

**No. 14-5291**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

GREGORY BOURKE, ET AL.,  
*Appellees,*

v.

STEVE BESHEAR, ET AL.,  
*Appellants.*

---

On Appeal from the Western District of Kentucky

---

**BRIEF *AMICUS CURIAE* OF  
LAW ENFORCEMENT OFFICERS AND ORGANIZATIONS**

---

G. David Carter  
Joseph P. Bowser  
Hunter Carter  
ARENT FOX LLP  
1717 K Street, N.W.  
Washington, D.C. 20036-5342  
(202) 857-8972

June 16, 2014

Counsel for *Amici Curiae*



“[W]e, as a country, stand by the families of those who put themselves in harm’s way to keep our communities safe, and we must never do so selectively. When any law enforcement officer falls in the line of duty or is gravely injured, the [ ] government should stand by that hero’s spouse – no matter whether that spouse is straight or gay.”

— Attorney General Eric Holder  
Remarks at the Human Rights Campaign  
Greater New York Gala  
February 10, 2014

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit  
Case Number: \_\_\_\_\_ Case Name: \_\_\_\_\_

Name of counsel: \_\_\_\_\_

Pursuant to 6th Cir. R. 26.1, \_\_\_\_\_  
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

### CERTIFICATE OF SERVICE

I certify that on \_\_\_\_\_ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE.....	1
STATEMENTS PURSUANT TO FRAP 29 .....	3
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	5
I.    Amici’s Experiences Show Why Classifications Based on Sexual Orientation Should be Subject to Heightened Scrutiny.....	5
A.    Gays and Lesbians Have Been Subject to a History of Discrimination and Violence, as Amici Are Uniquely Aware .....	9
B.    Sexual Orientation Is Irrelevant to One’s Ability to Perform in or Contribute to Society .....	17
C.    The Other Relevant Criteria Also Support the Conclusion that Heightened Scrutiny is Warranted.....	19
II.    The Refusal to Recognize Same-Sex Couple’s Marriages Denies Our First Responders the Respect and Dignity They Deserve And Puts Them In Harm’s Way .....	20
III.   The Refusal to Honor the Marriages of Same-Sex Couples Uniquely Harms Law Enforcement Officers.....	25
A.    Without Marriage and Recognition of Existing Marriages, the Committed Partners of Gay and Lesbian Officers Residing in Kentucky, Michigan, and Tennessee Are Not Guaranteed Benefits Under Federal Law if The Officer is Killed in the Line of Duty .....	26
B.    The Families of Gay and Lesbian Officers Are Also Denied Significant Benefits under State Law .....	29
CONCLUSION .....	35

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Baker v. Nelson</i> , 409 U.S. 810 (1972).....	6
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005) .....	15
<i>Bourke v. Beshear</i> , 2014 WL 556729 (W.D. Ky. Feb. 12, 2014).....	21, 25
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987).....	7
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	5, 7
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	6, 20
<i>Davis v. Prison Health Services</i> , 679 F.3d 433 (6th Cir. 2012) .....	8
<i>DeBoer v. Snyder</i> , 2014 WL 1100794 (E.D Mich. Mar. 21, 2014).....	21, 25
<i>Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati</i> , 128 F.3d 289 (6th Cir. 1997) .....	8
<i>Glossip v. Missouri Dept.of Trans.</i> , 411 S.W.3d 796 (Mo. 2013) .....	33
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971).....	19
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000) .....	19
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	6, 9, 17

<i>Mathews v. Lucas</i> , 427 U.S. 495 (1976).....	19
<i>National Pride at Work, Inc. v. Governor of Michigan</i> , 274 Mich. App. 147, 732 N.W.2d 139 (2007).....	32
<i>Nyquist v. Mauclet</i> , 432 U.S. 1 (1977).....	7
<i>Romer v. Evans</i> , 571 U.S. 620 (1996).....	6, 14
<i>S.J.L.S. v. T.L.S.</i> , 265 S.W.3d 804 (Ky. App. 2008).....	30
<i>Salvi v. Suffolk Cnty. Sheriff's Dep't</i> , 67 Mass App 596 (Mass. App. Ct. 2006) .....	15
<i>Scarborough v. Morgan County Board of Education</i> , 470 F.3d 250 (6th Cir. 2006) .....	8
<i>SmithKline Beecham Corp. v. Abbott Labs.</i> , 740 F.3d 471 (9th Cir. 2014) .....	8
<i>Sorrenti v. City of New York</i> , 17 Misc.3d 1102(A) (N.Y. Sup. Ct. 2007) .....	15
<i>Tanco v. Haslam</i> , 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014).....	21, 25
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	25
<i>United States v. Windsor</i> , 133 S.Ct. 2675 (2013).....	8, 21, 23, 25, 27
<i>Weeks v. Suffolk Cnty. Police Dept.</i> , No. CV-03-4294, Memorandum and Order, ECF No. 47 (E.D.N.Y. Apr. 28, 2005) .....	15

**STATUTES**

42 U.S.C. § 3716.....	12
42 U.S.C. § 3796.....	26, 27, 28
42 U.S.C. § 3796d-1 .....	26
18 U.S.C. § 249.....	12
18 U.S.C. § 1389.....	12
18 U.S.C.A. § 249 .....	12, 13
28 C.F.R. § 32.3 .....	27
KRS § 61.315.....	29
KRS § 95.865.....	30
KRS § 95.860.....	29
KRS § 164.2841 .....	29, 30
KRS § 164.2842.....	29
KRS § 346.155.....	29
M.C.L.A. § 28.632(j) .....	31
M.C.L.A. § 28.634 .....	31
M.C.L.A. § 38.556(2) .....	31
M.C.L.A. § 38.1601 .....	31
M.C.L.A. § 38.1604.....	31
M.C.L.A. § 390.1241 .....	31
Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321.....	18
T.C.A. § 7-51-208.....	32
T.C.A. § 7-51-1802.....	14



T.C.A. § 31-2-104.....	32
Mich. Const. art. 1, § 25.....	32
Tenn. House Bill No. 600, Pub. Ch. No. 278 .....	14
<b>ADMINISTRATIVE MATERIALS</b>	
Exec. Order No. 10450, 3 C.F.R. 936 (1949-1953).....	13
<b>OTHER AUTHORITIES</b>	
Aaron Belkin & Jason McNichol, <i>Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department</i> , 5(1) Police Quarterly 63 (2002) .....	passim
Amnesty International, <i>Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.</i> (Sept. 21, 2005) .....	10
Associated Press, <i>Cop’s Companion to Sue for Survivor’s Benefits</i> , Miami Herald, Feb. 28, 2002, at 5B .....	33
Brad Sears et al., <i>Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment</i> , Williams Inst. (2009).....	13
Bureau of Justice Assistance, Public Safety Officers’ Benefits Program, available at <a href="https://www.psob.gov/">https://www.psob.gov/</a> .....	26
Bureau of Justice Assistance, <i>Public Safety Officers’ Benefits Program</i> , 79 Fed. Reg. 12434 (Mar. 5, 2014).....	27
Christy Mallory, Amira Hasenbush & Brad Sears, <i>Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity 2000-2013</i> , Williams Inst. (2013) .....	10, 13, 14, 20
Deirdre Hiatt & George E. Hargrave , <i>Psychological Assessment of Gay and Lesbian Law Enforcement Applicants</i> , 63(1) J. of Personality Assessment, 80 (1994).....	18
Ellen D. B. Riggle, Jerry D. Thomas & Sharon S. Rostosky, <i>The Marriage Debate and Minority Stress</i> , 38(2) Pol. Sci. and Pols. 221 (2005).....	22

