IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

KELLY D. GLOSSIP, Plaintiff, v. MISSOURI DEPARTMENT OF TRANSPORTATION AND HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM, Defendant.	)	Case No. 10-CC00434

PLAINTIFF KELLY GLOSSIP'S CORRECTED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

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III. INTRODUCTION

Kelly Glossip and Dennis Engelhard shared a loving intimate relationship for 15 years until Dennis's death. Mr. Engelhard was a nine-year veteran state highway patrolman who died while serving Missouri citizens by seeking to protect them from harm in the course of a snowstorm. If Dennis had been married to a woman, his widow would have been statutorily entitled to receive survivor benefits pursuant to R.S. Mo. Section 104.140, which requires the Transportation and Highway Patrol Employees' Retirement System ("MPERS") to pay death benefits to the surviving different-sex spouse when an employee of Missouri State Highway Patrol ("MSHP") is killed in the line of duty. But under the statute, same-sex couples like Dennis and Kelly are explicitly and categorically excluded from qualifying for death benefits no matter how committed and financially interdependent they are. In this action against MPERS for declaratory and injunctive relief, Mr. Glossip challenges the constitutionality of R.S. Mo. Section 104.140 and its application to him and to other same-sex domestic partners of deceased MSHP employees.

The exclusion of same-sex couples from receiving survivor benefits violates equal protection and due process under Article I, Sections 2 and 10 of the Missouri Constitution and violates Article III, Section 40's prohibition on special laws. This Court should deny Defendant's motion to dismiss and grant Mr. Glossip's cross motion for summary judgment.

IV. UNDISPUTED FACTS

A. Kelly Glossip And Dennis Engelhard Shared An Intimate, Loving, Interdependent Relationship For Nearly 15 Years.

Kelly Glossip is a 44-year-old Missourian who shared a long-term, loving, committed, interdependent, and intimate relationship for nearly 15 years with Dennis Engelhard, a Missouri State Trooper and employee of the Missouri State Highway Patrol. (Amended Petition for

Injunctive Relief and Declaratory Relief ("Pet.") at ¶¶2, 10, 20-29; Plaintiff's Statement of Uncontested Facts ("Facts") at ¶13). During their relationship, they lived together, with the exception of temporary work-related periods of separation, until Mr. Engelhard's death. Pet. at ¶ 21; Facts at ¶11. They held themselves out to their families as a couple in a committed, marital relationship, and they would have entered into a civil marriage if it were legal to do so in Missouri, Pet. at ¶¶-23, 30; Facts at ¶¶14, 20. Although never able to legally marry in Missouri, their mutual support emotionally, financially, and spiritually for one another was comparable to a spousal relationship. Pet. at ¶20; Facts at ¶10. Mr. Glossip and Mr. Engelhard exchanged rings with each other on Christmas Day, 1997 to pledge their mutual support for one another. Pet. at ¶23; Facts at ¶20. They were each other's sole domestic partner and intended to remain so indefinitely. Facts at ¶19.

Mr. Glossip and Mr. Engelhard intertwined their lives financially and were financially interdependent. Pet. at ¶¶20, 27; Facts at ¶21. They cared for each other in sickness and in health. Pet. at ¶20; Facts at ¶16. They jointly owned their house in Springfield, and in May 2004, they purchased a home in Robertsville, Missouri. Pet. at ¶26; Facts at ¶18. Both were responsible for the mortgage and insurance payments on that home. Pet. at ¶26; Facts at ¶18. They had joint checking and savings accounts, and over their 15-year relationship they jointly owned five cars and two trucks, sharing responsibility for the car loans and insurance on all of them. Pet. at ¶27; Facts at ¶18.

They were a family. Pet. at ¶20; Facts at ¶17. Mr. Engelhard acted as a step-father for Mr. Glossip's son from a previous marriage, providing emotional support to the son and sharing with Mr. Glossip the responsibility for making child-support payments. Pet. at ¶28; Facts at ¶17. They chose a church home, celebrated the anniversary of their relationship there, attended

services and other church-related events, and contributed regularly to the church. Pet. at ¶29; Facts at ¶15.

B. Mr. Engelhard And Mr. Glossip Moved So That Mr. Engelhard Could Work As a State Trooper Until Mr. Engelhard Made The Ultimate Sacrifice For The Citizens Of Missouri.

Since 2000, Mr. Engelhard was employed by the MSHP as a state trooper. Pet. at ¶24; Fact at ¶1. When Mr. Engelhard was assigned to Troop C of the MSHP, Mr. Glossip gave up his job as a customer service representative at Great Southern Bank and moved with Mr. Engelhard to Washington, Missouri, and then to the home they purchased in Robertsville. Pet. at ¶26; Facts at ¶23.

Mr. Glossip tried to convince Mr. Engelhard not to become a state trooper because he was concerned that the job would be dangerous and Mr. Engelhard could be hurt. Facts at ¶22 Mr. Engelhard always reassured Mr. Glossip that if anything ever happened to a state trooper, the government and other troopers would make sure that the trooper's family is taken care of. Facts at ¶22. When he filled out his paperwork as a new employee at MSHP, Mr. Engelhard named Mr. Glossip as the primary beneficiary of his retirement savings account, a fifty per cent beneficiary of a life insurance policy he obtained as an MSHP employee, and the sole beneficiary of his deferred- compensation plan. Pet. at ¶25; Facts at ¶21. Mr. Engelhard indicated on the beneficiary form that Mr. Glossip was his "fiancé." Pet. at ¶25; Facts at ¶21.

Mr. Engelhard made the ultimate sacrifice while serving and protecting the citizens of Missouri when, on December 25, 2009, he was killed in the line of duty. Pet. at ¶31; Facts at ¶2 He was struck by a vehicle while responding to an accident on I-44, east of Eureka, Missouri. Pet. at ¶31; Facts at ¶2. Mr. Glossip was the only person from Mr. Engelhard's family who went to the hospital to be with Mr. Engelhard when he died. Pet. at ¶32; Facts at ¶24 Mr. Engelhard

had already passed away by the time Mr. Glossip arrived at the hospital, but Mr. Glossip sat with Mr. Engelhard for hours holding his hand. Pet. at ¶32; Facts at ¶24.

On December 25, 2009, Governor Jay Nixon issued a statement regarding Mr. Engelhard's death in which he stated that "our state has lost one of its most dedicated law-enforcement officers." Pet. at ¶33. Governor Nixon further proclaimed that "Corporal Engelhard served the people of Missouri honorably, and he made the ultimate sacrifice in fulfilling his duty." *Id.* On December 28, 2009, "to honor the bravery and sacrifice" of Mr. Engelhard, Governor Nixon ordered that the U.S. and Missouri flags at state buildings in all 114 counties and the City of St. Louis be flown at half-staff. Pet. at ¶34. After Mr. Engelhard's death, Mr. Glossip attended a ceremony in Jefferson City on May 1, 2010, commemorating the police officers who were killed in the line of duty during 2009, and, as Mr. Engelhard's surviving partner, Mr. Glossip placed a flower in a memorial wreath. Pet. at ¶35; Facts at ¶25. Mr. Glossip also attended a ceremony in Washington, D.C. on May 15, 2010, commemorating the loss of police officers nationwide and was recognized with a medallion as Mr. Engelhard's surviving domestic partner. Pet. at ¶36; Facts at ¶25.

Since Mr. Engelhard died, Mr. Glossip has been alone both emotionally and financially. Facts at ¶26. Both were very emotionally dependent on each other, and Mr. Glossip's entire support system was built around Mr. Engelhard. Facts at ¶¶21, 26. In addition to losing Mr. Engelhard's emotional support, Mr. Glossip has had to bear the entire financial burden of paying their mortgage, car loans, utilities, and other expenses. Facts at ¶26.

C. Defendant Denied Mr. Glossip Survivor Benefits After Mr. Engelhard's Death Solely Because Mr. Glossip and Mr. Engelhard Were Of The Same Sex.

Defendant MPERS is the arm of the State with the power to administer the retirement benefits for certain state employees, including state troopers such as Mr. Engelhard. Pet. at ¶11;

Facts at ¶¶3, 9. On August 5, 2010, Mr. Glossip submitted an application for survivor benefits to MPERS, but MPERS denied the application solely because of R.S. Mo. § 104.012, which states that "[f]or purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman," and 451.022, which provides that "[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." Pet. at ¶¶4, 14-16; Facts at ¶5. Mr. Glossip timely appealed the denial to the MPERS' Board of Trustees, but that appeal was denied on November 18, 2010. Pet. at ¶¶17-19; Facts at ¶¶4-5. This timely appeal of that denial followed.

D. The Experience Of Thousands Of Employers, Including Local Government Employers In Missouri, Shows That Domestic Partner Systems Use Objective Criteria That Make It Easy To Administer Employment Benefits.

Many employers, including a number of local government employers in Missouri, provide domestic partner benefits to their employees. Pet. at ¶46; Facts at ¶¶31-39, 44-46. Nationwide, more than 8,673 private sector for-profit employers and 293 public employers provide some form of domestic-partner benefits to their employees' same-sex domestic partners. Pet. at ¶46; Facts at ¶33, 35. At least 40 private employers headquartered in Missouri provide some form of domestic-partner benefits to their employees' same-sex domestic partners. Facts at ¶39. Two hundred thirty-two (232) out of the 615 large private employers surveyed by the Human Rights Campaign provide qualified joint and survivor annuity plans to same-sex domestic partners of employees; 174 of those 615 large employers provide pre-retirement survivor annuity plans to same-sex domestic partners. Facts at ¶¶36--37. At least six governmental bodies in Missouri provide one or more of the following domestic partner benefits to their employees -- including law enforcement personnel -- who have same-sex domestic

partners: health insurance, dental insurance, dependent life insurance, survivor pension benefits, sick leave, and funeral leave. Facts at ¶¶44-45. At least four of these governments offer the same pension benefits that they provide for spouses of employees to some or all of their employees' same-sex domestic partners. Facts at ¶46.

