

No. 14-50196

**In The United States Court of Appeals
For The Fifth Circuit**

CLEOPATRA DE LEON; NICOLE DIMETMAN;
VICTOR HOLMES; MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF
TEXAS; GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY
GENERAL; DAVID LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF
THE DEPARTMENT OF STATE HEALTH SERVICES,

Defendants-Appellants.

**On Appeal from the United States District Court
For The Western District of Texas
Case No. 5:13-cv-982**

**BRIEF OF *AMICUS CURIAE* LAW ENFORCEMENT OFFICERS, FIRST
RESPONDERS, AND ORGANIZATIONS IN SUPPORT OF APPELLEES AND
SUPPORTING AFFIRMANCE**

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

September 15, 2014

Counsel for Amici Curiae

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

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

No. 14-50196

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON; NICOLE DIMETMAN;
VICTOR HOLMES; MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS;
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL; DAVID
LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF
STATE HEALTH SERVICES,

Defendants-Appellants.

Certificate of Interested Persons

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

APPELLANTS:

Rick Perry, in his official capacity as Governor of the State of Texas.
Greg Abbott, in his official capacity as Texas Attorney General.
David Lakey, in his official capacity as Commissioner of the Texas Department of State Health Services.

APPELLANT'S ATTORNEYS:

Jonathan F. Mitchell, Solicitor
General
OFFICE OF THE SOLICITOR GENERAL
FOR THE STATE OF TEXAS
7th Floor MC-059
209 W. 14th Street
Austin, TX 78701-0000

Beth Ellen Klusmann Esq.
Michael P. Murphy
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

APPELLEES:

Cleopatra DeLeon
Nicole Dimetman
Victor Holmes
Mark Phariss

APPELLEES ATTORNEYS:

Barry Alan Chasnoff
Daniel McNeel Lane, Jr.
Matthew Edwin Pepping
AKIN GUMP STRAUSS HAUER & FELD,
L.L.P.
Suite 1600
300 Convent Street
NationsBank Plaza
San Antonio, TX 78205

Andrew Forest Newman
Michael P. Cooley
AKIN GUMP STRAUSS HAUER & FELD,
L.L.P.
Suite 4100
1700 Pacific Avenue
Dallas, TX 75204

Jessica M. Weisel
AKIN GUMP STRAUSS HAUER & FELD,
L.L.P.
Suite 2400
2029 Century Park, E.
Los Angeles, CA 90067-0000

AMICI CURIAE INTERESTED IN THE OUTCOME OF THIS APPEAL:

AMICUS CURIAE

Law Enforcement Officers,
First Responders, and Organizations

North Carolina Values Coalition
David Christopher Boyle
Liberty, Life, And Law Foundation
Katy Faust
Liberty Counsel

B. N. Klein
Paul Mchugh

Robert Oscar Lopez
Social Science Professors
Dawn Stefanowicz
State Of Indiana
State Of Alaska
State Of Arizona
State Of Colorado
State Of Montana
State Of Oklahoma
State Of South Carolina
State Of South Dakota
State Of Utah
Professor Alan J. Hawkins
Professor Jason S. Carroll
United States Conference Of Catholic
Bishops
National Association Of Evangelicals
Church Of Jesus Christ Of Latter-day
Saints
Ethics & Religious Liberty Commission
Of The Southern Baptist Convention
Lutheran Church Missouri Synod

COUNSEL

G. David Carter
Joseph P. Bowser
Hunter T. Carter
ARENT FOX LLP
Deborah Jane Dewart, Attorney
Self
Deborah Jane Dewart, Attorney
Self
Mathew D. Staver, Esq.
Mary Elizabeth Mcalister
Anita Leigh Staver, Esq.
LIBERTY COUNSEL
Self
Kevin Trent Snider, Chief Counsel
PACIFIC JUSTICE INSTITUTE
Self
Jon Roy Ker, Esq.
Self
Thomas Molnar Fisher, Solicitor
General
OFFICE OF THE ATTORNEY GENERAL
FOR THE STATE OF INDIANA

Robert Smead Hogan, Esq.
HOGAN LAW FIRM, P.C.
Richard Arthur Bordelon
Ralph Joseph Aucoin, Sr.
DENECHAUD & DENECHAUD, L.L.P.

Texas Eagle Forum	Lawrence John Joseph
Eagle Forum Education And Legal Defense Fund	
Texas Values	David Robert Nimocks, Esq.
Louisiana Family Forum	ALLIANCE DEFENDING FREEDOM
	Robert Paul Wilson
	LAW OFFICES OF ROBERT P. WILSON
Concerned Women For America	Steven W. Fitschen, Esq.
	NATIONAL LEGAL FOUNDATION
23 Scholars Of Federalism And Judicial Restraint	Dean John Sauer
Becket Fund For Religious Liberty	CLARK & SAUER, L.L.C.
	Eric C. Rassbach
	BECKET FUND FOR RELIGIOUS LIBERTY
State Of Louisiana	Stuart Kyle Duncan
Helen M. Alvare	Steven James Griffin, Esq.
	DANIEL, COKER, HORTON & BELL, P.A.
Marriage Law Foundation	William C. Duncan
	MARRIAGE LAW FOUNDATION
Robert P. George	Michael Francis Smith
Sherif Girgis	SMITH APPELLATE LAW FIRM
Ryan T. Anderson	
Texas Conservative Coalition	Russell Henry Withers
	TEXAS CONSERVATIVE COALITION
Center For The Preservation Of American Ideals	Cecilia M. Wood
David Robinson	Self
David Robert Upham, Esq.	Self
United States Pastor Council	Leif A. Olson
Coalition Of African American Pastors	OLSON FIRM, P.L.L.C.

