

IN THE SUPREME COURT OF MISSOURI

NO. SC92583

KELLY D. GLOSSIP,

Plaintiff-Appellant

v.

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

Defendant-Respondent.

**BRIEF OF PROMO AS *AMICUS CURIAE*
ON BEHALF OF APPELLANT KELLY D. GLOSSIP**

PROMO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

CONSENT OF PARTIES 2

JURISDICTIONAL STATEMENT 2

STATEMENT OF FACTS 2

POINTS RELIED ON 2

ARGUMENT 3

I. THE SUPREME COURT’S RECENT RULING IN *U.S. v. WINDSOR* EVIDENCES AN “EVOLVING UNDERSTANDING OF EQUALITY” THAT UNDERMINES THE BASIS FOR THE STATE’S EXCLUSION OF BENEFITS BASED ON SEXUAL ORIENTATION AND WARRANTS HEIGHTENED SCRUTINY FOR DISTINCTIONS BASED ON SEXUAL ORIENTATION 3

A. THE STATE’S INTEREST IN ITS DISCRIMINATORY POLICY CANNOT MATCH LGBT MISSOURIANS’ INTEREST IN EQUAL TREATMENT 7

B. LGBT MISSOURIANS FACE INQUITABLE AND FAR GREATER BURDENS IN ATTEMPTING TO PROVIDE FINANCIAL SECURITY FOR THEIR FAMILIES 9

C. THE POLITICAL PROCESS FAILS TO PROTECT THE INTERESTS OF LGBT MISSOURIANS, A DISCRETE AND INSULAR MINORITY, WARRANTING HEIGHTENED JUDICIAL SCRUTINY..... 13

i. LGBT MISSOURIANS FACE ANIMUS IN THE LEGISLATURE 15

ii. LGBT MISSOURIANS FACE ANIMUS IN THE COMMUNITY 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Bowers v. Hardwick, 478 U.S. 186 (1986)..... 3, 4

Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) 22

Johnson v. Mo. Dep’t of Social Servs., 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Feb. 17, 2006)..... 3, 5

Lawrence v. Texas, 539 U.S. 558 (2003) 3, 4, 15

Romer v. Evans, 517 U.S. 620 (1996) 7, 8, 9

State v. Young, 362 S.W.3d 386, 397 (Mo banc 2012) 13

United States v. Carolene Prods. Co., 304 U.S. 144 (1938)..... 13

United States v. Windsor, 570 U.S. ____, 133 S.Ct. 2675 (2013) 1,3,4,5,7,
..... 8,12,22

CONSTITUTIONAL PROVISIONS, STATUTES AND LEGISLATION

Mo. Const., Art I, § 2 5, 22

Mo. Const., Art I, § 33 22

Section 104.012, RSMo 3,5,8,9,13

Section 104.140, RSMo 5,8,9,13

2001 Mo. Legis. Serv. SB371 7

2004 Mo. Legis. Serv. SJR29 15

2008 Mo. Legis. Serv. HB1751..... 17

2012 Mo. Legis. Serv. HB2051..... 15,16,18

2013 Mo. Legis. Serv. SB96 14

OTHER AUTHORITIES

Joe Borlik, “Gay teacher fired from Catholic school after marriage plans.” WGHP FOX 8, (March 1, 2012), <http://myfox8.com/2012/03/01/gay-teacher-fired-from-catholic-school-after-marriage-plans/> 21

John Celock, “Missouri 'Don't Say Gay' Bill: GOP Sponsors Wary Of 'Homosexual Agenda'”, HUFFINGTON POST, (April 23, 2012), http://www.huffingtonpost.com/2012/04/23/missouri-dont-say-gay-bill_n_1447121.html 18

Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity (as of June 5, 2013), HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> 21

Don Corrigan, “'Don't Say Gay' Bill Draws Plenty Of School Criticism: Bill restricts discussion of sexual orientation in public schools,” WEBSTER-KIRKWOOD TIMES, (May 4, 2012), <http://www.websterkirkwoodtimes.com/pdalpeditorial.lasso?-token.story=180251.114137> 15, 19

David Edwards, “Missouri man arrested at hospital for refusing to leave gay partner,” THE RAW STORY, (April 11, 2013), <http://www.rawstory.com/rs/2013/04/11/missouri-man-arrested-at-hospital-for-refusing-to-leave-gay-partner/> 10, 20

Ed Emery, “Free or Reprobate,” LEGISLATIVE COLUMN OF MISSOURI SENATOR ED EMERY, (July 3, 2013),
<http://www.senate.mo.gov/media/13info/Emery/columns/Emery-070313.html> 20

“First Openly Gay Candidate Elected to Missouri House of Representatives” GAY & LESBIAN VICTORY FUND, (Aug. 5, 1994),
<http://www.qrd.org/qrd/orgs/GLVF/1994/missouri.candidate.van.zandt.wins-08.03.94> 16

Gary J. Gates, Frank Newport, “Gallup Special Report: New Estimates of the LGBT Population in the United States,” WILLIAMS INSTITUTE (Feb. 2013),
<http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/gallop-lgbt-pop-feb-2013> 11

