No. COA 18-1045 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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M.E.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	From Wake County
	)	10th Judicial District
T.J.,	)	Case No: 18CVD600773
	)	
Defendant-Appellee.	)	
	)	
	)	

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PLAINTIFF-APPELLANT'S BRIEF

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PLAINTIFF-APPELLANT'S BRIEF

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ISSUE PRESENTED

Did the trial court's application of Chapter 50B of the North Carolina General Statutes to deny Plaintiff-Appellant's Motion for a Domestic Violence Protective Order because the parties were in a same-sex dating relationship deprive Plaintiff-Appellant of the constitutional guarantees of equal protection and due process under the law?

INTRODUCTION

As applied to M.E. and those similarly situated, Chapter 50B discriminates on the basis of sexual orientation and sex. This discrimination

cannot survive the appropriate heightened scrutiny review. Indeed, there is not even a rational basis for the peerless exclusion at issue as it arbitrarily undermines the legislative purpose of effectively protecting survivors of domestic violence. When applied here, Chapter 50B's "of the opposite sex" language re-victimizes survivors like M.E. The constitutional guarantees of equal protection and due process demand more for North Carolinians.

STATEMENT OF THE CASE

On 31 May 2018, Plaintiff-Appellant M.E. filed a Complaint and Motion for Domestic Violence Protective Order (DVPO) pursuant to Chapter 50B of the North Carolina General Statutes against Defendant-Appellee T.J. in Wake County District Court.

In an ex parte proceeding that same day, Judge Margaret Eagles denied M.E.'s request for a DVPO. (R p 12). Judge Eagles also ordered a hearing on M.E.'s motion for emergency relief under the DVPO statute. (R p 12).

With Judge Anna Worley presiding, M.E. renewed her request for a DVPO on 7 June 2018. (R pp 16-24). Judge Worley also denied M.E.'s request for a DVPO. (R p 18).

M.E. timely appealed the 7 June 2018 denial of emergency relief. (R pp 27-28). The Proposed Record on Appeal was timely served 28 August 2018, (R p 39), and settled on 27 September 2018 due to T.J.'s failure to respond. (R p

40). The Record on Appeal was filed 11 October 2018 and docketed 22 October 2018. (R p 1).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

M.E. appeals pursuant to North Carolina General Statute section 7A-27(b) from a final judgment entered against her in Wake County District Court on 7 June 2018.

STATEMENT OF THE FACTS

Statutory Background

Chapter 50B defines domestic violence as "[a]ttempting to cause bodily injury, or intentionally causing bodily injury; or . . . [p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment"; or committing one of many enumerated criminal sex offenses. N.C. Gen. Stat. § 50B-1(a). "If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." § 50B-3(a). Such an order, known as a DVPO, may provide the following relief to a domestic violence survivor:

- "Order[ing] a party to refrain from . . . [t]hreatening, abusing, or following the other party[;] [h]arassing the other party, including by telephone, visiting the home or workplace, or other means." § 50B-3(a)(9)(a-b).
- "Prohibit[ing] a party from purchasing a firearm[.]" § 50B-3(a)(11).

- "Order[ing] the defendant to surrender . . . all firearms." § 50B-3.1(a).

An order entered pursuant to Chapter 50B "shall be for a fixed period of time not to exceed one year[,]" though a court "may renew a protective order for a fixed period of time not to exceed two years[.]" § 50B-3(b).

A DVPO, however, is only available where a statutorily defined "personal relationship" exists. § 50B-1(a)-(b). Qualifying relationships include "current or former spouses[,]" "persons of opposite sex who live together or have lived together[,]" persons "related as parents and children . . . or as grandparents and grandchildren[,]" persons with "a child in common[,]" "current or former household members[,]" and "***persons of the opposite sex*** who are in a dating relationship or have been in a dating relationship." § 50B-1(b) (emphasis added). Thus, while North Carolinians in opposite-sex intimate relationships can access DVPOs when necessary, *id.*, this is not true for all North Carolinians in same-sex intimate relationships. *Compare* § 50B-1(b)(1) (allowing current and former same-sex spouses to access DVPOs), *with* § 50B-1(b) (excluding individuals in same-sex dating relationships from DVPO protections when they never married, lived with, or had a child with their abuser).

The protections offered by Chapter 50B outstrip those of Chapter 50C, which allows a party to seek a No-Contact Order for Stalking or Nonconsensual

Sexual Conduct (No-Contact Order). As noted above, in entering a DVPO a court may prohibit a defendant from purchasing a firearm, § 50B-3(a)(11), and require the surrender of the defendant's firearms. § 50B-3.1(a). A No-Contact Order granted under Chapter 50C has no similar protections. *See* § 50C.

Factual Background

M.E. and T.J. were in a same-sex dating relationship. (R pp 3, 14). They never married, had children, or lived together. (R pp 12, 24).

On 29 May 2018, M.E. told T.J. that she wished to end their relationship. (R p 3). T.J. responded by becoming physically aggressive, including screaming in M.E.'s face, and threatening physical violence against M.E. (R pp 3, 7, 14).

M.E. locked T.J. out of her house and called 911. (R p 3). Police responded to this call, (R p 3), but since T.J. appeared to be gone, the officer left. (R p 7). In fact, T.J. was hiding in M.E.'s backyard. (R p 3). After the police left, M.E. went outside to close her gate, and T.J. chased M.E. and attempted to force her way into the house. (R p 7). M.E. called 911 again, and police removed T.J. from the scene. (R p 3, 7). Nonetheless, T.J. did "not stop[] attempting to contact" M.E, (R p 3), including going by her home and friends' residences. (R p 7).

