

denied the claim because Plaintiff did not qualify as a "spouse" under Missouri law.

As a matter of law, the rational basis standard controls the outcome of this case. Legislation is presumed constitutional, and under the rational basis standard, will withstand constitutional scrutiny so long as the statutory classification is rationally related to a legitimate state interest. *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009). Under the rational basis standard, "a classification is constitutional 'if any state of facts can be reasonably conceived that would justify it.'" *Id. quoting Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997). As established in Defendant's pending motion to dismiss, the challenged statutes are valid, because it is reasonably conceivable that the Missouri legislature enacted the statutes to benefit those individuals most likely to be financially dependent on a deceased trooper's earnings.

Plaintiff's own proffered facts establish that higher percentages of married couples are single earner couples (28.9%) when compared to same-sex couples (21.4%). See Pl.'s Statement of Uncontroverted Facts, ¶¶ 65, 66, and Def.'s Rsp. to ¶¶ 65, 66 below at pp. 37-38. These uncontroverted facts establish that limiting survivorship benefits to spouses is rationally related to the state's interest in ensuring that limited retirement system resources benefit those survivors most likely to be dependent on the deceased. This is a

legally sufficient basis to deny Plaintiff's Motion for Summary Judgment and is also a sufficient basis to sustain Defendant's Motion to Dismiss. Thus, there is no need to examine Plaintiff's remaining facts.

Most of Plaintiff's statement of facts consists of allegations concerning his relationship with Trooper Engelhard in an attempt to support his argument that that relationship should be treated as the "functional equivalent" of marriage. Those facts, regardless of the alleged personal commitment between Plaintiff and the decedent, do not alter the legal analysis. Heightened scrutiny does not apply to Plaintiff's claims because the challenged statutes involve only an economic interest, and do not impinge upon any of Plaintiff's fundamental rights or concern a suspect class. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.3d 98, 102 (Mo. banc 2008). Sections 140.140.3 and 140.012 RSMo satisfy the applicable rational basis standard. Thus, Plaintiff cannot meet his burden of overcoming the presumption of constitutionality. Accordingly, as detailed below, Plaintiff's motion should be denied.

STANDARD OF REVIEW

The moving party has the burden of demonstrating its entitlement to summary judgment. *I.T.T. Commercial Fin. Corp v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 380 (Mo. banc 1993). To be entitled to summary judgment, the movants must show that (1) there is no genuine dispute as to

the material facts on which they rely for summary judgment; and (2) based on those facts, they are entitled to judgment as a matter of law. Rule 74.04(c)(6); *Missouri Employers' Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 623 (Mo. App. W.D. 2004). A movant's right to summary judgment "differs significantly depending upon whether that movant is a 'claimant' or a 'defending party.'" *Missouri Employers' Mut. Ins. Co.* at 623, citing *I.T.T. Commercial Fin. Corp.* at 381.

A claimant must establish that there is no genuine dispute as to those material facts upon which he would have had the burden of persuasion at trial, entitling him to judgment as a matter of law. Thus, a claimant, to be entitled to summary judgment, must allege undisputed facts establishing each and every element of his claim. *Id.* A mere conclusional allegation does not constitute a genuine issue of material fact. *I.H. Garms & Sons Co. v. Potashnick Construction, Inc.*, 781 S.W.2d 203, 205 (Mo. App. E.D. 1989).

The non-movant is entitled to the benefit of all reasonable inferences from the record. *I.T.T. Commercial Fin. Corp.* at 376.

**Defendant's Response to Plaintiff's Statement of
Uncontroverted Facts**

"Eligibility for Survivor Benefits"

1. Since 2000, Dennis Engelhard was employed by the Missouri State Highway Patrol ("MSHP"). (Ex. 1, Joint Stip. ¶1).

RESPONSE: Admitted.

2. Mr. Engelhard was killed in the line of duty when he was struck by a vehicle while responding to an accident on I-44, east of Eureka, Missouri. (Ex. 1, Joint Stip. ¶1).

RESPONSE: Admitted.

3. If Mr. Engelhard had been married to a woman, she would have received survivor benefits pursuant to R.S. Mo. § 104.140.3, which are administered by the Missouri Department of Transportation and Patrol Employees' Retirement System ("MPERS"). (Ex. 1, Joint Stip. ¶8); *see also* (Ex. 1-B, Joint Stip. Ex. B (noting that application was denied because Mr. Glossip "is male"))).

RESPONSE: Plaintiffs' Statement of Facts consists of arguments and conclusions as well as speculation to which Defendant is not required to respond. To the extent a response is required, Defendant admits that had Trooper Engelhard been legally married to a woman at the time of his death she would have been a surviving spouse eligible for benefits as provided by statute.

4. Plaintiff Kelly Glossip submitted a timely application for survivor benefits pursuant to R.S. Mo. § 104.140.3. (Ex. 1, Joint Stip. ¶2).

RESPONSE: Admitted, but immaterial for purposes of determining Plaintiff's Motion for Summary Judgment.

5. Mr. Glossip's application was denied by the Executive Director of MPERS solely because his relationship with Mr. Engelhard was not a "marriage between a man and a woman." (Ex. 1, Joint Stip. ¶8).

RESPONSE: Denied and not supported by the cited evidence. As stated in Pl.'s Summ. J. Ex. 1B, Plaintiff's claim was also denied due to the lack of a valid marriage certificate and based upon Sections 104.012 and 451.022 RSMo.

6. Mr. Glossip timely appealed the Executive Director's denial of his application to the MPERS Board of Trustees. (Ex. 2, Letter from Roger K. Heidenreich to Board of Trustees, dated October 14, 2010, with Request for Review).

RESPONSE: Admitted.

7. On November 18, 2010, the MPERS Board upheld the denial of survivor benefits to Mr. Glossip. (Ex. 3, Letter from Keith Thornburgh to Roger K. Heidenreich, dated November 26, 2010 and certified excerpt of minutes of the MPERS Board of Trustees' meeting).

RESPONSE: Admitted.

8. Mr. Glossip's application would have been denied no matter how emotionally committed and financially interdependent Mr. Glossip and Mr. Engelhard were with each other. (Ex. 1, Joint Stip. ¶8) (Ex. 1-B, Joint Stip. Ex. B).

RESPONSE: Admitted, but immaterial. This statement of fact is argumentative.

9. MPERS distributes pension benefits in accordance with the requirements of Missouri statutes and did not supply any independent reason for the legislature's decision to provide survivor benefits to the surviving different-sex spouse of a state trooper but not the surviving same-sex domestic partner of a state trooper. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 1-2).

RESPONSE: Admitted, but immaterial. This statement of fact is argumentative.

"Relationship Between Mr. Glossip and Mr. Engelhard"

10. Kelly Glossip and Dennis Engelhard were similarly situated to a married different-sex couple in all material respects, including with respect

to the mutual emotional, financial, and spiritual support they provided to each other. (Ex. 4, Glossip 10/13/10 Aff. ¶¶4-13); (Ex. 5, Sluss Aff. ¶11); (Ex. 6, Blevins Aff. ¶8).