Gary J. Gates, “Missouri Census Snapshot: 2010,” WILLIAMS INSTITUTE,
http://williamsinstitute.law.ucla.edu/wpcontent/uploads/Census2010Snapshot_Missouri_v2.pdf 11

Gary J. Gates, “Percent of Same-Sex Couples Raising Children By State,” WILLIAMS INSTITUTE (Apr. 2013),
https://docs.google.com/spreadsheets/ccc?key=0Akrw3DX_QeLIIdHZLWnFRbDhxVm1lWWIIZHk2ajVLYWc#gid=0 11

Ryan Lenz, “Anti-LGBT Activist Targets ‘Gay Fascism’ Law in Springfield, MO,” SOUTHERN POVERTY LAW CENTER, (July 13, 2012),
<http://www.splcenter.org/blog/2012/07/13/anti-lgbt-activist-targets-gay-fascism-ordinance-in-springfield-mo/> 21

Mark E. McCormick, “Lively urges fight against Springfield’s anti-discrimination proposal: City proposal aids gay agenda, lawyer says,” SPRINGFIELD NEWS-LEADER, (July 14, 2012), <http://www.news-leader.com/article/20120714/NEWS06/307140028/Springfield-anti-discrimination-ordinance-gays-Lively> 21

Mallory McGowin, “Bullying accusations at the Capitol,” CONNECT MID MISSOURI, KRCCG-13, (April 10, 2008), <http://www.connectmidmissouri.com/news/story.aspx?id=119806#.UeP5zD5AQ0N> 18

“Mott Oxford suspects committee snub caused by anti-gay sentiments,” GAYPOLITICS, (Feb. 6, 2009), <http://www.gaypolitics.com/2009/02/06/mott-oxford-suspects-committee-snub-caused-by-anti-gay-sentiments/> 17

“Mott Oxford No Longer Too Offensive To Serve on Children & Families Committee,” FIREDUP MISSOURI, <http://www.firedupmissouri.com/content/mott-oxford-no-longer-too-offensive-serve-children-families-committee> 17

Mandy Oaklander, “Cynthia Davis refuses to acknowledge gay parents, calls them their childrens' 'friends',” THE PITCH, (Sept. 16, 2010), <http://www.pitch.com/FastPitch/archives/2010/09/16/cynthia-davis-refuses-to-acknowledge-gay-parents-calls-them-their-childrens-friends> 19

Official Election Returns, State of Missouri Primary Election, Tuesday, August 03, 2004, MISSOURI SECRETARY OF STATE’S OFFICE, <http://www.sos.mo.gov/enrweb/ballotissuereults.asp?eid=116&arc=1> 22

“Opinion Poll: Missouri Small Businesses Support Workplace Non-Discrimination Policies,” SMALL BUSINESS MAJORITY, (June 4, 2013), <http://www.smallbusinessmajority.org/small-business-research/downloads/060413-MO-workplace-nondiscrimination-poll-report.pdf> 14

“Out Missouri lawmakers accuses colleague of bullying students,” GAYPOLITICS, (April 14, 2008), <http://www.gaypolitics.com/2008/04/14/out-missouri-lawmakers-accuses-colleague-of-bullying-students/> 18

“Oxford named ranking un-member of children and families committee,” KANSAS CITY STAR, <http://midwestdemocracy.com/blogs/entries/oxford-named-ranking-un-member-of-children-and-families-committee/> 17

PROMO Organizational Vision, <http://promoonline.org/about-promo/about-promo.html> 1

Statewide Employment Laws and Policies, HUMAN RIGHTS CAMPAIGN (June 19, 2013), http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf 14

“Tax Alert 2013-06: Supreme Court Decisions on Same-Sex Marriage,” U.S. TRUST, BANK OF AMERICA PRIVATE WEALTH MANAGEMENT (June 2013) 10

“Tim Van Zandt,” WIKIPEDIA, http://en.wikipedia.org/wiki/Tim_Van_Zandt, accessed July 11, 2013 16

INTEREST OF AMICUS

PROMO is Missouri's statewide organization advocating for lesbian, gay, bisexual and transgender ("LGBT") equality through legislative action, electoral politics, grassroots organizing and community education. It is a member of the Equality Federation, a national network of statewide LGBT equality organizations. A non-profit, non-partisan organization founded in 1986, PROMO is the leading voice advocating on behalf of LGBT Missourians through the legislative and political process and knows first-hand the challenges faced by its constituency advocating their interests through the political process. PROMO represents the interests of thousands of LGBT families, and other LGBT Missourians, who stand to be impacted by the issues in this case.

As part of its mission, PROMO works to advance "legislative changes that eliminate legal sanctions against the lesbian, gay, bisexual, and transgender community" and to "reduce ignorance of and animosity toward LGBT individuals."¹ It believes that "[a] shift in the Missouri laws, from a system flawed with fundamental injustices to one that truly embraces the concept of equality for all citizens, regardless of sexual orientation or gender identity, will put us one step closer to a society where all voices are heard and people are free."² In the wake of the U.S. Supreme Court's June 26, 2013, decision in *United States v. Windsor*, 570 U.S. ____, 133 S.Ct. 2675 (2013), PROMO has fielded questions from LGBT Missourians and others concerned about the individual and

¹ PROMO Organizational Vision, <http://promoonline.org/about-promo/about-promo.html>

² *Id.*

familial rights related to partner benefits, including survivor benefits like those at issue in this case. Accordingly, PROMO's perspective, reflecting that of its LGBT constituency and its allies, would assist this Court in weighing the important issues in this case, and thus PROMO submits its brief of *Amicus Curiae* in response to this Court's June 27, 2013, order requesting additional briefing in light of *Windsor*.

