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LAW SUMMARY

Cloaking a Challenge to Missouri's Marriage Amendment with a Challenge for Survivor Benefits

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I. INTRODUCTION

On Christmas day of 2009, the Missouri State Highway Patrol (MSHP) tragically lost trooper Dennis Engelhard. Engelhard was attending to a minor accident on Interstate 44 near Eureka, Missouri, when a vehicle lost control and struck and killed him.[1] In the days immediately following his death, little, if any, thought would be given to the enormous implications that this loss would have on Missouri state law, and even less thought would be given to the possibility that Engelhard's death might become the backdrop for another layer of argument surrounding the ongoing same-sex marriage debate throughout the country. Appropriately, the immediate focus following Engelhard's death was on the tragedy that surrounds losing one who so bravely serves the public. His obituary praised him for his service and noted that Governor Jay Nixon ordered flags at all state buildings be flown at half-staff in Engelhard's honor.[2]

Following the death of an officer of the law, concern often shifts to the officer's surviving family and loved ones with the hope that they will be provided for following their tragic loss. However, this situation was different. There was more to this story than Engelhard's obituary, which stated that his parents and brother survived him and that he was single with no children.[3] Nowhere in his obituary did it mention that Engelhard was gay or that he had

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1. Jake Wagman, *Sliding Car Kills Trooper on I-44: Officer was on Scene of an Accident, One of Dozens Caused by Slick Roadways*, ST. LOUIS POST-DISPATCH, Dec. 26, 2009, at A1.

2. *Cpl. Dennis E. Engelhard: Funeral Services Are Announced for Fallen State Trooper*, ST. LOUIS POST-DISPATCH, Dec. 29, 2009, at A17.

3. *Id.* Englehard was laid to rest on December 30, 2009, in his hometown of Brookfield, Missouri. *Honoring a Fallen Trooper*, ST. LOUIS POST-DISPATCH, Dec. 31, 2009, at A22.

been in a committed same-sex relationship with Kelly Glossip for fifteen years.[4] Despite the couple's relationship, it soon became clear that under Missouri law, Glossip was ineligible to receive the same benefits that the spouse of a married, heterosexual officer receives following the loss of his or her loved one.

On August 5, 2010, Glossip formally sought survivor benefits by filing a Survivor Application with the Missouri Department of Transportation and Highway Patrol Employees' Retirement System (MPERS).[5] Shortly thereafter, MPERS sent a letter to Glossip's attorney denying Glossip's claim for survivor benefits under Missouri Revised Statutes section 104.140.[6] This section provides that if an employee's death "was a natural and proximate result of a personal injury or disease arising out of and in the course of the member's actual performance of duty as an employee, then the minimum benefit to such member's surviving spouse . . . shall be fifty percent of the member's final average compensation."[7] The denial letter cited Missouri Revised Statutes section 104.012, which provides that for purposes of the retirement systems administered under Chapter 104, "spouse" refers only to an individual in a marriage between a man and a woman.[8] MPERS also referenced Missouri Revised Statutes section 451.022, Missouri's general statute providing that same-sex marriage is not recognized for any purpose.[9] On October 14, 2010, Glossip appealed the MPERS Executive Director's denial.[10] The MPERS Board of Trustees met a month later and upheld the denial.[11]

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4. Glossip Aff. ¶ 2, July 23, 2010, *available at* http://www.aclu.org/files/assets/Glossip_Benefits_Application.pdf.

5. Glossip Survivor Application to MODOT & Patrol Employees' Retirement System (MPERS) [hereinafter Survivor Application], *available at* http://www.aclu.org/files/assets/Glossip_Benefits_Application.pdf. The Survivor Application is dated July 23, 2010, but MPERS did not receive the Survivor Application until August 5, 2010. *Id.*

6. Letter from Susie Dahl, Exec. Dir., Mo. Patrol Emps. Ret. Sys., to Roger K. Heidenreich, Attorney for Kelly D. Glossip (Aug. 17, 2010) [hereinafter Denial Letter], *available at* http://www.aclu.org/files/assets/Glossip_Benefits_Denial.pdf.

7. MO. REV. STAT. § 104.140.3 (Supp. 2011).

8. Denial Letter, *supra* note 6. Specifically, Missouri Revised Statutes section 104.012 provides: "For the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman." MO. REV. STAT. § 104.012.

9. Denial Letter, *supra* note 6. Missouri Revised Statutes section 451.022.4 provides in pertinent part: "A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." MO. REV. STAT. § 451.002.4.

10. Request for Review, *In re:* Survivor Application – Dennis Engelhard, Deceased, (Appeal No. 2010-1), *available at http://www.aclu.org/files/assets/Glossip_Trustees_Appeal.pdf*. Glossip's appeal laid the groundwork for his eventual Petition and later documents filed in his lawsuit, discussed *infra* Part III. *Id.* His arguments in

Glossip then brought an action against MPERS in the Circuit Court of Cole County.[12] The arguments advanced by both Glossip and MPERS have been consistent throughout the litigation.[13] Since the onset of this lawsuit,

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his appeal attack Missouri Revised Statutes section 104.140.3 as a statute in violation of the Missouri Constitution's guarantee of equal protection and substantive due process, as well as a violation of Missouri's prohibition of "special law[s]." *Id.* ¶¶ 17, 26.

11. Certificate Authenticating Records Kept by the System (Nov. 26, 2010) (attaching MPERS Board of Trustees meeting minutes from Nov. 18, 2010), *available at* http://www.aclu.org/files/assets/Glossip_Appeal_Denial.pdf.

12. Petition for Injunctive Relief and Declaratory Relief, Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys., No. 10-CC00434 (Cole Cnty. Cir. Ct. dismissed Apr. 30, 2012), *available at* http://www.aclu.org/files/assets/glossipB.pdf. Glossip filed his lawsuit with the help of the American Civil Liberties Union (ACLU). *Id.* Glossip's Amended Petition, filed on April 4, 2011, sought, *inter alia*:

> (1) A declaration that [MPERS's] failure to provide same-sex, surviving, domestic partners of gay, lesbian, and bisexual MSHP employees the opportunity to obtain survivor benefits that are available to different-sex couples through the legal status of marriage violat[ed] . . . Glossip's right to equal protection under . . . the Missouri Constitution.
> (2) A declaration that [MPERS's] exclusion of same-sex, surviving, domestic partners of deceased gay, lesbian, and bisexual MSHP employees from the survivor benefits that are available to different-sex couples who marry violates . . . Glossip's right to due process under . . . the Missouri Constitution.
> (3) A declaration that [Missouri Revised Statutes sections] 104.012 and 104.140.3 are a special law and, therefore, violate . . . the Missouri Constitution.
> (4) An order enjoining [MPERS] from continuing to deny . . . Glossip access to survivor benefits.

Amended Petition for Injunctive Relief and Declaratory Relief at 16-17, *Glossip*, No. 10-CC00434 [hereinafter Amended Petition], *available at* http://www.aclu.org/files/assets/Unopposed_Motion_and_Amd_Petition.pdf.

