No. COA 18-1045 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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M.E.,	)	
	)	
Plaintiff-Appellant,	)	
	)	From Wake County
v.	)	No. 18 CVD 600773
	)	
T.J.,	)	
	)	
Defendant-Appellee.	)	

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BRIEF OF *AMICI CURIAE*
NORTH CAROLINA LGBTQ+ NON-PROFIT ORGANIZATIONS

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BRIEF OF *AMICI CURIAE*
NORTH CAROLINA LGBTQ+ NON-PROFIT ORGANIZATIONS[1]

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Pursuant to North Carolina Rule of Appellate Procedure 28(i), *Amici* respectfully submit this Amicus Curiae Brief in support of Plaintiff-Appellant M.E.[2]

The trial court erred by failing to issue a Chapter 50B domestic violence protective order ("DVPO") against Defendant-Appellee T.J. when M.E., a

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Court granted Appellant's motion to allow the parties to proceed using initials on 19 October 2018.

woman, suffered violence at the hands of her intimate partner, T.J., also a woman. The trial court found M.E. presented evidence sufficient to "support[] the entry of a Domestic Violence Protective Order." (R p 18). Nonetheless, the trial court refused to enter a DVPO under N.C. Gen. Stat. § 50B-1(b)(6) because M.E.'s abuser and intimate partner was of M.E.'s same sex, and they were in a dating relationship. (R p 19–21).

In short, Chapter 50B, as interpreted by the trial court, provides individuals in a same-sex, non-cohabitating dating relationship no court-ordered protection from domestic violence. As such, it is an unconstitutional anachronism that singles out certain LGBTQ+ people and denies them equal protection and due process under the law. This disparate treatment cannot be justified for any reason, rational or otherwise, and therefore, as applied to M.E., it violates both the State and Federal Constitutions.

Amici urge this Court to declare that an interpretation of N.C. Gen. Stat. § 50B-1(b)(6) limiting dating violence protections to persons "of the opposite sex" is unconstitutional as applied to M.E. and similarly situated individuals and, in so doing, reaffirm the long-held principle that all individuals deserve equal protection of the laws and due process under the law.

ARGUMENT

I. SAME-SEX INTIMATE RELATIONSHIPS ARE EQUAL TO OPPOSITE-SEX INTIMATE RELATIONSHIPS UNDER THE CONSTITUTION.

Until recently, lesbian, gay, bisexual, transgender, queer, and other sexual and gender minority ("LGBTQ+") persons were denied the right to autonomy in intimate relationships. In 1986, the United States Supreme Court solidified this status when it upheld the constitutionality of laws criminalizing same-sex intimacy, indicating that the LGTBQ+ persons' rights did not extend as far as those of heterosexual persons. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Within ten years of the *Bowers* decision, though, the Court undermined and then overturned *Bowers*, setting LGBTQ+ rights jurisprudence on the trajectory seen today, namely that LGBTQ+ intimate relationships are equal to opposite-sex relationships in the eyes of the law.

- In 1996, the Court undermined the holding of *Bowers* when it invalidated a Colorado law foreclosing political subdivisions from protecting LGBTQ+ persons from discrimination, holding that the provision was "born of animosity toward the class of persons affected" and that it had no rational relation to a legitimate governmental purpose. *See Romer v. Evans*, 517 U.S. 620, 634 (1996).

- In 2003, just 17 years after *Bowers*, the Court overturned its decision and held that laws criminalizing same-sex intimacy are unconstitutional and "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

- In 2013, the Court invalidated the federal Defense of Marriage Act to the extent it barred the federal government from treating same-sex marriages as valid when they were valid in the state licensing them. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

- In 2015, the Court made clear that same-sex relationships are deserving of the same state protections as opposite-sex relationships and held that same-sex couples have the same right to marry as opposite-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) ("[I]t is now clear that the challenged laws . . . abridge central precepts of equality.").

- In 2017, the Court found unconstitutional a state statute denying married same-sex couples access to "the constellation of benefits" that the state provided to married opposite-sex couples. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017).

Lower courts have applied these principles in numerous contexts in recent years. *See, e.g.*, *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 349–50 (7th Cir. 2017) (relying on these Supreme Court decisions in holding that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964); *Doe v. State*, 421 S.C. 490, 508 (2017) (finding that a statute limiting domestic violence protective orders to opposite sex couples violates the Equal Protection Clause); *McLaughlin v. Jones in & for Cty. of Pima*, 243 Ariz. 29, 37, 401 P.3d 492, 500 (2017) (extending Arizona's marital paternity presumption to same-sex spouses regardless of the spouse's gender).