CONSENT OF PARTIES

Counsel for both parties have provided consent to PROMO filing this brief as *Amicus Curiae*.

JURISDICTIONAL STATEMENT

Amicus hereby adopts the Jurisdictional Statement set forth in the brief filed by Appellant in this matter.

STATEMENT OF FACTS

Amicus hereby adopts the Statement of Facts set forth in the brief filed by Appellant in this matter.

POINTS RELIED ON

Amicus hereby adopts the Points Relied On set forth in the brief filed by Appellant in this matter.

ARGUMENT

THE SUPREME COURT’S RECENT RULING IN *U.S. v. WINDSOR* EVIDENCES AN “EVOLVING UNDERSTANDING OF EQUALITY” THAT UNDERMINES THE BASIS FOR THE STATE’S EXCLUSION OF BENEFITS BASED ON SEXUAL ORIENTATION AND WARRANTS HEIGHTENED SCRUTINY FOR DISTINCTIONS BASED ON SEXUAL ORIENTATION.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Stevens, J., dissenting).

When the restrictions on survivor benefits under the Missouri Department of Transportation and Highway Patrol Employees’ Retirement System (“MPERS”) were enacted, restricting benefits to heterosexual spouses only,³ *Bowers* was the law of the land. *Bowers* was “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). *Bowers* was used to justify denying a huge range of rights and privileges to gay and lesbian Missourians on grounds that they were presumptive criminals. *See, e.g., Johnson v. Mo. Dep’t of Social Servs.*, 0516-CV09517, 2006 WL 6903173, *7-8 (Mo. Cir. Feb. 17, 2006) (finding that lesbian applicant’s denial to serve as foster parent was based

³ “For 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.

solely on presumption that she lacked “reputable character” because of sodomy law). *Lawrence*, which overruled *Bowers*, acknowledged Americans’ common rights and humanity, recognizing that when legislatures make laws that marginalize LGBT citizens, they “demean[] the lives of homosexual persons.” 539 U.S. 558, 575 (2003). Such laws, to paraphrase Dr. Martin Luther King Jr., perpetrate the injustices that diminish us all.

Moreover, when the restrictions in MPERS now before this Court were enacted, Section 3 of the Defense of Marriage Act (DOMA) was also the law of the land, mandating that the federal government not recognize the valid spousal relationships of LGBT citizens or afford them equal access to federal benefits – a law that likewise demeaned the relationships of same-sex couples and deemed them second-class citizens. After the U.S. Supreme Court’s June 26, 2013, ruling in *United States v Windsor*, 570 U.S. ____, 133 S.Ct. 2675 (2013), that is no longer the case. A re-examination of MPERS by this Court is now required in the interests of justice and to honor the high court’s elucidation of the ideals of equal protection under law.

In *Windsor*, the Court concluded that DOMA’s exclusion of valid marriages from federal recognition under Section 3 of the law results in “injury and indignity” to impacted same-sex couples, *Windsor*, 570 U.S. at 19 (slip op.) and in so doing “violates basic due process and equal protection principles” of the Fifth Amendment. *Id.* at 20, 25 (slip op.). In *Windsor*, the Court concluded that DOMA had “the purpose and effect of disapproval” of legally married same-sex couples and imposed “a disadvantage, a separate status, and so a stigma” on them. *Id.* at 21 (slip op.). While *Windsor* acknowledges the rights of the states to define marriage and, in striking only Section 3 of

the law, does not require Missouri to recognize gay marriages, it nevertheless unequivocally signals an “evolving understanding of the meaning of equality,” *Id.* at 20 (slip op.). It forcefully reiterates that laws which have the “purpose and effect of disapproval of that class” – as does the law at issue before this Court – do not comport with our evolving understanding of equal protection under law. *Id.*

The “evolving understanding of the meaning of equality” that informed the Court’s decision in *Windsor* must also inform this Court’s review of the exclusion of survivor benefits based on sexual orientation under MPERS, as set forth in Mo. Rev. Stat. §§104.012 and 104.140, and compel a conclusion that it violates the equal protection guarantees of the Missouri Constitution, Mo. Const., Art I, § 2. Indeed, not too long ago, Missouri criminalized consensual sexual activity by people of the same sex and barred gays and lesbians from serving as foster parents no matter how qualified they were, and both of those proscriptions have been shown now, in light of our evolving aspirations towards a better polity, to clearly offend our state’s “understanding of the meaning of equality.” *Id.*, See *Johnson v. Mo. Dep’t of Social Servs.*, 0516-CV09517, 2006 WL 6903173, at *5 (Mo. Cir. Feb. 17, 2006).

