

**Nos. 14-14061, 14-14066**

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

JAMES DOMER BRENNER, et al.

SLOAN GRIMSLEY, et al.

*Plaintiffs-Appellees,*

*Plaintiffs-Appellees,*

v.

v.

JOHN ARMSTRONG, et al.,

JOHN ARMSTRONG, et al.

*Defendants-Appellants.*

*Defendants-Appellants.*

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**On Appeal from the United States District Court  
for the Northern District of Florida  
Case Nos. 4:14-cv-107, 4:14-cv-138**

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

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December 23, 2014

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*Brenner, et al. v. Armstrong et al.*  
*Grimsley, et al. v. Armstrong, et al.*

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for amici curiae law enforcement officers, first responders and organizations in support of affirmance certify that the following a complete list of the persons and entities who have an interest in the outcome of this case:

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b) amici curiae law enforcement officers, first responders and organizations in support of affirmance state that amici are individuals and organizations that have no parent corporations or any publicly held corporation that owns ten percent or more of its stock.

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**ADMINISTRATIVE MATERIALS**

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**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*, *Police Quarterly*, 63, 64 (2002).....passim

Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (Sept. 21, 2005) ..... 19

Associated Press, *Cop's Companion to Sue for Survivor's Benefits*, *Miami Herald*, Feb. 28, 2002, at 5B .....35

Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, Williams Institute (2009).....22

Bureau of Justice Assistance, *Public Safety Officers' Benefits Program*, available at <https://www.psob.gov/>.....32

Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Discrimination: 2000 to 2013*, Williams Institute (2013).....19, 22, 27

Deirdre Hiatt & George E. Hargrave , *Psychological Assessment of Gay and Lesbian Law Enforcement Applicants*, 63(1) *J. of Personality Assessment*, 80 (1994).....25

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) .....20

FBI, *Latest Hate Crime Statistics* (2012).....20

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) .....19

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).....19, 30

Matt Apuzzo, *Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs*, *N.Y. Times* .....21

National Law Enforcement Officers Memorial Fund, *Law Enforcement Facts & Officer Deaths by State*, *available at* <http://www.nleomf.org/facts/enforcement/> .....31

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) .....24, 29

Roddrick Colvin , *Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in Law Enforcement Work Environment*, 12(1) *Police Quarterly* 86 (2008).....24

Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 *Colum. Hum. Rts. L. Rev.* 159 (1980).....18

William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 *Fla. St. U. L. Rev.* 703 (1997).....18

## **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:<sup>1</sup>

### **Within the Eleventh Circuit**

- Chief Jane Castor, Chief of Police, Tampa Police Department.
- Chief Cindy Dick, Fire Chief (Ret.), Tallahassee Fire Department.
- Chief David Frisby, Police Chief (Ret.), Monticello Police Department.
- Chief Sharon Lippman, Battalion Chief (Ret.), Tallahassee Fire Department.
- Chief Walt McNeil, Police Chief (Ret.), Tallahassee Police.
- Ross Allen, Firefighter.
- Melissa Almonte, Paramedic/FTO.
- Nathalia Anaya, Captain, Hillsborough County Fire Rescue.
- Amanda Anderson, EMT.
- Anton Anderson, EMT, Leon County EMS.

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<sup>1</sup> These individuals submit this brief on their own behalf. Their views do not necessarily reflect the views of their employers. Dozens of others have agreed to sign the brief, but space limitations prevent listing them all.

