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Stand with Sam: Missouri, Survivor Benefits, and Discrimination Against Same-Sex Couples

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NOTE

Stand with Sam: Missouri, Survivor Benefits, and Discrimination Against Same-Sex Couples

Glossip v. Missouri Department of Transportation and Highway Patrol Employees' Retirement System, 411 S.W.3d 796 (Mo. 2013).

LESLEY A. HALL*

I. INTRODUCTION

“Michael, are you a gay man?” asked Chris Connelly, ESPN’s *Outside the Lines* host.¹ “I am a gay man,” Michael Sam responded, “And I’m happy to be one.”² On February 9, 2014, Michael Sam garnered the University of Missouri (“Mizzou”) football team international attention – but this time, it was not because of his skills as Mizzou’s All-American defensive lineman and the *Associated Press*’s SEC Defensive Player of the Year.³ Michael was the first NFL-bound collegiate football player to openly state he was gay *before* the NFL draft.⁴ “I understand how big this is [I]t’s a big deal. No one has done this before. And it’s kind of a nervous process, but I know what I want to be I want to be a football player in the NFL.”⁵

Michael Sam’s proclamation of his sexuality has been met with enthusiastic support and harsh criticism. Many supporters, including many Mizzou students, formed a human wall around Mizzou Arena to block members of the Westboro Baptist Church, which had come to protest Michael Sam’s homosexuality.⁶ However, others were not so enthusiastic. New York Giants cornerback Terrell Thomas said, “I think society is ready for [an openly gay

*B.S., Missouri State University, 2009; M.B.A., Missouri State University, 2011; J.D., University of Missouri-Columbia School of Law, May 2014. I would like to thank Professor Douglas Abrams for all of his help and support.

1. Chris Connelly, *Mizzou’s Michael Sam Says He’s Gay*, ESPN OUTSIDE THE LINES (Mar. 11, 2014, 5:18 PM), http://espn.go.com/espn/otl/story/_/id/10429030/michael-sam-missouri-tigers-says-gay.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Dave Urbanski, *Missouri Students Block Westboro Baptist Protest Against Gay NFL Hopeful Michael Sam – Give Him Standing-O in Arena*, THE BLAZE (Feb. 15, 2014, 10:16 PM), <http://www.theblaze.com/stories/2014/02/15/missouri-students-block-westboro-baptist-protest-against-gay-nfl-hopeful-michael-sam-give-him-standing-o-in-arena/>.

NFL football player] and America's ready for it, but I don't think the NFL is."⁷ Even fiercer was Gordon Klingenschmitt, a.k.a. "Dr. Chaps," a former Navy chaplain, who denounced Sam in a recent episode of his "Pray In Jesus' Name" program: "It's a tragedy every time somebody comes out of the closet [I]t's not something to be celebrating."⁸

The sad irony was that Michael Sam felt compelled to admit his sexual orientation to the world, fearing "how many people knew," and that he would suffer retaliation for it.⁹ Michael is not alone; many gay and lesbian individuals fear "coming out" to friends, family, and co-workers because they are afraid of the possibility of retaliation, harassment, isolation, or worse.¹⁰

In *Glossip v. Missouri Department of Transportation and Highway Patrol Employees' Retirement System*,¹¹ the Supreme Court of Missouri perpetuated these fears. The court refused to identify sexual orientation as a classification worthy of heightened or "intermediate" equal protection scrutiny,¹² signaling to Missourians that homosexuality is still something to discount, fear, and hide. The holding also erroneously deprived Kelly Glossip of Corporal Engelhard's survivor benefits after Engelhard, his partner of many years, was killed in the line of duty.¹³ This Note discusses the resolution of this case and analyzes why the court's holding demonstrates a regressive step for gays and lesbians in Missouri and elsewhere. Part II analyzes the facts and holding of *Glossip*. Part III discusses the Missouri Constitution's Equal Protection Clause, sexual orientation and federal jurisprudence, and Missouri's statutory and constitutional bans on same-sex marriage. Part IV examines the Supreme Court of Missouri's rationale in *Glossip*, including Judge Teitelman's dissent. Part V analyzes why the majority erred in determining that the Missouri survivor benefits statute discriminated against non-married couples, when the discriminatory characteristic was clearly sexual orientation. This Note ends by explaining that sexual orientation should receive heightened or "intermediate" scrutiny, under which the Missouri survivor benefits statute would have been held to have violated Glossip's rights under the Equal Protection Clause of the Missouri Constitution.

7. Dan Graziano, *CB: NFL Not Ready for Gay Player*, ESPN N.Y. (Feb. 12, 2014, 1:59 PM), http://espn.go.com/new-york/nfl/story/_/id/10442283/terrell-thomas-new-york-giants-says-nfl-not-ready-gay-player.

8. *Michael Sam's Coming Out 'Is a Tragedy,' According to Ex-Navy Chaplain Gordon Klingenschmitt*, HUFFINGTON POST (Mar. 11, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/03/11/michael-sam-gordon-klingenschmitt_n_4943967.html.

9. Connelly, *supra* note 1.

10. *See infra* notes 180-182.

11. 411 S.W.3d 796 (Mo. 2013) (en banc).

12. *Id.* at 800.

13. *Contra id.* at 799.

II. FACTS AND HOLDING

Corporal Dennis Engelhard, a Missouri State Highway Patrol veteran, was killed “in the line of duty” on December 25, 2009.¹⁴ Appellant Kelly D. Glossip was Engelhard’s surviving same-sex partner.¹⁵ After Engelhard’s death, “Glossip applied to the Missouri Department of Transportation and Highway Patrol Employees’ Retirement System (“MPERS”) for survivor benefits” under Missouri Revised Statutes Section 104.140(3).¹⁶ He then “submitted his driver’s license, Engelhard’s death certificate, and an affidavit,” stating that he and Engelhard “had cohabited in a same-sex relationship since 1995.”¹⁷ The affidavit further stated that they held themselves out to friends and family as a couple in a committed marital relationship, and would have married had Missouri law permitted them to do so.¹⁸ MPERS denied Glossip’s application for survivor benefits, claiming that he and Engelhard lacked a marriage certificate.¹⁹ Glossip unsuccessfully appealed the denial to the MPERS Board of Trustees.²⁰

Glossip then filed a petition requesting declaratory and injunctive relief in the Circuit Court of Cole County.²¹ He argued that the survivor benefits statute and Missouri Revised Statutes Section 104.012 violated the Missouri Constitution’s Equal Protection Clause because he was excluded from survivor benefits for his sexual orientation.²² MPERS moved to dismiss Glossip’s amended petition on the ground that it failed to state a claim for which relief could be granted, and Glossip moved for summary judgment. The trial court granted MPERS’s motion to dismiss.²³

Glossip appealed, and on October 29, 2013, the Supreme Court of Missouri granted transfer and held that Missouri’s survivor benefits statute did not impermissibly discriminate against Glossip because it required him and Engelhard to be married; thus, Glossip could not receive the spousal benefits because he and Engelhard were not married when Engelhard died.²⁴ The court applied rational basis scrutiny to the survivor benefits statute and held that Missouri’s interests in providing benefits to economically dependent surviving spouses, controlling costs, and efficient administration satisfied the

14. *Id.* at 800.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; see MO. REV. STAT. §§ 104.012, 451.022 (Supp. 2001).

20. *Glossip*, 411 S.W.3d at 800.

21. *Id.*

22. *Id.* at 800-01.

23. Specifically, the trial court also dismissed Glossip’s motion for summary judgment as moot and dismissed his amended petition with prejudice. *Id.* at 801.

