IN THE SUPREME COURT OF MISSOURI

KELLY D. GLOSSIP,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	**No. SC 92583**
MISSOURI DEPARTMENT OF TRANSPORTATION AND HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM,	)	
	)	
Respondent.	)	

BRIEF OF MISSOURI LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* are faculty members at all four of Missouri's public and private law schools. As legal scholars, teachers, and practitioners with a broad variety of expertise in constitutional law, family law, civil rights, and other areas, they are well-qualified to assist the Court in evaluating and resolving the appellant's equal protection claim. Moreover, as Missouri citizens, they care deeply about the guarantees of equality and individual rights provided by their state's constitution.

The *amici* are:

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CONSENT OF PARTIES

Appellant Kelly Glossip and Respondent Missouri Department of Transportation and Highway Patrol Employees' Retirement System have both consented to the filing of this *amicus* brief.

INTRODUCTION

This case presents the question of whether, under the Missouri Constitution's Equal Protection Clause, the state Highway Patrol may discriminate against gay men and lesbians in the death benefits it provides to the surviving family members of state troopers who are killed in the line of duty.

After thoughtful and thorough analysis, the supreme courts of three of Missouri's sister states – including, most recently, its neighbor Iowa – have concluded that such classifications based on sexual orientation should receive searching judicial scrutiny, not ordinary rational basis review. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). These states recently have been joined by a United States Court of Appeals, *see Windsor v. United States*, No. 12-2335-cv(L), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), and the U.S. Department of Justice, *see* Att'y Gen. Letter to Congress re: Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. For reasons the *amici* explain in this brief, this Court should join these sister states, the Second Circuit, and the United States government in concluding that, when government classifies on basis of sexual orientation, the relevant factors "all point to an elevated level of scrutiny." *Varnum*, 763 N.W.2d at 896.[1]

[1] The U.S. Supreme Court has not yet spoken to the proper level of scrutiny for sexual orientation under the Equal Protection Clause. But in any event, this Court has explained that it may construe provisions of the Missouri Constitution to provide greater protections

As the Iowa Supreme Court has observed, *id*. 895, "it would be difficult to improve upon the words of the Supreme Court of Connecticut" in summarizing why heightened scrutiny is appropriate:

> Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society. The characteristic that defines the members of this group – attraction to persons of the same sex – bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens. Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so. Gay persons also represent a distinct minority of the population. It is true, of course, that gay persons recently have made significant advances in obtaining equal treatment under the law. Nonetheless . . . as a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling them out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.

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than comparable provisions of the federal Constitution. *E.g.*, *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006).

Kerrigan, 957 A.2d at 432.

For classifications based on sexual orientation, the Iowa, Connecticut, and Second Circuit courts all have adopted intermediate scrutiny, under which "'a statutory classification must be substantially related to an important government objective'" and be supported by an "'exceedingly persuasive'" justification. *Varnum*, 763 N.W.2d at 896-97 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988) and *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)); *accord Kerrigan*, 957 A.2d at 431-32 (designating sexual orientation a "quasi-suspect" classification); *Windsor*, 2012 WL 4937310, at *9-10 (same).[2] *Amici* urge this Court to adopt the same standard.[3]

While this Court is, of course, "not bound to follow the decisions of a sister state" or lower federal courts, such decisions "are persuasive, if based on sound principles and good reason." *Mo. Twp., Chariton Cnty. v. Farmers' Bank of Forest Green*, 42 S.W.2d

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[2] The California Supreme Court has determined that sexual orientation creates a suspect class subject to strict scrutiny. *In re Marriage Cases*, 183 P.3d at 444.

[3] This Court currently applies "heightened scrutiny" to classifications based on race, alienage, national origin, gender, and illegitimacy. *E.g., United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). At other times, the Court has used the term "suspect class" to refer to "classes, such as those based upon race, national origin, or illegitimacy that for historical reasons command extraordinary protection from the majoritarian political process." *E.g., Riche v. Director of Revenue*, 987 S.W.2d 331, 336 (Mo. banc 1999) (citation and internal quotation marks omitted).

