

No. SC92583

IN THE SUPREME COURT OF MISSOURI

Kelly D. Glossip,

Plaintiff-Appellant

v.

Missouri Department of Transportation
and Highway Patrol Employees'
Retirement System,

Defendant-Appellee.

Appeal from the Circuit Court of Cole County, No. 10AC-CC00812

Honorable Daniel R. Green

**AMICUS CURIAE BRIEF OF LAW ENFORCEMENT GAYS AND
LESBIANS (LEGAL) INTERNATIONAL AND ITS AFFILIATED
CHAPTERS**

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Defendant’s counsel, James R. Ward, Assistant Attorney General, has consented to our filing of this Amicus Brief.

Plaintiff’s counsel, Joshua Block, LGBT & AIDS Project ACLU Foundation, has consented to our filing of this Amicus Brief.

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

This Amicus Brief adopts the jurisdictional statement and statement of facts as set forth in Appellant's brief.

STATEMENT OF INTEREST OF AMICI

Law Enforcement Gays and Lesbians (LEGAL) International is an umbrella organization comprised of independent statewide and multi state-regional chapters, spanning the United States and the globe. The Chicago Lesbian Gay Police Association/Gay Officers Action League (LGPA/GOAL Chicago), the Florida Law Enforcement Gays and Lesbians (FL-LEGAL), the Gay Peace Officers Association of Southern California (GPOA-SC) and the Michigan Gay Officers Action League (MI-GOAL) are several of LEGAL's chapters.

Chapters exist to advocate for the equal treatment of lesbian, gay, bisexual and transgender ("LGBT") law enforcement, public safety, corrections and criminal justice professionals, and their non-gay allies. Together, they share a mission of supporting their LGBT law enforcement professionals in the workplace, educating non-LGBT law enforcement personnel through such programs as sensitivity training and promoting positive relationships between law enforcement and the broader LGBT community through community outreach programs.

INTRODUCTION

Highway patrol officers put their lives and safety at risk to protect the people of Missouri. In return for this commitment, the State of Missouri (the “State”), through the State’s Department of Transportation and Highway Patrol Employees’ Retirement System, provides a survivor pension benefit to the spouses of officers killed in the line of duty. With the peace of mind and financial security that this survivor benefit provides, officers can serve the State and also start a family, buy a house, and have children without worrying about leaving their family in financial distress in the event they are killed in the line of duty or otherwise die.

This benefit, however, is not available to lesbian and gay highway patrol officers, even though lesbian and gay officers also form committed, long-term relationships, have children, and worry about what will happen to their loved ones if they are killed while serving the people of Missouri. Lesbians and gay men serving the State of Missouri currently do not receive this benefit because an officer must be married to someone of the opposite sex for his or her partner to be eligible. Unlike their non-gay colleagues, lesbians and gay men cannot get married in Missouri, and marriages entered into by same-sex couples in other states are not recognized under Missouri law.

Simply because the Missouri Constitution prohibits same-sex couples from marrying does not mean, however, that it permits the State to discriminate against

lesbians and gay men with respect to survivor pension benefits. Indeed, the equal protection and “no special laws” provisions of the Missouri Constitution apply equally to lesbians and gay men as to their non-gay counterparts. By conditioning the survivor pension benefit on marital status, the State expressly withholds that benefit from the surviving partners of lesbian and gay officers—and no others—in violation of the Missouri Constitution.

Furthermore, although the State has argued that various governmental interests purportedly justify withholding the survivor pension benefit from lesbian and gay officers, an examination of these justifications reveals that none of them pass constitutional muster. Thus, *amici* respectfully submit that the Court must reverse the circuit court’s decision granting summary judgment to the State.

Amici submit this brief to provide the Court with the perspective of lesbian and gay law enforcement officers on several points. First, this brief explains why the survivor pension benefit is crucial to LGBT officers. Second, this brief explains why the denial of the benefit constitutes discrimination on the basis of sexual orientation. Finally, this brief explains why the government interests that purportedly justify this discrimination—namely, establishing objective benefit criteria, allocating benefits to those most likely to be harmed by an employee’s death, and controlling costs—should be rejected by this Court as constitutionally infirm justifications, regardless of the level of scrutiny the Court applies.

ARGUMENT

I. THE STATE IS DENYING LESBIAN AND GAY POLICE OFFICERS A BENEFIT THAT IS CRUCIAL TO THEM.

As organizations comprised of law enforcement officers who face significant risks at work, *amici* respectfully submit that the benefit at issue in this case is crucial to the well-being of all law enforcement officers—including LGBT officers.

A. Police officers face a significant risk of being killed in the line of duty.

Police officers put their lives at risk simply by going to work. Nationwide, nearly 20,000 police officers have died in the line of duty since 1791.¹ Of those, 628 were from Missouri.² In the history of the Missouri State Highway Patrol, 31 officers have been killed in the line of duty.³ Despite improvements in police

¹ Nat'l Law Enforcement Officers Memorial Fund, *Law Enforcement Facts: Key Data about the Profession*, <http://www.nleomf.org/facts/enforcement> (last visited Nov. 1, 2012).