24. *Id.* at 804-05.

Missouri Constitution's Equal Protection Clause because these were legitimate state interests.²⁵ Judge Teitelman wrote the dissenting opinion.²⁶

III. LEGAL BACKGROUND

To provide a sufficient legal context, this Note discusses both the constitutional issues presented in *Glossip* and the statutes at issue. First, Section A discusses the Missouri Constitution's Equal Protection Clause and its various levels of scrutiny. Next, Section B discusses the Supreme Court of the United States' constitutional decisions regarding sexual orientation, and Section C discusses the Missouri Constitution's prohibition on same-sex marriages. Then, Section D discusses Missouri's Survivor Benefits statute. Finally, Section E discusses Missouri's statutory proscription of same-sex marriages.

A. *The Missouri Constitution's Equal Protection Clause*

The Missouri Constitution and the U.S. Constitution each contain equal protection clauses.²⁷ The Missouri Constitution's Equal Protection Clause has been construed to be coextensive with its federal counterpart, but Missouri courts are reluctant to extend the state's Equal Protection Clause beyond the scope of the Fourteenth Amendment.²⁸ Article I, Section 2 of the Missouri Constitution states as follows:

That . . . all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of gains of their own industry; *that all persons are created equal and are entitled to equal rights and opportunity under the law*; that to give security to these things is the principal office of the government, and that when government does not confer this security, it fails its chief design.²⁹

Article 1, Section 2 of the Missouri Constitution guarantees that persons similarly situated in relation to a statute be treated equally.³⁰ When faced with the question of whether a statute violates the state or federal equal protection clause(s), a court must first determine the level of scrutiny to apply to the statute.³¹ Traditionally, courts have had three options from which to

25. *Id.* at 805-07.

26. *Id.* at 809.

27. MO. CONST. art. I, §2; *see* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

28. *Glossip*, 411 S.W.3d at 805.

29. MO. CONST. art. I, §2 (emphasis added).

30. 32 ROBERT H. DIERKER, *History, Constitutional Issues, Classification of Offenses, Principles of Liability and Defenses*, in MISSOURI PRACTICE SERIES, MISSOURI CRIMINAL LAW § 2.3 (2d ed. 2014).

31. *Glossip*, 411 S.W.3d at 805.

choose: strict scrutiny, intermediate scrutiny, or rational basis scrutiny.³² However, other, non-traditional levels of scrutiny have arisen in case law that do not fit within the parameters of the traditional three-tier analysis.³³ These levels have often been equivocally labeled “Heightened Scrutiny.”³⁴

1. Strict Scrutiny

When a plaintiff files an equal protection challenge to a state law that impinges upon a fundamental right or disadvantages a suspect classification, the courts apply strict scrutiny.³⁵ Strict scrutiny applies where the law discriminates based on race, national origin, or ethnicity.³⁶ Strict scrutiny also applies when the law limits a fundamental right, such as freedom of speech.³⁷ The statute survives only when the state establishes a “compelling interest,” and where the law or ordinance is narrowly tailored such that there are no less restrictive means available to achieve the desired effect.³⁸ This standard of review imposes a heavy burden on the state, and laws reviewed under strict scrutiny usually fail this rigorous standard.³⁹

2. Intermediate Scrutiny

Intermediate scrutiny usually involves “mid-range scrutiny” and applies to claims of discrimination based on gender or status as a non-marital child, among others.⁴⁰ While intermediate scrutiny grants more deference to legislative acts than strict scrutiny – thus providing an easier standard for the government to overcome – it nonetheless provides greater protection than rational basis scrutiny.⁴¹ In intermediate scrutiny cases, the government bears the burden of showing that the classification promotes an “important governmental” interest.⁴² Courts have established a two-prong test that challengers must

32. See DIERKER, *supra* note 30.

33. Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774-76 (2005).

34. *Id.* at 2770.

35. *Glossip*, 411 S.W.3d at 805.

36. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 695, 771 (4th ed. 2011).

37. 16B *AM. JUR.* 2d *Constitutional Law* § 862 (2014).

38. *Id.*

39. *Id.*

40. *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* § 4:25 (2013) (“[O]ccasionally lower courts recognize quasi-fundamental rights such as the right of intrastate travel, a denial of liberty based on indigence, expression, education, or gun possession . . .”).

41. Brent L. Caslin, *Gender Classifications and United States v. Virginia: Muddying the Waters of Equal Protection*, 24 *PEPP. L. REV.* 1353, 1359 (1997).

42. *Id.* at 1364.

overcome in order to justify the classification: “first, the classification must serve an important government objective, and second, the classification must be substantially related to the achievement of that objective.”⁴³ Courts have consistently struck down laws that restrict protected classifications if the restriction is “archaic and overbroad,”⁴⁴ or if the restrictions are generalizations,⁴⁵ are invidious,⁴⁶ or are based on stereotypical notions.⁴⁷

3. Rational Basis Scrutiny

The rational basis standard is the most relaxed and is thus the most favorable standard to the government.⁴⁸ If a law does not involve suspect classification or fundamental rights it is examined under the rational basis standard, which “requires only that the classification reasonably further a legitimate governmental purpose[.]”⁴⁹ Under this standard, the government need only establish that the law is “rationally related to a legitimate governmental interest or purpose.”⁵⁰ Essentially, unless the different treatment of various groups is thoroughly unrelated to achievement of a legitimate purpose, the law will survive challenge under the equal protection clause.⁵¹

4. Heightened Scrutiny

Courts have applied a fourth level of scrutiny, which provides a higher level of scrutiny than rational basis, but has not been placed within the definitions of strict scrutiny or intermediate scrutiny.⁵² Indeed, as discussed below, the dissent in *Glossip* argued that this fourth type of scrutiny – “heightened scrutiny” – should be the level of scrutiny used to analyze sexual orientation.⁵³ The test for heightened scrutiny was established by the U.S. Supreme Court in *Bowen v. Gilliard*,⁵⁴ which required heightened scrutiny when a person “(1) has suffered a history of discrimination; (2) exhibits obvious, immu-

43. *Id.* at 1360.

44. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 198 (1976).

45. *Id.*

46. *Caslin*, *supra* note 41, at 1360.

47. *Id.*

48. *See* 16B C.J.S. *Constitutional Law* § 1120 (2014).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Smith*, *supra* note 33, at 2775.

53. *Glossip v. Mo. Dep’t of Transp. & Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796, 813 (Mo. 2013) (en banc) (Teitelman, J., dissenting).