13. On May 26, 2011, MPERS filed a Motion to Dismiss Plaintiff's Amended Petition. Defendant's Motion to Dismiss, *Glossip*, No. 10AC-CC00434, *available at* http://www.aclu.org/files/assets/glossip_mtd_amended_petition.pdf; Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Amended Petition, *Glossip*, No. 10AC-CC00434 [hereinafter Defendant's Motion to Dismiss Plaintiff's Amended Petition], *available* at http://www.aclu.org/files/assets/glossip_mtd_amended_ petition.pdf. In July, Glossip responded to the Motion to Dismiss and countered with his own Motion for Summary Judgment, which was corrected and re-filed on November 30, 2011. Plaintiff Kelly Glossip's Corrected Memorandum in Opposition to Defen-

Glossip has contended that he is not challenging Missouri's Marriage Amendment that bans gay marriage.[14] Instead, he is "simply seek[ing] the same survivor benefit that [Missouri] has chosen to offer only different-sex, surviving partners of MSHP employees."[15] Glossip focused his arguments on the idea that although Missouri only recognizes marriage between a man and a woman, the constitutional protections shared by all Missourians – equal protection,[16] due process,[17] and governance by general, rather than special, laws[18]– applied to him and had been violated.[19]

This Law Summary focuses on Glossip's ongoing challenge to receive survivor benefits. The case not only implicates the Missouri Constitution's equal protection and due process clauses, but it is also controversial because it involves the same-sex marriage issues that have stirred national debate for quite some time. This Law Summary will discuss each of these issues. Specifically, Part II provides the legal background for Missouri's equal protection and substantive due process clauses and provides case law pertaining to situations similar to Glossip's that have arisen in other states. Part III provides a more in-depth background of Glossip's lawsuit, focusing on the arguments advanced by both Glossip and MPERS. Part IV provides discussion and analysis of the arguments and the case in general. Part V concludes that Missouri courts should uphold the denial of benefits and rule in favor of MPERS.

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dant's Motion to Dismiss and In Support of His Motion for Summary Judgment, *Glossip*, No. 10AC-CC00434 [hereinafter Corrected Memorandum]. Additionally, MPERS filed a reply in support of its Motion to Dismiss. Reply in Support of Defendant's Motion to Dismiss, *Glossip*, No. 10AC-CC00434, *available at* http://www.aclu.org/files/assets/glossip_-_reply_in_support_of_defendants_motion_to_dismiss.pdf. MPERS responded to Glossip's summary judgment motion on February 1, 2012 and Glossip replied on February 15, 2012. Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment, *Glossip*, No. 10AC-CC00434 (Feb. 1, 2012), [hereinafter Defendant's Response in Opposition], *available at* http://www.aclu.org/files/assets/glossip_-_defs_response_in_opp_to_plfs_mot_for_summ_judg.pdf; Plaintiff Kelly Glossip's Reply in Support of his Motion for Summary Judgment, *Glossip*, No. 10AC-CC00434) [hereinafter Plaintiff's Reply in Support], *available at* http://www.aclu.org/files/assets/plfs_reply_in_support_of_his_motion_for_summary_judgment.pdf.

14. Amended Petition, *supra* note 12, ¶ 2.

15. *Id.*

16. *See* MO. CONST. art. I, § 2.

17. *See* MO. CONST. art I, § 10.

18. *See* MO. CONST. art. III, § 40. The focus of this Law Summary will be on Glossip's equal protection and due process claims. Glossip's special law claim will not be discussed.

19. Amended Petition, *supra* note 12, ¶ 3.

II. LEGAL BACKGROUND

This Part of the Law Summary will provide the legal background needed to fully understand the arguments made by Glossip and MPERS. First, it details the Missouri Constitution's equal protection and substantive due process clauses. Next, it provides a brief summary and history of legal arguments used when subjecting a challenged statute to heightened scrutiny. It then looks at the approach used in reviewing laws that have been enacted on the basis of animosity toward a group of individuals. Finally, this Part will provide a look at case law from states that have been presented with challenges to statutes similar to Missouri Revised Statutes section 104.140.

A. Missouri's Equal Protection Clause

The Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law[.]"[20] Missouri's equal protection clause is "coextensive" with the Fourteenth Amendment of the United States Constitution.[21] That is, the Missouri Constitution and the Fourteenth Amendment provide individuals with the same protections.[22] Specifically, Missouri has long recognized that its clause provides "equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances."[23] The Supreme Court of Missouri engages in a two-part analysis in deciding whether a statute violates the equal protection clause:

> The first step is to determine whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. If so, the classification is subject to strict scrutiny and this [c]ourt must determine whether it is necessary to accomplish a compelling

20. MO. CONST. art. I, § 2.

21. Bernat v. State, 194 S.W.3d 863, 867 (Mo. 2006) (en banc). The Fourteenth Amendment's equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

22. *In re* Care & Treatment of Coffman, 225 S.W.3d 439, 445 (Mo. 2007) (en banc) (citing *Bernat*, 194 S.W.3d 863).

23. *Bernat*, 194 S.W.3d at 867 (quoting *Ex parte* Wilson, 48 S.W.2d 919, 921 (Mo. 1932)).

> state interest. If not, review is limited to determining whether the classification is rationally related to a legitimate state interest.[24]

Concerning the initial step, the existence of a suspect classification is apparent "where a group of persons is legally categorized and the resulting class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[25] Examples of such suspect classifications include those "based upon race, national origin or illegitimacy[.]"[26] Alternatively, if a plaintiff claims an equal protection violation for the denial of a fundamental right, he or she must identify a right that is either "explicitly or implicitly guaranteed by the Constitution,"[27] such as the right to free speech, to vote, to travel interstate, or to some other basic liberty.[28]

Importantly, Missouri has found that most classifications do not disadvantage a suspect class or impinge on a fundamental right.[29] Such classifications are analyzed under the rational basis standard and withstand a constitutional attack "if any state of facts can be reasonably conceived that would justify [the law]."[30] Statutes that only affect economic interests, for example, do not implicate fundamental rights and thus receive rational basis scrutiny.[31] For such statutes, there is "a presumption of rationality that can only be over-

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24. *In re* Care & Treatment of Norton, 123 S.W.3d 170, 173 (Mo. 2003) (en banc) (quoting Etling v. Westport Heating & Cooling Servs., Inc., 92 S.W.3d 771, 774 (Mo. 2003) (en banc)).

25. Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1997) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

26. Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 512 (Mo. 1991) (en banc). *See generally* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (explaining the reason that race, national origin, or illegitimacy are examples of suspect classifications).

27. *Mahoney*, 807 S.W.2d at 512 (quoting *Rodriguez*, 411 U.S. at 33-34).

28. *Id.*

29. *See, e.g.*, Alderson v. State, 273 S.W.3d 533 (Mo. 2009) (en banc) (holding classifications did not violate the equal protection clause because they were rationally related to legitimate state interests).

30. *Id.* at 537 (quoting *Missourians for Tax Justice Educ. Project*, 959 S.W.2d at 103).

31. *See id.* at 537-38; *see also In re* Marriage of Kohring, 999 S.W.2d 228, 232 (Mo. 1999) (en banc) ("Because father's asserted 'right' involves only his economic, rather than his associational interests with his daughter, [the statute] is not subject to strict judicial scrutiny."); City of St. Joseph v. Preferred Family Healthcare, Inc., 859 S.W.2d 723, 728 (Mo. App. W.D. 1993) ("Zoning ordinances designating residential districts and defining a family unit deal with economic and social legislation, not with a fundamental interest or a suspect classification").

come by a clear showing of arbitrariness and irrationality."[32] The individual attacking the classification has the burden of demonstrating that it is irrational and purely arbitrary.[33] Along these lines, there is no fundamental right to collect survivorship benefits or benefit from a retirement system by virtue of one's relationship with a retirement system member.[34] Moreover, when applying rational basis review, Missouri courts do not question the social or economic policies underlying a statute.[35]

B. Missouri's Substantive Due Process Clause

The Missouri Constitution also provides "[t]hat no person shall be deprived of life, liberty or property without due process of law."[36] As with Missouri's equal protection clause, the Supreme Court of Missouri has held that the due process clauses of the Missouri Constitution and the United States Constitution are coextensive.[37] Concerning legislative action, "due process protects fundamental rights and liberties that are 'deeply rooted in this Nation's history and traditions,' and 'implicit in the concept of ordered liberty.'"[38] State action that "deprives one of life, liberty or property [must] be rationally related to a legitimate state interest" in order to satisfy substantive due process.[39] The Supreme Court of the United States has recognized fundamental rights or liberty interests for purposes of substantive due process in areas such as family autonomy,[40] the right to privacy,[41] reproductive auton-

32. Fust v. Att'y Gen. of Mo., 947 S.W.2d 424, 432 (Mo. 1997) (en banc) (quoting Hodel v. Indiana, 452 U.S. 314, 331-32 (1981)); *see also* Kilmer v. Mun, 17 S.W.3d 545, 552 n.21 (Mo. 2000) (en banc) ("A statute that creates arbitrary classifications that are irrelevant to the achievement of the statute's purpose may be struck down because the arbitrary classifications violate equal protection.").