- Mary Anderson, Police Officer (Ret.), Tallahassee Police Department.
- Tess Anderson, EMT, Tallahassee Memorial Healthcare.
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- Mike Aries, EMT, TMH Healthcare.
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- David Bellamy, Reserve Police Officer, Tallahassee Police Department.
- Rebecca Berhalter, EMT, Tallahassee Memorial Healthcare.
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- John Berrang, Chief Officer (Ret.), K9 Officer and Fire-Rescue Paramedic.
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- Kim Billingsley, Firefighter/EMT-B.
- Kimberley Blackmon, Detective (Ret.).
- Michael Bloom, Firefighter and Inspector.
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- Denise Schrecengost, Road Patrol Officer, Boynton Beach Police Department.
- Courtney Scott, Police Officer, Tampa Police Department.
- Rhonda Scott, Lieutenant, Tallahassee Police Department.
- Sharon Scott, Lieutenant, Jacksonville Sheriff's Office.
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- Tamora Thompson, Patrol Officer (Ret.), Tallahassee Police Department.
- Nicole Tolentino, Paramedic, HCA.
- J. Denise Vignati-Woodard, Master Police Officer (Ret.).
- Letitia Ward, Seminole County Sheriff's Office.
- Chris Welborn, Deputy First Class, Escambia County Sheriff's Office.
- Taltha White, Lieutenant (Ret.), Tallahassee Police Department.
- Danny Whittaker, Master Officer (Ret.), Venice Police and President of Florida Law Enforcement Gays and Lesbians (Fla-LEGAL), Inc.
- Jane Williams, EMT, Madison County EMS.
- Jeri Williams, Police Officer (Ret.), Apopka Police Department.
- Al Xiques, Captain, Pembroke Pines Police Department.
- Grace Zopf, Deputy Sheriff.

#### **Outside the Eleventh Circuit**

- Jim Petro, Attorney General of Ohio from 2003-2007;
- Chief Jeff Hadley, Kalamazoo, Michigan Department of Public Safety;
- Chief Kim Jacobs, Columbus Ohio Division of Police;

- Chief Richard Biehl, Dayton Ohio Police;
- Elizabeth J. Mullen, Deputy Director (Ret.), TX Dep't of Criminal Justice, OIG;
- Scott Gunn, Police Officer, Co-Founder, LGBT Fallen Heroes Fund;
- Shawn Matthews, Supervisory Special Agent and co-chair of FBI Pride;
- Victor Bulos, Deputy Sheriff / U.S. Marshals Fugitive Task Force.

The following organizations are also *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., dedicated to creating awareness of the gay, lesbian, bisexual, and transgender law enforcement professionals;
- Gay Peace Officers Association of Southern California, an organization of LGBT peace officers and civilian 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 Officers Action League New York, an organization that 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 Florida denies these men and women the equal dignity and respect they deserve. Florida does not treat them equally in their day-to-day work, nor, tragically, when they make the ultimate sacrifice. *Amici* submit this brief to explain why basic human dignity – enshrined in the Fourteenth Amendment's guarantee of equal protection – requires affirmance of the rulings of the court below.

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. These state laws on appeal here highlight recent examples of such discrimination by depriving gays and lesbians of the fundamental right to marry.

*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, as evident by the Florida laws on appeal here.

The practical consequences of Florida’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, Florida and the communities they serve will come to their family’s aid with financial resources, healthcare, and higher education. *Amici* are deprived of many of these benefits by virtue of being unable to marry. 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, but it has not yet identified a level of scrutiny to apply to classifications based on sexual orientation. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court summarily dismissed an appeal from denying same-sex couples the right to marry, but expressed no view on the appropriate level of scrutiny.<sup>2</sup> Since that summary dismissal over four decades ago, the Court has struck down laws aimed at gays and lesbians without announcing any particular level of review. *Romer v. Evans*, 571 U.S. 620, 632 (1996) (law at issue failed “*even*” rational-basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)

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<sup>2</sup> The Supreme Court summarily dismissed the appeal in *Baker v. Nelson* with the single line that it did not raise a substantial federal issue. Most federal courts that have considered the issue since *United States v. Windsor*, 133 S. Ct. 2675 (2013), including the court below, have determined that *Baker v. Nelson* no longer binds the federal courts. *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (listing decisions of other courts); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014). A summary dismissal by the Supreme Court binds all other federal courts on the same issue until the Supreme Court overrules itself or until “doctrinal developments” illustrate that the Supreme Court no longer views” the issue in the same way. *Bostic*, 760 F.3d at 373; *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir.1985), *rev’d on other grounds*. In light of *United States v. Windsor*, the opinion of the Supreme Court in *Baker v. Nelson* that same sex marriage does not present a substantial federal question has clearly changed due to doctrinal developments. *Bostic*, 760 F.3d at 373; *Kitchen v. Herbert*, 755 F.3d 1193, 1208 (10th Cir.).