54. 483 U.S. 587 (1987). In *Bowen*, children of low-income mothers sought to enjoin state and federal officials from enforcing Federal Aid to Families with Dependent Children (AFDC) child support attribution requirements, suggesting that it violated the Fifth Amendment. *See id.* at 590-91. The Court held that rational basis, not heightened scrutiny, was the standard that applied. *Id.* at 601.

table, or distinguishing characteristics that define him as a member of a discrete group; and (3) shows that the group is politically powerless or a minority, or that the statutory classification at issue burdens a fundamental right.”⁵⁵ Equal protection jurisprudence has espoused that the classification must be unrelated to the person’s “ability to contribute to society,”⁵⁶ as those laws lack a sufficient nexus between the discriminatory characteristic and the law enacted to serve any purpose other than “deep-seated prejudice.”⁵⁷ Furthermore, equal protection jurisprudence requires that the group discriminated against must have suffered a history of “intentional, invidious discrimination against the group of which he or she is a member because of the characteristic at issue.”⁵⁸

The Court has espoused two other prongs that, while not dispositive, have proved helpful in determining whether the discriminated class is entitled to heightened scrutiny.⁵⁹ The first is the “immutability characteristic,” which is a personal characteristic “determined solely by accident of birth.”⁶⁰ Like race or gender, congenital personal characteristics receive heightened scrutiny because the characteristics do not bear on that person’s responsibility to society.⁶¹ Courts have maintained that some immutable characteristics are not necessarily limited to those defined at birth, but include characteristics “that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them.”⁶² While they are important, the Court deemed that some immutable characteristics are not dispositive to heightened scrutiny determinations because such characteristics must be balanced against the governmental interest in enacting the discriminatory statute and the impact that the characteristic has on that person’s “self-perception, group affiliation, and identification by others.”⁶³

The second prong is the group’s lack of political power.⁶⁴ This factor has received diminished weight because most groups are not considered “po-

55. Smith, *supra* note 33, at 2774.

56. *Id.* at 2775 (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

57. *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

58. *Id.*

59. *Id.*

60. Andrea L. Claus, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHOENIX L. REV. 151, 153 (2011) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

61. *Id.*

62. Smith, *supra* note 33, at 2776 (citing *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (“It is clear that by ‘immutability’ the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed . . .”).

63. *Id.* at 2776; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

64. Smith, *supra* note 33, at 2776.

litically powerless' . . . in the sense that 'they have no ability to attract the attention of lawmakers.'"⁶⁵

B. Sexual Orientation and Federal Constitutional Jurisprudence

The U.S. Supreme Court has not definitively stated whether sexual orientation is a suspect classification.⁶⁶ Consequently, state courts differ concerning what level of scrutiny to apply to sexual orientation.⁶⁷ The difference could be attributed to a disagreement about immutability because some medical experts believe that homosexuality is congenital, while others believe it is a chosen lifestyle.⁶⁸ Whatever the reason, the Court has struggled with sexual orientation's classification in relation to the Equal Protection and Due Process Clauses, leading to confusion in the lower courts.⁶⁹

The Court's first effort to determine scrutiny based on sexual orientation was in 1986 in *Bowers v. Hardwick*.⁷⁰ In *Bowers*, Michael Hardwick was charged with violating a Georgia statute criminalizing sodomy by engaging in consensual sodomy with another competent adult male.⁷¹ Hardwick brought suit in federal district court, asserting that the statute violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.⁷² The Court upheld the statute on the ground that the U.S. Constitution did not extend a fundamental right to homosexuals to engage in consensual sodomy.⁷³ The Court stated that Hardwick's argument that his right to engage in sodomy was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" was "facetious."⁷⁴ According to the Court, because the law was based on morality, it satisfied rational basis scrutiny.⁷⁵

The Court's next decision with respect to sexual orientation occurred ten years later in *Romer v. Evans*.⁷⁶ In *Romer*, Richard Evans, other homosexual persons, and municipalities challenged the validity of an amendment to the Colorado state constitution ("Amendment 2"), which repealed municipal ordinances that banned discrimination against individuals due to their sexual orientation.⁷⁷ Amendment 2 also prohibited any state or local legislative,

65. *Id.* at 2776-77 (quoting *City of Cleburne*, 473 U.S. at 445).

66. Claus, *supra* note 60, at 151.

67. *Id.* at 173.

68. *Id.* at 171.

69. *Id.* at 153.

70. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

71. *Id.* at 187-88.

72. *Id.* at 188.

73. *Id.* at 192.

74. *Id.* at 194.

75. *Id.* at 196.

76. 517 U.S. 620 (1996).

77. *Id.* at 623-24 ("For example, the cities of Aspen and Boulder and the city and county of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accom-

executive, or judicial action that protected homosexuals, lesbians, or bisexuals.⁷⁸ The Court held that the amendment violated the Fourteenth Amendment's Equal Protection Clause: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else [A] state cannot so deem a class of persons a stranger to its laws."⁷⁹ The Court was silent as to whether sexual orientation was a suspect classification because Amendment 2's discrimination against homosexual conduct bore no "rational relation to some legitimate end," therefore Amendment 2 failed even rational basis scrutiny.⁸⁰ Amendment 2, according to the Court, needlessly discriminated against a particular group, and served no purpose other than to foster animosity toward a particular class of people.⁸¹

The Court's next major sexual orientation decision was in 2003 in *Lawrence v. Texas*,⁸² which overruled *Bowers* by striking down a Texas statute criminalizing sexual intercourse with a consenting, competent adult of the same sex.⁸³ The Court stated that "[homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."⁸⁴ *Lawrence*, for the first time, identified gay and lesbian individuals as a class of people, not as a group of people who engaged in homosexual conduct.⁸⁵ However, the Court's ruling relied on the Due Process Clause, claiming that invalidating the statute under the Equal Protection Clause would have left *Bowers* intact and perhaps would have allowed state statutes banning sodomy to be construed as valid as long as they applied to heterosexual couples as well.⁸⁶ The Court's use of the Due Process

modations, and health and welfare services. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of sexual orientation." (internal citations omitted)).

78. *Id.* at 624 ("No protected status based on homosexual, lesbian, or bisexual orientation. Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis to entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the constitution shall be in all respects self-executing." (internal quotation marks omitted)); see DENVER, CO., REV. MUNICIPAL CODE art. IV, § 28-92 (1991) (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality, or bisexuality").

79. *Romer*, 517 U.S. at 635.

80. *Id.* at 631-32.

81. *Id.* at 635.

82. 539 U.S. 558 (2003).

83. *Id.* at 578.

84. *Id.*

85. Claus, *supra* note 60, at 158.

86. *See id.* at 158-59.

Clause enabled the Court to avoid addressing whether sexual orientation was a suspect classification under the Equal Protection Clause.⁸⁷

C. *The Missouri Constitution's Prohibition of Same-Sex Marriage*

The court in *Glossip* held that the Missouri Constitution's ban on same-sex marriage had no impact on Glossip's inability to obtain survivor benefits from his partner, but Glossip argued that his inability to marry Engelhard in Missouri was the reason they could not obtain a marriage license and thus fulfill the requirement under the survivor benefits statute.⁸⁸ Article I, Section 33 of the Missouri Constitution states "[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman."⁸⁹ Section 33, enacted on June 3, 2004, was likely a legislative reaction to *Lawrence v. Texas*.⁹⁰ States such as Missouri have stated that same-sex marriages are contrary to the state's public policy.⁹¹

D. *Missouri's Surviving Spouse Benefits Statute*

Glossip argued that the Missouri surviving spouse benefits statute violated his equal protection rights under the Missouri Constitution.⁹² *Glossip* referenced the 2002 version of the survivorship benefits statute.⁹³ At that time, the Missouri Revised Statutes Section 104.140.1(1) and (2) provided survivorship benefits for a surviving spouse,⁹⁴ "calculated as if the member were of normal retirement age and had retired as of the date of the member's death"⁹⁵ For purposes of the statute, "spouse" was defined by a "marriage between a man and a woman."⁹⁶ As of 2013, the Missouri legislature added that the decedent needed to provide five or more years of creditable service prior to death for the surviving spouse benefits to attach.⁹⁷

87. *See id.* at 158.

88. *Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps.' Ret. Sys.*, 411 S.W.3d 796, 799 (Mo. 2013) (en banc).

89. MO. CONST. art. I, § 33.

90. *See generally* 539 U.S. 558 (2003); *supra* Part III.B.

91. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1970-76 (1997).

92. *Glossip*, 411 S.W.3d at 800-01.