/s/ G. David Carter

Attorney of record for Law Enforcement Officers,
First Responders, and Organizations

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE.....	1
STATEMENTS PURSUANT TO FRAP 29.....	10
SUMMARY OF THE ARGUMENT.....	11
ARGUMENT.....	13
I. Amici’s Experiences Show Why Classifications Based on Sexual Orientation Should be Subject to Heightened Scrutiny	13
A. Gays and Lesbians Have Been Subject to a History of Discrimination and Violence.....	15
B. Sexual Orientation Is Irrelevant to One’s Ability to Perform in or Contribute to Society	22
C. The Other Relevant Criteria Also Support the Application of Heightened Scrutiny	24
II. The Refusal to Recognize Same-Sex Couple’s Marriages Denies First Responders the Respect and Dignity They Deserve And Puts Them In Harm’s Way	25
III. The Refusal to Honor the Marriages of Same-Sex Couples Uniquely Harms First Responders	29
A. The Lack of Marriage Equality Impacts Benefits Provided by Federal Law to Families of Public Safety Officers Killed in the Line of Duty	30
B. The Families of Gay and Lesbian Officers Are Denied Significant Benefits Under State Law.....	31
CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Baker v. Nelson</i> , 409 U.S. 810 (1972).....	14
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005)	20
<i>Bourke v. Beshear</i> , 2014 WL 556729 (W.D. Ky. Feb. 12, 2014).....	26
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987).....	14, 15
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	13, 14
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	13, 14, 25
<i>DeBoer v. Snyder</i> , 2014 WL 1100794 (E.D Mich. Mar. 21, 2014).....	26
<i>Glossip v. Missouri Dept. of Trans.</i> , 411 S.W.3d 796 (Mo. 2013)	33
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971).....	24
<i>Henry v. Himes</i> , 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014).....	26
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000)	24
<i>Johnson v. Johnson</i> , 385 F.3d 503, 532 (5th Cir. 2004)	15
<i>Latta v. Otter</i> , 2014 WL 1909999 (D. Idaho May 13, 2014).....	26

Lawrence v. Texas,
539 U.S. 558 (2003)..... 14, 15, 22

Mathews v. Lucas,
427 U.S. 495 (1976)..... 24

Romer v. Evans,
571 U.S. 620 (1996)..... 14

Salvi v. Suffolk Cnty. Sheriff’s Dep’t,
67 Mass App 596 (Mass. App. Ct. 2006)..... 21

Sorrenti v. City of New York,
17 Misc.3d 1102(A) (N.Y. Sup. Ct. 2007) 20

Tanco v. Haslam,
2014 WL 997525 (M.D. Tenn. Mar. 14, 2014)..... 26

Turner v. Safley,
482 U.S. 78 (1987)..... 29

United States v. Windsor,
133 S.Ct. 2675 (2013)..... 15, 26, 28, 29, 30

Weeks v. Suffolk Cnty. Police Dept.,
No. CV-03-4294, Memorandum and Order, ECF No. 47 (E.D.N.Y. Apr.
28, 2005) 21

STATUTES

42 U.S.C. § 3716..... 18

42 U.S.C. § 3796..... 30

18 U.S.C. § 249..... 18

18 U.S.C. § 1389..... 18

18 U.S.C.A. § 249 18, 19

28 C.F.R. § 32.3 30

Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. 111-321 23

Texas Code Ann. § 615.021(a) 32

Texas Code Ann. § 615.022 32

Texas Code Ann. § 615.023..... 32

Texas Code § 54.351 32

ADMINISTRATIVE MATERIALS

Exec. Order No. 10450, 3 C.F.R. 936 (1949-1953) 19

OTHER AUTHORITIES

Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly* 63 (2002).....passim

Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (Sept. 21, 2005) 16

Associated Press, *Cop’s Companion to Sue for Survivor’s Benefits*, Miami Herald, Feb. 28, 2002, at 5B..... 33

Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, Williams Institute (2009)..... 19

Bureau of Justice Assistance, Public Safety Officers’ Benefits Program,
available at <https://www.psob.gov/>30

Bureau of Justice Assistance, *Public Safety Officers’ Benefits Program*, 79
 Fed. Reg. 35490-01 (June 23, 2014) 31

Christy Mallory, Amira Hasenbush & Brad Sears, *Discrimination Against
 Law Enforcement Officers on the Basis of Sexual Orientation and Gender
 Identity 2000-2013*, Williams Institute (2013) 16, 20, 25

Deirdre Hiatt & George E. Hargrave , *Psychological Assessment of Gay and
 Lesbian Law Enforcement Applicants*, 63(1) *J. of Personality
 Assessment*, 80 (1994)..... 23

Ethan H. Mereish, Conall O’Cleirigh & Judith B. Bradford ,
*Interrelationships Between LGBT-Based Victimization, Suicide, And
 Substance Use Problems in a Diverse Sample of Sexual and Gender
 Minorities*, 19(1) *Psychology, Health & Med.* 1 (2014) 17

FBI, *Latest Hate Crime Statistics* (2012) 18

Katie M. Edwards & Kateryna M. Sylaska , *The Perpetration of Intimate
 Partner Violence Among LGBTQ College Youth: The Role of Minority
 Stress*, 42 *J. Youth Adolescence* 1721 (2013)..... 17

Kristina B. Wolff & Carrie L. Cokely, “*To Protect and to Serve?*”: *An
 Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual
 and Transgender Community*, 11(1) *Sexuality and Culture* 1 (2007)..... 17, 28