² Nat'l Law Enforcement Officers Memorial Fund, *Officer Deaths by State*, <http://www.nleomf.org/facts/officer-fatalities-data/state.html> (last visited Nov. 1, 2012).

³ Mo. State Highway Patrol, *The Ultimate Sacrifice – Killed in the Line of Duty*, <http://www.mshp.dps.missouri.gov/MSHPWeb/UltimateSacrifice/index.html> (last visited Nov. 1, 2012).

training and procedures, the job remains a dangerous one. In 2011, 163 police officers were killed in the line of duty nationwide.⁴ A U.S. Bureau of Labor Statistics study found that police officers, detectives, and supervisors have a fatality rate that is more than three times higher than the rate than that of the average worker.⁵

B. The death of a police officer has devastating consequences on the surviving family members.

Police officers' family members always know that their loved ones are in danger at work. The average age of officers killed in the line of duty in 2011 was 41.⁶ At that age, many officers have families and young children. The entire family, not just the police officer, takes on the risk of death or serious injury. Family members' lives, including the lives of children, can be torn apart in an

⁴ Nat'l Law Enforcement Officers Memorial Fund, *Officer Deaths by State*, <http://www.nleomf.org/facts/officer-fatalities-data/state.html> (last visited Nov. 1, 2012)

⁵ Guy A. Toscano, *Dangerous Jobs*, Compensation and Working Conditions (Summer 1997), www.bls.gov/iif/oshwc/cfar0020.pdf.

⁶ Nat'l Law Enforcement Officers Memorial Fund, *Research Bulletin: Firearms-related Incidents are the Leading Cause of Officer Fatalities in 2011*, (Preliminary 2011) 4, <http://www.nleomf.org/assets/pdfs/reports/2011-EOY-Report.pdf> (last visited Nov. 1, 2012)

instant, creating not just emotional pain, but financial turmoil as well.

When an officer dies in the line of duty, the officer's family instantly loses the salary and benefits of an important breadwinner:

“This loss of life is tragic in itself, but the tragedy is further compounded because the officers leave behind family members – spouses, children, parents, siblings (and fellow officers) – whose lives are forever changed by their untimely loss.”⁷

The impact on the surviving spouse of a police officer's death in the line of duty is particularly painful.⁸ Many spouses experience more distress than parents

⁷ Frances Stillman, *Line of Duty Deaths: Survivor and Departmental Responses*, Nat'l Inst. of Just. 1 (1986), available at <https://www.ncjrs.gov/pdffiles1/Digitization/102835NCJRS.pdf>.

⁸ Laurence Miller, *Line-of-Duty Death: Psychological Treatment of Traumatic Bereavement in Law Enforcement*, 9 Int'l J. of Emergency Mental Health 13-23 (2007), https://www.psychceu.com/miller/Miller_LODD.pdf (noting that spouses “must live with the tragedy 24/7 . . .”).

or siblings.⁹ Spouses also experience depression and loneliness.¹⁰ Notably, the Stillman study of police survivor responses, which was funded by the U.S. Department of Justice, reported that many spouses felt that “others did not understand and were unsympathetic toward them.”¹¹

The same study, as well as another Department of Justice-funded study, found high rates of post-traumatic stress disorder among surviving spouses.¹²

⁹ Frances Stillman, *Line of Duty Deaths: Survivor and Departmental Responses*, Nat’l Inst. of Just. 79 (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/102835NCJRS.pdf> (“Some of the differences reflect the loss of companionship, change in social status, and new relationship patterns that apply after loss of the spouse .”).

¹⁰ *Id.* (“They felt more alienated than the parents, and reported spending too much time alone and having no one close to confide in.”).

¹¹ *Id.*

¹² John M. Violanti, *Line-of-Duty Deaths: Survivor Responses and Departmental Policies Study II* (1997), available at http://www.dc-cops.org/PDFs/Research_in_Brief.pdf; Frances Stillman, *Line of Duty Deaths: Survivor and Departmental Responses*, Nat’l Inst. of Just. 58 (1986), available at <https://www.ncjrs.gov/pdffiles1/Digitization/102835NCJRS.pdf>. The rates did not seem to vary depending on “whether the death was accidental or felonious.” *Id.* at 61-62. See also Laurence Miller, *Line-of-Duty Death: Psychological Treatment of Traumatic Bereavement in Law Enforcement*, 9 Int’l J. of Emergency Mental Health 16 (2007),

Symptoms of surviving spouses include difficulty concentrating and making decisions, confusion, hostility, loneliness, fear of people, fear of leaving their home, vulnerability, and lack of trust.¹³ Surviving spouses also experience a reduction in positive feelings and overall happiness.¹⁴

The psychological and physical impacts on the spouses of fallen police officers make it especially important that police agencies and the community take care of the struggling spouse. After a police officer dies, the focus “must begin to shift to the long-term implications the death has for the family, the department, and the community.”¹⁵ Furthermore, survivor benefits are important because “the benefit is a form of security that may symbolize that the officer’s death was not in vain.”¹⁶ Denial of a benefit can be a painful experience as well.¹⁷

available at https://www.psychceu.com/miller/Miller_LODD.pdf (reporting “appetite and sleep disturbances, gastrointestinal and cardiovascular symptoms, decreased resistance to infections, and increased anxiety and depression,” as well as signs of PTSD).

