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

BRIEF OF APPELLANT

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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

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JURISDICTIONAL STATEMENT

Plaintiff Kelly Glossip filed a petition in the Circuit Court of Cole County seeking access to benefits for himself as the surviving domestic partner of Cpl. Dennis Engelhard, who died in the line of his duty as a Missouri State Trooper. This appeal is from the Circuit Court's final judgment granting the Defendant's motion to dismiss and denying Plaintiff's motion for summary judgment. The appeal involves the question whether the exclusion of committed same-sex couples Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 from equal access to survivor benefits that are afforded to married heterosexual couples pursuant to violates Article I, § 2; or Article III, § 40 of the Missouri Constitution, and therefore involves the validity of a statute of this state. This Court has exclusive appellate jurisdiction in all cases that involve the validity of a statute. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

Kelly Glossip is a 45-year-old Missourian who shared a long-term, loving, committed, interdependent, and intimate relationship for nearly 15 years with Cpl. Dennis Engelhard, an employee of the Missouri State Highway Patrol ("MSHP"). LF0006(¶2); LF0008(¶10); LF0050(¶1); LF0052(¶13); LF0117(¶4); LF0122-33. Cpl. Engelhard was a nine-year veteran patrolman who died on December 25, 2009 from injuries received when struck by a vehicle while responding to an accident on I-44, east of Eureka, Missouri. LF0010-11(¶¶24, 31); LF0050(¶¶1, 2); LF0054(¶24); LF0119(¶13). Mr. Glossip was the only person from Cpl. Engelhard's family who went to the hospital to be with Cpl. Engelhard when he died. LF0011(¶32); LF0054 (¶24); LF0119(¶13).

If Cpl. Engelhard had been married to a woman, his widow would have been entitled to receive survivor benefits from the Missouri Department of Transportation and Highway Patrol Employees' Retirement System ("MPERS") pursuant to Mo. Rev. Stat. § 104.140. But under the statute, Cpl. Engelhard and Mr. Glossip are excluded from qualifying for these survivor benefits because they were a same-sex couple. LF0007(¶¶4-6); LF0009(¶¶14-19); LF0050-51(¶¶3, 5, 9); LF0067-68(¶¶3, 5, 8); LF0092-93(¶2).

Cpl. Engelhard and Mr. Glossip shared a relationship comparable to a traditional married couple's relationship. LF0009-11(¶¶20-23, 25-30); LF0051-55(¶¶10-26); LF0117-20 (¶¶4-16); LF0134-41; LF0143-50; LF0153-63; LF0165; LF0167-73(¶¶5-6, 8-9, 11-12); LF0175-76(¶7); LF0179(¶¶2-4); LF0181-82 . Until Cpl. Engelhard's death, they lived together with the exception of temporary work-related periods of separation. LF0010(¶21); LF0052(¶11); LF0117-18(¶¶4, 7). They were each other's sole domestic

partner and intended to remain so indefinitely, LF0053(¶19); LF0117-18(¶¶5, 6), and cared for each other in sickness and in health. LF0009(¶20); LF0052-53(¶¶16, 19); LF0117-18(¶¶5-6); LF0119(¶13); LF0173(¶9). Cpl. Engelhard acted as a step-father for Mr. Glossip's son from an earlier marriage, providing emotional support to the son and sharing with Mr. Glossip the responsibility for making child-support payments. LF0011(¶28); LF0052(¶17); LF0118-9(¶10); LF0173(¶8). They chose a church home, celebrated the anniversary of their relationship there, attended services and other church-related events, and contributed regularly to the church. LF0011(¶29); LF0052(¶15); LF0119(¶11); LF0172(¶¶5-6).

Mr. Glossip and Cpl. Engelhard exchanged rings with each other on Christmas Day 1997 to pledge their mutual support for and dependence on each other. LF0010(¶23); LF0053(¶20); LF0117-18(¶¶4,6); LF0173(¶11). They held themselves out to their families as a couple in a committed, marital relationship, and they would have entered into a civil marriage if it were legal to do so in Missouri. LF0010-11(¶¶23, 30); LF0052-53(¶¶14, 20); LF0117-18(¶¶4, 6); LF0173(¶11); LF0175-76(¶7). Their mutual emotional, financial, and spiritual support for each other was, without question, comparable to a spousal relationship. LF0009(¶20); LF0051(¶10); LF0117-19(¶¶4-13); LF0173(¶11); LF0175-76(¶7).

Like a married couple, Mr. Glossip and Cpl. Engelhard were financially interdependent. LF0009-11(¶¶20, 25-28); LF0053(¶21); LF0120(¶15); LF0167-71. They jointly owned their house in Springfield, and in May 2004, they purchased a home in Robertsville, Missouri. Both were responsible for the mortgage and insurance

payments on that home. They had joint checking and savings accounts, and over their 15-year relationship they jointly owned five cars and two trucks, sharing responsibility for the car loans and insurance. LF0010 (¶26); LF0053(¶18); LF0119 (¶12); LF0134-41; LF0143-49; LF0152-63.

Like a married couple, Cpl. Engelhard and Mr. Glossip made sacrifices for one another. LF0054(¶23); LF0118(¶9). For example, when Cpl. Engelhard was assigned to Troop C of the MSHP, Mr. Glossip gave up his job as a customer service representative at Great Southern Bank and moved with Cpl. Engelhard to Washington, Missouri, and then to the home they purchased in Robertsville. LF0010(¶26); LF0054(¶23); LF0118(¶9). Mr. Glossip tried to convince Cpl. Engelhard not to become a state trooper because he was concerned that the job would be dangerous. Cpl. Engelhard reassured Mr. Glossip that if anything ever happened to a state trooper, the government and other troopers would make sure that the trooper's family is cared for. LF0053-54(¶22); LF0118(¶8).

The MSHP accepted and relied upon forms Cpl. Engelhard filled out that indicated and described his domestic partner relationship with Mr. Glossip. Cpl. Engelhard named Mr. Glossip as the primary beneficiary of his retirement savings account, a fifty per cent beneficiary of a life insurance policy he obtained as an MSHP employee, and the sole beneficiary of his deferred-compensation plan. On the beneficiary form, Cpl. Engelhard described Mr. Glossip as his "fiancé." LF0010(¶25); LF0053(¶21); LF0120(¶15); LF0167-71.

After Cpl. Engelhard's death, Mr. Glossip attended a ceremony in Jefferson City on May 1, 2010, commemorating police officers who were killed in the line of duty during 2009, and, as Cpl. Engelhard's surviving partner, Mr. Glossip placed a flower in a memorial wreath. Mr. Glossip also attended a ceremony in Washington, D.C. on May 15, 2010, commemorating the loss of police officers nationwide and was recognized with a medallion as Cpl. Engelhard's surviving domestic partner. LF0012(¶¶35-36); LF0054-55(¶25); LF0119-20(¶14); LF0165-66; LF0179(¶¶2-4); LF0180-82.

Since Cpl. Engelhard's death, Mr. Glossip has been alone both emotionally and financially. LF0014(¶43); LF0055(¶26); LF120(¶16); LF0173(¶12). Both were emotionally dependent on each other, and Mr. Glossip's entire support system was built around Cpl. Engelhard. LF0009(¶20); LF0051-55(¶¶10, 13, 16, 19, 24, 26); LF0117-20 (¶¶4-7, 13, 16); LF0122-33. In addition to losing Cpl. Engelhard's emotional support, Mr. Glossip has had to bear the entire financial burden of paying their mortgage, car loans, and other expenses. LF0014(¶43); LF0055(¶26); LF0120(¶16); LF0173(¶12).

Defendant denied Mr. Glossip survivor benefits after Cpl. Engelhard's death solely because Mr. Glossip and Cpl. Engelhard were of the same sex. LF0009(¶¶16-19); LF0013-14(¶42); LF0051(¶5); LF0068(¶8). Defendant MPERS is the arm of the State with the power to administer the retirement benefits for certain state employees, including state troopers such as Cpl. Engelhard. LF0008(¶11); LF0051(¶9); LF0092(¶1). On August 5, 2010, Mr. Glossip submitted an application for survivor benefits to MPERS, but MPERS denied the application solely because of Mo. Rev. Stat. § 104.012, which states 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," and Mo. Rev. Stat. § 451.022, which provides that "[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." LF0009; LF0051.