353, 356 (Mo. 1931). In this case, heightened scrutiny is required in order to vindicate our state constitution's command that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, § 2.

Should this Court decline to apply intermediate scrutiny, the discussion offered by the *amici* in this brief should inform its analysis even under rational basis review. As Judge Michael Boudin recently explained for a unanimous panel of the U.S. Court of Appeals for the First Circuit, modern U.S. Supreme Court decisions invoking rational basis have "intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012). For almost 40 years, in cases involving non-suspect classes that are nonetheless marked by "historic patterns of disadvantage," the Supreme Court has "undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id*. at 11.

To be sure, a court must respect the roles of the legislature and the executive branch in formulating state policy. But the constitutional separation of powers also presumes an independent judiciary and meaningful judicial review. As this Court has observed, "the separation of the powers of government into three distinct departments is, as oft stated, vital to our form of government, because it prevents the abuses of power that would surely flow if power accumulated in one department." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997) (internal citations and quotation marks omitted). "Thus, '[t]he doctrine of the separation of powers [is not

meant to] promote efficiency but to preclude the exercise of arbitrary power.'" *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). As every law student learns, a central principle of our system of government is that "it is emphatically the province and duty of the judicial department to say what the law is," and ensuring that legislative acts conform to the superior law of a constitution is "the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

ARGUMENT

I. Because the Majoritarian Political Process Has Failed to Protect Their Equality and Dignity, Gays and Lesbians Meet This Court's Standard for Heightened Scrutiny

In setting out what has become a foundational principle of modern equal protection law, the U.S. Supreme Court observed that "searching judicial inquiry" is particularly necessary where prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). The principled and context-sensitive equal protection analysis described by Justice Stone in *Carolene Products* appropriately balances judicial responsibility for enforcing constitutional equality with "deference to the concept of representative democracy." *Wengler v. Druggists Mut. Ins. Co.*, 601 S.W.2d 8, 9 (Mo. banc 1980) (Donnelly, J., concurring in the result).

Consistent with the teaching of *Carolene Products*, this Court has explained that heightened scrutiny, not mere rational basis review, is required for groups whose history

of social and legal treatment shows they cannot rely on the "majoritarian political process" to protect their basic rights. *See, e.g.*, *State v. Young*, 362 S.W.3d 386, 397 (Mo. banc 2012); *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc. 1991) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

Regrettably, gays and lesbians remain a clear example of such a group: in Missouri, the ordinary political process – that is, the statutory policies that elected legislators have chosen to enact or reject – has been almost entirely indifferent, and sometimes hostile, toward their equality and dignity. As 12 current and former Missouri lawmakers and St. Louis Mayor Francis Slay explain in their brief in this case, "[d]iscrimination against gays and lesbians in Missouri is real," and their "[e]fforts to obtain basic protection from discrimination have failed." Amicus Br. of Mayor Francis Slay, et al., at 11, 14.

For example, although more than half the U.S. population now lives in jurisdictions where gays and lesbians are protected against discrimination in employment, housing, and public accommodations, *see* National Gay and Lesbian Task Force, "Unprecedented Series of Gains Coast to Coast for Lesbian, Gay, Bisexual and Transgender People" (May 9, 2007), *available at* http://www.thetaskforce.org/press/releases/prstates_050907, such a non-discrimination law has been routinely rejected in Missouri. Indeed, it took a decade of trying before such a measure even got a hearing in 2010. *See* Tony Messenger, "Gay Discrimination Measure Advances in Mo. House," *St. Louis Post-Dispatch* (Mar. 23, 2010), *available at* http://www.stltoday.com/news/

local/metro/article_e90befb8-1668-5322-a02a-e2d75da7e0d4.html. Protection against sexual orientation discrimination has failed to pass despite support from the Attorney General's office and the adoption of non-discrimination policies by major corporations that do business in Missouri. *See id*.

