Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

IN THE SUPREME COURT OF MISSOURI

No. SC 92583

KELLY D. GLOSSIP,

Plaintiff-Appellant

v.

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

Defendant-Respondent.

On Appeal from Circuit Court for Cole County, Missouri

Case No. 10AC-CC00812

The Honorable Daniel R. Green

REPLY BRIEF OF APPELLANT

Maurice B. Graham #18029
Gray, Ritter & Graham, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
Fax: (314) 241-4140
E-mail: mgraham@grgpc.com

Steven Douglas Bonney, #36164
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, Missouri 64111
(816) 756-3113
Fax: (816) 756-0136
E-mail: dbonney@aclukswmo.org

Anthony E. Rothert, #44827
Grant R. Doty, #60788
American Civil Liberties Union of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
Fax: (314) 652-3112
E-mail: tony@aclu-em.org
grant@aclu-em.org

John Knight, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
180 N. Michigan, Suite 2300
Chicago, Illinois 60601

List of counsel continued on next page

Joshua Block, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Roger K. Heidenreich #40898
SNR Denton US LLP
One Metropolitan Square, #3000
St. Louis, MO 63102
(314) 259-5806
Fax: (314) 259-5959
E-mail: roger.heidenreich@snrdenton.com

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

TABLE OF CONTENTS

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

TABLE OF AUTHORITIES

Cases

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Constitutional Provisions

Statutes

Other Authorities

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

ARGUMENT

I. The exclusion of Mr. Glossip from access to survivor benefits violates Missouri's equal protection guarantee even if reviewed under the lowest level of review.

The exclusion of Mr. Glossip from access to survivor benefits violates Missouri's equal protection guarantee against discrimination on the basis of his sexual orientation even if reviewed under the lowest level of review. There is no rational relationship between the exclusion of same-sex couples from survivor benefits and any of the alleged state interests asserted by Defendant.

A. Mo. Rev. Stat. § 104.012 and Mo. Rev Stat. § 104.140 discriminate against Mr. Glossip on the basis of sexual orientation.

In Section I of its brief, Def. Br. 13-22, the Defendant fails to respond directly to Mr. Glossip's actual legal claim. Mr. Glossip argues that the survivor benefit statutes discriminate against him on the basis of sexual orientation by categorically denying same-sex couples any opportunity to qualify for benefits no matter how committed or financially dependent they are. Defendant, however, misconstrues Mr. Glossip's claim as an assertion of marital status discrimination, a challenge to the Marriage Amendment, and an argument that he has a fundamental right to survivor benefits. None of these characterizations is accurate.

The first step in analyzing an equal protection claim is to describe the classification at issue. *See Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. banc 2006) (first step of two-step analysis is to determine the nature of the classification to

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

decide the level of review); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 529 (1973) (starting review of Food Stamp Act of 1964 with description of the favored and disfavored classes). Defendant's first error is its characterization of the relevant classification as one made up of all unmarried surviving partners of state troopers. Here the relevant disfavored class is made up people who were in a committed and mutually dependent same-sex relationship with a state trooper who died in the line of duty. Mr. Glossip is a member of that class. His committed and mutually dependent relationship with Cpl. Engelhard was substantially similar to the relationship of a different-sex partner of a trooper killed in the line of duty in all ways relevant to the purpose of survivor benefits. Pl. Br. 2-5, 18-20. Yet, different sex couples were able to secure a valuable employment benefit for the surviving partner by choosing to marry while same-sex couples were categorically excluded from ever being able to secure the same protection no matter how committed and interdependent they were. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 788 (Alaska 2005) (explaining that "the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married"). The fact that same-sex couples are denied survivor benefits under Mo. Rev. Stat. § 104.012, whether or not they are legally married in a jurisdiction outside of Missouri, such as Iowa, makes the nature of the discrimination even clearer -- their exclusion from the benefits is the result of their sexual orientation and *not* their marital status.[1]

[1] In addition, Mo. Rev. Stat. § 104.012 contains its own discriminatory classification that would bar same-sex couples from survivor benefits even if Missouri's Marriage

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Secondly, the Defendant errs in its treatment of the scope of this case. Mr. Glossip is *not* challenging Missouri's ban on marriage for same-sex couples or any other way in which same-sex couples are subjected to disparate treatment. His argument is limited to one important protection that Missouri provides to the surviving life partners of state troopers killed in the line of duty. Questions about any other protections currently available only to heterosexual married couples will require the analysis of different facts and governmental interests and will not be resolved in this case.[2]

Amendment were repealed. It provides 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." *Id.* That distinction sets this case apart from the cases cited by Defendant, *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007); *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997); and *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992). Def. Br. 13, 24.