Mr. Glossip timely appealed the denial to the MPERS' Board of Trustees, but that appeal was denied on November 18, 2010. LF0009(¶¶17-18); LF0051(¶¶6, 9); LF0092-93(¶¶1-2). He timely appealed to the Circuit Court of Cole County, where the court on May 1, 2012 granted the state's motion to dismiss and denied Mr. Glossip's motion for summary judgment LF0006-24; LF0381-90. This timely appeal followed.

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); *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091 (N.D. Cal. 2012); *Personnel 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*, Case Nos. 12–2335–cv(L), 12–2435(Con), 2012 WL 4937310 (2d Cir. Oct. 18, 2012); *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); *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921 (5th Cir. 1988)*; 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); *State ex rel. Kenamore v. Wood*, 56 S.W. 474 (Mo. 1900);

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

ARGUMENT

Standard of Review

A trial court's grant of a motion to dismiss is reviewed *de novo. Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008) (citing *Moynihan v. Gunn*, 204 S.W.3d 230, 232–33 (Mo. App. 2006)). An appellate court reviews a petition "to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). The court "treat[s] the facts contained in the petition as true and construe[s] them liberally in favor of the plaintiffs." *Ste. Genevieve Sch. Dist. R–II, et al. v. Bd. of Aldermen of Ste. Genevieve, et al.*, 66 S.W.3d 6, 11 (Mo. banc 2002). "If the petition asserts any set of facts that would, if proven, entitle the plaintiff[ ] to relief, the petition states a claim." *Id.*

The denial of Mr. Glossip's summary judgment motion is also a final judgment. *See RLI Ins. Co. v. So. Union Co.*, 341 S.W.3d 821, 828 (Mo. App. 2011) ("[I]f the combined effect of several orders entered in a case, including an order denominated 'final judgment,' is to dispose of all issues as to all parties, leaving nothing for future determination, then the collective orders combine to form the 'final judgment' from which an appeal can be taken.") (citing *Magee v. Blue Ridge Prof. Bldg. Co.*, 821 S.W.2d 839, 841 (Mo. Banc. 1991)). *Cf. Transatlantic Ltd. v. Salva*, 71 S.W.3d 670, 675-76 (Mo. App. 2002) ("In certain circumstances, the denial of a party's motion for summary judgment can be reviewed when its merits are completely intertwined with a grant of summary judgment in favor of an opposing party."). The denial of plaintiff's motion for

summary judgment and the grant of defendant's motion to dismiss may be reviewed together in the interest of judicial economy, where there are no genuine disputes of material fact. *See Am. Motorists Ins. Co. v. United Furnace Co., Inc.*, 876 F.2d 293, 302-03 (2d Cir. 1989); *Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972).[1] Here, the merits of Mr. Glossip's summary judgment motion are closely intertwined with the state's motion to dismiss and there are no genuine issues of material fact.

Review of the denial of a motion for summary judgment is de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* Summary judgment shall be granted where the motion and other briefs and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[.]" Rule 74.04 (c).

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

[1] Where, as here, "the Missouri and federal rules are essentially the same, federal precedents constitute persuasive, although not binding, authority." *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 532–33 (Mo. banc 2002). Compare Rule 55.27(6) & Rule 74.04 to Fed. R. Civ. P. 12(b)(6) & Fed. R. Civ. P. 56(a).

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.

Mr. Glossip's petition presents a case of first impression in Missouri. It is important to note that his claim is a narrow one. Mr. Glossip challenges the denial of one specific employment benefit -- the survivor benefits currently provided only to the spouses of heterosexual MSHP employees who die in the line of duty or the employee's "eligible surviving children under twenty-one years of age." Mo. Rev. Stat. § 104.140. The only question before the Court is whether there is a constitutional reason for denying Cpl. Engelhard and Mr. Glossip this particular employment benefit. The unique purpose of line-of-duty survivor benefits and their crucial importance for MSHP troopers and their families sets this case apart from other circumstances where committed same-sex couples are treated differently from married couples. Cases involving other forms of different treatment would require an independent review of the nature of the

discriminatory classification and the specific governmental interests related to it. Resolution of Mr. Glossip's narrow case leaves such future cases undecided.

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.

Missouri's Marriage Amendment, Mo. Const. art. I, § 33, does not provide a reason for denying survivor benefits to Mr. Glossip. Mr. Glossip's petition seeks a discrete employment benefit, not marriage. As discussed below, the Marriage Amendment bans only marriage and does not sanction Missouri's unequal treatment of state employees and their same-sex domestic partners in accessing the survivor benefits at issue in this case.

"In construing the Missouri Constitution, the Court's task is to reconcile provisions that may seem to be in conflict." *Thompson v. Hunter*, 119 S.W.3d 95, 100 (Mo. banc 2003); *accord Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. banc 1999) (explaining that court has a "duty to read [amendments] consistent[ly] with the remainder of the Missouri Constitution"). The Marriage Amendment provides that "to be valid and recognized in this state, a marriage shall exist only between a man and a woman." Mo. Const. art. I, § 33. The Amendment bans marriage or its recognition for same-sex couples, but it does not eviscerate every other constitutional protection for partners in a same-sex couple. Mr. Glossip may still seek equal protection under Article I, Section 2

and the right under Article I, Section 40 to be governed by a general, rather than a special, law.

The Supreme Court of Alaska addressed precisely this issue when it concluded that the Alaska's constitutional amendment prohibiting marriage for same-sex couples did not preclude same-sex couples from seeking equal employment benefits under other provisions of the Alaska Constitution. The court explained:

> The Alaska Constitution's equal protection clause and Marriage Amendment can be harmonized in this case because it concerns a dispute about employment benefits. . . .
>
> . . . That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.

Alaska Civil Liberties Union v. State, 122 P.3d 781, 786-87 (Alaska 2005). *See also Diaz v. Brewer*, 656 F.3d 1008, 1010, 1012-15 (9th Cir. 2011) (recognizing that statutory limit on access to family health care coverage to different-sex married couples violated equal protection, even though Arizona's constitution prevents same-sex couples from marrying or having their marriages from elsewhere recognized), *petition for cert. filed* (July 2, 2012) (No. 12-23).

Even the U.S. Supreme Court has held that marriage bans do not automatically license the state to discriminate in other ways against couples who are prohibited from

marrying. In *McLaughlin v. Florida*, 379 U.S. 184, 195 (1964), the Supreme Court held that even if a state could constitutionally ban interracial marriage (a question the Court declined to answer), the state could not ban interracial couples from cohabitating with each other without violating the Equal Protection Clause. The Court explained that "even if we posit the constitutionality of the ban against [interracial] marriage, it does not follow that the cohabitation law is not to be subject to independent examination under the Fourteenth Amendment." *Id.*[2]

As these cases demonstrate, Missouri's Marriage Amendment does not resolve this case, as the circuit court incorrectly concluded. Tr. 8-9. Like the marriage amendments in Alaska's and Arizona's constitutions, Missouri's Marriage Amendment "does not address the topic of employment benefits at all." *Alaska Civil Liberties Union*, 122 P.3d at 786 (footnote omitted). Indeed, numerous courts in states across the county have recognized that the government may provide domestic partner employment benefits

[2] *Cf. Johnson v. New York*, 49 F.3d 75, 78 (2d Cir. 1995) (holding that the state had to independently defend an age-based classification for security guards from a challenge under the Age Discrimination in Employment Act ("ADEA") even though it had adopted the classification from a military context where the classification was not subject to the ADEA); *Erie County Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir. 2000) (classification based on Medicare eligibility is classification based on age because only persons over 65 are eligible for Medicare).

without violating a state ban against marriage for same-sex couples.[3] Even though Mr. Glossip and Cpl. Engelhard could not legally marry in Missouri, the Missouri Constitution "does not automatically permit the government to treat them differently in other ways." *Id.* at 786-87. The denial of survivor benefits coverage must independently survive constitutional scrutiny through consideration of the nature of the specific classification and governmental interests related to it.

B. Same-sex couples are not similarly situated to unmarried different-sex couples because they are barred from qualifying for the benefits through marriage.

The purpose of line-of-duty survivor benefits is to provide financial security for a trooper and his family. Cpl. Engelhard performed the same job as heterosexual troopers. This case presents the question: Why should a trooper who has been in a committed domestic partner relationship for 15 years be denied the same financial security for his partner as his heterosexual married colleagues?