While Missouri's gays and lesbians lack legal recourse against discrimination in the private marketplace, it is even more troubling that they have been targeted for discrimination, even outright animus, by their own government and its legislators. Missouri was one the last states to continue criminalizing sodomy until such laws finally were invalidated by the Supreme Court in 2003. *See Lawrence v. Texas*, 539 U.S. 558 (2003). (At the time of *Lawrence*, Missouri was one of only four states that criminalized *only* homosexual activity. *See id*. at 570.) Gays and lesbians in this state also are barred by constitutional amendment from the benefits and responsibilities of civil marriage, *see* Mo. Const. art. I, § 33, which prevents them from seeking marriage rights through the normal majoritarian legislative process.

Last spring, Missouri legislators proposed a so-called "Don't Say Gay" bill, which would have prohibited any mention of sexual orientation – perhaps even ordinary conversations – in public school instruction, material, or extracurricular activities. *See* H.B. No. 2051, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012), *available at* http://www.house.mo.gov/billtracking/bills121/biltxt/intro/HB2051I.htm. Some 20 legislative sponsors apparently believed that such anti-gay scapegoating and censorship was appropriate despite the measure's troubling implications for the First Amendment and a warning from the Missouri Chapter of American Academy of Pediatrics that it was

"clearly harmful to the best interests of the children of Missouri." Chad Garrison, "Opposition Mounts to Missouri's 'Don't Say Gay' Bill for Schools, *Riverfront Times* (Apr. 26, 2012), *available at* http://blogs.riverfronttimes.com/dailyrft/2012/04/opposition_missouri_hb_2051_dont_say_gay.php.

The facts of this case provide further evidence of how the ordinary legislative process has worked against the equality and dignity of gays and lesbians, underscoring the argument for heightened scrutiny. The Highway Patrol Employees' Retirement System was created in 1955, but Mo. Rev. Stat. § 104.012, which provides that any reference to "spouse" in the system's programs "only recognizes marriage between a man and a woman," was added only in 2001, *see* S.B. No. 371, § 2, 91st Gen. Assemb., 1st Reg. Sess. (Mo. 2001) – before it was actually possible for same-sex couples to marry in any U.S. state.[4] The discrimination worked by § 104.012 is not, then, some relic of outdated prejudice that has simply eluded the legislature's attention. Rather, it reflects a considered, deliberate, and contemporary legislative decision to inscribe discrimination into the State's public employment law.

The legislature *has* acted to protect gays and lesbians in one area – hate crimes. In 1999, it approved a law enhancing penalties for crimes motivated by the "race, color, religion, national origin, sex, sexual orientation or disability of the victim or victims." Mo. Rev. Stat. § 557.035 (2012). Such hate crime measures serve the worthy purpose of

[4] The first state to authorize marriage for couples of the same sex was Massachusetts in 2003. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

discouraging and punishing private bias-motivated violence, but they do not meaningfully advance public legal equality. Ironically, at the same time that Missouri's hate crimes law recognizes that gays and lesbians need special legal protection due to their history of mistreatment, the State's affirmative discrimination against persons like Kelly Glossip, or dubious proposals like the "Don't Say Gay" bill, may actually encourage private bias, and even violence, by signaling that the State and its lawmakers "find[] the group undesirable." Sarah K. Skow, *What Missouri "Shows Me" About Sexual Orientation Legislation*, 37 U. TOL. L. REV. 807, 839 (2006).