[2] *Cf. Donaldson v. State of Montana*, 2012 MT 288, 2012 WL 6587677 (Mont. Dec. 17, 2012) (affirming dismissal of challenge to Montana's failure to provide same-sex couples with all of the protections and responsibilities of marriage while reversing to allow plaintiffs to plead the specific "statute or statutes to put in issue and upon what legal grounds," based on the court's reasoning that constitutional review requires "careful consideration of the purpose and effect of the statute, employing the proper level of scrutiny" for each challenged statute).

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Mr. Glossip's claim must be considered separately from the Marriage Amendment. However, the Defendant confuses the question of the constitutionality of denying same-sex couples the freedom to marry with the narrow question presented here – whether the Defendant may deny Mr. Glossip survivor benefits by limiting them to different-sex married couples. Consequently, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *dismissed for want of substantial federal questions*, 409 U.S. 810 (1972); *Jackson v. Abercrombie*, 2012 WL 3255201 (D. Haw. Aug. 8, 2012), and *Sevcik v. Sandoval*, 2012 WL 5989662 (D. Nev. Nov. 26, 2012), all which address the constitutionality of excluding same-sex couples from marriage, are inapposite. The equal protection question in this case is distinct from the precise issue of whether denying marriage to same-sex couples violated the Fourteenth Amendment presented in *Baker*. *Cf. United States v. Windsor*, 699 F.3d 169, 178 (2d Cir. 2012), *petition for cert. granted*, 81 U.S.L.W. 3116 (Dec. 7, 2012), (finding that the constitutionality of "DOMA is sufficiently distinct from the question in *Baker*"); *Massachusetts v. U. S. Dep't of Health and Human Services*, 682 F.3d 1, 8 (1st Cir. 2012), *petition for cert. filed* (July 24, 2012) (12-13, 12-15) (holding in challenge to DOMA that "*Baker* does not resolve our own case").[3]

[3] For similar reasons, *Nat'l Pride at Work, Inc.* is also distinguishable, since that court's reasoning depended on Michigan's broad constitutional 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*," 732 N.W.2d at 143 n. 2 (quoting Mich. Const. 1963, art. 1, § 25) (emphasis added), and the broad

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Indeed, it is particularly ironic that Defendant attempts to defend the statutory scheme by relying on recent decisions in *Abercrombie* and *Sevcik*, which rejected challenges to the marriage statutes in Hawaii and Nevada because – unlike Missouri – those states provide same-sex partners with comprehensive domestic partnerships that include all the rights and responsibilities of marriage. *See Jackson*, 2012 WL 3255201, at *35-*37 (describing civil unions law in Hawaii); *Sevcik*, 2012 WL 5989662, at *4-*5 (describing domestic partner law in Nevada). Far from supporting the Defendant's position, these cases simply underscore that excluding same-sex couples from marriage is a different constitutional issue than excluding same-sex couples from other valuable benefits and protections.

While relying on inapposite cases from other jurisdictions concerning freedom to marry, Defendant completely fails to address cases that bear directly on Mr. Glossip's claims by holding that committed same-sex couples who were barred from marrying under state law were similarly situated to committed different-sex couples for purposes of particular employment benefits. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005); *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283 at *6 (N.H. Super. May 3, 2006); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir.