93. *Id.*

94. Alternatively, if there is no surviving spouse, the benefits would go to the decedent's children who are under the age of twenty-one. MO. REV. STAT. § 104.140.1(2) (Supp. 2001); *see also* MO. REV. STAT. § 104.012 (Supp. 2001).

95. § 104.140.1(2) (Supp. 2001).

96. § 104.012 (Supp. 2001) (emphasis added).

97. MO. REV. STAT. § 104.140.1(1) (2012).

E. Missouri's Marriage Statute

Glossip argued that the survivor benefits statute violated his equal protection rights because he was discriminated against on the basis of his sexual orientation.⁹⁸ Missouri Revised Statutes Section 451.022 states that,

1. It is the public policy of this state to recognize marriage only between a man and a woman. 2. Any purported marriage not between a man and a woman is invalid. 3. No recorder shall issue a marriage license, except to a man and a woman. 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.⁹⁹

He claimed that his inability to get married was due to the Missouri Constitution¹⁰⁰ and Section 451.022.¹⁰¹

IV. INSTANT DECISION

A. Majority Opinion

In *Glossip v. Missouri Department of Transportation and Highway Patrol Employees' Retirement System*, the Supreme Court of Missouri began by reciting the Equal Protection Clause of the Missouri Constitution.¹⁰² The court then determined which standard of review to use.¹⁰³ The court considered intermediate scrutiny,¹⁰⁴ but ultimately rejected it in favor of rational basis scrutiny.¹⁰⁵ Intermediate scrutiny, according to the court, has been applied to cases involving gender discrimination, but rational basis scrutiny was chosen after the court determined that marriage was the discriminatory feature.¹⁰⁶

The court determined that Glossip had standing to challenge the constitutionality of the survivor benefits statute – Missouri Revised Statutes Section 140.140 – but not to challenge the ban on same-sex married couples – Missouri Revised Statutes Section 104.012 – because he was “not a member of the class of persons disadvantaged by the statute.”¹⁰⁷ According to the court, Glossip had standing to challenge the survivor benefits statute because he was within the class of persons he alleged were unconstitutionally denied bene-

98. *Glossip*, 411 S.W.3d at 801.

99. MO. REV. STAT. § 451.022 (2012).

100. *See supra* Part II.

101. *Glossip*, 411 S.W.3d at 800.

102. *Id.* at 801.

103. *Id.*

104. *See supra* Part II.

105. *Glossip*, 411 S.W.3d at 805.

106. *Id.*

107. *Id.* at 803.

fits.¹⁰⁸ He argued that the survivor benefits statute distinguished between similarly-situated people by requiring marriage to be a prerequisite, and as Engelhard's significant other, he was the functional equivalent of Engelhard's spouse.¹⁰⁹ However, Missouri Revised Statutes Section 104.012 limited the survivor benefits beneficiaries to opposite-sex married spouses,¹¹⁰ and thus distinguished between opposite-sex and same-sex married couples. Since Glossip and Engelhard were not married, Glossip lacked the requisite standing to contest the statute's constitutionality.¹¹¹

Responding to Glossip's argument that the survivor benefits statute violated the Equal Protection Clause because the statute discriminated against him on the basis of sexual orientation, the court determined that the discriminatory aspect of the statute related to marital status, not sexual orientation.¹¹² Marriage, stated the court, was a threshold requirement for a prospective beneficiary; without it, no benefits were available.¹¹³ The court opined that the outcome may have been different if Glossip and Engelhard had married in another state, but since they did not, the court declined to surmise what it would have held had that been the case.¹¹⁴ The court also suggested that if Glossip had challenged the ban on same-sex marriage, its analysis would likely have been different.¹¹⁵

Rational basis scrutiny, stated the court, was the accurate standard of review because the Missouri Constitution's Equal Protection Clause was consistent in scope with the U.S. Constitution's Equal Protection Clause, and the U.S. Supreme Court has never held marriage to be a characteristic worthy of heightened scrutiny.¹¹⁶ The court then recognized that neither the U.S. Supreme Court nor the Supreme Court of Missouri has ever determined what standard of review should apply to sexual orientation.¹¹⁷ The court left that question for another day because the survivor benefits statute discriminated based on marital status, not sexual orientation.¹¹⁸

108. *Id.*

109. *Id.*

110. *Id.* Decedent's surviving children under twenty-one years of age were also included. *See* MO. REV. STAT. § 104.012 (2012).

111. *Glossip*, 411 S.W.3d at 803.

112. *Id.* at 804.

113. *Id.*

114. *Id.*

115. *Id.* at 805.

116. The court expressed its disinclination to extend the Missouri Constitution's Equal Protection Clause beyond the breadth of the U.S. Constitution's Equal Protection Clause. *Id.*

117. The court touched on the landmark cases *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Lawrence v. Texas*, 539 U.S. 558 (2003), but said that the U.S. Supreme Court left open the question of what level of equal protection scrutiny should be given to sexual orientation, holding that the statutes at issue in the two cases failed even rational basis scrutiny. *Id.* at 805-06.

118. *Id.* at 806.

Once the court determined the standard of review, it turned to whether the statute provided a reasonable relationship to a rational state interest.¹¹⁹ The court recognized that limiting survivor benefits to spouses provided many advantages to the state.¹²⁰ First, the limitation enhanced administrative efficiency.¹²¹ It was “reasonably conceiv[able]” that married couples were more economically dependent on their spouses than were non-married partners.¹²² Furthermore, spouses owed a duty of support under Missouri law, a legal obligation absent in non-marital relationships.¹²³ According to the court, this notion of marriage coupled with financial interdependence established a rational basis.¹²⁴

Secondly, limiting survivor benefits to surviving spouses and children helped preserve limited economic funds.¹²⁵ The Missouri General Assembly could have expanded the reach of the survivor benefits statute to all persons economically dependent on the deceased employee, but it chose not to, and the court found that the choice was rational.¹²⁶ Lastly, the spousal requirement enhanced administrative efficiency.¹²⁷ Had the General Assembly extended the reach of the benefits statute to others, resolving claims would be a much more expensive and cumbersome task.¹²⁸ It was rational to limit the beneficiaries for this purpose.¹²⁹

Because Missouri’s survivor benefits statute discriminated in favor of married couples to the disadvantage of non-married couples and did not discriminate based on sexual orientation, the court upheld the statute under the Equal Protection Clause.¹³⁰

B. Dissenting Opinion

Judge Teitelman wrote the dissenting opinion.¹³¹ He argued that for centuries, gays and lesbians have battled inequality, persecution, and subjugation both socially and legally.¹³² Judge Teitelman opined that Missouri Revised Statutes Sections 104.140 and 104.012 perpetuate these negative ef-

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 807.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 809 (Teitelman, J., dissenting).

132. *Id.*

fects.¹³³ The majority's holding, according to the dissent, used a definition of "spouse" that disadvantaged gays and lesbians.¹³⁴

The dissent was unpersuaded by the majority's justification that the survivor benefits statute discriminated against Glossip because of his marital status and not his sexual orientation.¹³⁵ Specifically, when the survivor benefits statute was read in conjunction with the statute's definition of "spouse," survivor benefits were a legal impossibility for all same-sex couples, regardless of their marital status.¹³⁶ Since same-sex couples were barred from marriage by both the state constitution¹³⁷ and state statute,¹³⁸ the dissent believed that discriminating against couples based on their marital status simultaneously created discrimination based upon sexual orientation.¹³⁹

The dissent also disagreed with the majority's assertion that Glossip's argument failed because he did not challenge Missouri's proscription of gay marriage.¹⁴⁰ According to the dissent, the state could provide benefits to gay and lesbian survivors without a marital condition.¹⁴¹ The dissent claimed that just because same-sex marriage was banned in Missouri did not mean that depriving gays and lesbians of their rights was justified.¹⁴² By electing to grant benefits only to persons legally married, the state intentionally blocked an entire class of people from access to these benefits.¹⁴³

Furthermore, the dissent posited, because the majority opinion incorrectly held that the class discriminated against involved unmarried couples rather than gays and lesbians, the majority applied the wrong level of scrutiny.¹⁴⁴ Classifications that disadvantage groups "that have been subjected to historic patterns of disadvantage" are often accorded intermediate scrutiny, and the majority erred in applying rational basis scrutiny.¹⁴⁵ The dissent, when it applied intermediate scrutiny, determined that the survivor benefits statute and its accompanying statutory definitions did not withstand this heightened scrutiny.¹⁴⁶

133. *Id.*

134. *Id.*

135. *Id.* at 809-10.