The inequality experienced by gays and lesbians reflects flaws in the majoritarian political process that go beyond our state alone. On the one hand, trends in public attitudes indicate that "a consensus is emerging" among Americans "that the government should act to end the inequality and discrimination that LGBT people have traditionally faced." Kenneth Sherrill, "Lessons for Democrats in New Poll," The Bilerico Project (Sept. 4, 2012, 11:00 a.m.), http://www.bilerico.com/2012/09/lessons_for_democrats_in_new_poll.php. On the other hand, recent empirical research in political science demonstrates that "representative institutions do a poor job protecting [gay and lesbian] rights even when the public *supports*" such rights, to the point that even supermajority support sometimes is insufficient to enact policies aimed at protecting gays and lesbians from discrimination. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AMER. POL. SCI. REV. 367, 383 (2009). Gays and lesbians have difficulty protecting their rights because their opponents' policy preferences often are systematically overrepresented in the legislative process,

meaning that opponents' "share of the population shapes policy even beyond directly affecting public opinion and the composition of state governments." *Id*. As a result, on many questions of public policy, "opinion and policy are disconnected in a way that works *against* the interests of gays and lesbians." *Id*.

In summary, because gays and lesbians cannot rely on the "majoritarian political process" to protect their basic rights, which is the concern this Court has looked to in defining a suspect class, *see*, *e.g.*, *Young*, 362 S.W.3d at 397, classifications involving sexual orientation should receive heightened scrutiny.

II. Heightened Scrutiny Also Is Warranted Under the Factors Typically Considered by Other State and Federal Courts

A. Factors for heightened scrutiny

In weighing whether to apply heightened scrutiny, various state and federal courts have identified four factors considered by the U.S. Supreme Court: "(1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is 'immutable' or beyond the class members' control; and (4) the political power of the subject class." *Varnum*, 763 N.W.2d at 887 (footnotes omitted); *accord Windsor*, 2012 WL 4937310, at *6. These factors are applied in a "flexible manner," and the first two – a history of discrimination and the class members' ability to contribute to society – are the most relevant. *Varnum*, 763 N.W.2d at 888-89; *accord Windsor*, 2012 WL 4937310, at *6.

The critical inquiry is whether a classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

The discussion in Section I, above, bears on the fourth factor. It demonstrates that gays and lesbians "lack[] sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means." *Kerrigan*, 957 A.2d at 444. Particularly in Missouri, experience demonstrates that this group is unable to protect its rights through the majoritarian political process, which this Court has identified as the key concern for heightened scrutiny. *See Young*, 362 S.W.3d at 397. This Court need not rest on that factor alone, however, because the other three plainly are satisfied as well.

History of discrimination. More than 25 years ago, this Court said "[i]t cannot be doubted that historically homosexuals have been subjected to 'antipathy [and] prejudice.'" *State v. Walsh*, 713 S.W.2d 508 (Mo. banc 1986).[5] Indeed, "[f]or centuries,

[5] In *Walsh*, this Court declined to recognize sexual orientation as a quasi-suspect classification, but that decision can no longer be considered good for that point of law. *Walsh* rested expressly on the then-permissible criminal prohibition of sodomy and on the approval given to such laws by the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Walsh*, 713 S.W.2d at 511. *Walsh*'s core reasoning has been eviscerated by *Lawrence*, which invalidated sodomy laws and explained that "*Bowers* was not correct when it was decided, and it is not correct today." 539 U.S. at 578. Accordingly, a

the prevailing attitude toward gay persons has been 'one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.'" *Kerrigan*, 957 A.2d at 432 (quoting RICHARD A. POSNER, SEX AND REASON 291 (1994)). "The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of the country" – including Missouri – "until very recently." *Varnum*, 763 N.W.2d at 889. Until 2003, states had free rein to "demean [gay men's and lesbians'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578. What is more, "only a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor." *Varnum*, 763 N.W.2d at 889. In our schools, "bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice." *Id*. Today, gays and lesbians are specifically barred from marrying in 40 states, including Missouri, and they are the group most frequently targeted for referenda aimed at restricting or rescinding their legal rights. *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1384 (2011).

At least since gays and lesbians emerged in the 1920s as a distinctive and visible social group, they have been disadvantaged, ostracized, and sometimes brutalized. As the

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holding that relied on *Bowers* or the state's authority to criminalize homosexual conduct must now be rejected.

Second Circuit succinctly concluded, "[n]inety years of discrimination is entirely sufficient to document 'a history of discrimination.'" *Windsor*, 2012 WL 4937310, at *7.

