SC92583

IN THE SUPREME COURT OF MISSOURI

KELLY D. GLOSSIP,

Appellant,

v.

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

Respondent.

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

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This case involves a challenge to the constitutionality of Sections 104.140.3 and 104.012 RSMo, which provide survivorship benefits to the surviving spouse, or to eligible children, of Missouri State Highway Patrol employees who die before retirement. Plaintiff/Appellant, Kelly D. Glossip, applied for survivorship benefits based on a same-sex relationship between Plaintiff and Trooper Dennis Engelhard that Plaintiff considers the "functional equivalent of a spousal relationship." The Circuit Court of Cole County determined that Sections 104.140.3 and 104.012 RSMo were constitutionally valid and granted the Missouri Department of Transportation and Highway Patrol Employees' Retirement System's motion to dismiss.

This Court has exclusive appellate jurisdiction because this appeal involves the constitutionality of two statutes.

INTRODUCTION

Section 104.140 RSMo provides survivorship benefits to the surviving spouse, or to eligible children, of Missouri State Highway Patrol Employees who die before retirement. Section 104.140.3 provides, in pertinent part:

> …[I]f the board finds that the death was a natural and proximate result of a personal injury or disease arising out of and in the course of the member's actual performance of duty as an employee, then the minimum benefit to such member's surviving spouse or, if no surviving spouse benefits are payable, the minimum benefit that shall be divided among and paid to such member's surviving eligible children under the age of twenty-one shall be fifty percent of the member's final average compensation.

Trooper Dennis Engelhard died as a result of injuries sustained while performing his duties. Plaintiff, Kelly D. Glossip, was in a same-sex relationship with Trooper Engelhard. Following Trooper Engelhard's untimely death, Plaintiff applied for survivorship benefits based on his relationship with Engelhard, which Plaintiff has described as "the functional equivalent of a spousal relationship" (Vol. I LF 9).

Plaintiff was never married to Trooper Engelhard. Vol. I LF 11 (Am. Pet., ¶ 30). The Missouri Department of Transportation and Highway Patrol Employees' Retirement System denied Plaintiff's application for survivorship benefits because Plaintiff did not qualify as Trooper Engelhard's "spouse" under Missouri law. Vol. 2A LF 77-78. Plaintiff concedes that limiting marriage to persons of the opposite sex does not violate the Missouri Constitution. Vol. III LF 271. Plaintiff asserts, however, that Sections

104.140.3 and 104.012 RSMo are unconstitutional to the extent that they exclude him from the class of surviving spouses of retirement system members.

STATEMENT OF FACTS

Defendant, the Missouri Department of Transportation and Highway Patrol Employees' Retirement System (MPERS), is a body corporate and instrumentality of the state created by Section 104.020 RSMo. Trooper Dennis Engelhard was employed by the Missouri State Highway Patrol from 2000 until his death on December 25, 2009. Vol. IV LF 314-15. Trooper Engelhard was not married (Vol. I LF 11) and had no children (Vol. 2A LF 77). His same-sex partner, Kelly D. Glossip (Plaintiff), submitted an application for survivorship benefits to MPERS. Vol. IV LF 315-16.

MPERS, noting that Plaintiff had not submitted a marriage certificate, denied his application for survivorship benefits, because Section 104.012 RSMo only recognizes marriages between a man and a woman in its definition of "spouse." Vol. 2A LF 77-78, 113. Plaintiff filed a petition alleging that MPERS' denial of his application for statutory survivorship benefits violated the equal protection clause of the Missouri Constitution, Art. I, sec. 4 (Vol. I LF 16, 18) (Counts I and II), the due process clause of the Missouri Constitution, Art. I, sec. 10 (Vol. I LF 19) (Count III), that Sections 104.012 and 104.140.3 RSMo violate the prohibition against special legislation in Art. III, sec. 40 (Vol. I LF 21) (Count IV), and requested declaratory and injunctive relief (Vol. I LF 21-22).

Defendant filed a motion to dismiss. Vol. I LF 25-42. Plaintiff filed a motion for summary judgment. Vol. I LF 43-49; Vols. II A and II B; Vol. III LF 230-235, 247-310.