RESPONSE: This statement of facts consists of legal characterizations and legal conclusions and arguments, not evidentiary facts. To the extent a response is required, Defendant denies this statement of fact. Plaintiff, who was never married to Trooper Engelhard, was not objectively similarly situated to a married person. The extent to which Plaintiff and Trooper Engelhard may have provided mutual support to each other is immaterial to this Court's determination of the constitutionality of the subject statutes.

11. Mr. Glossip and Mr. Engelhard lived together, with the exception of temporary work-related periods of separation, until his death. (Ex. 4, Glossip 10/13/10 Aff. ¶¶4, 7).

RESPONSE: Defendant admits Paragraph 11 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

12. Mr. Glossip identifies as bisexual; Mr. Engelhard identified as gay. Neither of them believed that they could change their sexual orientation. (Ex. 4, Glossip 7/23/10 Aff. ¶4).

RESPONSE: Defendant admits Paragraph 12 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

13. Mr. Glossip and Mr. Engelhard met in April 1995 and were in an intimate, loving, and committed relationship for 15 years, until his death on December 25, 2009. (Ex. 4, Glossip 10/13/10 Aff. ¶1); *see also* (Ex. 4-A, Ex. 4-B, Ex. 4-C, Ex. 4-D, Glossip 10/13/10 Aff. Exs. A-D (copies of anniversary cards from Mr. Engelhard to Mr. Glossip)).

RESPONSE: Defendant admits Paragraph 13 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

14. Mr. Glossip and Mr. Engelhard held themselves out to their friends, family, and community as a couple in a committed, marital relationship. (Ex. 4, Glossip 10/13/10 Aff. ¶4); (Ex. 5, Sluss Aff. ¶11); (Ex. 6, Blevins Aff. ¶8).

RESPONSE: Defendant admits Paragraph 14 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial. Plaintiff admits that he was never married to Trooper Engelhard. (Pl.'s Am. Pet., ¶ 30).

15. Mr. Glossip and Mr. Engelhard chose a church home, publicly celebrated the anniversary of their marriage with their church community, attended services and other church-related events, and regularly contributed to the church. They were treated the same as any married couple by their church. (Ex. 4, Glossip 10/13/10 Aff. ¶10); (Ex. 5, Sluss Aff. ¶¶5-6).

RESPONSE: Defendant denies that Plaintiff was married to Trooper Engelhard, and any allegation that he was is not supported by the cited evidence. Plaintiff has admitted that he was never married to Trooper Engelhard. (Pl.'s Am. Pet., ¶ 30). For the purpose of determining Plaintiff's Motion for Summary Judgment Defendant admits that, as stated in Mr. Sluss' affidavit, Plaintiff's church commemorated the anniversary of Plaintiff's relationship with Trooper Engelhard similarly to anniversaries of married members of Plaintiff's church. This statement of fact is immaterial.

16. Mr. Engelhard and Mr. Glossip cared for each other in sickness and in health. Whenever one of them was in the hospital, the other was

there taking care of the sick one. (Ex. 4, Glossip 10/13/10 Aff. ¶13); (Ex. 5, Sluss Aff. ¶9).

RESPONSE: Defendant admits Paragraph 16 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

17. Mr. Engelhard served as a step-parent to Mr. Glossip's son from a previous marriage; the three of them would come to church as a family, and Mr. Engelhard shared in the responsibility for making child-support payments. (Ex. 4, Glossip 10/13/10 Aff. ¶11); (Ex. 5, Sluss Aff. ¶8); *see also* (Ex. 4-I, Glossip 10/13/10 Aff. Ex. I (family portraits of Mr. Engelhard, Mr. Glossip, and their son)).

RESPONSE: Defendant admits Paragraph 17 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

18. Over the course of their relationship, Mr. Engelhard and Mr. Glossip shared joint checking and savings accounts, jointly owned two houses, five cars, and two trucks, and shared responsibility for the loan and insurance payments on all their houses and vehicles. (Ex. 4, Glossip 10/13/10

Aff. ¶12); (Ex. 4-E, Ex. 4-G, Ex. 4-H, Ex. 4-K, Ex. 4-Q, Glossip 10/13/10 Aff. Exs E, G-H, K-Q).

RESPONSE: Defendant admits Paragraph 18 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

19. Mr. Glossip and Mr. Engelhard were each other's sole domestic partner and intended to spend the rest of their lives with each other. (Ex. 4, Glossip 10/13/10 Aff. ¶¶5-6); *see also* (Ex. 4-A, Glossip 10/13/10 Aff. Ex. A (card from Mr. Engelhard to Mr. Glossip saying he is "looking forward to the rest of my life with you"))).

RESPONSE: Defendant admits Paragraph 19 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

20. Mr. Glossip and Mr. Engelhard exchanged rings with each other and would have entered into a civil marriage if it were legal to do so in Missouri; after Iowa legalized same-sex marriage, they considered getting married in Iowa but decided to wait until their marriage would be legally recognized in Missouri. (Ex. 4, Glossip 10/13/10 Aff. ¶¶ 4, 6); (Ex. 5, Sluss Aff. ¶11).

RESPONSE: Defendant admits Paragraph 20 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment, but the cited evidence also supports an inference that Plaintiff and Trooper Engelhardt would have entered into a civil union as opposed to marriage. This statement of fact is ultimately immaterial.

21. Mr. Engelhard and Mr. Glossip intertwined their lives financially and were financially interdependent. Mr. Engelhard and Mr. Glossip sought to provide financial security to each other in the event of one of their deaths. Since 1996, Mr. Engelhard listed Mr. Glossip as the primary beneficiary of his retirement savings account. When Mr. Engelhard began working as a state trooper, he named Mr. Glossip as the fifty percent beneficiary of his life insurance policy and as sole beneficiary of his deferred compensation plan and indicated on the enrollment form that Mr. Glossip was his "fiancé." (Ex. 4, Glossip 10/13/10 Aff. ¶15); (Ex. 4-S, Ex. 4-T, Glossip 10/13/10 Aff. Exs. S-T).

RESPONSE: The first sentence of this statement of fact consists mostly of conclusions, not evidentiary facts. Trooper Engelhard died intestate (see Pl.'s Summ. J. Ex. 4, Aff. of Pl., ¶ 15). Defendants admit the second, third, and fourth sentences of this statement of fact for the purpose of

determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

22. Like other state troopers, Mr. Engelhard relied on the government to take care of his family in the event that he was killed in the line of duty. Mr. Glossip tried to convince Mr. Engelhard not to become a state trooper because he was concerned that the job would be dangerous and Mr. Engelhard could be hurt. Mr. Engelhard always tried to reassure Mr. Glossip and told him that if anything ever happens to a state trooper, the government and other troopers make sure that the trooper's family is taken care of. (Ex. 4, Glossip 10/13/10 Aff. ¶8); (see also Ex. 4-F, Glossip 10/13/10 Aff. Ex. F (picture of Mr. Engelhard and Mr. Glossip together at Mr. Engelhard's induction ceremony)).

RESPONSE: This statement of fact consists of hearsay, not evidentiary facts, and is inadmissible under the deadman's statute, Section 491.010 RSMo. This statement of fact is immaterial.