Ability to contribute to society. Classifications based on a human characteristic that "frequently bears no relation to ability to perform or contribute to society" also reinforce the need for heightened scrutiny. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Indeed, this factor "has played a critical and decisive role" in determining whether a classification should receive more searching judicial review. *Pedersen v. Office of Pers. Mgmt.*, No. 3:10–cv–1750 (VLB), 2012 WL 3113883, at *22 (D. Conn. 2012).

This factor in the heightened scrutiny analysis is well established, since the broad consensus of courts, as well as social science research and legal commentary, is that "homosexuality bears no relation at all to [an] individual's ability to contribute fully to society." *Kerrigan*, 957 A.2d at 435 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1616 (2d ed. 1990)); *see also id*. at 434-35 (collecting cases); *Varnum*, 763 N.W.2d at 892 ("[I]t is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society."). According to the American Psychological Association, "[t]he longstanding consensus of the behavioral and social sciences and the health and mental health professions is that homosexuality per se is a normal and positive variation of human sexual orientation." APA Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts (adopted Aug. 5, 2009), *available at* http://www.apa.org/about/policy/sexual-orientation.pdf. While "[t]here are some distinguishing characteristics, such as age or

mental handicap, that may arguably inhibit an individual's ability to contribute to society . . . homosexuality is not one of them." *Windsor*, 2012 WL 4937310, at *7. In short, "[t]he aversion homosexuals experience has nothing to do with aptitude or performance." *Id*.

Centrality of sexual orientation to a person's being. In weighing heightened scrutiny, courts may consider whether a characteristic is innate, permanent, or otherwise central to a person's being, "because the inability of a person to change a characteristic that is used to justify different treatment makes the discrimination violative of the rather 'basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Varnum*, 763 N.W.2d at 892 (quoting *Frontiero*, 411 U.S. at 686). A characteristic need not be "immutable" in the strictest sense. After all, religion, gender, alienage, and race have all been recognized as suspect classifications, yet people may convert to a different faith, undergo gender reassignment surgery, become naturalized, or sometimes "pass" as being of a different race.

In assessing heightened scrutiny for sexual orientation, courts have reasoned that this "prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Kerrigan*, 957 A.2d at 438 (citation and internal quotation marks omitted). As the U.S. Supreme Court has emphasized, "the protected right of homosexual adults to engage in intimate, consensual conduct . . . [represents] an integral part of human freedom." *Lawrence*, 539 U.S. at 576-77. Consequently, "[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not

appropriate to require a person to repudiate or change [it] . . . in order to avoid discriminatory treatment." *In re Marriage Cases*, 183 P.3d at 442.

B. Application of heightened scrutiny

To date in this litigation, the State has failed to offer any defense for its discrimination against Glossip that would satisfy the test for intermediate scrutiny – an "exceedingly persuasive" justification that is substantially related to an important government objective. *See Varnum*, 763 N.W.2d at 896-97; *Virginia*, 518 U.S. at 532-33. Nor is it likely to be able to do so. Concerns for "'preserving the status quo'" or "'eliminating inconsistencies and easing administrative burdens' of the government" do not satisfy heightened scrutiny. *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011). Nor do concerns for "conservation of state resources." *Varnum*, 763 N.W.2d at 902. Nor does Missouri's decision to reserve marriage to heterosexual couples authorize the State to discriminate against gays and lesbians under other laws. *See Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment) (while "other reasons exist to promote the institution of marriage," "mere moral disapproval" of a group is insufficient to satisfy even rational basis review). Finally, the kinds of hypothesized state interests offered up by the State and relied upon by the trial court, *see* LF0384-0386, never satisfy any degree of heightened scrutiny. *Kerrigan*, 957 A.2d at 476 ("'The justification must be genuine, not hypothesized or invented post hoc in response to [the] litigation.'" (quoting *Virginia*, 518 U.S. at 532-33)).