Ethan H. Mereish, Conall O’Cleirigh & Judith B. Bradford , <i>Interrelationships Between LGBT-Based Victimization, Suicide, And Substance Use Problems in a Diverse Sample of Sexual and Gender Minorities</i> , 19(1) <i>Psychology, Health &amp; Med.</i> 1 (2014) .....	11
FBI, <i>Latest Hate Crime Statistics</i> (2012).....	11
Katie M. Edwards & Kateryna M. Sylaska , <i>The Perpetration of Intimate Partner Violence Among LGBTQ College Youth: The Role of Minority Stress</i> , 42 <i>J. Youth Adolescence</i> 1721 (2013) .....	10
Kristina B. Wolff & Carrie L. Cokely, “ <i>To Protect and to Serve?</i> ”: <i>An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual and Transgender Community</i> , 11(1) <i>Sexuality and Culture</i> 1 (2007).....	10, 24
Matt Apuzzo, <i>Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs</i> , N.Y. Times, May 20, 2014, at A13 .....	13
Mo. State Highway Patrol, <i>The Ultimate Sacrifice: Killed in the Line of Duty</i> , available at <a href="http://www.mshp.dps">http://www.mshp.dps</a> .....	33
National Law Enforcement Officers Memorial Fund, <i>Law Enforcement Facts &amp; Officer Deaths by State</i> , available at <a href="http://www.nleomf.org/facts/enforcement/">http://www.nleomf.org/facts/enforcement/</a> .....	25
Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner , <i>Texas Police Chiefs’ Attitudes Toward Gay and Lesbian Police Officers</i> , 11(1) <i>Police Quarterly</i> 102 (2008) .....	16, 23
Roddrick Colvin , <i>Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in Law Enforcement Work Environment</i> , 12(1) <i>Police Quarterly</i> 86 (2008).....	16
Sharon Scales Rostosky, Ellen D.B. Riggle, Sharon G. Horne & Angela D. Miller, <i>Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults</i> , 56(1) <i>J. of Counseling and Psychol.</i> , 56 (2009) .....	21
Steven A. Rosen, <i>Police Harassment of Homosexual Women and Men in New York City 1960-1980</i> , 12 <i>Colum. Hum. Rts. L. Rev.</i> 159 (1980).....	9
William N. Eskridge, Jr., <i>Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961</i> , 24 <i>Fla. St. U. L. Rev.</i> 703 (1997).....	9

## **INTEREST OF *AMICI CURIAE***

*Amici Curiae* are law enforcement officers, law enforcement departments, or not-for-profit organizations that have as their mission to support gay and lesbian law enforcement officers. Collectively, they represent thousands of active duty and retired law enforcement officers that serve and protect our communities.

*Amici* include the following individuals:<sup>1</sup>

- Shawn Matthews is a supervisory special agent in the Federal Bureau of Investigations, where he serves as co-chair of FBI Pride.
- Cole Bouck, Co-Founder and Past President of Michigan Gay Officers Action League (MI-GOAL).
- Major Irene Burks, MSM, Patrol Commander, Prince George's County, Maryland.
- Scott Gunn has been an Arundel County Maryland Police Officer for over 26 years. Together with his husband, he founded the LGBT Fallen Heroes Fund.
- Greg Miraglia is a former a Deputy Police Chief and currently the Dean of a police academy in California.

---

<sup>1</sup> These individuals submit this brief on their own behalf. Their views do not necessarily reflect the views of their employers.

The following organizations are also *amici*:

- Out To Protect, Inc. is an organization that seeks to create awareness of the gay, lesbian, bi-sexual, and transgender professionals working in law enforcement to support those pursuing a law enforcement career.
- LGBT Fallen Heroes Fund is an organization that seeks to identify and honor those LGBT Police, Firefighters, Military, and EMS that have given their lives in service to their communities and give recognition to their survivors.
- Gay Peace Officers Association of Southern California (GPOA) is a non-profit, social, and community organization of lesbian, gay, bisexual, and transgendered (LGBT) peace officers and civilian law enforcement professionals. Its membership includes active, reserve, and retired peace officers and civilian employees of local, state, and federal law enforcement agencies.
- Gay Officers Action League New York (GOAL NY) was formed in 1982 to address the needs, issues and concerns of gay and lesbian law enforcement personnel in New York. Its members include both active and retired uniformed and civilian personnel employed in criminal justice professions.

## STATEMENTS PURSUANT TO FRAP 29

Pursuant to Federal Rules of Appellate Procedure 29(c)(5), no party's counsel authored this brief, and no party, party's counsel or person other than *amici curiae* contributed money to the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Gay and lesbian law enforcement officers put on their uniforms, place themselves in harm's way to protect and defend our communities, and swear to uphold our laws without prejudice or bias. They serve our communities with equal distinction, skill, and bravery. But Kentucky, Michigan, and Tennessee deny these men and women the equal dignity and respect they deserve. These states do not treat them equally in their day-to-day work, nor, tragically, even when they make the ultimate sacrifice. *Amici* submit this brief, therefore, to explain why basic human dignity – enshrined in the Fourteenth Amendment's guarantee of equal protection – requires the rulings of the courts below to be affirmed.

All four of the factors the Supreme Court uses in determining whether to apply heightened scrutiny support its application here. *First*, sexual minorities have suffered a significant history of discrimination in this country. It was not until 2003 that the Supreme Court declared unconstitutional state laws that

*criminalized* private sexual conduct between persons of the same sex. And these state laws on appeal here highlight recent efforts to deprive gays and lesbians of one of the most basic pillars of civil society – the right to marry. Indeed, just three years ago, Tennessee passed a state law *nullifying* all local ordinances that precluded discrimination on the basis of sexual orientation. Predictably, state-sanctioned discrimination has led to individual acts of violence – the FBI’s hate crime statistics show that sexual orientation motivates a significant amount of this country’s hate crimes. That gays and lesbians have been the subject of long-standing, and often state-sanctioned, discrimination is not open to serious debate.