Despite the strides made by an enlightened judiciary, many legal inequalities persist in Missouri, including the exclusion at issue in the MPERS program, that continue to relegate Missouri’s gay and lesbian families to second-class citizenship and impose “a disadvantage,” a “separate status,” and a “stigma” on the state’s same-sex couples and their families. *Windsor*, 570 U.S. at 21 (slip op.). This Court can and must take notice of the evolving understanding of equality acknowledged by *Windsor* to conclude that

Missouri's LGBT citizens continue to suffer severe disadvantages in the political arena, including outright animus, that curtails their ability to politically protect their interests against discrimination. Accordingly, heightened scrutiny is the appropriate standard of review.⁴ Under MPERS, LGBT Missourians have been singled out for disparate treatment based solely on their LGBT status. The state's purported interest in providing financial security for interdependent families of fallen state troopers is not advanced by this exclusion and can be met by less discriminatory means by, for example, tying eligibility to financial interdependency or to other indicators of an intimate familial relationship, as numerous employers and government entities that provide benefits to same-sex couples have done. Even under the most lenient standard of review, it is clear that the restrictions in the program – on their face and in their operative effect – intentionally relegate LGBT Missourians to second-class status without any legitimate

⁴ The other factors addressing when heightened scrutiny is warranted – whether the classified group has suffered a history of invidious discrimination; whether the classification has any bearing on a person's ability to perform in or contribute to society; and whether the characteristic is immutable – are fully covered in briefs for Appellant and *amici* on behalf of Appellant, and *amicus* PROMO agrees with the reasoning therein. This brief focuses on the fourth factor – whether the group has sufficient power to protect itself in the political process – due to the specific experience and expertise of *amicus* PROMO in this area.

basis, and thus, MPERS is not rationally related to a legitimate government interest and violates the equal protection guarantees of the Missouri Constitution.

**A. THE STATE’S INTEREST IN ITS DISCRIMINATORY POLICY
CANNOT MATCH LGBT MISSOURIANS’ INTEREST IN EQUAL
TREATMENT.**

As the Court reiterated in *Windsor*, “[t]he constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.’” *Id.* at 20 (slip op.), (citation omitted); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (citation omitted).

In *Windsor*, the Court found that the legislative history and text of Section 3 of DOMA evidenced an “interference with the equal dignity of same-sex marriages,” finding discriminatory purpose to be the “essence” of the law, *Windsor*, 570 U.S., at 21 (slip op.), in violation of the Equal Protection Clause. Similarly, in Missouri, the legislative history and clear language of the exclusion of same-sex couples from the pension program shows that barring gays and lesbians from eligibility was “more than an incidental effect” of the law, but was indeed the very purpose. *See Id.* In 2001, the Missouri legislature explicitly amended the pension statutes at issue in this case to exclude same sex couples from eligibility, providing that “[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term ‘spouse’ only recognizes marriage between a man and a woman.” 2001 Mo. Legis. Serv. SB 371. Excluding LGBT families is the clear purpose and intent; even if Missouri recognized marriages of same-sex couples, they would still be excluded from eligibility

under this provision. What could evidence a “bare legislative desire” more convincingly? *See Romer*, 517 U.S. at 634.

The MPERS exclusion imparts real and lasting harm on LGBT Missourians “in visible and public ways . . . from the mundane to the profound.” *See Windsor*, 570 U.S. at 23 (slip op.). In *Windsor*, the Supreme Court acknowledged the “substantial societal impact the State’s classifications have in the daily lives and customs of its people.” *Id.* at 20 (slip op.). Indeed, Missouri’s classifications related to sexual orientation in MPERS and in numerous other regulations affect our state’s LGBT families in almost every area of daily life – with respect to housing, employment, public accommodations, ability to access health care, estate taxes, retirement tax rollovers, finance and credit, and the ability to obtain benefits and provide for their families. The classification created by Mo. Rev. Stat. §§104.012 and 104.140 at issue in this case imparts substantial hardship and fundamental inequality on Missouri’s same-sex couples in relation to similarly situated heterosexual married couples. Under MPERS, “[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint,” *Romer*, 517 U.S. at 631. The record in this case demonstrates the financial interdependence shared by Mr. Glossip and Cpl. Engelhard over their 15 years together – no different than that of similarly situated heterosexual married couples – and the injury suffered by Kelly Glossip and his son as result of MPERS’ discriminatory allocation of survivor benefits. Mr. Glossip suffered financial injury he would not have suffered had Cpl. Engelhard been in a heterosexual marriage – even though he took affirmative steps to provide for Glossip’s financial security by listing him as the primary beneficiary of his retirement savings

account and the sole beneficiary of his deferred-compensation plan. Pet. at ¶25; Facts at ¶21. The state cannot justifiably support this preference for heterosexuals over homosexuals in allocating its benefits – a “bare desire” to prefer one group over another is never a legitimate state interest. *Cf. Romer*, 517 U.S. at 634.