23. Like other spouses of state troopers, Mr. Glossip made financial and emotional sacrifices to help Mr. Engelhard. For example, when Mr. Engelhard was assigned to Troop [REDACTED] of the MSHP, Mr. Glossip gave up his job as a customer service representative at [REDACTED] and moved

with Mr. Engelhard to [REDACTED] Missouri. (Ex. 4, Glossip 10/13/10 Aff. ¶8).

RESPONSE: Defendant denies Plaintiff's characterization of himself as Trooper Engelhard's spouse. Plaintiff has admitted that he was never married to Trooper Engelhard. (Pl.'s Am. Pet., ¶ 30). The allegation that resigning Plaintiff's position with Great Southern Bank was an emotional or financial sacrifice is not supported by the cited evidence. Defendant admits the remaining factual allegations contained in Paragraph 23 of Plaintiff's Statement of Facts. This statement of fact is immaterial.

24. Mr. Glossip was the only person from Mr. Engelhard's family that went to the hospital to be with Mr. Engelhard when he died on December 25, 2009 after being hit by a car during a traffic stop. Mr. Engelhard had already passed away by the time Mr. Glossip arrived at the hospital, but Mr. Glossip sat with Mr. Engelhard for hours holding his hand. (Ex. 4, Glossip 10/13/10 Aff. ¶13).

RESPONSE: Admitted, but immaterial.

25. On May 1, 2010, after Mr. Engelhard's death, Mr. Glossip and his son attended a memorial ceremony at the Missouri State Capitol in Jefferson City for Mr. Engelhard and other troopers killed in the line of duty. As Mr.

Engelhard's surviving partner, Mr. Glossip placed a flower in a memorial wreath during the ceremony. Mr. Glossip also attended the ceremony in Washington, D.C. on May 15, 2010 commemorating the loss of police officers nationwide and was recognized with a medallion as Mr. Engelhard's surviving partner. (Ex. 4, Glossip 10/13/10 Aff. ¶14); (Ex. 4-R, Glossip 10/13/10 Aff. Ex. R); (Ex. 8, Glossip 7/11/11 Aff. ¶¶ 2-4); (Ex. 8-A, Ex. 8-B, Ex. 8-C, Glossip 7/11/11 Aff. Exs. A-C);

RESPONSE: Admitted, but immaterial.

26. Like other surviving spouses of state troopers who are killed in the line of duty, Mr. Glossip has been emotionally and financially devastated by Mr. Engelhard's death; in addition to losing Mr. Engelhard's emotional support, Mr. Glossip has to bear the entire financial burden of paying their mortgage, car loans, utilities, and other expenses. (Ex. 4, Glossip 10/13/10 Aff ¶16); (Ex. 5, Sluss Aff. ¶12).

RESPONSE: Defendant denies Plaintiff's characterization of himself as Trooper Engelhard's spouse. Plaintiff has admitted that he was never married to Trooper Engelhard. (Pl.'s Am. Pet., ¶ 30). Plaintiff was a beneficiary on a life insurance policy owned by Trooper Engelhard (Pl.'s Summ. J. Ex. 4T; Pl.'s Summ. J. Ex. 4, ¶ 15), however Defendant admits the remaining factual allegations contained in Paragraph 26 of Plaintiff's

Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

“Administration of Survivor Benefits”

27. In the past ten years, MPERS has received 1,189 applications for survivor benefits and granted 100% of the applications, with the exception of Mr. Glossip's. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 4-6).

RESPONSE: Admitted.

28. To the best of its knowledge, in the past ten years, MPERS has not received any fraudulent applications for survivor benefits. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 6-7).

RESPONSE: Defendant admits that to the best of its knowledge between September 2000 and October 2001 MPERS did not receive any fraudulent or falsified applications by a widow or widower for survivor benefits, as stated in the cited response. Pl.'s Summ. J. Ex. 1D, pp. 6-7 (Rsp. to Item h).

29. MPERS is not aware of any data indicating that providing survivor benefits to same-sex domestic partners would be more

administratively difficult than providing survivor benefits to different-sex spouses. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 9).

RESPONSE: This statement of fact is argumentative, is not supported by the cited evidence, and mischaracterizes MPERS' response to question 6 at page 9 of Pl.'s Summ. J. Ex. 1D. This statement of fact is immaterial.

30. MPERS is not aware of any data indicating that providing survivor benefits to same-sex domestic partners would be more costly than providing benefits to married different-sex couples. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 8).

RESPONSE: This statement of fact is argumentative, is not supported by the cited evidence, and mischaracterizes MPERS' response to question 8 at page 9 of Pl.'s Summ. J. Ex. 1D. Defendant admits that it does not currently have data from which it could develop an estimate of the cost differences or additional costs it would incur if a change in the law required it to provide survivor benefits to "same-sex domestic partners." Actuarial estimates would depend upon the terms of enabling legislation and upon "speculative fact assumptions." Pl.'s Summ. J. Ex. 1D, p. 8 (Rsps. to Nos. 4 and 5).

31. The Human Rights Campaign ("HRC") has compiled a non-exhaustive list of employers that offer benefits to same-sex domestic partners. HRC's database is the most complete and accurate source available to show the number of public and private employer in the United States that provide same-sex domestic-partner benefits. (Ex. 9, Herrschaft Aff. ¶¶10-15).

RESPONSE: Defendant admits the first sentence of this statement of fact. Defendant admits that Mr. Herrschaft's affidavit states that to his knowledge HRC's database is the most complete and accurate available source to show the number of employers in the United States who provide some form of benefits to "same-sex domestic partners." This statement of fact is immaterial.

32. The total number of employers in HRC's database is an inherently conservative number of potentially all employers that grant same-sex domestic partnership benefits because the database reflects priorities of HRC flagship projects and thus focuses on employers in the Fortune 1000, *American Lawyer* 200, and other major U.S. businesses with at least 500 full-time employees. As a result, there may be additional employers that offer

benefits to same-sex domestic partners but have not been included in HRC's database. (Ex. 9, Herrschaft Aff. ¶3).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

33. Nationwide, HRC has identified 8,673 private-sector for-profit employers that offer some form of domestic-partner benefits to their employees' same-sex domestic partners. (Ex. 9, Herrschaft Aff. ¶4).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

34. HRC has identified 292, or 58% of, Fortune 500 companies in the United States that offer some form of domestic-partner benefits to their employees' same-sex domestic partners. (Ex. 9, Herrschaft Aff. ¶5).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

35. HRC's has identified 293 public employers in the United States, including 65 governmental organizations and 228 state and local

governments, that offer some form of domestic-partner benefits to their employees' same-sex domestic partners. (Ex. 9, Herrschaft Aff. ¶6).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

36. HRC has identified 232 companies out of the 615 rated in HRC's 2011 Corporate Equality Index ("CEI") survey that provide qualified joint and survivor annuity plans to same-sex domestic partners. (Ex. 9, Herrschaft Aff. ¶7).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

37. HRC has identified 174 companies out of the 615 rated in the CEI survey that provide pre-retirement survivor annuity plans to same-sex domestic partners. (Ex. 9, Herrschaft Aff ¶8).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

38. The number of companies providing annuity plans to same-sex domestic partners as stated in paragraphs 36 and 37 was determined solely

from the results of the 2011 Corporate Equality Index ("CEI") survey, which rated 615 companies from the Fortune 1000, *American Lawyer* 200, and other large U.S. businesses employing 500 individuals or more. As a result, there may be additional employers that offer a survivor annuity plan to same-sex domestic partners but have not been included in HRC's database. (Ex. 9, Herrschaft Aff. ¶9).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

39. HRC has catalogued 40 private employers headquartered in Missouri that provide some form of domestic partnership benefits to their employees' same-sex domestic partners. (Ex. 9, Herrschaft Aff. ¶10).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

40. Employers that provide domestic partnership benefits for same-sex couples have established objective standards for determining whether a same-sex couple is eligible for receiving domestic-partner benefits. (Ex. 9, Herrschaft Aff. ¶ 16).