*Second*, sexual orientation generally bears no relation to one’s ability to perform in or contribute to society. Again, *amici* serve their communities and put themselves in harm’s way every day just like their colleagues who happen to go home to an opposite-sex spouse. The available data shows that sexual orientation predictably has no bearing on law enforcement officers’ on-the-job performance. Indeed, Congress eliminated the military’s Don’t Ask Don’t Tell policy because it disserved the interests of our Armed Forces, a job which has similar mental, physical, and emotional demands.

*Third*, the discrimination against gays and lesbians is based on their immutable and distinguishing characteristic – their sexual orientation – that defines them as a group. *Fourth* and finally, sexual minorities are a group with limited

ability to protect itself from majority action in the political process. These state laws on appeal highlight the overwhelming political forces that gays and lesbians are powerless to overcome. Our constitutional design relies on the judiciary to serve as the bulwark against these unconstitutional intrusions on the equal dignity of all citizens.

The practical consequences to *amici* of the state laws on appeal are very real. *Amici's* heterosexual colleagues have the peace of mind knowing that, should tragedy befall them in the line of duty, the states and communities they died serving will come to their family's aid – with financial resources, healthcare, and higher education – once their sacrifice prevents them from providing that critical support themselves. But even though *Amici* walk shoulder to shoulder into harm's way with their heterosexual colleagues, beneath them is no safety net, only darkness born of fear and discrimination. Equal Protection demands *equal protection* for all those who serve.

## ARGUMENT

### I. **AMICI'S EXPERIENCES SHOW WHY CLASSIFICATIONS BASED ON SEXUAL ORIENTATION SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY**

Legislation is generally presumed valid as long as the “classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). But when legislation classifies on

the basis of a factor that “generally provides no sensible ground for different treatment,” the Fourteenth Amendment’s guarantee of equal protection requires the government to meet a higher burden to justify the classification. *Id.* at 440-41.

The Supreme Court has developed varying tiers of scrutiny that apply based on which class of citizens is affected. “Classifications based on race or national origin” are considered highly suspect, and “are given the most exacting scrutiny.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). “Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.” *Id.* at 461. Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are “substantially related to an important governmental objective.” *Id.*

The United States Supreme Court has not resolved the question of what level of scrutiny applies to classifications based on sexual orientation. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court summarily dismissed an appeal from a Minnesota Supreme Court decision denying same-sex couples the right to marry, but expressed no view on the appropriate level of scrutiny. Since that summary dismissal in *Baker* over four decades ago, in *Romer v. Evans*, 571 U.S. 620 (1996), the Court struck down a Colorado law that repealed existing – and prohibited future – legal protections for gays and lesbians, and concluded that the



ballot measure failed “*even*” rational-basis review. *Id.* at 632. Similarly, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas statute that criminalized homosexual sodomy, but did not announce its level of review. *Id.* at 578.

The Supreme Court ordinarily considers four factors in deciding whether to apply heightened scrutiny to a law that singles out a particular group: (a) whether the class has been historically “subjected to discrimination,” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (b) whether the class has a defining characteristic that “frequently bears [a] relation to ability to perform or contribute to society,” *Cleburne*, 473 U.S. at 440–41; (c) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” *Bowen*, 483 U.S. at 602; and (d) whether the class is “a minority or politically powerless.” *Id.*

Immutability and lack of political power are not strictly necessary factors to identify a suspect class. *See Cleburne*, 473 U.S. at 442 n. 10 (“‘[T]here's not much left of the immutability theory, is there?’”) (quoting J. Ely, *Democracy and Distrust* 150 (1980)); *Cleburne*, 473 U.S. at 472 n. 24, 105 S.Ct. 3249 (Marshall, J., concurring in part and dissenting in part) (“The ‘political powerlessness’ of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.”); *Nyquist v.*

*Mauclet*, 432 U.S. 1, 9 n. 11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was not immutable).

Because all four factors justify heightened scrutiny with regard to classifications based on sexual orientation, and in light of the changed legal landscape since 1997, *amici* respectfully encourages the Court to revisit its decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997) that sexual orientation does not present a suspect or quasi-suspect class, which was reiterated without further analysis in *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 260 (6th Cir. 2006) and *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012).<sup>2</sup>

As *amici* can uniquely attest, gays and lesbians have historically endured persecution and discrimination, and one's sexual orientation has no relation to aptitude or ability to contribute to society. Moreover, gays and lesbians also meet the other criteria relevant to heightened scrutiny— they are a discernible group with distinguishing characteristics and, as a class, remain a politically weakened minority, as these discriminatory state laws illustrate.

---

<sup>2</sup> Indeed, reconsideration is particularly warranted in light of the Ninth Circuit Court of Appeals' recent conclusion that heightened scrutiny is compelled by the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013). *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014).

**A. Gays and Lesbians Have Been Subject To A History Of Discrimination and Violence, As *Amici* Are Uniquely Aware**

Gays and lesbians have suffered a long history of state-condoned and private discrimination, which continues to persist in numerous ways today. *Amici* offer their unique perspective with regard to several examples that underscore this conclusion.

*Law Enforcement and the Gay Community.* It is only relatively recently that the Supreme Court struck down state laws that made the private sexual conduct of gays and lesbians a crime. *Lawrence*, 539 U.S. at 578. In so doing, the Supreme Court recognized that laws of this nature were “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Id.* at 575.

While *amici* have been aggressively trying to reverse the historical patterns, the history of discrimination of sexual minorities *by law enforcement* runs deep. Even before the Stonewall riots of 1969, liquor licensing laws were used as pretext to raid establishments frequented by gays and lesbians. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703, 761-66 (1997). It has also been documented that police relied on a variety of other laws (lewdness, vagrancy, and disorderly conduct) to harass gays and lesbians. *See, e.g.,* Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 Colum. Hum. Rts. L. Rev. 159, 162-64 (1980). The result, according to research, is that these experiences and

distrust make gays and lesbians less likely to identify themselves as victims of crime or cooperate with the police.

While groups like *amici*'s and community policing efforts in many jurisdictions have improved the relationship between law enforcement and the GLBT community in certain parts of the country,<sup>3</sup> recent research suggests that abuses remain. Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (Sept. 21, 2005).<sup>4</sup>

Studies also show a direct connection between stigma and crime. Nationally, sexual minorities are less likely to report incidences of violence, particularly if they involve sexual orientation bias, likely due to the stigma involved and the history of inadequate response by authorities. Kristina B. Wolff & Carrie L. Cokely, *"To Protect and to Serve?": An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual and Transgender Community*, 11 (1) *Sexuality and Culture*, 1,3, 19 (2007). The phenomenon of "minority

---

<sup>3</sup> Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Discrimination: 2000 to 2013*, § IV.D, William Inst. (Nov. 2013) (available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Law-Enforcement-Discrim-Report-Nov-2013.pdf>).