Employers that provide domestic-partnership benefits for same-sex couples have established objective standards for determining whether a same-sex couple is eligible for receiving domestic-partner benefits. Pet. at ¶47; Facts at ¶40. Employers use substantially the same objective criteria in the absence of a state-issued marriage certificate, civil union, or domestic-partnership registry. Facts at ¶41. Those that require affidavits generally require some or all of the following criteria to recognize a same-sex domestic-partnership: The partners are each 18 years old or older; they are not related to one another; they currently live together; each is not currently in a domestic partnership, civil union, or marriage with a different person; they are mutually responsible for each other; and they are currently in an intimate, committed relationship of at least six to twelve months' duration. Pet. at ¶48; Facts at ¶43.

As shown by the affidavits attached to the Facts, governmental bodies in Missouri have established standards for determining whether a same-sex couple is eligible to receive domestic-partner benefits with an affidavit documenting their domestic partnership based on very similar criteria to that used by private employers as described above. Pet. at ¶49; Facts at ¶¶48-53. These standards make it possible for Missouri governmental bodies to make beneficiary eligibility determinations with minimal additional administrative costs. Pet at ¶50; Facts at ¶54. In fact, these governmental bodies have found that there is no significant difference between the burdens of administering the benefit programs for employees with domestic partners as compared to the burdens of administering benefit programs for employees with spouses. Pet. at

¶50; Facts at ¶55. The Missouri governmental bodies administering these domestic-partner benefit programs have also not seen any evidence of fraud in the use of domestic-partner programs. Pet. at ¶51; Facts at ¶56.

V. SUMMARY OF THE ARGUMENT

This Memorandum of Law responds to the specific arguments made by the Attorney General and makes additional affirmative arguments in support of Mr. Glossip's cross motion for summary judgment.[1]

The Attorney General fundamentally misconstrues the classification at issue by asserting that Mr. Engelhard and Mr. Glossip are similarly situated to an unmarried different-sex couple. As explained in Pltf. Mem. ~~I~~VI.B, the pension statutes do not create a neutral classification that distinguishes between all married couples and all unmarried couples regardless of whether the couples are same-sex or different-sex. Instead, the statutes explicitly and categorically classify couples on the basis of sex and sexual orientation with the purpose of denying same-sex couples the survivor benefits they might otherwise have been entitled to receive. The Attorney General appears to assume that this discrimination is sheltered from constitutional challenge by Mo. Const. Art. I, Section 33 (the "Marriage Amendment"). But, as explained in Pltf. Mem. ~~I~~VI.B.3, the Marriage Amendment does not apply to this case and does not authorize the Missouri government to discriminate against same-sex couples in other contexts, such as employment benefits.

[1] Defendant is represented by the Attorney General. The terms defendant and Attorney General are used interchangeably. The motion to dismiss argues that the discriminatory denial of survivor benefits to Mr. Glossip and other same-sex domestic partners of deceased MSHP employees survives rational basis review, Def. Mem. at 3-8, is not subject to strict scrutiny analysis. Def. Mem. at 8-9, and does not violate Mr. Glossip's and other similarly-situated same-sex domestic partners' rights to intimate association. *Id.* at 9-10. Defendant additionally asserts R.S. Mo. Section 104.140 is not a special law. *Id.* at 10-12.

The explicit discrimination in R.S. Mo. § 104.140 must be subjected to heightened scrutiny under Missouri law. (Pltf. Mem. VI.C at pp. 29-44). The statute discriminates on the basis of sexual orientation and gender, which are suspect or quasi-suspect classes. (Pltf. Mem. VI.C.1-2, at pp. 29-39). It is also subject to heightened scrutiny because it burdens the fundamental rights and liberty interests of same-sex couples to form an intimate association with one another. (Pltf. Mem. VI.C.3, at pp. 39-44).

In any event, under any level of review -- even review for a mere "rational basis" -- R.S. Mo. § 104.140 violates the equal protection and substantive due process guarantees of the Missouri Constitution. (Pltf. Mem. VI.D at pp. 44-57). Even under rational-basis review, the conceivable interests supported by the classification must rest upon some real differences. Pltf. Mem. VI.D.1 at pp. 45-47). None of the interests asserted by Defendant or any other conceivable interest could rationally support the categorical denial of survivor benefits to Mr. Glossip and other same-sex domestic partners of deceased MSHP employees. (Pltf. Mem. VI.D.2-4, at pp. 47-57).

Additionally, R.S. Mo. § 104.140's exclusion of same-sex couples from survivor benefits makes the statute a special law in violation of Mo. Const. Art. III, § 40. (Pltf. Mem. VI.E, at pp. 57-60). Because the statute classifies on the basis of immutable characteristics, it is a facially special law that must be presumed unconstitutional unless the Attorney General can show that it is supported by a substantial justification. The Attorney General has failed to meet that burden.

This Court should deny Defendant's motion to dismiss and grant Mr. Glossip's cross-motion for summary judgment.

VI. ARGUMENT

A. Motion to Dismiss and Summary Judgment Standards.

In considering Defendant's motion to dismiss, this Court assumes that all of the facts Mr. Glossip has asserted are true and liberally grants him all reasonable inferences that may be drawn from those factual assertions. *Sullivan v. Carlisle,* 851 S.W.2d 510, 512 (Mo. banc 1993). Summary judgment shall be granted if the motion and other briefs and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[.]" Mo. R. Civ. P 74.04 (c)

B. Missouri's Statutory Scheme Discriminates Against Same-Sex Couples By Denying Them The Protections Of Survivor Benefits.

1. For Equal Protection Purposes, Committed Same-Sex Couples Should Be Compared With Committed Different-Sex Couples.

According to the Attorney General, Missouri's statutes do not discriminate against same-sex couples because all unmarried couples -- whether same-sex or different-sex -- are equally precluded from receiving survivor benefits. *See* Def. Mem. at 6, 11-12. But comparing unmarried same-sex couples in Missouri to unmarried different-sex couples is like comparing apples to oranges: A same-sex couple that is categorically barred from marrying no matter how committed and interdependent they are to each other is not similarly situated to a different-sex couple that is legally capable of marrying but declines to do so.

Courts examining similar statutory schemes have concluded that unmarried same-sex couples and unmarried different-sex couples are not similarly situated in states where only different-sex couples have the ability to marry: As the Supreme Court of Alaska recently explained when evaluating a similar benefit scheme:

> We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The

> municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

Alaska Civil Liberties Union v. State, 122 P.3d 781, 788 (Alaska 2005) (footnotes omitted).

A federal court in Arizona reached the same conclusion when examining the interaction between Arizona's marriage amendment and a state statute limiting couples' health benefits to married governmental employees. *See Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010). In rejecting the state's argument that the benefit scheme was "a neutral policy that treats all unmarried employees equally," the court explained:

> [The benefit statute], when read together with Arizona Constitution Article 30 § 1, treats unmarried heterosexual State employees differently than unmarried homosexual employees. Heterosexual domestic partners may become eligible for family coverage under the State plan by marrying. Because employees involved in same-sex partnerships do not have the same right to marry as their heterosexual counterparts, [the benefit statute] has the effect of completely barring lesbians and gays from receiving family benefits.

Id. at 803 (internal quotation marks and footnote omitted).

The reasoning of *Alaska Civil Liberties Union* and *Collins* has been embraced by New Hampshire state courts as well during the time period before New Hampshire legislatively authorized marriage for same-sex couples. *See Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *6 (N.H. Super. 2006) ("Thus, same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may

avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits.").

As these cases demonstrate, in order to defend the statutory scheme, the Attorney General must do more than assert that the law denies R.S. Mo. § 104.140.3 benefits equally to unmarried same-sex couples and unmarried different-sex couples. The Attorney General must instead provide a constitutional justification for making a valuable benefit available to committed different-sex couples while categorically denying committed same-sex couples any mechanism for obtaining the same benefit.

2. Missouri's Pension Benefit Statutes Are Not Facially Neutral.

Even though Missouri's statutes categorically exclude same-sex couples from ever obtaining R.S. Mo. § 104.140.3 survivor benefits, the Attorney General argues that the statutes are facially neutral classifications based on marriage, not a facial classification against same-sex couples. Def. Mem. at 7-8.[2] But the text of the pension statutes at issue in this case flatly contradict that assertion.

Most dramatically, the pension statutes themselves do not simply classify on the basis of marital status; they contain an additional explicit classification based on a couple's gender. The pension benefit statutes specifically state 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." R.S. Mo. § 104.012. This explicit classification does

[2] Although some courts in jurisdictions prohibiting same-sex marriage have accepted the argument that restrictions of benefits to married couples are facially neutral, *see e.g.*, *Phillips v. Wis. Personnel Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992); *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. 1997), more recent decisions have rejected that claim, *see Alaska Civil Liberties Union*, 122 P.3d at 789; *Bedford*, 2006 WL 1217283, at *6.

more than simply cross reference Missouri's generally applicable marriage statutes. In order to qualify for benefits, a couple must (a) be married and (b) be comprised of a man and a woman. Even if the Marriage Amendment were repealed and Missouri's marriage laws were amended to authorize marriage for same-sex couples, R.S. Mo. § 104.012 would still exclude married same-sex couples from survivor pension benefits.[3]

Moreover, even if the pension statutes did simply classify on the basis of marital status, they would still constitute a facial classification between same-sex and different-sex couples because same-sex couples are explicitly and categorically excluded from ever being married under Missouri's Constitution. When a statute incorporates by reference another statute's discriminatory classification, then the facial classification applies both to the underlying statute and the one that incorporates it. The Supreme Court's decision in *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), is instructive. In *Feeney*, the Supreme Court held that a Massachusetts law that gave a hiring preference to veterans did not facially discriminate on the basis of gender, because both men and women were allowed to enroll in the military. Critically, the Court noted that "[v]eteran status is not uniquely male" and "the definition of 'veterans' in the statute has always been neutral as to gender and . . . Massachusetts has consistently defined

[3] By contrast, in the cases cited by the Attorney General, the employment benefit statutes and regulations simply limited benefits to "spouses" without containing their own explicit classification excluding same-sex couples. *Rutgers Council of AAUP Chapters*, 689 A.2d at 833; *Phillips*, 482 N.W.2d at 129. The Attorney General also cites *National Pride At Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139 (Mich. Ct. App. 2007), *aff'd*, 748 N.W.2d 524 (Mich. 2008), but that court's reasoning depended on Michigan's broad marriage amendment which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose*," *id.* at 143 n. 2 (quoting Mich. Const. 1963, art. 1, § 25) (emphasis added), and the broad interpretation it gave the amendment. *id.* at 155. Because the court concluded that the amendment prohibited the government from providing employment benefits to unmarried couples on any basis related to the recognition of the couples' relationship, it concluded that there was no violation of equal protection under the Michigan Constitution. *Id.* at 155-56.

veteran status in a way that has been inclusive of women who have served in the military." *Id.* at 275. If women had been categorically excluded from becoming veterans, then a hiring preference for veterans would have constituted a facial classification based on gender under *Feeney*. Similarly, in this case, because same-sex couples are categorically excluded from marriage in Missouri, a statue that attaches pension benefits to marital status facially discriminates between same-sex and different-sex couples.

