

Nos. 14-2386, 14-2387, 14-2388, 14-2526

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

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,

v.

GREG ZOELLER, et al.,
Defendants-Appellants.

**On Appeal From The United States District Court
For The Southern District of Indiana
Case Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB,
1:14-cv-00406-RLY-MJD (The Honorable Richard L. Young)**

VIRGINIA WOLF, et al.,
Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,
Defendants-Appellants.

**On Appeal From The United States District Court
For The Western District of Wisconsin
Case No. 3:14-cv-00064-BBC (The Honorable Barbara B. Crabb)**

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

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August 5, 2014

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“[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

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Seventh Circuit Rule 26.1 and Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* state that they are active duty or retired law enforcement officers, fire fighters, paramedics, public safety departments, or not-for-profit organizations and make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) Names of all law firms whose partners or associates have appeared for the party in the case:

Arent Fox LLP

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INTEREST OF *AMICI CURIAE*

Amici Curiae are active duty or retired law enforcement officers, fire fighters, paramedics, public safety departments, or not-for-profit organizations that 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 Seventh Circuit

- Alyson Ritter, Detective, Plainfield, Indiana Police.
- Amber Lockridge, EMT-B, Alliance EMS, Winamac, Indiana.
- Andrew Gillespie, Sergeant, Indianapolis Metropolitan Police.
- Angela Patterson, Private, Indianapolis Fire Department.
- 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.
- Bettye Dobkins, Lieutenant (retired), Indianapolis Metropolitan Police.
- Brenda Bucci, Lieutenant, Indianapolis Metropolitan Police.
- Brian McCann, Sergeant, Indianapolis Metropolitan Police.

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

- Brian Bennett, Volunteer Firefighter, Walton, Indiana Volunteer Fire Department.

- Candace Ashby, Captain, Indianapolis Fire Department.
- Carri Webber, Assistant Chief, Plainfield, Indiana Police.
- Carrie East, Corporal, New Albany, Indiana Police.
- Cathy Hill, EMT Paramedic, Seals Ambulance Service, Indianapolis.
- Chad Osborn, Sergeant, Indianapolis Metropolitan Police.
- Chaplain Gerry E Griffith, Hamilton County, Indiana Sheriff's

Department.

- Christina R. Sell, Firefighter, Indianapolis Fire Department.
- Christine R. King, Patrolman, Indianapolis Metropolitan Police.
- Christy Liner, EMT-B, Indianapolis.
- Courtney Rice, Captain, Wayne Township Fire Department.
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- Dawn E. Higgins, Sergeant, Indianapolis Metropolitan Police.
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- Djuna Foster, Lieutenant, Indianapolis Fire Department.
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Outside the Seventh Circuit

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- 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.
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- 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.

The following organizations are *amici*:

- 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 Indiana and Wisconsin deny these men and women the equal dignity and respect they deserve. Indiana and Wisconsin do not treat them equally in their day-to-day work, nor, tragically, in Indiana, 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 Indiana and Wisconsin 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 Indiana and Wisconsin'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, Indiana 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 Indiana 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.*

While this Court has held otherwise, *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953-54 (7th Cir. 2002), in light of the changed legal landscape since *Schroeder*, including the Supreme Court’s analysis in *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court should conclude that heightened scrutiny is applicable to evaluating equal protection claims relating to classifications based on sexual orientation. Despite Appellants’ arguments to the contrary, heightened scrutiny is the appropriate level of review and all four of the relevant factors support its application here.

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. While Wisconsin has, Indiana has not adopted a statewide prohibition against employment discrimination based on sexual orientation.

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 Indiana 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 Indiana and Wisconsin 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).

Indiana and Wisconsin’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, 648 were Indiana and Wisconsin 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 Indiana 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.⁶ The denial of benefits is particularly harmful and discriminatory to the families of gay and lesbian law enforcement officers, who, again, are asked every day to take the same risks and make the same sacrifices as their straight colleagues.