Matt Apuzzo, *Uncovered Papers Show Past Government Efforts to Drive
 Gays From Jobs*, *N.Y. Times*, May 20, 2014, at A13..... 19

National Law Enforcement Officers Memorial Fund, *Law Enforcement
 Facts & Officer Deaths by State*, *available at*
<http://www.nleomf.org/facts/enforcement/> 29

Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner , *Texas
 Police Chiefs’ Attitudes Toward Gay and Lesbian Police Officers*, 11(1)
Police Quarterly 102 (2008) 22, 27

Roddrick Colvin , *Shared Perceptions Among Lesbian and Gay Police
 Officers: Barriers and Opportunities in Law Enforcement Work
 Environment*, 12(1) *Police Quarterly* 86 (2008)..... 21

Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 Colum. Hum. Rts. L. Rev. 159 (1980) 16

William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703 (1997)..... 16

INTEREST OF *AMICI CURIAE*

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

Amici include the following individuals:¹

Within the Fifth Circuit

- Sheriff Adrian Garcia, Harris County, Texas.
- Sheriff Lupe Valdez, Dallas County, Texas.
- Aaron Johnson, Supervisor EMT.
- Adrian Young, Firefighter/ Driver Operator.
- Albert Mock, Paramedic Shift Commander BSA EMS.
- Amadeo Ortiz, Bexar County Sheriff (Retired).
- Amber Hardcastle, CDA Investigator.
- Angela Shelton, Paramedic, Reagan County EMS.
- Bekah Cockrum , EMT-B.
- Brad Daugirda, EMT-P/ Firefighter Captain, City of Keller, Texas.
- CA Gorrie, Detective.
- Cat McDonald, Officer, San Marcos Police Department.
- Chris Gerstner, Sergeant, Georgetown Police Department.
- Christin Pritchett, Domestic Crimes Detective.

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

- Claudia J. Porter Withrow, DART Police Officer .
- Dave Waugh, Patrol Sergeant, San Marcos Police Department.
- David Medford, EMT/SSG (Retired) US Army.
- Deanne Flecker, Dispatcher II, Lewisville Police Department.
- Devon Daugirda, EMT, MedStar EMS.
- Elizabeth J. Mullen, Deputy Director (Retired), Investigations Division, Texas Department of Criminal Justice, Office of the Inspector General.
- Erin Covington, Paramedic/ Driver Engineer.
- Heather Lawson, Firefighter/ EMT-Paramedic.
- Jackye McAnn, Flight Paramedic, AEL.
- Jamie McMennamy, EMT, GEMS911 & Lifestar.
- Jared Neeley, Firefighter and Volunteer Fire Captain.
- Jeanette Pruett , EMT-B.
- Jennifer LaChance, Firefighter Captain (Retired), DFW Airport DPS.
- Jeremy Blackman, Lieutenant Investigator, Deputy Sheriff .
- Joanna Weaver, Police Officer.
- Juan Amaya, Senior Corporal, Property Crimes Detective.
- Julie Martin, Senior Sergeant, Dallas County Sheriff's Department.
- Julie Stevens, EMT Medic.
- Karen Donahue, Police Officer & Recruit Academy Coordinator, Arlington Police Department.
- Karon K. Guenther, Commander of Criminal Investigations (Retired), San Marcos, Texas, Police Department.
- Katharine Elizabeth Bitz, EMT-B.
- Kathryn McGrath, School Resource Officer, Lockhart Police Department.
- Kellie Pullin, Officer, Federal Reserve Law Enforcement.

- Kellie Whitehead, Fort Worth Police Officer.
- Kelly Franks, Certified Peace Officer II, Travis County Sheriff's Office.
- Kelly Lincoln, Police Officer, Arlington Police Department.
- Kimberly E. Coates, Driver-Engineer, Firefighter/ Paramedic.
- Kimberly L. Harris, Lieutenant, Arlington Police Department - South Bureau Midnight Commander and SWAT Hostage Negotiation Assistant Team Leader.
- Kristi Weil, Police Officer.
- Lisa Sorrels, Detective, Fort Worth Police Department.
- Matthew Thomas, Patrol Officer.
- Michael Baggott, Detective, Fort Worth Police Department.
- Micheal Vance, Lead Paramedic.
- Nancy Blankenship, Sergeant (Retired), Fort Worth Police Department.
- Penelope Flores, DART Police Officer.
- Ray Haag, Paramedic.
- Rebecca Trammell, MA, NCC, LPC-S.
- Rena Baillie, Firefighter/ EMT.
- Russell Kauitzsch, Victim Witness Counselor, Austin Police Department.
- Samantha Helmick, Communications Specialist, Hewitt Police Department.
- Sarah Jamerson, Remote EMT-Paramedic, NRP, Texas.
- Shannon Rucker, Primary Paramedic, Field Training Officer.
- Steven McCormick, Senior Police Officer, Austin Police Department.
- Sylvia Gallegos, Firefighter/ EMT-Paramedic.
- Tammy Bishop, U.S. Customs and Border Protection Supervisor, Department of Homeland Security.

- Theresa J. Peery, Field Medic I, Austin Travis County EMS.
- Tracey Knight, Corporal, Fort Worth Police Department.
- Tracy Gerrish, Sergeant, Child Abuse Unit, Austin Police Department.
- Victor Bulos, Deputy Sheriff / U.S. Marshals Fugitive Task Force, El Paso County Sheriff's Office.
- William H. Toucheck, Paramedic PII.