33. *Missourians for Tax Justice Educ. Project*, 959 S.W.2d at 103.

34. *In re* Marriage of Woodson, 92 S.W.3d 780, 784 (Mo. 2003) (en banc) (finding that a "[h]usband does not have a fundamental right in [w]ife's teacher retirement").

35. *Id.* Missouri courts do not substitute their judgment in place of the legislature's judgment as to "the wisdom, social desirability or economic policy underlying a statute." Mo. Prosecuting Att'ys & Circuit Att'ys Ret. Sys. v. Pemiscot Cnty., 256 S.W.3d 98, 102 (Mo. 2008) (en banc) (quoting *In re Kohring*, 999 S.W.2d at 233).

36. MO. CONST. art. I, § 10.

37. Doe v. Phillips, 194 S.W.3d 833, 841 (Mo. 2006) (en banc).

38. *In re Woodson*, 92 S.W.3d at 783 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

39. Roy v. Mo. Dep't of Corr., 23 S.W.3d 738, 746 (Mo. App. W.D. 2000) (quoting Lane v. State Comm. of Psychologists, 954 S.W.2d 23, 24 (Mo. App. E.D. 1997)).

40. *See, e.g.*, Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925).

41. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973).

omy,[42] and medical care decisions.[43] As with fundamental rights and suspect classes under the equal protection clause, statutes affecting fundamental rights under the substantive due process clause receive strict scrutiny.[44] In sum, doctrine commands that a substantive rule of law be invalidated "if it impinges on liberty interests that 'are so fundamental that a state may not interfere with them . . . unless the infringement is narrowly tailored to serve a compelling state interest.'"[45]

C. Heightened Levels of Scrutiny

While the Supreme Court of Missouri has held that the equal protection and substantive due process clauses of the Missouri Constitution are *at least* coextensive with the United States Constitution,[46] Missouri courts appear to have left open the question whether the federal Constitution provides a floor rather than a ceiling.[47] Indeed, a broader reading of the Missouri Constitution is not an unprecedented occurrence.[48] In fact, one case has suggested that the Missouri Constitution's due process and equal protection clauses should be construed more broadly when federal precedents "dilute these important rights."[49] Broader protections by the Missouri Constitution could conceivably allow the application of heightened scrutiny to a right or a class, such as homosexuals, generally only given rational basis review under federal law.[50]

Missouri courts generally follow the federal standard when determining whether a classification is subject to heightened scrutiny.[51] Factors considered under the federal standard generally look to: (1) whether a classified group has suffered historical discrimination; (2) whether the class exhibits obvious, immutable characteristics that defines them as a discrete group; and

42. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972).

43. *See, e.g.*, Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

44. Doe v. Phillips, 194 S.W.3d 833, 845 (Mo. 2006) (en banc).

45. *Id.* at 842 (quoting Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005)).

46. *See supra* Part II.A-B.

47. *See, e.g.*, *Phillips*, 194 S.W.3d at 841 ("provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions" (quoting State v. Rushing, 935 S.W.2d 30, 34 (Mo. 1996) (en banc))).

48. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 212 (Mo. 2006) (en banc) (finding "more expansive and concrete protections of the right to vote under the Missouri Constitution"); State *ex rel.* Amrine v. Roper 102 S.W.3d 541, 545-46 (Mo. 2003) (en banc) (noting that the Missouri Constitution provides broader habeas corpus rights than the federal Consitution).

49. State *ex rel.* J.D.S. v. Edwards, 574 S.W.2d 405, 409 (Mo. 1978) (en banc).

50. *See* Corrected Memorandum *supra* note 13, at 39-44.

51. *See supra* notes 25-28 and accompanying text; *see also* Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 64 n.4 (Mo. 1989) (en banc) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

(3) whether the group is able to protect itself through the political process.[52] However, the federal standard used in evaluating discrimination on the basis of gender or sexual orientation reveals inconsistent scrutiny applications.[53] Often these classes have been referred to as "quasi-suspect," or classifications that should receive "intermediate" scrutiny.[54] Whether or not Missouri specifically recognizes "quasi-suspect" classifications is an open question.[55] However, Missouri courts have followed federal precedent and recognized gender as a classification that should receive intermediate scrutiny.[56] That means, a classification on the basis of gender "must serve important governmental objectives and must be substantially related to achievement of those objectives."[57]

In line with federal Supreme Court precedent, the Supreme Court of Missouri previously found a classification based on sexual preference to be neither subject to intermediate scrutiny, nor quasi-suspect.[58] In the same case, the court held that "there is no fundamental right . . . to engage in private consensual homosexual activity."[59] However, this reasoning was based on *Bowers v. Hardwick*,[60] in which the Supreme Court of the United States held that criminal prohibitions on same-sex sodomy did not violate the federal Constitution.[61] In *Lawrence v. Texas*, the Supreme Court overruled *Bowers*.[62]

Lawrence involved two men arrested for violating a Texas state law that made it illegal to "engage[] in deviate sexual intercourse with another individual of the same sex."[63] The Court found that such laws violated a homosexual's protected liberty interest under the Due Process Clause of the Four-

52. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)).

53. *Compare* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("Legislative classifications based on gender also call for a heightened standard of review."), *with* Rainey v. Chever, 527 U.S. 1044 (1999) (denying review where a lower court used intermediate scrutiny in evaluating whether a statute creates a gender-based classification).

54. *See* Ramos v. Town of Vernon, 353 F.3d 171, 175 (2d Cir. 2003).

55. *See Harrell*, 781 S.W.2d at 63. However, the Supreme Court of Missouri has, on occasion, used the "quasi-suspect" terminology without reservations. *See* Berdella v. Pender, 821 S.W.2d 846, 851 (Mo. 1991) (en banc).

56. *See, e.g.*, Comm. for Educ. Equal. v. State, 294 S.W.3d 477, 496 n.4 (Mo. 2009) (en banc).

57. Craig v. Boren, 429 U.S. 190, 197 (1976).

58. State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986) (en banc).

59. *Id.* at 511.

60. *Id.*; *see also* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

61. *Bowers*, 478 U.S. at 197.

62. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.").