These decisions mark a sea change in the law since *Bowers*, securing rights for LGBTQ+ persons mirroring those long held by heterosexual persons,

and they make clear that our Constitution stands for equality under the law regardless of sexual orientation.

As further detailed below, as intimacy may be found in all relationships, regardless of sexual orientation, so may the threat of intimate-partner violence. Because the threat of intimate-partner violence does not discriminate on the basis of sexual orientation, neither should the State in protecting individuals from such violence. Otherwise, there is no constitutionally guaranteed "equal dignity in the eyes of the law" for same-sex relationships. *Obergefell*, 135 S. Ct. at 2608.

II. CHAPTER 50B VIOLATES THE NORTH CAROLINA AND FEDERAL CONSTITUTIONS.

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633 (emphasis added). "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*

N.C. Gen. Stat. § 50B-1(b)(6) singles out victims of same-sex dating violence. "Dating violence" refers specifically to domestic violence experienced by a victim in a dating relationship, as defined by N.C. Gen. Stat. § 50B-1(b)(6),

who is not and has not been married to, co-habitating with, or parenting children with their abuser. While all heterosexual intimate partners may obtain a DVPO, and most categories of same-sex intimate partners may obtain a DVPO, victims of same-sex dating violence are specifically excluded from the protections of Chapter 50B. *See, e.g.*, N.C. Gen. Stat. § 50B-1(b)(1) (same-sex intimate partners may be spouses under *Obergefell*, 135 S. Ct. 2584); N.C. Gen. Stat. § 50B-1(b)(5) (covering same-sex couples "who live together or have lived together" under N.C. Gen. Stat. § 50B-1(b)(2) as "current or former household members"). Indeed, the only victims who cannot obtain a Chapter 50B DVPO are those abused by an intimate partner (1) of their same sex and (2) who have not lived together, gotten married, or had children with their abuser.

This disparity not only singles out for discrimination a single group but also bears no rational relationship to any legitimate governmental purpose. *See Heller v. Doe by Doe*, 509 U.S. 312, 319–20 (1993) (requiring at least "a rational relationship between the disparity of treatment and some legitimate governmental purpose" for all discriminatory laws); *Doe*, 421 S.C. at 505 (finding that preventing victims from obtaining a DVPO because their abuser is of their same sex "cannot even satisfy the rational basis test"). "The Constitution . . . does not permit the State to bar same-sex couples from [access to legal institutions] on the same terms as accorded to couples of the opposite sex." *Obergefell*, 135 S. Ct. at 2607. Accordingly, victims of same-sex domestic

violence should have the same access to DVPOs as victims of opposite-sex domestic violence.

A. Preventing certain victims of domestic violence from obtaining a Chapter 50B DVPO bears no relation to the legislative purpose of Chapter 50B.

The legislative purpose of Chapter 50B is simply stated, but vitally important: to "immediately and effectively protect[] victims of domestic violence" from their abusers. *See Thomas v. Williams*, 242 N.C. App. 236, 241, 773 S.E.2d 900, 904 (2015).

Because the stated purpose of Chapter 50B is to provide protection for all victims of domestic violence, regardless of their gender or sexual orientation, barring access to Chapter 50B DVPOs only for victims of same-sex dating violence bears no rational relationship to the legislative purpose of Chapter 50B. Like heterosexual people, LGBTQ+ people face being victims of intimate-partner violence, but unlike heterosexual people, they also face unique barriers to assistance when they experience intimate-partner violence.

i. LGBTQ+ people experience intimate-partner violence in similar or more damaging ways and at similar or higher rates than heterosexual people.

Ample empirical and anecdotal evidence indicates that the dynamics and prevalence of intimate-partner violence are largely the same, if not worse, in same-sex partnerships as in opposite-sex partnerships. *See* Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of*

Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Women's Syndrome in Same-Sex Domestic Violence Cases, 24 ST. THOMAS L. REV. 544, 550–55 (2012).

