827
Grant R. Doty, #60788
American Civil Liberties Union of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
Fax: (314) 652-3112

John Knight, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
180 N. Michigan, Suite 2300
Chicago, Illinois 60601

Joshua Block, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Roger K. Heidenreich #40898
SNR Denton US LLP
One Metropolitan Square, #3000
St. Louis, MO 63102
(314) 259-5806
Fax: (314) 259-5959

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benefits coverage is not narrowly tailored to serve a compelling interest, substantially related to an important governmental interest, nor even rationally related to a legitimate governmental purpose in that: (a) the state failed to show that the exclusion is narrowly tailored to serve a compelling interest or substantially related to an important governmental interest and the trial court failed to engage in the careful rational basis scrutiny required for a law that burdens the rights of a disfavored group or burdens personal relationships; (b) even speculation about a rational basis for a discriminatory classification must have some basis in reality; (c) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in allocating pension benefits to those most financially dependent on a deceased employee, in that the trial court erroneously compared all unmarried couples to married couples and failed to recognize that the survivor benefits statutes are not based on financial interdependence, that same-sex domestic partners are similarly financially interdependent to different-sex married couples, and that same-sex couples are denied benefits even if married; (d) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in establishing objective benefit criteria in that same-sex couples are denied the benefits even if married, the facts show that Cpl. Engelhard and Mr. Glossip were in

a relationship comparable to a spousal relationship, and the evidence shows that domestic partner benefits can be provided on an objective basis with minimal administrative burden; and (e) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in controlling costs in that the government may not control costs by discriminating against similarly situated classes and a bare desire to harm a class of people is not a legitimate state interest. 17

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JURISDICTIONAL STATEMENT

Plaintiff Kelly Glossip adopts and incorporates herein by reference the jurisdictional statement in his opening brief filed on November 5, 2012.

STATEMENT OF FACTS

Glossip adopts and incorporates herein by reference the statement of facts in his opening brief filed on November 5, 2012.

POINTS RELIED ON

I. The trial court erred in granting defendant's motion to dismiss and denying plaintiff's motion for summary judgment because Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 exclude Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard in violation of the Missouri Constitution's equal protection guarantee, in that (a) the discriminatory denial of survivor benefits to Mr. Glossip is neither justified nor required by the Marriage Amendment's ban against marriage for same-sex couples, but must independently survive constitutional review; (b) same-sex couples are not similarly situated to unmarried different-sex couples because they are barred from qualifying for the benefits through marriage; and (c) Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 facially and intentionally discriminate on the basis of sexual orientation as shown by the statutes, their legislative history, and their operative effect.

Alaska Civil Liberties Union v. State, 122 P.3d 781 (Alaska 2005); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied*, No. 12-23, 2013 WL 3213545 (U.S. June 27, 2013); *Bassett v. Snyder*, No. 12-cv-10038, 2013 WL 3285111 (E.D. Mich. Jun. 28, 2013); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

Mo. Rev. Stat. § 104.012; Mo. Rev. Stat. § 104.140; Mo. Const. art. I, § 2.

II. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because the court failed to independently

examine whether sexual orientation is entitled to heightened scrutiny under the Missouri constitution's equal protection guarantee in that the exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard must be subjected to heightened scrutiny because (a) the Missouri Constitution's equal protection guarantee should be interpreted independently and more expansively in this case than the equal protection clause of the U.S. Constitution and (b) an examination of the applicable criteria for heightened scrutiny and recent favorable state and federal precedent, rather than the now-discredited federal precedent relied on by the trial court, show that heightened scrutiny should be applied to sexual orientation classifications.

State ex rel. J. D. S. v. Edwards, 574 S.W.2d 405 (Mo. banc 1978); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675, 2013 WL 3196928 (2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Mo. Const. art. I, § 2.