On 31 May 2018, M.E. filed a Complaint and Motion for DVPO in Wake County District Court, recounting the harassment she endured. (R pp 3-5). She sought an emergency Ex Parte Order. (R p 4). M.E. stated that T.J. posed a serious and immediate threat of injury to her, (R p 3), noting T.J. "has access

to her fathers (sic) guns" and that they were co-workers. (R p 8). She sought to bar T.J. from contact with her and from possessing or purchasing a firearm. (R p 5). When it became plain that M.E. could not obtain an Ex Parte DVPO pursuant to Chapter 50B, (R pp 9-13), she sought and obtained an Ex Parte Temporary No-Contact Order pursuant to Chapter 50C. (R pp. 7-8, 14-15).

This process repeated itself when M.E. returned to court seeking longer-term protection on 7 June 2018, in a hearing T.J. also attended. (R pp 17-26). M.E. again sought a DVPO pursuant to Chapter 50B and was denied. (R pp 17-24). The parties then agreed to extend the Chapter 50C No-Contact Order, (T pp 9-11), for one year. (R pp 25-26).

In their findings of fact, both Judge Eagles and Judge Worley deemed M.E.'s complaint credible and adopted its factual recitation. (R pp 14, 25). Judge Eagles found the "[p]arties are in a same sex relationship and do not live together" and that "is [the] only reason [M.E. is] not receiving a 50B DVPO today." (R p 14). Judge Worley found that the facts "would have supported the entry of a Domestic Violence Protective Order . . . had the parties been of opposite genders[.]" (R p 18).

Both, however, denied M.E. a DVPO because she was not "the opposite sex" of her abuser. § 50B-1(b)(6). Judge Eagles concluded that "the plaintiff has failed to prove grounds for ex parte relief" because the parties do not have a statutorily recognized relationship. (R p 12). Judge Worley acknowledged

M.E.'s argument through her counsel that her exclusion from Chapter 50B's protections was unconstitutional. (R p 23). Nonetheless, Judge Worley concluded M.E. "has failed to prove grounds for issuance of a domestic violence protective order as [M.E.] does not have a [statutorily recognized] 'personal relationship' with [T.J.]." (R p 24). Judge Worley's conclusions of law did not substantively address M.E.'s constitutional challenge. (R pp 23-24).

Both trial court proceedings found "the plaintiff has suffered unlawful conduct by the defendant[.]" (R pp 14, 25). These findings were the basis for Judge Eagles entering a Temporary No-Contact Order pursuant to Chapter 50C, (R pp 14-15), and Judge Worley extending it for a year. (R pp 25-26). The order entered by Judge Worley particularly noted that T.J.'s conduct had "terrified" M.E. and "caused [her] to suffer substantial emotional distress by placing her in fear of bodily injury and continued torment[.]" (R p 25). Judge Worley, counsel for M.E., and T.J. signed this order and agreed to its findings. (R p 26); (T pp 9-11).

STANDARD OF REVIEW

In a bench trial "on a motion for a DVPO, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Thomas v. Williams*, 242 N.C. App. 236, 238, 773 S.E. 2d 900, 902 (2015) (citation omitted). "Where there is competent evidence to support the trial

court's findings of fact, those findings are binding on appeal." *Id.* "[I]ts conclusions of law, however, are reviewable *de novo*." *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 452, 325 S.E.2d 493, 495 (1985).

ARGUMENT

This is a case of textbook unconstitutional discrimination. There is no disputing the trial court's findings of fact that if M.E. had been dating a man under these circumstances, she would have received a DVPO. (R pp 14, 18). Instead, based solely on who she is, M.E. was excluded from the protection of Chapter 50B and had to settle for the inferior protections from violence and harassment offered by Chapter 50C. *Supra* Statutory Background. The question for this Court is whether the trial court properly concluded Chapter 50B could exclude M.E. and those similarly situated consistent with constitutional guarantees of equal protection and due process under the law.[1]

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[1] This is an as-applied challenge to Chapter 50B-1(b)(6) as it "protests against how a statute was applied in the particular context in which plaintiff acted[.]" *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted). "Because there are numerous valid applications" of this provision "it is not invalid *in toto*[,]" and thus this is not a facial challenge. *Doe v. State*, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017) (internal quotation marks omitted); *see also Beech Mountain*, 247 N.C. App. at 460, 786 S.E.2d at 347 ("[A] facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context.") (citation omitted). This is consistent with how courts have treated other challenges to inequitable treatment of individuals in same-sex relationships. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (holding state same-sex marriage bans "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex

The answer is clear: our state and federal constitutions[2] "neither know[] nor tolerate[] classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Denying M.E. the crucial protections of Chapter 50B because of who she is violates the constitutional guarantees of equal protection and due process under the law.

Specifically, this inequitable treatment constitutes impermissible discrimination on the basis of sexual orientation and sex. Such discrimination triggers heightened scrutiny under the governing equal protection jurisprudence, and the denial of M.E.'s motion for a DVPO cannot withstand

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couples"); *id.* at 2597 (noting similar scope of Defense of Marriage Act invalidation in *United States v. Windsor*, 570 U.S. 744 (2013)); *Doe*, 421 S.C. at 504, 808 S.E.2d at 814 (deeming challenge to an exclusion similar to the one at issue here as-applied).

[2] Both the state and federal constitutions safeguard the right to equal protection and due process under the law of the land. Article I, section 19 of the North Carolina Constitution prohibits the State from denying any person "the equal protection of the law," as does the Fourteenth Amendment to the United States Constitution. *See White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983) (noting parallel nature of state and federal equal protection guarantees). Similarly, the "law of the land" clause of Article I, section 19 of the North Carolina Constitution is akin to the Fourteenth Amendment's guarantee of an individual's right to due process under the law. *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 137, 757 S.E.2d 302, 304 (2014). But though these rights are parallel, the federal constitution provides only a "floor[,]" as state constitutions "frequently give citizens . . . basic rights in addition to those guaranteed by the United States Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998); *see also Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.").

this heightened scrutiny. Indeed, excluding M.E. and similarly situated individuals from the full protections of Chapter 50B fails any standard of judicial review. Relatedly, the guarantee of due process under the law does not permit the state to arbitrarily infringe upon a person's autonomy because they are a member of the lesbian, gay, bisexual, transgender, queer, or other sexual and gender minority ("LGBTQ+") community. Given the "interlocking nature of [the equal protection and due process] constitutional safeguards" here, the decision below cannot stand. *Obergefell*, 135 S. Ct. at 2604.