<sup>4</sup> Available at: <http://www.amnesty.org/en/library/info/AMR51/122/2005>.

stress,” often experienced by gays and lesbians, is also correlated to crimes. Katie M. Edwards & Kateryna M. Sylaska , *The Perpetration of Intimate Partner Violence Among LGBTQ College Youth: The Role of Minority Stress*, 42 J. Youth Adolescence, 1721, 1728-29 (2013) (observing that “ internalized homonegativity may be the most salient minority stress correlate of the perpetration of same-sex partner violence” and “the results of this study underscore the utility of understanding partner violence among LGBTQ youth through a minority stress framework”); Ethan H. Mereish, Conall O’Cleirigh & Judith B. Bradford , *Interrelationships Between LGBT-Based Victimization, Suicide, And Substance Use Problems in a Diverse Sample of Sexual and Gender Minorities*, 19(1) Psychology, Health & Med., 1-13 (2014).

*Hate Crimes.* Hate crime statistics reported by the FBI show that gay and lesbian people experience the second highest volume of bias-motivated crimes, following only racial minorities. *See* FBI, *Latest Hate Crime Statistics* (2012).<sup>5</sup> 19.6% of the total hate crimes reported in 2012, the most recently available date, resulted from sexual-orientation bias. Indeed, an analysis of the FBI’s 2012 data

---

<sup>5</sup> Available at: <http://www.fbi.gov/news/stories/2013/november/annual-hate-crime-statistics-show-slight-decease>)

shows that Kentucky, Michigan, and Tennessee each have more reported hate crimes per capita than nearly any other state in the country.<sup>6</sup>

In 2009, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act as part of the National Defense Authorization Act for Fiscal Year 2010. Pub. L. 111-84, codified at 42 U.S.C. §§ 3716, 3716(a), 18 USC 249 and 1389 (“Hate Crimes Prevention Act”). In seeking to curb hate crimes, Congress has made legislative findings acknowledging the link between sexual orientation bias and violence. *See* 18 U.S.C.A. § 249 (“Editor’s and Revisor’s Notes”). Particularly relevant to this Court’s analysis are the following findings:

(1) The incidence of violence motivated by the actual or perceived . . . sexual orientation [or] gender identity poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

...

---

<sup>6</sup> According to an analysis of the data made available by the FBI, the District of Columbia reported the highest number of hate crimes per capita, followed by Michigan, North Dakota, Kentucky, and then Tennessee. If the same analysis is performed based only on sexual orientation-motivated hate crimes, Tennessee would rank 6<sup>th</sup>, Kentucky 9<sup>th</sup>, and Michigan 11<sup>th</sup> among the states in the number of hate crimes per capita. *See* Table 12, Agency Hate Crime Reporting by State, 2012; Table 13, Hate Crime Incidents per Bias Motivation and Quarter (both available at: [http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/jurisdiction/jurisdiction\\_final](http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/jurisdiction/jurisdiction_final)).

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

...

(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

*Id.* Congress's conclusion reflects a considered judgment that gays and lesbians have confronted significant violence based on their membership, or perceived membership, in a class.

Employment Discrimination. In public and private employment, discrimination against gays and lesbians is prevalent.<sup>7</sup> There is no nationwide

---

<sup>7</sup> See, e.g., Matt Apuzzo, Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs, N.Y. Times; May 20, 2014 at A13 (reporting on newly discovered civil service documents relaying that the Civil Service Commission had a "tendency to 'lean over backwards' to rule against a homosexual" in issues related to government employment and about Federal Bureau of Investigations activity to collect information on suspected gays) (available at: [http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html?\\_r=0](http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html?_r=0)); Executive Order 10450 (authorizing investigations into sexual activities of government employees); Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, William Inst. (Sept. 2009) (available at: <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/>).

employment nondiscrimination law protecting gays and lesbians, leaving a patchwork of state and local laws. None of the relevant states – Kentucky, Michigan, and Tennessee – have adopted a statewide prohibition against employment discrimination based on sexual orientation. Indeed, Tennessee is one of only seven states in the country in which *not a single locality* has enforceable prohibitions against sexual orientation discrimination. Williams Institute (2013) § IV.D. This is because, in May 2011, not unlike the Colorado law invalidated in *Romer*, the Tennessee legislature passed a new law that had the effect of repealing *all local ordinances* prohibiting discrimination on the basis of sexual orientation and barred any such future ordinances unless, and until, the state makes sexual orientation a protected class under state law. Tenn. House Bill No. 600, Pub. Ch. No. 278.<sup>8</sup>

Issues of employment discrimination based on sexual orientation are particularly troublesome for men and women in law enforcement. Gay male officers who chose to come out or who were known to be gay frequently reported harassment, and isolated cases of threatened physical abuse and failure to provide back up to gay cops in serious situations have been corroborated in a number of instances. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated*

---

<sup>8</sup> Available at: <http://www.capitol.tn.gov/Bills/107/Bill/HB0600.pdf>; see also T. C. A. § 7-51-1802.



*with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) Police Quarterly, 63, 64 (2002).

According to a recent study conducted by the Williams Institute at UCLA School of Law, discrimination and harassment against law enforcement and corrections officers who do not conform to sexual stereotypes continues to be pervasive throughout the United States. Williams Institute (2013), § 1. This discrimination includes firing or demotions, but also includes verbal, physical, and sexual harassment. *Id.*; *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 733-35 (6th Cir. 2005) (affirming a jury award of more than \$500,000 to a Cincinnati police officer harassed and fired after informing the department of a plan to transition from male to female); *Sorrenti v. City of New York*, 17 Misc.3d 1102(A) (N.Y. Sup. Ct. 2007) (affirming a jury's verdict collectively awarding over \$1.4 million dollars in damages to an officer that was discriminated against based on his perceived sexual orientation and to two other officers that were retaliated against for opposing the discriminatory treatment of their colleague); *Salvi v. Suffolk Cnty. Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006) (affirming a jury verdict of over \$600,000 in damages resulting from an officer being subjected to pervasive discrimination based on his sexual orientation and a hostile work environment); *Weeks v. Suffolk Cnty. Police Dept.*, No. CV-03-4294, Memorandum and Order, ECF No. 47 (E.D.N.Y. Apr. 28, 2005) (affirming a jury award of \$230,000,

including an award of punitive damages, to an officer who alleged that the police department ordered him to relinquish his weapon based upon an unfounded complaint that he was gay and that, thereafter, the officer was subjected to prolonged harassment that was condoned by supervisors before being wrongfully terminated).

While a strong EEO policy may reduce blatant discrimination against officers, the lack of state-wide employment discrimination laws in Kentucky, Michigan, and Tennessee means that officers can be fired for even being perceived to be gay or lesbian. Moreover, even in jurisdictions where blatant discrimination is unlawful, potential difficulties with promotion remain. Aaron Belkin & Jason McNichol , *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly*, 63, 89 (2002).