III. **The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because the exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard violates the Missouri Constitution's equal protection guarantee since the denial of survivor benefits coverage is not narrowly tailored to serve a compelling interest, substantially related to an important**

governmental interest, nor even rationally related to a legitimate governmental purpose in that: (a) the state failed to show that the exclusion is narrowly tailored to serve a compelling interest or substantially related to an important governmental interest and the trial court failed to engage in the careful rational basis scrutiny required for a law that burdens the rights of a disfavored group or burdens personal relationships; (b) even speculation about a rational basis for a discriminatory classification must have some basis in reality; (c) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in allocating pension benefits to those most financially dependent on a deceased employee, in that the trial court erroneously compared all unmarried couples to married couples and failed to recognize that the survivor benefits statutes are not based on financial interdependence, that same-sex domestic partners are similarly financially interdependent to different-sex married couples, and that same-sex couples are denied benefits even if married; (d) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in establishing objective benefit criteria in that same-sex couples are denied the benefits even if married, the facts show that Cpl. Engelhard and Mr. Glossip were in a relationship comparable to a spousal relationship, and the evidence shows that domestic partner benefits can be provided on an objective basis with minimal administrative burden; and (e) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in

controlling costs in that the government may not control costs by discriminating against similarly situated classes and a bare desire to harm a class of people is not a legitimate state interest.

Massachusetts v. U.S. Dept. of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012); *United States v. Windsor*, 133 S. Ct. 2675, 2013 WL 3196928 (2013); *State ex rel. Classics Tavern Co., Inc. v. McMahon*, 783 S.W.2d 463 (Mo. App. 1990); *Petitt v. Field*, 341 S.W.2d 106 (Mo. 1960).

Mo. Rev. Stat. § 104.012; Mo. Rev. Stat. § 104.140; Mo. Const. art. I, § 2.

IV. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because together Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 are an unconstitutional special law in that (a) the statutes fail to provide survivor benefits coverage to all similarly situated couples but create fixed categories based on sexual orientation, which is an immutable characteristic, and the state provided no evidence to show a substantial justification for excluding same-sex couples from survivor benefits coverage; and (b) even if the statutes were not a facially special law, the discrimination against Mr. Glossip lacks a rational basis in that the trial court erroneously relied on speculations about financial interdependence and administrative difficulties that are contradicted by logic, common sense, and the undisputed evidence in the record.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. banc 2006); *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58 (Mo. banc 1994);

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006); *Alderson v. State*, 273 S.W.3d 533 (Mo. banc 2009).

Mo. Rev. Stat. § 104.140; Mo. Rev. Stat. § 104.012; Mo. Const. art. III, § 40.

V. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because Mr. Glossip is entitled to injunctive relief in that he has suffered an irreparable injury in the loss of survivor benefit coverage, damages are inadequate to address his harm because the injury to Mr. Glossip is continuing and repeated every year, the balance of hardships between Mr. Glossip and the state weighs in favor of an injunction because the administrative burdens to the state are speculative and the cost to the state does not justify the constitutional violation, and the public interest is served by granting a permanent injunction because it is in the public interest to protect constitutional rights.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir. 1981); *Randolph v. Rodgers*, 170 F.3d 850 (8th Cir. 1999).

Mo. Rev. Stat. §§ 104.140.3, 104.090.3.

ARGUMENT

Standard of Review

Glossip adopts and incorporates herein by reference the standard of review argument set forth in his opening brief filed on November 5, 2012.

Introduction

United States v. Windsor, 133 S. Ct. 2675, 2013 WL 3196928 (2013), supports Mr. Glossip's argument that Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 violate Missouri's equal protection guarantee. Indeed, shortly after deciding *Windsor*, the Supreme Court denied *certiorari* in *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied*, No. 12-23, 2013 WL 3213545 (U.S. June 27, 2013), leaving intact the Ninth Circuit's ruling that Arizona's decision to categorically exclude committed same-sex couples from spousal employment benefits fails rational basis review under the United States Constitution's Equal Protection Clause. In addition, just days after the Supreme Court's decision in *Windsor* and denial of *certiorari* in *Diaz*, a federal district court in *Bassett v. Snyder*, No. 12-cv-10038, 2013 WL 3285111 (E.D. Mich. Jun. 28, 2013), relied in part on those decisions to strike down a Michigan statute with striking similarities to the statutes Glossip challenges. *Windsor*, *Diaz*, and *Bassett* provide additional reasons why this Court should reverse the trial court's dismissal of Glossip's petition and the denial of his motion for summary judgment. Those decisions bear on the following issues: the discriminatory nature of the statutory classification addressed in Point I of Glossip's opening brief (Pl. Br. 15-25), the applicable level of scrutiny to the challenged statutes addressed in Point II of Glossip's opening brief (Pl. Br. 28-36), and

the failure of the survivor benefit statute to survive any level of constitutional review discussed in Part III of Glossip's opening brief (Pl. Br. 38-54).