Plaintiff presented evidence comparing the percentage of married, single earner couples (28.9%) to the percentage of single earner same-sex couples (21.4%). Vol. IV LF 347-48. On April 30, 2012, the circuit court granted Defendant's motion to dismiss and denied Plaintiff's motion for summary judgment. Vol. IV LF 390. Plaintiff filed his notice of appeal on May 9, 2012. Vol. I LF 4; Vol. IV 391-94.

ARGUMENT

I. The circuit court correctly determined that the statutory classification limiting survivorship benefits to surviving spouses or eligible children is rationally related to legitimate state interests and does not violate equal protection. (Responds to Points I and III.B)

Plaintiff concedes that he was never married to Trooper Dennis Engelhard. Vol. I LF 11. Notwithstanding, he applied for survivorship benefits that Section 104.140 RSMo provides only to the surviving spouse, or to eligible children, of Missouri State Highway Patrol employees who die before retirement. MPERS denied the claim because Plaintiff did not qualify as a "spouse" under Missouri law. Vol. 2A LF 77-78.

Neither Plaintiff's sexual orientation nor his relationship with Trooper Engelhard changes the legal standard that this Court should apply in determining the constitutionality of Sections 104.140.3 and 104.012 RSMo. Plaintiff has not sought to challenge the validity of the Missouri Constitution's ban on marriage between persons of the same sex, Art. I, § 33, nor did he ask the trial court to construe the Marriage Amendment. Indeed, Plaintiff conceded that "[l]imiting marriage to different-sex couples does not itself violate the Missouri Constitution." Vol. III LF 271. There is no conflict between the Marriage Amendment and the equal protection clause.

The subject statutes do not violate Plaintiff's right to equal protection, as all unmarried cohabitants (including heterosexual couples who have not married) may not obtain survivorship benefits on the basis of an intimate relationship. *National Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007).

Plaintiff contends that the purpose of "line-of-duty survivor benefits" in general is to provide financial security for a trooper's "family." (Pl.'s Br. at 18). There is no fundamental right to benefit from a retirement system by virtue of a party's relationship with a retirement system member. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). The challenged statutes concern only economic interests. *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009).

A statute that does not impact a suspect class or impinge on a fundamental right will be upheld if it is rationally related to a legitimate state interest. *Missouri Prosecuting Attorneys Ret. Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008); *In re Marriage of Kohring*, 999 S.W.2d 228, 233 (Mo. banc 1999). "The rational basis standard prevents the courts from over-writing the legislature's judgment with its own regarding the wisdom, social desirability or economic policy underlying a statute." *City of St. Louis v. State*, 382 S.W.3d 905, 913 (Mo. banc 2012). A classification is constitutional under the rational basis standard "if any state of facts can be reasonably conceived that would justify it." *Alderson*, 273 S.W.3d at 537. "A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

A rational legislature can base survivorship benefit classifications on any number of considerations. *See Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996); *Alderson*, 273 S.W.3d at 537. An equal protection challenge fails as a matter of law where the considerations supporting the challenged legislation present a rational basis question that is "at least debatable." *Minnesota v. Clover Leaf Creamery*

Co., 449 U.S. 456, 464 (1981). Plaintiff proffered evidence that he contended would support his claim that excluding same-sex partners from a statutory class of "surviving spouse" beneficiaries is not rationally related to a legitimate government interest. The rational relationship between the defined class of eligible beneficiaries and the state's interests in administrative efficiency in making objective beneficiary determinations, controlling costs, and preserving limited retirement system resources for those most likely to be economically dependent on a deceased member is at least debatable. It is equally plausible that limiting the scope of eligible beneficiaries, as opposed to creating a wider class of potential claimants who may have relied on the deceased for financial support or assistance, furthers those goals. Plaintiff bore the burden of showing that the statutes are wholly irrational, *Alderson*, 273 S.W.3d at 537, a burden he failed to meet.

It is reasonably conceivable that surviving spouses are the most economically interdependent in comparison with unmarried couples. *See Smith v. Sullivan*, 767 F.Supp. 186, 190 (C.D. Ill. 1991). Not only must a statutory classification be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis," a defendant "has no obligation to produce evidence to sustain the rationality of a statutory classification." *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993). "The State is not compelled to verify logical assumptions with statistical evidence." *Vance v. Bradley*, 440 U.S. 93, 110, n. 28 (1979), *quoting Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976).