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[3] *See, e.g., Leskovar v. Nickels*, 166 P.3d 1251, 1255-56 (Wash. Ct. App. 2007); *Knight v. Superior Court*, 26 Cal. Reptr. 3d 687, 699 (Cal. Ct. App. 2005); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1244-45 (Pa. 2004); *Tyma v. Montgomery County*, 801 A.2d 148, 158 (Md. 2002); *Heinsma v. City of Vancouver*, 29 P.3d 709, 713 n.3 (Wash. 2001); *Lowe v. Broward County*, 766 So.2d 1199, 1206 (Fla. Dist. Ct. App. 2000); *Crawford v. City of Chicago*, 304 Ill. App. 3d 818, 826-27 (Ill. App. Ct. 1999).

The trial court ignored this discrimination based on sexual orientation by reasoning that Mr. Glossip and Cpl. Engelhard receive the same benefits as other unmarried couples under Mo. Rev. Stat. § 104.140.3. But that is not the proper point of comparison. Although Mo. Rev. Stat. § 104.140.3 creates a classification between married and unmarried couples, Missouri law creates a sub-class of unmarried persons – those who are permitted to marry (different-sex couples) and those who are not (same-sex couples). Mr. Glossip and Cpl. Engelhard were not similarly situated to unmarried heterosexual couples because no matter how committed, loving, and financially interdependent their relationship, Mr. Glossip and Cpl. Engelhard were constitutionally barred from marrying (or having their marriage from elsewhere recognized). Rather, Mr. Glossip and Cpl. Engelhard's relationship makes them similarly situated to the relationships of different-sex *married* couples with respect to the purposes served by survivor benefits for the committed domestic partners of state troopers killed in the line of duty. *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (laws that "visi[t] different consequences on two categories of persons" and "apply to all [in one class]" are not "merely *disproportionate* in impact[,]" but violate equal protection) (emphasis in original).

It may be logical to use marriage as a proxy for commitment and financial interdependence when deciding whether different-sex couples should benefit from survivor benefits. But because Mr. Glossip and Cpl. Engelhard and other same-sex couples are excluded from marriage regardless of how committed and financially interdependent they are, they are *not* similarly situated to different-sex couples who

choose not to marry. Their spousal relationship, including their commitment and financial interdependence, makes them substantially similar to different-sex married couples. In these circumstances, their unmarried status is irrelevant. *See Petitt v. Field*, 341 S.W.2d 106, 109 (Mo. 1960) (equal protection violated by "exclusions not based on differences reasonably related to the purposes of the Act"); *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) ("[I]n applying the [similarly situated] standard, courts should not demand exact correlation, but should instead seek relevant similarity."); *accord More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1993).

Other courts that have examined similar statutory schemes that conditioned access to a valuable employment benefit on marriage in states that concurrently deny marriage to same-sex couples. They have concluded that unmarried same-sex couples and unmarried different-sex couples are not similarly situated where only different-sex couples are allowed to marry. As the Supreme Court of Alaska recently explained when evaluating a benefit scheme that limited access to family health insurance benefits to spouses:

> We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the

> opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

Alaska Civil Liberties Union, 122 P.3d at 788 (footnotes omitted).

Federal courts in Arizona and California have reached the same conclusion when examining the interaction between Arizona's and California's marriage amendments and statutes limiting couples' health benefits to married governmental employees. *See Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) and *Dragovich v. U.S. Dept. of the Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012). Rejecting the state's argument that the benefit scheme was "a neutral policy that treats all unmarried employees equally," the *Collins* court explained:

> [The benefit statute], when read together with Arizona Constitution Article 30 § 1, treats unmarried heterosexual State employees differently than unmarried homosexual employees. Heterosexual domestic partners may

> become eligible for family coverage under the State plan by marrying. Because employees involved in same-sex partnerships do not have the same right to marry as their heterosexual counterparts, [the benefit statute] has the effect of completely barring lesbians and gays from receiving family benefits.

727 F. Supp. 2d at 803 (internal quotation marks and footnote omitted). Similarly, the *Dragovich* court found that a law denying state employees and their same-sex domestic partners the ability to participate in a long-term care insurance program available only married employees, while the law prevented them from marriage, discriminated on the basis of sexual orientation. 804 F. Supp. 2d at 1100. The New Hampshire Superior Court reached the same conclusion. *See Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *6 (N.H. Super. 2006) ("Thus, same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits.").

As *Alaska Civil Liberties Union*, *Collins*, *Dragovich*, and *Bedford* all demonstrate, in order to defend the statutory scheme, the government must do more than assert that the state denies Mo. Rev. Stat. § 104.140.3 benefits equally to unmarried same-sex couples and unmarried different-sex couples. There must instead be a constitutional justification for making a valuable benefit available to committed different-sex couples while

categorically denying committed same-sex couples any mechanism for obtaining the same benefit.

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.

The statutory scheme for survivor benefits being examined in this case is discriminatory on its face and in its operative effect. *Alaska Civil Liberties Union*, 122 P.3d at 788; *Williams v. Illinois*, 399 U.S. 235, 242 (1970). The statute specifically states 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." Mo. Rev. Stat. § 104.012. This explicit classification does more than simply cross reference Missouri's generally applicable marriage statutes. In order to qualify for benefits, a couple must (a) be married and (b) be comprised of a man and a woman. Even if the Marriage Amendment were repealed and Missouri's marriage laws were amended to authorize marriage for same-sex couples, Mo. Rev. Stat. § 104.012 would still exclude married same-sex couples from survivor pension benefits.[4]

[4] By contrast, the employment benefit statutes and regulations found to be non-discriminatory in two older cases cited by the trial court, LF0386, simply limited benefits to "spouses" without containing their own explicit classification excluding same-sex couples. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super.

Even if the statutory scheme did not on its face or in operative effect discriminate on the basis of sexual orientation, the legislative history shows that the statutory scheme was unconstitutionally motivated by a legislative intent to discriminate against same-sex couples. A facially neutral statute may still be challenged as discriminatory when the government has "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

The history of Missouri's pension laws makes clear that the current statutory scheme was enacted because of, not in spite of, its exclusion of same-sex couples. The current version of the pension statutes specifically exclude same-sex couples from receiving survivor benefits, but at the time the original statutory scheme was adopted there was no specific provision in the pension statutes or Missouri's marriage laws excluding same-sex couples. Otis Cowan, Note, *A Plebiscite for Prejudice: An Analysis of Equal Rights for Gay and Lesbian Missourians*, 62 UMKC L. Rev. 347, 354 (1993). When the Missouri legislature enacted the current statute in 2001 banning same-sex couples from marrying, it also specifically amended the pension statutes at issue in this case to exclude same-sex couples from eligibility. The new provision specifically stating that "[f]or the purposes of public retirement systems administered pursuant to this

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Ct. 1997); *Phillips v. Wis. Personnel Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992).

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).

These statutory amendments demonstrate that the legislature specifically intended to bar same-sex couples from receiving the line-of-duty survivor benefits at issue in this case. This specific intent stands in stark contrast to the laws at issue in the cases cited by the trial court.[5] The history of Missouri's pension statutes shows that Missouri has "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" same-sex couples. *Feeney*, 442 U.S. at 279. Like any other form of intentional discrimination, the intentional exclusion of same-sex couples from survivor benefits is subject to constitutional challenge.

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

[5] In *Rutgers*, the plaintiffs challenged a statute enacted in 1961; it was therefore clear that "the [l]egislature was not considering the possibility of a 'non-traditional' marriage when it enacted the various sections of the marriage laws. Therefore, one could argue that it was not the intent of the [l]egislature to deny marriage and its associated benefits to same-sex couples." *Rutgers Council of AAUP Chapters*, 689 A.2d at 840 (Levy, concurring). Similarly, in *Phillips*, the Wisconsin statutes had provided that marriage consisted of "a husband and a wife" decades before marriage for same-sex couples became a topic of public debate. *See In Interest of Angel Lace M.*, 516 N.W.2d 678, 680 n.1 (Wis. 1994) (citing Wis. Stat. § 765.001(2)).

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.

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.

Although the discriminatory denial of survivor benefits to Mr. Glossip after Cpl. Engelhard's death in the line of duty would also violate the equal protection clause in the federal Constitution, Missouri's equal protection guarantee should be interpreted independently and more expansively in this case than the comparable federal clauses. *See Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006) ("'[P]rovisions of [the Missouri] state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions.'") (quoting *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996)).