RESPONSE: The cited paragraph of Mr. Herrschaft's affidavit asserts conclusions, not evidentiary facts. Mr. Herrschaft's affidavit speaks

for itself. Paragraph 40 of Plaintiff's Statement of Facts contains arguments and conclusions to which no response is required. This statement of fact is immaterial.

41. Employers use substantially the same objective criteria in the absence of a state-issued marriage certificate, civil union, or domestic partnership registry. (Ex. 9, Herrschaft Aff. ¶ 16).

RESPONSE: Defendant admits that this is what Mr. Herrschaft's affidavit says. This statement of fact is immaterial.

42. Once established, domestic-partner benefits at employers nationally are administered with little or no administrative cost or extra costs due to fraud. (Ex. 10, Badgett Aff. ¶¶ 12, 13).

RESPONSE: Defendant admits that Paragraph 12 of Mr. Badgett's affidavit asserts his belief that administrative costs for such benefits are "not costly." Paragraph 42 of Plaintiff's Statement of Facts contains arguments and conclusions to which no response is required. For the purpose of determining Plaintiff's Motion for Summary Judgment, Defendant admits that this would be Mr. Badgett's testimony. This statement of fact is immaterial.

43. Those employers that require affidavits generally required some or all of the following criteria to recognize a same-sex domestic partner: They are each 18 years old or older; they are not related to one another; they currently live together; each is not currently in a domestic partnership, civil union, or marriage with a different person; they are mutually responsible for each other; and they are currently in an intimate, committed relationship of at least six to twelve months duration. (Ex. 9, Herrschaft Aff. ¶ 17).

RESPONSE: For the purpose of determining Plaintiff's motion for summary judgment, Defendant admits that this is Mr. Herrschaft's conclusion or belief. This statement of fact is immaterial.

44. The following governmental entities in Missouri provide some form of domestic-partner benefits to their employees' same-sex domestic partners: City of Kansas City, Jackson County, St. Louis County, St. Louis Metropolitan Police Department, and City of St. Louis. (Ex. 11, O'Bannon Aff. ¶ 7); (Ex. 12, Mossie Aff. ¶ 5); (Ex. 13, McCarley Aff. ¶ 9); (Ex. 14, Green Aff. ¶ 4); (Ex. 15, Frank Aff. ¶ 4).

RESPONSE: Admitted, but immaterial. Defendant notes that the City of St. Louis provides only health and dental insurance benefits to eligible domestic partners.

45. In addition, the City of Columbia provides some forms domestic partner benefits to their employees' same-sex domestic partners. See Section 107-776, Ord. 19336; Amending the City of Columbia Health Care Plan and the City of Columbian Dental Plan, *available at* http://www.gocolumbiamo.com/Council/Final_Ordinances/Series_107/776;.html. See also Section 110-513, Ord. 20438; Amending Chapter 19 of the City Code as it relates to personnel policies, procedures, rules and regulation, *available at* http://www.gocolumbiamo.com/Council/Final_Ordinances/Series_110/513;.html. See also Chapter 19 PERSONNEL POLICIES, PROCEDURES, RULES AND REGULATION, Section 19-130 Sick Leave, *available at* <http://www.gocolumbiamo.com/downloadfile.php?id=55>.

RESPONSE: Defendant admits that the City of Columbia passed an ordinance in 2006 extending certain health and dental benefits to domestic partners. The more recent ordinances that Plaintiff cites in this statement of fact do not appear to reflect any benefits currently available to

domestic partners, but Defendants admit this statement of fact for the purpose of determining summary judgment. This statement of fact is immaterial.

46. In addition, the following governmental entities in Missouri provide pension benefits to same-sex domestic partners: City of Kansas City firefighters, Jackson County, St. Louis County, St. Louis Metropolitan Police Department. (Ex. 11, O'Bannon Aff. ¶ 4); (Ex. 12, Mossie Aff. ¶ 3); (Ex. 13, McCarley Aff. ¶ 6); (Ex. 14, Green Aff. ¶ 6).

RESPONSE: Admitted, but immaterial.

47. The governmental entities in Missouri that provide benefits to same-sex domestic partners have established objective requirements that an employee must satisfy in order to qualify as a domestic partner. (Ex. 11, O'Bannon Aff. ¶ 7); (Ex. 12, Mossie Aff. ¶ 5); (Ex. 13, McCarley Aff. ¶ 8); (Ex. 14, Green Aff. ¶ 9); (Ex. 15, Frank Aff. ¶ 6-7).

RESPONSE: For the purpose of determining Plaintiff's motion for summary judgment, Defendant admits that this is the conclusion or belief of Mr. O'Bannon, Ms. Mossie, and Mr. Frank. This statement of fact is immaterial.

48. In order to receive domestic-partner benefits as an employee of one of the governmental entities in Missouri listed in paragraph 44, employees must submit a signed affidavit stating that the employee and his or her domestic partner satisfy the objective eligibility requirements. (Ex. 11, O'Bannon Aff. ¶¶ 2, 6); (Ex. 12, Mossie Aff. ¶4); (Ex. 13, McCarley Aff. ¶ 8); (Ex. 14, Green Aff. ¶ 8); (Ex. 15, Frank Aff. ¶ 6).

RESPONSE: Defendant admits that this is what the cited affidavits say. This statement of fact is immaterial.

49. City of Kansas City employees document their domestic partnerships to qualify for benefits by signing sworn affidavits showing that they meet the following criteria:

1. Are not related by blood to a degree of closeness that would prohibit legal marriage, and
2. Are both at least 18 years of age, and
3. Have resided together for a period of at least one year and intend to do so permanently, and
4. Are not legally married, and
5. Are responsible for each other's common welfare, and
6. Are each other's sole domestic partner, and
7. Were mentally competent to consent to contract when the domestic partnership began.

(Ex. 11-A, Ex. 11-B, Ex. 11-C, O'Bannon Aff. ¶ 6 & Exs A-C).

RESPONSE: Exhibit 11 speaks for itself. This statement of fact is immaterial.