¹³ *Id.* at 62-63.

¹⁴ *Id.* at 65 (“The spouses indicate that their trust in the world as an orderly place is destroyed. They do not seem to be able to look to the future with optimism. They no longer feel able to trust others and begin to withdraw.”).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 5.

C. Survivor pension benefits are essential for police officers to be able to make long-term financial commitments for and with their spouses.

A death benefit for police survivors gives police officers and their families a sense of security that allows them to make long-term financial decisions and start a family despite the dangers of police work. Police organizations have made improving benefits a top legislative priority because this benefit gives “peace of mind to men and women seeking careers in public safety”¹⁸ Prominent elected leaders in Washington, D.C. have long recognized the importance of police death benefits to attracting a high-quality police force.¹⁹

¹⁷ *Id.* Difficulties in obtaining benefits, while rare, were a painful experience “for an already traumatized survivor.” *Id.* at 50.

¹⁸ Nat’l Assoc. of Police Orgs., *Legis. Priorities for 112th Congress, 2011-2013*, available at http://www.napo.org/legislative-update/LegislativePriorities2011_2013.pdf; Letter from William J. Johnson, Exec. Dir., Nat’l Assoc. of Police Orgs. to Senator Patrick Leahy and Congressman Michael Fitzpatrick (Jun. 19, 2012), available at <http://www.napo.org/legislative-update/NAPOLtrofSupportforPSOBLegislationJune2012.pdf>.

¹⁹ When President Ford signed the Public Safety Officer’s Benefit Act of 1976, he highlighted this point: “I fully recognize that no amount of money can fill the void left when these brave officers make the supreme sacrifice in pursuit of their duties. The least the Federal government can do is to assure that their dependents have adequate financial

D. The surviving pension benefit is extremely important to lesbian and gay police officers.

A survivor pension benefit is as important to lesbian and gay officers as it is to their non-gay counterparts. Same-sex couples form committed relationships and start families all over the United States. There are almost 650,000 same-sex couple households in the United States, and they are located in all fifty states.²⁰ These same-sex couples are also rearing children.²¹ According to U.S. Census data, there

assistance to see them through their difficulties.” Indexed Legislative History of the Public Safety Officers' Benefits Act of 1976, 94th Cong., 274 (Sept. 29, 1976) (President’s Statement), available at <https://www.ncjrs.gov/pdffiles1/Digitization/143482NCJRS.pdf>.

Senator Strom Thurmond also made the point on the Senate floor: “Law enforcement careers must be made more acceptable to our qualified citizens. We cannot ask decent, hard-working men and women to face the constant risk of death in the line of duty and then ignore their rightful request that their families be protected from financial calamity.” *Id.* at 272 (Sept. 16, 1976) (Senate Debate).

²⁰ See Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, Williams Institute (last accessed Nov. 1, 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

²¹ *Id.* at 3.

are almost 11,000 households headed by same-sex couples in Missouri,²² including in every county in the State.²³ In fact, in a ranking of U.S. cities, St. Louis has the eleventh highest concentration of households headed by same-sex couples in the country and Kansas City ranks 23rd.²⁴

Just like different-sex married couples, gay and lesbian couples form relationships that entail financial interdependence. For example, in an analysis of census data from 2000, the Williams Institute at the University of California at Los Angeles, concluded that “same-sex partners in Missouri depend upon one another in ways that are similar to married couples.”²⁵ Furthermore, like their different-sex married counterparts, many same-sex couples are rearing children together.

²² *Id.* at 5.

²³ Adam P. Romero, et.al., *Census Snapshot: Missouri*, Williams Institute 1 (Jan. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriCensus2000Snapshot.pdf>.

²⁴ Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, Williams Institute 7 (last accessed Nov. 1, 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

²⁵ Adam P. Romero, et.al., *Census Snapshot: Missouri*, Williams Institute 2 (Jan. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriCensus2000Snapshot.pdf>.

Indeed, it is estimated that same-sex couples were parenting more than 5,400 children in Missouri in 2005.²⁶ At the same time, the Williams Institute also found that the average and median household incomes of same-sex couples were lower than those of different-sex married couples. As a result, the Williams Institute concluded: “While in many respects Missouri’s same-sex couples look like married couples, same-sex couples—especially those with children—have fewer economic resources than married couples to provide for their families and lower rates of home ownership.”