The Missouri Supreme Court has also construed those provisions more broadly than their federal counterparts when federal precedents inappropriately "dilute" equal protection and substantive due process rights. *State ex rel. J. D. S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978); *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. banc 2006). For example, in *J. D. S.*, the Missouri Supreme Court provided greater protections under the Missouri Constitution than the United States Supreme Court had provided under the federal Constitution in *Quilloin v. Walcott*, 434 U.S. 246 (1978). The United States Supreme Court held in *Quilloin* that, even though the parental rights of a divorced father cannot be terminated without clear and convincing proof that he is an unfit parent, a father who was never married to the child's mother could have his parental rights terminated without any showing of unfitness. Even though this unequal treatment of unwed and divorced fathers did not violate the federal standards for equal protection and substantive due process, the Missouri Supreme Court rejected *Quilloin* and held that such discrimination did violate equal protection and substantive due process under the Missouri Constitution. *See J. D. S.*, 574 S.W.2d at 409.

In this case, Missouri's categorical exclusion of same-sex couples from survivor benefits coverage should be subjected to heightened scrutiny under both state and federal precedent. The potentially broader protections given by the Missouri Constitution remove any doubt that such heightened scrutiny is required.

B. The trial court erroneously relied on federal court decisions that depended on the now-overruled case of *Bowers v. Hardwick*, 478 U.S. 186 (1986) rather than examining the criteria for heightened scrutiny

and applying the recent federal and state precedent showing that heightened scrutiny should be applied to sexual orientation classifications.

The Missouri Constitution guarantees that "all persons have a natural right to life, liberty, the pursuit of happiness" and that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, § 2; *see Weinschenk*, 203 S.W.3d at 219. In determining whether a statute violates the equal protection guarantee, this Court employs a two-step process. "The first step is to determine whether the statute implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Id.* at 210; *accord In re Marriage of Woodson*, 92 S.W.3d 780 (Mo. banc 2003). "The second step is to apply the appropriate level of scrutiny to the challenged statute." *Weinschenk*, 203 S.W.3d at 211. Under this framework, Missouri's exclusion of same-sex couples from survivor benefits coverage must be subjected to heightened review.

Sexual orientation should be recognized as a suspect or quasi-suspect classification. In determining whether a classification should be recognized as a suspect or quasi-suspect classification under the Missouri Constitution, this Court examines the same heightened-scrutiny factors used by the Supreme Court when interpreting the federal Constitution. *See Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 n.4 (Mo. banc 1989). The four factors most consistently analyzed by the U.S. Supreme Court are: (1) whether a classified group has suffered a history of invidious discrimination, (2) whether the classification has any bearing on a person's ability to perform in or

contribute to society; (3) whether the characteristic is immutable or beyond the person's control; and (4) whether the group has sufficient power to protect itself in the political process. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality).

Although this Court rejected heightened scrutiny when it upheld Missouri's sodomy statutes in *State v. Walsh*, 713 S.W.2d 508 (Mo. banc 1986), the precedent supporting that decision is no longer good law. *See Johnston v. Mo. Dep't of Social Servs.*, No. 0516-CV09517, 2006 WL 6903173, at *5 (Mo. Cir. Feb. 17, 2006). The decision in *Walsh* was based on the now-overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the United States Supreme Court held that criminal prohibitions on same-sex "sodomy" do not violate the federal Constitution. *Walsh* extended the reasoning of *Bowers* and rejected a state constitutional challenge to a sodomy statute criminalizing "deviate sexual intercourse with another person of the same sex." *Walsh*, 713 S.W.2d at 509-10. In upholding the statute, the *Walsh* court held that sexual orientation does not constitute a suspect or quasi-suspect classification requiring heightened scrutiny. The *Walsh* court acknowledged that gay people have suffered discrimination and are disadvantaged in the political processes, but the court concluded that the discrimination suffered by gay people was a natural and proper consequence of their criminal activity.

According to the court,

> It cannot be doubted that historically homosexuals have been subjected to "antipathy [and] prejudice." But, so have other classes whose members have violated society's legal and moral codes of conduct. . . .
>
> . . . If homosexual conduct is properly forbidden, any social stigma attaching to those who violate this proscription cannot be constitutionally suspect. The fact that the democratic process does not respond to those who violate its ordinances is no source of condemnation. Are we to say that drug addicts or pedophiliacs are a powerless class because the democratic process has refused to sanction the activity they seek to have sanctioned?

Id. at 511. By upholding criminal prohibitions on same-sex "sodomy," the United States Supreme Court's decision in *Bowers* and this Court's decision in *Walsh* extended an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

In *Lawrence*, the Supreme Court rescinded that invitation and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. By overruling *Bowers*, the Supreme Court also abrogated *Walsh* and rendered Missouri's criminal sodomy statute unenforceable. *See Johnston*, 2006 WL 6903173, at *5. Now that *Bowers* has been overruled and *Walsh* has been abrogated, this Court must determine whether sexual orientation constitutes a suspect classification.

After *Lawrence*, a straightforward application of the traditional heightened-scrutiny factors requires that sexual orientation be recognized as a suspect classification.[6] Several recent decisions have carefully examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification. *See, e.g.*, *Windsor v. United States*, Case Nos. 12–2335–cv(L), 12–2435(Con), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *petition for cert. filed* (July 16, 2012) (12-63); *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 989-990 (N.D. Cal. 2012), *petition for cert. filed* (July 3, 2012) (12-16); *Pedersen v. Office of Personnel Mgmt.*, No.

[6] In concluding that sexual orientation has not been recognized as a suspect classification under federal law, the trial court cites to cases that simply adhered to pre-*Lawrence* case law, which had -- like the decision in *Walsh* -- reasoned that sexual orientation could not constitute a suspect classification because intimate same-sex activity could itself be criminalized. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (relying on pre-*Lawrence* case law regarding the applicable standard of review, even though decided after *Lawrence* overruled *Bowers*); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (following *Lofton*). The reasoning of those decisions depended on *Bowers*; now that *Bowers* has been overruled that reasoning has been fatally undermined. *See* Feb. 23, 2011 DOJ Letter re Defense of Marriage Act ("DOJ Memo"), Appendix A24-A27.

3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012), *petition for cert. filed* (Sept. 11, 2012) (12-302); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting state constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 442-44 (Cal. 2008) (analyzing factors similar to the federal test); *see also Collins*, 727 F. Supp. 2d at 804 (invalidating statute under rational-basis review but noting that heightened scrutiny may be appropriate).

As explained in these decisions, sexual orientation satisfies all the traditional criteria required for heightened scrutiny. The Second Circuit recently wrote that "[i]t is easy to conclude that homosexuals have suffered a history of discrimination[,]" noting that "[p]erhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal." *Windsor*, 2012 WL 4937310, at *6. *See also Pedersen*, 2012 WL 3113883, at **17-21; *Perry*, 704 F. Supp. 2d at 981-82; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 434. Indeed, this Court in *Walsh* acknowledged that "[i]t cannot be doubted that historically homosexuals have been subjected to 'antipathy [and] prejudice[,]'" but found that this history of prejudice was a justified consequence of "violat[ing] society's legal and moral codes of conduct." 713 S.W.2d at 511.

Second, it is also well-settled that a person's sexual orientation bears no relation to a person's ability to contribute to society. *See, e.g.*, *Windsor*, 2012 WL 4937310, at *7

(finding it easy to conclude that sexual orientation has no relationship to a person's ability to contribute, since "[t]he aversion homosexuals experience has nothing to do with aptitude or performance."); *Pedersen*, 2012 WL 3113883, at **21-23; *Perry*, 704 F. Supp. 2d at 1002; *Varnum*, 763 N.W.2d at 890; *Kerrigan*, 957 A.2d at 435.[7]

Third, "homosexuality is a sufficiently discernible characteristic to define a discrete minority class." *Windsor*, 2012 WL 4937310, at *8. Although not always obvious to others, "the characteristic of the class calls down discrimination when it is manifest" and "is necessarily revealed in order to exercise a legal right." *Id.* Although immutability is not a required factor, *id.* at **6, 8, there is a scientific consensus that sexual orientation cannot be changed either by a decision-making process or by medical intervention. *See* American Psychological Association, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, 53 Am. Psychologist 934-35 (1998);

[7] The American Psychiatric Association and the American Psychological Association made clear decades ago that a person's sexual orientation is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities." *See* American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); American Psychological Association, *Resolution on Prejudice, Stereotypes, and Discrimination*, 62 Am. Psychologist 475-81 (2006).