136. *Id.* at 810.

137. *See supra* Part III.C.

138. *See supra* Part III.E.

139. *Glossip*, 411 S.W.3d at 810-11 (Teitelman, J., dissenting).

140. *Id.* at 811-12.

141. *Id.* at 812.

142. *Id.* at 811.

143. *Id.* at 812.

144. *Id.*

145. *Id.*

146. *Id.* at 812-13 ("Under intermediate or heightened scrutiny, the classification is permissible only if it is substantially related to the achievement of important governmental objectives.").

First, it was implausible to believe that Glossip and Engelhard were not as financially interdependent as a traditional opposite-sex married couple.¹⁴⁷ Moreover, the nexus between marriage and financial interdependence did not withstand rational basis scrutiny – much less intermediate scrutiny.¹⁴⁸ Second, while the state was free to apply “objective”¹⁴⁹ criteria to the statute, the state was not able to apply whatever “objective” criteria it desired and assume that the criteria were constitutionally sound.¹⁵⁰ To underscore the importance of financial interdependence in granting survivor benefits disbursements, the state could have requested evidence of “long-term commitment and financial interdependence.”¹⁵¹ Finally, the dissent balked at the majority’s holding that excluding same-sex couples from benefits provided a cost-control function.¹⁵² If cost control were enough to justify discrimination subject to heightened scrutiny, cost control would be a commonly-employed justification by the state.¹⁵³ After all, stated the dissent, “discrimination is cheaper than equal protection.”¹⁵⁴

Judge Teitelman expressed concern with this holding not only because he believed the majority chose the wrong classification and applied the wrong level of scrutiny, but also because he believed this opinion would remain a blemish on Missouri’s constitutional jurisprudence once the Supreme Court of Missouri gets it right.¹⁵⁵ Just as *Brown v. Board of Education*¹⁵⁶ cleansed the U.S. Supreme Court of the blemish left by *Plessy v. Ferguson*¹⁵⁷ in 1896, Teitelman believed that future case law would correct the *Glossip* error.¹⁵⁸ However, warned Judge Teitelman, even if the court ultimately corrects itself, the time lost and harm done will have been irreparable to those discriminated against.¹⁵⁹

147. *Id.* at 813.

148. *Id.*

149. Verdict at 15, *Glossip v. Mo. Dep’t of Transp. & Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013) (No. SC92583), 2013 WL 364570, *14. The court stated that the “objective” criteria used by the statute were administrative efficiency, controlling costs, and preserving limited retirement resources. *Glossip*, 411 S.W.3d at 813 (Teitelman, J., dissenting).

150. *Glossip*, 411 S.W.3d at 813 (Teitelman, J., dissenting).

151. *Id.* at 814.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 810.

156. *Id.* at 809 (citing *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954) (holding that state-sponsored “separate but equal” public schools violated the Equal Protection Clause)).

157. 163 U.S. 537 (1896).

158. *Glossip*, 411 S.W.3d at 810 (Teitelman, J., dissenting).

159. *See id.* at 809-14.

V. COMMENT

A. Sexual Orientation Should Be Accorded Heightened Scrutiny

The Supreme Court of Missouri erred when it held that Kelly Glossip was not eligible for survivor benefits because he and Dennis Engelhard were not married at the time of Engelhard's death.¹⁶⁰ The Supreme Court of Missouri also erred when it held that Glossip was discriminated against because he and Engelhard were not married.¹⁶¹ The court erred because it used the wrong classification to determine which level of scrutiny to apply.¹⁶² Because the survivor benefits statute indirectly discriminated against Glossip based on his sexual orientation, the discriminating characteristic was that he and Engelhard were gay.¹⁶³ And because sexual orientation – not marriage – was the discriminating characteristic, the claim should have received heightened scrutiny.¹⁶⁴

1. The Survivor Benefits Statute Discriminates on the Basis of Sexual Orientation

Glossip and Engelhard were not married when Engelhard died, but they were in a “committed marital relationship” and “would have entered into a civil marriage if it were legal to do so in Missouri.”¹⁶⁵ The majority determined that, because Glossip and Engelhard were not married, Glossip was not entitled to the survivor benefits.¹⁶⁶ However, Glossip and Engelhard could not get married in Missouri.¹⁶⁷ Missouri statutory law explicitly forbade it,¹⁶⁸ the survivor benefits statute explicitly refused to acknowledge same-sex marriages,¹⁶⁹ and – lest anyone fail to take the hint – the Missouri Constitution

160. *See id.* at 805 (majority opinion).

161. *See id.*

162. *See id.* at 813 (Teitelman, J., dissenting).

163. *See id.* at 810-11.

164. *See id.* at 813.

165. *Id.* at 800 (majority opinion) (internal quotations marks omitted).

166. *Id.*

167. *See id.* at 810 (Teitelman, J., dissenting).

168. MO. REV. STAT. § 451.022 (Supp. 2001) (“1. It is the public policy of this state to recognize marriage only between a man and a woman. 2. Any purported marriage not between a man and a woman is invalid. 3. No recorder shall issue a marriage license, except to a man and a woman. 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.”).

169. MO. REV. STAT. § 104.012 (Supp. 2001) (“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.”).

explicitly prohibited same-sex marriages.¹⁷⁰ Until recently, Missouri refused to recognize same-sex marriages performed in other states, maintaining that same-sex marriage is contrary to Missouri's public policy.¹⁷¹ Thus, the court's assertion that Missouri's survivor benefits statute discriminated against Glossip because he and Engelhard failed to marry was erroneous, albeit convenient because it permitted the court to avoid determining what level of scrutiny to apply to sexual orientation.¹⁷² Glossip and Engelhard could not get married in Missouri, and Glossip and Engelhard's out-of-state marriage license (had they obtained one) would not have been accepted in Missouri at the time of the case.¹⁷³ Thus, the discussion of whether Glossip and Engelhard *could have* or *should have* been married was irrelevant because Missouri courts were proscribed from recognizing it. Because Missouri statutory and constitutional law made it impossible for Glossip and Engelhard to be married in Missouri, and because their marriage was forbidden by virtue of them being gay, Missouri's survivor benefits statute made it impossible for Glossip to obtain survivor benefits.¹⁷⁴ The distinction at issue was sexual orientation.¹⁷⁵

2. Gays and Lesbians Have Endured Discrimination for Decades

Sexual orientation should receive heightened or "intermediate" equal protection scrutiny.¹⁷⁶ Gays and lesbians have been discriminated against, subjugated, and stigmatized throughout history.¹⁷⁷ They have been the target

170. MO. CONST. art. I, §33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.").

171. § 451.022.1; *see also* Kevin Tuininga, *Toward Predictable Choice of Law in Missouri*, 65 J. MO. B. 14, 20 (2009) (explaining that, even when choice of law provisions favor application of non-Missouri state law, marriages between same-sex couples performed in other states are invalid in Missouri). However, as of the writing of this Note, the state of the law in Missouri is in flux: a recent ruling in Missouri requires the state to now recognize same-sex marriages performed in other states, and other recent court decisions have allowed same-sex individuals to marry in certain parts of the state. *See Missouri*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/missouri> (last visited Jan. 4, 2015).