A survey of police officers revealed that lesbian and gay officers face barriers to equal employment opportunities similar to those faced by women and other minorities in law enforcement. Roddrick Colvin , *Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in Law Enforcement Work Environment*, 12(1) *Police Quarterly*, 86 (2008). Surveys have also shown that discrimination in promotion was the most common barrier to equal employment opportunity in law enforcement (22%), followed by assignments

(17%) and evaluations (16%). *Id.* at 95. And, as recently as 2008, nearly half of the police chiefs in the State of Texas responding to a survey said that they would have difficulty working with a gay man, while 62% indicated that they believed homosexuality constituted “moral turpitude.” Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner, *Texas Police Chiefs’ Attitudes Toward Gay and Lesbian Police Officers*, 11(1) *Police Quarterly*, 102, 110 (2008).

These are but a few examples of the long history of discrimination against gays and lesbians as a group, and gay and lesbian law enforcement personnel in particular, which inescapably point to the conclusion that heightened scrutiny is appropriate.

**B. Sexual orientation is irrelevant to one’s ability to perform in or contribute to society**

In determining whether heightened scrutiny is appropriate for classifications based on sexual orientation, a court also considers whether sexual orientation is relevant to one’s ability to perform in or contribute to society. There is little room for debate on this issue, especially since the Supreme Court invalidated criminal laws that may have otherwise hindered the ability of gays and lesbians to perform in or contribute to society. *Lawrence*, 539 U.S. 558.

Law enforcement careers are among the most demanding in our society. Nevertheless, studies have consistently concluded that gays and lesbians meet or exceed expectations in these careers and do not diminish the department’s

effectiveness. A study of the San Diego Police Department ten years after it began intentionally integrating gay and lesbian officers concluded that increasing participation of self-disclosed gays and lesbians did not lead to any overall negative consequences for performance, effectiveness, recruiting, morale, or other measures of well-being. Aaron Belkin & Jason McNichol , *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) Police Quarterly, 63, 65 (2002). Indeed, several respondents reported that increasing participation of gay cops on the beat improved the quality of neighborhood policing in the city. *Id.* at 87. Other studies have shown no differences in job-performance measures among police officers who identified themselves as gay, lesbian, or heterosexual. *See*, Deirdre Hiatt & George E. Hargrave , *Psychological Assessment of Gay and Lesbian Law Enforcement Applicants*, 63(1) J. of Personality Assessment, 80, 85 (1994). *Amici* are aware of no published study to the contrary. Moreover, in a similar vein, Congress repealed the failed “Don’t Ask, Don’t Tell” policy in September 2011 because it failed to improve the operations of the Armed Forces. Pub. L. 111-321.

*Amici*, and the thousands of gay and lesbian law enforcement officers they represent, risk their lives, and stand shoulder-to-shoulder with their colleagues, in protecting our communities. Their sexual orientation is irrelevant to their ability to

perform their jobs and contribute in significant ways to the well-being of our society.

**C. The Other Relevant Criteria Also Support the Conclusion that Heightened Scrutiny is Warranted**

The final two criteria that a court considers in deciding whether heightened scrutiny is appropriate -- whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” and whether the class is “a minority or politically powerless” – also support the application of heightened scrutiny here.

A classification may be constitutionally suspect even if it rests on a characteristic that is not readily visible. *See Mathews v. Lucas*, 427 U.S. 495, 504, 506 (1976) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage). As other courts have recognized, sexual orientation is “fundamental to one’s identity” and is a characteristic that one should “not be required to abandon” in order to receive fair treatment. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000). Moreover, significant social science supports the conclusion that sexual orientation is immutable. *Id.*

Gays and lesbians, as a class, are also a politically weakened minority. Indeed, nothing better illustrates this last point than the state constitutional amendments adopted through constitutional referendums supported by majorities,

in some cases overwhelming majorities, which deny same-sex couples the right to enter into, and receive the benefits of, civil marriage.

For these reason, *Amici* respectfully submit that this Court should conclude that heightened scrutiny is the appropriate level of review when evaluating classifications based on sexual orientation on equal protection grounds.

**II. THE REFUSAL TO RECOGNIZE SAME-SEX COUPLE’S MARRIAGES DENIES OUR FIRST RESPONDERS THE RESPECT AND DIGNITY THEY DESERVE AND PUTS THEM IN HARM’S WAY**

It is clear that the state’s interest in denying committed same-sex couples the benefits of civil marriage is not “substantially related to an important governmental objective,” and thus the laws should be struck down. *Clark*, 486 U.S. 456, 461 (1988). As noted above, discrimination against gay and lesbian officers is well documented. *See Williams Institute* (2013). Denying law enforcement officers of Kentucky, Michigan, and Tennessee the right to marry a person of the same-sex is another form of discrimination, which results in gay and lesbian officers being treated as “second class,” rather than affording them the full measure of dignity and respect that they deserve.

State recognition of the relationships of same-sex couples is significant for many, but especially for our first responders who put their lives on the line each day to serve our community. Not only do many have committed partners that must be cared for, but many also have children as well. As the Supreme Court has

recognized, the refusal to permit same-sex partners from being married “humiliates tens of thousands of children now being raised by same-sex couples,” which makes it “more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.” *Windsor*, 133 S.Ct. at 2694. The district courts uniformly recognized this important impact that marriage has on children, concluding that it provided a reason in favor of, not against, the right of same-sex couples to wed. *Bourke v. Beshear*, 2014 WL 556729, at \*8 (W.D. Ky. Feb. 12, 2014); *DeBoer v. Snyder*, 2014 WL 1100794, at \*12 -13 (E.D Mich. Mar. 21, 2014); *Tanco v. Haslam*, 2014 WL 997525, at \*7 (M.D. Tenn. Mar. 14, 2014).