To the extent the trial court evaluated the State's justifications, it did so by focusing on marital status rather than sexual orientation, and it applied only a very

deferential form of rational basis review. *See* LF0383-0386. But that analysis was incorrect. This case is not about marital status. A committed same-sex couple like Glossip and Cpl. Engelhard, who were *prohibited* from marrying in Missouri, are not similarly situated to a heterosexual couple who could legally marry at any time, and thereby become eligible for the employment benefit plan that is at issue in this case, but have simply *chosen* not to do so. Moreover, the state trooper death benefit statute discriminates *facially* against gays and lesbians who are married or in committed, long-term relationships, because it says that "any reference to the term 'spouse' only recognizes marriage between a man and a woman." Mo. Rev. Stat. § 104.012.[6] Having misconstrued the nature of Glossip's equal protection claim, the trial court relied on purported justifications from the State that completely failed to justify its specific discrimination against Glossip *as a gay man in a same-sex relationship.*

* * *

In summary, the extensive and thoughtful analyses provided by numerous state and federal courts provide strong persuasive authority that this Court should review Glossip's claim under heightened scrutiny, and that it should reject any justification that is not "exceedingly persuasive" and substantially related to an important government objective.

[6] To its credit, the State has not attempted to argue the non sequitur that a gay man like Glossip could avoid such discrimination simply by marrying a woman.

III. Discrimination in a Discretionary Employment Benefit Should Not Be Confused With the Requirements of Marriage Law

It is undisputed that the two men at the center of this case, Kelly Glossip and the late Cpl. Dennis Engelhard, built a committed, 15-year relationship that was marked by most of the same routines, shared responsibilities, joys, and sacrifices as a marital relationship. *See* LF0009-11; LF0051-55. Nearly two-thirds of Missourians believe that such same-sex couples should receive *some* legal recognition for their relationships, in the form of either equal marriage rights or civil unions. *See* Public Policy Polling, "Missouri will be a swing state this year, voters say" (June 1, 2012), *available at* http://www.publicpolicypolling.com/pdf/2011/PPP_Release_MO_060112.pdf. Such support for legal recognition includes 69 percent of self-identified moderates and 57 percent of those who call themselves "somewhat conservative." *See id.*

This case, however, is not about marriage or civil unions. As Glossip correctly states in his brief, the question before the Court is a narrow one: whether there is a justification that survives constitutional review for denying him, on the basis of his sexual orientation and thus his inability to legally marry, a specific discretionary benefit that arose from Cpl. Engelhard's employment as a state trooper. *See* Appellant's Br. at 15.

It is not necessary for the State to provide a *legal status*, such as marriage or civil union, in order to provide *equality of treatment* in dispensing a discretionary government employment benefit, such as a state trooper's death benefit. *See*, *e.g.*, *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 786-87 (Alaska 2005) (distinguishing between marriage rights and employment benefits for same-sex couples). The State has failed in

this obligation, and so this case invites the Court to exercise its constitutional responsibility to enforce the guarantee that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, § 2.

Providing heightened scrutiny under the equal protection guarantee could not, of course, disturb the *different* constitutional provision that reserves marriage to "a man and a woman." Mo. Const. art. I, § 33. Such a holding would make clear, however, that government is not at liberty to discriminate against gays and lesbians in any way it chooses. It would also underscore the fundamental rule that a "constitution controls any legislative act repugnant to it." *Marbury*, 5 U.S. (1 Cranch) at 177.

The principle that government should not discriminate in dispensing a discretionary employment benefit, even if it reserves the status of marriage for heterosexual couples, is not lost on fair-minded Americans. An AP/National Constitution Center poll this summer found that 63 percent of Americans agreed that "couples of the same sex [should] be entitled to the same government *benefits* as married couples of the opposite sex" – 10 percent more than said government should provide legal recognition to *marriages* between couples of the same sex. AP/National Constitution Center Poll, GfK Roper Public Affairs & Corporate Commc'ns (conducted Aug. 16-20, 2012), *available at* http://www.pollingreport.com/civil.htm (emphasis added).