Here Plaintiff "has acknowledged that both nationally and in Missouri, the percentage of same-sex couples with both partners employed is greater than the

percentage of dual earner married spouses. (Am. Pet., ¶ 54).” Vol. IV LF 384. Such statistical evidence “argue[s] powerfully for sustaining the statute.” *Vance*, 440 U.S. at 110. Plaintiff’s admissions defeat his argument that the statute is insufficiently related to the purpose of providing compensation to those most likely to be dependent on the wages of a deceased member.

Further, in Missouri spouses are legally responsible for each others’ support and necessary expenses, *St. Luke’s Episcopal-Presbyterian Hosp. v. Underwood*, 957 S.W.2d 496, 498 (Mo. App. E.D. 1997), while unmarried couples are under no such obligation. The legislature “is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent.” *State ex rel. Pub. Counsel v. Pub. Serv. Comm’n*, 259 S.W.3d 23, 31 (Mo. App. W.D. 2008) (internal quotations omitted). The legislature, acting with full awareness of spouses’ duties to support each other financially, could rationally conclude that married couples are the most economically interdependent in comparison to unmarried couples, whose financial obligations to one another can be eliminated in an instant. Unmarried couples simply are not “in all respects similarly situated,” *Flowers v. City of Minneapolis*, 558 F.3d 794, 798 (8th Cir. 2009), to married couples.

Nevertheless, Plaintiff contends that surviving spouses who were employed prior to the death of their husbands or wives do not need survivor benefits. See Pl.’s Br. at 45. Even if Plaintiff could show that some surviving spouses were financially independent (see Pl.’s Br. at 43), that still would not fulfill Plaintiff’s burden of showing that the statutes are “wholly irrational.” *See Treadway v. State*, 988 S.W.2d 508, 511 (Mo. banc

1999); *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The legislature could reasonably have concluded that many surviving spouses will have insufficient income to pay a mortgage or fully support their households in the event of a retirement system member's untimely death. It is reasonably conceivable that many surviving spouses of retirement system members have lower earnings or less stable employment than Missouri State Highway Patrol employees. Statutes are constitutional where the legislature had a rational basis for enacting the legislation, "regardless of whether the circumstances that it was attempting to address are present in every case" or for every surviving spouse. *City of St. Louis*, 382 S.W.3d at 913.

The statute's classification on the basis of marital status has a "fair and substantial relationship" to its object, *see Reed v. Reed*, 404 U.S. 71, 76 (1971), of providing compensation to those most likely to be financially harmed or dependent upon the wages of a deceased member. Notably, Plaintiff concedes that "[i]t may be logical to use marriage as a proxy for commitment and financial interdependence." (Pls' Br. at 19). Yet, he contends that the statutory classification is discriminatory because opposite sex couples may obtain survivor benefits by marrying, while same-sex couples (who are not eligible to marry), are legally precluded from receiving survivor benefits. Missouri, like other jurisdictions, however, does not prescribe a fundamental right to marry a person of the same sex. *Wilson v. Ake*, 354 F.Supp.2d 1298, 1306 (M.D. Fla. 2005); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), 409 U.S. 810 (1972), *dismissed for want of substantial federal question*; *Jackson v. Abercrombie*, 2012 WL 3255201 at * 26 (D. Hawaii Aug. 8, 2012). Equal protection does not require the legislature to treat all

intimate relationships identically. *Jackson*, 2012 WL 3255201 at * 36.

Nevertheless, Plaintiff suggests that the legislature's 2001 incorporation of a previously enacted statutory provision recognizing "marriage only between a man and a woman," *see* Section 451.022.1 RSMo (adopted by the legislature in 1996, Senate Bill 768), in Section 104.012 RSMo reflects discriminatory intent. Section 104.012 was enacted in 2001 Senate Bill 371, which made extensive changes to dozens of provisions in Chapter 104, governing state retirement systems. Plaintiff's argument that Section 104.012 RSMo violates his right to equal protection is foreclosed by the United States Supreme Court's summary dismissal of plaintiffs' appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissed for want of substantial federal question*, which affirmed the Minnesota Supreme Court's determination that a state statute defining marriage as between a man and a woman did not violate a same sex couple's right to equal protection and that there was no "irrational or invidious discrimination," *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). *See Wilson v. Ake*, 354 F.Supp.2d 1298, 1301-2, 1304-5 (M.D. Fla. 2005) (upholding constitutional validity of Florida statute prohibiting same sex marriage; *Baker v. Nelson* dispositive of plaintiffs' equal protection challenge).