Cpl. Engelhard was a decorated officer. He performed the same job as his heterosexual colleagues. He took steps to name his long-time partner as his beneficiary for benefits intended by the state to provide security to families of state troopers in tragedies precisely like Cpl. Engelhard’s. Yet his partner and family were excluded by Mo. Rev. Stat. §§104.012 and 104.140 solely based on sexual orientation – in derogation of the asserted state interest to provide financial security for the families of state troopers. His family is financially devastated as a result. Sadly, Glossip’s story is not unique – it reflects the inequities that befall same-sex couples across the state who lack the automatic legal access to financial security enjoyed by similarly situated heterosexual married couples.

**B. LGBT MISSOURIANS FACE INEQUITABLE AND FAR
GREATER BURDENS IN ATTEMPTING TO PROVIDE FINANCIAL
SECURITY FOR THEIR FAMILIES.**

Because of legal inequalities like those imposed by the MPERS program, same-sex couples in Missouri face substantial additional burdens in attempting to provide financial security for their spouses and children. Same-sex couples generally have to spend significant money to have additional estate-planning documents drafted just to have their estate distributed the way that estates of heterosexual married couples are

distributed automatically under the law. This is a financial strain and stands as a real impediment and barrier for many LGBT Missourians attempting to provide for their families' financial security. Adding to this, only a few attorneys in Missouri provide estate-planning services LGBT families. This shortage exists because of continued stigma, the challenges in crafting numerous extra documents that don't need to be crafted for heterosexual married couples to obtain similar benefits, and because many attorneys simply do not understand how to co-mingle the variety of estate-planning documents (powers of attorney, health care declarations, wills, trusts, beneficiary deeds) to meet the needs of LGBT families. Even for LGBT families that have the education, access and resources to prepare the various legal documents to secure recognition of their families for legal purposes, these may not always be recognized, and may be more readily contested by other family members.⁵

The *Windsor* decision will have real-life consequences for same-sex couples, including potentially changing their eligibility for previously inaccessible benefits in

⁵ For example, in April 2013, a man was arrested at a Kansas City hospital after being ordered to leave his partner's bedside following other family members' objections despite that couple had prepared the necessary powers of attorney designating the partner to make medical decisions. See, David Edwards, "Missouri man arrested at hospital for refusing to leave gay partner," THE RAW STORY, (April 11, 2013), <http://www.rawstory.com/rs/2013/04/11/missouri-man-arrested-at-hospital-for-refusing-to-leave-gay-partner/>

estate planning, tax deductions, taxes on gifts made to a same-sex partner, gift-splitting, grantor retained-income trusts, the ability of a surviving spouse to make use of an unused estate tax exemption of a deceased spouse, spousal rollovers, beneficiary designations, Social Security, Medicare, Medicaid, and more. *See*, “Tax Alert 2013-06: Supreme Court Decisions on Same-Sex Marriage,” U.S. TRUST, BANK OF AMERICA PRIVATE WEALTH MANAGEMENT (June 2013). It warrants re-examination of the exclusion in this case too.

These issues deeply affect PROMO’s members -- real citizens across Missouri who identify as lesbian, gay, bisexual or transgender and their allies. According to a recent study by the Williams Institute analyzing the 2010 U.S. Census data, an estimated 3.3 percent of the general population identify as LGBT in Missouri. *See*, Gary J. Gates, Frank Newport, “Gallup Special Report: New Estimates of the LGBT Population in the United States,” WILLIAMS INSTITUTE (Feb. 2013), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/gallup-lgbt-pop-feb-2013>. There are 10,557 same-sex couples residing in Missouri. *See*, Gary J. Gates, “Missouri Census Snapshot: 2010,” WILLIAMS INSTITUTE, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Missouri_v2.pdf. Of these couples who identify as spouses, 32% of them are raising their own children, in addition to the 15% of unmarried same-sex partners who are raising their own children. *Id.*⁶ Additionally, there are 22

⁶ See chart at: Gary J. Gates, “Percent of Same-Sex Couples Raising Children By State,” WILLIAMS INSTITUTE (Apr. 2013),

counties in Missouri that more than 50 same-sex couples call home, which constitutes 19.3% of Missouri counties. *Id.* Our state law currently provides meager protections for these families, largely allowing them to be discriminated against in employment, housing and public accommodations, and depriving them of benefits, such as MPERS, that are available to their similarly situated heterosexual married counterparts.

This harm extends beyond the couple to the entire family. Like the court recognized in *Windsor*, the exclusion in MPERS “also brings financial harm to children of same-sex couples.” *Windsor*, 570 U.S., at 24 (slip op.). The court specifically noted the harm brought by DOMA’s denial of Social Security survivors’ benefits to LGBT families, “benefits allowed to families upon the loss of a spouse, and parent, benefits that are an integral part of family security.” *Id.* After *Windsor*, the Supreme Court has cleared a path for the federal government to grant survival benefits to eligible legally married LGBT couples, but Missouri’s exclusion of survivor benefits to LGBT families under MPERS remains. As the Court found in *Windsor*, such “differentiation demeans the couple,” “humiliates the tens of thousands of children now being raised by same sex couples,” and “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Id.* at 23 (slip op.). Indeed, the discrimination enshrined in

https://docs.google.com/spreadsheet/ccc?key=0Akrw3DX_QeLIIdHZLWnFRbDhxVm11WWIIZHk2ajVLYWc#gid=0

§§104.012 and 104.140 targets Missouri’s LGBT families in ways that go far beyond the specific monetary benefit that MPERS provides.