I. The trial court erred in granting defendant's motion to dismiss and denying plaintiff's motion for summary judgment because Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 exclude Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard in violation of the Missouri Constitution's equal protection guarantee, in that (a) the discriminatory denial of survivor benefits to Mr. Glossip is neither justified nor required by the Marriage Amendment's ban against marriage for same-sex couples, but must independently survive constitutional review; (b) same-sex couples are not similarly situated to unmarried different-sex couples because they are barred from qualifying for the benefits through marriage; and (c) Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 facially and intentionally discriminate on the basis of sexual orientation as shown by the statutes, their legislative history, and their operative effect.

Glossip adopts and incorporates herein by reference the arguments regarding Point I set forth in his opening brief filed on November 5, 2012 (Pl. Br. 15-25) and in Section I.A of his reply brief filed on January 28, 2013 (Pl. Reply 1-6) and offers the following additional argument.

In *Windsor*, the Court struck down Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, ("DOMA"), which denied married lesbian and gay persons the rights and responsibilities accorded under federal law to all other married persons because it

violated "basic due process and equal protection principles." *Windsor*, 2013 WL 3196928, at *15. The Court held impermissible and unconstitutional DOMA's "avowed purpose and practical effect … [of] impos[ing] a disadvantage, a separate status, and so a stigma" on same-sex couples' relationships by denying federal recognition to their marriages, and ensuring that "those unions will be treated as second-class." *Id.*, at *15-16. It concluded that DOMA was passed because of, not in spite of, its negative effects on same-sex couples. *Id.*, at *15.

The day after *Windsor* was decided, the Supreme Court denied review in *Diaz.* The Ninth Circuit, in *Diaz*, had affirmed the district court's ruling that an Arizona law limiting employment benefits to spouses when state law prohibits same-sex couples from marrying has "a discriminatory effect . . . because, under Arizona law, different-sex couples could retain their health coverage by marrying, but same-sex couples could not." 656 F.3d at 1012. The court compared the Arizona law to the federal law limiting food stamp eligibility to households of persons in order to prevent "hippies" from getting food stamps overturned by the Supreme Court in *Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973). The *Diaz* court reasoned that the Arizona law "may present a more compelling scenario [than the food stamp amendment], since the plaintiffs in *Moreno* were prevented from financial circumstances from adjusting their status to gain eligibility, while same-sex couples in Arizona are *prevented by operation of law*." *Id.* at 1014 (emphasis added).

Finally, relying on *Windsor*, the *Bassett* court enjoined a state law that similarly had as its purpose and practical effect the imposition of disparate treatment on public employees and their same-sex partners. *Bassett*, 2013 WL 3285111, at *18-20, 24-25,

29. The challenged law prohibited public employers from providing employment benefits to a person living with a public employee unless the person was legally married to the employee, the employee's Internal Revenue Service dependent, or eligible to inherit from the employee under state intestacy law. *Id.*, at *1, 3-4. The district court found the law discriminatory on the basis of sexual orientation because it incorporates definitions from "the Michigan marriage amendment and intestacy statute" that "distinguish between opposite-sex couples, who are permitted to marry and can inherit under intestacy, and same-sex couples, who cannot." *Id.*, at *18. Relying on holdings of several federal and state courts "that statutes restricting benefits on the basis of marriage intentionally classify on the basis of sexual orientation where gays and lesbians cannot legally marry[,]" the court concluded that the Michigan law "makes health benefits available 'on terms that are a legal impossibility for gay and lesbian couples'" *id.*, at *19 (citations omitted), leading the court to "[t]he unavoidable conclusion . . . that [the law] contains a discriminatory classification on the basis of sexual orientation." *Id.*, at *20.

