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. 10-CC00434

The Honorable Daniel R. Green

REPLY TO ADDITIONAL BRIEF OF RESPONDENT PURSUANT TO COURT ORDER OF JUNE 27, 2013

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ARGUMENT

Introduction

United States v. Windsor, 133 S. Ct. 2675 (2013) reinforced basic equal protections principles and confirmed their applicability to laws that single out same-sex couples for differential treatment. It consequently offers strong support for Kelly Glossip's argument that Mo. Rev. Stat. § 104.012 and Mo. Rev. Stat. § 104.140 violate Missouri's constitutional guarantee of equal protection. Glossip outlined *Windsor*'s support in his Additional Brief for his arguments: 1) that the survivor benefit statutes discriminate against him on the basis of his sexual orientation, 2) that heightened scrutiny should apply to the classification, and 3) that the statutes fail to withstand any level of constitutional review. Glossip addressed not only *Windsor*, but also *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 2884 (2013), since the U.S. Supreme Court denied *certiorari* in that case the day after deciding *Windsor*, and *Bassett v. Snyder*, No. 12-cv-10038, 2013 WL 3285111 (E.D. Mich. Jun. 28, 2013), since it relied in part on *Windsor* to strike down a statute similar to the statutes challenged by Glossip. In its Additional Brief, Respondent first argues that *Windsor* "affirm[ed] Missouri's authority to define the marital relation[,]" is limited to its facts, and failed to "decide that classifications based on sexual orientation are subject to 'heightened scrutiny.'" (Resp. Br. at 5-6.) Second, Respondent asserts that *Diaz* and *Bassett* are distinguishable since both involved challenges to "legislation that took away previously existing rights that other states had chosen to grant to non-marital couples." (Resp. Br. at 7.) Neither argument has merit.

I. Glossip's suit is not about Missouri's ability to decide who can marry and *Windsor*'s equal protection analysis strongly supports his request for survivor employment benefits.

Kelly Glossip's suit does not challenge Missouri's authority to decide who can or cannot marry. His case is about a single protection that Respondent provides to the surviving life partners of non-gay state troopers killed in the line of duty. *See also* Pl. Reply 3-5. Glossip *is not* challenging the constitutionality of denying Missouri same-sex couples the freedom to marry; he *is* challenging Defendant's denial of survivor employment benefits to him by limiting them to different-sex married couples *and* refusing to make them available to same-sex domestic partners, such as Mr. Glossip. Additionally, his challenge does not require this Court to decide whether other spousal protections currently only available to heterosexual married couples must be provided to lesbian and gay domestic partners, since questions about other benefits will require constitutional review of different facts, laws and their legislative histories, and governmental interests.[1]

[1] *Cf. Donaldson v. State*, 292 P.3d 364, 367 (Mont. 2012) (affirming dismissal of challenge to Montana's failure to provide same-sex couples with all 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).

In fact, Missouri's Marriage Amendment, Mo. Const. art I, § 33, does not decide this case. Like the similar marriage amendments in Alaska's and Arizona's constitutions, Missouri's Marriage Amendment "does not address the topic of employment benefits at all." *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 786 (Alaska 2005). Consequently, many Missouri public employers already offer their employees' same-sex domestic partners some or all of the benefits they offer to the spouses of their employees without running afoul of the Marriage Amendment. LF0057-58(¶¶44, 46); LF0208(¶7); LF0213(¶5); LF0020(¶9); LF02244(¶4); LF0227(¶4). They do so through objective criteria that narrowly defines domestic partners to include only those who are mutually responsible for one another and have been in an intimate, committed relationship for at least six-to-twelve months, among other factors.[2]

"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). The Supreme Court of Alaska addressed precisely this issue when it

[2] The definition of domestic partner typically includes only partners who 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, with employees and their partners proving their eligibility with an affidavit documenting their domestic partnership. LF0015(¶¶48-49); LF0057-61(¶¶43-53); LF0185(¶17); LF0207-29.

concluded that the Alaska's constitutional amendment prohibiting marriage for same-sex couples did not prevent the court from awarding equal employment benefits to same-sex domestic partners 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; *see also Diaz*, 656 F.3d at 1010, 1012-15.