The states’ decisions to subject the right of gays and lesbians to marry to a public referendum added additional stress on these brave men and women. It has been documented that increased minority stress and concurrent increased psychological distress followed the passage of marriage amendments, supporting the notion that marriage-amendment campaigns had a negative and immediate effect on LGB psychological health. Sharon Scales Rostosky, Ellen D.B. Riggle, Sharon G. Horne & Angela D. Miller, *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56(1) J. of Counseling and Psychol., 56 (2009). That study focused on the November 2006 ballot initiatives (which included Tennessee) and concluded that exposure to negative media

messages and negative conversations significantly increased around the election period in the states that had an amendment on the ballot. *Id.* Moreover, discrimination in civil marriage rights exacerbates the negative effects of chronic minority stress. Ellen D. B. Riggle, Jerry D. Thomas & Sharon S. Rostosky, *The Marriage Debate and Minority Stress*, 38(2) Pol. Sci. and Pols., 221, 221-24 (2005). The protections offered by civil marriage help to provide security and support for the continuation of long-term relationships, especially during crisis periods. *Id.*

The states' refusal to treat *all* citizens with dignity and respect also makes it more difficult for gay and lesbian officers to live open and honestly. Closeted personnel who fear being identified as gay or lesbian are unlikely to come forward to complain about problems, especially because they are not certain how supervisors may respond. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) Police Quarterly, 63, 73 (2002). Before coming out for the first time, virtually all respondents had concerns that a number of close colleagues would reject them or refuse to work with them, or that they even would be fired. *Id.* at 77. Even in San Diego, a city which has been on the vanguard of recruiting a diverse cadre of officers, many gay male officers still choose to remain closeted, as do some lesbians, likely to the detriment of their own



mental health and the long-term well-being of their units. *Id.* at 90. Thus, gay and lesbian law enforcement officers in states that do not recognize sexual orientation as a protected class are dependent upon the good will of their colleagues or upon their own ability to keep their sexual orientation secret. Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner, *Texas Police Chiefs' Attitudes Toward Gay and Lesbian Police Officers*, 11(1) *Police Quarterly*, 102, 105 (2008).

The need to keep one's sexual orientation secret not only means increased stress for the officer, but may also have profound impact on the individual's personal relationships. Most significantly, closeted gay and lesbian officers may not inform their department of the name and contact information of their same-sex partner. Thus, if the officer is injured in the line of duty, the department would be aware of the need to notify the officer's partner or bring that individual to the hospital to make critical medical decisions.

The state-sponsored discrimination may also place gay and lesbian law enforcement officers in harm's way, as it reflects an official position that these individuals do not deserve the same degree of respect and dignity as their heterosexual colleagues. *Cf. Windsor*, 133 S.Ct. at 2694 (laws against the recognition of marriage between same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier

marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . .”).

Researchers have found that the way decisions are made by police officers reflects the policies, practices and attitudes of their departments, thus suggesting that institutional responses are important to determining how heterosexual officers will engage with their gay and lesbian colleagues. Kristina B. Wolff & Carrie L. Cokely, *“To Protect and to Serve?”: An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual and Transgender Community*, 11(1) *Sexuality and Culture*, 1, 4 & 19 (2007). Conversely, in Departments that have fully integrated gay and lesbian officers and firmly enforced a policy of equality, officers have not reported concerns about whether their heterosexual colleagues would provide backup in dangerous situations. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly*, 63, 86 (2002). Thus, not only do discriminatory policies, like the states’ ban on marriage between same-sex couples, deny these individuals dignity, it also contributes to an environment in which gay and lesbian law enforcement officers are more likely to be subjected to discrimination and harassment while on the job.

### **III. THE REFUSAL TO HONOR THE MARRIAGES OF SAME-SEX COUPLES UNIQUELY HARMS LAW ENFORCEMENT OFFICERS**

The work we ask our law enforcement officers to do to protect our communities is dangerous. Each year, there are tens of thousands of assaults committed against law enforcement officers. Nationwide, nearly 20,000 police officers have died in the line of duty since such deaths were recorded. National Law Enforcement Officers Memorial Fund, Law Enforcement Facts (*available at*: <http://www.nleomf.org/facts/enforcement/>). Of those deaths, 555 were Kentucky officers, 560 were from Michigan, and 486 served in Tennessee. National Law Enforcement Officers Memorial Fund, Officer Deaths by State (*available at*: <http://www.nleomf.org/facts/officer-fatalities-data/state.html>).

The Supreme Court has repeatedly recognized that marriage confers a multitude of benefits. *See, e.g., Windsor*, 133 S.Ct. at 2694 (discussing the over 1,000 federal regulations impacted by marriage and noting that significant benefits and responsibilities are also imposed by state law); *Turner v. Safley*, 482 U.S. 78, 96 (1987); *see also Bourke v. Beshear*, 2014 WL 556729, at \*3; *DeBoer v. Snyder*, 2014 WL 1100794, at \*5; *Tanco v. Haslam*, 2014 WL 997525, at \*7. Appreciating the dangers of the job, the federal government and states have implemented their own special benefit programs to provide law enforcement officers and their families the peace of mind of knowing that they will be taken care of if something

happens to them in the line of duty. But state law in Kentucky, Michigan, and Tennessee deny these protections to the survivors of gay and lesbian fallen heroes, because it refuses to allow them to enter into or to otherwise recognize the marriages of same-sex couples. The denial of benefits is particularly harmful and discriminatory to the families of gay and lesbian law enforcement officers, who, again, are asked every day to take the same risks and make the same sacrifices as their straight colleagues.

**A. Without Marriage and Recognition of Existing Marriages, The Committed Partners of Gay and Lesbian Officers Residing In Kentucky, Michigan, and Tennessee Are Not Guaranteed Benefits Under Federal Law if The Officer is Killed in the Line of Duty**

The states' refusal to permit same-sex marriages presently deprives gay and lesbian officers killed in the line of duty of significant federal benefits. The federal Public Safety Officers' Benefits (PSOB) Program provides a one-time financial payment to the "spouses" of public safety officers that die in the line of duty. *See* 42 U.S.C. § 3796. Currently, the financial benefit is \$333,604.68. *See, e.g.,* Bureau of Justice Assistance, Public Safety Officers' Benefits Program, <https://www.psob.gov/> ("The amount of the PSOB benefit is \$333,604.68 for eligible deaths occurring on or after October 1, 2013."). PSOB also provides educational benefits to the spouses and children of officers who die in the line of duty or are catastrophically disabled. 42 U.S.C. § 3796d-1.

Even though the Supreme Court has struck down a portion of the Defense of Marriage Act, *see Windsor*, existing federal law extends benefits to the spouses of gay and lesbian law enforcement officers killed in the line of duty *only insofar as the officer's state of residence at the time of death recognizes the marriage*. See 28 C.F.R. § 32.3 (defining “spouse” as individual’s “lawful husband, -wife, -widower, or -widow” and providing that in “deciding who may be the spouse of a public safety officer,” the “relevant jurisdiction of domicile is the officer’s (as of the injury date)”). Thus, until and unless the Bureau of Justice Assistance (BJA) completes a rulemaking proceeding<sup>9</sup> and modifies the definition of spouse to eliminate the reference to the officer’s domicile, the same-sex spouses of law enforcement officers killed in the line of duty in Kentucky, Michigan, and Tennessee are not automatically eligible for these substantial benefits.