Outside the Fifth Circuit

- Jim Petro, Attorney General of Ohio from 2003 to 2007.
- Chief Kim Jacobs, Chief, Columbus, Ohio Division of Police.
- Chief Richard Biehl, Chief, Dayton, Ohio Police.
- Chief Jeff Hadley, Chief, Kalamazoo, Michigan Department of Public Safety.
- Shawn Matthews, Supervisory Special Agent and co-chair of FBI Pride.
- Javier Pagan, LGBT Liaison Officer, Boston Police.
- Michelle Bryant, LGBT Liaison Officer, Lansing, Michigan Police.
- Brenda Berkman, Captain (Ret.), New York City Fire.
- Jona Olsson, Fire & EMS Chief, Latir Volunteer Fire Department, New Mexico.
- Cheryl Horvath, Division Chief, Northwest Fire Department, Tucson, Arizona.
- Donna Newry, Chief (Ret.), Metro Dade County, Florida Fire.
- Michelle Crowley, Captain, Biloxi, Mississippi Fire.
- Jordan Rolley, Lieutenant, Henderson County, Kentucky Detention Center.

- Mary Katherine Spiker, EMT-B, University of Louisville Hospital, Kentucky.
- Cole Bouck, Co-Founder and Past President of Michigan Gay Officers Action League.
- Kat Cooper, Collegedale, Tennessee Police.
- Brandon Allen, Collegedale, Tennessee Police.
- Matthew Fuson, Paramedic, Nashville Fire.
- John Johnson III, Critical Care Paramedic, Nashville Fire.
- Jade Medders, Firefighter, EMT-IV, Nashville Fire.
- Donna DeWeese, Officer (Ret.), California Highway Patrol.
- Susan Schlesinger, Volunteer Firefighter, Califon, New Jersey.
- Christina Bahr, Firefighter (Ret.), Redwood City, California.
- Irene Burks, Patrol Commander, Prince George's County, Maryland.
- Greg Miraglia, former Deputy Police Chief, Dean of a police academy in California.
- Scott Gunn, Arundel County Maryland Police; Co-Founder, LGBT Fallen Heroes Fund.
- Alyson Ritter, Detective, Plainfield, Indiana Police.
- Amber Lockridge, EMT-B, Alliance EMS, Winamac, Indiana.
- Ann Watzka, Assistant Chief, Howard, Wisconsin Fire Department.
- Anthony Henson, Paramedic, Wayne Township, Indiana Fire Department.
- April Ashlock, Lieutenant, Marion County, Indiana Sheriff's Office.
- Barry Rolley, Private (Ret.), Evansville, Indiana Fire.
- Brian Bennett, Volunteer Firefighter, Walton, Indiana Volunteer Fire Department.

- Bryan K. DeShon, EMT-B, Americare Ambulance.
- Carri Webber, Assistant Chief, Plainfield, Indiana Police.
- Carrie East, Corporal, New Albany, Indiana Police.
- Cathy Hill, EMT Paramedic, Seals Ambulance Service, Indianapolis.
- Chaplain Gerry E. Griffith, Hamilton County, Indiana Sheriff's

Department.

- Christy Liner, EMT-B, Indianapolis.
- Courtney Rice, Captain, Wayne Township Fire Department.
- Crystal Conder, EMT-B, Indianapolis.
- Daneen Wilson, Paramedic Supervisor, Care Ambulance Service,

Indiana.

- Daniel Tinkel, Supervisor - Communications, South Bend, Indiana

Police.

- Dennis Dorsey, Corporal, Indianapolis Emergency Medical Services.
- Jason Miller, EMT, Community Howard Regional Hospital, Kokomo,

Indiana.

- Jennifer Loesch, Dispatcher, Gibson County, Indiana Sheriff's Office.
- Jennifer Hunt, Private, Evansville, Indiana Fire Department.
- Jenny Purdue, EMT-P, Rural/Metro Ambulance, Indiana.
- Jeremy Smith, EMT, Rural/Metro Ambulance Service, Indiana.
- John Steele, Advanced EMT (retired), Southwest Medical

Ambulance.

- John Plan, EMT/Director, Midwest Ambulance Service.
- Kimberly Garrett, Captain, Evansville, Indiana Fire Department.
- Kevin Corbin, Officer, Evansville, Indiana Police.
- Kyle Daniels, EMT-Advance, Union Hospital, Terre Haute, Indiana.

- Larry Alcorn, Chief (Ret.), Wayne Township Fire Department.
- Lisa Jones, Firefighter.
- Mandy Decker, Firefighter, Indiana.
- Mark Ridge, EMT-B, Seals Ambulance Service, Indianapolis.
- Michelle Merriman, Firefighter-EMT (Ret.), Indiana.
- Molly McAfee, Firefighter, EMT-B, Indiana.
- Randy Rolley, Patrolman (Ret.), Evansville, Indiana Police.
- Samantha SeDoris, Police Officer, Evansville, Indiana Police.
- Shannon Henry, Deputy Sheriff, Vanderburgh County, Indiana

Sheriff's Office.

- Shellie King, Detective, Evansville, Indiana Police.
- Stacy Warfield, Paramedic, Indianapolis.
- Stefanie Kesecker, Control Operator, Dispatch, Marion County,

Indiana Sheriff's Department.

- Sue Kartman, Firefighter/Paramedic (Ret.), Madison Fire Department.
- Tony McKinney, Chief of Mentone EMS, Fulton County.
- Tony Zimmer, Officer, Evansville, Indiana Police.
- Tracey Pompey, Control Operator, Dispatch, Marion County, Indiana

Sheriff's Department.

- Wesley Lock, Support services, Wayne Township Fire Department.