The Attorney General argues that Mr. Glossip cannot challenge the constitutionality of the pension benefit statutes without also challenging Missouri's Marriage Amendment. Def. Mem. at 8. That is a non sequitur. To be sure, under Missouri's law, the discrimination in the Marriage Amendment between same-sex and different-sex couples is insulated from constitutional challenge; but that does not shield the discriminatory classification from review when the government attempts to import the classification in other contexts. For example, in *Johnson v. New York*, 49 F.3d 75 (2d Cir. 1995), the plaintiff was employed as an air base security guard, but New York law required all security guards to be members of the Air National Guard, and the Air National Guard had a mandatory retirement age of 60. When the plaintiff turned 60 years old, he was forced to retire from the Air National Guard and, as a result, was also disqualified from continuing to serve as an air-base security guard. Federal protections against age discrimination in the Age Discrimination in Employment Act ("ADEA") did not apply to the Air National Guard, so the plaintiff could not challenge his forced resignation from the Air National Guard, but the court nevertheless held that he could challenge the age-based classification when it was incorporated as a condition of employment as a security guard. The court explained: "[T]he [Air National Guard] has a termination policy that facially discriminates on the basis of age. That policy does not itself violate the ADEA . . . . [b]ut the State of New

York -- an employer covered by the ADEA -- is not permitted to adopt the [Air National Guard] facially discriminatory termination policy as a condition of employment for its civilian employees . . . ." *Id.* at 79; *see also Erie County Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir. 2000) (classification based on Medicare eligibility is classification based on age because only persons over 65 are eligible for Medicare).

The same reasoning used in *Feeney* and *Johnson* applies here. Limiting marriage to different-sex couples does not itself violate the Missouri Constitution, but the government's decision to condition R.S. Mo. § 104.140.3 benefits on marital status is still a facial classification between same-sex and different-sex couples, which is subject to constitutional challenge. *See Alaska Civil Liberties Union*, 122 P.3d at 789.

3. Missouri's Pension Benefit Statutes Were Enacted And Reaffirmed For The Purpose Of Excluding Same-Sex Couples.

Even if the statutory scheme did not on its face discriminate against same-sex couples, Mr. Glossip could still show that the statutory scheme was unconstitutionally motivated by a legislative intent to discriminate against same-sex couples. A facially neutral statute may still be challenged as discriminatory when the government has "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

The history of Missouri's marriage and pension laws makes clear that the current statutory scheme was enacted because of, not in spite of, its exclusion of same-sex couples. Until 1996, Missouri's marriage laws did not explicitly exclude same-sex couples. Up until that point, "the plain language of Missouri's marriage statute d[id] not state that applicants for a marriage license must be a man and a woman." Otis Cowan, Note, *A Plebiscite for Prejudice: An Analysis of Equal Rights for Gay and Lesbian Missourians*, 62 UMKC L. Rev. 347, 354

(1993). But after 1993, when a decision from the Hawaii Supreme Court indicated that Hawaii may soon recognize marriage for same-sex couples, opponents of same-sex marriage in Missouri argued that without an explicit ban on marriage for same-sex couples, Missouri would have to recognize same-sex marriages that took place in Hawaii. Those fears were bolstered by testimony from a law professor at the University of Missouri, who warned that "'[n]owhere do the statutes of Missouri forthrightly state that same-sex marriage is disallowed.'" Virginia Young, *State Senate Revives, Passes Bill Outlawing Same-Sex Marriages*, The St. Louis Post-Dispatch, May 9, 1996, at A16 (quoting testimony from Prof. Carl. Esbeck). Prof. Esbeck wrote in a letter to legislators that "[t]o deny validity to other states' same-sex marriages, Missouri needs to put a policy statement against such unions in its statutes." *Id.*

In 1996, Missouri for the first time specifically passed a statute to exclude same-sex couples from the ability to marry. *See* 1996 Mo. Legis. Serv. S.B. 768 § A(§ 6) (codified at R.S. Mo. § 451.022). After the Missouri Supreme Court invalidated the statute for violating Missouri's "single subject" rule, *see St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998), the legislature reenacted a statutory ban on same-sex marriages. *See* ~~1996~~ 2001 Mo. Legis. Serv. ~~S.B~~H.B. ~~768~~ 157 § A (codified at R.S. Mo. § 451.022). Even more dramatically, the Missouri legislature specifically amended the pension statutes at issue in this litigation to exclude same-sex couples from eligibility. In 2001, the legislature for the first time adopted a provision specifically stating that "[f]or the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman." 2001 Mo. Legis. Serv. S.B. 371 § 2 (codified at R.S. Mo. § 104.012). Finally, in 2004, Missouri enacted a constitutional amendment to specifically exclude same-sex couples from the institution of marriage. *See* Mo. Const. Art. I, Section 33.

This specific intent to bar same-sex couples from the institution of marriage stands in stark contrast to the laws at issue in the cases cited by the Attorney General.[4] The history of Missouri's marriage laws since 1996 make clear that Missouri has "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" same-sex couples. *Feeney*, 442 U.S. at 279. Like any other form of intentional discrimination, the intentional exclusion of same-sex couples from survivor benefits is subject to constitutional challenge.

4. Missouri's Marriage Amendment Does Not Authorize The Government To Violate Other Constitutional Rights Of Same-Sex Couples.

As already noted, Plaintiff is not challenging Missouri's constitutional and statutory exclusion of same-sex couples from access to marriage but instead is challenging the denial of valuable employment benefits to MSHP employees and their same-sex domestic partners. Missouri's "Marriage Amendment" does not insulate that survivor-benefit scheme from constitutional review. "In construing the Missouri Constitution, the Court's task is to reconcile provisions that may seem to be in conflict." *Thompson v. Hunter*, 119 S.W.3d 95, 100 (Mo. banc 2003); *accord Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. banc 1999) (explaining that court has a "duty to read [amendments] consistent[ly] with the remainder of the Missouri Constitution"). The 2004 amendment to the Missouri Constitution, known as the "Marriage Amendment," provides that "to be valid and recognized in this state, a marriage shall exist only

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

between a man and a woman." Mo. Const. Art. I, Section 33. But, outside the limited context of marriage, the Marriage Amendment did not abrogate other constitutional protections of same-sex couples, including the guarantees in Article I, Sections 2 and 10 of equal protection and due process and the right under Article I, Section 40 to be governed by general, rather than special, laws.

Nothing in the Marriage Amendment authorizes the government to discriminate against same-sex couples when providing survivor benefits as part of government employment. When interpreting a similar marriage amendment to its own state constitution, the Alaska Supreme Court concluded that the Alaska's constitutional amendment prohibiting same-sex marriage did not preclude same-sex couples from seeking equal employment benefits under other provisions of the Alaska Constitution. The court explained:

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

Alaska Civil Liberties Union, 122 P.3d at 786-87 (internal quotation marks, brackets, and footnotes omitted).

The reasoning of the Alaska Supreme Court is equally applicable to this case. Like the marriage amendment in Alaska's constitution, Missouri's Marriage Amendment "does not address the topic of employment benefits at all." *Id.* at 786.[5] Even though Mr. Glossip and Mr.

[5] The narrow scope of Missouri's Marriage Amendment distinguishes this case from *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008), in which the Michigan Supreme Court held that Michigan's broad constitutional amendment precluded the state from providing health benefits to domestic partners. Unlike Missouri, Michigan has a broader

Engelhard could not legally marry in Missouri, the Missouri Constitution "does not automatically permit the government to treat them differently in other ways." *Id.* (internal quotation marks, brackets, and footnotes omitted). Any additional disparate treatment related to the survivor benefits provided by R.S. Mo. § 104.140.3 must independently survive constitutional scrutiny.

C. Missouri's Categorical Exclusion Of Same-Sex Couples From The Survivor Benefits Provided By R.S. Mo. § 104.140 Must Be Subjected To Heightened Scrutiny.

1. The Missouri Constitution's Guarantees Of Equal Protection And Substantive Due Process Should Be Interpreted More Expansively In This Case Than Comparable Provisions Of The Federal Constitution.

"'[P]rovisions of [the Missouri] state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions.'" *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006) (quoting *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996)). In some contexts, the Missouri Supreme Court has interpreted Missouri's guarantees of equal protection and substantive due process to provide coextensive protection with the federal Constitution. *See id.* at 841 (no greater protection under Missouri Constitution for challenge to

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marriage amendment, which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose*." Mich. Const. art. 1, § 25 (emphasis added). The court in *Nat'l Pride at Work* held that because Michigan's marriage amendment extended beyond marriage to also prohibit recognition of a "similar union for any purpose," the Michigan marriage amendment prohibited local governments from providing benefits to same-sex domestic partners. *See Nat'l Pride at Work.*, 748 N.W.2d at 533, 535-37. In contrast, Missouri's Marriage Amendment -- like Alaska's -- simply states that marriage is limited to a man and woman and goes no further.

