No. COA18-1045 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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M.E.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	From Wake County
	)	
T.J.,	)	
	)	
Defendant-Appellee.	)	

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BRIEF BY AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF BY AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF PLAINTIFF-APPELLANT[1]

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[1] No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

ISSUES PRESENTED

Under North Carolina law, most victims of domestic violence have the legal right to seek a protective order from a court. However, the protective-order statute explicitly denies this right to some victims if they are abused by an intimate partner of the same sex. Thus, the statute provides unequal legal protections from domestic violence solely based on sexual orientation.

The issues presented are:

1. Is it unconstitutional to deny legal protections from domestic violence only to persons in same-sex relationships?
2. If such denials are unconstitutional, is the appropriate remedy to extend legal protections from domestic violence to persons in same-sex relationships?

INTRODUCTION

North Carolina is the only state in the nation that continues to define domestic violence in a way that denies equal legal protections to same-sex couples. *See infra* pp. 9-10. Specifically, for certain kinds of relationships, victims of domestic violence can only seek a protective order if their abuser is a member "of the opposite sex." N.C. Gen. Stat. § 50B-1(b)(2), (6).

Under court decisions rendered since the restrictions here were enacted, it is now clear that this discriminatory treatment of same-sex couples is untenable and unconstitutional. No conceivable state interest is advanced by denying some North Carolinians the right to a protective order based solely on their sexual orientation. Indeed, the law's sex-based distinctions affirmatively undermine the State's strong law-enforcement interests in preventing and punishing all forms of domestic violence, regardless of the victim's or the abuser's sex.

To remedy this constitutional violation, the State of North Carolina, acting through its Attorney General Joshua H. Stein, respectfully requests that this Court extend statutory domestic-violence protections to all persons in same-sex relationships.

BACKGROUND

Domestic violence is one of the most serious law-enforcement problems in North Carolina. An estimated 157,193 North Carolinians were victims of domestic violence in 2014—nearly 2 percent of the State's total population.[2] Nationwide, domestic violence accounts for 21 percent of *all* violent crime.[3]

Domestic violence affects a wide range of North Carolinians without regard to their race, gender, or sexual orientation. For example, of the 110 people in the State who were murdered by an intimate partner in 2016, 37 victims were men.[4] These 110 intimate-partner murders made up over 15 percent of all murders in the State.[5] Persons in same-sex relationships are

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[2] *Nearly 2% of NC Population Victims of Domestic Violence*, WRAL.com (Nov. 3, 2017), https://www.wral.com/nearly-2-of-nc-population-victims-of-domestic-violence/17088388.

[3] U.S. Dep't of Justice, Bureau of Justice Statistics, *Nonfatal Domestic Violence 2003-2013* (2014), https://www.bjs.gov/content/pub/pdf/ndv0312.pdf.

[4] N.C. Dep't of Pub. Safety, *Report on Domestic Violence Related Homicides for Calendar Year 2016* (Apr. 5, 2017) ("2016 Homicide Report"), https://www.ncsbi.gov/Services/SBI-Statistics/2016-DV-Homicides-Report-5-April-2017.aspx.

[5] N.C. State Bureau of Investigation, Crime in North Carolina – 2016 (Nov. 2017), https://www.ncsbi.gov/Services/SBI-Statistics/SBI-Uniform-Crime-Reports/2016-Annual-Summary.aspx.

equally likely—and by some measures, more likely—to suffer violence at the hands of an intimate partner.[6]

Like all states, North Carolina has enacted criminal statutes designed to address the unique challenges posed by domestic violence. Most notably, Chapter 50B of the North Carolina General Statutes enables domestic-violence victims to seek a protective order against an intimate partner from a local district court. N.C. Gen. Stat. § 50B-2(a). A court may enter a protective order if, among other reasons, a person "intentionally caus[es] bodily injury" to an intimate partner, or places the partner "in fear of imminent serious bodily injury." *Id.* § 50B-1(a).