---

interpretation the Michigan court gave the amendment. *Id.* at 155. In contrast, Missouri's Marriage Amendment's prohibition is limited to the validity and recognition of marriage for same-sex couples. Mo. Const. art. I, § 33.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

2011), *petition for cert. filed* (July 3, 2012) (12-16); *Dragovich v. U.S. Dept. of Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012); *see also Donaldson*, 2012 WL 6587677.[4]

The Defendant further misapprehends Mr. Glossip's argument as claiming a "fundamental right to benefit from a retirement system by virtue of a party's relationship with a retirement system member." Def. Br. 14 (citing *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003)). Mr. Glossip has made no such claim.[5] *Marriage of Woodson* is also factually distinguishable, since that case involved an *ex-husband's* claim to equitable division of his wife's teacher retirement benefits.

B. There is no rational basis for excluding Mr. Glossip from survivor benefits.

In addition to misconstruing the classification at issue here and the scope of Mr. Glossip's argument, the Defendant relies on a cramped and distorted version of rational

---

[4] Defendant's only discussion of *Dragovich* relates to its argument against heightened scrutiny. Def. Br. 25. It describes *Diaz* as a "case involv[ing] the withdrawal of a previously existing right," Def. Br. 25-26, but fails to explain why any factual differences between the law challenged in *Diaz* and Mo. Rev. Stat. § 104.012 would change the legal analysis or result.

[5] In contrast, Mr. Glossip argued in the circuit court that denying him survivor benefits because he was in a domestic partner relationship with a person of the same sex violated his fundamental right to intimate association. However, he has not pursued that argument before this Court.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

basis review to argue that Mr. Glossip has failed to show that the denial of survivor benefits to Mr. Glossip because of the sexual orientation of Mr. Glossip and Cpl. Engelhard has no rational basis. Even though the state is not required to point to facts proving a rational connection between a governmental interest and the discriminatory classification, Mr. Glossip is free to do so, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and a statute must be invalidated under rational basis review 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). Speculation about rational bases for a classification "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). *See also* Pl. Br. 41-42. Such real-world grounding is required to make an alleged connection "debatable," Def. Br. 14, 15, since an alleged rational basis must at least be plausible in order to pass constitutional muster. *Nordlinger v. Hahn*, 505 U.S. 1, 14 (1992).

Here, Mr. Glossip's evidence and argument show that there is no rational connection between a legitimate governmental interest and the exclusion of Mr. Glossip from access to the survivor benefits the Defendant would provide him as the surviving partner of Cpl. Engelhard, but for the sexual orientation of Mr. Glossip and Cpl. Engelhard. There is no rational connection between the denial of survivor benefits to Mr. Glossip and state interests in: 1) preserving survivor benefits to those most likely to be economically dependent on the trooper; 2) objective determinations of eligibility for survivor benefits; and 3) controlling costs.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

1. Excluding same-sex couples is not rationally related to the preservation of survivor benefits to those most likely to be economically dependent on the trooper.

Committed same-sex couples are similarly situated to committed different-sex couples for purposes of financial interdependence. The Defendant focuses on the small difference between the number of single earner married couples (couples where only one of the two spouses works) as compared to the number of single earner same-sex couples – 28.9% versus 21.4% -- as sufficient evidence to show the statute's rational basis. However, Mr. Glossip showed in his opening brief that this small difference fails to show any rational connection between an interest in preserving benefits for those most likely to be economically dependent on a state trooper and the denial of benefits to him, because he and Cpl. Engelhard were in a same-sex as opposed to a different-sex committed relationship. *Cf. Moreno*, 413 U.S. at 535-36 (explaining that "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households" the government could not show that denying food stamps to unrelated households "constitutes a rational effort to deal with these concerns").

First, even if financial dependence were the reason Missouri provides survivor benefits, both partners in a large majority of both same-sex and different-sex couples work, so the connection between the single earner characteristic and financial dependence is extremely remote. Other financial dependence criteria, such as the number of couples where one partner has a disability, show that same-sex couples and different-sex married

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

couples, in fact, have very similar levels of financial dependence. Still other criteria, such as the lower income levels of same-sex couples in Missouri as compared to different-sex married couples, show that in many cases same-sex surviving partners of state troopers may have an even higher need for the financial protections of survivor benefits than different-sex couples, so that denying survivor benefits to partners of lesbian and gay state troopers undermines, rather than furthers, any governmental interest in assisting financially dependent family members. *See* Law Enforcement Gays and Lesbians Brf. 28-29.