The trial court appropriately found that M.E. had suffered fear of bodily harm and torment sufficient to obtain a DVPO. The trial court erred as a matter of law in concluding that M.E. was barred from receiving the protections of Chapter 50B solely on account of her sexual orientation and sex. This Court reverses conclusions of law that deviate from the competently found facts. *See Brandon v. Brandon*, 132 N.C. App. 646, 655, 513 S.E.2d 589, 595 (1999) (reversing trial court issuance of DVPO because factual findings did not support conclusion of statutory violation).

I. THE TRIAL COURT'S APPLICATION OF CHAPTER 50B TO DENY M.E.'S MOTION FOR A DVPO CONSTITUTES IMPERMISSIBLE DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND SEX IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION UNDER THE LAW.

"No person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19. The concept is simple: "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. When a statute classifies in a suspect fashion, however, this "general rule gives way," and courts are required to apply a heightened level of scrutiny. *Id.*

Applying Chapter 50B to exclude M.E. from its protections involved two distinct, but related, suspect classifications. First, M.E. was denied a DVPO because of her sexual orientation. (R p 14) ("Parties are in a same sex relationship and do not live together" and that "is [the] only reason [M.E.] is not receiving 50B DVPO today."); (R p 18) (applying Chapter 50B to excluding "dating partners of the same sex"); *see also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). "[H]eightened scrutiny [must] be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *see also Malecek v. Williams*, 804 S.E.2d 592, 596 (N.C. Ct. App. 2017) (noting, in a case unrelated to LGBTQ+ rights, that "[l]aws that demean individuals because of lingering prejudices or moral disapproval" are subject to heightened scrutiny). Second,

M.E. was denied the protections of Chapter 50B because she had been in a romantic relationship with another woman. (R p 18) ("[H]ad the parties been of opposite genders, [these] facts would have supported the entry of a Domestic Violence Protective Order[.]"). This constitutes "gender-based discrimination[,]" which is "presumptively unconstitutional." *Dunn v. Pate*, 334 N.C. 115, 116, 431 S.E.2d 178, 179 (1993).

The statute as applied below cannot survive the requisite heightened scrutiny. In fact, its application here is unconstitutional under even the most deferential scrutiny. Excluding M.E. and similarly situated members of the LGBTQ+ community from protections against domestic violence bears no relationship to any legitimate governmental interest, let alone an important government interest. *See Doe*, 421 S.C. at 508, 808 S.E.2d at 816 (reversing trial court summary denial of domestic violence Order of Protection on statutory jurisdictional grounds and holding that "there is no reasonable basis . . . to support a[n] [eligibility] definition that results in disparate treatment of same-sex couples" in invalidating similar exclusion in South Carolina law).

The trial court erred as a matter of law in failing to apply heightened scrutiny to and upholding M.E.'s exclusion from the protections of Chapter 50B. (R pp. 23-24).

A. Heightened scrutiny is required because M.E. was denied a DVPO on the basis of sexual orientation and sex.

1. M.E. was denied a DVPO on the basis of her sexual orientation, which triggers heightened scrutiny.

Some classifications "are so seldom relevant to the achievement of any legitimate state interest" that their use triggers searching judicial review. *Cleburne*, 473 U.S. at 440. Sexual orientation is one such classification. *See Pavan v. Smith*, 137 S. Ct. 2075 (2017) (invalidating Arkansas birth certificate regime to extent it discriminates against same-sex female spouses); *Obergefell*, 135 S. Ct. at 2584 (invalidating state constitutional provisions to extent they bar same-sex marriages); *Windsor*, 570 U.S. 744 (invalidating federal refusal to recognize same-sex marriages); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas law criminalizing sodomy between consenting same-sex adults); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado constitutional amendment preventing protections for gay and bisexual community). *Romer*, *Lawrence*, *Windsor*, *Obergefell*, and *Pavan* form a robust body of law that repudiates the notion that discrimination based on sexual orientation is presumptively legitimate.

Sexual orientation bears all the indicia of a suspect class. *See Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion). In determining whether a class is suspect, courts have examined whether the class has experienced a history of discrimination, whether the defining characteristic of the class bears any relation to the class's ability to contribute to society,

whether any distinguishing characteristic defines the group, and whether the group has sufficient political power to protect itself from the majority. As several state courts, three federal appeals courts, and numerous federal district courts have recognized, consideration of these factors reveals that heightened scrutiny should apply to government classifications on the basis of sexual orientation. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 654-55, 671 (7th Cir. 2014), *SmithKline*, 740 F.3d at 480-86, *Windsor v. United States*, 699 F.3d 169, 181-85 (2nd Cir. 2012), *aff'd*, 570 U.S. 744 (2013), *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-91 (N.D. Cal. 2012), *In re Marriage Cases*, 43 Cal. 4th 757, 840-45, 183 P.3d 384, 441-44 (2008); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 174-228, 957 A.2d 407, 431-61 (2008); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013).

a. M.E. and gay individuals in general have suffered a long history of discrimination.

"[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]" *Baskin*, 766 F.3d at 658. "For much of the 20th century . . . homosexuality was treated as an illness." *Obergefell*, 135 S. Ct. at 2596. And, until recently, "[g]ays and

lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by the police, and burdened in their rights to associate." *Id*.