Individuals Serving with the Indianapolis Metropolitan Police Department:

Andrew Gillespie

Kimberly Kelsay

Bettye Dobkins

Kimberly Travitz

Brenda Bucci

Laura Spicer

Brian McCann

Malcolm Smith

Chad Osborn	Mark Carrico
Christine R. King	Michelle Lewis
Dale Tippit	Nicholas Hubbs
Dawn E. Higgins	Nikole Pilkington
Don Spiege	Pauli Irwin
Jamie Guilfooy	Rebecca Uberta
Jan Faber	Richard Riddle
Jeff Terry	Robert Chandler
John Corly	Steven Donahue
Judy Phillips	Tina Ridener
Julia Baade	Wayne Volda
Julie Dutrieux	William Dahlke
Karen Dague	

Individuals Serving with the Indianapolis Fire Department

Angela Patterson	Kimberly Lang
Candace Ashby	Kimberly Sims-Powell
Christina R. Sell	Lance Langsford
Djuna Foster	Myla Williams
J.M. Goddard	Paula Watson
Jackie Boone	Tracey Fulton

Jamie Foust

Valarie High

Jennifer Hunt

Vicki Morr

Katherine Rogers

Victoria Brown

The following organizations are *amici*:

- Lesbian Gay Police Officers Association of Austin, Texas.
- Columbus, Ohio Division of Police.
- City of Dayton, Ohio Police Department.
- City of Cambridge, Massachusetts Police Department.
- Kalamazoo, Michigan Department of Public Safety.
- Lesbian Gay Police Officers Association – Austin.
- Out To Protect, Inc. creates awareness of the gay, lesbian, bi-sexual, and transgender law enforcement professionals.
- LGBT Fallen Heroes Fund honors LGBT Police, Firefighters, Military, and EMS that have given their lives in service to their communities.
- Gay Peace Officers Association of Southern California is an organization of LGBT peace officers and civilian law enforcement professionals.
- Gay Officers Action League New York addresses the needs of gay and lesbian law enforcement personnel in New York.

STATEMENTS PURSUANT TO FRAP 29

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this brief.

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

SUMMARY OF THE ARGUMENT

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

All four of the factors relevant to deciding whether to apply heightened scrutiny compel its application here. *First*, sexual minorities have suffered a long history of discrimination. It was not until 2003 that the Supreme Court declared unconstitutional state laws that *criminalized* private sexual conduct between persons of the same sex. These state laws on appeal here highlight recent efforts to deprive gays and lesbians of one of the most basic pillars of civil society – the right to marry. Predictably, state-sanctioned discrimination has led to individual acts of violence – the FBI's hate crime statistics show that sexual orientation motivates a significant amount of this country's hate crimes. That gays and lesbians have been

the subject of long-standing, and often state-sanctioned, discrimination is not open to serious debate.

Second, sexual orientation bears no relation to one's ability to perform in or contribute to society. *Amici* serve their communities every day just like their colleagues who happen to go home to an opposite-sex spouse. The available data shows that sexual orientation has no bearing on first responders' on-the-job performance.

Third, discrimination against gays and lesbians is based on their immutable and distinguishing characteristic – their sexual orientation – that defines them as a group. *Fourth* and finally, sexual minorities are a group with limited ability to protect itself from majority action in the political process. The Texas laws on appeal highlight the overwhelming political forces that gays and lesbians are powerless to overcome. Our constitutional design relies on the judiciary to serve as the bulwark against these unconstitutional intrusions on the equal dignity of all citizens.

The practical consequences of Texas's discriminatory laws, and others like them, are very real to *amici*. *Amici's* heterosexual colleagues go to work knowing that, should tragedy befall them in the line of duty, Texas and the communities they served will come to their family's aid – with financial resources, healthcare, and higher education. But even though *amici* walk shoulder to shoulder with their

heterosexual colleagues, beneath them in Texas is no safety net, only darkness born of fear and discrimination. Equal Protection demands *equal protection* for all those who serve.

ARGUMENT

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

Legislation is generally presumed valid as long as the “classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). But when legislation classifies on the basis of a factor that “generally provides no sensible ground for different treatment,” the Fourteenth Amendment’s guarantee of equal protection requires the government to meet a higher burden to justify the classification. *Id.* at 440-41.

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

scrutiny are quasi-suspect classifications that can be sustained only if they are “substantially related to an important governmental objective.” *Id.*

The U.S. Supreme Court has not resolved the question of what level of scrutiny applies to classifications based on sexual orientation. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court summarily dismissed an appeal from a Minnesota Supreme Court decision denying same-sex couples the right to marry, but expressed no view on the appropriate level of scrutiny. Since that summary dismissal over four decades ago, the Court struck down a Colorado law that repealed existing legal protections for gays and lesbians, and concluded that the ballot measure failed “*even*” rational-basis review. *Romer v. Evans*, 571 U.S. 620, 632 (1996). Similarly, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas statute that criminalized homosexual sodomy, but did not announce its level of review. *Id.* at 578.

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

or distinguishing characteristics that define them as a discrete group;” *Bowen*, 483 U.S. at 602; and (d) whether the class is “a minority or politically powerless.” *Id.*

This Court has not previously “recognized sexual orientation as a suspect classification.” *See Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (observing that neither this Circuit nor the Supreme Court had found sexual orientation to be a suspect class, but not analyzing whether such a finding would be warranted). In light of the the Supreme Court’s analysis in *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court should examine the relevant factors, which *amici* submit clearly support a conclusion that heightened scrutiny is applicable when evaluating equal protection claims relating to classifications based on sexual orientation.