The Defendant correctly notes that the single earner couple criteria is an imperfect proxy for levels of financial dependence, since he concedes that surviving spouses may "have lower earnings or less stable employment than Missouri State Highway Patrol employees." Def. Br. 17. He is right that some, if not most, "surviving spouses will have insufficient income to pay a mortgage or fully support their households in the event of a retirement system member's untimely death," Def. Br. 17, but the same is true of surviving same-sex partners of state troopers. See, e.g., Pl. Br. 5 (discussing the financial impact of Cpl. Engelhard's death on Mr. Glossip).

Second, by any measure, the connection between marriage and financial dependence is fairly remote: only 28.9% are single earner couples, while only 28% are couples where a partner is disabled. In contrast to other Missouri statutes, survivor benefits are not awarded only to dependent spouses but to all of them, whereas persons who are neither spouses nor children under the age of 18 are denied benefits even if they were completely dependent on the trooper for their financial support. See Pl. Br. 43-45.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

In an additional attempt to rationalize its asserted connection between marriage and financial dependence, the Defendant argues that only married couples are "legally responsible for each others' support[.]" Def. Br. 16. However, under Missouri law, committed same-sex couples also assume a duty of mutual support as a matter of contract law. Same-sex couples' eligibility for domestic partner employment benefits typically require them to sign an affidavit swearing that they have undertaken a duty of mutual support for one another. LF0015(¶48); LF0057(¶43); LF0185(¶17). And even without such an affidavit, the duty of mutual support can be imposed as part of an implied-in-fact contract. *Hudson v. DeLonjay*, 732 S.W.2d 922, 926 (Mo. App. E.D. 1987) (finding that long-term relationship created an implied-in-fact contract with a duty of mutual support); *accord In re Marriage of Estep*, 978 S.W.2d 817, 819 (Mo. App. S.D. 1998). In any event, Defendant fails to provide any explanation for why the duty of mutual support is relevant to a person's eligibility for a *death benefit*, which is provided only after a partner has already died.

Finally, even if married couples had higher degrees of financial interdependence as compared to same-sex domestic partners, that difference fails to rationally explain a law that limits survivor benefits to *different-sex* spouses of troopers. The Defendant quotes a portion of Mr Glossip's statement that "[i]t may be logical to use marriage as a proxy for commitment and financial interdependence when deciding whether *different-sex* couples should benefit from survivor benefits," Pl. Br. 19 (emphasis added), out of context as a concession that his failure to marry Cpl. Engelhard provides a rational basis for ruling against him. His "concession" was limited to different-sex couples who are

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

able to marry under Missouri law if they choose. Marriage cannot be a proxy for commitment and financial interdependence, when same-sex couples are denied the ability marry and are denied survivor benefits even if they have legally married. Any relationship that exists between marriage and the goal of providing compensation for "those most likely to be financially harmed or dependent up the wages of a deceased member," Def. Br. 17, fails to explain the exclusion of all same-sex committed couples – married or unmarried – from access to the benefits. *See Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) ("[I]n defining a class subject to legislation, the distinction that are drawn [must] have some relevance to the purpose for which the classification is made."); *State ex rel Classics Tavern Co., Inc. v. McMahon*, 783 S.W.2d 463, 466 (Mo. App. E.D. 1990) (finding no rational relationship where the classification "is unrelated to the achievement of the object of the law").

2. Excluding same-sex couples is not rationally related to making objective determinations of eligibility for survivor benefits and avoidance of conflicting claims.

The Defendant asserts in general that the efficient administration of survivor benefits supports limiting them to married couples. Def. Br. 19-21.[6]

[6] The Defendant does not dispute that the evidence Mr. Glossip has submitted proves that his loving, committed, and financially interdependent relationship with Cpl. Engelhard was substantially similar to a spousal relationship for the purpose of qualifying him for survivor benefits. Nor does it assert any risk of competing claims with Mr. Glossip's.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