Moreover, even other states with broad constitutional amendments like Michigan's have declined to follow the reasoning of the Michigan courts. *See*, *e.g.*, *State v. Carswell*, 871 N.E.2d 547, 551 (Ohio 2007) (limiting the scope of Ohio's broad marriage amendment to apply only to legal statuses that "bear[] *all* of the attributes of marriage"); *Cleveland Taxpayers for Ohio Constitution v. Cleveland*, No. 94327, 2010 WL 3816393, at *3-*4 (Ohio. App. 8th Dist., Sept. 30, 2010) (holding that Ohio's broad marriage amendment did not prevent Cleveland from creating more limited domestic partnership benefits).

sex-offender law). But the Missouri Supreme Court has also construed those provisions more broadly than their federal counterparts when federal precedents inappropriately "dilute" equal protection and substantive due process rights. *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978); *Weinschenk*, 203 S.W.3d at 212.

For example, in *J.D.S.*, the Missouri Supreme Court provided greater protections under the Missouri Constitution than the United States Supreme Court had provided under the federal Constitution in *Quilloin v. Walcott*, 434 U.S. 246 (1978). The United States Supreme Court held in *Quilloin* that, even though the parental rights of a divorced father cannot be terminated without clear and convincing proof that he is an unfit parent, a father who was never married to the child's mother could have his parental rights terminated without any showing of unfitness. Even though this unequal treatment of unwed and divorced fathers did not violate the federal standards for equal protection and substantive due process, the Missouri Supreme Court rejected *Quilloin* and held that such discrimination did violate equal protection and substantive due process under the Missouri Constitution. *See J.D.S.*, 574 S.W.2d at 409.

In this case, Missouri's categorical exclusion of same-sex couples from R.S. Mo. § 104.140.3 survivor benefits must be subjected to heightened scrutiny under both state and federal precedent. But the potentially broader protections given by the Missouri Constitution remove any doubt that such heightened scrutiny is required.

2. The Exclusion Of Same-Sex Couples Should Be Subjected To Heightened Scrutiny Under Missouri's Equal Protection Clause.

The Missouri Constitution's equal protection clause provides that "all persons have a natural right to life, liberty, the pursuit of happiness" and that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. Art. I, § 2; *see Weinschenk*, 203 S.W.3d at 219. In determining whether a statute violates equal protection,

Missouri courts employ a two-step process. "The first step is to determine whether the statute implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Id.* at 210; *accord In re Marriage of Woodson*, 92 S.W.3d 780 (Mo. banc 2003). "The second step is to apply the appropriate level of scrutiny to the challenged statute." *Weinschenk*, 203 S.W.3d at 211. Under this framework, Missouri's exclusion of same-sex couples from the survivor benefits provided by R.S. Mo. § 104.140.3 must be subjected to heightened review.[6]

a) Heightened Scrutiny Applies Because Sexual Orientation Should Be Recognized As A Suspect Or Quasi-Suspect Classification Under Missouri Law.

Sexual orientation should be recognized as a suspect or quasi-suspect classification under the Missouri Constitution. In determining whether a classification should be recognized as a suspect or quasi-suspect classification under the Missouri Constitution, the Missouri Supreme Court examines the same heightened-scrutiny factors used by the Supreme Court when interpreting the federal Constitution. *See Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 n.4 (Mo. banc 1989). The four factors most consistently analyzed by the Court are: (1) whether a classified group has suffered a history of invidious discrimination, (2) whether the classification has any bearing on a person's ability to perform in or contribute to society; (3) whether the characteristic is immutable or beyond the person's control; and (4) whether the

[6] This case is therefore different from the cases cited by the Attorney General to support his assertion that the survivor benefits statute "touche[es] only upon economic interests," Def. Mem. at 3 (citing *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009), and is subject to rational-basis review. *Id.* (citing *Alderson*, 273 S.W.3d at 537; *Mo. Prosecuting Atty's & Circuit Atty's Retirement Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. Banc 2008)). The plaintiffs in those cases did not argue that the government had made a classification based on a suspect classification or the exercise of a fundamental right.

group has sufficient power to protect itself in the political process. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality).

Although the Missouri Supreme Court rejected heightened scrutiny when it upheld Missouri's sodomy statutes in *State v. Walsh*, 713 S.W.2d 508 (Mo. banc 1986), that decision is no longer good law. *See Johnston v. Mo. Dep't of Social Servs.*, No. 0516-CV09517, 2005 WL 3465711, at *5 (Mo. Cir. May, 2, 2005). The decision in *Walsh* was based on the now-discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the United States Supreme Court held that criminal prohibitions on same-sex "sodomy" do not violate the federal Constitution. *Walsh* extended the reasoning of *Bowers* and rejected a state constitutional challenge to a sodomy statute criminalizing "deviate sexual intercourse with another person of the same sex." *Walsh*, 713 S.W.2d at 510. In upholding the statute, the *Walsh* court held that sexual orientation does not constitute a suspect or quasi-suspect classification requiring heightened scrutiny. The *Walsh* court acknowledged that gay people have suffered discrimination and are disadvantaged in the political processes, but the court concluded that the discrimination suffered by gay people was a natural and proper consequence of their criminal activity. According to the court

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

Id. at 511. By upholding criminal prohibitions on same-sex "sodomy," the United States Supreme Court's decision in *Bowers* and the Missouri Supreme Court's decision in *Walsh* thus

effectively extended an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

In *Lawrence*, the Supreme Court rescinded that invitation and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. By overruling *Bowers*, the Supreme Court's decision in *Lawrence* also abrogated *Walsh* and rendered Missouri's criminal sodomy statute unenforceable. *See Johnston*, 2005 WL 3465711, at *5. Now that *Bowers* and *Walsh* have been abrogated by *Lawrence*, the Missouri courts must determine whether sexual orientation constitutes a suspect classification without the misconception that intimate same-sex activity could itself be criminalized as a form of "deviate sexual intercourse."

After *Lawrence*, a straightforward application of the traditional heightened-scrutiny factors requires that sexual orientation be recognized as a suspect classification.[7] Several recent decisions have carefully examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting state constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage*

[7] In arguing that sexual orientation has not been recognized as a suspect classification under federal law, the Attorney General cites to cases that simply adhered to pre-*Lawrence* case law, which had -- like the decision in *Walsh* -- reasoned that sexual orientation could not constitute a suspect classification because intimate same-sex activity could itself be criminalized. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (relying on pre-*Lawrence* case law regarding the applicable standard of review, even though decided after *Lawrence* overruled *Bowers*). The reasoning of those decisions depended on *Bowers*; now that *Bowers* has been overruled that reasoning has been fatally undermined. *See* Feb. 23, 2011 DOJ Letter re Defense of Marriage Act ("DOJ Memo"), *available online at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

Cases, 183 P.3d 384, 442-44 (Cal. 2008) (analyzing factors similar to the federal test); *see also Collins*, 727 F. Supp. 2d at 804 (invalidating statute under rational-basis review but noting that heightened scrutiny may be appropriate). The U.S. Department of Justice reached the same conclusion after conducting its own careful examination of the heightened-scrutiny factors. *See* Feb. 23, 2011 DOJ Letter re Defense of Marriage Act ("DOJ Memo"), *available online at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. This Court should adopt the analysis set forth in those thorough and well-reasoned decisions and hold that sexual orientation classifications must be subjected to heightened scrutiny.[8]

As recounted at length in the DOJ memo and state court decisions, sexual orientation satisfies all the traditional criteria that are typically required for heightened scrutiny. With respect to the first heightened-scrutiny factor, there is no doubt that gay men and lesbians have suffered a history of discrimination, which has been discussed at length by numerous other courts. *See, e.g.*, *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.); *In re Marriage Cases*, 183 P.3d

[8] The Eighth Circuit's decision *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which applied a rational-basis test to evaluate a ban on same-sex marriage, is not to the contrary. The Eighth Circuit did not analyze the traditional heightened-scrutiny factors and therefore should not be afforded any persuasive weight by this Court. Moreover, even if *Bruning* were otherwise persuasive, that decision rested on the theory that marriage is designed to encourage responsible procreation and that heterosexual couples -- unlike same-sex couples -- do not have the ability to accidentally procreate. Here, however, Missouri does not seek to justify the exclusion of same-sex couples based on a "responsible procreation" theory, and instead argues that the purpose of the statute is to provide resources to those "whom the legislature has determined are most likely to be economically dependent upon a deceased member." Def. Mem. at 9. *Cf. Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 775 (Mo. banc 2003). Moreover, there is no rational connection between encouraging different-sex couples to responsibly procreate and denying survivor benefits to same-sex domestic partner survivors of MSHP employees. Outside the context of encouraging procreation, the *Bruning* decision does not foreclose closer scrutiny of sexual orientation discrimination. *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 11 (2006) (adopting responsible-procreation theory but noting that it may nevertheless be appropriate "to apply heightened scrutiny to sexual preference discrimination" in other cases where the ability to procreate is not implicated).

at 442; *Kerrigan*, 957 A.2d at 434; *Perry*, 704 F. Supp. 2d at 981-82. As noted above, that discrimination was reinforced by the erroneous decisions in *Bowers* and *Walsh*, which extended an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. Indeed, the court in *Walsh* acknowledged that "[i]t cannot be doubted that historically homosexuals have been subjected to 'antipathy [and] prejudice'" but held that this history of prejudice was a justified consequence of "violat[ing] society's legal and moral codes of conduct." *Walsh*, 713 S.W.2d at 511.

Second, it is also well-settled that a person's sexual orientation bears no relation to a person's ability to contribute to society. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 1002; *Varnum*, 473 N.W.2d at 890; *Kerrigan*, 957 A.2d at 435; *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (en banc) (Norris, J., concurring); *Dean v. District of Columbia*, 653 A.2d 307, 345 (D.C. 1995). Although homosexuality was once stigmatized as a mental illness, the American Psychiatric Association and the American Psychological Association made clear decades ago that a person's sexual orientation is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities." *See* American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); American Psychological Association, *Resolution on Prejudice, Stereotypes, and Discrimination*, 62 Am. Psychologist 475-81 (2006); *see also Perry*, 704. F. Supp. 2d at 967-68.