While unique from couple to couple, victims of same-sex intimate-partner violence face the same range of dynamics of intimate-partner violence, which may include physical violence; verbal abuse, such as coercion, threats, and intimidation; sexual violence; emotional abuse; financial abuse; psychological abuse; economic abuse; and isolation. *See* Mikel L. Walters, Jieru Chen, & Matthew J. Breiding, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*, National Center for Injury Prevention and Control 17 (2013). Additionally, as "an extra weapon in their arsenal of terror," abusers in same-sex intimate relationships may threaten to "out" their victims, meaning to reveal the victim's sexual orientation without their consent, often to long-ranging and dire consequences, such as familial isolation and loss of employment. *See* Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 282–83 (1993); Emily Waters, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in* 2015, National Coalition of Anti-Violence Programs 28 (2016 ed.), https://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

Further, same-sex intimate-partner violence occurs at rates similar to, or higher than, opposite-sex intimate-partner violence. In a ground-breaking report, the National Center for Disease Control ("CDC") reported that the lifetime prevalence of rape, physical violence, and/or stalking by an intimate partner was 43.8% for lesbian women and 61.1% for bisexual women, compared with 35.0% for heterosexual women. Walters, Chen, & Breiding, *supra*, at 2, 18. Similarly, 26.0% of gay men and 37.3% of bisexual men experienced intimate-partner violence, while 29.0% of heterosexual men did. *Id.* at 2, 19. Additionally, gay men experienced statistically significant higher levels of psychological aggression by an intimate partner than other men. *Id.* at 24.

Even though same-sex couples are not excluded from the threat of intimate-partner violence, many are excluded from Chapter 50B's protections.

ii. LGBTQ+ victims face unique barriers to seeking help for intimate-partner violence.

While victims of domestic violence, regardless of sexual orientation, face certain hurdles, such as the financial inability to leave abusive partners and internalized negative feelings (*e.g.*, embarrassment, fear, shame, depression, guilt, and isolation), LGBTQ+ victims face unique barriers to assistance. *See* Taylor N.T. Brown & Jody Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research*, Williams Inst. 17 (Nov. 2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/

Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf. A 2010 study revealed that 94% of 648 respondents, including domestic violence agencies, sexual assault centers, prosecutors' offices, law enforcement agencies, and child victim services, responded that they were not serving victims of same-sex intimate-partner violence at all. Waters, *supra*, at 13. Indeed, Chapter 50B's discriminatory exclusion of LGBTQ+ victims has deleterious effects far beyond the issuance (or denial) of a DVPO.

First, state statutes embed discrimination against victims of same-sex domestic violence into the North Carolina judicial system. *See* Pertnoy, *supra*, at 563. The root of this discrimination is Chapter 50B's failure to protect victims of same-sex dating violence.

For example, certain crimes carry harsher punishments if committed by someone subject to a Chapter 50B DVPO. *See, e.g.*, N.C. Gen. Stat § 14-269.8 (making possession of a firearm in violation of a protective order a Class H felony only when in violation of a Chapter 50B DVPO); N.C. Gen. Stat § 50B-4.1(d) (elevating any felony committed in violation of a Chapter 50B DVPO by one class). Other crimes rely on Chapter 50B's discriminatory definition of "personal relationship" to determine the severity of the offense. *See, e.g.*, N.C. Gen. Stat § 14-33(d) (relying on Chapter 50B definition to determine whether an assault in the presence of a minor is a Class 2 misdemeanor or aggravated to a Class A1 misdemeanor). Additionally, the current Victim's Rights Act

provides rights to victims of certain crimes who are in a Chapter 50B "personal relationship," thereby excluding victims of same-sex dating violence. *See* N.C. Gen. Stat § 15A-830(g).

Moreover, because of the disparity between victims of same-sex and opposite-sex dating violence embedded in the definition of "personal relationship" in Chapter 50B, the statutes allowing, and sometimes requiring, officers to arrest abusers without a warrant do not apply in same-sex dating violence situations. *See, e.g.*, N.C. Gen. Stat § 50B-4.1(b) (requiring officers to arrest and take into custody without a warrant anyone whom the officer has probable cause to believe has violated a Chapter 50B DVPO by entering the residence of the victim or threatening, abusing, or harassing the victim); N.C. Gen. Stat § 15A-401(b)(2) (allowing officers to arrest and take into custody without a warrant anyone whom the officer has probable cause to believe has violated a Chapter 50B DVPO or who has committed simple assault, assault with a deadly weapon or inflicting serious injury, assault on a female, and assault by pointing a gun if a Chapter 50B "personal relationship" exists).