Simply put, lesbian and gay couples value survivor benefits for the same reasons different-sex couples value survivor benefits—many times with an even greater need for those benefits. Lesbian and gay police officers experience the same sense of security that police officers in different-sex relationships have when they know that their families will be taken care of if they are killed in the line of duty. All Missouri Highway Patrol officers, whether they are gay or straight, are entitled to ensure their families will be taken care of if they die.

Providing equal benefits to LGBT law enforcement officers is also important to the recruitment and retention of valuable employees—a fact that increasingly has been recognized in the corporate and governmental sectors as more and more employers have decided to provide the same employment benefits to all

²⁶ *Id.* at 2.

employees, regardless of their sexual orientation. According to the Human Rights Campaign's most recent Corporate Equality Index, which monitors corporate America's policies regarding LGBT employees, 60 percent of all Fortune 500 companies offer domestic partner health benefits.²⁷ Another survey of approximately 3,000 employers conducted by the consultant Mercer found that 52 percent of the employers surveyed offered domestic partner health benefits in 2011, an increase from 31 percent in 2010.²⁸ Furthermore, the U.S. Department of Labor's Bureau of Labor Statistics found that half of all state and local government employees are entitled to name a same-sex unmarried partner to receive survivor

²⁷ *Corporate Equality Index 2012: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality*, Human Rights Campaign 9, available at http://asp.hrc.org/documents/CorporateEqualityIndex_2012.pdf (last visited Dec. 1, 2012).

²⁸ Julie Appleby, *Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws*, Kaiser Health News, May 14, 2012, available at <http://www.kaiserhealthnews.org/stories/2012/may/14/businesses-move-to-offer-health-benefits-to-same-sex-couples.aspx>.

benefits from defined-benefit retirement survivor plans.²⁹ The survey, called the National Compensation Survey, also found that one-third of state and local government workers are entitled to receive health care benefits for same-sex partners.³⁰ Recently, the federal government also began extending some benefits to same-sex partners.³¹

The need to attract high-quality workers played a significant motivating factor in the decision by many employers to provide equal benefits. For example, Paul Fronstin, a senior research associate and the director of the Health Research and Education Program of the Employee Benefit Research Institute (EBRI), told

²⁹ US Bureau of Labor Statistics, *Nat'l Compensation Survey: Unmarried Domestic Partner Benefits*, tbl.44 (March 2011), available at

<http://www.bls.gov/ncs/ebs/benefits/2011/ownership/govt/table47a.htm>.

³⁰ *Id.*

³¹ Office of the Press Secretary, *Presidential Memorandum on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees* (June 2, 2010), available at

<http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>;

Mark Landler, *Diplomats' Same-Sex Partners to Get Benefits*, *New York Times* (May 23, 2009),

<http://www.nytimes.com/2009/05/24/us/24benefit.html>; Sheryl Gay Stolberg, *New*

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<http://thecaucus.blogs.nytimes.com/2010/06/02/new-benefits-for-same-sex-partners/>.

Kaiser Health News: “Employers started doing this [providing lesbian and gay employees with domestic partner health benefits] because they felt they needed to be competitive in the labor market, just like with other benefits.”³² According to a report by EBRI, which is a Washington-based employee-benefits think tank, attracting and retaining employees, as well as fairness, are the two main reasons that employers offer domestic partner benefits.³³ Another study by EBRI found that 77 percent of workers report that “the benefits that a prospective employer offers are very important in their decision to accept or reject a job”³⁴ When the federal government began offering long-term care insurance to federal employees’ same-sex domestic partners, it explained that the new benefits would

³² Julie Appleby, *Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws*, Kaiser Health News, May 14, 2012, available at <http://www.kaiserhealthnews.org/stories/2012/may/14/businesses-move-to-offer-health-benefits-to-same-sex-couples.aspx>.

³³ Ken McDonnell, *Domestic Partner Benefits: Facts and Background (September 2008 Update)*, 29 EBRI Notes (Sept. 2008), available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_09-2008.pdf.

³⁴ Rachel Christensen, *Value of Benefits Constant in a Changing World: Findings from the 2001 EBRI/MGA Value of Benefits Survey*, 23 EBRI Notes 2 (Mar. 2002), available at <http://www.ebri.org/pdf/notespdf/0302notes.pdf>.

“enhance the Federal Government’s ability to compete with the private sector for talent.”³⁵

What happened to Mr. Glossip and Corporal Englehard is a perfect example of why the State should not be permitted to withhold the survivor pension benefit from lesbian and gay officers. The two men spent fifteen years together and held themselves out to the community as being in a committed, marital relationship. (LF0009, LF0010; LF0052.) They were dependent on each other. Mr. Glossip gave up his job as a customer service representative at Great Southern Bank when Mr. Engelhard became a police officer. (LF0054.) After Mr. Glossip gave up his job, the couple moved across the State from Springfield to Washington, Missouri, and then to Robertsville, where they purchased a home together. (LF0010; LF0054.)

