

**No. 14-3464**

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

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BRITTANI HENRY, ET AL.,  
*Appellees,*

v.

LANCE HIMES, ET AL.,  
*Appellants.*

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On Appeal from the Southern District of Ohio at Cincinnati  
Western Division Case No. 1:14-cv-0129, Judge Timothy S. Black

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**BRIEF OF *AMICUS CURIAE*  
FORMER OHIO ATTORNEY GENERAL JIM PETRO,  
COLUMBUS POLICE CHIEF KIM JACOBS, DAYTON POLICE CHIEF  
RICHARD BIEHL, AND 25 OTHER LAW ENFORCEMENT OFFICERS,  
FIRST RESPONDERS, AND ORGANIZATIONS IN SUPPORT OF  
APPELLEES AND SUPPORTING AFFIRMANCE**

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July 15, 2014

“[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



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

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

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

- James M. “Jim” Petro, Attorney General of Ohio from 2003 to 2007.
- Chief Kim Jacobs, Chief of the Columbus, Ohio Division of Police.
- Chief Richard Biehl, Chief of the Dayton, Ohio Police Department.
- Chief Jeff Hadley, Chief of the Kalamazoo, Michigan Department of Public Safety, which encompasses law enforcement, fire, and emergency medical services.
- Michelle Bryant, Detective and LGBT Liaison Officer, Lansing Michigan Police Department.
- Cole Bouck, Co-Founder and Past President of Michigan Gay Officers Action League.

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

- Detective Kat Cooper, City of Collegedale Tennessee Police

Department.

- Detective Brandon Allen, City of Collegedale Tennessee Police

Department.

- Matthew Fuson, Paramedic, Nashville Tennessee Fire Department.

- John W. Johnson III, Critical Care Paramedic, Nashville Tennessee

Fire Department.

- Jade Medders, Firefighter, EMT-IV, Nashville Tennessee Fire

Department.

- Shawn Matthews, Supervisory Special Agent with the Federal Bureau of Investigations and co-chair of FBI Pride.

- Javier Pagan, Boston Police Department, serves as a liaison to the GLBT community. He was at the finish line of the Boston City Marathon in 2013 when a bomb exploded nearby, killing and injuring bystanders.

- Battalion Chief (retired) Ruth Morrison, Indianapolis Fire Department.

- Officer Pamela Lee, Indianapolis Metropolitan Police Department.

- Captain Lance Langsford, Indianapolis Fire Department.

- Lt. Brenda Bucci, Indianapolis Fire Department.

- Lt. Bettye Dobkins (retired), Indianapolis Metropolitan Police Department.
- Major Irene Burks, MSM, Patrol Commander, Prince George's County, Maryland.
- Scott Gunn, Arundel County Maryland Police Department, and co-founder of the LGBT Fallen Heroes Fund.
- Greg Miraglia, a former Deputy Police Chief and currently the Dean of a police academy in California.

The following organizations are *amici*:

- Columbus, Ohio Division of Police
- City of Dayton, Ohio Police Department
- Kalamazoo, Michigan Department of Public Safety
- Out To Protect, Inc., 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, 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 gives recognition to their survivors.

- Gay Peace Officers Association of Southern California is a non-profit, social, and community organization of lesbian, gay, bisexual, and transgendered peace officers and civilian law enforcement professionals
- Gay Officers Action League New York was formed in 1982 to address the needs and concerns of gay and lesbian law enforcement personnel in New York.

### **STATEMENTS PURSUANT TO FRAP 29**

Pursuant to FRAP 29(a), all parties have consented to the filing of this brief.

Pursuant to FRAP 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 and other first responders 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 Ohio, 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 relevant to deciding whether to apply heightened scrutiny support its application here. *First*, sexual minorities have suffered a long history of discrimination. It was not until 2003 that the Supreme Court declared unconstitutional state laws that *criminalized* private sexual conduct between persons of the same sex. 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. 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 bears no relation to one's ability to perform in or contribute to society. *Amici* serve their communities every day just like their colleagues who happen to go home to an opposite-sex spouse. The available data shows that sexual orientation has no bearing on first responders' on-the-job performance.

*Third*, 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 of the state laws on appeal are very real to *amici*. *Amici's* heterosexual colleagues go to work knowing that, should tragedy befall them in the line of duty, the states and communities they served will come to their family's aid – with financial resources, healthcare, and higher education. But even though *amici* walk shoulder to shoulder 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 U.S. 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 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 over four decades ago, the Court struck down a Colorado law that repealed existing legal protections for gays and lesbians, and concluded that the ballot measure failed “*even*” rational-basis review. *Romer v. Evans*, 571 U.S. 620, 632 (1996). 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.*

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 encourage 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).

**A. Gays and Lesbians Have Been Subject To A History Of Discrimination and Violence**

Gays and lesbians have suffered a long history of state-condoned and private discrimination, which persists 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 criminalized the private sexual conduct of gays and lesbians. *Lawrence*, 539 U.S. at 578. In so doing, the 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>2</sup> 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>3</sup>

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<sup>2</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>3</sup> *Available at*: <http://www.amnesty.org/en/library/info/AMR51/122/2005>.