American Psychological Association, *Resolution on Prejudice, Stereotypes, and Discrimination*, 62 Am. Psychologist 475-81 (2006); American Psychiatric Association, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998); *see also Pedersen*, 2012 WL 3113883, at **23-29; *Perry*, 704. F. Supp. 2d at 966-67. Moreover, sexual orientation is a core component of a person's identity that cannot serve as a legitimate basis for imposing discrimination. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

Before *Lawrence*, some lower courts concluded that gay men and lesbians were not a sufficiently immutable class to warrant heightened scrutiny. But those courts reached that conclusion by relying on a false distinction between sexual orientation and sexual conduct, reasoning that behavior is not immutable. That distinction between sexual orientation and sexual conduct has now been squarely repudiated by the Supreme Court. As *Lawrence* explained, "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." 539 U.S. at 575 (emphasis added)); *accord id.*, at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."). Indeed, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct.

2971, 2990 (2010), rejected a litigant's argument that a prohibition on same-sex intimate conduct is different than discrimination against gay people; the Court explained that "[o]ur decisions have declined to distinguish between status and conduct in this context." *Id.* at 2990. *See also Windsor*, 2012 WL 4937310, at *6 (anti-gay discrimination shown by evidence that "for many years and in many states, homosexual conduct was criminal.").

Finally, with respect to the fourth heightened-scrutiny factor, several recent decisions have recognized the overwhelming political disadvantages of lesbian and gay people. *See, e.g.*, *Windsor*, 2012 WL 4937310, at *9; *Pedersen*, 2012 WL 3113883, at **29-35, *Varnum*, 763 N.W.2d at 895; *Kerrigan*, 957 A.2d at 461. Gay men and lesbians continue to suffer severe disadvantages in the political arena. Gay people have received some modest protections at the state and local level, but the Supreme Court has never used the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process. *Windsor*, 2012 WL 4937310, at *9 ("The question is whether [gays] have the strength to politically protect themselves from wrongful discrimination."). The limited protections currently provided to gay people do not approach the comprehensive legislation protecting the rights of women when sex was recognized as requiring heightened scrutiny. *See id.* ("When the Supreme Court ruled that sex-based classifications were subject to heightened scrutiny in 1973, the Court acknowledged that women had already achieved major political victories."). Moreover, when gay people have secured minimal protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum

processes to repeal laws or even amend state constitutions.[8] This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay people vividly illustrates the continuing disadvantages that gay people face in the political arena. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

In short, sexual orientation easily satisfies all of the factors that courts traditionally consider when determining whether a classification should be recognized as suspect or quasi-suspect. Application of that framework leads to the inexorable conclusion that sexual orientation classifications -- including the decision to exclude same-sex couples from the survivor benefits provided by Mo. Rev. Stat. § 104.140.3 -- are not entitled to a presumption of constitutionality and must be subjected to heightened scrutiny.

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

[8] *See also* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) (calculating the high rate of success of anti-gay ballot initiatives); Donald P. Haider-Markel *et al., Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 312-13 (2007) (same).

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.

Because heightened scrutiny applies, Missouri's denial of survivor benefits to Mr. Glossip and Cpl. Engelhard is plainly unconstitutional. To survive strict scrutiny, the state must show that the exclusion of same-sex couples is narrowly tailored to serve a compelling interest. *Weinschenk*, 203 S.W.3d at 216. To survive intermediate scrutiny, the State must show that the exclusion is substantially related to an important governmental interest. *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W.2d 162,164-65 (Mo. banc 1979), *rev'd on other grounds*, 446 U.S. 142 (1980). Here, the state has made no effort to justify the exclusion under either standard.

But even under rational-basis review, Missouri's exclusion of same-sex couples from survivor benefits cannot survive. To satisfy rational-basis review, legislation must be "rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Rational-basis review "does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals." *Tyler v. Mitchell*, 853 S.W.2d 338, 341 (Mo. App. 1993). Thus, even under rational basis review the "classification adopted [must] rest[] upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed." *State v.*

Ewing, 518 S.W.2d 643, 646 (Mo. banc 1975). "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

Moreover, in a case like this one, rational-basis review must be applied more stringently than in other contexts. As the First Circuit explained recently, "equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10-11 (1st Cir. 2012). Under rational-basis review, classifications are scrutinized more carefully where the disfavored group has been unpopular and experienced a history of discrimination. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (closer scrutiny where group is singled out for discriminatory treatment that "seems inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 448 (closer scrutiny because of "negative attitudes" regarding the mentally retarded persons); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973) (closer scrutiny because of legislative history revealing a "congressional bare desire to harm"); *cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (deferential rational basis review is appropriate "absent some reason to infer antipathy"). Additionally, where a law "inhibits burdens personal relationships," the Supreme Court has been more likely to strike it down, even under rational basis review. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citing *Moreno* and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

Missouri's categorical denial of line-of-duty survivor benefits to same-sex couples is exactly the type of exclusion that warrants more stringent rational-basis review. The

statutory exclusion facially discriminates against a historically disadvantaged group, the legislative history shows that this discrimination was intentional, and the discrimination cannot be plausibly explained by any legitimate state interest. Indeed, the Ninth Circuit in *Diaz* has already applied this "more searching" rational-basis review to invalidate Arizona's categorical exclusion of same-sex couples from receiving from governmental employee health-care benefits. *Diaz*, 656 F.3d at 1012; *see also Massachusetts v. HHS*, 682 F.3d at 10 (1st Cir. 2012) (invalidating statute under rational-basis review "where "the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible"); *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 361 359 (8th Cir.) (record showed that Planned Parenthood's "unpopularity played a large role in [challenged law's] passage"; affirming district court's careful review of the facts to find no rational basis for law granting money for pre-pregnancy family planning to hospitals and health maintenance organizations that performed abortions, while denying it to nonprofit organizations that performed abortions), *aff'd mem.*, 408 U.S. 901 (1980).[9]

[9] Consistent with this heightened form of rational basis review applicable to laws targeting a traditionally disfavored group made up of lesbians and gay men and burdening their committed personal relationships, several cases evaluating the constitutionality of the federal Defense of Marriage Act, have applied heightened rational basis review *See, e.g., Massachusetts v. HHS*, 682 F.3d at 10; *Golinski*, 824 F. Supp. 2d at 996; and *Windsor v. U.S.*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012), *aff'd*, 2012 WL

As discussed below, the trial court erred in concluding that the exclusion of Mr. Glossip from access to survivor benefits advances the government's interest in (a) establishing objective standards for verification; (b) directing benefits to those who are most financially interdependent with the deceased employee; and (c) controlling costs. The denial of survivor benefits coverage to Mr. Glossip is not rationally related to any of these goals.

A. Even the trial court's speculation about a rational basis must have some basis in reality.

The Supreme Court requires that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The legislature is entitled to pass laws based on *rational* speculation, but the legislation must be invalidated if the challenger is able to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," *Vance*, 440 U.S. at 111. "Although the legitimate purpose can be hypothesized, the rational relationship must be real." *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 937 (5th Cir. 1988). As then-Judge Thomas

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4937310 (applying intermediate scrutiny). In contrast to those cases seeking the federal recognition of the *marriages* of same-sex couples, Mr. Glossip's request here is exceedingly modest, but no less demanding of a heightened level of constitutional scrutiny.

explained when he sat on the D.C. Circuit: "If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison* . . . that has not been the law." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

Rational-basis review therefore frequently requires courts to examine a full evidentiary record and not simply rely on speculation that has no basis in reality. As the Fifth Circuit has explained, rational-basis review "cannot be conducted in a vacuum. The purpose itself must still be found 'legitimate,' a determination which may require a reference to the circumstances which surround the state's action." *Mahone*, 836 F.2d at 936-37. And "the determination of the fit between the classification and the legitimate purpose -- the search for rationality -- may also require a factual backdrop." *Id.* at 937 (citations omitted); *see also Hope For Families & Cmty. Serv., Inc. v. Warren*, No. 3:06-cv-1113-WKW, 2008 WL 630469 (M.D. Ala. Mar. 5, 2008).