(holding unconstitutional a Texas statute that criminalized homosexual sodomy, but without announcing a level of review).

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 bears on its “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. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). In light of 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.* While *amici* have been aggressively trying to reverse the historical patterns, the history of discrimination of sexual minorities *by law enforcement* runs deep. Even before the Stonewall riots of 1969, liquor-licensing laws were used as pretext to raid establishments frequented by gays and lesbians. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703, 761-66 (1997). It has also been documented that police relied on a variety of other laws (lewdness, vagrancy, and disorderly conduct) to harass gays and lesbians. *See, e.g.,* Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 Colum. Hum. Rts. L. Rev. 159, 162-64 (1980). The result, according to research, is that these experiences and distrust make gays and lesbians less likely to identify themselves as victims of crime or cooperate with the police.

While groups like *amici's* and community-policing efforts in many jurisdictions have improved the relationship between law enforcement and the

GLBT community in certain parts of the country,<sup>3</sup> research suggests that abuses remain. Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (Sept. 21, 2005).<sup>4</sup>

Studies also show a direct connection between stigma and crime.

Nationally, sexual minorities are less likely to report incidents 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

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<sup>3</sup> Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Discrimination: 2000 to 2013*, § IV.D, William Inst. (Nov. 2013) (available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Law-Enforcement-Discrim-Report-Nov-2013.pdf> (“Williams Institute (2013)”).

<sup>4</sup> Available at: <http://www.amnesty.org/en/library/info/AMR51/122/2005>.

may be the most salient minority stress correlate of the perpetration of same-sex partner violence” and “the results of this study underscore the utility of understanding partner violence among LGBTQ youth through a minority stress framework”); Ethan H. Mereish, Conall O’Cleirigh & Judith B. Bradford , *Interrelationships Between LGBT-Based Victimization, Suicide, And Substance Use Problems in a Diverse Sample of Sexual and Gender Minorities*, 19(1) *Psychology, Health & Med.*, 1-13 (2014).

*Hate Crimes.* The FBI’s hate crime statistics show that gay and lesbian people experience the second highest volume of bias-motivated crimes, following only racial minorities. *See* FBI, *Latest Hate Crime Statistics* (2012).<sup>5</sup> 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:

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<sup>5</sup> Available at: <http://www.fbi.gov/news/stories/2013/november/annual-hate-crime-statistics-show-slight-decrease>

(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.

...

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

...

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

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

*Employment Discrimination.* In public and private employment, discrimination against gays and lesbians is prevalent.<sup>6</sup> There is no federal

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<sup>6</sup> See, e.g., Matt Apuzzo, *Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs*, N.Y. Times, May 20, 2014 at A13 (reporting on newly discovered documents showing that the Civil Service Commission had a "tendency to 'lean over backwards' to rule against a homosexual") (*available at*: [http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html?\\_r=0](http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html?_r=0)); Exec. Order 10450

nondiscrimination law protecting gays and lesbians, leaving a patchwork of state and local laws. Florida is among those states that have not adopted any statewide prohibition against employment discrimination based on sexual orientation and gender identity. 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

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(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/>).

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 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 jury verdict awarding \$1.4 million to an officer discriminated against based on his perceived sexual orientation and to two other officers 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 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).

The lack of state-wide employment discrimination laws in Florida 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 shown 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. In Texas, as recently as 2008, half of Texas police chiefs responding to a survey said they would have difficulty working with a gay man, while 62% indicated 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. 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.

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 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.