**C. THE POLITICAL PROCESS FAILS TO PROTECT THE
INTERESTS OF LGBT MISSOURIANS, WARRANTING HEIGHTENED
JUDICIAL SCRUTINY.**

LGBT Missourians and their families lack the ability to advocate effectively through the political and legislative process to protect themselves from discrimination. They not only face difficulty in getting heard, but also outright animus – an animus that permeates not only their formal legal rights, but their dignity as well. This continues to relegate LGBT Missourians and their families to second-class citizenship with respect to their daily lives.

The U.S. Supreme Court has found that heightened judicial scrutiny is warranted where prejudice against an insular minority “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938). This Court has adopted that reasoning, agreeing that a more searching review – not rational basis scrutiny – is warranted where the group cannot rely on the “majoritarian political process” to effectively advocate for their rights. *State v Young*, 362 S.W.3d 386, 397 (Mo banc 2012). In Missouri, the political process currently is not effective for LGBT citizens.⁷

⁷ A brief filed in this case by a dozen current and former elected officials further elaborates on the political climate related to LGBT rights in Missouri. *See* Amicus Br. Of

Despite more than a decade-long effort by organizations like PROMO advocating for equal rights under law on behalf of the state's LGBT population, Missouri lawmakers have every year rejected proposed legislation, the Missouri Non-Discrimination Act ("MONA"), *See e.g.*, 2013 Mo. Legis. Serv. SB96, that would extend basic protections against discrimination in employment, housing and public accommodations. Missouri continues to reject these basic protections that 21 states have conferred based on sexual orientation and 17 of which have also conferred with respect to gender identity. *See*, Statewide Employment Laws and Policies, HUMAN RIGHTS CAMPAIGN (June 19, 2013), http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf. MONA has been introduced in each legislative session for more than a decade, but these most basic protections against discrimination for LGBT Missourians have failed to pass despite support from the state's top leaders and businesses.⁸

Mayor Francis Slay, et al., at 11, asserting that "[e]fforts to obtain basic protection from discrimination have failed."

⁸ A scientific survey released in June found that 71 percent of Missouri small business owners believe Missouri should have a state law prohibiting discrimination based on sexual orientation and gender identity. *See*, "Opinion Poll: Missouri Small Businesses Support Workplace Non-Discrimination Policies," SMALL BUSINESS MAJORITY, (June 4, 2013), <http://www.smallbusinessmajority.org/small-business-research/downloads/060413-MO-workplace-nondiscrimination-poll-report.pdf>

i. LGBT MISSOURIANS FACE ANIMUS IN THE LEGISLATURE.

Missouri's LGBT population not only faces an uphill battle in attempting to advocate for extending basic rights against discrimination for LGBT Missourians, but also face outwardly hostile laws that target, dismiss and diminish their existence. When *Lawrence v. Texas* was handed down in 2003, Missouri was one of just four states that still affirmatively criminalized only same-sex sodomy – targeting solely homosexuals for the criminalization of consensual sexual conduct. Missouri didn't legislatively repeal the law until three years later, in 2006.

But it is not just remnants of old laws that demonstrate animus – Missouri has taken affirmative measures to demonstrate its animus towards its LGBT citizens. In 2004, when Massachusetts performed the nation's first legal gay marriage, Missouri lawmakers responded by passing SJR29, a ballot measure asking voters to enshrine a ban on gay marriage into the state constitution. 2004 Mo. Legis. Serv. SJR29. Just last year in 2012, Missouri lawmakers introduced HB2051, otherwise known as the “don't say gay” bill, to prohibit discussion of sexual orientation in public schools, which would have marginalized LGBT students and their families, and, according to Rep. Stacey Newman, who opposed the measure, “would stifle the more than 80 Gay Straight Alliances (GSA clubs) that meet in Missouri high schools and are a tremendous resource for kids struggling with their sexual identity.” Don Corrigan, "Don't Say Gay' Bill Draws Plenty Of School Criticism: Bill restricts discussion of sexual orientation in public schools," WEBSTER-KIRKWOOD TIMES, (May 4, 2012), [http://www.websterkirkwoodtimes.com/pdalpeditorial.lasso?-](http://www.websterkirkwoodtimes.com/pdalpeditorial.lasso?)

token.story=180251.114137. The legislation, which mandated "no instruction, material, or extracurricular activity sponsored by a public school that discusses sexual orientation other than in scientific instruction concerning human reproduction shall be provided in any public school," had at least 20 influential co-sponsors, including the Speaker of the House Steve Tilley and Majority Leader Tim Jones. 2012 Mo. Legis. Serv. HB2051.

Out of Missouri's 197 state legislators, only two are openly LGBT; the first openly gay legislator in Missouri, Tim Van Zandt, was elected in 1994.⁹ Nearly 20 years later, there are only two openly gay legislators in the Missouri Legislature today. In fact, through Missouri's entire history, there have been only five legislators who identified as gay, lesbian, bisexual or transgender. This is hardly a testament to the political clout that will enable a disenfranchised minority to protect its own interests without rigorous judicial scrutiny.