In this case, the trial court's speculation about financial interdependence and administrative difficulties simply have no "footing in the realities" of domestic-partner benefits and are fundamentally irrational. As discussed below, the rationales advanced by the trial court are contradicted by logic, common sense, and the undisputed evidence regarding the experiences and practices of thousands of private and governmental employers who have provided similar employment benefits to same-sex couples for over 20 years.

B. The exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard is not

rationally related to a legitimate government interest in allocating pension benefits to those most financially dependent on a deceased employee.

The trial court erroneously justified the exclusion of Mr. Glossip from access to survivor benefits coverage on the basis that heterosexual marriage serves as a valid proxy for identifying those couples who are most financially dependent on each other. According to the trial court, allocating survivor benefits only to married couples is rational because "[t]he legislature could rationally have concluded that married couples are the most economically interdependent in comparison to unmarried couples." LF0384. But, a rational basis for disparate treatment of all unmarried couples is not a rational basis for disparate treatment of same-sex couples where same-sex couples cannot marry, since their unmarried status "is unrelated to the achievement of the object of the law." *State ex rel. Classics Tavern Co., Inc. v. McMahon*, 783 S.W.2d 463, 466 (Mo. App. 1990). Moreover, excluding all same-sex couples from survivor benefits cannot be rationally explained as a mechanism for steering benefits to the most financially interdependent couples because the statutes provide the same survivor benefits to *all* surviving spouses regardless of financial dependency. "Although the legitimate purpose can be hypothesized, the rational relationship must be real." *Mahone*, 836 F.2d 921 at 937.

When the legislature has sought to target pension benefits based on financial dependency, it has done so explicitly. For example, in the Worker's Compensation Statute, the legislature limited death benefits to "dependent" relatives, defined as "a relative by blood or marriage of a deceased employee, who is actually dependent for

support, in whole or in part, upon his or her wages at the time of the injury." Mo. Rev. Stat. § 287.240(4); *see Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 775 (Mo. banc 2003). Husbands and wives are presumed to be dependents, but only if they actually live together or are legally liable for each other's support. Mo. Rev. Stat. § 287.240(4)(a). There is no similar limitation in the pension statutes at issue in this litigation.

Moreover, unlike the statute at issue in this litigation, the survivor benefits awarded under the Worker's Compensation Statute do not provide an irrebutable presumption that other relatives can never be dependents. If financial dependency were the key criteria -- as opposed to the presence of an intimate, committed relationship -- then other relatives such as siblings, cousins, and grandparents should also be given survivor benefits. And, in fact, the Worker's Compensation Statute offers those other relatives an opportunity to demonstrate their financial dependence on the deceased employee in order to qualify for death benefits. Mo. Rev. Stat. § 287.240(4). In contrast, the pension statutes for state troopers make no mention of financial dependency and provide no mechanism for other relatives to show their financial dependence. This absence demonstrates that the state's objective is not to limit MSHP survivor benefits to those who are financially dependent on the deceased. *Cf. State ex rel Classics Tavern Co.*, 783 S.W.2d at 465-66 (finding no rational relationship between the greater demand of businesses selling alcohol for "county services, particularly police services[,] and ordinance placing a greater burden for payment of real estate taxes on those businesses, since "the amount of tax is . . . not [determined] by the use of the real estate.");

Ranschburg v. Toan, 709 F.2d 1207, 1210 (8th Cir. 1983) (rejecting state's argument that statute limiting utility assistance to those disabled persons receiving specific types of public assistance "allocated a limited amount of funding to the state's most needy" where some of the public assistance programs were "not even based on need").

Indeed, the record evidence shows that marital status is a poor proxy for financial interdependence. In Missouri, 71% of married couples live in households where both spouses work and 72% live in households where neither spouse is disabled. LF0016(¶54); LF0063(¶64); LF0187-88(¶7). Under the trial court's reasoning, the legislature gave survivor benefits to over 70% of married couples who do not need them in order to provide support to the less-than 30% of married couples who do need them. That cannot plausibly have been the decision of a rational legislature. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (purported rationales for legislation must be rejected if "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation") (internal quotation marks omitted).

To the extent that marriage is a proxy for financial interdependence, the existence of a same-sex domestic partnership is just as good a proxy. Couples in which one partner has a disability suggests some degree of interdependence, since the non-disabled partner's income might be important for preserving the standard of living for both members of the couples. And the percentage of couples in which one partner has a disability is exactly the same, 28%, for both same-sex couples and different sex married couples. LF0016(¶54); LF0063(¶64); LF0187-88(¶7). Similarly, the proportion of

couples that has just one partner working in the paid labor force shows likely economic interdependence for the non-working partner. The proportion of same-sex couples in which only one partner is working, 21.4%, is very close to the percentage for married different-sex couples, 28.9%, and is even closer if one looks only at the proportion of couples raising children that have just one partner working in the paid labor force: 27.7% of same-sex couples and 31.2% of married different-sex couples. LF0016(¶54); LF0063-64(¶65); LF0188(¶8). National data tells a similar story about the similarities of same-sex and different-sex couples with respect to economic interdependence and other measures, such as racial diversity and average and median household incomes. LF0016(¶54); LF0064(¶¶66-67); LF0188-89(¶¶9-11).

Despite these broad and consistent similarities between same-sex couples and different-sex married couples, the trial court relied on the fact that the percentage of married couples in Missouri with only one wage earner is a few percentage points higher than the percent of committed same-sex couples with one wage earner (although both groups have an identical percent of couples in which one member has a disability). LF0384. This miniscule difference does not provide a rational basis for categorically barring all same-sex domestic partners from receiving benefits. In light of the fact that Mo. Rev. Stat. § 104.140.3 automatically provides survivor benefits to all married different-sex couples even though 70% of those couples consist of people who are both employed, it is not rational to categorically exclude all same-sex couples from survivor benefits (including the more than 20% of those couples where only one member is employed) to prioritize the needs of those most likely to be financially interdependent.

See Dep't of Agric. v. Murry, 413 U.S. 508, 514 (1973) (invalidating classification in benefit statute that "is not a rational measure" of a household's need and "rests on an irrebuttable presumption often contrary to fact"); *Moreno*, 413 U.S. at 535-536 (explaining that even if households with unrelated members were slightly less stable than households where everyone is related, a categorical ban on food stamp benefits for unrelated households is not "a rational effort to deal with these concerns"); *cf. Petitt*, 341 S.W.2d at 108-09 (finding that law denying licenses to sell checks, drafts, or money orders to businesses "the major portion of which involves" the mercantile business – "[i]f 49% of a person's business was buying and selling, he could be licensed but if it was 51% he could not be" – arbitrary in violation of equal protection).

The irrationality of the statute is underscored by the fact that Missouri excludes all same-sex couples from Mo. Rev. Stat. § 104.140.3 survivor benefits even if they have legally married in another jurisdiction. There is no rational explanation for why a same-sex couple who legally marries in Iowa, for example, is any less financially interdependent than a different-sex couple that legally marries in Iowa. Yet, under the current statutory scheme, the different-sex couple is eligible for Mo. Rev. Stat. § 104.140.3 benefits while the same-sex couple is not.

In the context of same-sex couples who are prohibited from marrying and denied recognition of their marriages entered outside Missouri, there is no rational basis for using marriage as a proxy for financial interdependence. To be sure, a legislature may engage in speculation when making classifications under rational-basis review, but "[t]he State may not rely on a classification whose relationship to an asserted goal is so

attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. "[I]n defining a class subject to legislation, the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *see also Classics Tavern Co.*, 783 S.W.2d at 466. Because there is no such relevance here, Missouri's categorical exclusion of same-sex couples from the survivor pension benefits provided by Mo. Rev. Stat. § 104.140.3 violates equal protection.

C. The exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard is not rationally related to a legitimate government interest in establishing objective benefit criteria.

In addition to speculating that the statutes rationally used marriage as a proxy for financial interdependence, the trial court also speculated that excluding Mr. Glossip and Cpl. Engelhard from survivor benefits rationally furthers the state's interest in establishing objective and uniform criteria for eligibility determinations. According to the court, providing survivor benefits to same-sex couples would require "subjective analysis . . . about the nature of a non-marital applicant's relationship to a deceased employee." LF0385. None of these assertions has any "footing in the realities of" Mr. Glossip and Cpl. Engelhard's circumstances or the way in which domestic partnership benefits are administered in Missouri and across the county. *Heller*, 509 U.S. at 321.