Unfortunately, this history is not past in North Carolina. Our state adopted a constitutional amendment banning same-sex marriage in 2012. Anne Blythe, *US Supreme Court Affirms Right to Same-Sex Marriage, Resolving Status of NC Marriages*, News & Observer, June 26, 2015, https://www.newsobserver.com/news/politics-government/state-politics/article25562428.html; *cf. Obergefell*, 135 S. Ct. at 2602 (invalidating state same-sex marriage bars as "impos[ing] stigma and injury of the kind prohibited by our basic charter"). In 2016, North Carolina adopted the infamous HB2 legislation, which, among other provisions, preempted the LGBTQ+ community from seeking local anti-discrimination protections. HB 2, 2016 N.C. Sess. Laws 3, ss. 3.1, 3.3; *cf. Romer*, 517 U.S. at 624-25 (invalidating state preemption of local protections for gay and bisexual community). Its replacement legislation, HB142, kept this preemption in place. HB 142, 2017 N.C. Sess. Laws 4, s. 3; *cf. Carcaño v. Cooper*, No. 1:16cv236, 2018 WL 4717897, at *22 (M.D.N.C. Sept. 30, 2018) ("Plaintiffs have plausibly [pled] both discriminatory intent and lack of a rational basis for [the preemption provision.]"). Finally, North Carolina is the only state that restricts access to domestic violence protections on the basis of sexual orientation. *See* Am. Bar Ass'n, *Domestic Violence Civil Protection*

Orders (CPOs), (2014) (noting only North Carolina, South Carolina, and Louisiana as outliers); Act No. 79, 2017 La. Sess. Law Serv. Act 79 (H.B. 27) (West) (eliminating Louisiana statutory requirement that a victim be "the opposite sex" of an abuser); *Doe*, 421 S.C. at 508, 808 S.E.2d at 816 (holding unconstitutional South Carolina domestic violence statute as applied to and "result[ing] in disparate treatment of same-sex couples").

b. M.E.'s sexual orientation has no relation to her ability to contribute to society.

"There are some distinguishing characteristics . . . that may arguably inhibit an individual's ability to contribute to society[.]" *Windsor*, 699 F.3d at 182. "Intellect, for example, has . . . a direct and substantial bearing on qualifications for certain types of employment . . . and there may be no reason to be particularly suspicious of a statute that classifies on that basis." *Baskin*, 766 F.3d at 655.

"But homosexuality is not one of them[;] [t]he aversion homosexuals experience has nothing to do with aptitude or performance." *Windsor*, 699 F.3d at 182-83. Applying Chapter 50B to exclude M.E. and those similarly situated "bears no relation to ability to perform or contribute to society[,]" and warrants judicial suspicion. *Frontiero*, 411 U.S. at 686 (plurality opinion).

c. M.E.'s sexual orientation is a distinguishing characteristic defining her as a member of a discrete minority group.

In determining whether a classification warrants heightened scrutiny, courts have also considered whether laws discriminate on the basis of "obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group." *Lyng v. Castillo*, 477 U.S. 635, 639 (1986).

"[P]sychiatrists and others recognized . . . in . . . recent years . . . that sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell*, 135 S. Ct. at 2592. Moreover, as M.E.'s inability to obtain a DVPO makes plain, there is no doubt that sexual orientation is a distinguishing characteristic that "invites discrimination when it is manifest." *Windsor*, 699 F.3d at 184.

d. M.E. and gay individuals in general cannot adequately protect themselves through the political process.

The final factor courts have considered is whether the classified group lacks political power to protect itself from discrimination. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting "searching judicial inquiry" where "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). "[G]ay persons clearly comprise a distinct minority of the population[,]" *Kerrigan*, 289 Conn. at 189, 957 A.2d at 440, and "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185.

For example, between 1998 and North Carolina's 2012 adoption of Amendment One, ballot measures amending state constitutions to prohibit same-sex marriages passed in 30 states. Nat'l Conference of State Legislatures, *Same-Sex Marriage Laws*, June 26, 2015, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx. This repeated use of majoritarian "direct democracy" to disadvantage a single minority group is extraordinary in our nation's history. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-60 (1997).

"The question is not whether homosexuals have achieved political successes over the years; they clearly have." *Windsor*, 699 F.3d at 184. Absolute political powerlessness, however, is not a prerequisite for the application of heightened scrutiny. Were it so, *Frontiero* would not have applied such scrutiny to classifications based on sex in 1973. 411 U.S. at 688 (plurality). By that point, Congress had already passed the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 to protect women from discrimination in the workplace. *Id.* at 687-88. North Carolina, on the other hand, recently blocked even local communities from adopting anti-discrimination protections for the LGBTQ+ community. *See supra* Part I.A.1.a. As political power has been defined for purposes of heightened scrutiny analysis, gay North Carolinians do not have it.

* * * * * * *

In short, as courts across the country have long concluded, sexual orientation classifications demand heightened scrutiny under all four considerations used to identify suspicious classifications. That the U.S. Supreme Court has consistently looked askance at such classifications for more than two decades only confirms that heightened scrutiny is appropriate for laws that discriminate against the LGBTQ+ community. In failing to apply heightened scrutiny to M.E.'s exclusion from the protections of Chapter 50B, the trial court erred as a matter of law.

2. M.E. was denied a DVPO on the basis of sex, which independently triggers heightened scrutiny.

The denial of M.E.'s DVPO motion was not just sexual orientation discrimination; it was also sex discrimination, in part because "sexual orientation [discrimination] is a form of sex discrimination." *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc).[3] Specifically, the application of Chapter 50B here was (a) a sex classification *per se*, (b) a sex classification regarding association, and (c) a form of sex stereotyping. It is

[3] What constitutes impermissible sex discrimination per the constitutional guarantee of equal protection is informed by Title VII case law, which prohibits sex discrimination in employment. "Constitutional cases . . . can provide helpful guidance in the statutory context of Title VII[,]" and vice versa. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2nd Cir. 2018) (en banc) (internal quotation marks omitted); *see also Bator v. State of Hawai'i*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994) ("[C]ase law on equal protection tracks case law on Title VII.").

black-letter constitutional law that "all gender based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotations omitted); *see also Dep't of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) ("[G]ender . . . classifications trigger intermediate scrutiny[.]").[4] Thus, as applied to M.E. and similarly situated individuals, Chapter 50B warrants heightened scrutiny.

a. The denial of M.E.'s motion for a DVPO was *per se* sex discrimination.