This discrete and insular minority of legislators have sometimes faced outright animus by their own colleagues. In 2009, State Rep. Jeanette Mott Oxford, one of two openly gay state representatives in Missouri at the time, had her qualifications to continue serving on the House Children and Families Committee – a committee on which she had

⁹ "Tim Van Zandt," WIKIPEDIA, http://en.wikipedia.org/wiki/Tim_Van_Zandt; "First Openly Gay Candidate Elected to Missouri House of Representatives" GAY & LESBIAN VICTORY FUND, (Aug. 5, 1994), <http://www.qrd.org/qrd/orgs/GLVF/1994/missouri.candidate.van.zandt.wins-08.03.94>,

served for four years – called into question because of her sexual orientation. Based on her seniority, she should have qualified as the ranking minority member. But her assignment was recalled by the Speaker of the House, on grounds that “some of our members find her highly offensive.” See, “Mott Oxford suspects committee snub caused by anti-gay sentiments,” GAYPOLITICS, (Feb. 6, 2009), <http://www.gaypolitics.com/2009/02/06/mott-oxford-suspects-committee-snob-caused-by-anti-gay-sentiments/>.¹⁰ Other legislative debates similarly evidence the outright hostility of lawmakers towards LGBT Missourians, making it harder for them to effectively lobby to advance their interests:

- In 2008, during legislative debates on bullying of LGBT youth in schools, Rep. Jane Cunningham, then chair of the Elementary and Secondary Education Committee that was considering legislation (2008 Mo. Legis. Serv. HB1751) to expand the definition of school bullying to include sexual orientation, chastised the appearance of two high school students who participated in

¹⁰ Mott Oxford was subsequently named as an unofficial member of the committee, *See*, “Oxford named ranking un-member of children and families committee,” KANSAS CITY STAR, <http://midwestdemocracy.com/blogs/entries/oxford-named-ranking-un-member-of-children-and-families-committee/>, and then re-instated to the Committee the following year. *See*, “Mott Oxford No Longer Too Offensive To Serve on Children & Families Committee,” FIREDUP MISSOURI, <http://www.firedupmissouri.com/content/mott-oxford-no-longer-too-offensive-serve-children-families-committee>.

- PROMO’s LGBT Lobby Day at the Capitol. After calling one “disgusting,” and telling them that it was hard for her to look at them, Rep. Cunningham ordered them to leave her office after they went to discuss the bill with her. *See* Mallory McGowin, “Bullying accusations at the Capitol,” CONNECT MID MISSOURI, KRCCG-13, (April 10, 2008), <http://www.connectmidmissouri.com/news/story.aspx?id=119806#.UeP5zD5AQ0N>. Rep. Mott Oxford, after holding a press conference to draw attention to this legislative hostility to citizen lobbying, noted that the lawmaker’s ousting of the students from her office when they came to lobby her, “mirrors the rejection and the bullying that students have received at their high school.” “Out Missouri lawmakers accuses colleague of bullying students,” GAYPOLITICS, (April 14, 2008), <http://www.gaypolitics.com/2008/04/14/out-missouri-lawmakers-accuses-colleague-of-bullying-students/>.
- Last year, while legislators were debating HB2051, the so-called “don’t say gay” bill that would have barred discussion of sexual orientation in schools, one of the bill’s 20 co-sponsors, Rep. Dwight Scharnhorst, linked discussing sexual orientation in school to teaching about bestiality, saying, "There is no need to talk about Billy wanting to marry a goat." John Celock, “Missouri 'Don't Say Gay' Bill: GOP Sponsors Wary Of 'Homosexual Agenda'”, HUFFINGTON POST, (April 23, 2012), http://www.huffingtonpost.com/2012/04/23/missouri-dont-say-gay-bill_n_1447121.html. A Kirkwood High School student said that the bill was

“a form of bullying in itself, because it says if you are bullied, you cannot talk about it with a teacher or a counselor if it involves orientation issues.”

Corrigan, "'Don't Say Gay' Bill Draws Plenty Of School Criticism,” *supra*.

- In a 2010 constituent newsletter, Rep. Cynthia Davis stated that gays and lesbians who are not related to their children by biology or adoption “may be very good friends, but they are not parents.” Mandy Oaklander, “Cynthia Davis refuses to acknowledge gay parents, calls them their children’s 'friends',” THE PITCH, (Sept. 16, 2010), <http://www.pitch.com/FastPitch/archives/2010/09/16/cynthia-davis-refuses-to-acknowledge-gay-parents-calls-them-their-childrens-friends>.

Such outright hostility deters LGBT Missourians from lobbying, legitimately leads them to believe that their views will be dismissed as less legitimate than those of other constituents, and makes it difficult for LGBT Missourians to effectively advocate their interests to their legislative representatives.