The United States Supreme Court's summary dismissal of a case for want of a substantial federal question is a binding decision on the merits. *Hicks v. Miranda*, 422 U.S. 322, 344 (1975). "[S]ummary dispositions have the same precedential value as other holdings and are binding on the lower courts until the Supreme Court decides otherwise." *Song v. City of Elyria*, 985 F.2d 840, 843 (6th Cir. 1993). "The 'precedential value of a dismissal for want of a substantial federal question extends beyond the facts of a

particular case to all similar cases.' " *Jackson v. Abercrombie*, 2012 WL 3255201 at * 14 (D. Hawaii Aug. 8, 2012), *quoting Bates v. Jones*, 131 F.3d 843, 848 (9th Cir. 1997); *see BBC Fireworks, Inc. v. State Hwy & Transp. Comm'n*, 828 S.W.2d 879, 883 (Mo. banc 1992) (recognizing precedential value of Supreme Court decisions dismissing constitutional challenges to statutes similar to Section 226.500 RSMo for want of a substantial federal question).

The subject statutes further MPERS' legitimate governmental interest in efficiently administering the retirement benefits system. *See Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993) (marital classification in SSI statute furthered goal of achieving most efficient use of available funds). Courts have recognized the rationality of making the determination of beneficiary eligibility more objective and uniform, *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833-34 (N.J. Super. Ct. App. Div. 1997) (rejecting equal protection challenge to denial of health care benefits to same-sex domestic partners), controlling benefit costs, *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996); *Robinson v. Fauver*, 932 F.Supp. 639 (D. N. J. 1996) (containing health care costs), and preserving limited retirement system resources. The statutes rationally further administrative convenience by avoiding case-by-case, subjective eligibility determinations, *Finley v. Astrue*, 601 F.Supp.2d 1092, 1106 (E.D. Ark. 2009) (state statute barring posthumous child through in vitro fertilization and mother from obtaining Social Security benefit furthered administrative convenience; no equal protection violation).

The summary judgment evidence that Plaintiff presented concerning the

administration of other employee benefit systems is immaterial because, under the applicable substantive law, those facts have no impact on the outcome of this case. *See Martin v. Washington*, 848 S.W.2d 487, 491 (Mo. banc 1993). The issue is not whether a different system for regulating benefits arguably can be administered easily or objectively in comparison to a challenged statutory system. Rather, it is whether the challenged system is conceivably or debatably rational. "[T]he very fact that" the assumptions underlying the rationales for a statutory classification "are 'arguable' is sufficient, on rational basis review, to 'immunize' the legislative choice from constitutional challenge." *Heller v. Doe*, 509 U.S. 312, 333 (1993).

Limiting beneficiaries to surviving spouses or children under age twenty-one provides compensation to those most likely to be financially harmed or dependent upon the wages of a deceased member. Excluding unmarried partners is rationally related to that legitimate purpose.

The statutory classification of eligible beneficiaries rationally furthers the state's interests in objective determinations of claims for survivorship benefits and controlling costs. (Responds to Points III.C and D)

The legislature's decision to limit eligible beneficiaries to survivors of married couples and eligible children of members reflects Missouri's longstanding public policy against recognizing common-law marriages and other intimate relationships that are not easily or objectively verifiable. *Nelson v. Marshall*, 869 S.W.2d 132, 134 (Mo. App. W.D. 1993), *citing State v. Eden*, 169 S.W.2d 342, 345 (1943). Plaintiff's argument that some same-sex couples may be able to produce a marriage certificate issued by another

state is misplaced. Plaintiff is not challenging the validity of the Marriage Amendment, and he admittedly was never married to Trooper Engelhard.