Third, whether or not sexual orientation is genetic, there is a scientific consensus that it cannot be changed either by a decision-making process or by medical intervention. *See* American Psychological Association, *Resolution on Appropriate Therapeutic Responses to*

Sexual Orientation, 53 Am. Psychologist 934-35 (1998); American Psychological Association, *Resolution on Prejudice, Stereotypes, and Discrimination*, 62 Am. Psychologist 475-81 (2006); American Psychiatric Association, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998); *see also Perry*, 704. F. Supp. 2d at 966-67. Moreover, sexual orientation is a core component of a person's identity that cannot serve as a legitimate basis for imposing discrimination. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) ("Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self."), *rev'd*, 976 F.2d 623 (10th Cir. 1992) (based on qualified immunity).

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

the Supreme Court in *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez* (*"CLS"*), 130 S. Ct. 2971, 2990 (2010), recently rejected a litigant's argument that a prohibition on same-sex intimate conduct is different than discrimination against gay people; the Court explained that "[o]ur decisions have declined to distinguish between status and conduct in this context." *Id.* at 2990. *Lawrence* and *CLS* make clear that there is no constitutional distinction between discriminating against same-sex intimate conduct and discriminating against gay and lesbian people.

Finally, with respect to the fourth heightened-scrutiny factor, gay men and lesbians continue to suffer severe disadvantages in the political arena. Some courts have reasoned that because gay people have received some modest protections at the state and local level, sexual orientation should not be treated as a suspect or quasi-suspect classification.[9] But the Supreme Court has never used the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process. The limited protections currently provided to gay people do not approach the comprehensive legislation protecting the rights of African-Americans or women when those classifications were recognized as requiring heightened scrutiny.[10] There is no national-level legislation prohibiting discrimination on the

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[9] *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (citing to a handful of non-discrimination laws and ordinances passed at the state and municipal level); *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (concluding that gay men and lesbians are not politically powerless because "*Time* magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual" and because "the Mayor of Chicago participated in a gay rights parade").

[10] By the early 1970s, African-Americans were already "protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 (ill-fated though it was), 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states." *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting). Likewise, by the time the Supreme Court plurality recognized sex as a suspect or quasi-suspect classification, Congress had already passed Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Equal Rights Amendment. *Frontiero*, 411 U.S. at 687-88 (plurality); *Kerrigan*, 957 A.2d at 452-53.

basis of sexual orientation in employment, education, access to public accommodations, or housing. Moreover, when gay people have secured minimal protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum processes to repeal laws or even amend state constitutions.[11] This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay people vividly illustrates the continuing disadvantages that gay people face in the political arena. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

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

b) Heightened Scrutiny Applies Because The Exclusion Of Same-Sex Couples Discriminates On The Basis Of Sex.

Even if the Court does not recognize sexual orientation as a suspect classification, the exclusion of same-sex couples from survivor benefits would still require heightened scrutiny as a

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The existence of these protections did not stop the Supreme Court from holding that discrimination on the basis of race and sex must be subjected to heightened scrutiny.

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

classification based on sex or gender. *See In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999) (recognizing gender as suspect classification).

The exclusion of same-sex couples explicitly classifies on the basis of sex by restricting R.S. Mo. § 104.140.3 benefits to married couples and explicitly limiting marriage to one "man" and one "woman." If Mr. Glossip had been a woman, he and Mr. Engelhard would have been able to marry, and Mr. Glossip would have received survivor benefits upon Mr. Engelhard's death. But solely because Mr. Glossip is a man, he and Mr. Engelhard were unable to marry under Missouri law and therefore unable to qualify for survivor benefits. By conditioning the survivor benefits on Mr. Glossip's sex, Missouri has created a gender-based classification that must be subjected to heightened scrutiny. *See Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (holding that discrimination against same-sex couples discriminates on the basis of gender); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI,1998 WL 88743, at *4 (Alaska Super. Feb 27, 1998) (same).

3. The Exclusion Of Same-Sex Couples Should Be Subjected To Heightened Scrutiny Because It Burdens The Fundamental Rights And Liberty Interests Of Same-Sex Couples.

In addition to violating Missouri's equal protection clause, the exclusion of same-sex couples must also be subjected to heightened scrutiny because of the burden it places on those couples' fundamental rights. The Missouri Constitution provides that "all persons have a natural right to life, liberty, the pursuit of happiness" and that "no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, §§ 2, 10. These rights encompass a right to substantive due process and privacy, which protects "'matters relating to marriage, family, procreation, and the right to bodily integrity.'" *Doe*, 194 S.W.3d at 843 (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994)); *cf. Hoff v. Berg*, 595 N.W.2d 285, 290 (N.D.

1999) (holding that the right to pursuit of happiness includes "the right to enjoy the domestic relations and the privileges of the family and the home"). Substantive due process also includes the fundamental right and liberty interest to engage in private, intimate sexual conduct with a same-sex partner. *Lawrence*, 539 U.S. at 575; *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).[12]

The Attorney General misconstrues Mr. Glossip's substantive due process claim. Mr. Glossip does not "allege[] that he has a fundamental right to collect survivorship benefits." Def. Mem. at 3 (citing *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003)). The fundamental rights at issue in this case are same-sex couples' right to intimate association and family integrity. The Missouri statutes burden those fundamental rights by providing survivor benefits to employees who exercise their fundamental right to intimately associate with a same-sex partner instead of an opposite-sex one. Missouri's decision to burden those rights by withholding survivor benefits from same-sex couples must be subjected to heightened scrutiny. *See Cook v. Gates*, 528 F.3d 42, 52-56 (1st Cir. 2008) (holding that substantive due process

[12] The Attorney General suggests that because Mr. Glossip and Mr. Engelhard were not legally married, they have no fundamental right to intimate association or family integrity protected by substantive due process. *See* Def. Mem. at 10. To support that assertion, the Attorney General relies on inapposite cases concerning the right to associate with a foster child that has not been legally adopted. *See id.* (citing *Lofton,* 358 F.3d at 804); *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000). Those cases have no bearing on the whether long-term intimate sexual relationships between unmarried couples receive constitutional protection. Both federal and state courts have repeatedly held that long-term unmarried couples have a protected constitutional right to intimate association with each other. *See Christensen v. County of Boone, Ill.,* 483 F.3d 454, 463 (7th Cir. 2007) (holding that long-term unmarried intimate relationship "is a form of "intimate association" protected by the Constitution"); *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004) (holding that a couple was engaged in a constitutionally-protected intimate association when they were living together, were romantically and sexually involved, and were monogamous); *Estate of Angel Antonio Mendoza-Saravia ex rel. successors of Interest*, No. 1:10 CV 0618 OWW SMS, 2011 WL 720061 (E.D. Cal. 2011); *Jegley*, 80 S.W.3d at 632 (holding that substantive due process protects the intimate conduct of same-sex partners); *Wasson*, 842 S.W.2d at 494-95 (same).

requires heightened scrutiny of burdens on same-sex couples' intimate association); *Witt v. Dep't of Air Force*, 527 F.3d 806, 813-19 (9th Cir. 2008) (same).

In order to show that his fundamental rights have been unconstitutionally burdened or penalized, Mr. Glossip does not have to show that he has "a fundamental right to collect survivorship benefits." Def. Mem. at 3. He must instead show that the denial of a benefit burdens or penalizes other constitutional rights:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958), (alteration in *Perry*); *accord Planned Parenthood of Mid-Mo. and E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 46 (8th Cir. 1999) ("Neither Congress nor the states may condition the granting of government funds on the forfeiture of constitutional rights."); *Weinschenk*, 203 S.W.3d at 2144 ("The exercise of fundamental rights cannot be conditioned upon financial expense.").[13]

[13] The Attorney General thus identifies the wrong fundamental right by citing *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003), for the proposition that there is "no fundamental right to benefit from a retirement system, including by virtue of a party's relationship with a retirement system member." Def. Mem. at 9. The fundamental right at issue here is a right to intimate association and family integrity, not the right to benefit from the retirement system. In *Woodson*, the husband asserted a purported fundamental right to equitable division of his wife's teacher retirement benefits, a claim he was able to make because of his relationship to his ex-wife. 92 S.W.3d at 783. However, nowhere did he claim that the failure to divide his former wife's retirement benefits with him burdened his right to associate with her. *Id.*

In a case analogous to this one, the Arkansas Supreme Court recently held that even though no person has a fundamental right to serve as a foster parent or adopt a child, a state law that categorically excluded unmarried couples (including all same-sex couples who cannot marry under Arkansas law) from being foster parents or adopting children unconstitutionally burdened the couples' fundamental right to sexual intimacy. *Ark. Dep't of Human Servs. v. Cole*, --- S.W.3d ----, 2011 WL 1319217 (Ark. 2011). The court acknowledged that "adopting and fostering children are privileges bestowed by state statutes and not rights in themselves." *Id.* But the court held that the categorical exclusion violated substantive due process because "the exercise of one's fundamental right to engage in private, consensual sexual activity is conditioned on foregoing the privilege of adopting or fostering children." *Id.* The exclusion placed an unconstitutional burden because couples "must choose either to lead a life of private, sexual intimacy with a partner without the opportunity to adopt or foster children or forego sexual cohabitation and, thereby, attain eligibility to adopt or foster." *Id.* As in *Jegley*, even though there is no fundamental right to receive survivor benefits, those benefits may not be withheld based on same-sex couples' exercise of their other fundamental rights.

In addition to identifying the wrong fundamental right, the Attorney General also applies an improper test for determining when a fundamental right is burdened. The Attorney General argues that in order for a burden to trigger substantive due process protections, Mr. Glossip must show that his exclusion from R.S. Mo. § 104.140.3 survivor benefits directly prevented him from exercising his fundamental rights to intimate association with Mr. Engelhard. Def. Mem. at 10.