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

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

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

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

While groups like *amici*'s and community-policing efforts in many jurisdictions have improved the relationship between law enforcement and the GLBT community in certain parts of the country,² research suggests that abuses remain. Amnesty International, *Stonewalled: Police Abuse and Misconduct*

² Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Discrimination: 2000 to 2013*, § IV.D, William Inst. (Nov. 2013) (*available at*: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Law-Enforcement-Discrim-Report-Nov-2013.pdf>)(“Williams Institute (2013)”).

Against Lesbian, Gay, Bisexual and Transgender People in the U.S. (Sept. 21, 2005).³

Studies also show a direct connection between stigma and crime. Nationally, sexual minorities are less likely to report incidences of violence, particularly if they involve sexual-orientation bias, likely due to the stigma involved and the history of inadequate response by authorities. Kristina B. Wolff & Carrie L. Cokely, *“To Protect and to Serve?”: An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual and Transgender Community*, 11 (1) *Sexuality and Culture*, 1,3, 19 (2007). The phenomenon of “minority stress,” often experienced by gays and lesbians, is also correlated to crimes. Katie M. Edwards & Kateryna M. Sylaska, *The Perpetration of Intimate Partner Violence Among LGBTQ College Youth: The Role of Minority Stress*, 42 *J. Youth Adolescence*, 1721, 1728-29 (2013) (observing that “internalized homonegativity may be the most salient minority stress correlate of the perpetration of same-sex partner violence” and “the results of this study underscore the utility of understanding partner violence among LGBTQ youth through a minority stress framework”); Ethan H. Mereish, Conall O’Cleirigh & Judith B. Bradford, *Interrelationships Between LGBT-Based Victimization, Suicide, And Substance*

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

Use Problems in a Diverse Sample of Sexual and Gender Minorities, 19(1)
Psychology, Health & Med., 1-13 (2014).

Hate Crimes. The FBI's hate crime statistics show that gay and lesbian people experience the second highest volume of bias-motivated crimes, following only racial minorities. *See* FBI, *Latest Hate Crime Statistics* (2012).⁴ 19.6% of all hate crimes reported in 2012, the most recently available data, resulted from sexual-orientation bias.

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

- (1) The incidence of violence motivated by the actual or perceived . . . sexual orientation [or] gender identity poses a serious national problem.
- (2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

...

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

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

...

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

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

Employment Discrimination. In public and private employment, discrimination against gays and lesbians is prevalent.⁵ There is no federal nondiscrimination law protecting gays and lesbians, leaving a patchwork of state

⁵ See, e.g., Matt Apuzzo, *Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs*, N.Y. Times; May 20, 2014 at A13 (reporting on newly discovered documents showing that the Civil Service Commission had a “tendency to ‘lean over backwards’ to rule against a homosexual”) (*available at*: http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html?_r=0); Exec. Order 10450 (authorizing investigations into sexual activities of government employees); Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, William Inst. (Sept. 2009) (*available at*: <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/>).

and local laws. Texas has not adopted a statewide prohibition against employment discrimination based on sexual orientation. *See* Williams Institute (2013) § IV.D.

Issues of employment discrimination based on sexual orientation are particularly troublesome for men and women in law enforcement. Gay officers who chose to come out or who were known to be gay frequently reported harassment, and cases of threatened physical abuse and failure to provide back up to gay cops in serious situations have been corroborated. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly*, 63, 64 (2002).

According to a study conducted by the Williams Institute at UCLA School of Law, discrimination and harassment against law enforcement and corrections officers who do not conform to sexual stereotypes continues to be pervasive throughout the United States. Williams Institute (2013), § 1. This discrimination includes firing or demotions, verbal, physical, and sexual harassment. *Id.*; *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 733-35 (6th Cir. 2005) (affirming a jury award of more than \$500,000 to a Cincinnati police officer harassed and fired after making plans to transition from male to female); *Sorrenti v. City of New York*, 17 Misc.3d 1102(A) (N.Y. Sup. Ct. 2007) (affirming a jury verdict awarding \$1.4 million to an officer that was discriminated against based on his perceived sexual

orientation and to two other officers that were retaliated against for defending him); *Salvi v. Suffolk Cnty. Sheriff's Dep't*, 67 Mass App 596 (Mass. App. Ct. 2006) (affirming a jury verdict of over \$600,000 for pervasive discrimination based on his sexual orientation and a hostile work environment); *Weeks v. Suffolk Cnty. Police Dept.*, No. CV-03-4294, Memorandum and Order, ECF No. 47 (E.D.N.Y. Apr. 28, 2005) (affirming a jury award of \$230,000 against a department that ordered an officer to relinquish his weapon based upon an unfounded complaint that he was gay and then subjected him to prolonged harassment and wrongful termination).

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

A survey of police officers revealed that lesbian and gay officers face barriers to equal employment opportunities similar to those faced by women and other minorities in law enforcement. Roddrick Colvin, *Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in Law*

Enforcement Work Environment, 12(1) Police Quarterly, 86 (2008). Surveys have also shown that discrimination in promotion was the most common barrier to equal employment opportunity in law enforcement (22%), followed by assignments (17%) and evaluations (16%). *Id.* at 95. And, as recently as 2008, nearly half of Texas police chiefs responding to a survey said that they would have difficulty working with a gay man, while 62% indicated that they believed homosexuality constituted “moral turpitude.” Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner , *Texas Police Chiefs’ Attitudes Toward Gay and Lesbian Police Officers*, 11(1) Police Quarterly, 102, 110 (2008).

These are but a few examples of the long history of discrimination against gays and lesbians as a group, and gay and lesbian law enforcement personnel in particular. Heightened scrutiny is appropriate.