63. *Id.* at 562-63 (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2011)).

teenth Amendment to choose to engage in sexual acts with members of the same sex within the confines of their own homes and in their private lives.[64] The Court noted "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[65] With this awareness in mind, the Court found that the Texas statute violated the Due Process Clause, as it furthered "no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual."[66]

Controversially, *Lawrence* subjected the Texas statute to a broadened form of rational basis review, yet remained silent on whether homosexual sodomy is a fundamental right.[67] Further, the Court did not specifically subject the statute to strict scrutiny, which would have been appropriate had it concluded that homosexual sodomy was a fundamental right.[68] Many argue that the decision in *Lawrence* had little, if any, basis in the United States Constitution or Supreme Court precedent.[69] Yet with the reasoning and support of *Lawrence*, many courts have concluded that sexual orientation should be recognized as a suspect or quasi-suspect classification and that a heightened form of scrutiny should be applied.[70]

D. Romer v. Evans[71] *and the Problem with "Animus"*

Romer v. Evans involved a 1992 Colorado referendum, in which Colorado voters adopted a state constitutional amendment – Amendment 2 – "prohibit[ing] all legislative, executive or judicial action . . . designed to protect . . . homosexual persons."[72] Amendment 2 was proposed in response to a number of municipal ordinances in place that prohibited discrimination on the

64. *Id.* at 567, 578.
65. *Id.* at 572.
66. *Id.* at 578.
67. *Id.* at 586 (Scalia, J., dissenting).
68. *Id.*
69. *See, e.g.*, *id.* at 599.
70. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) ("All classifications based on sexual orientation appear suspect."); *see also* Collins v. Brewer, 727 F. Supp. 2d 797, 804 (D. Ariz. 2010) (invalidating statute under rational basis review but pointing out that some form of heightened scrutiny may apply to plaintiffs' claims), *aff'd sub nom.* Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 463-69 (Conn. 2008) (analyzing federal precedent when interpreting state constitution and concluding that cases ruling that gay persons are not a suspect or quasi-suspect class are unpersuasive because of their reliance on *Bowers*). *But see* Perry v. Brown, 671 F.3d at 1082 (affirming *Perry v. Schwarzenegger* under rational basis review and *not* using a heightened form of scrutiny).
71. 517 U.S. 620 (1996).
72. *Id.* at 623-24.

basis of sexual orientation in areas such as employment, housing, education, public accommodations, and health and welfare services.[73] In response to the adoption of Amendment 2, a number of homosexuals sued seeking a declaration of the amendment's invalidity and an injunction preventing its enforcement.[74]

The Supreme Court of the United States found that Amendment 2 "lack[ed] a rational relationship to [any] legitimate state interest[]."[75] Noting that "[i]t is not within our constitutional tradition to enact laws of this sort[,]" the Court further opined that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[76] The Court concluded that Amendment 2 classified homosexuals for the sole reason of "mak[ing] them unequal to everyone else."[77]

The Court effectively held that Amendment 2 was unconstitutional because no law derived from animus toward a specific class could be rationally related to a legitimate end. Recently, the United States Court of Appeals for the Ninth Circuit used similar logic in overturning California's voter-enacted law, Proposition 8.[78] Prior to the adoption of Proposition 8, California law recognized a right for same-sex couples to have their committed relationships designated as "marriage."[79] Proposition 8 eliminated this right by providing, "[o]nly marriage between a man and woman is valid or recognized in California."[80] In overturning Proposition 8, the Ninth Circuit did not consider the broader question of whether or not same-sex couples have a fundamental right to marry, but instead based its decision on the narrow issue of whether stripping a *previously held* right from same-sex couples rationally served a legitimate state interest.[81] The Ninth Circuit focused on *Romer*, noting that what the Supreme Court forbids is "the targeted exclusion of a group of citizens from a right or benefit that they [previously have] enjoyed on equal terms with all other citizens."[82] The Ninth Circuit held that taking away the designation of "marriage" furthered no legitimate state interest and left the "'inevitable inference'" that Proposition 8 was "'born of animosity toward'" same-sex couples as a class.[83] Looking to *Romer*, the Ninth Circuit said, "[e]nacting a rule into law based solely on the disapproval of a group . . . 'is a

73. *Id.*
74. *Id.* at 625.
75. *Id.* at 632.
76. *Id.* at 633-34.
77. *Id.* at 635.
78. Perry v. Brown, 671 F.3d 1052, 1080-81 (9th Cir. 2012).
79. *Id.* at 1063.
80. *Id*. at 1067. As the Ninth Circuit explained, Proposition 8 "stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage.'" *Id.* at 1076.
81. *Id.* at 1076.
82. *Id.* at 1084.
83. *Id.* at 1093 (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)).

classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.'"[84]

E. Case Law Examining Statutes Similar to Missouri Revised Statutes Section 104.140(3)

While challenges to statutes providing benefits for surviving spouses only are not especially common, cases do exist in which a surviving domestic partner has sought benefits under a statute similar to Missouri Revised Statutes section 104.140(3). This Part of the Law Summary describes some of those cases, first examining a Florida case that found in favor of the state, and then by looking at cases that found in favor of the surviving partner.

On July 6, 2001, a Florida police officer, Lois Marrero, was shot and killed while pursuing two bank robbers.[85] Shortly after her death, it became apparent that her same-sex partner Mickie Mashburn, a detective for the same police department, would be ineligible to receive Marrero's pension payments.[86] The women had been a couple for ten years, but because Florida law did not recognize same-sex marriages, Mashburn could not receive the pension because only surviving spouses or children were eligible.[87] Despite not qualifying, Mashburn applied for pension benefits as a surviving spouse anyway, asking the pension board to recognize her as a widow.[88] In August 2001, the pension board denied Mashburn's request for pension benefits on the basis of her not qualifying as Marrero's spouse[89] and following an appeal by Mashburn, again denied the pension award in February 2002.[90] Following the denial, Mashburn vowed to challenge the decision in Florida state court.[91]

84. *Id.* at 1094 (citing *Romer*, 517 U.S. at 635).

85. Geoff Dutton & Sean Lengell, *Killed in "Cold Blood,"* TAMPA TRIBUNE, July 7, 2001, at Nation/World 1. The shooter, Nester Luis DeJesus, took his own life following a lengthy standoff with police. *Id.* The other individual involved was his girlfriend, who was later charged with first-degree murder. *Id.*

86. Laura Kinsler, *Companion Not Eligible for Slain Officer's Pension*, TAMPA TRIBUNE, July 10, 2001, at Nation/World 4. The pension payments were equal to one-half of Marrero's salary. *Id.* For an interesting account of the events and Mashburn's attempt to receive benefits, see the documentary TYING THE KNOT (2004).

87. Kinsler, *supra* note 86. Unfortunately for Mashburn, the city of Tampa, only three days before Marrero's slaying, enacted a policy that would have allowed Marrero to name a specific beneficiary of her pension. Laura Kinsler, *Marrero's Pension Studied*, TAMPA TRIBUNE, July 19, 2001, at Metro 1. Given the timing of her death, Marrero had not yet identified such a beneficiary. *Id.*

88. Geoff Dutton, *Officer's Partner Applies for Pension*, TAMPA TRIBUNE, Aug. 18, 2001, at Metro 1.

89. *See* Geoff Dutton, *Officer Denied Pension*, TAMPA TRIBUNE, Aug. 29, 2001, at Metro 1.

90. Laura Kinsler, *Board Denies Pension for Slain Officer's Partner*, TAMPA TRIBUNE, Feb. 27, 2002, at Nation/World 1.

91. *Id.*

Despite her contentions, Mashburn's case was eventually denied review by a Florida appeals court.[92]

While the Mashburn case is the only case directly on point with the developing situation in Missouri, it fails to provide much by way of an opinion. Other cases exist in which public employees with same-sex domestic partners have challenged state and municipal programs that grant valuable benefits to spouses of employees, but deny such benefits to unmarried employees and their domestic partners. However, not all states follow Florida.