Importantly, though the PSOB program permits officers to designate a beneficiary, *see* 42 U.S.C. § 3796(a)(4), it does not fully mitigate the harmful effects of the states’ refusal to recognize the marriages of gay and lesbian officers. Rather, the statute provides that the officer’s election only becomes relevant if the

---

<sup>9</sup> The BJA issued a Notice of Proposed Rulemaking Recently that would change the definition to state, in pertinent part, that a spouse “means someone with whom an individual entered into marriage lawfully under the law of the jurisdiction in which it was entered into. . . .” *See* 79 Fed. Reg. 12434 (Mar. 5, 2014) (proposing amendment to the definition of spouse in 28 C.F.R. § 32.3 in light of *Windsor*).

officer has no surviving spouse *and* no surviving children. *Id.* (“if there is no surviving spouse of the public safety officer and no surviving child. . . to the surviving individual (or individuals, in shares per the designation, or, otherwise, in equal shares) designated by the public safety officer to receive benefits”). Thus, anytime an officer has a child, whether or not that child lives with the officer, his or her designation of a beneficiary would be rendered moot. An officer’s same-sex committed partner is, therefore, not guaranteed any financial resources in these circumstances, because the states of Kentucky, Tennessee, and Michigan allow those individuals to be married or to recognize a marriage performed in another state. This result could be extremely detrimental in situations in which the officer served as the primary income earner for the family.

Moreover, even if federal law is amended as proposed by the BJA, it would not eliminate the discriminatory impact of the state bans because gay and lesbian officers would be required to travel to another state that allows out-of-state same-sex couples to be married. There is no legitimate justification for denying gay and lesbian officers the ability to celebrate their marriages among family and friends in the communities that they dedicate their lives to serving, just as their heterosexual colleagues are allowed to do.

**B. The Families of Gay and Lesbian Officers Are Also Denied Significant Benefits Under State Law**

In addition to the federal PSOB benefits, the survivors of law enforcement officers killed in the line of duty are also entitled to myriad state benefits. In Kentucky, Michigan, and Tennessee the receipt of these benefits is significantly impacted by the states' refusal to permit same-sex couples to be married in the state or to recognize lawful marriages performed in other jurisdictions. A few examples from each of the states at issue in this case are set forth below.

Kentucky: Kentucky provides a lump sum payment of \$80,000 to a “surviving spouse” of a police officer killed in the line of duty. KRS § 61.315. In addition, the state may provide an additional payment of \$25,000 to those that serve in cities, counties, and urban counties who are ineligible for death benefits under a pension plan administered by the city, county, or urban county. KRS § 346.155. Widows and children of officers killed or permanently injured or disabled in the line of duty are also eligible for free tuition at a state-supported college. KRS §§ 164.2841 & 164.2842. Both provisions require the “spousal relationship” to “be shown by a marriage certificate or other documentary evidence.” *Id.* Thus,

For purposes of an officer's retirement account, Kentucky law also discriminates against the families of gay and lesbian officers. For example, while officers in certain jurisdictions may designate someone other than a “spouse” or

“child” to receive death benefits, the amount of the benefits is limited to the total contributions made to the plan by the officer. *See, e.g.*, KRS § 95.865 (relevant to cities of the second class). A lawfully-recognized widow, on the other hand, would also receive a percentage of the officer’s salary. KRS § 95.860.

In Kentucky, in addition to the committed partner of the law enforcement officer not being automatically eligible for the various state benefits, the children of same-sex couples also lack full protection in Kentucky if their non-biological parent dies or is seriously injured in the line of duty. Kentucky does not allow non-biological gay or lesbian parents to adopt children that are born to their partners. *See, e.g., S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008) (concluding that the state’s prohibition against marriages between same-sex couples means that a child cannot be legally recognized as a “stepchild” of the non-biological gay or lesbian parent and concluding that the “overwhelmingly obvious answer” is that Kentucky law forbids courts from legally recognizing these relationships, even if it is otherwise in the best interest of the child). Thus, under Kentucky law, if the law enforcement officer is not the biological parent of the couples’ child, that child will not be entitled to the benefits available to the “child” of a fallen officer. *See, e.g.*, KRS § 164.2841 (requiring that the “the parent-child relationship . . . be shown by birth certificate, adoption papers, or other documentary evidence” in order for a “child” to be eligible for free tuition state-supported university).



Michigan: Michigan provides a one-time payment of \$25,000 to the dependents of public safety officers who are killed or who are permanently disabled in the line of duty. M.C.L.A. § 28.634. This payment is made to the “surviving spouse,” or if there is no spouse, to the officer’s dependents. *Id.* While an officer may designate a beneficiary, such a designation can only be relevant if the officer has no dependants. *Id.* The survivors of police officers in Michigan are also eligible for a state-funded pension program, health benefits, and educational benefits. *See* M.C.L.A. § 38.1601 *et seq.* (retirement for state police officers); M.C.L.A. § 38.556(2) (pension benefits); M.C.L.A. § 390.1241 *et seq.* (education benefits).

The Michigan Public Safety Officers Benefit Act defines “surviving spouse” to mean “the husband or wife of the deceased officer at the time of the officer’s death.” M.C.L.A. § 28.632(j); *see also* M.C.L.A. § 38.1604 (defining “surviving spouse” for purposes of the state police retirement program to mean “the spouse at the time of death of the member or retirant”). Thus, under Michigan law, a same-sex partner is not automatically eligible to receive these benefits because the same-sex partner is not allowed to become the officer’s spouse.

In Michigan, in fact, there is substantial basis to conclude that the state may act to invalidate beneficiary designations that would otherwise provide benefits to same-sex partners. Michigan’s constitution invalidates the recognition of “union

[s]” “similar” to marriage “for any purpose.” Michigan Constitution, Article 1, § 25. In *National Pride at Work, Inc. v. Governor of Michigan*, 274 Mich. App. 147, 165, 732 N.W.2d 139 (2007), the Court of Appeals of Michigan, interpreting this language, held that Michigan law not only denies automatic benefits to same-sex couples that could be gained through heterosexual marriage, but prohibits “public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of policy.” 732 N.W.2d at 153. Application of that same logic could jeopardize designations of same-sex partners made by gay and lesbian officers.

Tennessee: The state of Tennessee, like Michigan, provides a one-time payment of \$25,000 to fallen officers. T.C.A. § 7-51-208. In Tennessee, the benefit is paid “to the estate of” the fallen officer. T.C.A. § 31-2-104 provides that, in the event there is no will in place, the decedent’s estate would be passed to the decedent’s children or parents in the event there is no lawfully recognized spouse. Thus, the law does not protect same-sex partners of gay and lesbian law enforcement officers.