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 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.* The FBI’s hate crime statistics 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>4</sup> 19.6% of the total hate crimes reported in 2012, the most recently available data, resulted from sexual-orientation bias. Indeed, an analysis of the FBI's 2012 data shows that Ohio, Kentucky, Michigan, and Tennessee each have a high number of sexual-orientation-based hate crimes per capita, indeed among the highest in the country.<sup>5</sup>

In 2009, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Pub. L. 111-84, codified at 42 U.S.C. §§ 3716, 3716(a), 18 U.S.C. §§ 249 and 1389. In seeking to curb hate crimes, Congress 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 here 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.

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<sup>4</sup> Available at: <http://www.fbi.gov/news/stories/2013/november/annual-hate-crime-statistics-show-slight-decrease>)

<sup>5</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. Ohio ranks 20th. If the same per-capita analysis is performed based solely on sexual-orientation-motivated hate crimes, however, Tennessee would rank 6th, Kentucky 9th, Michigan 11th, and Ohio 14th. *See* Table 12, Agency Hate Crime Reporting by State, 2012; Table 13, Hate Crime Incidents per Bias Motivation and Quarter (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)).

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

...

(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>6</sup> There is no federal

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<sup>6</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 documents showing that the Civil Service Commission had a "tendency to 'lean over backwards' to rule against a homosexual") (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)); Exec. 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: [13](http://williamsinstitute.law.ucla.edu/research/workplace/documenting-</a></p></div><div data-bbox=)

nondiscrimination law protecting gays and lesbians, leaving a patchwork of state and local laws. Neither Ohio, Kentucky, Michigan or 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, the Tennessee legislature passed a new law that, not unlike the Colorado law invalidated in *Romer*, effectively repealed *all local ordinances* prohibiting sexual-orientation discrimination and barred any such future ordinances unless the state ever made sexual orientation a protected class under state law. Tenn. House Bill No. 600, Pub. Ch. No. 278.<sup>7</sup>

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

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discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/).

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

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

According to a 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, 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 making plans 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 verdict awarding \$1.4 million to an officer that was discriminated against based on his perceived sexual orientation and to two other officers that were retaliated against for defending him); *Salvi v. Suffolk Cnty. Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006) (affirming a jury verdict of over \$600,000 for 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 against a department that ordered an officer to relinquish his weapon based upon an

unfounded complaint that he was gay and then subjected him to prolonged harassment and wrongful termination).

While a strong EEO policy may reduce blatant discrimination against officers, the lack of state-wide employment discrimination laws in Ohio, Kentucky, Michigan, and Tennessee allow officers to 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 Texas police chiefs 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. Heightened scrutiny is appropriate.

**B. Sexual Orientation Is Irrelevant to One’s Ability to Perform in or Contribute to Society**

In determining whether to apply heightened scrutiny, 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 and first responders’ 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 first responders they represent, risk their lives, and stand shoulder-to-shoulder with their colleagues, in protecting and serving 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 Application of Heightened Scrutiny**

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 applying 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” 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 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 FIRST RESPONDERS THE RESPECT AND DIGNITY THEY DESERVE AND PUTS THEM IN HARM’S WAY**

A 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 first responders in Ohio, Kentucky, Michigan, and Tennessee the right to marry a person of the same sex is another form of discrimination, which results in these men and women 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 risk their lives each day serving our communities. 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. *Henry v. Himes*, 2014 WL 1418395, at \*11-\*15 (S.D. Ohio Apr. 14, 2014); *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’ refusal to treat *all* citizens with dignity and respect also makes it more difficult for gay and lesbian officers to live openly 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 uncertain 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 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 and first responders 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 loved ones. 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 unaware 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 and other first responders 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. . . .”).

Research shows that police officers commonly make decisions that reflect the policies, practices and attitudes of their departments, 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 enforce 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, they also contribute to an environment in which gay and lesbian law enforcement officers are more likely to be subjected to discrimination and harassment while on duty.

### **III. THE REFUSAL TO HONOR THE MARRIAGES OF SAME-SEX COUPLES UNIQUELY HARMS FIRST RESPONDERS**

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, 773 were Ohio officers, 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>*).

As the Supreme Court has repeatedly recognized, 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). Appreciating the dangers of the job, the federal government and states have implemented various benefit programs to provide first responders 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 Ohio, 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 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. The Lack of Marriage Equality Impacts Benefits Provided by Federal Law to Families of Public Safety Officers Killed in the Line of Duty**

The states' refusal to permit same-sex marriages imposes an unfair burden on gay and lesbian officers who seek to ensure that their partner will receive significant federal benefits if the officer is injured or killed in the line of duty. The 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* <https://www.psob.gov/>. 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 struck down a portion of the Defense of Marriage Act in 2013 in *Windsor*, federal law could only extend benefits to the spouses of gay and lesbian law enforcement officers killed in the line of duty if the officer's state of residence recognized the marriage. *See* 28 C.F.R. § 32.3

(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)”).