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

The states' refusal to permit same-sex marriages imposes an unfair burden on gay and lesbian officers who seek to ensure that their partner will receive

⁶ Wisconsin ameliorates this aspect of its same-sex marriage ban by allowing applicable survivor benefits to be paid to domestic partners. *See, e.g.*, Wis. Stat. Ann. § 102.475 (providing for a special benefit to dependents of fallen officers, fire fighters and other first responders); Wis. Stat. Ann. § 102.51(1)(a)(2m) (defining “dependents” to include a “domestic partner under ch. 770...”). That said, Wisconsin law is clear that a domestic partnership is materially different from full-fledged marriage. *See Appling v. Doyle*, 826 N.W.2d 666, 666 (Wis. Ct. App. 2012), *aff'd*, *Appling v. Walker*, No. 2011AP1572, 2014 WL 3744232, at *1 (Wis. 2014) (holding that the “legal status” of a domestic partnership is not “substantially similar” to the legal status of a marriage).

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 Indiana and Wisconsin.

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 Indiana, 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.

Indiana provides death benefits to families when a police officer or fire fighter dies in the line of duty. Ind. Code § 36-8-8-20. Specifically, a payment of \$150,000 is paid to a "surviving spouse." *Id.* If there is no surviving spouse, the funds are paid to surviving children. *Id.* The "surviving spouse" also receives a significant monthly pension for the rest of his or her life when their officer or other

applicable first responder spouse “dies in the line of duty.” Ind. Code § 36-8-8-14.1.

Indiana Code §§ 21-14-6-2 and 21-14-6-3 also provide that spouses and children of police officers, fire fighters and other first responders killed in the line of duty will be allowed to attend any state educational institution or state supported technical school in Indiana without paying tuition or fees otherwise applicable to their pursuit of an undergraduate degree.

Indiana’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 Indiana is killed in the line of duty. Moreover, because Indiana and Wisconsin law restricts the right of loving couples to marry, it also implicates their right to have joint custody over their children.⁷ As such, the children of gay

⁷ Wisconsin law has been interpreted to bar adoption by same-sex couples. *See In re: Angel Lace M.*, 184 Wis.2d 492, 503-15 (Wis. 1994) (second-parent adoption by non-biological gay or lesbian parent not permitted where rights of one of the biological parents remained intact); *In re Guardianship of O.G.M-K.*, 327 Wis.2d 749, 753 (Wis. Ct. App. 2010) (lesbian couple could not jointly adopt children because they were unmarried and Wisconsin law prohibited them from being married). Same-sex couples in Indiana are eligible for second-parent adoption, but are not automatically afforded parental status if they are not the biological parent. *See In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1254 (Ind. Ct. App. 2004) (a same-sex domestic partner may adopt the biological children of her partner without divesting the parental rights of the biological parent).

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

Indiana and Wisconsin'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 Indiana and Wisconsin, 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).⁸

⁸ 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 Indiana and Wisconsin 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: August 5, 2014

/s/ G. David Carter

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

The undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,999 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) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in 14-point Times New Roman font.

Dated: August 5, 2014

/s/ G. David Carter
G. David Carter

CERTIFICATE OF SERVICE

It is hereby certified that on August 5, 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 Seventh Circuit using the CM/ECF system, and service was accomplished through same.

Dated: August 5, 2014

/s/ G. David Carter
G. David Carter

Appendix A

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

Clm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOHN WEEKS,

Plaintiff,

-against-

SUFFOLK COUNTY POLICE
DEPARTMENT et al.,

Defendants.
-----X

MEMORANDUM AND ORDER

CV 03-4294

(Wexler, J.)

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

★ APR 29 2005 ★

LONG ISLAND OFFICE

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WEXLER, District Judge

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

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

Upon consideration, the court denies the motion to set aside the jury verdict, except with regard to the imposition of punitive damages against Defendant Robillito. Those damages, in the amount of \$30,000, were assessed by the jury against Robillito in his personal capacity.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