A protective order restrains a defendant from committing further acts of violence. *See id.* § 50B-3(a). It can also include "any additional prohibitions or requirements the court deems necessary to protect" a victim. *Id.* § 50B-3(a)(13). For example, an order can grant a victim possession of the parties' joint residence and bar the abuser from the residence. *Id.* § 50B-3(a)(2). It can also order an abuser to make child-support payments, or to attend a treatment program. *Id.* § 50B-3(a)(6), (7), (12). If an abuser has

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[6] *See* Centers for Disease Control, *Findings on Victimization by Sexual Orientation* (2010), https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf.

engaged in especially serious conduct—such as threatening to kill a partner or a child—the abuser must temporarily surrender any firearms to the local sheriff. *Id.* § 50B-3.1. In addition, victims of domestic violence are granted special protections from eviction under North Carolina landlord-tenant law. *See id.* §§ 42-40(4), 42-42.2.

To enforce these restrictions, a victim can file a contempt motion in district court. *Id.* § 50B-4. Moreover, if a law-enforcement officer has probable cause to believe that a person has violated a protective order, the officer *must* arrest that person. *Id.* § 50B-4.1(b).

The first and second violations of a protective order are generally misdemeanors; the third offense is a felony. *Id.* § 50B-4.1(a), (f). In addition, if a person violates a protective order while also committing another felony, the person is generally "guilty of a felony one class higher than the principal felony." *Id.* § 50B-4.1(d). Similarly, if a person murders someone after being convicted of violating a protective order for the same victim, the murder is deemed premeditated first-degree murder as a matter of law. *Id.* § 14-17(a1).

These offense-level enhancements typically lead to longer prison terms, as well as a range of other collateral consequences. *See id.* § 15A-1340.17(c), -.18(a)(2). For example, federal law prohibits persons who are

subject to certain protective orders from possessing or purchasing a gun. 18 U.S.C. § 922(g)(8).

In sum, Chapter 50B establishes a comprehensive framework that is designed to prevent and punish domestic violence.

However, these protections come with an important limit: They are only available to victims who suffer abuse in the context of a qualifying "personal relationship." N.C. Gen. Stat. § 50B-1(a). The statute defines a personal relationship as including only six kinds of relationships:

1. "current or former spouses,"
2. "*persons of opposite sex* who live together or have lived together,"
3. "parents and children,"
4. persons who "have a child in common,"
5. "current or former household members," and
6. "*persons of the opposite sex* who are in a dating relationship or have been in a dating relationship."

Id. § 50B-1(b)(1)-(6) (emphases added).[7]

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[7] A "dating relationship" is further defined as when persons "are romantically involved over time and on a continuous basis." N.C. Gen. Stat. § 50B-1(b)(6). This Court has construed that definition to include romantic relationships that last less than three weeks. *Thomas v. Williams*, 242 N.C. App. 236, 239, 773 S.E.2d 900, 902 (2015).

Based on these definitions, victims of domestic violence who are in certain kinds of same-sex relationships cannot seek a protective order under Chapter 50B.[8] A large number of domestic-violence victims are thus excluded from the statute's legal protections. For example, nearly 30 percent of North Carolinians who were murdered by an intimate partner in 2016 were in a "dating relationship" with their murderer. *See* 2016 Homicide Report at 3. These victims would have had no right to seek a protective order if they were in a same-sex relationship.

In this case, the plaintiff and defendant are persons of the same sex who were once in a "dating relationship." (R p 24) The plaintiff sought a protective order to protect against the defendant's threats of physical violence following their breakup. (R p 7) The district court expressly held that, "had the parties been of opposite genders," the facts here "would have supported the entry of a Domestic Violence Protective order [under Chapter] 50B." (R p 18) However, citing Chapter 50B's explicit exclusion of same-sex couples, the court denied plaintiff's request for a protective order. (R p 24)

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[8] All persons may seek a "no-contact order" against someone who is stalking them, regardless of their relationship with the stalker. N.C. Gen. Stat. § 50C. However, a Chapter 50C no-contact order provides significantly fewer protections than a domestic-violence protective order under Chapter 50B. *See id.*

ARGUMENT

I. Chapter 50B's Sex-Based Distinctions Are Unconstitutional.

A. North Carolina is the only state that explicitly denies same-sex couples equal legal protections from domestic violence.