Second, law enforcement officers have historically minimized or otherwise responded inappropriately to same-sex intimate-partner violence, due substantially to laws such as Chapter 50B that require them to discriminate against victims of same-sex intimate-partner violence. *See* Pertnoy, *supra*, at 561–62. In many circumstances, both parties, neither party,

or the wrong party will be arrested. Waters, *supra*, at 27 (reporting that 31% of LGBTQ+ victims responded that they experienced misarrest, meaning the victim, and not the abuser, was arrested); *id.* at 33 (noting that same-sex couples are at least ten times as likely to experience dual arrest). Additionally, law enforcement often minimizes the severity of same-sex intimate-partner violence. For instance, in one study, 25% of LGBTQ+ victims reported law enforcement reactions to their reports of intimate-partner violence as ranging from hostile to indifferent. Waters, *supra*, at 27. In another, 36% of service providers reported that police did not even recognize intimate-partner violence when it occurred between two people of the same sex. Waters, *supra*, at 32–33. The resultant "widespread distrust of police" leads to only about one-third of LGBTQ+ intimate-partner violence victims reporting domestic violence to law enforcement. Knauer, *supra,* at 348; Waters, *supra*, at 27.

Third, social services providers discriminate against victims of same-sex intimate-partner violence. *Id.*; Walters, Chen, & Breiding, *supra*, at 37–38. Many shelters do not serve same-sex intimate-partner violence victims—especially gay men—and it is even rarer to find a shelter that <u>specifically</u> serves that constituency. Pertnoy, *supra*, at 560. Of the LGBTQ+ victims of intimate-partner violence who seek shelter, one survey found nearly half were turned away. Waters, *supra*, at 27. Where LGBTQ+ victims are able to access services, the service providers are ill-equipped to serve them. *See* Pertnoy,

supra, at 560. According to a 2009 survey, crisis center staff wrongly consider same-sex intimate-partner violence less serious than opposite-sex intimate-partner violence. Michael J. Brown & Jennifer Groscup, *Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff*, 24 J. Fam. Violence 87, 87 (2009). As a result, most LGBTQ+ victims of intimate-partner violence are reluctant to seek shelter at all. Indeed, one survey found that only 27% of LGBTQ+ victims of intimate-partner violence even attempt to access emergency shelter. Waters, *supra*, at 27.

iii. Chapter 50B leaves victims of same-sex dating violence with fewer ways to avoid abuse.

When there is nowhere to turn, victims often return to their abusers. Waters, *supra*, at 23; Peterman & Dixon, *supra*, at 44. "It is essential that survivors of same-sex [intimate-partner violence] can receive equal access to domestic violence remedies in order to protect them from their abusive partners, deter future violence, and stop the dangerous cycle of abuse that characterizes [intimate-partner violence]." Natalie E. Serra, *Queering International Human Rights: LGBT Access to Domestic Violence Remedies*, 21 AM. U. J. GENDER SOC. POL'Y L. 583, 605 (2013). Accordingly, victims of same-sex domestic violence, regardless of their marriage or habitation status, should have access to DVPOs equal to victims of opposite-sex domestic violence.

Indeed, "an order of protection is one of the most important tools in attempting to protect a survivor from further abuse." Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of* Lawrence v. Texas *on Victims of Same-Sex Domestic Violence*, 109 PENN. ST. L. REV. 1251, 1257 (2005).

B. There is no legitimate government interest in excluding victims of same-sex dating violence from the protections of Chapter 50B.

Considering the prevalence of, and dynamics of, same-sex domestic violence, there is no legitimate government interest justifying the State's distinction between opposite-sex and same-sex dating couples when providing protections from intimate-partner violence.

The nature of the carve-out from protection suggests that it may arise from biases and prejudices held against the LGBTQ+ community. The Constitution denies the legitimacy of such a reason. *See Lawrence*, 539 U.S. at 571 (finding that governmental power may not be used to enforce views that "homosexual conduct" is immoral); *Romer*, 517 U.S. at 625–26 (rejecting the notion that it is legitimate for the government to discriminate against gay people based on biases or prejudices); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[T]he law cannot, by legislation or judicial decision, give effect to biases or prejudices without violating the Equal Protection Clause.").

Even if not rooted in bias, the distinction between North Carolina's treatment of victims of opposite-sex and same-sex domestic violence is

arbitrary, as recognized by Congress, the American Bar Association ("ABA"), the CDC, and every state other than North Carolina. To be clear, North Carolina stands alone in maintaining this form of discrimination against victims of same-sex domestic violence.