As an initial matter, it is impossible to conclude that a purpose of the statutory scheme is to ensure that claims for survivor benefits are objectively verified by reviewing

a marriage certificate. *See Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7 (purported rationales for legislation must be rejected if "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation") (internal quotation marks omitted). Missouri does not provide survivor benefits to any couple that presents "a marriage certificate." Many same-sex couples also possess "marriage certificates" from other jurisdictions, and it is uncontested that Mr. Glossip and Cpl. Engelhard would have married in another jurisdiction if their marriage had been recognized by Missouri. Under this statutory scheme, however, if a different-sex couple presents a marriage certificate from Iowa they receive survivor benefits, but if a same-sex couple presents a marriage certificate from Iowa, they do not. This unequal treatment demonstrates that the asserted interest in limiting proof to verifiable marriage certificate could not "conceivably or . . . reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (internal quotation marks omitted); *accord Hancock Indus. v. Schaeffer*, 811 F.2d 225, 237 n.10 (3d Cir. 1987).

Even if the court were to credit the trial court's hypothesis that the purpose of excluding same-sex couples is to promote objective verification of claims, the court's conclusions are based on the faulty assumption that same-sex couples' eligibility for survivor benefits would be determined on a *post hoc* basis after an employee has already died. If an employee is given the opportunity to designate a domestic partner in advance -- at the same time the employee designates who shall be the beneficiary of his or her life insurance policy and retirement accounts -- then there is no need to engage in a "subjective" analysis to determine whether a claimant is a bona fide domestic partner or

to resolve competing claims from multiple people claiming to have had a relationship with a deceased employee. Indeed, even in this case, Cpl. Engelhard's other employment documentation makes clear that he and Mr. Glossip were in a spousal relationship. As part of the forms he submitted to MDOT when he was hired, Cpl. Engelhard specifically identified Mr. Glossip as his "fiancé," along with naming him as beneficiary on his retirement savings account and deferred compensation plan and fifty percent beneficiary of his life insurance policy. LF0010(¶25); LF0053(¶21); LF0120(¶15); LF0167-71. Because Cpl. Engelhard made these designations himself, there is no need to engage in the "subjective" multi-factored analysis envisioned by the trial court.

Nothing prevents Missouri from establishing a uniform and objective definition of "domestic partner" for purposes of receiving survivor benefits. Many employers, including a number of state and local government employers in Missouri, have already established such criteria for providing domestic partner benefits to their employees. LF0014(¶¶46-47); LF0055-58(¶¶31-47); LF0183-85(¶¶3-17).[10] Indeed, the affidavits

[10] At least six governmental bodies in Missouri provide one or more of the following domestic partner benefits to their employees -- including law enforcement personnel -- who have same-sex domestic partners: health insurance, dental insurance, dependent life insurance, survivor pension benefits, sick leave, and funeral leave. At least four of these governments offer the same pension benefits that they provide for spouses of employees to some or all of their employees' same-sex domestic partners. LF0057-58(¶¶44, 46); LF0208(¶7); LF0213(¶5); LF0220(¶9); LF0224(¶4); LF0227(¶4).

signed by other governmental bodies in Missouri show that they have established objective standards for determining whether a same-sex couple is eligible to receive domestic partner benefits with an affidavit documenting their domestic partnership. LF0015(¶¶48-49); LF0057-61(¶¶44-53); LF0207-29. Although employers are free to specify their own eligibility standards, such affidavits typically require the employee to testify that both partners are 18 or older; not related to each other; live together; are not currently in a domestic partnership, civil union or marriage with a different person; mutually responsible for each other; and have been in an intimate, committed relationship of at least six-to-twelve months' duration. LF0015(¶48); LF0057(¶43); LF0185(¶17).

Moreover, these other Missouri governmental entities that provide benefits to same-sex domestic partners have found minimal additional administrative costs and no significant difference between the burdens of administering the benefit programs for employees with domestic partners as compared to the burdens of administering benefit programs for employees with spouses. LF0015(¶50); LF0061-62(¶54); LF0208(¶7); LF0213(¶5); LF0220(¶9); LF0224(¶9); LF0227(¶7). And MPERS itself has admitted that it is unaware of any data supporting the trial court's hypothesis that providing benefits to same-sex domestic partners would be more administratively difficult than providing survivor benefits to different-sex spouses. LF0055(¶29); LF0099.[11]

[11] The Missouri governmental bodies administering these domestic-partner benefit programs have also not seen any evidence of fraud in the use of domestic-partner programs. LF0015(¶51); LF0062(¶58); LF0185(¶18).

There is no rational relationship between the goal of providing objective standards and the categorical exclusion of same-sex couples. The trial court hypothesized that providing survivor benefits to same-sex couples would be difficult to administer, but that court's speculation has no "footing in the realities of" how domestic partnership benefits are actually administered. *Heller*, 509 U.S. at 321.

D. The exclusion of Mr. Glossip from survivor benefits coverage because of the sexual orientation of Mr. Glossip and Cpl. Engelhard is not rationally related to a legitimate government interest in controlling costs.

Finally, the trial court suggests that the by limiting the class of eligible beneficiaries to married couples, the legislature could have sought to avoid an increase in "MPERS' actuarial and financial burdens." LF0385. Controlling costs is a legitimate governmental interest in the abstract, but the government may not attempt to advance that interest by making irrational and arbitrary distinctions among similarly situated people. *See Collins*, 727 F. Supp. 2d at 805. As the Supreme Court has explained, if the government could justify discrimination simply by asserting that it wanted to allocate scarce resources to a favored group, then "*any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985).

"Arbitrary selection can never be justified by calling it classification." *Petitt*, 341 S.W.2d at 108-109 (Mo. 1960) (internal quotation marks and citations omitted).[12]

A bare desire to prefer one group of people over another is not a legitimate state interest. *Cf. Romer*, 517 U.S. at 634. The Eighth Circuit explained this principle when it invalidated a Missouri statute that arbitrarily provided benefits to one group of disabled persons but not to others:

> Although states may have great discretion in the area of social welfare, they do not have unbridled discretion. They must still explain why they chose to favor one group of recipients over another. Thus, it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest.

Ranschburg v. Toan, 709 F.2d at 1211; *accord Del. River Basin Comm'n. v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1099-100 (3d Cir. 1981) (rational basis

[12] Similarly, although administrative efficiency is a legitimate state interest in the abstract, the government may not use purported concerns about administrative efficiency as a justification to irrationally discriminate. *See Collins*, 727 F. Supp. 2d at 806 (explaining that although administrative efficiency is a legitimate interest, the state cannot further that interest through "an impermissible invidious classification which imposes costs on lesbians and gays by stripping their dependents of health care benefits, which the dependents of their heterosexual counterparts would continue to enjoy").

review does not allow government to claim that "the purpose underlying a classification is the goal of treating one class differently from another").

Similarly, in this case, Missouri cannot justify its exclusion of Mr. Glossip and Cpl. Engelhard simply by saying it seeks to prefer different-sex couples to same-sex couples when allocating state benefits. An intent to discriminate between same-sex and opposite-sex couples is not a legitimate state interest. *Cf. Ranschburg*, 709 F.2d at 1211; *Romer*, 517 U.S. at 634. The government must, at a minimum, identify "some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed." *Ewing*, 518 S.W.2d at 646. Because there is no difference justifying the differential treatment, the exclusion of Mr. Glossip and Cpl. Engelhard fails even rational-basis review.

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.

In addition to violating the Missouri Constitution's equal protection guarantee, the categorical exclusion of same-sex couples from the survivor benefits provided by Mo. Rev. Stat. § 104.140.3 makes the statute an unconstitutional "special law." Mo. Const. art. III, § 40 provides that "[t]he general assembly shall not pass any local or special law: … where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without any regard to any legislative assertion on that subject."

"The vice in special laws is that they do not embrace all of the class to which they are naturally related." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006) (internal quotation marks omitted). The discriminatory exclusion of same-sex couples from survivor benefits is a perfect illustration of that vice. Instead of limiting the survivor benefits provided by Mo. Rev. Stat. § 104.140.3 to different-sex couples, Missouri could have provided -- and is constitutionally obligated to provide -- those benefits generally to similarly situated committed couples regardless of their sex and sexual orientation.

A. Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 are an unconstitutional special law in that the statutes create fixed categories based on sexual orientation and the state provided no evidence to show a substantial justification for excluding same-sex couples from survivor benefits coverage.

The appropriate standard of scrutiny under Mo. Const. art. III, § 40 depends on whether a classification is a "facially special law" or a general law. *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. banc 2006). "A facially special law is presumed to be unconstitutional." *Id.* The government bears the burden of proving the statute's constitutionality and in order to do so, it "must demonstrate a 'substantial justification' for the special treatment." *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. banc 1994). "In order to meet this standard, the mere existence of a rational or reasonable basis for the classification is insufficient." *City of Springfield*, 203 S.W.3d at 186; *see O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) (invalidating facially special law even though government demonstrated it was rational). Moreover, the party defending the statute must submit actual evidence defending the exclusion and "cannot rely on a legislative determination that a special law was necessary." *City of Springfield*, 203 S.W.3d at 186; *see* Mo. Const. art. III, § 40 ("[W]hether a general law could have been made applicable is a judicial question to be judicially determined without any regard to any legislative assertion on that subject.").

The exclusion of same-sex couples from the survivor benefits coverage makes Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 is a special law on its face. "[W]hether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic." *City of Springfield*, 203 S.W.3d at 184; *accord Harris*, 869 S.W.2d at 65. As discussed above in connection with the "suspect classification factors," there is scientific consensus that a person's sexual orientation is an immutable

characteristic that cannot be changed either by a decision-making process or by medical intervention. App. Br. at 33-35. Because a person's sexual orientation is an integral component of his or her identity that in all relevant respects is "set, solid, and fixed," *City of Springfield*, 203 S.W.3d at 186, statutory distinctions on the basis of sexual orientation are facially special laws that must be supported by a substantial justification.

The trial court concluded that the survivor benefit statute "create[s] an open-ended class because beneficiaries may enter and then leave the class of eligible beneficiaries as marriages to members begin and end," LF0388, completely ignoring the fact that Mr. Glossip and Cpl. Engelhard, and other same-sex couples, are denied entry into the class because they cannot marry in Missouri and their marriages entered outside of Missouri are not recognized as a basis for receiving survivor benefits. The relevant class for purposes of eligibility for survivor benefits is limited to heterosexual different-sex couples – a class to which Mr. Glossip and Cpl. Engelhard were denied entry because of their sexual orientation.

There is no substantial justification for excluding same-sex couples from survivor benefits coverage. And the government cannot make a showing of a substantial justification without providing actual evidence to support its claims. *City of Springfield*, 203 S.W.3d at 184; *see* Mo. Const. art. III, § 40. Here, the state provides none. Because the exclusion of same-sex couples is a facially special law, it is presumptively unconstitutional and must be invalidated by this Court.

B. Even if the exclusion of same-sex couples did not make Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140.3 a facially special law, the discrimination against Mr. Glossip lacks a rational basis.

Finally, even if the statute were not a facially special law, it must be invalidated as unreasonable, arbitrary, and without a rational relationship to a legislative purpose. *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. banc 2009). For the reasons set forth in Section III, there is no rational justification for excluding committed same-sex couples from the survivor benefits provided to heterosexual couples by Mo. Rev. Stat. § 104.140.3 and the exclusion of same-sex couple from survivor benefits is therefore unconstitutional.

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.

Mr. Glossip seeks a permanent injunction for an award of survivor benefits.

In order to secure a permanent injunction, a plaintiff must show that he or she has suffered an irreparable injury, damages are inadequate, the balance of hardships between the plaintiff and defendant weighs in favor of an injunction, and the public interest is served by granting a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The requirements for a permanent injunction are the same as those for a preliminary injunction, except instead of a *likelihood* of success on the merits, the movant must show *actual* success on the merits. *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999). For the same reasons that Mr. Glossip is entitled to prevail on the merits of his claims, he has also shown that the balance of equities and the public interest weigh in favor of an injunction. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981) (en banc) (injunction may issue where "balance of the other factors tip decidedly toward plaintiff"); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights."), *overruled on other grounds*, *Phelps-Roper v. City of Manchester*, No. 10–3197, 2012 WL 4868215 (8th Cir. Oct 16, 2012).

Mr. Glossip's injuries cannot be satisfied by an award of monetary damage, so he has no adequate remedy at law. A single payment for money damages would be inadequate because Mr. Glossip is suffering an ongoing harm that cannot be remedied with a single damages award. Mr. Glossip is entitled to annual payments under the pension statute. The harm he suffers is therefore ongoing and will repeat itself each year MPERS fails to provide him the regular survivor benefits to which he is entitled. Without an injunction, even after a victory on the merits Mr. Glossip would be forced to

return to court again and again in order to claim what he is owed. *See State ex rel. Kenamore v. Wood*, 56 S.W. 474, 488 (1900) ("one of the offices of an injunction is to prevent a multiplicity of suits").[13]

CONCLUSION

For all these reasons, this Court should reverse the trial court's dismissal of Mr. Glossip's petition and the denial of his cross-motion for summary judgment. Because there are no genuine disputes of the facts but only questions of law,[14] this Court should

[13] The survivor benefit statute provides only for annual payments; no lump sum payment is available under the statute, foreclosing any argument that Mr. Glossip could be fully and adequately compensated after a single lawsuit. *See* Mo. Rev. Stat. §§ 104.140.3, 104.090.3.

[14] MPERS admitted the overwhelming bulk of Mr. Glossip's uncontroverted facts, LF0314-50(¶¶1-4, 6- 9, 11-14, 16-20, 24, 25, 27, 28, 31-47, 54-59, 61, 67-69); failed to dispute others, LF0337-41; LF0344-49(¶¶49-53, 60, 62, 63, 64, 66); and failed to put on evidence to dispute any it disputed in whole or part. LF0316(¶5); LF0317-18(¶10); LF0320(¶15); LF0323-25(¶21-23); LF0326-28(¶¶26, 29, 30); LF0344-49(¶¶60, 62- 66). Having failed to offer evidence to dispute those facts means they are admitted. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 382.

The state's few objections to Mr. Glossip's evidence lack any merit. The state argued that Fact ¶22 is based on hearsay and inadmissible under the statute abrogating the deadman's statute, Mo. Rev. Stat. § 491.010, LF0324, but Cpl. Engelhard's out-of-court

both reverse the dismissal of the petition and grant Mr. Glossip's summary judgment motion. *See American Motorists Ins. Co.*, 876 F.2d at 302-03; *Morgan Guarantee Trust Co.*, 466 F.2d at 600; *Palos Community Hosp. v. Illinois Health Facilities Planning Bd.*, 328 Ill. App.3d 336, 338-39 (Ill. App. 2002). *Cf. Transatlantic Ltd. v. Salva*, 71 S.W.3d 670, 675-76 (Mo. App. 2002) ("[i]n certain circumstances, the denial of a party's motion for summary judgment can be reviewed when its merits are completely intertwined with a grant of summary judgment in favor of an opposing party. . . .[The Court] may direct in

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statement is not offered for the truth of the matter asserted and is subject to the state-of-mind exception to the hearsay rule. *See Coon v. American Compressed Steel, Inc.*, 207 S.W.3d 629, 636 (Mo. App. 2006) ("Because [decedent's] out-of-court statements were admissible under the state of mind exception to the hearsay rule, the Dead Man Statute was not applicable in this proceeding."). With regard to Facts ¶¶60, 62, 63, 64, and 66, the state objected that the facts are based on "opinions," "conclusions" and "beliefs," LF0344-49, even though expert testimony in the form of opinion or inference can be admitted, even if the testimony "embraces an ultimate issue to be decided by the trier of fact." Mo. Rev. Stat. § 490.065.2. The state's challenge to the evidentiary support for Ms. Badgett's opinions set out in Facts ¶¶60, 63, and 64 is misplaced, since the facts or data upon which she relied – the sources cited in the footnotes of her affidavit and her experience in the field of expertise regarding the economics of sexual orientation – are the type of facts that are reasonably relied upon by an expert in her field, *see* LF0187(¶5), and support the factual statements for which they are offered.

this posture, if proper, the judgment that the court should have entered[,]" including summary judgment) (citing *Redpath v. Missouri Highway and Trans. Comm'n*, 14 S.W.3d 34 (Mo. App. 1999).

Respectfully Submitted,

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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 18,450 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 5th day of November, 2012, 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:

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