This significant legal hurdle will change on July 23, 2014, when rule changes adopted by the Office of Justice Programs will alter the definition of “spouse” to read, in pertinent part, “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. 35490-01 (June 23, 2014). As a result, gay and lesbian officers will soon be eligible for federal PSOB benefits, provided they are married in another state that allows non-residents to wed. This is an important legal change for gay and lesbian officers. Unfortunately, however, it falls short of creating real equality for those serving in Ohio, Kentucky, Tennessee, and Michigan.

Rather, because of the on-going state bans, gay and lesbian officers will be required to travel to another state to be married. This is an additional burden that heterosexual couples do not have to endure. It is particularly demeaning to deny gay and lesbian officers the opportunity to celebrate their commitment to one another in the communities that they dedicate their lives to serving, just so that they may be eligible for these federal benefits.

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

The survivors of law enforcement officers and many first responders killed in the line of duty are also entitled to many state benefits. In Ohio, Kentucky,

Michigan, and Tennessee, the receipt of these benefits is significantly and adversely impacted by the states' refusal to permit same-sex couples to be married in the state or to recognize lawful marriages performed elsewhere. A few examples from each of the states at issue here are set forth below.

Ohio: Ohio created the public safety officers death benefit fund to care for the families of law enforcement officers and firefighters killed in the line of duty. Ohio Revised Code § 742.62. It provides a death benefit equal to the officer's or firefighter's full salary (less certain deductions for other state benefits) until such time as the officer or firefighter would have reached retirement. *Id.* at § 742.63(A)(11). The benefits are only paid to a spouse, children, or dependent parents. *Id.* at § 742.63(D) – (E). Ohio also provides spouses and children of officers killed in the line of duty free tuition at state universities and colleges. Ohio Revised Code § 3333.26.

Because Ohio does not permit gay and lesbian couples access to civil marriage, these benefits are not available to committed partners if a gay or lesbian officer dies in the line of duty. Ohio also does not extend parental rights to unmarried couples and even refuses to permit non-biological gay or lesbian parents the right to adopt the couple's children, unless the biological parent relinquishes his or her own custody rights. *See In re Adoption of Doe*, 719 N.E.2d 1071, 1072-73 (Ohio App. 9 Dist. 1998)). As a result, the children of fallen law enforcement

and other public safety officers may also be denied these benefits because of the state's refusal to permit their parents to marry.

Kentucky: Kentucky provides a lump sum payment of \$80,000 to a “surviving spouse” of a police officer, firefighter and other first responders killed in the line of duty. KRS § 61.315. The state may also provide an additional \$25,000 to officer serving in certain municipalities. 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.*

With regard to an officer's retirement account, Kentucky law also discriminates against the families of gay and lesbian officers. When officers in certain jurisdictions 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. A lawfully recognized widow, on the other hand, would receive those benefits plus a percentage of the officer's salary. KRS § 95.860.

In Kentucky, 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 “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 or first responder is not the biological parent of the couples’ child, that child will not be entitled to benefits if his or her parent is killed in the line of duty. *See* KRS § 164.2841.

Michigan: Michigan provides a one-time payment of \$25,000 to the dependents of public safety officers who are killed or 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 is relevant only if the officer has no other dependents. *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. 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 fear that the state may even invalidate beneficiary designations that would otherwise provide benefits to same-sex partners. Michigan's constitution refuses to recognize "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 held that Michigan law not only denies automatic benefits to same-sex couples, 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 provides a one-time payment of \$25,000 to fallen officers, firefighters and other first responders. T.C.A. §§ 7-51-206 – 7-51-208. In Tennessee, the benefit is paid "to the estate of" the fallen officer. If 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. T.C.A. §

31-2-104. Thus, the law does not protect same-sex partners of gay and lesbian law enforcement officers, firefighters or other first responders.

These states' bans on the recognition of marriages by same-sex couples, and others like them, have real, damaging effects on gay and lesbian law enforcement officers. 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 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. Glossip applied for survivor benefits under Missouri law, which, like Ohio, 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>8</sup>

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<sup>8</sup> Glossip is not the only example of a same-sex partner of a slain gay or lesbian officer being denied benefits. *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 them the peace of mind of knowing that the person they love will be cared for if they are killed in the line of duty. Significant state and federal benefits turn on these precise issues, and no alternatives can provide the same level of dignity and protection as civil marriage. This Court’s decision can ensure that never again will a law enforcement or other public safety 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 uniform 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 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 public safety officers deserve the peace of mind of knowing 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: July 15, 2014

/s/ G. David Carter

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**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 6,970 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: July 15, 2014 /s/ G. David Carter  
G. David Carter

**CERTIFICATE OF SERVICE**

It is hereby certified that on July 15, 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: July 15, 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)

Clm

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

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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

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<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.

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LEONARD D. WEXLER  
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York  
April 29, 2005