Excluding individuals in same-sex dating relationships from domestic violence protections is "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345. The "simple test" is "whether the evidence shows treatment of a person in a manner which *but for* that person's sex would be different." *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted). For example, "a woman . . . subject to . . . adverse . . . action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." *Zarda*, 883 F.3d at 119 (plurality opinion).

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[4] Classifications based on sex are subject to heightened scrutiny even if they give no preference to women or men. *Latta v. Otter*, 771 F.3d 456, 482-84 (9th Cir. 2014) (Berzon, J., concurring) (collecting cases). Such classifications nevertheless restrict the rights of both women and men based on sex. *Id.*

Courts have relied upon this "but-for" approach to identify sex discrimination in different contexts for generations. The *Manhart* Court held that requiring women to contribute more than men to a pension fund based on life expectancy constituted sex discrimination. 435 U.S. at 711. In *Price Waterhouse*, the Court "asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup 'if she had been a man.'" *Zarda*, 883 F.3d at 117 (plurality opinion) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion)). As courts recognized in cases challenging same-sex marriage bans, those bans discriminated on the basis of sex by declaring that "[o]nly women may marry men, and only men may marry women." *Latta*, 771 F.3d at 480 (Berzon, J., concurring); *see also Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286-87 (E.D. Ark. 2014); *Rosenhrahn v. Daugaard*, 61 F. Supp. 3d 845, 859-60 (D.S.D. 2014); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206-07 (D. Utah 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); *Baehr v. Lewin*, 74 Haw. 530, 572, 852 P.2d 44, 64 (1993); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 345-347, 798 N.E.2d 941, 971-72 (2003) (Greaney, J., concurring); *Baker v. State*, 170 Vt. 194, 251-62, 744 A.2d 864, 904-12 (1999) (Johnson, J., concurring in part and dissenting in part). Likewise, Title VII's prohibition on sex discrimination in employment has been held to encompass sexual

orientation discrimination. *See, e.g*, *Zarda*, 883 F.3d at 132; *Hively*, 853 F.3d at 351-52; *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *5-*8 (July 15, 2015).

"[H]olding all other things constant and changing only her sex," *Hively* 853 F.3d at 345, would have resulted in M.E. obtaining a DVPO from the trial court. Judge Eagles found the fact that "the parties are in a same sex relationship and do not live together" was the "only reason plaintiff [is] not receiving a 50B DVPO[.]" (R p 14). "[H]ad the parties been of opposite genders, [these] facts would have supported the entry of a Domestic Violence Protective Order[,]" according to Judge Worley. (R p 18). M.E.'s inability to obtain the protection she needs is therefore quintessential sex discrimination. However, the trial court did not apply the proper heightened scrutiny to assess M.E.'s exclusion. (R pp 23-24).

b. The denial of M.E.'s motion for a DVPO was associational discrimination based on the sex of her romantic partner.

The exclusion of M.E. and those similarly situated also represents sex discrimination on associational grounds.

The foundational case on this form of discrimination is *Loving v. Virginia*, 388 U.S. 1 (1967). Virginia argued its interracial marriage ban had not deprived the Lovings of equal protection by highlighting it "punish[ed] equally both the white and the Negro participants in an interracial

marriage[.]" *Id.* at 8. But "the fact of equal application [did] not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment. *Id.* at 9. Instead, because "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race[,]" *id.* at 11, they "violate[d] the central meaning of the Equal Protection Clause." *Id.* at 12. It is now commonly accepted that disparate treatment based on the race of a person with whom an individual associates is a form of race discrimination. *See, e.g.*, *State v. Brown*, 202 N.C. App. 499, 506-08, 689 S.E.2d 210, 214-16 (2010) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race.") (quoting *Holcomb v. Iona College,* 521 F.3d 130, 139 (2d Cir. 2008)).

More generally, "[i]t is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." *Hively*, 853 F.3d at 347. Thus, the logic that resulted in "the prohibition on associational discrimination" on the basis of race "applies with equal force" to similar discrimination on the basis of sex. *Zarda*, 883 F.3d at 125; *see also Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion) (noting "principles announced" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin[,]" and vice versa).

Just as "[c]hanging the race of one partner made a difference in determining the legality of the conduct" in *Loving*, "chang[ing] the sex of one partner in a lesbian relationship" changes the outcome here too. *Hively*, 853 F.3d at 348-49. Had M.E. associated romantically with a man who had terrorized her in precisely the same fashion as T.J. did, the trial court found she would receive a DVPO. (R pp 14, 18). Yet, despite finding Chapter 50B resulted in associational sex discrimination here, the trial court conducted no meaningful constitutional scrutiny of this outcome. (R pp 23-24).

c. The denial of M.E.'s motion for a DVPO was a form of sex stereotyping.

Chapter 50B as applied to M.E. and those similarly situated also discriminates on the basis of sex by relying upon stereotypes. "[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause[.]" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). Judicial skepticism "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart*, 435 U.S. at 707 n.13. This zero-tolerance policy accords with the now well-settled constitutional notion that "nobody should be forced into a predetermined role on account of sex[.]" Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 1 (1975).

"[S]exual orientation discrimination is almost invariably rooted in stereotypes about men and women." *Zarda*, 883 F.3d at 119 (plurality opinion). Gay, lesbian, and bisexual people are targeted by sex stereotyping because they "fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men." *Hively*, 853 F.3d at 342; *see also EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("The gender stereotype at work here is that 'real' men should date women and not other men."). At bottom, any negative reaction "based on the fact that the complainant . . . dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Hively*, 853 F.3d at 347.