Like the enjoined Arizona and Michigan laws, the Missouri survivor benefits statute challenged here makes benefits available only on terms that are a legal impossibility for gay and lesbian couples like Kelly Glossip and Cpl. Engelhard.[1]

[1] Glossip's application for survivor benefits was denied solely because he and Cpl. Engelhard were of the same sex since the denial was premised on Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. 451.022. *See* Pl. Brf. at pp. 5-6. This distinguishes his case from *Beard v. Mo. State Emps.' Ret. Sys.*, 379 S.W.3d 167 (Mo. 2012), where the

Additionally, the history and text of Mo. Rev. Stat. §§ 104.012 & 104.140.3 show that their "essence" and "practical effect" is to deny same-sex partners of state troopers the survivor benefits provided to different-sex spouses of troopers. The Missouri legislature's amendment of Section 104.012 in 2001 to provide that "[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman," 2001 Mo. Legis. Serv. S.B. 371 § 2 (codified at Mo. Rev. Stat. § 104.012), has as its "primary purpose" if not the "sole purpose" to ensure that partners of lesbian or gay state employees, such as Cpl. Engelhard, are denied the benefits provided to the spouses of heterosexual employees, including survivor benefits provided to spouses of heterosexual state troopers under §

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designated beneficiaries of Theresa Beard, a vested member of the Missouri State Employees' Retirement System, "were not entitled to retirement or survivor benefits because Beard died prior to her annuity starting date and did not have a surviving spouse or dependent children." *Id.* at 169. There was no constitutional violation for this Court to consider, since "under the terms of the contract Beard signed, she was not eligible to receive her retirement benefits until she retired" and having "died before she retired, . . . her designated beneficiaries[ ] were not entitled to benefits[.]" *Id.* at 170. In contrast, Cpl. Engelhard's eligibility for survivor benefits for a spouse is not in question, since he served as a member of the Missouri Highway Patrol and died in the line-of-duty. Kelly Glossip was ineligible for the survivor annuity solely because he and Cpl. Engelhard were a same-sex couple.

104.140.3. The history and text of Missouri's pension statutes demonstrate that Missouri chose "a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" same-sex couples. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Discrimination against same-sex couples—including surviving partners of state troopers, such as Glossip—"was more than an incidental effect of the [ ] statute[s]. It was [their] essence." *Windsor*, 2013 WL 3196928, at *15.

Windsor concerned the denial of federal benefits to married same-sex couples, while *Bassett*, *Diaz* and Glossip's case concern the denial of public employment benefits to committed same-sex couples by providing them *only* to married couples when same-sex couples are unable to marry (or have their marriages entered elsewhere recognized). Despite this difference, the principle is the same across all four cases: where the purpose and practical effect of a law is to disadvantage same-sex couples, the law discriminates on the basis of sexual orientation.

II. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because the court failed to independently examine whether sexual orientation is entitled to heightened scrutiny under the Missouri constitution's equal protection guarantee in that the exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard must be subjected to heightened scrutiny because (a) the Missouri Constitution's equal protection guarantee should be interpreted independently and more expansively in this case than the equal protection clause of the U.S. Constitution and (b) an examination of the

applicable criteria for heightened scrutiny and recent favorable state and federal precedent, rather than the now-discredited federal precedent relied on by the trial court, show that heightened scrutiny should be applied to sexual orientation classifications.

Glossip adopts and incorporates herein by reference the arguments regarding Point II set forth in his opening brief filed on November 5, 2012 (Pl. Br. 28-36) and in Section II of his reply brief filed on January 28, 2013 (Pl. Reply 17-21) and offers the following additional argument.

Windsor affirmed the ruling of the Court of Appeals without explicitly adopting or rejecting the Court of Appeals' decision to apply heightened scrutiny to the sexual orientation classification of DOMA. Because the Court did not vacate the Second Circuit's decision, its holding with respect to heightened scrutiny, *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012), remains binding authority on federal courts in the Second Circuit, *cf. Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1206 (E.D. Cal. 2009) (following circuit precedent applying strict scrutiny since Supreme Court precedent regarding the appropriate level of scrutiny was unclear); *Sieg v. Sears Roebuck & Co.*, 855 F. Supp. 2d 320, 327 (M.D. Pa. 2012) ("In light of the failure of a Supreme Court majority to adopt clearly one of the two *Asahi* standards, we will continue with the Third Circuit Court of Appeals' approach."), and continues to provide persuasive authority to guide this Court in determining that heightened scrutiny applies to sexual-orientation classifications under the Missouri Constitution.