That is not the proper test. The Attorney General cites to *Flowers v. City of Minneapolis*, 478 F.3d 869, 874 (8th Cir. 2007), in which the plaintiff alleged that excessive patrolling around the Flowers household directly violated the family's fundamental right. The

court rejected that argument because the patrolling "did not force the family member to live apart or otherwise amount to 'intrusive regulation' of 'family living arrangements.'" *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)). Here, in contrast, Mr. Glossip is not arguing that his fundamental rights are being directly violated; he is arguing that Missouri has indirectly burdened his fundamental rights by withholding governmental benefits. The plaintiff in *Perry v. Sindermann* did not have to show that the denial of a tax exemption actually prevented him from engaging in political speech, and the plaintiffs in *Cole* did not have to show that the ban on serving as foster parents actually forced the couples to end their relationship. Accordingly, in this case, the question is not whether excluding Mr. Glossip and Mr. Engelhard from survivor benefits directly prevented them from exercising their fundamental rights, but instead whether Mr. Glossip and Mr. Engelhard was forced "to choose between" exercising their fundamental rights and receiving a governmental benefit. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

The Attorney General also incorrectly cites *In re Marriage of Kohring* for the proposition that "economic consequences do not critically affect associational rights" and therefore cannot trigger the protections of substantive due process. Def. Mem. at 3, 9-10. The Attorney General's paraphrasing dramatically distorts *Kohrig*'s holding. In *Kohrig* the Missouri Supreme Court upheld a statute that required divorced parents to pay child support for their child's college education. The plaintiff in *Kohrig* was a divorced father who argued that the statute unconstitutionally infringed upon his purported fundamental right to refuse to pay money against his will. The father did not argue that his fundamental right to associate with his daughter was burdened or limited in any way as a result of his refusal to continue providing monetary support. The court explained that the plaintiff's asserted right to withhold money from his child was not a

fundamental right because it "involves only his economic, rather than his associational interests with his daughter." *Kohring*, 999 S.W.2d at 232. *Kohring* did not address what burdens could be imposed on intimate association rights and provides no authority for the Attorney General's assertion that the government can freely withhold economic benefits as a penalty for exercising fundamental rights. To the contrary, the Missouri Supreme Court has emphatically stated that "[t]he exercise of fundamental rights cannot be conditioned upon financial expense." *Weinschenk*, 203 S.W.3d at 214.

By excluding same-sex couples from R.S. Mo. § 104.140.3 survivor benefits, Missouri's statutory scheme forces those couples to choose between receiving survivor benefits and their fundamental right to intimate association. Missouri's imposition of that burden must be subjected to heightened scrutiny.

D. Under Any Standard Of Review, The Categorical Exclusion Of Same-Sex Couples Violates The Missouri Constitution's Guarantees Of Equal Protection And Substantive Due Process.

There is no question that, if heightened scrutiny applies, Missouri's exclusion of same-sex couples from survivor benefits is plainly unconstitutional. To survive strict scrutiny, the state must show that the exclusion of same-sex couples is narrowly tailored to serve a compelling interest. *Weinschenk*, 203 S.W.3d at 216. To survive intermediate scrutiny, the State must show that the exclusion is substantially related to an important governmental interest. *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W.2d 162,164-65 (Mo. banc 1979), *rev'd on other grounds*, 446 U.S. 142 (1980). The Attorney General does not even attempt to meet either of those standards.

But even under rational-basis review, Missouri's exclusion of same-sex couples from survivor benefits cannot survive. To survive rational-basis review, legislation must be "rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne*

Living Ctr., 473 U.S. 432, 446 (1985). Rational-basis review "does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals." *Tyler v. Mitchell*, 853 S.W.2d 338, 341 (Mo. App. 1993). Thus, even under rational basis review the "classification adopted [must] rest[] upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed." *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. banc 1975). "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

As discussed below, the Attorney General asserts that the exclusion of same-sex couples advances the government's interest in (a) establishing objective standards for verification, (b) directing benefits to those who are most financially interdependent with the deceased employee, and (c) controlling costs. The categorical exclusion of same-sex couples from survivor benefits is not rationally related to any of these goals, and therefore fails even the most deferential standard of review.

1. Even Under Rational-Basis Review, Governmental Justifications Must Have Some Basis In Reality.

The Supreme Court has warned that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The Attorney General argues that actual facts are irrelevant in this case because "the government 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" Def. Mem. at 4 (quoting *Heller*, 509 U.S. at 319). But even if the government does not have the burden of producing its own evidence, that does not mean that the party challenging a classification is precluded from doing so. Under rational

basis review, "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and the legislation must be invalidated if the challenger is able to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," *Vance v. Bradley*, 440 U.S. 93, 111, (1979). As then-Judge Thomas explained when he sat on the D.C. Circuit: "If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison* . . . that has not been the law." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

Rational-basis review therefore frequently requires courts to examine a full evidentiary record. As the Fifth Circuit has explained, rational-basis review "cannot be conducted in a vacuum. The purpose itself must still be found 'legitimate,' a determination which may require a reference to the circumstances which surround the state's action." *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 936-37 (5th Cir. 1988). "Moreover, rationality analysis requires more than just a determination that a legitimate state purpose exists; it also requires that the classification chosen by the state actors be rationally related to that legitimate state purpose. Although the legitimate purpose can be hypothesized, the rational relationship must be real. Consequently, the determination of the fit between the classification and the legitimate purpose -- the search for rationality -- may also require a factual backdrop." *Id.* at 937 (citations omitted); *see also Hope For Families & Cmty. Serv., Inc. v. Warren*, No. 3:06-cv-1113, 2008 WL 630469 (M.D. Ala. Mar. 5, 2008).

In this case, the Attorney General's speculations about administrative difficulties and financial interdependence simply have no "footing in the realities" of domestic-partner benefits

and are fundamentally irrational. As discussed below, the rationales advanced by the Attorney General are contradicted by logic, common sense, and the experiences of thousands of private and governmental employers who have provided similar employment benefits to same-sex couples for over 20 years.[14]

2. Excluding Same-Sex Couples From R.S. Mo. § 104.140.3 Survivor Benefits Is Not Rationally Related To A Legitimate Governmental Interest In Establishing Objective Benefit Criteria.

The Attorney General primarily argues that excluding same-sex couples rationally furthers the state's interest in establishing objective and uniform criteria for eligibility determinations. According to the Attorney General, marriages can be "objectively verified" by "reviewing a marriage certificate" but providing survivor benefits to same-sex couples would require a "highly subjective analysis" of "various tangible and intangible aspects of a non-marital relationship." Def. Mem. at 7. None of these assertions has any "footing in the realities of" how

[14] In contrast to the present case, there was a rational basis for the differences in the availability and amount of pension benefits addressed in *Alderson*, 273 S.W.3d at 533, and *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.,* 256 S.W.3d at 98, cited by Defendant. In *Alderson*, 273 S.W.3d at 533, plaintiffs were employees who, although eligible for other retirement programs, complained that their exclusion from membership in the County Employees' Retirement Fund ("CERF") violated equal protection. The county's right to control the employees who were eligible for CERF membership and the CERF-eligible employees' lack of coverage by an alternative retirement fund provided a rational basis for the exclusion of plaintiffs from CERF membership. 273 S.W.3d at 537-38. In *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.,* the statutory difference in the statutory contributions for prosecuting attorneys in counties whose positions were made full-time *before* August 21, 2001, as compared to the contributions for those with positions in counties made full-time *after* August 21, 2001, were justified by the presumed intentions of citizens who voted to make the position full-time. On August 28, 2001, the required rate of county contribution to the retirement fund increased. Consequently, voters who gave their prosecutor a full-time position before August 28, 2001 "could not have made an informed choice given the substantial increase in the county contribution that was to come after that date." *Id.* at 103. "[T]he August 28, 2001 cutoff reflects the legislative intent to impose upon counties no greater obligation than that which the voters approved, and that, indeed, is a rational basis for the disparity." *Id.*

domestic partnership benefits are administered in Missouri and across the county. *Heller*, 509 U.S. at 321.

As an initial matter, it is impossible to conclude that a purpose of the statutory scheme is to ensure that claims for survivor benefits are "objectively verified" by "reviewing a marriage certificate." Def. Mem. at 6. *See Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7 (purported rationales for legislation must be rejected if "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation") (internal quotation marks omitted). Contrary to the Attorney General's assertions, Missouri does not provide survivor benefits to any couple that presents "a marriage certificate." Many same-sex couples also possess "marriage certificates" from other jurisdictions, and it is uncontested that Mr. Glossip and Mr. Engelhard would have married in another jurisdiction if their marriage had been recognized by Missouri. Under this statutory scheme, however, if a different-sex couple presents a marriage certificate from Iowa they receive survivor benefits, but if a same-sex couple presents a marriage certificate from Iowa, they do not. This unequal treatment demonstrates that the asserted interest in limiting proof to verifiable marriage certificate could not "conceivably or . . . reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (internal quotation marks omitted); *accord Hancock Indus. v. Schaeffer*, 811 F.2d 225, 237 n.10 (3d Cir. 1987).[15]

Even if the court were to credit the Attorney General's hypothesis that the purpose of excluding same-sex couples is to promote objective verification of claims, the Attorney General's arguments are based on the faulty assumption that same-sex couples' eligibility for

[15] Indeed, as discussed above, the impetus for the legislation was to ensure that same-sex couples would be excluded from benefits even if they had a marriage certificate from Hawaii. See Ptf. Mem. ~~at~~ VI.B.3 at pp. 25-27~~[x]~~.

survivor benefits would be determined on a *post hoc* basis after an employee has already died. If an employee is given the opportunity to designate a domestic partner in advance -- at the same time the employee designates who shall be the beneficiary of his or her life insurance policy and retirement accounts -- then there is no need to engage in a "subjective" analysis to determine whether a claimant is a bona fide domestic partner or to resolve competing claims from multiple people claiming to have had a relationship with a deceased employee. Indeed, even in this case, Mr. Engelhard's other employment documentation makes clear that he and Mr. Glossip were in a spousal relationship. As part of the forms he submitted to MDOT when he was hired, Mr. Engelhard specifically identified Mr. Glossip as his "fiancé." Because Mr. Engelhard made that designation himself, there is no need to engage in the "subjective" multi-factored analysis envisioned by the Attorney General.