The impact that these states’ constitutional bans on the recognition of marriages by same-sex couples, and others like them, have on our gay and lesbian law enforcement officers is anything but theoretical. Corporal Dennis Engelhard, a

nine-year veteran of the Missouri State Highway Patrol, was killed in the line of duty when a driver lost control of his vehicle on an ice-covered roadway and struck and killed him on Christmas Day in 2009. At the time of his death, Corporal Engelhard had been in a long-term relationship with his same-sex domestic partner, Kelly Glossip.<sup>10</sup> Glossip applied to the Missouri Department of Transportation and Highway Patrol Employees' Retirement System for survivor benefits under Missouri state law, which, like Kentucky, Michigan, and Tennessee, provides survivor benefits to the surviving spouse of a police officer killed in the line of duty. Glossip's claim for benefits was denied. The case was eventually submitted to the Supreme Court of Missouri, which concluded that, even though Missouri state law did not permit Engelhard and Glossip to marry, the lack of marriage prohibited Glossip from obtaining the benefits that would be available to a heterosexual spouse. *Glossip v. Missouri Dept. of Trans.*, 411 S.W.3d 796 (Mo. 2013).<sup>11</sup>

---

<sup>10</sup> Even to this day, the Missouri State Highway Patrol does not acknowledge Dennis and Kelly's relationship. See: <http://www.msdp.dps.missouri.gov/MSHPWeb/UltimateSacrifice/OfficerPages/corporalDennisEEengelhard.html> (identifying survivors as his parents and a brother, sister-in-law, niece, and nephews).

<sup>11</sup> Glossip does not represent the only known example of a same-sex partner of a slain gay or lesbian officer being denied options. See, e.g., Associated Press, *Cop's Companion to Sue for Survivor's Benefits*, Miami Herald, Feb. 28, 2002, at 5B (available at: WLNR 4641676).

In sum, the ability of a gay and lesbian officer to marry would not only allow them to be treated equally with their peers – *i.e.*, with dignity – but would also ensure these women and men the peace of mind of knowing that the person they love will be cared for in the event they are killed in the line of duty. Significant state and federal benefits hinge on these precise issues, and no alternatives can provide the same level of dignity and protection as civil marriage does. This Court’s decision, while it would affect the lives of all gays and lesbians in Kentucky, Michigan, and Tennessee, can also ensure that never again will a law enforcement officer worry about whether his state will honor and provide for his family if he is killed while serving his community.

## **CONCLUSION**

When our men and women in blue finish a long day's work – be they straight or gay – they should have the right to come home to their spouse. They should know that the state that they serve and protect will honor their relationship, not strip away their dignity or force them to remain in fearful silence.

But, most of all, our gay and lesbian officers deserve the peace of mind knowing without a doubt that, after the bagpipe has wailed its last somber note and the flag has been folded, the loved ones they have left behind will be provided for.

Wherefore, *amici* respectfully pray that the Court affirm each of the decisions below.

Dated: June 16, 2014

/s/ G. David Carter  
G. David Carter  
Joseph P. Bowser  
Hunter T. Carter  
ARENT FOX LLP  
1717 K Street, N.W.  
Washington, D.C. 20036-5342  
(202) 857-8972

Counsel for *Amici Curiae*

**CERTIFICATE OF COMPLIANCE  
REQUIRED BY FED. R. APP. P. 32(A)(7)(C)**

The undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 7,247 words, excluding the parts of the brief exempted by 6 Cir. R. 32(b)(1).

The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in 14-point Times New Roman font.

Dated: June 16, 2014

/s/ G. David Carter  
G. David Carter

**CERTIFICATE OF SERVICE**

It is hereby certified that on June 9, 2014, I electronically filed the foregoing Brief *Amicus Curiae* Of Law Enforcement Officers and Organizations with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, and service was accomplished through same.

Dated: June 16, 2014

/s/ G. David Carter  
G. David Carter

Appendix A

*Weeks v. Suffolk Cnty. Police Dept.*,  
No. CV-03-4294, Memorandum and Order, ECF No. 47 (E.D.N.Y. Apr. 28, 2005)

C/m

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JOHN WEEKS,

Plaintiff,

-against-

SUFFOLK COUNTY POLICE  
DEPARTMENT et al.,

Defendants.  
-----X

MEMORANDUM AND ORDER

CV 03-4294

(Wexler, J.)

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ APR 29 2005 ★

LONG ISLAND OFFICE

APPEARANCES:

LEEDS MORELLI & BROWN, P.C.  
BY: RICK OSTROVE, ESQ.  
Attorneys for Plaintiff  
One Old Country Road Suite 347  
Carle Place, New York 11514

CHRISTINE MALAFI, SUFFOLK COUNTY ATTORNEY  
BY: BRIAN P. CALLAHAN, ESQ. ASSISTANT COUNTY ATTORNEY  
Attorneys for Defendants  
100 Veterans Memorial Highway  
P.O. Box 6100  
Hauppauge, New York 11788

ROMANO, CAPUTO & QUAIL, P.C.  
BY: JAMES J. QUAIL, ESQ.  
21 Carleton Avenue  
East Islip, New York 11730  
Former Attorney for Plaintiff

WEXLER, District Judge

This case was tried before a jury that rendered a verdict awarding Plaintiff damages in the amount of \$260,000. Of that award, \$30,000 was assessed in punitive damages against Defendant Phillip . Robillito and \$150,000 was assessed against Defendant James Quinn.



Presently before the court is Defendant's motion to set aside the jury verdict. Also before the court are Plaintiff's cross motions for awards of attorneys' fees pursuant to 28 U.S.C. § 1988. Attorney's fees applications have been filed by Plaintiff on behalf of Leeds, Morelli & Brown, Plaintiff's trial counsel (and the only counsel of record before this court) as well as on behalf of James Quail, Esq., who apparently rendered legal advice and service to Plaintiff prior to the filing of this lawsuit.

Upon consideration, the court denies the motion to set aside the jury verdict, except with regard to the imposition of punitive damages against Defendant Robillito. Those damages, in the amount of \$30,000, were assessed by the jury against Robillito in his personal capacity.<sup>1</sup> As the court instructed the jury, punitive damages are properly awarded to punish a wrongdoer for extraordinarily offensive misconduct. In this case, the evidence presented with respect to Defendant Robillito was sparse. While that evidence might have supported a finding that Robillito was, in some way, made aware of certain conduct with respect to Plaintiff, the evidence cannot be relied upon to support a verdict imposing punitive damages. Accordingly, the court sets aside the \$30,000 punitive damages award assessed against Robillito, but in all other respects affirms the jury's verdict.

As to the attorneys' fees applications, the court will hold those applications in abeyance pending a conference to be held before this court on May 12, 2005 at 10:00 A.M. The parties are advised to confer prior to the conference to attempt to settle the attorneys' fee issue and to be

---

<sup>1</sup> Defendants argue that because Robillito was deemed to be a policy maker, punitive damages cannot be assessed against him. While it is true that punitive damages are not available against the municipality, such damages may be, and apparently were, assessed against Robillito in his individual capacity. It is this finding with which the court disagrees.

available to discuss settlement of all such issues on the date of the conference. The Clerk of the Court is directed to terminate all post-trial motions at this time with the right to re-open the motions if they are not settled.

SO ORDERED.

LEONARD D. WEXLER  
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York  
April 29, 2005