In any event, death benefits like those provided by the Highway Patrol are part of the law of employment, not the law of marriage. The statutory provisions governing the Highway Patrol Employees' Retirement System, including Mo. Rev. Stat. § 104.012, are classified to Title VIII of the Revised Statutes, which deals with Public Officers and

Employees, not Title XXX, where Domestic Relations are addressed. Substantively, the purpose of this benefit is to provide compensation for the loss of a family member's income, companionship, and emotional support. Its purpose is not to regulate a legal relationship, in the manner of the intestacy, spousal support, or child custody laws that attach uniquely to marriage.

Nor is its purpose to express the state's favor or disfavor toward particular types of families. As a matter of common sense, paying a death benefit to the survivor of a state officer who is killed in the line of duty does nothing to channel citizens into traditional marital relationships, promote responsible procreation, or advance any other interests that might be implicit in Missouri's decision to limit marriage to heterosexuals. However, affirmatively *refusing* to provide such a benefit to the surviving member of a same-sex couple imposes a stamp of second-rate citizenship and moral disapproval. A statute disadvantaging same-sex couples fails even rational basis review when it "lack[s] . . . any demonstrated connection between [its] treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15. Mo. Rev. Stat. § 104.012 signals the legislature's belief that gay or lesbian state troopers belong in a class that is inferior to their heterosexual fellow officers, and that gay men and lesbians do not need or deserve compensation when *their* committed, long-term partners are killed in the State's service. Both propositions are, of course, unfounded and repugnant. As the Iowa Supreme Court has said, "[a] classification unrelated to a person's ability to perform or contribute to society typically reflects 'prejudice and antipathy – a view that those in the burdened class are not as

worthy or deserving as others' or 'reflect[s] outmoded notions of the relative capabilities of persons with the characteristic.'" *Varnum*, 763 N.W.2d at 890 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985)).

This Court has a duty, then, to carefully inquire whether any important, "exceedingly persuasive" end is served by classifying gay and lesbian state troopers and their survivors as inferior to other troopers and their families. Doing so need not involve the Court in separate policy questions about marriage, because the judgment of the people of Missouri to deny equal marriage to gays and lesbians does not license the State to discriminate in other areas. *See, e.g.*, *Alaska Civil Liberties Union*, 122 P.3d at 786-87 ("That the [Alaska] Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways."); *Collins v. Brewer*, 727 F. Supp. 2d 797, 807 (D. Ariz. 2010), *aff'd sub. nom*, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (denying certain employment benefits to gays and lesbians does not promote heterosexual marriage); *Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. banc 1999) (this Court has a duty to read specific provisions "consistent with the remainder of the Missouri Constitution" and to harmonize them whenever possible).

Therefore, the State must be required to justify its specific discrimination against Kelly Glossip in a discretionary death benefit, rather than simply resting on the fact that he was legally barred from marrying Cpl. Engelhard. As the U.S. Supreme Court explained in *Romer v. Evans*, "[t]he search for the link between classification and objective" of a law "gives substance to" equal protection review, "provides guidance and

discipline for the legislature," and "marks the limits of [a court's] own authority." 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an *independent* and legitimate legislative end," a court may "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id*. (emphasis added).

CONCLUSION

This Court should hold that for purposes of the Missouri Constitution, classifications based on sexual orientation are reviewed under heightened or intermediate scrutiny, and it should evaluate Glossip's equal protection claim accordingly. The challenged benefit program discriminates on the basis of sexual orientation. Glossip may not be denied a death benefit for the loss of Cpl. Engelhard unless the State demonstrates that its discrimination is substantially related to an important government objective and supported by an exceedingly persuasive justification.

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I 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 by operation thereof upon counsel for the parties:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of Microsoft Word, the undersigned certifies per the requirements of Rule 84.06(b) that this brief contains a total of 6,483 words, excluding the cover, certificate of service, certificate of compliance, and signature block.

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