The Defendant dismisses the evidence showing that survivor benefits may be provided to same-sex domestic partners through easily administered systems based on objective criteria as "immaterial" because "[t]he issue is not whether a different system for regulating benefits arguably can be administered easily or objectively in comparison to the challenged statutory system." Def. Br. 20. But evidence that benefits may be administered in a non-discriminatory way is exactly the point, since it shows the irrationality of excluding same-sex surviving partners from the benefits on that basis. *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("A classification . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation[.]); *Petitt v. Field*, 341 S.W.2d 106, 109 (Mo. 1960) (equal protection violated by "exclusions not based on differences reasonably related to the purposes of the Act"). A system that establishes objective criteria for designation of a domestic partner beneficiary for survivor benefits in advance ends the risk of case-by-case determinations and any risk of competing claims. Indeed, the error in the Defendant's argument is shown by the fact that even if a same-sex couple did produce an "objectively verifiable" marriage license from a state such as Iowa, the surviving same-sex partner of a state trooper would still be denied benefits under the statutory scheme.[7]

[7] The Respondent's only answer to this argument is that Mr. Glossip "is not challenging the validity of the Marriage Amendment, and he admittedly was never married to Trooper Engelhard." Def. Br. 21. This is not responsive to Mr. Glossip's argument and fails to account for the fact that Mo. Rev. Stat. § 104.012 would continue to deny survivor

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

The Defendant's speculation that "a non-marital relationship declared in an affidavit can terminate in an instant" and that married couples whose relationships have ended have "far greater incentives to update financial documents and beneficiary designation than unmarried persons," Def. Br. 21, has no "footing in the realities" of how Mr. Glossip and Cpl. Engelhard and other committed couples live their lives or employers' experiences with administering domestic partner benefits. *Heller*, 509 U.S. at 321. The record evidence cited in Mr. Glossip's brief shows the emotional and financial interdependence of Mr. Glossip and Cpl. Engelhard, Pl. Br. 2-5; and the similarities in financial interdependence and other measure of same-sex couples and different-sex married couples. Pl. Br. 45-46. Similarly, the record evidence cited in Mr. Glossip's brief regarding the minimal administrative burdens associated with domestic partner programs, including the absence of incidents of fraud, shows the irrationality of the Defendant's speculation. Pl. Br. 51. Finally, as noted above, same-sex couples may also be bound by enforceable contractual obligations comparable to married couples' duty of support. Mr. Glossip and Cpl. Engelhard, like different-sex couple, lived financially interdependent lives by merging their incomes, jointly undertaking loans, and jointly

---

benefits to same-sex married couples even if the Marriage Amendment were to be superseded by a future amendment and same-sex couples were allowed to marry.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

purchasing property. Pl. Br. 2-5. Shared lives of committed and financially interdependent couples are not "terminate[d] in an instant," as the Defendant claims.[8]

The cases cited by the Defendant fail to show any merits to administrative burden argument in this case. *Finley v. Astrue*, 601 F. Supp. 2d 1092 (E.D. Ark. 2009) and *Smith v. Shalala*, 5 F.3d 235 (7th Cir. 1993) address very different questions. The portion of *Finley* cited by the Defendant addresses whether a rational basis supported the incorporation of state intestacy law to determine that a child born of an embryo implanted in a woman's womb after her husband's death had no right to his social security survivor benefits. Interests in "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 incorporation of state intestacy law. *Id.* at 1106. In *Smith*, the challenged regulation treated married couples and those living as married couples as the same for purposes of reducing the Supplemental Security Income

[8] Defendant's argument that Missouri has a "longstanding public policy against recognizing common-law marriages and other intimate relationships that are not easily or objectively verifiable," Def. Br. 20, finds no support in *Nelson v. Marshall*, 869 S.W.2d 132 (Mo. App. W.D. 1993), since that case is limited to the question whether "a ceremonial marriage conducted . . . without the parties having ever applied for, or obtained, a marriage license," *id.* at 133-34, was a valid marriage. The only discussion of legislative intent addressed the state's prohibition of common-law marriage, *id.* at 134, but Mr. Glossip does not argue that he was married to Cpl. Engelhard.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

benefits paid them. The law was rationally related to interests in "achieving the most efficient use of available funds" "the prevention of fraud and the diminution of administrative burdens in eligibility assessment." 5 F.3d at 239.[9] *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997), finds that a marital status classification is supported by a state interest in "objective determinations of eligibility[.]" However, the record evidence in this case sets it apart from the *Rutgers* decision, since it is based on more than fifteen years of experience with domestic partner benefits since the date of that decision, shows that objective criteria for domestic partners eligibility may be established and that any burdens associated with administering the programs are minimal.