The *Bassett* court, although recognizing that it was bound to follow Sixth Circuit precedent finding rational basis review to be the applicable standard for sexual-orientation classifications, concluded that Sixth Circuit precedents should be reexamined since their holdings were based on the now-overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). *Bassett*, 2013 WL 3285111, at *16. The *Bassett* court found that lesbians and gay men meet all four factors that entitle classes entitled to heightened scrutiny. *Id.*, at *15-16.[2]

Accordingly, *Windsor* and its progeny provide additional support for the conclusion that this Court should apply heightened scrutiny to review the constitutionality of the survivor benefit statutes under the Missouri Constitution.

[2] Subsequent to the decision in *Windsor*, the Supreme Court denied *certiorari* in several other cases cited by Glossip in support of the applicability of heightened scrutiny, including *Golinski v U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989-90 (N.D. Cal 2012), *cert. denied* (U.S. June 27, 2013) (No. 12-16), and *Pederson v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), *cert. denied* (U.S. June 27, 2013) (12-302). In addition, the Supreme Court's vacating of the Ninth Circuit's decision in *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), and *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), leaves in place the district court decision applying heightened scrutiny. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

III. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because the exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard violates the Missouri Constitution's equal protection guarantee since the denial of survivor benefits coverage is not narrowly tailored to serve a compelling interest, substantially related to an important governmental interest, nor even rationally related to a legitimate governmental purpose in that: (a) the state failed to show that the exclusion is narrowly tailored to serve a compelling interest or substantially related to an important governmental interest and the trial court failed to engage in the careful rational basis scrutiny required for a law that burdens the rights of a disfavored group or burdens personal relationships; (b) even speculation about a rational basis for a discriminatory classification must have some basis in reality; (c) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in allocating pension benefits to those most financially dependent on a deceased employee, in that the trial court erroneously compared all unmarried couples to married couples and failed to recognize that the survivor benefits statutes are not based on financial interdependence, that same-sex domestic partners are similarly financially interdependent to different-sex married couples, and that same-sex couples are denied benefits even if married; (d) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in

establishing objective benefit criteria in that same-sex couples are denied the benefits even if married, the facts show that Cpl. Engelhard and Mr. Glossip were in a relationship comparable to a spousal relationship, and the evidence shows that domestic partner benefits can be provided on an objective basis with minimal administrative burden; and (e) the exclusion of same-sex couples from survivor benefits is not rationally related to a state interest in controlling costs in that the government may not control costs by discriminating against similarly situated classes and a bare desire to harm a class of people is not a legitimate state interests.

Glossip adopts and incorporates herein by reference the arguments regarding Point III set forth in his opening brief filed on November 5, 2012 (Pl. Br. 38-54) and in Section I.B. of his reply brief filed on January 28, 2013 (Pl. Reply 6-16) and offers the following additional argument.

Windsor confirmed that a law motivated by a legislative "desire to harm a politically unpopular group" fails equal protection review under any level of scrutiny. *Windsor*, 2013 WL 3196928, at *15 (quoting *Moreno*, 413 U.S. at 534-535). And even though the defenders of DOMA tried to rationalize the law as serving goals of administrative efficiency, uniformity and cost savings,[3] the Court rejected these alleged

[3] *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives, No. 12-307, 2013 WL 267026, at *34-41 (filed Jan. 22, 2013) (arguing that uniform rule for non-recognition of

interests because of the animus towards same-sex couples evidenced in DOMA's history and its text. *Id.*, at *15 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence."); *Id.*, at *18 ("no legitimate purpose overcomes the purpose and effect to disparage and to injure [same-sex couples,] whom the State, by its marriage laws, sought to protect in personhood and dignity.").