Plaintiff's assertion that other government employee benefit systems have developed criteria for determining who is eligible for domestic partner benefits and for affidavits concerning non-marital relationships does not negate the rational connection between Missouri's surviving spouse requirement and its interest in furthering administrative efficiency by avoiding case-by-case, subjective eligibility determinations. Ultimately, a non-marital relationship declared in an affidavit can terminate in an instant, unlike a marriage. A couple dissolving their marriage and concomitant, legally binding obligation to support each other financially, has far greater incentives to update financial documents and beneficiary designations than unmarried persons who have gone their separate ways.

If Missouri's statutory benefits scheme were not limited to survivors of marital couples, it would create a risk of competing claims by multiple applicants based on non-marital relationships with deceased members. For example, an individual claiming to have been the fiancé of a deceased member, and a second person who had a child with the decedent (and asserted that he or she still had an intimate relationship with the member on the date of death), might *both* apply for survivorship benefits if the marriage requirement were eliminated. In doing so, each would submit his or her own subjective proffer for why their relationship with the deceased should be given validity and priority. Even if a non-marital claimant produced evidence of joint ownership of property, how the non-marital couple presented their relationship to a community, or other tangible or

intangible aspects of that relationship, an attempt to administer survivor benefits under a system that accepted non-marital claimants as potential beneficiaries would require highly subjective analysis and decision making.

Moreover, if any and all unmarried claimants were permitted to apply for and potentially obtain survivorship benefits based on their subjective commitment or devotion to retirement system members, MPERS' actuarial and financial burdens would increase. (Vol. IV LF 385). Plaintiff concedes that controlling costs is a legitimate governmental interest, *see Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996); *Robinson v. Fauver*, 932 F.Supp. 639 (D. N. J. 1996). (App.'s Br. at 52).

The interests of the contingent statutory beneficiaries—i.e., eligible children of members—also merit consideration. Plaintiff has a child from a previous relationship (Vol. I LF 11), as do many unmarried persons. In situations where a member in a non-marital relationship is survived by an eligible child, the statutory scheme allows MPERS to make an objective determination that, in the absence of a surviving spouse, the deceased member's child is eligible for survivorship benefits. A claim such as Plaintiff's could enable a non-marital adult claimant to displace the right of an eligible child to receive survivor benefits. The classification limiting survivorship benefits to surviving spouses or eligible children is thus rationally related to legitimate state interests and does not violate equal protection.

II. This Court should decline Plaintiff's invitation to interpret the Missouri Constitution's equal protection clause more broadly than its federal counterpart. (Responds to Point II.A)

Plaintiff invites this Court to construe the Missouri Constitution's equal protection clause (art. I, sec. 2) more expansively than the federal constitution's equal protection clause in order to apply heightened scrutiny to Plaintiff's claim for monetary benefits. In *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), however this Court declined to interpret Missouri's equal protection clause more broadly than its federal equivalent. 194 S.W.3d at 841. Like the plaintiffs in *Doe v. Phillips*, Glossip identifies "no reason grounded either in the language of Missouri's 1945 Constitution or the history of its enactment" to suggest its framers intended Missouri's due process clause to be interpreted more broadly than an almost identical provision of the federal constitution. *Doe* at 841. This Court should continue to interpret the equal protection clause in art. I, sec. 2 coextensively with the Fourteenth Amendment's equal protection clause. *See Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006).

Plaintiff's reliance on cases involving parents' fundamental right to relationships with their children, *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978), and the Missouri Constitution's more expansive protection of the fundamental right to vote, *Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. banc 2006), is misplaced. Plaintiff's claim involves an economic benefit, not a fundamental right.

Federal districts courts continue to apply the rational basis test to equal protection claims brought by same sex couples. (Responds to Point II.B)

Plaintiff's argument that heightened scrutiny should apply to his claims fails because the subject statutes depend on marital status and treat all unmarried couples—no matter how subjectively committed—alike. Classifications based on marital status are not subject to heightened scrutiny. *See e.g., Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997) (rejecting equal protection challenge to denial of health insurance benefits to same-sex domestic partners); *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992). Unmarried couples are not considered a suspect class. *Smith*, 5 F.3d at 239.