50. Jackson County, Missouri employees document their domestic partnerships to qualify for benefits by signing sworn affidavits showing that they meet the following criteria:

1. We are both at least 18 years of age, and
2. We have maintained the same residence for at least 12 months prior to the completion of this affidavit, and
3. We are not legally married, and
4. We have an exclusive mutual commitment to share responsibility for each other's welfare and financial obligations which has existed for at least 12 months prior to the enrollment of the Domestic Partner coverage which is expected to last indefinitely,
5. We are competent to contract at the time the domestic partnership statement is completed;
6. We are not legally married to any person and not related in any way that would prohibit marriage in the State of Missouri; and
7. We are each other's sole domestic partners.

(Ex. 12-A, Mossie Aff. ¶ 4 & Ex. A).

RESPONSE: Exhibit 12 speaks for itself. This statement of fact is immaterial.

51. St. Louis County employees document their domestic partnerships to qualify for benefits by signing sworn affidavits showing that they meet the following criteria:

1. We are each eighteen years of age or older and mentally competent.
2. We are not related by blood in a manner that would bar marriage under the laws of the State of Missouri.

3. We have a close and committed personal relationship, and we are each other's sole domestic partner not married to or partnered with any other spouse, spouse equivalent or domestic partner.
4. For at least one year, immediately preceding the date of this Affidavit, we have shared the same regular and permanent residence in a committed relationship and intend to do so indefinitely.
5. We are jointly financially responsible for basic living expenses defined as the cost of food, shelter, and other expenses of maintaining a household. Upon request by St. Louis County, we will provide within 5 calendar days, at least three of the following documents as verification of our joint responsibility (information should be dated to confirm eligibility at time of enrollment):
 - a) Joint mortgage or lease
 - b) Designation of the domestic partner as primary beneficiary for a life insurance policy.
 - c) Designation of the domestic partner as primary beneficiary in the employee's will.
 - d) Durable power of attorney for health care or financial management.
 - e) Joint ownership of a motor vehicle, a joint checking account, or a joint credit account; or
 - f) A relationship or cohabitation contract which obligates each of the parties to provide support for the other party.

(Ex. 13, Ex. 13-A, McCarley Aff. ¶ 8 & Ex. A).

RESPONSE: Exhibit 13 speaks for itself. This statement of fact is immaterial.

52. St. Louis Metropolitan Police Department employees document their domestic partnerships to qualify for benefits by signing sworn affidavits showing that they meet the following criteria:

We are each eighteen years of age or older and mentally competent.

We are not related by blood in a manner that would bar marriage under the laws of the State of _____.

We have a close and committed personal relationship, and we are each other's sole domestic partner not married to or partnered with any other spouse, spouse equivalent or domestic partner.

For at least one year we have shared the same regular and permanent residence in a committed relationship and intend to do so indefinitely.

We have provided true and accurate required documentation of our relationship.

Each of us understands and agrees that in the event any of the statements set forth herein are not true the insurance or health care coverage for which this Affidavit is being submitted may be rescinded and/or each of us shall jointly and severally be liable for any expenses incurred by the employer, insurer or health care entity.

(Ex. 14, Ex. 14-A, Green Aff. ¶ 8 & Ex. A).

RESPONSE: Exhibit 14 speaks for itself. This statement of fact is immaterial.

53. City of St. Louis employees document their domestic partnerships to qualify for benefits by signing sworn affidavits showing that they meet the following criteria:

1. We are each eighteen years of age or older and mentally competent.
2. We are not related by blood in a manner that would bar marriage under the laws of the State of Missouri.

3. We have a close and committed personal relationship, and we are each other's sole domestic partner not married to or partnered with any other spouse or domestic partner.
4. For at least 6 months immediately preceding the date of this Affidavit, we have shared the same regular and permanent residence in a committed relationship and intend to do so indefinitely.
5. We are jointly financially responsible for basic living expenses defined as the cost of food, shelter, and other expenses of maintaining a household. Upon request by the City of St. Louis, we will provide within 5 calendar days at least two of the following documents as verification of our joint responsibility (information should be dated to confirm eligibility at time of enrollment):
 - a) Joint mortgage or lease;
 - b) Designation of the domestic partner as primary beneficiary for a life insurance policy;
 - c) Designation of the domestic partner as primary beneficiary in the employee's will;
 - d) Durable power of attorney for health care or financial management;
 - e) Joint ownership of a motor vehicle, a joint checking account, or a joint credit account; or
 - f) A relationship or cohabitation contract which obligates each of the parties to provide support for the other party, or other evidence that establishes economic interdependence;
 - g) Registration as domestic partners with the City of St. Louis in accordance with Ordinance 64401.

(Ex. 15, Ex. 15A, Frank Aff. ¶ 6 & Ex. A).

RESPONSE: Exhibit 15 speaks for itself. This statement of fact is immaterial.

54. These objective standards make it possible for Missouri governmental bodies to make beneficiary eligibility determinations with minimal additional administrative costs. (Ex. 11, O'Bannon Aff. ¶7); (Ex. 12, Mossie Aff. ¶5); (Ex. 13, McCarley Aff. ¶9); (Ex. 14, Green Aff. ¶ 9); (Ex. 15, Frank Aff. ¶ 7).

RESPONSE: Defendant admits that this is what the cited affidavits say. This statement of fact is immaterial.

55. Missouri governmental bodies have found no significant difference between the burdens of administering the benefit programs for employees with domestic partners as compared to the burdens of administering benefit programs for employees with spouses. (Ex. 11, O'Bannon Aff. ¶8; Ex. 12, Mossie Aff. ¶6).

RESPONSE: Defendants admit that this is the conclusion or belief of Mr. O'Bannon and Ms. Mossie with respect to their particular employers. This statement of fact is immaterial.

56. The Missouri governmental bodies administering these domestic-partner benefit programs have not seen any evidence of fraud in the use of domestic-partner programs. (Ex. 11, O'Bannon Aff. ¶9); (Ex. 12, Mossie Aff. ¶7); (Ex. 13, McCarley Aff. ¶10); (Ex. 14, Green Aff. ¶ 10).

RESPONSE: Admitted, but immaterial.

57. The Missouri governmental bodies administering these domestic-partner benefit programs are not aware of any cases in which multiple persons claimed to be the domestic partner of an employee. (Ex. 12, Mossie Aff. ¶7); (Ex. 14, Green Aff. ¶ 10).

RESPONSE: Defendants admit that this is the conclusion or belief of Ms. Mossie and Ms. Green with respect to their particular employers. This statement of fact is immaterial.

58. HRC is not aware of any cases of fraud or conflicting claims to benefits resulting from the availability of same-sex domestic partnership benefits. (Ex. 9, Herrschaft Aff. At ¶18).

RESPONSE: Admitted, but immaterial.

59. On average, MPERS pays \$19,823,275.25 each year for survivor benefits. (Ex. 1-D, Joint Stip. Ex D (Dahl Aff.) at 6).

RESPONSE: Defendants admit that this was the average of survivor benefits paid to widows or widowers over a ten year period between September 2000 and August 2010, as stated in the cited response.