Corporal Engelhard listed Mr. Glossip as the primary beneficiary on his retirement account, a 50-percent beneficiary on his life insurance policy, and the sole beneficiary on his deferred compensation plan. (LF0010; LF0053.) The couple shared joint checking and savings accounts, as well as payments for the cars

³⁵ US Office of Personnel Management, No. 10-901, *Benefits Administration Letter on Federal Long Term Care Insurance Program (FLTCIP): Qualified Relatives now include Same-Sex Domestic Partners* (Jun. 1, 2010), available at <http://www.opm.gov/retire/pubs/bals/2010/10-901.pdf>.

that they jointly owned. (LF0011; LF0053.) During the course of their relationship, they owned two homes together. (LF0010; LF0053.)

Corporal Engelhard served as a step father to Mr. Glossip's son, and they shared child-support obligations. (LF0011; LF0052.) They joined a church, which they attended as a family with Mr. Glossip's son. (LF0052.) When Corporal Engelhard died on Christmas Day, which was also the twelfth anniversary of the date the couple exchanged rings, Mr. Glossip was the only family member who went to the hospital. (LF0011; LF0054.) By the time Mr. Glossip arrived at the hospital, even though Corporal Engelhard already had died, Mr. Glossip held Corporal Engelhard's hand for hours. (LF0011; LF0054.) As Corporal Engelhard's surviving partner, Mr. Glossip also attended state and national memorial ceremonies for fallen police officers. (LF0012; LF0054-55.)

Mr. Glossip understood the dangers associated with Corporal Engelhard's job. In fact, worried that the job was too dangerous, Mr. Glossip tried to convince Mr. Engelhard not to take it. (LF0053-54.) Mr. Engelhard told Mr. Glossip that the government and the other troopers would make sure that Mr. Glossip would be taken care of. (LF0053-54.)

Since his partner's tragic death, Mr. Glossip has been left alone, financially and emotionally. He has to pay the mortgage, car loans, and other expenses on his own. (LF0055.) The couple took a risk—both financially and emotionally—so

that Mr. Engelhard could serve the people of Missouri. When that risk turned into an actual line-of-duty death, the State denied the survivor benefit to Mr. Glossip.

The organization Concerns of Police Survivors, which is based in Missouri, recommends that police departments “handle the surviving family of a co-worker as you would want someone to treat your family if the incident had occurred to you.”³⁶ Unfortunately, the Missouri Highway Patrol did not meet this standard. Instead of providing the Plaintiff, Kelly Glossip, with the support he needed after the traumatic loss of his long-term partner, Corporal Dennis Engelhard, the Highway Patrol left Mr. Glossip out in the cold.

This outcome cannot be comforting to a lesbian or gay Highway Patrol trooper concerned about what will happen to a spouse and children if the trooper is killed in the line of duty. It certainly will make it more difficult for the Highway Patrol to attract and retain the best-qualified candidates to serve as state troopers if those individuals happen to be lesbian or gay. Knowing that the Highway Patrol will deny their partners a benefit afforded to their non-gay counterparts, lesbian and gay officers will not have the peace of mind necessary to make long-term financial and emotional commitments while also doing dangerous work for the

³⁶ Suzanne F. Sawyer, *Support Services to Surviving Families of Line-of-Duty Death: A Public Safety Agency Handbook*, Concerns of Police Survivors, Inc. (February 1999), available at 66.39.68.87/PDFs/Support_Services.pdf.

good of the public. Indeed, any purported governmental interests proffered by the State to justify this abhorrent treatment can only be adequately evaluated against this harsh reality.

II. THE DENIAL OF THE SURVIVOR PENSION BENEFIT TO LESBIAN AND GAY OFFICERS CONSTITUTES DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION.

Contrary to the conclusion of the circuit court, denying the survivor pension benefit to lesbian and gay officers does, in fact, constitute discrimination on the basis of sexual orientation. The State argued below, and the circuit court found that the State does not discriminate against same-sex couples because no unmarried couples—gay or straight—may receive the survivor pension benefit. This conclusion is based on flawed reasoning. It fails to address the reality that numerous same-sex couples would marry but for the State’s categorical denial of that right to them. These couples are not similarly situated to unmarried different-sex couples who could marry but choose not to do so. Because the State has placed an insurmountable obstacle in their path, lesbians and gay troopers in committed, long-term relationships cannot ensure that their partners are protected by the survivor pension benefit, while unmarried non-gay troopers always have that option available.

Because the State explicitly has conditioned receipt of the survivor pension

benefit on a status that lesbians and gay men cannot achieve in the State of Missouri, it has ensured that lesbians and gay men are not entitled to receive equal compensation for the same work. As such, using the Missouri Constitution's prohibition of same-sex marriage as a justification to prevent lesbians and gay men from receiving crucial survival benefits is unlawful discrimination.

That the Missouri Constitution denies lesbians and gay men the freedom to marry does not alter the analysis. Other provisions of the Missouri Constitution—most importantly, the equal protection and “no special laws” provisions—apply equally to lesbians and gay men. Because of these provisions, the State is required to offer a legitimate reason to treat lesbian and gay couples differently than different-sex married couples. As the Alaska Supreme Court explained, a constitutional provision barring same-sex marriage “does not automatically permit the government to treat them differently in other ways.” *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 786-87 (Alaska 2005).