Section 104.140 RSMo creates a classification based on marital status, not sexual orientation. Nevertheless, Plaintiff contends that this Court should recognize sexual orientation as either a suspect or a quasi-suspect classification. This Court has rejected "quasi-suspect classes" as a viable concept under Missouri law. *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 (Mo. banc 1989). The Eighth Circuit, among others, has held that gay persons are not a suspect class. *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Lofton v. Sec'y of Dept. of Children and Family Serv.*, 358 F.3d 804, 818 (11th Cir. 2004); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). In 2012, three district courts within the Ninth Circuit reached the same conclusion. *Jackson v. Abercrombie*, 2012 WL 3255201 at *27-28, 30

(D. Hawaii Aug. 8, 2012) (homosexuality is not a quasi-suspect or suspect classification); *Dragovich v. United States Dept. of Treasury*, 2012 WL 1909603 at * 9 (D. N.D. Cal. May 24, 2012) ("The Ninth Circuit has held that gay men and lesbians do not constitute a suspect or quasi-suspect class."); *Sevcik v. Sandoval*, 2012 WL 5989662 at * 9, 16 (D. Nev. Nov. 26, 2012). The status of suspect class has been limited to race, national origin, illegitimacy, and, in some cases, gender. *In re Marriage of Kohring*, 999 S.W.2d 228, 231 (Mo. banc 1999). In light of these precedents, this Court should not recognize sexual orientation as a suspect class or subject Sections 104.012 and 104.140 RSMo to heightened scrutiny.

The invalidation of criminal prohibitions on private, homosexual conduct between consenting adults, *Lawrence v. Texas*, 539 U.S. 558 (2003), does not support Plaintiff's contrary arguments. In *Lawrence* the Supreme Court held that substantive due process required the decriminalization of private, consensual homosexual activity, 539 U.S. at 564, 578, and determined that the Texas statute did not further a legitimate state interest. *Id.* at 578. *Lawrence* did not apply strict scrutiny. *Lofton*, 358 F.3d at 816.

The cases challenging the federal government's refusal, under the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), to recognize marriages of same-sex couples authorized by their states' law, *see Windsor v. United States*, 699 F.3d 169, 178 n. 1 (2nd Cir. 2012), that Plaintiff references at pages 31-35 of his Brief have no bearing on the resolution of Plaintiff's claims. Nor does this case involve the withdrawal of a previously existing right. *Cf. Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012); *Collins v. Brewer*, 727 F.Supp.2d 797, 800 (D. Ariz. 2010), *Diaz v. Brewer*, 656 F.3d 1008, 1010

(9th Cir. 2011) (existing right for domestic partners to participate in state health insurance plan). Same-sex marriage is not (and has not been) recognized under Missouri law, and Plaintiff was never married to Trooper Engelhard. Accordingly, *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012), *cert granted* 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307); *Golinski v. United States Office of Personnel Management*, 824 F.Supp.2d 968 (N.D. Calif. 2012); and *Pederson v. Office of Personnel Management*, 2012 WL 3113883 (D. Conn. July 31, 2012) do not warrant departure from the rational basis standard here.

A final factor that courts have considered in determining whether a class of persons is a disadvantaged or suspect class is whether a group is "a minority or politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). The number or frequency of group members within a larger population does not alone satisfy this element. *High Tech Gays*, 895 F.2d at 573-74; *Mummelthie v. City of Mason City*, 873 F.Supp. 1293, 1332 n. 22 (N.D. Iowa 1995) (citing the poor and mentally disabled as examples of non-suspect classes). Plaintiff does not suggest otherwise.

Nor can gay persons be said to constitute a politically powerless group. In 2012, voters in three states approved ballot initiatives that adopted same-sex marriage and Minnesota voters rejected a constitutional prohibition on same sex marriage. *See Sevcik*, 2012 WL 5989662 at *15 (D. Nev. Nov. 26, 2012). As noted by Plaintiffs, the U.S. Department of Justice has stopped defending legal challenges to DOMA. (Pls' App. at A24-27; Pls' Br. at 31, n. 6). Governor Nixon has issued an executive order barring discrimination on the basis of sexual orientation. Executive Order 10-24 (July 9, 2010),

cited in Amicus Br. of Law Enforcement Gays and Lesbians at 21, n. 37. Several municipalities in Missouri, including the City of St. Louis, Kansas City, and Columbia, "have included sexual orientation in anti-discrimination legislation in recent years." *See Group aims to get sexual orientation bias ban on Missouri ballot*, St. Louis Post-Dispatch, November 13, 2012.