Alaska has found in favor of same-sex couples on this issue.[93] In a case that commenced in 1999, nine same-sex couples, along with the help of the Alaska Civil Liberties Union, filed suit against the state of Alaska and the municipality of Anchorage alleging that employment benefits programs that only grant benefits to spouses of state or municipality employees or retirees violated their right to equal protection under the Alaska Constitution.[94] Alaska's Marriage Amendment provides that "a marriage may exist only between one man and one woman."[95] This "absolutely precluded [the plaintiff employees and their same-sex partners] from becoming eligible for these benefits."[96] However, the plaintiffs' argument did not focus on the Marriage Amendment.[97] Rather, they argued that "the benefits programs discriminate[d] against them by denying them benefits that the programs provide to others who . . . [were] similarly situated."[98] Alaska and Anchorage argued that the benefits programs at issue did not apply differently based on sexual orientation or gender, but were based only on marital status.[99] The Alaska Supreme Court did not agree and ruled that the comparison was between same-sex couples and opposite-sex couples.[100]

After making this decision, the court noted that the plaintiffs' interest at issue, employment benefits, was purely economic and therefore should receive "minimum scrutiny."[101] Under Alaska's Equal Protection Clause the government must demonstrate that its objectives were legitimate and that the means employed to further these objectives were substantially related to the

92. Mashburn v. Tampa Fire & Police Pension Bd., 887 So. 2d 342 (Fla. Dist. Ct. App. 2004) (unpublished table decision) (denying certiorari).

93. *See* Alaska Civil Liberties Union v. State, 122 P.3d 781, 783 (Alaska 2005).

94. *Id.* at 784.

95. *Id.* (quoting ALASKA CONST. art. I, § 25).

96. *Id.*

97. *Id.* at 787.

98. *Id.*

99. *Id.* This argument allowed the defendants to contend that they were treating same-sex couples the same way they treated other unmarried couples. *Id.* Thus, they contended that no unmarried couple had the right to employment benefits. *Id.* at 788.

100. *Id.* at 788.

101. *Id.* at 790.

end goal.[102] Alaska and Anchorage argued that they had legitimate interests in (1) cost control, (2) administrative efficiency, and (3) promotion of marriage.[103] The court found that each of these interests was in fact, legitimate; however, it ruled against the state because the "absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests."[104]

In another case, the United States Court of Appeals for the Ninth Circuit recently affirmed a federal court decision in Arizona that followed a line of reasoning similar to that of the Alaska Supreme Court.[105] The Arizona case involved a group of gay and lesbian state employees suing Arizona state officials over a statutory amendment that eliminated family health benefits for non-spouse domestic partners.[106] At the time of the suit, Arizona law permitted both spouses and domestic partners of state employees to receive health care benefits.[107] The amendment at issue, Section O, was to take effect on January 1, 2011, and in an effort to prevent this amendment from becoming law, the plaintiffs filed suit under the Equal Protection Clause of the Fourteenth Amendment.[108] The court noted that although Section O was not discriminatory on its face, as applied, it "makes benefits available on terms that

102. *Id.* at 789. The court noted that the Alaska Constitution "affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment." *Id.* at 787 (quoting Malabed v. N. Slope Borough, 70 P.3d 416, 420 (Alaska 2003)). That is, in applying the lowest level of scrutiny in Alaska a *substantial* connection must exist, while under the Fourteenth Amendment, there must only be some *rational* basis. *Id.* at 786 n.20, 791; *see also* U.S. CONST. amend. XIV; United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

103. *Alaska Civil Liberties Union*, 122 P.3d at 790.

104. *Id.* at 793-94. The court went on to say that regardless of the challenged program's policy goals, "the means [the government employs] would not be fairly and substantially related to furthering those goals." *Id.* at 794.

105. *See* Diaz v. Brewer, 656 F.3d 1008, 1014 (9th Cir. 2011), *aff'g* Collins v. Brewer, 727 F. Supp. 2d 797, 807 (D. Ariz. 2010).

106. *Collins*, 727 F. Supp. 2d at 801.

107. *Id.* at 799 (quoting ARIZ. ADMIN. CODE § R2-5-416 (repealed 2009)). Domestic partners seeking such benefits were required to prove the legitimacy of their partnership in accordance with Arizona's definition of "domestic partner." *Id.* at 799-800.

108. *Id.* at 801. The federal court's opinion was issued in response to both the State's motion to dismiss and the plaintiffs' motion for preliminary injunction. *Id.* at 799. For the purposes of this analysis, the court's ruling on the defendants' Motion to Dismiss provides the most insight. All allegations of the Complaint are construed as true and in the manner that is most favorable to the nonmoving party, in this case the plaintiffs. *Id.* at 802. Regarding plaintiffs' motion for preliminary injunction, the analysis of plaintiffs' equal protection claim that accompanied the court's ruling on defendants' motion to dismiss also provides relevant insight on why the court ultimately found a likelihood of success and granted plaintiffs' motion for preliminary injunction. *Id.* at 811-12.

are a legal impossibility for gay and lesbian couples."[109] Despite the plaintiffs' contention that such discrimination deserved a heightened form of scrutiny, the court analyzed the plaintiffs' equal protection claim under the rational basis standard of review.[110] Arizona justified the amendment with rationales claiming that it: (1) promoted cost savings, (2) promoted administrative efficiency, (3) allocated funds to those that are better served by receiving such funds, (4) benefited families with dependent children, and (5) promoted marriage.[111] Although the state's interests in these goals were legitimate, the court stated that "the absolute denial of benefits to employees with same-sex domestic partners [was] not rationally and substantially related to these government interests."[112]

New Hampshire state courts have also followed this line of reasoning.[113] In a Title VII employment discrimination case, two lesbians sued state organizations over whether or not their committed same-sex domestic partners were entitled to the benefits reserved for employees' spouses.[114] The plaintiffs argued that they were discriminated against on the basis of their sexual orientation.[115] They based their argument on the fact that benefits were available to the married partners of state employees, but same-sex persons were, at the time, unable to be married and therefore unable to receive these benefits.[116] The court agreed with this argument and citing *Alaska Civil Liberties Union*, stated:

> [S]ame-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for the purposes of receiving employee benefits.[117]

Thus, the court found that the plaintiffs had stated a claim for sexual orientation discrimination.[118]

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109. *Id.* at 803.

110. *Id.* at 804.

111. *Id.* at 804-05.

112. *Id.* at 807. The court noted again that facts alleged in the complaint are to be construed in favor of the non-moving party. *Id.*

113. *See* Bedford v. N.H. Cmty. Technical. Coll. Sys., Nos. 04-E-229, 04-E-230, 2006 WL 1217283 (N.H. Super. May 3, 2006). New Hampshire now allows same-sex marriage. N.H. REV. STAT. ANN. § 457:1-a (Westlaw through 2012 Reg. Sess.).

114. *Bedford*, 2006 WL 1217283 at *1-2.

115. *Id.* at *2.

116. *Id.*

117. *Id.* at *6-7 (citing Alaska Civil Liberties Union v. State, 122 P.3d 781, 788 (Alaska 2005)).

118. *Id.* at *7.

III. RECENT DEVELOPMENTS: *GLOSSIP V. MISSOURI DEPARTMENT OF TRANSPORTATION AND HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM*

As detailed above, Kelly Glossip filed a lawsuit seeking survivor benefits following his partner's death.[119] On April 12, 2012, Judge Daniel Green of the Cole County Circuit Court heard oral argument from Glossip and MPERS. On April 30, 2012, the trial court ruled in favor of MPERS, dismissing the case pursuant to the motion of MPERS and denying Glossip's summary judgment motion as moot.[120] This Part of the Law Summary outlines and examines the arguments presented before the trial court. Specifically, the first section will explain in more detail the parties' arguments regarding Glossip's equal protection claim. The second section looks at Glossip's due process claims under the Missouri Constitution and the defenses presented by MPERS.