172. *See Glossip*, 411 S.W.3d. at 805 ("This case would be a different analysis if, as in the recent case of *United States v. Windsor*, Glossip and Engelhard had been married under the law of another state or jurisdiction. But that is not this case, and this Court must apply the law to the facts before it. In this case, Glossip is not eligible for survivor benefits because he was not married." (internal citations omitted)).

173. *See* sources cited *supra* note 171.

174. *See Glossip*, 411 S.W.3d at 810-11 (Teitelman, J., dissenting).

175. *Id.*

176. *See id.* at 812.

177. Brief of Missouri Law Professors as Amici Curiae in Support of Appellant, *Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps.*, 411 S.W.3d 796 (Mo. 2013) (No. SC92583), 2012 WL 6825482, at *4.

of anti-gay legislation,¹⁷⁸ verbal chastisement by public officials,¹⁷⁹ and even violent physical attacks.¹⁸⁰ The long history of discrimination against gays and lesbians cannot be overlooked; they have been “denied employment, targeted for violence, publicly humiliated, and treated as perverts, sinners, and criminals.”¹⁸¹ Nearly thirty years ago, the Supreme Court of Missouri agreed that historically, homosexuals have been subjected to “antipathy and prejudice.”¹⁸² Even today, gay and lesbian individuals face potential backlash for their sexual orientation.¹⁸³ As of this writing, the Missouri Senate has filed a bill that could protect businesses that refuse service to gays and lesbians due to religious reasons.¹⁸⁴ This regressive legislation exemplifies that gay and lesbian Missourians are still treated as a subclass of humans. When compared to other social groups, homosexuals are still among the most stigmatized nationally: many gay teens are bullied and humiliated in

178. Jonathan Shorman, *Mo. Joins States Mulling Anti-Gay Religious Bills*, USA TODAY (Feb. 26, 2014, 12:09 PM), <http://www.usatoday.com/story/news/nation/2014/02/26/missouri-anti-gay-religion-bill/5834319/> (“Sen. Wayne Wallingford, R-Cape Girardeau, on Monday filed Senate Bill 916, which would allow businesses to cite religious belief as a legal justification for refusing service.”).

179. Brief of Mayor Francis Slay, Congresswoman Lacy Clay, and Certain Current and Former Members of the Missouri General Assembly as Amicus Curiae in Support of Appellant Kelly D. Glossip, *Glossip v. Mo. Dep’t of Transp. and Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013) (No. SC92583), 2012 WL 10159357, at *14 (“Missouri State University’s addition of sexual orientation to the list of protected classes in its anti-discrimination policy was bookended by bias-laced rhetoric. In a letter to alumni before the change, the university’s president wrote that homosexuality was a ‘biological perversion’ and ‘intrinsically disordered.’”). Furthermore, in the mid 1970s, the University of Missouri refused to recognize the student group “Gay Lib” because it represented and “perpetuated an abnormal way of life” and would allow “the sick and abnormal to counsel others who are similarly ill and abnormal” *Id.* at *16. The state’s two largest universities have historically rejected the prospect of gays and lesbians interacting on their own campuses.

180. Lila Shapiro, *Highest Number of Anti-Gay Murders Ever Reported in 2011: The National Coalition of Anti-Violence Programs*, HUFFINGTON POST (June 2, 2012, 1:10 PM), http://www.huffingtonpost.com/2012/06/02/anti-gay-hate-crimes-murders-national-coalition-of-anti-violence-programs_n_1564885.html.

181. Brief Of Constitutional Law Scholars Bruce Ackerman, et al. as Amici Curiae Addressing the Merits and Supporting Affirmance, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Nos. 12-144, 12-307), 2013 WL 795542, at *8.

182. Brief of Missouri Law Professors as Amici Curiae in Support of Appellant, *supra* note 177, at *13.

183. *See Anti Gay Attacks*, HUFFINGTON POST, <http://www.huffingtonpost.com/tag/anti-gay-attacks> (last visited April 4, 2014) (listing articles regarding recent anti-gay attacks across the United States).

184. Jonathan Shorman, *State Senator Files Bill to Protect Businesses That Discriminate on Religious Grounds*, SPRINGFIELD NEWS-LEADER (Feb. 26, 2014), <http://www.news-leader.com/article/20140226/NEWS01/302260019/missouri-state-senator-bill-wallingford>.

school,¹⁸⁵ and professionals fear negative co-worker reactions by identifying as gay at their workplace.¹⁸⁶ People are being targeted and attacked, solely due to their sexual orientations.¹⁸⁷

3. Gay and Lesbian Citizens Have a Small Political Voice

A recent study found that only about 1.7% of the U.S. population and .75% of Missourians identify as gay or lesbian.¹⁸⁸ Fear of retaliation prevents many gay individuals from engaging in political discourse aimed at demanding a positive change.¹⁸⁹ Anti-gay hate crimes represent an increasingly large percentage of total hate crimes in the United States.¹⁹⁰ Furthermore, the threat of private ostracism and discrimination prevents gay and lesbian citizens from participating politically, opting instead to “stay in the closet.”¹⁹¹ And while the 113th United States Congress boasts seven openly gay or bisexual Congress members,¹⁹² Missouri’s General Assembly has had only five openly gay members: Representative Tim Van Zandt,¹⁹³ Representative Zachary Wyatt,¹⁹⁴ Representative Mike Colona,¹⁹⁵ Representative Jeanette

185. See Jane Riese, *Youth Who Are Bullied Based on Perceptions About Their Sexual Orientation*, VIOLENCE PREVENTION WORKS!, http://www.violencepreventionworks.org/public/bullying_sexual_orientation.page (last visited Apr. 4, 2014).

186. See Brief of Mayor Francis Slay, Congresswoman Lacy Clay, and Certain Current and Former Members of the Missouri General Assembly as Amicus Curiae in Support of Appellant Kelly D. Glossip, *supra* note 179, at *15.

187. See *id.* at *16 (quoting *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 434 (Conn. 2008)).

188. *Id.* at *11.

189. See generally sources cited *infra* notes 192-206.

190. See Brief for Respondents at 31, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 649742, at *31.

191. See generally *id.*

192. Carlos Santoscoy, *Seven Openly LGBT Members in 113th Congress*, ON TOP MAGAZINE (Jan. 3, 2013), <http://www.ontopmag.com/article.aspx?id=14009>.

193. See Kim Bell, *Gay Legislator Introduces Bill to Repeal Ban on Homosexual Sex*, ST. LOUIS POST-DISPATCH (Feb. 26, 1998), <http://www.glapn.org/sodomylaws/usa/missouri/monews02.htm>; see also *Finding Aid 552.14*, MO. STATE ARCHIVES, <http://www.sos.mo.gov/archives/resources/findingaids/lp/552-14.pdf> (last visited Oct. 5, 2014); *Tim Van Zandt*, MO. HOUSE OF REPRESENTATIVES, <http://house.missouri.gov/content.aspx?info=/bills01/member01/bio038.htm> (last visited Mar. 11, 2014).