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

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

Law enforcement and first responders’ careers are among the most demanding in our society. Nevertheless, studies have consistently concluded that

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

Amici, and the thousands of gay and lesbian first responders they represent, risk their lives, and stand shoulder-to-shoulder with their colleagues, in protecting

and serving our communities. Their sexual orientation is irrelevant to their ability to perform their jobs and contribute in significant ways to the well-being of our society.

C. The Other Relevant Criteria Also Support the Application of Heightened Scrutiny

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

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

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

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

For these reason, *amici* respectfully submit that this Court should continue to apply heightened scrutiny when evaluating classifications based on sexual orientation on equal protection grounds.

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

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

State recognition of the relationships of same-sex couples is significant for many, but especially for our first responders who risk their lives each day serving our communities. Not only do many have committed partners that must be cared for, but many also have children as well. As the Supreme Court has recognized, the refusal to permit same-sex partners from being married “humiliates tens of

thousands of children now being raised by same-sex couples,” which makes it “more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.” *Windsor*, 133 S.Ct. at 2694. The district courts below, and many others, have recognized this important impact that marriage has on children, concluding that it provided a reason in favor of, not against, the right of same-sex couples to wed. *See, e.g., Latta v. Otter*, 2014 WL 1909999, at * 24 (D. Idaho May 13, 2014); *Henry v. Himes*, 2014 WL 1418395, at *11-*15 (S.D. Ohio Apr. 14, 2014); *Bourke v. Beshear*, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); *DeBoer v. Snyder*, 2014 WL 1100794, at *12 -13 (E.D Mich. Mar. 21, 2014); *Tanco v. Haslam*, 2014 WL 997525, at *7 (M.D. Tenn. Mar. 14, 2014).

Texas’s refusal to treat *all* citizens with dignity and respect also makes it more difficult for gay and lesbian officers to live openly and honestly. Closeted personnel who fear being identified as gay or lesbian are unlikely to come forward to complain about problems, especially because they are uncertain how supervisors may respond. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly*, 63, 73 (2002). Before coming out for the first time, virtually all respondents had concerns that a number of close colleagues would reject them or refuse to work with them, or that they would be

fired. *Id.* at 77. Even in San Diego, a city which has been on the vanguard of recruiting a diverse cadre of officers, many gay male officers still choose to remain closeted, as do some lesbians, likely to the detriment of their own mental health and the long-term well-being of their units. *Id.* at 90. Thus, gay and lesbian law enforcement officers and first responders in states that do not recognize sexual orientation as a protected class are dependent upon the good will of their colleagues or upon their own ability to keep their sexual orientation secret. Phillip M. Lyons, Jr., Michael J. DeValve & Randall L. Garner, *Texas Police Chiefs' Attitudes Toward Gay and Lesbian Police Officers*, 11(1) *Police Quarterly*, 102, 105 (2008).

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

The state-sponsored discrimination may also place gay and lesbian law enforcement officers and other first responders in harm's way, as it reflects an official position that these individuals do not deserve the same degree of respect

and dignity as their heterosexual colleagues. *Cf. Windsor*, 133 S.Ct. at 2694 (laws against the recognition of marriage between same-sex couples “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . .”).

Research shows that police officers commonly make decisions that reflect the policies, practices and attitudes of their departments, suggesting that institutional responses are important to determining how heterosexual officers will engage with their gay and lesbian colleagues. Kristina B. Wolff & Carrie L. Cokely, “*To Protect and to Serve?*”: *An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual and Transgender Community*, 11(1) *Sexuality and Culture*, 1, 4 & 19 (2007). Conversely, in Departments that have fully integrated gay and lesbian officers and firmly enforce a policy of equality, officers have not reported concerns about whether their heterosexual colleagues would provide backup in dangerous situations. Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5(1) *Police Quarterly*, 63, 86 (2002). Thus, not only do discriminatory policies, like the States’ ban on marriage between same-sex couples, deny these individuals dignity, they also

contribute to an environment in which gay and lesbian law enforcement officers are more likely to be subjected to discrimination and harassment while on duty.

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

The work we ask our law enforcement officers to do to protect our communities is dangerous. Each year, there are tens of thousands of assaults committed against law enforcement officers. Nationwide, nearly 20,000 police officers have died in the line of duty since such deaths were recorded. National Law Enforcement Officers Memorial Fund, Law Enforcement Facts (*available at*: <http://www.nleomf.org/facts/enforcement/>). Of those deaths, 1,675 were Texas officers. National Law Enforcement Officers Memorial Fund, Officer Deaths by State (*available at*: <http://www.nleomf.org/facts/officer-fatalities-data/state.html>).

As the Supreme Court has repeatedly recognized, marriage confers a multitude of benefits. *See, e.g., Windsor*, 133 S.Ct. at 2694 (discussing the over 1,000 federal regulations impacted by marriage and noting that significant benefits and responsibilities are also imposed by state law); *Turner v. Safley*, 482 U.S. 78, 96 (1987). Appreciating the dangers of the job, the federal government and states have implemented various benefit programs to provide first responders and their families the peace of mind of knowing that they will be taken care of if something happens to them in the line of duty. But state law in Texas denies these protections to the survivors of gay and lesbian fallen heroes, because it refuses to

allow them to enter into or otherwise recognize the marriages of same-sex couples. The denial of benefits is particularly harmful and discriminatory to the families of gay and lesbian law enforcement officers, who, again, are asked every day to take the same risks and make the same sacrifices as their straight colleagues.