A. Glossip's Equal Protection Claim

Glossip alleged that his equal protection rights were denied on the basis of his sexual orientation and on the basis of his sex.[121] The crux of Glossip's equal protection argument was that in requiring the recipient of survivor benefits to be a "spouse" of the deceased MSHP employee, gays, lesbians, and bisexuals – individuals "similarly situated in every material respect to the different-sex, surviving partners of deceased MSHP employees who are afforded the opportunity to access significant survivor benefits granted exclusively on the basis of marriage" – are categorically excluded from receiving the same benefits received by surviving spouses.[122] MPERS countered Glossip's equal protection claims by arguing that the statutes at issue did not violate Glossip's right to equal protection because all cohabitants, including unmarried heterosexual couples, may not receive survivor benefits on the basis of an intimate, but unmarried relationship. In other words, all unmarried individuals are precluded from receiving survivor benefits under the statute, regardless of sexual orientation.[123] Glossip contended that, "[a] same-sex

119. *See supra* notes 5-19 and accompanying text.

120. Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys., No. 10AC-CC00812 (Cole Cnty. Cir. Ct. Apr. 30, 2012). Following the trial court's judgment in favor of MPERS, Glossip appealed to the Supreme Court of Missouri. The Supreme Court of Missouri heard argument on the case on February 27, 2013. As of this writing, a decision is pending.

121. Amended Petition, *supra* note 12, ¶¶ 64, 70.

122. *Id.* ¶ 62.

123. Defendant's Motion to Dismiss Plaintiff's Amended Petition, *supra* note 13, at 5. Interestingly, it appears that in later filings, the Attorney General, on behalf of MPERS, may have backed off of the claim that no classification existed, as this argument is not discussed in later filings.

couple that is categorically barred from marrying . . . is not similarly situated to a different-sex couple that is legally capable of marrying but declines to do so."[124] This argument was in line with the opinions rendered in the previously discussed Alaska, Arizona, and New Hampshire cases.[125]

Glossip argued that discrimination based on sexual orientation and gender demands a heightened level of scrutiny because both classes are "suspect."[126] Glossip contended that at a minimum, sexual orientation should be classified as a quasi-suspect class.[127] In support of these assertions, Glossip pointed to the factors generally considered by the Supreme Court of the United States when determining whether a classification should be recognized as suspect or quasi-suspect.[128] He also pointed out the significance of *Lawrence v. Texas*,[129] and asserted that a "straightforward application of the traditional heightened-scrutiny factors requires that sexual orientation be recognized as a suspect classification."[130]

MPERS rejected the application of strict scrutiny.[131] First, MPERS contended that "the statutes [did] not implicate a fundamental right."[132] Specifically, MPERS noted that the survivor benefits sought by Glossip were merely an economic benefit and that such a benefit did not implicate a fundamental right.[133] Additionally, MPERS argued that the statutes did not disadvantage a suspect class.[134] According to MPERS, "[s]trict scrutiny [did] not apply here

124. Corrected Memorandum, *supra* note 13, at 20.

125. *See supra* Part II.E.

126. Amended Petition, *supra* note 12, ¶ 66,72. For discussion on the application of heightened scrutiny, see *supra* Part II.C.

127. Corrected Memorandum, *supra* note 13, at 31.

128. *Id.* at 31-32 ("The four factors most consistently analyzed by the Court are: (1) whether a classified group has suffered a history of invidious discrimination, (2) whether the classification has any bearing on a person's ability to perform in or contribute to society; (3) whether the characteristic is immutable or beyond the person's control; and (4) whether the group has sufficient power to protect itself in the political process.").

129. *See supra* notes 62-70 and accompanying text.

130. Corrected Memorandum, *supra note* 13, at 33. Glossip analyzed the "heightened-scrutiny" factors and finds that (1) homosexuals "have suffered a history of discrimination," (2) a person's sexual orientation does not affect his or her "ability to contribute to society," (3) sexual orientation "cannot be changed," and (4) homosexuals "suffer severe disadvantages in the political arena." *Id.* at 34-38.

131. Defendant's Response in Opposition, *supra* note 13, at 46.

132. *Id.* at 46-47.

133. *See id.* at 47. Glossip suggests that "denial of his application for survivor benefits interfered with" rights such as the "right to bodily integrity," the "right to family integrity," and the "right to sexual intimacy with a partner." *Id.* These arguments seem to fit more along substantive due process lines and will be discussed *infra* in Part III.B.

134. Defendant's Response in Opposition, *supra* note 13, at 48-49.

because unmarried couples are not considered a suspect class."[135] Moreover, MPERS suggested that "where all unmarried cohabitants" are denied access to "survivorship benefits on the basis of an intimate relationship," no equal protection violation exists.[136] Bearing in mind that the equal protection clauses of the Missouri and United States Constitutions are coextensive,[137] MPERS demanded that the court decline Glossip's "invitation to expand interpretation of the equal protection clause of the Missouri [C]onstitution to determine the level of scrutiny applicable to [Glossip's] claim for *monetary benefits*."[138] In making this argument, MPERS pointed out that the Alaska case cited by Glossip was inapposite because Alaska's equal protection clause is more "stringent" than Missouri's equal protection clause.[139]

MPERS next argued that because the only interest at stake was economic in nature, Glossip's equal protection challenge should only receive rational basis review.[140] Such a statute withstands a constitutional attack "if any state of facts can be reasonably conceived that would justify it."[141] Here, MPERS argued that there was a rational relationship between the subject statutes and Missouri's interests in (1) "administrative efficiency in making objective beneficiary determinations," (2) "controlling costs," and (3) "preserving limited retirement system resources for those most likely to be economically dependent on a deceased member[.]"[142]

Although Glossip focused much of his argument on the need for the case to be decided under heightened scrutiny, he contended that if such scrutiny did not apply, the "exclusion of same-sex couples from survivor benefits would still fail . . . rational basis review."[143] Initially, Glossip directed the court's attention to cases that have found statutory schemes similar to Missouri Revised Statutes section 104.140(3) unconstitutional for their failure to be "rationally related to any legitimate government interest."[144] He placed special emphasis on the Ninth Circuit's decision in *Diaz*, which was analyzed

135. *Id.* at 48 (citing Smith v. Shalala, 5 F.3d 235, 239 (7th Cir. 1993)).

136. *Id.*

137. *See supra* notes 21-22 and accompanying text.

138. Defendant's Response in Opposition, *supra* note 13, at 48 (emphasis added). The emphasis added here is to highlight the importance of MPERS's focus on monetary benefits. The implications of this will be discussed *infra* in Part IV.A.