60. Thousands of employers have successfully implemented domestic partner benefits in their workplaces. To the extent that any administrative costs are involved in implementing domestic partner benefits, those costs would be one-time start-up costs. After those procedures are in place, employers would see little or no additional administrative costs. There are no studies or data that suggest that administrative problems exist. (Ex. 10, Badgett Aff. ¶ 12).

RESPONSE: Paragraph 60 of Plaintiff's Statement of Facts consists of arguments and Mr. Badgett's conclusions or beliefs. Mr. Badgett's belief that employers generally "would see little or no additional administrative costs" is pure speculation and not based on any material, preferred evidence. The absence of studies concerning administrative problems is not evidence of the actual extent of such problems. This statement of fact is immaterial.

61. Early in the history of domestic-partner benefits, insurance companies and employers feared that the cost of health care benefits for domestic partners could be high as a result of fraud and adverse selection, that is the signing up of partners who have higher-than-average health care

costs. When the claims experience showed no evidence of adverse selection, the insurance plans dropped the higher premiums and surcharges. (Ex. 10, Badgett Aff. ¶ 13).

RESPONSE: Defendant admits that this is what Mr. Badgett's affidavit says. This statement of fact is immaterial.

62. One reason that the cost of domestic-partner benefits is low is that there are very few same-sex couples compared with the number of married couples. The 2008 American Community Survey suggests that 9,384 same-sex couples live in Missouri, or 18,768 individuals in same-sex couples. In contrast, the Census Bureau reports that 2.4 million currently married people over the age of 15 live in Missouri. In other words, there is one person in a same-sex couple for every 130 married persons. (Ex. 10, Badgett Aff. ¶ 14).

RESPONSE: The first sentence of Paragraph 62 of Plaintiff's Statement of Facts is Mr. Badgett's opinion or belief. Defendant was unable to access the website or report cited by Plaintiff. The U.S. Census Bureau's website for the American Community Survey, *available at:* www.factfinder.census.gov (visited Jan. 6, 2012), provides only estimates for 2008. If the statistics provided by Mr. Badgett are reported correctly, there

would actually be one person who acknowledged being a member of a "same-sex couple" for every 127.87 Missourians. This statement of Fact is immaterial.

63. Social science evidence suggests that same-sex couples are economically interdependent in ways and to an extent similar to different-sex couples. This evidence comes from studies that analyzed representative data in reliable ways and used standard academic techniques. (Ex. 10, Badgett Aff. ¶ 6).

RESPONSE: Paragraph 63 of Plaintiff's Statement of Facts asserts Mr. Badgett's opinion or belief, but the cited paragraph of his affidavit is not supported by evidentiary facts. This statement of fact is immaterial.

64. Couples in which one partner has a disability suggest some degree of interdependence, since the non-disabled partner's income might be especially important for preserving the standard of living for both members of the couple. In Missouri, 28% of same-sex couples and 28% of different-sex married couples have at least one disabled partner. (Ex. 10, Badgett Aff. ¶ 7).

RESPONSE: The first sentence of this Statement of Fact consists of arguments or conclusions to which Defendant is not required to respond. Defendant was unable to access the website or report cited by Plaintiff. The alleged statistics are of marginal if any probative value for reasons including Plaintiff's failure to indicate how disability status was defined. Defendant admits the second sentence of Paragraph 64 of Plaintiff's Statement of Facts for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

65. The proportion of couples that have just one partner working in the paid labor force demonstrates a situation of likely interdependence for the non-working partner. By this measure, same-sex couples—21.4%—are quite similar to married different-sex couples—28.9%. The proportion of couples raising children that have just one partner working in the paid labor force is even closer: 27.7% of same-sex couples and 31.2% of married different-sex couples have just one earner, and that difference is not statistically significant. Even where there is a small difference between same-sex couples and married different-sex couples that is statistically significant, the overlap in experiences of the two types of couples is striking, since a clear minority of

both same-sex and different-sex couples are in this position. (Ex. 10, Badgett Aff. ¶ 8).

RESPONSE: Mr. Badgett appears to admit that there is a statistically significant difference between the percentage of married couples involving only one employed spouse (28.9%) and the percentage of "same-sex couples" in which only one member is employed. He also admits that a greater percentage of married couples raising children consist of one earned income couples. Defendant was unable to access the website or report cited by Plaintiff, therefore the trustworthiness of the surveys or underlying data cannot be determined. To the extent a response is required Defendant denies the remaining factual allegations contained in Paragraph 65 of Plaintiff's Statement of Facts. This statement of fact is immaterial.

66. More recent national level data tell a similar story of similarities between same-sex couples and different-sex couples. In the 2008 American Community Survey, both partners are employed in a majority of both different-sex couples (52%) and same-sex couples (64%). (Ex. 10, Badgett Aff. ¶ 9).

RESPONSE: The first sentence of Paragraph 66 of Plaintiff's Statement of Facts contains argument and Mr. Badgett's conclusion or belief. Defendant was unable to access the website or report cited by Plaintiff. The

U.S. Census Bureau's website for the American Community Survey, *available at*: www.factfinder.census.gov (visited Jan. 6, 2012), provides only estimates for 2008. If the statistics provided by Mr. Badgett are reported correctly, they show that almost 19% more "same-sex couples" involve two working partners (64%) compared to different-sex married couples (52%).

67. Both same-sex couples and different-sex couples are similar in ways other than their economic interdependence. For example, they are both racially diverse, are made up people who are mostly employed in the private sector, and have very similar average and median household incomes. (Ex. 10, Badgett Aff. ¶¶ 10, 11).

RESPONSE: Defendant admits that this is what Mr. Badgett's affidavit says. This statement of fact is immaterial.

68. Findings released by the United States Department of Labor on July 26, 2011, demonstrate that half of all state and local employees are permitted to name a same-sex unmarried partner for survivor benefits in defined-benefit retirement plans. (Ex. 16, Supplemental Badgett Aff, ¶ 4).

RESPONSE: Defendant admits this statement of fact for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

69. The United States Department of Labor's 2010 National Compensation Survey (NCS) found that 50% of employees of state and local governments have access to survivor benefits for a same-sex partner in defined benefit retirement plans. Because 84% of state and local employees have access to a defined benefit retirement plan, this means that almost 60% of those with access can name a same-sex unmarried partner as a survivor. (Ex. 16, Supplemental Badgett Aff, ¶ 4, 6).

RESPONSE: Defendant admits this statement of fact for the purpose of determining Plaintiff's motion for summary judgment. This statement of fact is immaterial.

ARGUMENT

Neither Plaintiff's sexual orientation nor his relationship with Trooper Engelhard changes the legal standard that this Court must apply in determining the constitutionality of the challenged statutes. Plaintiff has not shown, as a matter of law, that Sections 104.140.3 and 104.012 RSMo fail to meet the rational basis standard, nor can he. Plaintiff is not entitled to

summary judgment because the subject statutes do not violate his rights to due process or equal protection, nor are they special laws.