In any event, the government cannot justify otherwise irrational distinctions between similarly situated groups by arguing that the exclusion is easy to administer. *See Dep't. of Agric. v. Murry*, 413 U.S. 508, 513 (1973) (explaining that "the Constitution

[9] The court also rejected Smith's challenge to the underinclusive nature of the "deemed married" classification, which failed to include "same-sex couples who hold themselves out as married and opposite-sex couples who are merely housemates," 5 F.3d at 239, finding that the imperfection of the classification was insufficient to violate rational basis review. *Id.* at 240. Decided today in light of the existence of marriage for same-sex couples and the evidence of economic interdependence of such couples, the result in *Smith* might be different.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

recognizes higher values than speed and efficiency" and invalidating statute that used irrational proxy to establish indigence for purposes of food stamp eligibility).

3. Excluding same-sex couples is not rationally related to controlling costs.

The Defendant further argues that "if any and all unmarried claimants" were able to seek benefits "MPERS' actuarial and financial burdens would increase." Def. Br. 22. Mr. Glossip showed in his opening brief, Pltf. Br. 52-55, that an interest in saving money may not be used to justify arbitrary line-drawing between two similarly situated groups of people. Otherwise, "*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). *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) and *Robinson v. Fauver*, 932 F. Supp. 639 (D. N.J. 1996), cited by the Defendant, are distinguishable. *Hamilton* 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 for the court's holding. *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' personal responsibility and the ability to manage money, while also conserving state resources. *Id.* at 644-45. Here, in contrast, the statutes do not award benefits because of the financial need of survivors and serve no interest independent of cost savings.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

II. The denial of survivor benefits to Mr. Glossip should be reviewed under heightened scrutiny or at least under a heightened form of rational basis review.

In his opening brief, Mr. Glossip cited *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006), to argue that this Court may construe Missouri's equal protection guarantee more expansively than federal court decisions that have rejected heightened scrutiny for sexual orientation classifications. In response, the Defendant incorrectly implies that an independent construction of Art. I, sec. 2 is required for this Court to adopt heightened scrutiny as the correct standard of review. Def. Br. 23. That is incorrect, since several federal courts, including most recently the Second Circuit in *Windsor*, 699 F.3d at 181-85, have concluded that heightened scrutiny is the standard of review for sexual orientation classifications. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-990 (N.D. Cal. 2012), *petition for cert. filed* (July 3, 2012) (No. 12-16); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883, *13-*35 (D. Conn. July 31, 2012), *petition for cert. filed* (Sept. 11, 2012) (No. 12-302); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (Dec. 7, 2012). Additionally, the highest courts of California, Connecticut, and Iowa have also concluded the intermediate or strict scrutiny should be applied to sexual orientation classifications. *See* Pl. Br. 32.

The Defendant cites other federal decisions that applied rational basis review to sexual orientation classifications. However, all of the circuit court decisions cited were

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

decided before *Lawrence v. Texas*, 539 U.S. 558 (2003) overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), or relied on pre-*Lawrence* case law, Pl. Br. 31, n. 6, so those decisions have little, if any, continuing authority. *See* Pl. Br. 29-30. It is not the level of scrutiny in the *Lawrence* Court's due process analysis that makes pre-*Lawrence* decisions unpersuasive, as the Defendant implies. Def. Br. 25. Rather, it is the Court's termination of the state's previous authority to criminalize intimate same-sex activity that seriously weakens them, since that authority can no longer be the basis for rejecting heighted scrutiny for sexual orientation classifications.[10]

The Defendant mistakenly argues that the heightened scrutiny analysis of *Windsor*, *Golinski*, and *Pederson* is limited to the Defense of Marriage Act context. In