139. Defendant's Response in Opposition, *supra* note 13, at 48-49.

140. Reply in Support of Defendant's Motion to Dismiss, *supra* note 13, at 2-3.

141. Alderson v. State, 273 S.W.3d 533, 537 (Mo. 2009) (en banc).

142. Reply in Support of Defendant's Motion to Dismiss, *supra* note 13, at 4.

143. Plaintiff's Reply in Support, *supra* note 13, at 5.

144. *Id.* at 6 (citing Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011); Collins v. Brewer, 727 F. Supp. 2d 797 (D. Ariz. 2010); Alaska Civil Liberties Union v. State, 122 P.3d 781 (Alaska 2005)).

under the federal Constitution's Equal Protection Clause.[145] Glossip also focused on more specific justifications for why the Missouri statute failed rational basis review. First, he drew the court's attention to the history of Missouri's law banning gay marriage and the related statutes excluding same-sex couples from receiving benefits, such as those at issue in this case.[146] According to Glossip, Missouri's enactment of such laws was in response to the possibility that Hawaii was on the verge of recognizing same-sex marriage, and thus, the Missouri legislature "amended the existing statutory scheme with the specific purpose of barring same-sex couples from receiving the same benefits given to married heterosexual couples[.]"[147] Glossip concluded that "[n]o legislature in 1996 or after could have conceivably thought that categorically excluding same-sex couples from survivor benefits rationally serves any of the interests identified by [MPERS]."[148]

Regarding MPERS's proposed rational basis that "married couples are more likely to be financially interdependent than unmarried couples,"[149] Glossip argued:

> [T]hat distinction makes sense only if a couple has the ability to legally marry but declines to do so. Since the Missouri Constitution bars same-sex couples from marrying no matter how committed and financially interdependent they are, it is not rational to use the fact that same-sex couples are unmarried as a basis for assuming they are not financially interdependent.[150]

Furthermore, he contended that even if same-sex couples were less financially interdependent than opposite-sex couples, it was not rational to categorically exclude them all from benefits.[151]

Glossip also rebutted MPERS's contention that "limiting survivor benefits to married couples was a rational means" of promoting administrative efficiency and making objective beneficiary determinations.[152] In support of this argument, Glossip cited evidence that, at least in his mind, demonstrated that MPERS's "speculations" about establishing objective eligibility criteria have "no footing in the realities of how domestic partnership benefits are

145. *Id.* at 6-7. Glossip found this case "instructive because the Attorney General concede[d] that if discrimination cannot survive rational basis review under the federal Constitution, then it violates the Missouri Constitution as well." *Id.* at 6.

146. *Id.* at 7.

147. *Id.* at 7-8.

148. *Id.* at 8.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 10.

routinely administered" in other employment contexts.[153] Finally, in response to MPERS's asserted rational basis of "controlling costs," Glossip contended that while cost control is a legitimate government interest, it could not be achieved "by making irrational and arbitrary distinctions among similarly situated people."[154]

B. Glossip's Substantive Due Process Claim

Glossip also contended that the statute at issue burdened his "fundamental rights . . . to intimate association and family integrity" under the Missouri Constitution's substantive due process clause.[155] In support of his substantive due process claim, Glossip cited *Lawrence* and the establishment of a "liberty interest to engage in private, intimate sexual conduct with a same-sex partner."[156] In response, MPERS first noted that Missouri "does not prescribe a fundamental right to marry a person of the same sex."[157] MPERS then argued that none of Glossip's asserted fundamental rights – such as a "right to bodily integrity," a "right to family integrity," and a "right to sexual intimacy" – were implicated by a claim for "purely monetary benefits."[158] This was the emphasis of MPERS's briefing regarding Glossip's substantive due process claim throughout the trial court proceedings. As MPERS explained, "the posthumous denial of an application for benefits cannot be said to have interfered with [Glossip's] past association or relationship with [Engelhard]."[159]

Glossip's arguments from here generally followed the same lines as the arguments presented by his equal protection challenge. That is, he argued that heightened scrutiny should apply and that even if it did not, the statute at issue failed rational basis review.[160] However, Glossip, making an argument more specifically related to his due process claim, argued that MPERS's contention that all Glossip had alleged was that he had "a fundamental right to collect survivorship benefits" misconstrued his substantive due process claim.[161] On this point, Glossip specifically argued that he did not have to

153. *Id.* MPERS had previously argued that by establishing this rational means of establishing objective eligibility criteria, there was less risk of competing claims and the possibility of post-hoc assessments of a same-sex relationship after the death of one of the partners. *Id.* Glossip pointed out that in private employment contexts that allow benefits for same-sex partners, "employees and their partners may be required to sign [an affidavit affirming their relationship] based on objective . . . criteria." *Id.*

154. Corrected Memorandum, *supra* note 13, at 55.

155. *Id.* at 40; Amended Petition, *supra* note 12, ¶¶ 76-77.

156. Corrected Memorandum, *supra* note 13, at 40 (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

157. Defendant's Response in Opposition, *supra* note 13, at 47.

158. *Id.*

159. *Id.* at 49.

160. *See supra* Part III.A.

161. Corrected Memorandum, *supra* note 13, at 40.

show that he had a fundamental right to collect survivorship benefits, but instead must only "show that the denial of [such] benefit[s] burden[ed] or penalize[d] other constitutional rights."[162] Therefore, from Glossip's perspective, "the question [was] not whether excluding . . . Glossip and . . . Engelhard from survivor benefits directly prevented them from exercising their fundamental rights, but instead whether [they were] forced 'to choose between' exercising their fundamental rights and receiving a governmental benefit."[163] Glossip stated that "when the government places an economic burden on the exercise of a fundamental right, that burden must be judged under heightened scrutiny."[164] Thus, he asserted that there was no support for MPERS's argument that "'economic burdens' on fundamental rights [fail to] trigger strict scrutiny."[165]

IV. DISCUSSION

This Law Summary has looked at Glossip's claims under the Missouri Constitution's equal protection and substantive due process clauses, thus this Part will focus on the merits of these claims. Additionally, this Part will also look at peripheral issues surrounding Glossip's ongoing suit. While the Cole County Circuit Court found in favor of MPERS, only time will tell how this case will ultimately be decided. Glossip appealed the trial court's dismissal of his case to the Supreme Court of Missouri, which heard argument on the case on February 27, 2013. While Missouri's high court is mulling a decision, the following analysis suggests that the Supreme Court of Missouri is probably more likely to rule in favor of MPERS than Glossip. This would be the correct decision. As will be explained, Glossip has not presented a due process claim that affords him the benefit of strict scrutiny. His claim for monetary benefits will receive rational basis review and fail. Likewise, Glossip's equal protection claim will fail. In brief, and as will be elaborated on below, Glossip's equal protection claim should also be scrutinized under the rational basis standard because (1) the classification at issue includes all un-

162. *Id.* at 41. Glossip cited multiple cases in support of this contention. *Id.* at 41-42 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 461 (8th Cir. 1999) ("Neither Congress nor the states may condition the granting of government funds on the forfeiture of constitutional rights."); Ark. Dep't of Human Servs. v. Cole, No. 10–840, 2011 WL 1319217, at *10 (Ark. Apr. 7, 2011) (finding an unconstitutional exclusion existed when "the exercise of one's fundamental right to engage in private, consensual sexual activity is conditioned on foregoing the privilege of adopting or fostering children.")).

163. Corrected Memorandum, *supra* note 13, at 43.

164. Plaintiff's Reply in Support, *supra* note 13, at 5; *see* Speiser v. Randall, 357 U.S. 513 (1958); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (en banc).

165. Plaintiff's Reply in Support, *supra* note 13, at 4.

married couples, regardless of sexual orientation, and (2) in the event that the classification is found to burden homosexuals, it seems unlikely that the Supreme Court of Missouri will find that discrimination on the basis of sexual orientation operates to disadvantage a suspect or quasi-suspect class. Glossip's argument that the statute is irrational will not be enough to overcome MPERS's reasonably conceived justifications.[166]

A. Due Process Claim

MPERS will likely overcome Glossip's substantive due process claim more easily than his equal protection claim.[167] Before the trial court, Glossip contended that Missouri Revised Statutes section 104.140 burdened his fundamental rights to intimate association and family integrity.[168] However, Missouri courts are not likely to find that a claim for "purely monetary benefits" burdens a fundamental right.[169] In an effort to combat this argument, Glossip contended that when an economic burden affects the exercise of a fundamental right, the burden must be analyzed under heightened scrutiny.[170] Glossip is correct in this regard.[171] However, even assuming that during Engelhard's life, the same-sex couple was entitled to the fundamental rights of intimate association and family integrity, Glossip did not necessarily maintain these rights *after* Engelhard's death. Simply put, Glossip cannot assert a right to intimate association or family integrity with a deceased person.[172] Thus, it seems likely that his substantive due process claim will fail.