194. See Wes Duplanter, *Zachary Wyatt, Missouri Lawmaker, Says He Is Gay, Denounces ‘Don’t Say Gay’ Bill*, HUFFINGTON POST (July 2, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/05/02/zachary-wyatt-gay-gop-missouri-lawmaker-dont-say-gay_n_1471191.html; see also *Zachary Wyatt*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/member.aspx?district=002&year=2011> (last visited Mar. 11, 2014).

195. See Danny Wicentowski, *State Rep. Mike Colona Seeks Repeal of Missouri’s Gay Marriage Ban*, RIVERFRONT TIMES (Mar. 28, 2014, 7:00 AM), http://blogs.riverfronttimes.com/dailyrft/2014/03/state_rep_mike_colona_seeks_re.php; see also *Mike*

Mott Oxford,¹⁹⁶ and Senator Jolie Justus,¹⁹⁷ with Senator Justus and Representative Colona being the only current gay politicians still serving the state.¹⁹⁸ In 2013, Missouri legislators attempted to pass a “Don’t Say Gay” bill, which would have forbidden the mention of sexual orientation in public schools.¹⁹⁹ Furthermore, the MPERS was established in 1955,²⁰⁰ but Missouri Revised Statutes Section 104.012 – the provision that recognized a “surviving spouse” only as an opposite-sex spouse – was added in 2001,²⁰¹ prior to any other U.S. state law permitting same-sex marriage anywhere in the United States.²⁰²

As an analogy, compare the U.S. Supreme Court’s analysis of the political power of women.²⁰³ The Court measured women’s political power in terms of the impact that discrimination had on the number of women elected into the House of Representatives or nominated to the Supreme Court, and even noted that there has never been a female president.²⁰⁴ Gender discrimination claims are afforded heightened scrutiny,²⁰⁵ although women’s ability to mobilize and fight legislation contrary to their promotion is much stronger than that of gay and lesbian citizens.²⁰⁶ There is an implication that sexual

Colona, MO. HOUSE OF REPRESENTATIVES, <http://house.mo.gov/member.aspx?year=2011&district=067> (last visited Oct. 5, 2014).

196. See Shalia Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. TIMES (July 5, 2005), http://www.nytimes.com/2005/07/05/national/05church.html?incamp=article_popular_5&r=1&; see also Jeanette Mott Oxford, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/member.aspx?district=059&year=2012> (last visited Oct. 5, 2014).

197. See HRC Staff, *Senator Jolie Justus Leads the Effort to Pass Nondiscrimination Act in Missouri*, HUMAN RIGHTS CAMPAIGN (Apr. 14, 2014), <http://www.hrc.org/blog/entry/senator-jolie-justus-leads-the-effort-to-pass-nondiscrimination-act-in-miss>; see also Jolie Justus, MO. SENATE, <http://www.senate.mo.gov/09info/members/mem10.htm> (last visited Oct. 5, 2014).

198. See sources cited *supra* notes 195, 197.

199. See John Celock, *Missouri ‘Don’t Say Gay’ Bill: GOP Sponsors Wary of ‘Homosexual Agenda’*, HUFFINGTON POST (Apr. 24, 2012, 11:46 AM), http://www.huffingtonpost.com/2012/04/23/missouri-dont-say-gay-bill_n_1447121.html.

200. See *History of MPERS, MoDOT & PATROL EMPLOYEES’ RETIREMENT SYS.*, <http://www.mpers.org/screenprintinfopage.aspx?menuitemid=198&menuubid=0> (last visited Oct. 5, 2014).

201. MO. REV. STAT. § 104.012 (Supp. 2001).

202. Massachusetts became the first state to allow same-sex marriage via court order. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

203. See generally Emily K. Baxter, Note, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891 (2007).

204. *Id.* at 904-05 (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1972)).

205. *United States v. Virginia*, 518 U.S. 515, 518 (1996) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (“[A]ll gender-based classifications today [warrant] heightened scrutiny.”)).

206. Baxter, *supra* note 203, at 905.

orientation should be a suspect classification because its political mobilization powers are intrinsically weaker than those of other suspect classifications, such as gender and race.²⁰⁷

4. Gay and Lesbian Individuals' Contributions to Society

Homosexuality has no bearing on a person's ability to contribute to society.²⁰⁸ In 1975, the American Psychological Association removed homosexuality from its official list of mental disorders and adopted the following resolution:

Homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has been long associated with homosexual orientations.²⁰⁹

Sexual orientation does not, and cannot, disable a person or render that individual less capable of being a lawyer, doctor, parent, teacher, judge, police officer, nurse, or plumber.²¹⁰ One needs only to look at the media, where famous and successful celebrities and business moguls have managed to gain immense success despite – or perhaps *because of* – their homosexuality.²¹¹

207. *Id.*

208. Brief of Missouri Law Professors as Amici Curiae in Support of Appellant, *supra* note 177, at *15 (citing *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 435 (Conn. 2008) (“[A]n individual’s homosexual orientation ‘implies no impairment in judgment, stability, reliability or general social or vocational capabilities.’”)).

209. *Discrimination Against Homosexuals*, AM. PSYCHOL. ASS’N (Jan. 26, 1975), <http://www.apa.org/about/policy/discrimination.aspx>; *see also* Brief of Missouri Law Professors as Amici Curiae in Support of Appellant, *supra* note 177, at *15.

210. Brief Of Constitutional Law Scholars Bruce Ackerman, et al. as Amici Curiae Addressing the Merits and Supporting Affirmance, *supra* note 181, at *3.

211. *World Pride Power List 2013: 100 Most Influential LGBT People of the Year*, GUARDIAN (June 28, 2013), <http://careers.theguardian.com/world-pride-power-list-2013-11-100>. The list names Ellen DeGeneres, multi-Emmy-award-winning actress, writer, stand-up comedian, and host of one of America’s most successful talk shows; Tim Cook, CEO of Apple; Sir Elton John, award-winning songwriter; Anderson Cooper, anchor of the CNN news show *Anderson Cooper 360 Degrees*; Jodie Foster, Oscar-winning actress; Anthony Watson, MD and CIO of Barclays and chair of the European Diversity Awards; and Daniel Winterfeldt, a United States securities lawyer and head of CMS’s International Capital Markets Group, to name a few. *Id.*

5. Sexual Orientation Is an Immutable Characteristic

Whether a person is “born” gay or “chooses” to be gay is still contested,²¹² but courts and society do not contest that a person’s sexual orientation is extremely personal and central to that person’s identity as a human being.²¹³ Arguably, being homosexual denotes a stronger tie to one’s sexuality than being heterosexual, because homosexuals are often targets of harassment, violence, and bullying, exemplifying that a person would opt for the heterosexual lifestyle if the issue were not so integral to his or her personhood.²¹⁴ Suspect classifications are often determined by asking whether it would be “abhorrent . . . to penalize a person for refusing to change [the trait in question].”²¹⁵ Americans value their sexual happiness; it is a major aspect of relationships with a significant other (whether of the same sex or not) and it intimately connects them to their personality, sense of identity, and self-expression.²¹⁶ No governmental branch – whether the legislature enacting a statute, the executive branch issuing an administrative regulation, or the judiciary creating new common law – has the authority or power to dictate a person’s sexual orientation. And just because a person is gay does not mean he or she is not entitled to fundamental individual constitutional rights.²¹⁷

The court in *Glossip* erroneously held that marriage – and not sexual orientation – was the discriminatory characteristic.²¹⁸ In doing so, the court skirted past the issue of whether to accord sexual orientation heightened scrutiny.²¹⁹ The court’s holding impedes gays’ and lesbians’ rights because it remained silent on the issue of sexual orientation’s protection under the Missouri Equal Protection Clause. Missouri’s gay and lesbian residents deserve better treatment.