Denying lesbian and gay officers the ability to obtain the survivor pension benefit is inconsistent with the Missouri Constitution and with the values that Missouri's governor, Jay Nixon, has declared should be followed in Missouri. In 2010, Governor Nixon issued an executive order stating: “[T]he employment practices of the State of Missouri . . . should serve as a model for business,

industry, and labor”³⁷ The executive order further stated that Missouri’s provision of benefits should not be subject to any “vestiges of discrimination against persons on account of race, color, religion, national origin, sex, ancestry, age, sexual orientation, veteran status, or disability”³⁸

Unfortunately, the State’s provision of the survivor pension benefit is not “a model for business” because it reflects the type of discrimination denounced by Governor Nixon. By conditioning the receipt of a benefit on a status that is not available to lesbian and gay couples, the State has adopted a policy that is not only contrary to the practices of most large U.S. corporate and governmental employers, but is antithetical to the principles of fairness and equality enshrined in the Missouri Constitution.

III. THE STATE CANNOT IDENTIFY ANY LEGITIMATE REASON FOR DISCRIMINATING AGAINST LESBIAN AND GAY POLICE OFFICERS.

As argued by Mr. Glossip in the proceedings below, because the denial of a survivor pension benefit to lesbian and gay officers constitutes discrimination on the basis of sexual orientation, the State’s actions should be subjected to

³⁷ Office of Mo. Governor Jay Nixon, Executive Order 10-24 (July 9, 2010), available at <http://governor.mo.gov/orders/2010/10-24.htm>.

³⁸ *Id.* (emphasis added)

heightened scrutiny under Missouri’s equal protection clause. Regardless of which standard of review is applied, this Court should conclude that none of the State’s purported justifications for denying lesbian and gay troopers survivor benefits for their same-sex partners are constitutionally sufficient to justify the discriminatory exclusion.

A. Excluding same-sex couples from survivor benefits cannot be justified by the government’s purported interest in establishing objective benefit criteria.

In its decision, the circuit court erroneously concluded that “[i]t is reasonably conceivable that the ‘surviving spouse’ classification was intended to enable [the State] to make more uniform and objective eligibility determinations, while reducing administrative burdens.” (LF0385.) Specifically, the circuit court noted that the classification allowed the State to avoid engaging in subjective analyses of the nature of a non-marital applicant’s relationship to a deceased employee. (*Id.*)

The circuit court’s reliance on “objective standards” as an acceptable rationale for discrimination is called into question by the numerous public employers in the State who provide some form of benefits to employees in same-sex, intimate, and committed relationships. Kansas City, Jackson County, St. Louis County, the St. Louis Metropolitan Police Department, and the City of St.

Louis all provide some form of domestic-partner benefits to their employees. (LF0057-58.) The City of Columbia offers some benefits to same-sex domestic partners. (LF0058.) The Kansas City firefighters, Jackson County, St. Louis County, and the St. Louis Metropolitan Police Department all provide benefits to same-sex domestic partners. (LF0058.)

To provide benefits to same-sex domestic partners, these governmental employers use objective standards that are easy to administer. The Missouri governments offering these benefits require that employees submit a signed affidavit stating that the employee and the employee's partner satisfy the objective requirements established by the governmental body. (LF0058-59.) The employee typically must swear in the affidavit that the employee and the domestic partner (1) are at least 18 years old, (2) not related by blood to a degree of closeness that would prevent marriage, (3) have lived together a required period of time, (4) are not legally married, (5) are each other's sole domestic partners, (6) are committed to each other's common welfare, and (7) are competent to contract. (LF0059-61.) The couple may also be required to produce some documentation verifying the domestic partnership. (LF0059-61.)

These requirements are common outside the context of Missouri public-sector employers. The EBRI, the Washington-based employee-benefits think tank, listed similar requirements as among the common requirements that private-sector

employers establish when they offer domestic partner benefits.³⁹ The federal government also has similar requirements for its domestic partnership programs, which are available only to same-sex domestic partners.⁴⁰

Missouri easily could establish a simple, objective process to allow a state trooper to list a domestic partner to receive the survivor benefit. The State merely needs to require that troopers submit an affidavit or declaration attesting that the couple's relationship meets the necessary criteria to qualify as a domestic partnership. All that MPERS would have to do is follow the same standard process that corporate America and the federal, state, and local governments have implemented.

The suggestion that the survivor pension benefit can be provided only to different-sex married couples because a marriage certificate is easily verified ignores the fact that a sworn affidavit or declaration from a same-sex couple is just

³⁹ Ken McDonnell, *Domestic Partner Benefits: Facts and Background (September 2008 Update)*, 29 EBRI Notes 10 (Sept. 2008), available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_09-2008.pdf.