There have been some modest gains, but not enough to offset the hostility LGBT Missourians still face. MONA, which would extend basic protections against discrimination in housing, employment and public accommodations in Missouri, made it further in 2013 than in any year of the previous decade that it has been introduced and garnered bipartisan support in the Senate. While most Americans now live in jurisdictions that provide these basic protections from discrimination, in Missouri, even MONA met with hostility during the 2013 legislative session. Not only that, but in the wake of the U.S. Supreme Court’s ruling in *Windsor*, just a few weeks ago, a Missouri

state senator used his official senatorial legislative report to condemn the ruling, calling gays and lesbians “reprobate,” deeming the majority opinion of Supreme Court an act of “tyranny,” and calling for “impeaching the five jurists” ruling in the majority in that case. Ed Emery, “Free or Reprobate,” LEGISLATIVE COLUMN OF MISSOURI SENATOR ED EMERY, (July 3, 2013), <http://www.senate.mo.gov/media/13info/Emery/columns/Emery-070313.html>. It is hard to imagine that his LGBT constituents believe he will hear their concerns after he publically labeled them reprobate.

ii. LGBT MISSOURIANS FACE ANIMUS IN THE COMMUNITY.

Animus against LGBT Missourians remains in broader society as well, making it difficult for this insular minority to advance its interests in the political arena.

- In April 2013, a gay man was arrested at a Kansas City, MO, hospital when he refused to leave his partner’s bedside – despite that he had power of attorney to make medical decisions for his partner, and despite a presidential order requiring hospitals that receive Medicare or Medicaid funding to allow visitation rights for gay and lesbian partners. “I was not recognized as being the husband, I wasn’t recognized as being the partner,” the man told reporters. David Edwards, “Missouri man arrested at hospital for refusing to leave gay partner,” THE RAW STORY, (April 11, 2013), <http://www.rawstory.com/rs/2013/04/11/missouri-man-arrested-at-hospital-for-refusing-to-leave-gay-partner/>.
- In 2012, a local proposal in Springfield, MO, to extend basic protections against discrimination in employment, housing and public accommodations to the city’s LGBT citizens – legislation that more than 174 cities and counties across the

nation have passed¹¹ – garnered so much negative response from the community that lawmakers tabled the measure and refused to vote on it, instead appointing a task force to study the measure. The measure never came back before the council. The proposal spurred standing-room only crowds at the council meetings, which were infused with vitriol and animus towards the community’s LGBT citizens. Ryan Lenz, “Anti-LGBT Activist Targets ‘Gay Fascism’ Law in Springfield, MO,” SOUTHERN POVERTY LAW CENTER, (July 13, 2012), <http://www.splcenter.org/blog/2012/07/13/anti-lgbt-activist-targets-gay-fascism-ordinance-in-springfield-mo/>; Mark E. McCormick, “Lively urges fight against Springfield’s anti-discrimination proposal: City proposal aids gay agenda, lawyer says,” SPRINGFIELD NEWS-LEADER, (July 14, 2012), <http://www.news-leader.com/article/20120714/NEWS06/307140028/Springfield-anti-discrimination-ordinance-gays-Lively>.

- In 2012, a St. Louis Catholic school teacher was fired after discussing his plans to marry his same-sex partner with co-workers. Joe Borlik, “Gay teacher fired from Catholic school after marriage plans.” WGHP FOX 8, (March 1, 2012),

¹¹ Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity (as of June 5, 2013), HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

<http://myfox8.com/2012/03/01/gay-teacher-fired-from-catholic-school-after-marriage-plans/>.

- In 2004, Missouri became the first state to pass a constitutional ban on gay marriage, now codified at Mo. Const., Art I, § 33, following Massachusetts' legalization of gay marriage. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Missouri voters approved the August 2004, referendum issue by an overwhelming majority – 71% to 29%. Official Election Returns, State of Missouri Primary Election, Tuesday, August 03, 2004, MISSOURI SECRETARY OF STATE'S OFFICE, <http://www.sos.mo.gov/enrweb/ballotissuereults.asp?eid=116&arc=1>.

These are just a few of many examples of animus towards LGBT Missourians to which PROMO has responded on behalf of LGBT Missourians and their allies. They overwhelmingly demonstrate that LGBT Missourians still cannot effectively advocate their interests in the political marketplace and call for a more searching judicial inquiry to ensure the fulfillment of the Missouri Constitution's promise that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const., Art I, § 2 – a mandate that must be informed by an "evolving understanding of the meaning of equality," *Windsor*, 570 U.S. at 20 (slip op.) at 20.

CONCLUSION

For the reasons stated, this Court should apply heightened scrutiny in addressing the constitutionality of classifications in law based on sexual orientation, and conclude that the effect of the statute at issue is to deprive Kelly Glossip and other same-sex

spouses of equal protection under law by denying him benefits he would receive if he had been in a heterosexual married relationship. MPERS demeans the personhood and dignity of the LGBT families it excludes from coverage, and no legitimate purpose overcomes the overt discriminatory intent and impact of the exclusion. Accordingly, this Court should declare that MPERS' discriminatory exclusion of survivor benefits under Mo. Rev. Stat. §104.012 and §104.140 based on sexual orientation violates the equal protection provisions of the Missouri Constitution.

Respectfully submitted,

PROMO

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July 2013, a true and correct copy of the foregoing was served upon the Clerk of the Court and upon counsel via the Missouri e-filing system to:

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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 that this brief contains a total of 5,211 words, excluding the cover, table of contents, table of authorities, certificate of service, certificate of compliance and signature block.

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