The circuit court correctly determined that the rational basis standard applies to Plaintiff's claims.

III. This Court should reject Plaintiff's argument that a heightened, more stringent rational basis standard should apply to his claims. (Responds to Point III).

Plaintiff asks this Court to create a higher rational basis standard if it rejects his Point II arguments. But heightened scrutiny does not apply to laws that do not impinge upon a fundamental right or operate to the disadvantage of a suspect class. *State v. Taylor*, 726 S.W.2d 335, 336 (Mo. banc 1987); *Heller v. Doe*, 509 U.S. 312, 319 (1993). In *Romer v. Evans*, 517 U.S. 620 (1996) the Supreme Court applied the "conventional" rational basis inquiry set forth in *Heller v. Doe*, 509 U.S. 312 (1996). *Romer*, 517 U.S. at 631-32. The Supreme Court's decisions in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-36 (1973), reflect the irrationality of stereotyping or groundless fears, not the application of some higher standard of rational basis review.

Plaintiff's reliance on *Massachusetts v. United States Dept. of Health & Human Serv.*, 682 F.3d 1 (1st Cir. 2012), in which the First Circuit acknowledged that Plaintiffs

could not prevail in their constitutional challenge to DOMA under the conventional rational basis standard, *id.* at 9, is misplaced. The First Circuit avoided this result by taking language in *Moreno*, *Cleburne*, and *Romer* that spoke to the irrationality of laws motivated solely by fear or a bare desire to harm disliked groups out of context in order to apply its own, unexplained standard of more "intensified" scrutiny to the case before it. 682 F.3d at 10.

IV. Sections 104.012 and 104.140 RSMo. are not special laws. (Responds to Point IV).

Plaintiff's reliance on *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006), which invalidated a statute that involved a fixed subclass of cities that adopted a tax ordinance before the Hancock amendment, *id.* at 184-85, is misplaced. The classification at issue in *Sprint* was based on close-ended characteristics. Section 104.140.3, in contrast, is not a special law, because its beneficiary classification is open-ended. *City of St. Louis*, 382 S.W.3d at 914. A law based on open-ended characteristics is entitled to a presumption of constitutionality, and is not a special law on its face. *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. banc 2009).

The subject statutes create an open-ended class because beneficiaries may enter and then leave the class as marriages to members begin and end, and as children are born and pass the age limit for eligibility. Plaintiff does not dispute the open-ended nature of the class of beneficiaries. Rather, he asserts that his sexual orientation prevents him from entering the class. The statutory classification is based on marital status, however, not sexual orientation.

When a statute is open-ended, the rational basis test applies, *Alderson* at 538, and Plaintiff has the burden of showing that the classification "is arbitrary and without a rational relationship to a legislative purpose." *Jefferson County Fire Prot. Dists Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. banc 2006). For the reasons discussed in Respondent's equal protection arguments (see Argument Section I), the challenged statutes are rationally related to legitimate state purposes. The circuit court correctly determined that Sections 104.012 and 104.140 RSMo do not violate Article III, section 40 of Missouri's Constitution.

V. Plaintiff is not entitled to injunctive relief. (Responds to Point V).

No legal theory supports injunctive relief under the facts alleged by Plaintiff, which fail to state a claim for relief. *See Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011). Plaintiff's request for a permanent injunction also fails because a monetary award would adequately compensate him for the denial of his application for survivorship benefits. Section 104.140.3 fixes the amount of the survivorship benefit at fifty percent of the member's final average compensation. Accordingly, if a beneficiary was eligible for survivorship benefits, a court could calculate a specific monthly or annual benefit payment. Where a monetary award would adequately compensate for an injury, an adequate legal remedy exists. *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 265-66 (Mo. App. W.D. 2010); *Guy Carpenter & Co., Inc. v. John B. Collins Assocs, Inc.*, 179 Fed.Appx. 982, 983 (8th Cir. 2006). The circuit court appropriately denied Plaintiff's request for injunctive relief.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06 and that the brief contains 6,348 words.

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