I. **THE SUBJECT STATUTES DO NOT VIOLATE PLAINTIFF'S RIGHT TO EQUAL PROTECTION.**

A. **The subject statutes satisfy the rational basis standard as a matter of law.**

Under Missouri law, statutes are presumed to be constitutional. *St. John's Mercy Health Sys. v. Div. of Employment Sec.*, 273 S.W.3d 510, 515 (Mo. banc 2009). Plaintiff has the burden of showing that a statute is unconstitutional. *Id.* Here, Plaintiff alleges that he has a fundamental right to collect survivorship benefits. As a matter of law, however, there is no fundamental right to benefit from a retirement system by virtue of a party's relationship with a retirement system member. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). Rather, the subject statutes concern only economic interests. *See Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009) (statute excluding certain county employees from retirement plan eligibility upheld as economic legislation). Accordingly, Plaintiff can overcome the presumed rationality of the subject statutes only by a "clear showing of arbitrariness and irrationality." *Alderson*, 273 S.W.2d at 537.

A classification is constitutional under the rational basis standard "if any state of facts can be reasonably conceived that would justify it." *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009). Indeed, an equal protection

challenge fails as a matter of law where the considerations supporting the challenged legislation present a rational basis question that is "at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Plaintiff, in fact, acknowledges that it is enough if a "legitimate purpose can be *hypothesized*." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss and in Support of Mot. for Summ. J. at 46) (emphasis added).

As established in Defendant's motion to dismiss arguments, the Missouri legislature could plausibly hypothesize or conclude that surviving spouses are the most economically interdependent in comparison with unmarried couples. Not only must a statutory classification be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis," a defendant "has no obligation to produce evidence to sustain the rationality of a statutory classification." See *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

Plaintiff's statistical data concerning the percentage of married and same-sex couples in the labor force cannot defeat the rationality of the statutes. In fact, those statistics reinforce the underlying rationality of the statute and provide a more than sufficient basis to sustain the constitutionality of the statutory classification as a matter of law. Specifically, Plaintiff concedes that, both in Missouri and nationally, higher percentages of married couples constitute single earned income households

when compared to “same-sex couples.” See Pl.’s Statement of Uncontroverted Facts, ¶¶ 65, 66 and Defendant’s Rsp. to ¶¶ 65, 66 *supra*, pp. 37-38. It is entirely rational— and supported by actual facts— for Missouri to rely upon a spousal relationship as a means to help ensure that survivor benefits flow to those most likely to be economically dependent on the deceased.

Further, in Missouri spouses are legally responsible for each others’ support and necessary expenses, *St. Luke’s Episcopal-Presbyterian Hosp. v. Underwood*, 957 S.W.2d 496, 498 (Mo. App. E.D. 1997), while unmarried couples are under no such obligation. The legislature “is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent.” *State ex rel. Pub. Counsel v. Pub. Serv. Comm’n*, 259 S.W.3d 23, 31 (Mo. App. W.D. 2008) (internal quotations omitted). The legislature, acting with full awareness of spouses’ financial duties to support each other, could rationally conclude that married couples are the most economically interdependent in comparison to unmarried spouses, whose financial obligations to one another can be eliminated in an instant.

The subject statutes further MPERS’ legitimate governmental interest in efficiently administering the retirement benefits system. In this regard, a number of authorities recognize the rationality of making beneficiary eligibility determination more objective and uniform, controlling costs, and

preserving limited retirement system resources. The summary judgment evidence Plaintiff has presented concerning government employee benefit administration is immaterial because those facts have no impact on the outcome of this case under the applicable substantive law. See *Martin v. Washington*, 848 S.W.2d 487, 491 (Mo. banc 1993). The issue here is not whether a different system for regulating benefits can be administered easily or objectively in comparison to the challenged statutory system. Rather, it is whether the statutory system at issue is conceivably or debatably rational. “[T]he very fact that” the assumptions underlying the rationales for a statutory classification “are ‘arguable’ is sufficient, on rational basis review, to ‘immunize’ the legislative choice from constitutional challenge.” *Heller v. Doe by Doe*, 509 U.S. 312, 333 (1993).

Likewise, the marriage requirement under the subject statutes promotes the rational purpose of furthering administrative efficiency by avoiding case-by-case, subjective eligibility determinations. *Finley v. Astrue*, 601 F.Supp.2d 1092, 1106 (E.D. Ark. 2009) (state statute barring posthumous child through in vitro fertilization and mother from obtaining social security death benefit furthered administrative convenience; no equal protection violation).

In this regard, if Missouri’s statutory benefits scheme were not limited to survivors of marital couples, it would create a risk of competing claims by

multiple applicants based on non-marital relationships with the deceased member. For example, an individual claiming to have been the fiancé of a deceased member, and a second person who had a child with the decedent (and asserted that he or she still had an intimate relationship with the member on the date of death), might *both* apply for survivorship benefits if the marriage requirement were eliminated. In doing so, each would submit his or her own subjective proffer for why their relationship with the deceased should be given validity and priority. Even if a non-marital claimant produced evidence of joint ownership of property, how the non-marital couple presented their relationship to a community, or other tangible or intangible aspects of that relationship, an attempt to administer survivor benefits under a system that accepted non-marital claimants as potential beneficiaries would require highly subjective analysis and decision making.

The interests of the contingent statutory beneficiaries -- i.e., eligible children of members -- also merit consideration. Plaintiff has a child from a previous relationship, as do many unmarried persons. In situations where a member in a non-marital relationship is survived by an eligible child, the statutory scheme allows MPERS to make an objective determination that, in the absence of a surviving spouse, a deceased member's child should be eligible for survivorship benefits. A claim such as Plaintiff's could enable a non-marital adult claimant to displace the right of an eligible child to receive

survivor benefits. The classification limiting survivorship benefits to surviving spouses or eligible children is thus rationally related to legitimate state interests and does not violate equal protection.

B. Plaintiff's equal protection challenge is not subject to "strict scrutiny" analysis.

A statute that does not impinge on a fundamental right or operate to the disadvantage of a suspect class is subject to a rational basis test rather than strict scrutiny. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.3d at 102; *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997).

1. The statutes do not implicate a fundamental right.

Plaintiff's argument that heightened scrutiny should apply to his claims fails because the subject statutes treat all unmarried couples — no matter how subjectively committed — the same. The subject statutes also do not impinge upon any of Plaintiff's fundamental rights. Plaintiff, who was never married to Trooper Engelhard, affirmatively states in his Petition that he does not directly challenge the constitutionality of Article I, section 33 of the Missouri constitution, which only recognizes a marriage between a man and a woman as valid (see Am. Pet., ¶ 7). Nevertheless, Plaintiff contends that the statutory classification that depends on marital status is discriminatory because opposite sex couples may obtain survivor benefits by

marrying, while same-sex couples (who are not eligible to marry), are legally precluded from receiving survivor benefits. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss and in Support of Mot. for Summ. J. at 24). Missouri, like other jurisdictions, however, does not prescribe a fundamental right to marry a person of the same sex. *Wilson v. Ake*, 354 F.Supp.2d 1298, 1306 (M.D. Fla. 2005); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), 409 U.S. 810 (1972), *dismissed for want of substantial federal question*.