A. The Lack of Marriage Equality Impacts Benefits Provided by Federal Law to Families of Public Safety Officers Killed in the Line of Duty

The state's refusal to permit same-sex marriages imposes an unfair burden on gay and lesbian officers who seek to ensure that their partner will receive significant federal benefits if the officer is injured or killed in the line of duty. The Public Safety Officers' Benefits (PSOB) Program provides a one-time financial payment to the "spouses" of public safety officers that die in the line of duty. *See* 42 U.S.C. § 3796. Currently, the financial benefit is \$333,604.68. *See* <https://www.psob.gov/>. PSOB also provides educational benefits to the spouses and children of officers who die in the line of duty or are catastrophically disabled. 42 U.S.C. § 3796d-1.

Even though the Supreme Court struck down a portion of the Defense of Marriage Act in 2013 in *Windsor*, federal law could only extend benefits to the spouses of gay and lesbian law enforcement officers killed in the line of duty if the officer's state of residence recognized the marriage. *See* 28 C.F.R. § 32.3

(providing that in “deciding who may be the spouse of a public safety officer,” the “relevant jurisdiction of domicile is the officer’s (as of the injury date)”).

This significant legal hurdle just changed on July 23, 2014, when rule changes adopted by the Office of Justice Programs took affect altering the definition of “spouse” to read, in pertinent part, “someone with whom an individual entered into marriage lawfully under the law of the jurisdiction in which it was entered into.” *See* 79 Fed. Reg. 35490-01 (June 23, 2014). As a result, gay and lesbian officers will soon be eligible for federal PSOB benefits, provided they are married in another state that allows non-residents to wed. This is an important legal change for gay and lesbian officers. Unfortunately, however, it falls short of creating real equality for those serving in Texas.

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

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

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

these benefits is significantly and adversely impacted by the State's refusal to permit same-sex couples to be married in the state or to recognize lawful marriages performed elsewhere.

Texas provides death benefits to families when a police officer or fire fighter dies in the line of duty. Texas Code Ann. § 615.022(a). Specifically, a payment of \$250,000 is paid to a "surviving spouse." *Id.* § 615.021(a)(2)(A). If there is no surviving spouse, the funds are paid to surviving children. *Id.* § 615.022(b). Minor children of police or fire fighters who die in the line of duty also receive a monthly payment until they turn age eighteen. *Id.* § 615.023.

Texas Code § 54.351 provides that the children of police officers and fire fighters killed or permanently injured in the line of duty will be allowed to attend any state institution of higher education in Texas without paying tuition or fees otherwise applicable to their pursuit of an undergraduate degree.

Texas's refusal to allow gay and lesbian couples to wed in the state, and the State's refusal to recognize unions legally performed in other states, means that the committed partners of those officers are not entitled to any of these benefits if a first responder in Texas is killed in the line of duty. Moreover, because Texas law restricts the right of loving couples to marry, it also implicates their right to have joint custody over their children. As such, the children of gay and lesbian first

responders may also be wrongly denied protections that would be automatically provided to those children born to married heterosexual couples.

Texas's ban on the recognition of marriages by same-sex couples, and others like it, have real, damaging effects on gay and lesbian law enforcement officers. Corporal Dennis Engelhard, a nine-year veteran of the Missouri State Highway Patrol, was killed in the line of duty when a driver lost control of his vehicle and struck and killed him on Christmas Day in 2009. At the time of his death, Corporal Engelhard had been in a long-term relationship with his same-sex domestic partner, Kelly Glossip. Glossip applied for survivor benefits under Missouri law, which, like Texas, provides survivor benefits to the surviving spouse of a police officer killed in the line of duty. Glossip's claim for benefits was denied. The case was eventually submitted to the Supreme Court of Missouri, which concluded that, even though Missouri state law did not permit Engelhard and Glossip to marry, the lack of marriage prohibited Glossip from obtaining the benefits that would be available to a heterosexual spouse. *Glossip v. Missouri Dept. of Trans.*, 411 S.W.3d 796 (Mo. 2013).⁶

⁶ Glossip is not the only example of a same-sex partner of a slain gay or lesbian officer being denied benefits. See, e.g., Associated Press, *Cop's Companion to Sue for Survivor's Benefits*, Miami Herald, Feb. 28, 2002, at 5B (available at: WLNR 4641676).

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

CONCLUSION

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

But, most of all, our gay and lesbian public safety officers deserve the peace of mind of knowing that, after the bagpipe has wailed its last somber note and the flag has been folded, the loved ones they have left behind will be provided for.

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

Dated: September 15, 2014

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

Counsel for Amici Curiae

**CERTIFICATE OF COMPLIANCE
REQUIRED BY FED. R. APP. P. 32(a) AND FIFTH CIRCUIT RULE 32**

The undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the requirements of Fifth Circuit Rule 32. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

The undersigned understands that a material misrepresentation in completing this certificate may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Dated: September 15, 2014

/s/ G. David Carter
G. David Carter

CERTIFICATE OF SERVICE

It is hereby certified that on September 15, 2014, I electronically filed the foregoing Brief *Amicus Curiae* Of Law Enforcement Officers and Organizations with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, and service was accomplished through same.

Dated: September 15, 2014

/s/ G. David Carter
G. David Carter

Appendix A

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

Clm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOHN WEEKS,

Plaintiff,

-against-

SUFFOLK COUNTY POLICE
DEPARTMENT et al.,

Defendants.
-----X

MEMORANDUM AND ORDER

CV 03-4294

(Wexler, J.)

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

★ APR 29 2005 ★

LONG ISLAND OFFICE

APPEARANCES:

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

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

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

WEXLER, District Judge

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

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

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

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

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

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

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York
April 29, 2005