Even though Glossip's case is not about marriage or access to the federal spousal benefits and responsibilities, the equal protection analysis of the *Windsor* decision offers compelling guidance in his case. Respondent suggests that the decision was based on federalism principles, but the Court said otherwise. The Court found it "unnecessary to decide whether [DOMA's] federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Windsor*, 133 S. Ct. at 2692. Instead, the Court found that DOMA "violates basic due process and equal protection

principles." *Id*. at 2693. And "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," was simply one of several factors showing that it had "the purpose and effect of disapproval of [same-sex couples]." *Id.* Its legislative history, its title, and its complete lack of a legitimate purpose other than to hurt lesbians and gay men showed that DOMA violated "basic . . . equal protection principles[.]" *Id*. at 2693, 2696.

As shown in Glossip's Additional Brief, *Windsor*'s analysis of basic equal protection principles is highly persuasive authority on the question whether there can be a rational basis under the Missouri Constitution for singling out and denying lesbian and gay state troopers and their same-sex domestic partners crucial survivor benefits, as Missouri did when it amended its pension statutes in 2001. *See* 2001 Mo. Legis. Serv. S.B. 371 § 2 (codified at Mo. Rev. Stat. § 104.012); *cf. Bassett*, 2013 WL 3285111, at *25 (applying *Windsor*'s reasoning to strike down law banning employment benefits for the domestic partners of local government employees). *Ocello v. Koster*, 354 S.W.3d 187 (Mo. banc 2011), cited by Respondent, is inapposite, since it failed to address animus towards an identifiable group of people but was concerned with the question whether one legislator's statements "disparaging sexually-oriented businesses demonstrate[d] the [entire] legislature's intent to suppress sexually oriented speech." *Id.* at 202. In contrast, *Windsor* found that a law whose legislative history and statutory effect evidenced animus towards lesbians and gays failed any level of constitutional review.

Finally, the *Windsor* Court affirmed the Second Circuit's ruling without deciding the question whether heightened scrutiny should apply to a sexual orientation

classification. It did so, since the "guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group[,]" and "DOMA cannot survive under these principles." *Id*. at 2693 (internal quotations and citations omitted). It was unnecessary for the Court to apply heightened scrutiny, since DOMA could not survive any level of constitutional review. *Id*.; *see also Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (finding anti-gay initiative violated the equal protection without decided whether heightened scrutiny should apply because the discrimination lacked even "a rational relationship to legitimate state interests" and thus was "inexplicable by anything but animus towards the class it affects"). The Supreme Court's *Windsor* decision teaches that the statutes challenged by Glossip fail even rational basis review because of the anti-gay animus evidenced in the passage of the 2001 pension statute amendments. However, the Second Circuit's opinion remains as persuasive authority regarding the applicability of heightened scrutiny to the sexual orientation classification he challenges.

II. The reasoning of *Diaz* and *Bassett* is not limited to laws that take away previously conferred benefits.

Glossip cited *Diaz* and *Bassett* as authority for his argument that the limitation of survivor benefits to spouses in a state where marriage is denied to same-sex couples is a sexual orientation classification. He also cited the decisions' reasoning for the proposition that where anti-gay animus animates the passage of a law to deny benefits to same-sex partners of public employees the law fails equal protection review. Respondent fails to explain why the precedential value of *Diaz* and *Bassett* is lessened with respect to

either of these points, simply because they concern laws that take away or ban existing benefits for the domestic partners of lesbian and gay employees while Glossip's case concerns a law that declares same-sex domestic partners ineligible for the benefits provided to different-sex spouses.

Whether taking away benefits from the domestic partners of same-sex employees or denying them in the first place, a statutory limitation of employment benefits to spouses in a state where same-sex couples cannot legally marry is a sexual orientation classification as shown not only by *Diaz* and *Bassett* but also by *Alaska Civil Liberties Union*, 122 P.3d at 788, *Dragovich v. U.S. Dep't of Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012), and *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *6 (N.H. Super. Ct. May 3, 2006), all of which concern domestic partner employment benefits that had not been previously provided to same-sex partners. Similarly, whether a law takes away benefits from the domestic partners of same-sex employees or denies them in the first place, the legislative animus towards lesbians and gays shown by such legislation is a sufficient basis to strike down the survivor benefits Glossip challenges. *See Windsor*, 133 S. Ct. at 2693, 2696 (finding animus behind passage of DOMA to deny married same-sex couples federal spousal benefits and responsibilities even though they had never before been provided).

CONCLUSION

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

Respectfully Submitted,

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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 2,014 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 9th day of August, 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:

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