The inquiry here is whether M.E. suffered adverse consequences "on the basis of a belief that a woman cannot . . . or . . . must not" possess certain traits. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). M.E.'s same-sex relationship with T.J. transgressed the ultimate sex stereotype that "women should form intimate relationships only with men." *Hively*, 853 F.3d at 342. It is undisputed that this transgression resulted in M.E. not obtaining the most

robust protections against domestic violence. Yet this manifestation of sex discrimination did not inform the trial court's conclusions of law. (R pp 23-24).

* * * * * * *

In sum, applying Chapter 50B to prevent M.E. and those similarly situated from obtaining a DVPO constitutes *per se* sex discrimination, associational sex discrimination, and sex discrimination by stereotype. Based on its findings, it was incumbent that the trial court apply heightened scrutiny here. Failure to apply the proper legal standard constitutes reversible error.

B. Applying Chapter 50B to deny M.E.'s motion for a DVPO cannot withstand heightened scrutiny, or even rational basis review, because the denial is arbitrary and purposeless.

Having established that heightened scrutiny is applicable, the burden rests with T.J. to demonstrate an "exceedingly persuasive justification" for Chapter 50B's disparate treatment of M.E. *Virginia*, 518 U.S. at 531; *see also Dunn*, 334 N.C. at 121, 431 S.E.2d at 182 (noting such discrimination is "presumptively unconstitutional"). This requires showing "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524 (internal quotation marks omitted). The justifications offered must find "footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Hypothesized or *post hoc* justifications created in response to litigation are insufficient.

Virginia, 518 U.S. at 533. Nor may the justification be based on "lingering prejudices[,] moral disapproval[,]" *Malecek*, 804 S.E.2d at 596, a "desire to harm a politically unpopular group[,]" *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), or "overbroad generalizations" about sex. *Virginia*, 518 U.S. at 533.

Chapter 50B fails to satisfy heightened scrutiny when applied to exclude M.E. and those similarly situated from its protections. There is not even a rational basis for excluding the impacted community from Chapter 50B's protections, let alone an important government objective. Such an exclusion, in fact, runs contrary to the goals of the statutory regime. Further, such disparate treatment calls for skepticism of any proffered justification. Denying M.E. a DVPO under these facts lacks any legitimate justification and, as such, constitutes an impermissible deprivation of equal protection.

The legislative purpose of Chapter 50B is to "immediately and effectively protect[] victims of domestic violence[.]" *State v. Poole*, 228 N.C. App. 248, 264, 745 S.E.2d 26, 37 (2013). The breadth of protection offered by DVPOs indicate that "the General Assembly sought to maximize the protection afforded to victims of domestic violence from their abusers." *State v. Williams*, 247 N.C. App. 239, 243, 784 S.E.2d 232, 234 (2016). For example, permitting a survivor to seek to have his or her abuser's access to firearms limited at an *ex parte* proceeding underlines that "[t]he State's interest is not simply in protecting victims of domestic violence generally, but *effectively* protecting them at the

point that the prosecuting witness first confronts her abuser through legal means." *Poole*, 228 N.C. App. at 264, 765 S.E.2d at 37. This interest is "undeniably valid and important." *Id.*

Applying Chapter 50B to exclude M.E. and those similarly situated from its protections bears no relationship to these important governmental objectives; in fact, "[i]t makes an arbitrary and irrational distinction unrelated to the purposes of the statute." *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 448, 253 S.E.2d 473, 484 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980). After T.J. placed M.E. "in fear of bodily injury" by becoming "physically aggressive[,] screaming in [her] face[,]" refusing to leave M.E.'s house, and, after briefly hiding in M.E.'s back yard when law enforcement were called, attempting to force her way back into the house, (R p 25), M.E. sought to "immediately and effectively protect[]" herself. *Poole*, 228 N.C. App. at 264, 765 S.E.2d at 37. To do so she sought a DVPO, which could have provided relief including limiting her abuser's "access to [her] fathers [sic] gun collection[.]" (R p 4). Both trial court judges found that "[t]he defendant committed acts of unlawful conduct against the plaintiff." (R pp 14, 25). And both agreed that "had the parties been of opposite genders . . . [these] facts would have supported the entry of a Domestic Violence Protective Order." (R pp 18, 14). Yet M.E. was consigned to obtaining a Chapter 50C No-Contact Order, which offers no mechanism comparable to Chapter 50B's firearm

restrictions. *See supra* Statutory Background. Far from "maximiz[ing] the protection afforded to victims of domestic violence from their abusers[,]" *Williams*, 247 N.C. App. at 243, 784 S.E.2d at 234, relegating M.E. undermined this legislative goal.

More broadly, "research shows that individuals within same-sex couples experience a similar degree of domestic violence as those in opposite-sex couples." *Doe*, 421 S. Ct. at 506, 808 S.E.2d at 815; *see also* Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence & Sexual Abuse Against LGBT People – A Review of Existing Research*, The Williams Institute, University of California-Los Angeles, Nov. 2015, at 2 [hereinafter *Intimate Partner Violence*] ("[L]ifetime prevalence of [domestic/intimate partner violence] among lesbian and bisexual women, gay and bisexual men and transgender people . . . is as high or higher than the U.S. general population."); Christina Samons, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government*, 22 S. Cal. Rev. L. & Soc. Just. 417, 430-35 (2013) (recognizing recent reform to criminal and family laws for domestic violence involving same-sex couples at the federal level and identifying need for similar reform at state level); Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 St. Thomas L. Rev. 544 (2012) (discussing similarities of domestic violence in

same-sex versus opposite-sex relationships; recognizing disparity in remedies afforded by the courts to victims of domestic violence in same-sex versus opposite-sex relationships). Because Chapter 50B is "intended to provide protection for all victims of domestic violence" and the LGBTQ+ community's needs are similar to those of the broader public, excluding M.E. and those similarly situated from its protections "bears no relation to furthering [its] legislative purpose[.]" *Doe*, 421 S.C. at 506, 808 S.E.2d at 815.