In *Diaz*, the court similarly concluded that enjoining a law banning employment benefits to same-sex couples "is consistent with long standing equal protection jurisprudence holding that some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests." 656 F.3d at 1014-15 (internal quotations omitted). Further, it found that "rational basis . . . review is more searching when a classification adversely affects unpopular groups." *Id.* at 1012.[4] Applying this

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marriages of same-sex couples "serves the government's rational interest in easing administrative burdens[,]" avoids confusion caused when married same-sex couples lose or gain benefits because they move between a state that recognizes their marriage and a state that does not, and conserves financial resources).

[4] The Supreme Court also denied *certiorari* in the First Circuit's decision applying a less-deferential form of rational basis review to strike down DOMA, which offers additional support for the conclusion that the Missouri Constitution requires, at a minimum, a more searching form a rational basis review to the classification at issue here. *See Massachusetts v. U.S. Dep't. of Health & Human Servs.*, 682 F.3d 1, 10-11 (1st Cir.

more-searching form of review, the Ninth Circuit found that "the district court properly rejected the state's claimed legislative justification because the record established that the statute was not rationally related to furthering such interests." *Id.* at 1015.

Likewise in *Bassett*, the court relied on *Windsor* and existing Sixth Circuit precedent holding "repeatedly . . . that the desire to effectuate one's animus against homosexuals can never be a legitimate purpose, [and] a state action based on that animus alone violates the [federal] Equal Protection Clause," *Bassett*, 2013 WL 3285111, at *17 (quotations and citations omitted), to conclude that the historical background and legislative history of a law excluding the partners of lesbian and gay public employees from employment benefits violates equal protection. Relying on *Windsor*, the court looked "to the history and text of Public Act 297" and concluded that "it is hard to argue with a straight face that the primary purpose—indeed, perhaps the sole purpose—of the statute is other than to deny health benefits to the same-sex partners of public employees[,] [b]ut that can never be a legitimate governmental purpose." *Id.*, at *25 (internal questions and citations omitted). As in *Diaz*, the *Bassett* court reasoned that

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2012), *cert. denied sub nom. Bipartisan Legal Advisory Grp. of U.S. House of Representatives v. Gill*, No. 12-13, 2013 WL 3213552 (U.S. June 27, 2013), *cert denied sub nom. Dep't of Health & Human Servs. v. Massachusetts*, No. 12-15, 2013 WL 3213559 (U.S. June 27, 2013), *cert. denied sub nom. Massachusetts v. Dep't of Health & Human Servs.*, No. 12-97, 2013 WL 3213571 (U.S. June 27, 2013).

"[l]egislation curtailing benefits that is aimed at an unpopular group calls for closer examination [of the potential state interests]," *id.*, at *23, and that the evidence showed the "weakness of the defendant's proffered explanations" indicating that the law "was nothing more than an attempt to bar same-sex couples from receiving partner benefits from public employers." *Id.*

The statutes challenged by Glossip and their historical background and legislative history show that their purpose is to harm a politically unpopular group— lesbians and gays—by denying the same-sex partners of state troopers the survivor benefits provided to heterosexual troopers and their spouses. The pension statutes were amended in 2001 at the same time Missouri enacted its current statute banning same-sex couples from marrying in Missouri, 2001 Mo. Legis. Serv. S.B. 157 (codified at Mo. Rev. Stat. § 451.022.4), to specifically exclude same-sex couples from eligibility. As amended, the pension statute explicitly provided that "[f]or purpose of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman." 2001 Mo. Legis. Serv. S.B. 371 § 2 (codified at Mo. Rev. Stat. § 104.012). In amending the pension statute, the Missouri legislature reached beyond its ban on marriage for same-sex couples into the area of employment benefits, where it specifically denied valuable compensation to the committed partners of lesbian and gay public employees, such as Cpl. Engelhard. *See* Missouri Law Prof. Br. at

19-23.[5] And it did so at a time when same-sex couples were unable to marry in any U.S. state. Missouri Law Prof. Br. at 10, n. 4. Moreover, the ban on public employee benefits occurred in the context of a long history of discrimination against lesbian and gay Missourians and failed attempts to overcome that discrimination. Missouri Law Prof. Br. at 7-15; Brief of Mayor Francis Slay, et al., Br. at 11-22.