Notably, Plaintiff concedes that "there is no fundamental right to receive survivor benefits." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss and in Support of Mot. for Summ. J. at 42). Yet Plaintiff suggests that denial of his application for survivorship benefits interfered with a "right to bodily integrity," "right to family integrity" and "right to sexual intimacy with a partner." (Pl.'s Mem. in Support of Summ. J. at 39-40). Such alleged fundamental rights, however, simply are not implicated by Plaintiff's claim for purely monetary benefits. Plaintiff's alleged right to receive survivor benefits involves only an economic interest, not Plaintiff's interest in intimacy or association with his deceased partner. *See In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. banc 1999) (obligating divorced, but not married, parents to pay for children's college involves mere economic consequence or interest, not parental right to relationship with children).

2. **The statutes do not operate to the disadvantage of a suspect class.**

Strict scrutiny does not apply here because unmarried couples are not considered a suspect class. *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993). Classifications based on marital status are not subject to heightened scrutiny. See e.g., *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997) (rejecting equal protection challenge to denial of health insurance benefits to same-sex domestic partners); *Smith*, 5 F.3d at 239; *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992). The subject statutes do not violate Plaintiff's right to equal protection where all unmarried cohabitants (including heterosexual couples who have not married) may not obtain survivorship benefits on the basis of an intimate relationship. *National Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007).

This Court should decline Plaintiff's invitation to expand interpretation of the equal protection clause of the Missouri constitution to determine the level of scrutiny applicable to Plaintiff's claim for monetary benefits. In fact, the equal protection clauses of the Missouri and federal constitutions are "coextensive." *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006). Thus, the more stringent equal protection clause of the Alaska constitution at issue in *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Ala. 2005), cited

by Plaintiff, is inapposite.

Because the subject statutes involve no suspect classification and do not impinge upon a fundamental right, the rational basis standard applies. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.3d 98, 102 (Mo. banc 2008). Under that standard, there is no equal protection violation as a matter of law, as established hereinabove and in Defendant's Motion to Dismiss.

II. THE DENIAL OF PLAINTIFF'S APPLICATION FOR BENEFITS DID NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Plaintiff's claim that operation of the subject statutes violates his right to substantive due process under article I, section 10 of the Missouri Constitution also fails a matter of law. When government action is legislative, due process protects fundamental rights and liberties that are "implicit in the concept of ordered liberty." *In re Marriage of Woodson*, 92 S.W.3d at 783. But Plaintiff's application for survivor benefits involves only an economic interest, not a fundamental right or liberty interest.

Plainly, the posthumous denial of an application for benefits cannot be said to have interfered with Plaintiff's past association or relationship with the deceased. In fact, Plaintiff does not assert that Defendant ever interfered with his personal relationship with Trooper Engelhard. The denial of Plaintiff's application for benefits, after his relationship with Trooper

Engelhard ended in death, simply did not operate directly on Plaintiff's relationship with the decedent, disturb his ability to live with Trooper Engelhard, or otherwise amount to the intrusive regulation of "family living arrangements" that substantive due process typically would guard against. *See Flowers v. City of Minneapolis*, 478 F.3d 869, 874 (8th Cir. 2007). Mere economic consequences do not critically affect associational rights. *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. banc 1999).

For these reasons, the subject statutes do not violate Plaintiff's right to substantive due process.

III. Section 104.140.3 is not a special law.

Plaintiff's reliance on *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006) is misplaced. That decision invalidated a statute as a special law because it involved a fixed subclass of cities that adopted a tax ordinance before the Hancock amendment. *Id.* at 184-85. Thus, the classification at issue was based on close-ended characteristics. Section 104.140.3, in contrast, is not a special law, because its beneficiary classification is open-ended.

A law based on open-ended characteristics is entitled to a presumption of constitutionality, and is not a special law on its face. *Alderson v. State*, 273

S.W.3d 533, 538 (Mo. banc 2009). When a law is open-ended¹, a standard of reasonableness applies to the statutory classification. *Id.* The same general principles used to determine if a statute violates equal protection thus apply in determining whether legislation is special. *Id.*

The subject statutes create an open-ended class because beneficiaries may enter and then leave the class as marriages to members begin and end, and as children are born and pass the age limit for eligibility. Because the class of survivorship beneficiaries is open-ended, this Court need only determine whether the classification is reasonable. *Alderson*, 273 S.W.3d at 538. A law is not special “if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Id.*

The prohibition against special laws contained in Article III, section 40 is satisfied if the statutory classification includes all who are similarly situated “and omits none whose relationship to the subject matter cannot be reasonably distinguished from those included.” *Civilian Personnel Div. v. Bd. of Police Comm’rs*, 914 S.W.2d 23, 25 (Mo. App. E.D. 1995). The statutory classification of “surviving spouse” satisfies this test. The subject statutes do not classify on the basis of sexual orientation. Rather, they create a class based on marital status. The subject statutes exclude not only Plaintiff, but many others who cannot legally marry in Missouri, including cousins,

¹ A class is considered “open-ended” if it is possible that the status of members of the class could change. *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58, 65 (Mo. banc 1994).

parents, siblings, those related too closely by blood to legally marry, and those legally married to another, "no matter how dependant or emotionally bonded" they may have been to the deceased. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 837 (N.J. Super. Ct. App. Div. 1997).

Plaintiff is in the same position as all unmarried persons, and his application for benefits was denied because he was not married to the decedent. The classification of beneficiaries includes all married persons of either gender who survive the death of an unretired member. Because the statute includes all who are similarly situated, it is not a special law. *Civilian Personnel Div.*, 914 S.W.2d at 25.

As noted above, the beneficiary classification is rational under the equal protection analysis because, at a minimum, the classification "can conceivably be rationally related to a legitimate state interest." *Powell v. Amer. Motors Corp.*, 834 S.W.2d 184, 191 (Mo. banc 1992); *Alderson*, 273 S.W.3d at 538. There is a reasonable basis for classifying beneficiaries based on their marital relationship to an eligible member. The subject statutes therefore are not special laws.

IV. Plaintiff is not entitled to a permanent injunction.

Injunctive relief is an extraordinary remedy that should not be granted where there is an adequate remedy at law. *Id. quoting City of Kansas City v. New York-Kansas Bldg. Assocs.*, 96 S.W.3d 846, 855 (Mo. App. W.D. 2002).

"The elements of a claim for permanent injunctive relief include: (1) irreparable harm, and (2) lack of adequate remedy at law." *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 265 (Mo. App. W.D. 2010). Plaintiff cannot satisfy either of these elements.

Where a monetary award would adequately compensate for an injury, an adequate legal remedy exists. *City of Greenwood*, 311 S.W.3d at 265-66; *Guy Carpenter & Co., Inc. v. John B. Collins Assocs, Inc.*, 179 Fed.Appx. 982, 983 (8th Cir. 2006). Here, Plaintiff's claim centers on denial of his claim for survivor benefits. That claim ultimately could be satisfied by the payment of a sum or sums of money.

CONCLUSION

In light of the foregoing, Defendant respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment and grant such relief to Defendant as the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2012, the above and foregoing document was served via U.S. first class mail hand-delivery facsimile email, to:

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