Given the need for DVPOs in same- and opposite-sex relationships, there is no valid justification for applying Chapter 50B to exclude M.E. and those similarly situated from domestic violence protections. As a general matter, the Equal Protection Clause prevents a state from creating "a classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635; *see also Doe*, 421 S.C. at 507, 808 S.E.2d at 815 n.12 ("Judicial declarations have eliminated, for the most part, disparate treatment between same-sex and opposite-sex couples."). More particularly, "lingering prejudices[,] moral disapproval[,]" *Malecek*, 804 S.E.2d at 596, or "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. Further, unconstitutional discrimination "rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respect from

ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).[5] Finally, the pernicious sex stereotype that domestic violence is exclusively a problem of male violence against women, *see Intimate Partner Violence*, at 5, finds no "footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. Consigning impacted members of the LGBTQ+ community "to an instability many [individuals in] opposite-sex [relationships] would deem intolerable" furthers no legitimate government interest, much less possesses a substantial relationship to an important government interest, as heightened scrutiny requires. *Obergefell*, 135 S. Ct. at 2601.

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The facts are undisputed: M.E. is currently being denied effective protection from domestic violence because her abuser is also a woman. This constitutes discrimination based on sexual orientation and sex. Though

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[5] State law remains littered with exclusionary provisions, charitably interpreted to evince inertia or insensitivity to the lives of LGBTQ+ North Carolinians. For example, until a recent settlement, North Carolina excluded same-sex female couples giving birth through artificial insemination access to birth certificates on equal terms as opposite-sex couples. Lambda Legal, *Victory! North Carolina To Issue Accurate Birth Certificates for All Children Born to Married Same-Sex Couples*, Lambda Legal Blog, Nov. 16, 2016, https://www.lambdalegal.org/blog/20161116_weiss; *see also Pavan*, 137 S. Ct. at 2078 (invalidating similar Arkansas statutory regime "to the extent [it] treated same-sex couples differently from opposite-sex couples" via summary reversal).

heightened scrutiny is applicable here, the trial court did not apply it. Further, the trial court did not find and there is no conceivable rational basis for exposing a North Carolinian to the gravest threats posed by domestic violence simply because of who she is. To the extent it excludes M.E. and similarly situated individuals from its protections, Chapter 50B unconstitutionally denies equal protection.

II. THE TRIAL COURT'S APPLICATION OF CHAPTER 50B TO DENY M.E.'S MOTION FOR A DVPO CONSTITUTES AN IMPERMISSIBLE DEPRIVATION OF DUE PROCESS UNDER THE LAW BY ARBITRARILY INFRINGING ON HER AUTONOMY ON ACCOUNT OF HER SEXUAL ORIENTATION.

"No State shall . . . deprive any person of life, liberty or property, without due process of law[.]" U.S. Const. amend. XIV, § 1; *see also* N.C. Const. art. I, § 19 (guaranteeing the same through its law of the land clause). In recent cases involving laws that discriminated on the basis of sexual orientation, the U.S. Supreme Court has explained that the Due Process Clause plays a key role in protecting equality, and that due process and equal protection analyses are therefore deeply connected. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2590 ("The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians."); *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects[.]"). Thus, while an analysis under equal protection is more

than sufficient to require reversal of the decision below, the discriminatory denial of M.E.'s motion for a DVPO also infringed upon her right to due process under the law.

Courts have long held that due process is a broad concept, which guarantees not only procedural protections but also important aspects of substantive freedom. The liberty protected by due process "does not consist simply of the right to be free from arbitrary physical restraints or servitude, but is deemed to embrace the right of man to be free in the enjoyment of his faculties . . . subject only to such restraints as are necessary to the common welfare." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) ("This 'liberty' is not a series of isolated points . . . It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]") (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). "Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious[.]"*State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975).

Indeed, due process safeguards autonomous decision-making—as well as access to fair legal proceedings to secure that autonomy—especially when an individual's associational and familial integrity is at stake. *See, e.g.*, *Santosky*

v. Kramer, 455 U.S. 745, 753 (1982) (finding a protected liberty interest in the "care, custody, and management" of children, and noting that "[e]ven when blood relations are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life"); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (recognizing right of indigent persons to access divorce proceedings as "in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship"). The Court distilled these cases' underlying principle in *Planned Parenthood v. Casey*: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851 (1992).

Courts in recent years have been particularly adamant to safeguard the autonomy and familial rights of members of the LGBTQ+ community. In invalidating Texas's sodomy law on due process grounds in *Lawrence*, the U.S. Supreme Court held that "the State cannot demean [gay persons'] existence or control their destiny by making their private sexual conduct a crime." 539 U.S. at 578. And in deeming same-sex marriage bans a deprivation of due process in *Obergefell*, the Court held that such denials "disparage [same-sex couples'] choices and diminish their personhood[,]" 135 S. Ct. at 2602, as well as sending a message of inferiority to the children of same-sex couples. *Id.* at 2600; *see also Malecek*, 804 S.E.2d at 596 ("Laws that demean individuals because of

lingering prejudices or moral disapproval . . . are . . . typically invalid[][.]"). In their application to the LGBTQ+ community, such statutes impose a "stigma and injury of the kind prohibited by our basic charter." *Obergefell*, 135 S. Ct. at 2602; *see also Windsor*, 570 U.S. at 770 ("[The] practical effect of the law . . . [is] to impose a disadvantage, a separate status, and so a stigma[.]"); *Lawrence*, 539 U.S. at 575 ("The stigma this criminal statute imposes . . . is not trivial.").