B. Equal Protection Claim

Glossip's equal protection claim will play the greatest role in the case's outcome. Under Missouri law, determining whether a statute violates the

166. The trial court concluded that MPERS's justifications were rational. Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys., No. 10AC-CC00812, at 3-6 (Cole Cnty. Cir. Ct. Apr. 30, 2012).

167. In fact, it appears that on appeal to the Supreme Court of Missouri Glossip has effectively abandoned his due process claim, and primarily relies on his equal protection claim. *See* Brief of Appellant, Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys., No. SC 92583 (Mo. argued Feb. 27, 2013).

168. *See supra* note 158 and accompanying text.

169. *See supra* notes 160-65 and accompanying text.

170. *See supra* note 164 and accompanying text.

171. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958); Weinschenk v. State, 203 S.W.3d 201, 214 (Mo. 2006) (en banc).

172. MPERS has suggested as much: "Such alleged fundamental rights . . . simply are not implicated by [Glossip's] claim for purely monetary benefits. [Glossip's] alleged right to receive survivor benefits involves only an economic interest, not [Glossip's] interest in intimacy or association with his *deceased* partner." Defendant's Response in Opposition, *supra* note 13, at 47 (emphasis added).

equal protection clause requires a two-step analysis.[173] First, the court must ask whether the classification operates to the disadvantage of a suspect class or burdens a fundamental right.[174] Then, the court must apply the appropriate level of scrutiny.[175] Implicit in the first step of this process is identifying the classification, or who exactly it is that is being treated differently. In the instant case, this determination will lay the groundwork for the remainder of the court's analysis.

Glossip contended that in requiring the recipient of survivor benefits to be a "spouse," the group being classified differently consisted of gay, lesbian, and bisexual individuals.[176] MPERS argued that the classification applied to all unmarried individuals, regardless of sexual orientation.[177] The importance of this classification inquiry is obvious. If Glossip can show that gays, lesbians, and bisexuals are being treated differently because of their sexual orientation, he has the opportunity to present a *Lawrence*-type argument in order to receive heightened scrutiny. On the other hand, if those being treated differently are all unmarried couples, regardless of sexual orientation, Glossip's claim is immediately relegated to receiving rational basis review, and in all likelihood will fail. The latter is the appropriate classification. Regardless of whether an individual is a heterosexual or a homosexual, the statute applies in the same manner to any individual who is unmarried. Unmarried couples are not a suspect class, and thus, such a classification should receive rational basis review.[178]

However, even if the court agrees that the classification has burdened gays, lesbians, and bisexuals, Glossip must still convince the court that discrimination based on sexual orientation operates to disadvantage a suspect or quasi-suspect class. This is an uphill battle. Although courts have recently been more amenable to a finding that sexual orientation should receive some form of heightened scrutiny, many states, including Missouri, have yet to give sexual orientation such construction.[179] A broader interpretation of the equal protection clause of the Missouri Constitution could ultimately open the door for a challenge to Missouri's Marriage Amendment, and it seems reasonable to conclude that Missouri courts will be hesitant to take this step.

This would mean that Glossip's lawsuit rests on a finding that the statute at issue fails rational basis review.[180] Indeed, Glossip has argued as much.[181] Glossip's problem with resting his hopes on a finding of irrationality is that if MPERS provides "any state of facts" than can be "reasonably conceived that

173. *See supra* Part II.A.
174. *See supra* Part II.A.
175. *See supra* Part II.A.
176. *See supra* note 122 and accompanying text.
177. *See supra* note 123 and accompanying text.
178. *See supra notes* 26-30 and accompanying text.
179. *See supra* notes 155-59 and accompanying text.
180. *See supra* notes 29-35 and accompanying text.
181. *See supra* notes 140-42 and accompanying text.

would justify" the statute, it will withstand his constitutional attack.[182] Thus, despite his arguments to the contrary, MPERS's justifications of cost control, preserving retirement resources for those who need them most, and administrative efficiency in making objective benefit determinations all seem to be "reasonably conceived."

Moreover, because statutory justifications can be "reasonably conceived" at any time,[183] Missouri courts are also unlikely to be convinced by Glossip's arguments that Missouri's law prohibiting same-sex marriage and the statutes that followed, including Missouri Revised Statutes section 104.140, were enacted "with the specific purpose of barring same-sex couples from receiving the same benefits given to married heterosexual couples."[184] Glossip used this argument to rebut all of the rational bases provided by MPERS.[185] He perhaps could have further used this line of reasoning to strengthen his case. The undertone of this argument – that the statutes were enacted on the sole basis of animosity toward homosexuals – seems to provide more support for Glossip's hope of a finding of irrationality, than is actually articulated in his briefing before the trial court.

While not fully fleshing out this argument, or directly tying it to the assertion that Missouri enacted statutes to specifically bar homosexuals from receiving certain benefits, Glossip does echo the sentiments of *Romer* by arguing that Missouri's "statutory scheme appears designed simply to impose disparate treatment for its own sake."[186] If it were shown that animosity toward homosexuals and the possibility of same-sex marriage were the reasons for Missouri's enactment of the statutes at issue, then perhaps an argument based on *Romer* and *Perry* could support a finding of arbitrariness and irrationality. After all, *Romer* suggested that no law derived from animus toward a specific class could be rationally related to a legitimate interest.[187] However, the instant case can be distinguished from *Romer* and *Perry* in that the laws at issue in each of those cases took an already recognized right away from the plaintiffs.[188] In Missouri, no right to the survivor benefits of a same-sex partner has ever existed. Thus, while *Romer* provides support for Glossip's claim, it does not mean the Missouri statute is unconstitutional.

182. Alderson v. State, 273 S.W.3d 533, 537 (Mo. 2009) (en banc).

183. *See id.*

184. Plaintiff's Reply in Support, *supra* note 13, at 7-8.

185. *See supra* Part III.A.

186. *Compare* Plaintiff's Reply in Support, *supra* note 13, at 12, *with* Romer v. Evans, 517 U.S. 620, 633-35 (1996) (noting that laws that disadvantage homosexuals "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

187. *See Romer*, 517 U.S. at 632-33; *see also supra* Part II.D.

188. *See Romer*, 517 U.S. at 634; Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012).

V. CONCLUSION

If an argument based on *Romer* is a failing argument, and assuming the Supreme Court of Missouri finds the statute rational based on MPERS's reasonably conceived justifications, Glossip will be left with an argument that the classification at issue includes gay, lesbian, and bisexual individuals, and that Missouri should, for the very first time, recognize this group as a suspect, or quasi-suspect class. This argument should fail. Not only does such an argument overlook the appropriate classification at which the analysis should start, but it also puts forth a position that is not grounded in Missouri law. Missouri has never recognized homosexuals as a suspect or quasi-suspect class. Moreover, *Lawrence*, the case largely referenced by other courts in support of a heightened form of rational basis review for classifications based on sexual orientation, was not actually an equal protection case and finds little support in the United States Constitution or Supreme Court precedent. If the Supreme Court of Missouri finds that the statute at issue burdens a suspect or quasi-suspect class, it would be doing more than ruling in favor of Glossip and his purported desire for survivor benefits. Such recognition would have "far-reaching implications beyond this case"[189] by effectively opening the door to the very thing that Glossip has, time and again, claimed this litigation is not about – a challenge to Missouri's Marriage Amendment. This is *the* Missouri case to keep an eye on, as both the in-state and potential national ramifications are great.

189. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).