Nothing prevents Missouri from establishing a uniform and objective definition of "domestic partner" for purposes of receiving survivor benefits. Indeed, the affidavits signed by other governmental bodies in Missouri show that they have established objective standards for determining whether a same-sex couple is eligible to receive domestic partner benefits with an affidavit documenting their domestic partnership. Although employers are free to specify their own eligibility standards, such affidavits typically require the employee to testify that both partners are 18 or older; not related to each other; live together; are not currently in a domestic partnership, civil union or marriage with a different person; mutually responsible for each other; and have been in an intimate, committed relationship of at least six-to-twelve months' duration.[16]

[16] Contrary to the assertions of the Attorney General, these other governmental employers in Missouri and throughout the country have not "chosen to allow their members to designate <u>any</u> person as a beneficiary." Def. Mem. at 5 (emphasis in original). Rather, they have limited the benefit to domestic partners who are in committed, intimate relationships that are the functional equivalent of marriage.

Moreover, these other Missouri governmental entities that provide benefits to same-sex domestic partners have found minimal additional administrative costs and no significant difference between the burdens of administering the benefit programs for employees with domestic partners as compared to the burdens of administering benefit programs for employees with spouses. Facts at ¶¶54, 55. And MPERS itself has admitted that it is unaware of any data supporting the Attorney General's hypothesis that providing benefits to same-sex domestic partners would be more administratively difficult than providing survivor benefits to different-sex spouses. Facts at ¶30.[17]

There is no rational relationship between the goal of providing objective standards and the categorical exclusion of same-sex couples. The Attorney General has hypothesized creative theories about how providing survivor benefits to same-sex couples would somehow be difficult to administer, but those speculations have no "footing in the realities of" how domestic partnership benefits are actually administered. *Heller*, 509 U.S. at 321.

3. The Exclusion of Same-Sex Couples Is Not Rationally Related To A Legitimate Governmental Interest In Allocating Pension Benefits To Those Most Financially Dependent On A Deceased Employee.

[17] Any administrative burden to determine whether Mr. Glossip and other same-sex survivors of deceased MSHP employees are eligible for survivor benefits is, therefore, very different from those in *Finley v. Astrue*, 601 F. Supp.2d 1092 (E.D. Ark. 2009), which addressed whether a rational basis supported denying a child born of an embryo implanted in a woman's womb after her husband's death a share in the former husband's estate and a right to his social security survivor benefits. Interests in deciding who are heirs for purposes of "orderly, timely, and final disposition of estate property," "benefitting those children that Congress perceives as most likely being dependent," and "administrative convenience by avoiding case-by-case determinations," were rational bases for the classifications. *Id.* at 1104, 1006. None of those interests rationally supports the classification here, since Mr. Glossip had a long-term and well-documented intimate relationship with Mr. Engelhard while he was alive that was comparable to a spousal relationship and since the relationships of other MSHP employees to their same-sex domestic partners can be easily established by objective criteria that avoid any case-by-case determinations after an MSHP employee's death.

The Attorney General also attempts to justify the exclusion of same-sex couples by claiming that heterosexual marriage serves as a valid proxy for identifying those couples who are most financially dependent on each other. According to the Attorney General, allocating survivor benefits only to married couples is rational because "[t]he legislature could rationally conclude that married couples are the most economically interdependent in comparison to unmarried couples." Def. Mem. at 5. But there is no rational relationship between the statutory pension scheme, which provides survivor benefits to all surviving spouses regardless of financial dependency, and the Attorney General's *post hoc* rationale of providing support to interdependent couples. "Although the legitimate purpose can be hypothesized, the rational relationship must be real." *Mahone*, 836 F.2d 921 at 937.

When the legislature has sought to target pension benefits based on financial dependency, it has done so explicitly. For example, in the Worker's Compensation Statute, the legislature limited death benefits to "dependent" relatives, defined as "a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury." R. S. Mo. § 287.240(4); *see Etling*, S.W.3d at 775. Husbands and wives are presumed to be dependents, but only if they actually live together or are legally liable for each other's support. R. S. Mo. § 287.240(4)(a). There is no similar limitation in the pension statutes at issue in this litigation.

Moreover, unlike the statute at issue in this litigation, the death benefits awarded under the Worker's Compensation Statute do not provide an irrebutable presumption that other relatives can never be dependents. As the Attorney General recognizes, if financial dependency were the key criteria -- as opposed to the presence of an intimate, committed relationship -- then other relatives such as siblings, cousins, and grandparents should also be given survivor benefits.

Def. Mem. 11. And, in fact, legislation like the Worker's Compensation Statute -- which, unlike the law at issue in this case, actually is designed to distribute benefits based on financial dependency -- offers those other relatives an opportunity to demonstrate their financial dependence on the deceased employee in order to qualify for death benefits. R.S. Mo. § 287.240(4). In contrast, the pension statutes for state troopers make no mention of financial dependency and provide no mechanism for other relatives to show their financial dependence. This conspicuous absence make clear that the pension statute for state troopers is not rationally related to the objective of limiting benefits those who are financially dependent on the deceased. *Cf. Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 336-37 (Mass. 2003) (finding no rational relationship between marital benefits and financial dependence because state provides benefits "to married couples regardless of whether they mingle their finances or actually depend on each other for support").

Indeed, the evidence shows that marital status is actually a poor proxy for financial interdependence. In Missouri, 71% of married couples live in households where both spouses work and 74% live in households where neither spouse is disabled. ~~[~~Facts at ¶65.~~cite]~~ Under the Attorney General's theory, the legislature gratuitously decided to give survivor benefits to over 70% of married couples who do not need them in order to provide support to the less-than 30% of married couples who do need them. That cannot plausibly have been the decision of a rational legislature. *See Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7 (purported rationales for legislation must be rejected if "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation") (internal quotation marks omitted).

To the extent that marriage is a proxy for financial interdependence, the existence of a long-term same-sex domestic partnership is just as good a proxy. Couples in which one partner

has a disability suggests some degree of interdependence, since the non-disabled partner's income might be particularly important for preserving the standard of living for both members of the couples. Facts at ¶~~53~~64. And the percentage of couples in which one partner has a disability is exactly the same, 28%, for both same-sex couples and different sex married couples. Facts at ¶~~53~~64. Similarly, the proportion of couples that has just one partner working in the paid labor force shows likely economic interdependence for the non-working partner. Facts at ¶~~54~~65. The proportion of same-sex couples in which only one partner is working, 21.4%, is very close to the percentage for married different-sex couples, 28.9%, and is even closer if one looks only at the proportion of couples raising children that have just one partner working in the paid labor force: 27.7% of same-sex couples and 31.2% of married different-sex couples. Facts at ¶65.~~*Id.*~~ National data tells a similar story about the similarities of same-sex and different-sex couples with respect to economic interdependence and other measures, such as racial diversity and average and median household incomes. Facts at ¶~~56~~66.

Despite these broad and consistent similarities, the Attorney General argues that the percentage of married couples in Missouri with only one wage earner is a few percentage points higher than the percent of committed same-sex couples with one wage earner (although both groups have an identical percent of couples in which one member has a disability). This miniscule difference does not provide a rational basis for categorically barring all same-sex domestic partners from receiving benefits. In light of the fact that the pension statutes automatically provide survivor benefits to all married different-sex couples even though 70% of those couples consist of people who are both employed, it is not rational to categorically exclude all same-sex couples from survivor benefits (including the more than 20% of those couples where only one member is employed) based on a purported desire to prioritize the needs of those

most likely to be financially interdependent. *See Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (invalidating classification in benefit statute that "is not a rational measure" of a household's need and "rests on an irrebuttable presumption often contrary to fact"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-536 (1973) (explaining that even if households with unrelated members were slightly less stable than households where everyone is related, a categorical ban on food stamp benefits for unrelated households is not "a rational effort to deal with these concerns").[18]

In the context of same-sex couples who are prohibited from marrying, there is no rational basis for using marriage as a proxy for financial interdependence. To be sure, a legislature may engage in speculation when making classifications under rational-basis review, but "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. "[I]n defining a class subject to legislation, the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). Because there is no such relevance here, Missouri's categorical exclusion of same-sex couples from the survivor pension benefits provided by R.S. Mo. § 104.140.3 violates equal protection.[19]

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[18] The Attorney General cites *Smith v. Sullivan*, 767 F. Supp. 186, 190 (C.D. Ill. 1991), *aff'd sub nom.*, 5 F.3d 235 (7th Cir. 1993), to support his argument that "[t]he legislature could rationally conclude that married couples are the most economically interdependent in comparison to unmarried couples," Def. Mem. at 5, but the case does not support his argument. In *Smith*, the regulation at issue treated married couples and those living as married couples as the same for purposes of reducing the Supplemental Security Income benefits paid them. Both have "economic interdependence which permits reduced benefits." *Smith*, 767 F. Supp. at 190. The court reasoned that Congress's decision not to reduce the benefits of same-sex couples who could not at that time "be legally married" could not "be said to be irrational." *Id.* Decided today in light of the existence of marriage for same-sex couples and the evidence of financial interdependence of such couples, the result in *Smith* would likely be different.