In 2015, the ABA passed a resolution urging state governments "to enact civil protection order statutes regarding domestic, intimate partner, sexual, dating, and stalking violence that extend protection to Lesbian, Gay, Bisexual, and Transgender individuals." Am. Bar Ass'n, Comm'n on Domestic Violence, Report No. 114 to the House of Delegates, https://www.americanbar.org/content/dam/aba/directories/policy/1997_my_114.authcheckdam.pdf.

The CDC likewise recommends that states pass laws explicitly protecting members of the LGBTQ+ community from intimate-partner violence. Walters, Chen, & Breiding, *supra*, at 37–38 (highlighting "the need to ensure that prevention and intervention resources be available for these groups at commensurate levels to those available for heterosexual populations").

In fact, every state but North Carolina now protects victims of same-sex and opposite-sex domestic violence equally. Notably, in 2017, South Carolina's Supreme Court addressed a statute similar to the one before this Court and found it unconstitutional as applied. Until that decision, South Carolina

allowed only victims of domestic violence who were married or formerly married to their abuser, who had a child in common with their abuser, or who lived with or formerly lived with their opposite-sex abuser to obtain a domestic violence Order of Protection. *Doe*, 421 S.C. at 507. The South Carolina Supreme Court found this statute unconstitutional as applied to the petitioner, a victim of same-sex domestic violence who lived with (but was not married to and had not had a child with) their abuser, because such disparate treatment could "not even satisfy the rational basis test." *Id.* at 505. The court specifically found that the exclusion of victims like the petitioner "(1) bears no relation to the legislative purpose of the Acts; (2) treats same-sex couples who live together or have lived together differently than all other couples; and (3) lacks a rational reason to justify this disparate treatment." *Id.*

Finally, recent iterations of the Violence Against Women Act strengthen federal protections for victims of same-sex domestic violence. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (explicitly naming LGBTQ+ people as an underserved population, allowing organizations serving such victims to receive specific federal grant funding; prohibiting grant recipients from turning away LGBTQ+ victims on the basis of their sexual orientation or gender identity).

In short, the overwhelming national trend is to address the irrationality of distinguishing between victims of opposite-sex and same-sex domestic violence. It is time for North Carolina to do the same.

The arbitrariness of excluding victims of same-sex dating violence from Chapter 50B protections is magnified when placed next to other North Carolina statutes designed to protect victims of domestic violence. For instance, in the criminal context, judges setting the abuser's conditions of pretrial release are able to protect victims of same-sex dating violence like all other victims of domestic violence, for example, by setting stay-away conditions or detaining the abuser if immediate release would pose a danger to the victim. *See* N.C. Gen. Stat. § 15A-534.1(a) (allowing up to a 48-hour hold during which a magistrate may set no bond for a defendant, requiring only a judge to set pretrial release conditions, and allowing certain pretrial release conditions if the defendant is charged with a crime against "a spouse or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship," regardless of the genders in the dating relationship). Likewise, a rebuttable presumption exists that a murder was a willful, deliberate, and premeditated killing if the victim was in any Chapter 50B personal relationship, including a dating relationship, with the murderer, regardless of the orientation of the couple,

and the murderer had a prior domestic violence conviction. *See* N.C. Gen. Stat. § 14-17(a1).

North Carolina's decision to protect victims of same-sex dating violence in these circumstances while denying them protection under Chapter 50B is arbitrary and unconstitutional.

CONCLUSION

Domestic violence permeates intimate relationships regardless of marital or cohabitation status, sexual orientation, or familial relationship. Discriminating against victims of same-sex dating violence unconstitutionally denies them due process and equal protection of the laws and cannot stand. Therefore, N.C. Gen. Stat. § 50B-1(b)(6) is unconstitutional as applied to M.E. and similarly situated victims of same-sex dating violence.

Respectfully submitted, this the 7th day of January, 2019.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for *Amici Curiae* certifies that the foregoing brief, which is prepared using a proportionally-spaced font, is less than 3,750 words (excluding cover, captions, indexes, tables of authorities, certificates of service, this certificate of compliance, counsel's signature block, and appendixes) as reported by the word-processing software used to prepare this brief.

/s/ Sarah M. Saint
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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **Brief of *Amici Curiae*** via United States mail, postage prepaid, addressed to the following parties:

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