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. 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**

As noted above, discrimination against gay and lesbian officers is well documented. *See* Williams Institute (2013). Denying first responders in Florida 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. Many other federal courts 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. *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir.); *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir.); *Kitchen v. Herbert*, 755 F.3d 1193, 1226 (10th Cir.); *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).

Florida’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 (“NLEOMF”), Law Enforcement Facts (*available at:* <http://www.nleomf.org/facts/enforcement/>). Of those deaths, 787 were Florida officers. NLEOMF, 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). 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 Florida 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 \$339,310.00. *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.

Since *Windsor* and through subsequent rule changes adopted by the Office of Justice Programs, federal law extends benefits to the spouses of gay and lesbian law enforcement officers killed in the line of duty, regardless of whether the officer's state of residence recognized the marriage. Unfortunately, this falls short of creating real equality for those serving in Florida.

Because of the on-going state bans, gay and lesbian officers will be required to travel to another state to be married, an additional burden that heterosexual couples do not have to endure. And it is more burdensome to same sex couples in Florida, who cannot simply drive across the border to a state that permits same sex marriage, since Georgia and Alabama do not yet permit same sex marriage.

Even if it were easy, it remains 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 Florida, 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.

Florida provides death benefits to the families of first responders when a police officer, fire fighter, corrections officer, or other designated first responder dies in the line of duty. Florida Statutes Ann. ("F.S.A.") § 112.19. Beneficiaries of a first responder who is killed in the line of duty are entitled to a lump sum payment. *Id.* at § 112.19.2(a-c). The beneficiary for the lump sum payment may be

a beneficiary designated by the officer and submitted to the employer in writing during his lifetime, a surviving spouse and children, or , in the absence of any spouse or children or designated beneficiary, the first responder's parents. *Id.* at § 112.19.2(d). Other benefits are only available to a spouse or child, without regard to any designation of a beneficiary. For example, under certain circumstances, a surviving spouse and children are entitled have the entire premium on their health insurance paid by the state. *Id.* at § 112.19.2(g-h). Surviving spouses and children are also entitled to have their educational expenses paid by the state. *Id.* at § 112.19.3.

Florida'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 Florida is killed in the line of duty.

Moreover, because Florida law restricts the right of loving couples to marry, it also implicates their right to have joint custody over their children. Florida's ban on LGBTQ adoption was held unconstitutional in 2010. *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010). Though the decision lifts the ban on adoption by LGBTQ parents, it did not create a right for two unmarried persons to jointly adopt a child, or for an unmarried person to co-adopt his partner's child. See F.S.A. § 63.042 (listing eligibility for

adoption). As such, the children of a gay and lesbian first responder's partner may also be wrongly denied protections and benefits that would be automatically provided to those children born to married heterosexual couples, without regard to the depth or strength the first responder's relationship to the child and his or her parent.

Florida'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. Officer Lois Marrero of the Tampa police department was shot and killed in the line of duty in 2001. She had been in a long-term committed relationship with her same-sex partner, but despite the Tampa Police and Fire Pension Board's sympathy, the partner was denied death benefits under the law. Associated Press, *Cop's Companion to Sue for Survivor's Benefits*, Miami Herald, Feb. 28, 2002, at 5B (*available at*: WLNR 4641676).

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 Florida's, 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).

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 people they love, including their partner and children, will be cared for if they are killed in the line of duty. This Court’s decision can ensure that never again will a law enforcement or other public safety officer worry about whether Florida 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 the decision below.

Dated: December 23, 2014

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**CERTIFICATE OF COMPLIANCE  
REQUIRED BY FED. R. APP. P. 32(a)**

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 6,985 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 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: December 23, 2014

/s/ Paul Fakler  
Paul Fakler

**CERTIFICATE OF SERVICE**

It is hereby certified that on December 23, 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 Eleventh Circuit using the CM/ECF system, and service was accomplished through same.

Dated: December 23, 2014

/s/ Paul Fakler  
Paul Fakler