⁴⁰ US Office of Personnel Management, No. 10-901, *Benefits Administration Letter on Federal Long Term Care Insurance Program (FLTCIP): Qualified Relatives now include Same-Sex Domestic Partners* (Jun. 1, 2010), available at <http://www.opm.gov/retire/pubs/bals/2010/10-901.pdf>.

as easily verified. Indeed, corporate America and federal, state, and local governments across the country have found that affidavits or declarations attesting to a committed domestic partnership are easily verifiable. Furthermore, the argument that marriage certificates are easily verifiable does not justify the State's denial of the survivor pension benefit to a same-sex couple who has been married in a state that allows same-sex marriage, such as Iowa. The fact that the State provides the survivor pension benefit to different-sex couples who are married out-of-state, but not to similarly situated same-sex couples, demonstrates that unconstitutional discrimination, not the desire for objective verification criteria, is the true explanation for the State's actions.

In the end, the State's purported administrative convenience cannot justify singling out lesbian and gay employees for disfavored treatment. While "efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). The Constitution's liberty and equality guarantees were "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials." *Stanley*, 405 U.S. at 656. *See also Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (reducing probate courts' workload through mandatory

preference for men as administrators of estates over equally qualified women is not “consistent with the command of the Equal Protection Clause”); *Shapiro v. Thompson* 394 U.S. 618, 636 (1969).

This is so even where “making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens.” *Alaska Civil Liberties Union*, 122 P.3d at 791; *see also Carrington v. Rash*, 380 U.S. 89, 96 (1965) (an interest in ensuring residency to qualify to vote did not excuse the state from the administrative burden of verifying residency, even where “special problems may be involved” in making such determinations for servicemen). On this justification, the State’s position fails.

B. Excluding same-sex couples from survivor benefits does not advance a governmental interest in directing benefits to those most likely to be financially harmed by an employee’s death.

The circuit court erroneously concluded that excluding same-sex partners from the survivor pension benefit is rationally related to the State’s interest in compensating those most likely to be financially harmed by an employee’s death. (LF0385.) Noting that same-sex couples are more likely to contain two wage earners than married couples, the circuit court concluded, incorrectly, that married couples are more “economically interdependent” than their same-sex couple counterparts. (LF0384.)

The facts belie the State's argument that the Legislature could have rationally concluded that married couples are more economically interdependent than same-sex partners in a committed domestic partnership. The State argued that same-sex couples are more likely to contain two wage earners than married couples, and that therefore, the current policy provides compensation to individuals who are the most likely to be financially hurt by the death of a wage earner.

The available census data refutes the State's position and the circuit court's conclusion. According to analysis of U.S. Census data by the Williams Institute, the vast majority of both same-sex couples *and* different-sex married couples contain two wage earners.⁴¹ Only 29 percent of different-sex married couples contain one wage earner.⁴² The percentage for same-sex couples is similar—21 percent.⁴³ In the case of families rearing children, the numbers are even closer. Among those families, 28 percent of same-sex couples with children have one wage earner, while 31 percent of different-sex married couples with children have

⁴¹ Adam P. Romero, et.al., *Census Snapshot: Missouri*, Williams Institute 2 (Jan. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriCensus2000Snapshot.pdf>.

⁴² *Id.*

⁴³ *Id.*

one wage earner.⁴⁴ Thus, the statistics regarding the presence of two wage earners in a relationship reveal very little difference between the two groups.

More importantly, additional census data regarding wages earned and the presence of children in families suggests that same-sex partners in Missouri may actually be more financially dependent on their partners than different-sex married spouses. The median income of same-sex households is \$50,500 in Missouri, which is less than the \$52,900 median income of different-sex married couples in Missouri.⁴⁵ On average, men in same-sex couples in Missouri earn \$33,695 a year - about \$11,000 a year less than the \$44,610 a year that married men earn.⁴⁶ The average salary for women in same-sex couples is slightly higher than for women in different-sex marriages.⁴⁷ The percentages of same-sex couples and different-sex married couples in which at least one partner is disabled are both 28 percent.⁴⁸

Furthermore, 20 percent of the same-sex couples in Missouri are rearing children.⁴⁹ As the statistics show, they are parenting their children under more

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 3.

⁴⁹ *Id.*

difficult financial circumstances than different-sex married couples. At \$36,300 a year, the median income of same-sex couples raising children is about \$20,000 lower than the comparable number for married parents, which is \$56,000.⁵⁰ The respective average incomes are \$44,280 for same-sex couples with children, and \$67,853 for different-sex married couples.⁵¹ Same-sex couples rearing children face other financial disadvantages in addition to a substantial income disparity. Only 44 percent of same-sex couples rearing children own their home, compared to 82 percent of different-sex married couples with children.⁵²

These statistics illustrate that it is far from clear that spouses in different-sex marriages in Missouri are more financially interdependent than partners in same-sex households. Marriage is a poor proxy for financial need. Even in the most “ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996) (Colorado’s legitimate interest in fighting discrimination against other minority groups did not explain or justify the state’s action of eliminating antidiscrimination protections for gay people). Although the State clearly has a valid interest in determining that

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

survivor benefits are targeted at those with the greatest financial need, using marriage as a proxy to distinguish between same-sex couples and their children and different-sex couples and their children does not rationally advance that interest. In fact, because the available data indicates married different-sex couples tend to be wealthier and more financially stable than households headed by same-sex couples, it appears the State's purported justification actually is undermined by the exclusion of committed partners of lesbian and gay troopers who are unmarried solely because marriage is not an available option in this State.