Due process protects M.E.'s ability to access domestic violence protections without arbitrary bars because of her sexuality. Much like the spouse in *Boddie* who sought a divorce, by seeking a DVPO against her former romantic partner, M.E. is engaging in one of "the most intimate and personal choices a person may make in a lifetime," and one crucial to her personal autonomy. *Casey*, 505 U.S. at 851; *see also Cruzan by Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) ("[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self-determination[.]").[6] That M.E. was denied a DVPO because she was in a

[6] Chapter 50B's exclusion imperils not only individuals like M.E., but also families when a victim-parent has a child from a previous relationship and cannot effectively protect himself or herself and his or her children because their abuser is of the same sex as the victim-parent. *See, e.g.,* Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 Temp. Pol. & Civ. Rts. L. Rev. 557, 558, 564 (2006) (noting majority of individuals seeking protective orders are parents of young children).

relationship with another woman, an "intimate choice[] that define[s] personal identity" and is central to the autonomy protected by the Due Process Clause, doubles the offense. *Obergefell*, 135 S. Ct at 2597. While the trial court acknowledged this governing case law, it failed to give proper weight to the arbitrary consequences Chapter 50B visits upon M.E. and those similarly situated. (R pp 23-24). This is reversible error.

This is all the more unfortunate because the trial court found and the parties agreed that T.J.'s threats of physical violence, efforts to force her way into M.E.'s house, and persistent, harassing contact, (R pp 3, 7), left M.E. "terrified" and "caused [her] substantial emotional distress by placing her in fear of bodily injury and continued torment[.]" (R p 25). M.E. stood up twice in court, shared her harrowing experience, sought an order protecting herself from physical harm, and was turned away not because her fears were not deemed credible but because of who she is, (R pp 14, 18); it is hard to imagine a greater affront to her dignity as a person. And for what was M.E. demeaned? This application of Chapter 50B left M.E. exposed to the gravest violence. (R p 8) (noting T.J. "has access to her fathers [sic] guns" and that the parties were co-workers). More broadly, this application runs counter to Chapter 50B's purpose of protecting victims of domestic violence. *See supra* Part I.B. It is so "unreasonable, arbitrary [and] capricious," *Joyner*, 286 N.C. at 371, 211 S.E.2d at 323, that North Carolina stands alone in excluding members of the LGBTQ+

community from domestic violence protections. *See supra* Part I.A.1.a. The interlocking safeguards of due process and equal protection forbid such purposeless stigmatization and injury.

CONCLUSION

For the foregoing reasons, the Wake County District Court erred in denying M.E.'s request for a DVPO and this Court should reverse its decision. In so doing, this Court should hold that heightened scrutiny is applicable to all such classifications based on sexual orientation and sex and that Chapter 50B-1(b)(6) lacks even a rational basis as applied to M.E. and other similarly situated LGBTQ+ individuals. Consistent with these holdings, this Court should remand the case to the trial court for entry of the DVPO.

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 Rules of Appellate Procedure, counsel for the Plaintiff-Appellant certifies that the foregoing brief, which is prepared using a 13-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, tables of authorities, indices, counsel's signature block, and certificates of service and compliance) as reported by the word-processing software.

This is the 7th day of January, 2019.

/s/ Christopher A. Brook
Christopher A. Brook

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PLAINTIFF-APPELLANT'S BRIEF** was e-filed and served this day on the Defendant-Appellee by placing a copy in United States Mail, return receipt requested, postage prepaid, and addressed as follows:

T.J.

Durham, NC
Defendant-Appellee

This is the 7th day of January, 2019

/s/ Christopher A. Brook
Christopher A. Brook

No. COA 18-1045 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

M.E.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	From Wake County
	)	10th Judicial District
T.J.,	)	Case No: 18CVD600773
	)	
Defendant-Appellee.	)	
	)	
	)	

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CONTENTS OF APPENDIX

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she understands the provisions of that order and that she knowingly and voluntarily enters into that. And then at the conclusion of that we talked with [redacted] and [redacted] about signing that to indicate their consent.

JUDGE WORLEY: Okay. So I have two up here, but I'm assuming that the one that has the handwriting on it is the one that is actually intended to be the binding order.

MS. MCCOOL: That's correct, Your Honor.

JUDGE WORLEY: In that case, it looks like I have been presented with a consent order that does have findings of fact about what the plaintiff fears.

And then it proceeds to restrain you, [redacted], from visiting, assaulting, molesting or otherwise interfering with the plaintiff, stalking, harassing, injuring or abusing her, in fact, contacting her in any way, written communications, telephonic communications, gifts, any sort of communication;

and that you would not work the same shift together at Amazon so that you would not be there at the same time;

that you would not go to any other place she found employment if she were to move on from her employment;

and that this would be good for a year;

that any violation of that, if you were to go around her, abuse her, harass her, threaten her, you could be held in contempt. And I'll tell you now, the penalty for contempt is jail time. So if you were found to have violated it -- now, you would get a hearing on that, on whether or not you had in fact violated it, but if you were found to have violated it, the penalty for contempt is jail time. There's often a purge, something that you can do to stay out, but the basic penalty is jail time, and then it may be some probationary period or some other -- something like that that is the penalty that actually gets put in place, but it does mean that you have to obey the order.

[redacted]: Of course I do, Your Honor.

JUDGE WORLEY: Okay. And you don't see any -- foresee any problems. It sounds like you do work in the same -- with the same employer. You think that you all can arrange to have

separate shifts and not get in violation that way.

[redacted]: [Unintelligible].

MS. MCCOOL: That's already been arranged, actually.

JUDGE WORLEY: Okay. So that's going to work. And so as long as you're off the premises by the time she gets there, vice versa, that should be okay.

Okay. I don't have signatures on this. There's not really a signature line for this on -- on this order because the cause...

Okay. So I have made up lines.

MS. MCCOOL: Thank you, Your Honor.

[Unintelligible]

JUDGE WORLEY: Yeah, that would be helpful because it's not going to have any boxes that fit what we need to do.

Okay. Good luck to you both. Just stay away.

MS. MCCOOL: Thank you, Your Honor.

And just for the record, we do give notice of appeal for the 50B.

JUDGE WORLEY: Okay.

MS. MCCOOL: We'll follow that up in