[19] The irrationality of the statute is underscored by the fact that Missouri excludes all same-sex couples from R.S. Mo. § 104.140.3 survivor benefits even if they have legally married in another

4. The Exclusion Of Same-Sex Couples Is Not Rationally Related To A Legitimate Governmental Interest In Controlling Costs

Finally, the Attorney General argues that the by "[l]imiting the class of eligible beneficiaries," the exclusion of same-sex couples "furthers the legitimate governmental interest in controlling the cost of benefits." Def. Mem. at 5.[20] Controlling costs is a legitimate governmental interest in the abstract, but the government may not attempt to advance that interest by making irrational and arbitrary distinctions among similarly situated people. *See Collins*, 727 F. Supp. 2d at 805. As the Supreme Court has explained, if the government could justify discrimination simply by asserting that it wanted to allocate scarce resources to a favored group, then "*any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). "Arbitrary selection can never be justified by calling it

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jurisdiction. The Attorney General has not given any reason for thinking that a same-sex couple that legally marries in Iowa, either while living there or during a visit to Iowa for that purpose, and moves to Missouri, or returns from a trip to Iowa married, is any less financially interdependent than a different-sex couple that legally marries in Iowa. Yet, under the current statutory scheme, the different-sex couple is eligible for R.S. Mo. § 104.140.3 benefits while the same-sex couple is not.

[20] *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996), cited by the Attorney General, Def. Mem. at 5, is not an equal protection case and, although the court noted that "cost concerns" can be a relevant governmental interest in a prison setting, cost considerations formed no basis of the court's holding. The Attorney General also cites *Robinson v. Fauver*, 932 F. Supp. 639 (D.N.J. 1996) to support his argument that cost is a rational basis for denying Mr. Glossip survivor benefits. *Robinson* was a challenge to a statute that required non-indigent inmates to pay for legal photocopying and medical care even though such payments were not required of indigent inmates. *Id.* at 644. The rule furthered the prison's interests in promoting inmates responsibility and management of money, while also conserving state resources. *Id.* at 644-45. Here, in contrast, the statutory classification in the pension statutes is not based on the financial need of survivor recipients and serves no interest independent of cost savings.

classification." *Petitt v. Field*, 341 S.W.2d 106, 108-109 (Mo. 1960) (internal quotation marks and citations omitted).[21]

A bare desire to prefer one group of people over another is not a legitimate state interest. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996). The Eighth Circuit explained this principle when it invalidated a Missouri statute that arbitrarily provided benefits to one group of disabled persons but not to others:

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

Ranschburg v. Toan, 709 F.2d 1207, 1211 (8th Cir. 1983); *accord Del. River Basin Comm'n. v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1099-100 (3d Cir. 1981) (rational basis review does not allow government to claim that "the purpose underlying a classification is the goal of treating one class differently from another").

Similarly, in this case, Missouri cannot justify its exclusion of same-sex couples simply by saying it seeks to prefer different-sex couples to same-sex couples when allocating state benefits. An intent to discriminate between same-sex and opposite-sex couples is not a legitimate state interest. *Cf. Ranschburg*, 709 F.2d at 1211; *Romer*, 517 U.S. at 634. The government must, at a minimum, identify "some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed." *Ewing*, 518 S.W.2d at

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

646. Because the Attorney General has failed to do so, the exclusion of same-sex couples fails even rational-basis review.[22]

E. The Exclusion Of Same-Sex Couples From The Survivor Benefits Provided By R.S. Mo § 104.140.3 Makes The Statute An Unconstitutional Special Law.

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

"The vice in special laws is that they do not embrace all of the class to which they are naturally related." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006) (internal quotation marks omitted). The discriminatory exclusion of same-sex couples

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[22] The Attorney General does not argue that withholding survivor benefits from same-sex couples is rationally related to a state interest in encouraging heterosexual couples to marry under a "responsible procreation" theory. Nor could he. Although rational-basis review does not require the government to articulate its purpose at the time a statute is enacted, it does require that the purpose could plausibly have motivated the statute. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *see also Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1415 (9th Cir. 1993). Here, the manifest purpose of the survivor benefits provided by R.S. Mo. § 104.140.3 is not to encourage "responsible procreation"; surviving spouses receive statutory benefits regardless of whether the couple had children together.

In any event, even if the goal of the legislature had been to encourage heterosexual couples to procreate within the confines of marriage, denying survivor benefits to same-sex couples such as Mr. Glossip and Mr. Engelhard is not rationally related to furthering that goal. *See Collins*, 727 F. Supp. 2d at 807 ("[D]enying benefits to heterosexual partners (who can marry in order to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry)."); *Alaska Civil Liberties Union*, 122 P.3d at 793 ("[M]aking benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.").

from survivor benefits is a perfect illustration of that vice. Instead of limiting the survivor benefits provided by R.S. Mo § 104.140.3 to different-sex couples, Missouri could have provided -- and is constitutionally obligated to provide -- those benefits generally to similarly situated committed couples regardless of their sex and sexual orientation.

1. The Exclusion Of Same-Sex Couples Makes The Statute A Facially Special Law Subject To Heightened Scrutiny.

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

The exclusion of same-sex couples from the survivor benefits provided by R.S. Mo § 104.140.3 is a special law on its face. "[W]hether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic." *City of Springfield*, 203 S.W.3d at 184; *accord*

Harris, 869 S.W.2d at 65. As discussed above in connection with the "suspect classification factors," there is scientific consensus that a person's sexual orientation is an immutable characteristic that cannot be changed either by a decision-making process or by medical intervention. Plf's Mem. VI.C.2.a, at pp. 30-38. Because person's sexual orientation is an integral component of his or her identity that in all relevant respects is "set, solid, and fixed," *City of Springfield*, 203 S.W.3d at 186, statutory distinctions on the basis of sexual orientation are facially special laws that must be supported by a substantial justification. [23]

The government has not even attempted to demonstrate a substantial justification for excluding same-sex couples from the pension benefits provided by R.S. Mo § 104.140.3. And it certainly cannot make that showing without providing actual evidence to support its claims. *City of Springfield*, 203 S.W.3d at 184; *see* Mo. Const. Art. III, § 40. Because the exclusion of same-sex couples is a facially special law, it is presumptively unconstitutional and must be invalidated by this Court.

2. Even If The Exclusion Of Same-Sex Couples Did Not Make The Statute A Facially Special Law, The Exclusion Lacks A Rational Basis.

Finally, even if the statute were not a facially special law, it would still have to be invalidated as unreasonable, arbitrary, and without a rational relationship to a legislative purpose.

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[23] The Attorney General states that the test for whether a law is invalid special legislation is whether the law "includes all who are similarly situated 'and omits none whose relationship to the subject matter cannot be reasonably distinguished from those included.'" Def. Mem. at 11 (quoting *Civilian Personnel Div. v. Bd. of Police Comm'rs*, 914 F.W.2d 23, 25 (Mo. App. E.D. 1995)). That is the standard that applies to laws that are not special on their face; it is not the standard for facially special legislation based on immutable characteristics. Although the law in *Civilian Personnel* conveyed a benefit to non-supervisory employees of the City of St. Louis, the benefits were open to "all who desire to be employed as non-supervisory civilian personnel of the Board" and "exclude[d] no one who would seek such a position." *Civilian Personnel*, 914 W.W.2d. at 25. Here, in contrast, benefits are not available to all who wish to marry. They are categorically denied to a particular subclass of couples based on a set of immutable characteristics.

Alderson 273 S.W.3d at 538. For the reasons set forth in Plf's Mem. IV.D, there is no rational justification for excluding committed same-sex couples from the survivor benefits provided to heterosexual couples by R.S. Mo. § 104.140.3 and the exclusion of same-sex couple from survivor benefits is therefore unconstitutional.

F. Plaintiff Is Entitled To Injunctive Relief.

Plaintiff's Petition seeks all relief that the court deems just and proper. The Attorney General, however, has moved to dismiss Plaintiff's request for preliminary injunctive relief. Def. Mem. at 12-13. Even if the Attorney General's motion to dismiss is interpreted to be a motion to strike Plaintiff's request for permanent injunctive relief, it should be denied. [24]

In order to secure a permanent injunction, a plaintiff must show that he or she has suffered an irreparable injury, damages are inadequate; the balance of hardships between the plaintiff and defendant weighs in favor of an injunction, and the public interest is served by granting a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The requirements for a permanent injunction are the same as those for a preliminary injunction, except instead of a *likelihood* of success on the merits, the movant must show *actual* success on the merits. *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999). For the same reasons that Mr. Glossip is entitled to prevail on the merits of his claims, he has also shown that the balance of hardships and the public interest weigh in favor of an injunction. The Attorney General's only objection to injunctive relief in particular -- as opposed to disagreement with the merits of the claims -- is that Mr. Glossip's injuries could purportedly be satisfied by monetary damage, which would create an adequate remedy at law. *See* Def. Mem. at 13 (quoting *Va. Petroleum Jobbers*

[24] Although the Attorney General's motion discusses a "preliminary injunction," Plaintiff has not sought a preliminary injunction. Instead, Plaintiff has requested declaratory relief, a *permanent* injunction, and such other relief as the Court may deem just and proper. *See* Pet. at 16-17.

Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)). But it is far from clear that Mr. Glossip has an adequate remedy at law or that money damages could provide full compensation.

A single payment for money damages would be inadequate because Mr. Glossip is suffering an ongoing harm that cannot be remedied with a single damages award. Mr. Glossip is entitled to annual payments under the pension statute. The harm he suffers is therefore ongoing and will repeat itself each year MPERS fails to provide him the regular survivor benefits he is entitled to. Without an injunction, even after a victory on the merits Plaintiff would be forced to return to court again and again in order to claim what he is owed. *See State ex rel. Kenamore v. Wood*, 56 S.W. 474, 488 (1900) ("one of the offices of an injunction is to prevent a multiplicity of suits").[25] The Attorney General's motion to dismiss the request for injunctive relief should be denied.

VII. CONCLUSION

For all these reasons, the Court should deny Defendant's motion to dismiss and grant Plaintiff's cross-motion for summary judgment.

[25] The survivor benefit statute provides only for annual payments; no lump sum payment is available under the statute, foreclosing any argument that Plaintiff could be fully and adequately compensated after a single lawsuit. *See* R.S. Mo. §§ 104.140.3, 140.090.3.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 15, 2011, I served the foregoing document by United States First Class mail to:

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