[10] The Attorney General's assertion that "[t]his Court has rejected 'quasi-suspect classes' as a viable concept under Missouri law," Def. Br. 24, is incorrect. Although the Missouri Supreme Court noted in *Harrell* that it had not definitively decided whether the notion of a "quasi-suspect class" is a viable concept, *see Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 (Mo. banc 1989) (reserving this question), it subsequently used the "quasi-suspect" terminology without any reservations in *Berdella v. Pender*, 821 S.W.2d 846, 851 (Mo. banc 1991). Even more importantly, regardless of the terminology it has used, the Missouri Supreme Court has repeatedly affirmed that "intermediate scrutiny" is a viable concept that applies to gender classifications. *See, e.g.*, *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992) ("Discrimination based on sex is a constitutionally suspect classification subject to intermediate scrutiny.").

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

general, however, classifications that are subject to heightened scrutiny in one context will be reviewed under the same level of scrutiny in other contexts. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have held that '*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.'"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary" based on its objective). There was nothing about the heightened scrutiny analysis in *Windsor*, *Golinski*, and *Pederson* that was conditioned on the specific nature of DOMA. Rather, the level-of-scrutiny analysis was independent of the specific protections denied by DOMA. Moreover, if the Defendant's argument were accurate, then all of the cases it cites in support of its argument for rational basis review would similarly be distinguishable, solely on the ground that different legal rights were at issue in each of those cases from the right to survivor benefits at issue in the present case.

As shown in Mr. Glossip's opening brief, lesbians and gay men meet all four heightened security criteria, including political powerlessness in the United States and especially in Missouri; the Defendant's arguments to the contrary should be rejected. The Defendant does not dispute that gay people meet the first three of these criteria and instead bases its entire case against heightened scrutiny on the factor of "political powerlessness." Defendant asserts that success in four recent ballot initiatives in Minnesota, Maine, Maryland, and Washington shows the political power of gay men and lesbians. However, the U.S. Supreme Court has never required a group to show an

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

inability to secure *any* protections for itself through the political process. *Windsor*, 699 F.3d at 184-85. The limited protections currently achieved by lesbians and gays in a few states are nowhere close to the comprehensive federal legislation protecting women at the time sex was recognized as requiring heightened scrutiny. *Id.*[11]

Moreover, recent advances by gay people in other states do not say anything about the political powerlessness of gay people *in Missouri*. As recounted by the amicus brief filed by Missouri elected officials, there is a long history of discrimination against gay people in Missouri and gay Missourians have consistently lacked the political power to

[11] Finally, the four states where there were recent political victories are emblematic of the political burdens placed on lesbians and gays, since all of them required gays to defend their rights in ballot measures, even though in Maine, Maryland, and Washington they had already won marriage in their state legislatures. *See* David Crary, *Gay marriage, marijuana backed in historic votes*, SEATTLE TIMES, Nov. 7, 2012, Appendix to Appellant's Reply Brief, A1. This time the opponents of lesbians and gays failed, but the cost of prevailing for lesbians and gays was extremely high. *See*, *e.g.*, Report of Minnesotans United for All Families to Campaign Finance And Public Disclosure Board (showing more than $10 million in total expenditures and disbursements for group that opposed marriage amendment), Appendix to Appellant's Reply Brief, A4. The history of lesbians and gays as well as recent empirical research show the continued vulnerability of gays to political losses. Missouri Law Prof. Br. 7-16. Mayor Francis Slay, et al. Br. 11-22.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

secure the basic protections that are provided to other vulnerable minority groups. *See* Mayor Francis Slay, et al. Br. 11-13; *see also* Law Prof. Br. 8-9.

If this Court chooses against adopting a form of heightened scrutiny for sexual orientation in this case, it should at least apply a more careful form of rational basis review because of the history lesbians and gays have experienced in Missouri as a disfavored group, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (closer scrutiny where group is singled out for discriminatory treatment that "seems inexplicable by anything but animus toward the class it affects"), and the survivor statutes place a burden on the personal relationships of lesbians and gays by excluding surviving partners of state troopers from the benefits because of the same-sex nature of their relationship. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). Like the statutes reviewed in *Romer*, *Moreno*, 413 U.S. at 534-36, and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), the survivor benefits statutes are grounded on irrational stereotypes and groundless fears associated with lesbian and gays. *See* Law Prof. Br. 10, Pl. Br. 24-25.

III. Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 are special laws because they discriminate on the basis of sexual orientation and fail even rational basis review.

The Defendant argues incorrectly that Mo. Rev. Stat. §§ 104.012 and 104.140 are not special laws "because its beneficiary classification is open-ended." Def. Br. 28. The classification that resulted in the denial of benefits to Mr. Glossip is based on sexual orientation, rather than marital status, so it is in fact a closed-ended classification. *See* Pl.

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Br. 56-57. The Defendant does not even attempt to explain how the facts show a substantial justification for excluding same-sex couples from survivor benefits. Moreover, even if the statutes were open-ended, they fail the rational basis test for the reasons set out in Section I.B. above and in Section III of Mr. Glossip's opening brief. See Pl. Brf. at 36-54.

IV. Mr. Glossip is entitled to injunctive relief, since damages are inadequate.

The Defendant argues that a monetary award of "a specific monthly or annual benefit payment" will "adequately compensate" Mr. Glossip's injury, so his claim for injunctive relief should be denied. Def. Br. 29. However, an order to make monthly payments is a form of injunctive relief, rather than damages. *See, e.g., Chu Drua Cha v. Noot*, 696 F.2d 594 (8th Cir. 1982) (remanding with instructions that district court should grant injunction reinstating refugees' cash assistance benefits pending compliance with notice and hearing requirements); *cf. Serv. Emps. Int'l Union Local 2000 v. State of Missouri*, 214 S.W.3d 368 (Mo. App. W.D. 2007) (affirming ruling that State wrongfully denied cost-of-living pay increases to state employees in case seeking declaratory and injunctive relief). Mo. Rev. Stat. §§104.140.1(1) and 104.090.3 provide for monthly benefits for the life of the trooper's spouse, so that a single award of damages would be impossible to quantify and presumptively inadequate. *See Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). The alternative of "a multiplicity of corrective actions" is also inadequate. *See State ex rel. Missouri Highway & Trans. Comm'n v. Marcum Oil Co.*, 697 S.W.2d 580, 581-82 (Mo. App. W.D. 1985).

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

CONCLUSION

For the reasons given in this brief and Mr. Glossip's opening brief, this Court should reverse the trial court's dismissal of Mr. Glossip's petition and denial of his summary judgment motion and enter an order granting summary judgment to Mr. Glossip.

Respectfully Submitted,

/s/ Maurice B. Graham
Maurice B. Graham #18029
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
Fax: (314) 241-440
E-mail: mgraham@grgpc.com

Joshua Block, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Roger K. Heidenreich, #40898
SNR Denton US LLP
One Metropolitan Square, #3000
St. Louis, MO 63102
(314) 259-5806
Fax: (314) 259-5959
E-mail: roger.heidenreich@snrdenton.com

Anthony E. Rothert, #44827
Grant R. Doty, #60788
American Civil Liberties Union of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
Fax: (314) 652-3112
E-mail: tony@aclu-em.org;
grant@aclu-em.org

Steven Douglas Bonney, #36164
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, Missouri 64111
(816) 756-3113
Fax: (816) 756-0136
E-mail: dbonney@aclukswmo.org

John Knight, *pro hac vice*
LGBT & AIDS Project
ACLU Foundation
180 N. Michigan, Suite 2300
Chicago, Illinois 60601

CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned certifies that this brief: includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) pursuant thereto, contains 6,884 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06.

/s/ Maurice B. Graham
Counsel for Appellant

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

Electronically Filed - Supreme Court - January 28, 2013 - 03:42 PM CST

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 28th day of January, 2013, electronically filed a copy of the forgoing pursuant to the automated filing system established by Missouri Supreme Court Operating Rules 1.03 and 27, to be served upon counsel for the parties by operation thereof:

James R. Ward, #43422
Emily A. Dodge, #53914
P.O. Box 1930
Jefferson City, Missouri 65102-1930
Attorneys for Defendant-Respondent

/s/ Maurice B. Graham
Counsel for Appellant