212. See generally Marcia Malory, *Homosexuality & Choice: Are Gay People ‘Born This Way?’*, HUFFINGTON POST (Oct. 25, 2012, 8:34 AM), http://www.huffingtonpost.com/2012/10/23/homosexuality--choice-born-science_n_2003361.html. A study published in a 1993 edition of the journal *Science* showed that families with two homosexual brothers were very likely to have certain genetic markers on a region of the X chromosome, which researchers believed illustrated that sexual preference has a genetic component. *Id.*

213. Brief of Missouri Law Professors as Amici Curiae in Support of Appellant, *supra* note 177, at 16.

214. *Overcoming Anti-Gay Harassment*, U. ROCHESTER MED. CENTER, <http://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=4564> (last visited Mar. 10, 2014) (“For far too many people, being gay or lesbian means having to deal with prejudice and harassment from childhood onward.”).

215. See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008).

216. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 36 (2010).

217. See *Glossip v. Mo. Dep’t of Transp. & Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796, 812 (Mo. 2013) (Teitelman, J., dissenting).

218. *Id.*

219. *Id.* at 813.

B. Missouri Is Failing Its Gay and Lesbian Residents

To survive equal protection analysis when subjected to heightened or “intermediate” scrutiny, a statutory classification must serve an “important government interest,” and the classification must be substantially related to achieving that objective.²²⁰ The court proffered three reasons why the survivor benefits statute survived rational basis scrutiny.²²¹ However, had the court applied the appropriate standard, the factors listed would not rise to the level of an “important government interest” needed to sustain the statute against a heightened level of equal protection scrutiny.²²²

First, the court argued that providing survivor benefits to married spouses who were financially dependent on the decedent was a legitimate state interest because that spouse would have been more dependent on his or her spouse’s income than on that of a non-married partner.²²³ This fails rational basis scrutiny, as well as heightened scrutiny, because a marriage certificate is not a prerequisite to financial interdependence.²²⁴ There are approximately 650,000 same-sex households in the U.S., including almost 11,000 same-sex households in Missouri.²²⁵ St. Louis ranks eleventh highest in concentration of households headed by same-sex partners in the country.²²⁶ Furthermore, it is estimated that Missouri same-sex couples parented over 5,400 children in 2005.²²⁷ Most of these families depend on dual incomes – just as heterosexual couples do – to maintain their standard of living.²²⁸ Glossip and Engelhard had been in a committed relationship for eighteen years and the state even conceded that they were financially interdependent.²²⁹ Glossip, as a member of Engelhard’s household and a man mourning the loss of his loved one, deserved to receive survivor benefits.

Second, the court stated that the spousal requirement served the interest of controlling costs because the General Assembly *could have* provided survivor benefits to more people, but chose instead to provide it to spouses and children.²³⁰ This is rational, stated the court, because providing disbursements to a smaller group of people meant that each individual got a larger

220. *See supra* notes 176-187 and accompanying text.

221. *Glossip*, 411 S.W.3d at 806-08.

222. *Id.* at 813-14 (Teitelman, J., dissenting).

223. *Id.* at 806 (majority opinion).

224. *Id.* at 814 (Teitelman, J., dissenting).

225. Amicus Curiae Brief of Law Enforcement Gays and Lesbians (Legal) International and Its Affiliated Chapters, *Glossip v. Mo. Dept. of Transp. & Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013) (No. SC92583), 2012 WL 6825481, at *9.

226. *Id.* at *11.

227. *Id.* at *12.

228. *Id.*

229. *Glossip*, 411 S.W.3d at 813 (Teitelman, J., dissenting).

230. *Id.* at 807 (majority opinion).

slice of the survivor benefits pie.²³¹ This “objective” criterion easily fails heightened or “intermediate” scrutiny because it is both arbitrary and contrary to legislative intent.²³² As stated, Glossip and Engelhard possessed all of the requisite characteristics of a married couple, absent the official piece of paper from the state.²³³ Glossip and Engelhard were dependent on each other; Glossip gave up his job as a customer service representative at Great Southern Bank when Engelhard became a police officer.²³⁴ Glossip moved with Engelhard from Springfield, Missouri, to Washington, Missouri, and then to Robertsville, Missouri.²³⁵ The couple owned a home together, and they joined a church and attended services with Glossip’s son.²³⁶ Engelhard co-parented with Glossip in raising Glossip’s son and shared child support obligations.²³⁷ When Engelhard was rushed to the hospital on Christmas Day, Glossip was the only family member who went to see him, holding his hand for hours although he had already passed away.²³⁸ The court held that none of these actions mattered because Glossip and Engelhard could not receive a marriage certificate proclaiming their marriage to the state.²³⁹ This notion confounds all rationality and distorts the legislation’s interest in providing dependent loved ones financial remuneration for their loss.

Lastly, the court stated that limiting the survivor benefits to surviving spouses served the interest of “administrative efficiency” because, otherwise, claims against the decedent’s benefits would increase, creating enhanced expenses associated with resolving those claims.²⁴⁰ Beyond irrational, this “objective criterion” is cruel.²⁴¹ Loved ones who have suffered immense loss and unspeakable tragedy are left to fend for themselves and pick up the pieces of their shattered lives without state benefits to which they are entitled, all because it is easier to process claims with a marriage certificate.²⁴² Since Engelhard’s death, Glossip has had to pay his mortgage, car loans, and other

231. *Id.*

232. *Id.* at 813-14 (Teitelman, J., dissenting).

233. *See id.* at 813.

234. Amicus Curiae Brief of Law Enforcement Gays and Lesbians (Legal) International and Its Affiliated Chapters, *supra* note 225, at *16.

235. *Id.*

236. *Id.* at *17.

237. *Id.*

238. *Id.*

239. *Glossip v. Mo. Dep’t of Transp. & Highway Patrol Emps.’ Ret. Sys.*, 411 S.W.3d 796, 807 (Mo. 2013) (en banc).

240. *Id.*

241. *Id.* at 813-14 (Teitelman, J., dissenting) (“[T]he state is not free to choose whatever ‘objective’ criteria it wants. Objectivity is not synonymous with constitutional validity. National origin and sex are objective criteria, yet no one would contend seriously that the objectivity of either classification conclusively would establish the constitutional validity of statutes based on those classifications.”).

242. Amicus Curiae Brief of Law Enforcement Gays and Lesbians (Legal) International and Its Affiliated Chapters, *supra* note 225, at *24-25.

expenses on his own.²⁴³ He lost his significant other, his friend, and a co-parent to his son, as well as a source of income.²⁴⁴ And the state of Missouri turned a blind eye because “discrimination is cheaper than equal protection.”²⁴⁵

VI. CONCLUSION

Glossip evaded the monumental issue of whether sexual orientation should be accorded heightened scrutiny and instead erroneously subjugated gay and lesbian citizens’ rights. Missouri’s judicial system must concede that gay and lesbian individuals have a right to be in Missouri, to prosper here, and to receive fundamental federal and state constitutional rights. As Judge Teitelman alluded to in his dissent, perhaps one day society will look back with a collective sigh, happy to see *Glossip* overruled and sexual orientation afforded meaningful protection inherent under the equal protection clauses.²⁴⁶ Unfortunately, they will have to ask, “Why did it take so long?”²⁴⁷

243. *Id.* at *17.

244. *Id.* at *16-17.

245. *Glossip*, 411 S.W.3d at 814 (Teitelman, J., dissenting).

246. *See id.*

247. *Id.* at 810.