The facts of this case also illustrate that the State's argument about financial interdependence makes little sense. Mr. Glossip gave up his job so that Corporal Engelhard could become a Highway Patrol trooper. The couple had significant joint financial obligations, including a mortgage, cars, and child-support payments. The survivor benefit was designed to assist a spouse or partner in exactly Mr. Glossip's position.

The State's argument that it uses marriage to target benefits to individuals who are financially dependent on another is a pretext. When the State actually wants to target financial dependency, it does so explicitly, not indirectly through marriage. The Missouri Worker's Compensation Statute, for example, targets dependent relatives, not spouses. § 287.240, RSMo. 2012. The statute requires that a relative through blood or marriage who receives death benefits from an

employer must be “actually dependent for support, in whole or in part, upon his or her wages at the time of the injury.” § 287.240(4), RSMo. 2012. The statute also contains provisions that cease payment of benefits if a dependent no longer needs the benefit for reasons including death or remarriage. *Id.* (a) (spouses), (b) (children). The statute also allows for payment to “partial dependents” under some circumstances, based on the level of support the deceased worker provided to the partial dependent. § 287.240(3), RSMo. 2012.

A legislature that is determined to help dependents based on financial need would include language about financial dependency, especially when that legislature has done so in other contexts. The Missouri Legislature has shown itself perfectly capable of directing aid to dependents based on financial need when that is its intention, and it has done so without using marriage as a proxy. If the State’s classification is intended to direct benefits to the surviving family members with the greatest need, the marriage requirement does not rationally advance that interest.

C. Excluding same-sex couples from survivor benefits does not advance the government’s interest in controlling costs.

The circuit court also concluded that the State was justified in discriminating against lesbian and gay officers because extending the survivor pension benefit to them would result in heightened actuarial and financial burdens. Here again, the

circuit court's conclusion is factually and legally deficient.

Federal courts repeatedly have rejected the idea that a state may “protect the public fisc by drawing an invidious distinction between classes of its citizens.”

Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro*, 394 U.S. at 633, overruled in part on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974). Accordingly, State Officials must “do more than show” that denying same-sex partner health insurance “saves money,” *Shapiro*, 394 U.S. at 633, because such an argument does nothing “more than justify [their] classification with a concise expression of an intention to discriminate.” *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (the court could “discern no principled reason to cut government expenditures at the particular expense of Plaintiffs,” aside from a desire to express “disapprobation” of them).

The cost-saving rationale also is implausible given that any impact from extending survivor pension benefits to same-sex partners would be negligible, if not “illusory.” See *Mem'l Hosp.*, 415 U.S. at 265 (recognizing that delayed medical care can cause a patient needlessly to deteriorate, requiring more expensive care in the future and possibly causing disability, which can strain a state's social services). Although an officer being killed in the line of duty is a tragic event for his or her family and loved ones, it is fortunately something that

occurs to a very small percentage of officers. Furthermore, although concrete data about the number of lesbian and gay officers in the Missouri highway patrol is not available, census data about same-sex couples does suggest that very few people would ever find themselves in the horrifying situation experienced by Mr. Glossip. There are an estimated 10,557 same-sex households in Missouri.⁵³ Given that very few of these households include a highway patrol officer, and even fewer would ever find themselves facing the consequences of a tragic on-the-job death, it is clear that the cost impact of extending the survivor pension benefit to lesbian and gay officers is negligible. Indeed, it is possible—and, even likely—that years could pass before the State would ever have to pay a benefit to the surviving partner of another lesbian or gay highway patrol officer.

Furthermore, there is no difference in administrative costs between adding a same-sex partner of a lesbian or gay employee and adding a different-sex spouse to an employee's benefit registration. The record includes affidavits from three local Missouri government personnel and human resources directors who administer benefits systems that include the same-sex, committed partners of lesbian and gay employees. Each of these affiants has sworn that the administration of

⁵³ Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, Williams Institute 5 (last accessed Nov. 1, 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

employment benefits such as health insurance, survivor annuities, and other spouse-related benefits has not added any additional administrative burden or cost. (LF0208; LF0213; LF0220.)

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision of the circuit court should be REVERSED.

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CERTIFICATE OF COMPLIANCE

This is to certify that this Amicus Brief complies with the word limits of Rule 84.06 (b) in that it contains 8,518 words as established by the word count of the word processing system used to create it.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of November, 2012, a copy of the foregoing Amicus Brief was served on all attorneys of record as required by Rule 84.06 (g) via the Supreme Court of Missouri's electronic filing system to:

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