The history and text of Mo. Rev. Stat. § 104.012 evidences a "desire to harm a politically unpopular group" which fails equal protection review under any level of scrutiny. *Windsor*, 2013 WL 3196928, at *15. Moreover, even if this Court chooses not to apply heightened scrutiny to review the denial of survivor benefits to same-sex partners of state troopers, such as Kelly Glossip, Section 104.012's purpose to harm a politically unpopular group calls for a more searching rational basis review than is applicable to other line-drawing statutes. *See Diaz*, 656 F.3d at 1012; *Bassett*, 2013 WL 3285111 at *23. *See also* Pl. Br. 38-40.

IV. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because together Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 are an unconstitutional special law in that (a) the statutes fail to provide survivor benefits coverage to all similarly situated couples but create fixed categories based on sexual orientation, which is an

[5] As Glossip has previously shown, Missouri's marriage ban does not license the government to discriminate against lesbians and gays, or same-sex couples, in other ways. Pl. Br. 15-18.

immutable characteristic, and the state provided no evidence to show a substantial justification for excluding same-sex couples from survivor benefits coverage; and (b) even if the statutes were not a facially special law, the discrimination against Mr. Glossip lacks a rational basis in that the trial court erroneously relied on speculations about financial interdependence and administrative difficulties that are contradicted by logic, common sense, and the undisputed evidence in the record.

Glossip adopts and incorporates herein by reference the arguments regarding Point IV set forth in his opening brief filed on November 5, 2012 (Pl. Br. 55-57) and in Section III of his reply brief filed on January 28, 2013 (Pl. Reply 21-22). He also adopts and incorporates herein by reference the arguments regarding Point III in this additional brief showing that Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140.3 have no rational relationship to a legislative purpose.

V. The trial court erred in granting defendant's motion to dismiss and denying summary judgment to plaintiff because Mr. Glossip is entitled to injunctive relief in that he has suffered an irreparable injury in the loss of survivor benefit coverage, damages are inadequate to address his harm because the injury to Mr. Glossip is continuing and repeated every year, the balance of hardships between Mr. Glossip and the state weighs in favor of an injunction because the administrative burdens to the state are speculative and the cost to the state does not justify the constitutional violation, and the public interest is

served by granting a permanent injunction because it is in the public interest to protect constitutional rights.

Windsor does not have any specific impact on Glossip's arguments related to his fifth point on appeal other than to show why he should prevail on the merits of his claims, as set out in his additional arguments regarding Points I and II.

CONCLUSION

For all these reasons, together with the reasons set forth in Glossip's opening brief and reply brief, this Court should reverse the trial court's dismissal of Kelly Glossip's petition, reverse the denial of his cross-motion for summary judgment, and enter judgment on his behalf.

Respectfully Submitted,

/s/ Maurice B. Graham
Maurice B. Graham #18029
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(312) 241-5620
Fax: (314) 241-4140
E-mail: mgraham@grgpc.com

Joshua Block, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Roger K. Heidenreich, #40898
SNR Denton US LLP
One Metropolitan Square, #3000
St. Louis, MO 63102
(314) 259-5806
Fax: (314) 259-5959
E-mail:
roger.heidenreich@snrdenton.com

Anthony E. Rothert, #44827
Grant R. Doty, #60788
American Civil Liberties Union of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
Fax: (314) 652-3112
E-mail: tony@aclu-em.org;
grant@aclu-em.org

Steven Douglas Bonney, #36164
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, Missouri 64111
(816) 756-3113
Fax: (816) 756-0136
E-mail: dbonney@aclukswmo.org

John Knight, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
180 N. Michigan, Suite 2300
Chicago, Illinois 60601

CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned certifies that this brief: includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) pursuant thereto, contains 6,759 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06.

/s/ Maurice B. Graham
Counsel for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 15th day of July, 2013, electronically filed a copy of the forgoing pursuant to the automated filing system established by Missouri Supreme Court Operating Rules 1.03 and 27, to be served upon counsel for the parties by operation thereof:

James R. Ward, #43422
Emily A. Dodge, #53914
P.O. Box 1930
Jefferson City, Missouri 65102-1930
Attorneys for Defendant-Respondent

/s/ Maurice B. Graham
Counsel for Appellant