The vast majority of states have never enacted a statute that explicitly denies victims of domestic violence the right to seek a protection order against a same-sex partner.[9] These states prove that it is easy to structure a domestic-violence protection statute in a gender-neutral way. For example, Alabama bans domestic violence between anyone in a "dating relationship," which it defines as "a recent frequent, intimate association." Ala. Code § 30-5-2(a)(4).

In recent years, every state other than North Carolina that explicitly denied same-sex couples equal domestic-violence protections has eliminated those discriminatory distinctions—either by statute or by court decision. For example, in 2013, the Montana legislature revised its protection statute to

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[9] *See* A.B.A., *Domestic Violence Protection Orders By State* (2008), http://www.ncdsv.org/images/ABACDSV_DV-Civil-POs_by-State_7-2008.pdf (noting that, by 2008, only four states explicitly denied domestic-violence protection orders to same-sex couples: Louisiana, Montana, North Carolina, and South Carolina).

eliminate the requirement that a victim be "the opposite sex" as an abuser.[10] In 2017, the Louisiana legislature passed a law to make this same change.[11] Also in 2017, the South Carolina Supreme Court held that the state's protection statute could not be constitutionally applied only to victims in "male and female" relationships. *Doe v. State*, 421 S.C. 490, 507-08, 808 S.E.2d 807, 815 (2017).

Like here, in *Doe*, the South Carolina Attorney General affirmatively argued on behalf of the State that the law's discriminatory treatment of same-sex couples was unconstitutional.[12]

Thus, North Carolina stands alone in maintaining domestic violence laws that explicitly discriminate against same-sex couples. As the next sections show, this discrimination violates both the federal and state constitutions.

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[10] *See* An Act Revising the Definition of "Partners" Under the Offense of Partner or Family Member Assault, 2013 Mont. Laws 228, 228.

[11] *See* Act No. 79, 2017 La. Sess. Law Serv. Act 79 (H.B. 27) (West).

[12] *See* State's Petition for Rehearing at 1-2, *Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017), (No. 2015-1726) ("We readily agree . . . that the Equal Protection Clause requires that same-sex couples . . . must be included within [state statutory] protections from domestic violence.").

B. The United States Constitution bars states from providing same-sex couples unequal legal protections from domestic violence.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution generally bars states from enacting laws that facially discriminate on the basis of sex. *United States. v. Virginia*, 518 U.S. 515, 532-33 (1996). For that kind of law to survive constitutional scrutiny, it must be justified by an "exceedingly persuasive" rationale. *Id.* at 533. Specifically, the law must serve "important governmental objectives" and "the discriminatory means employed" must be "substantially related to the achievement of those objectives." *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The justification for a discriminatory law, moreover, "must not rely on overbroad generalizations" about the sexes that fail to account for individual circumstances. *Id.*

These "constitutional safeguards" apply with full force to laws that "burden the liberty of same-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). Thus, a law that—like Chapter 50B here—denies "same-sex couples . . . the benefits afforded to opposite-sex couples" constitutes "sex-based inequality" for purposes of the Equal Protection Clause. *Id.* After all, it is "paradigmatic sex discrimination" for a law to provide disparate legal

protections based on a person's sexual orientation. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc).

As one federal appeals court has explained, "sexual orientation is a function of sex" because "one cannot fully define a person's sexual orientation without identifying his or her sex." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2017) (en banc). Indeed, "sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted." *Id.*; *see also Loving v. Virginia*, 388 U.S. 1, 7-12 (1967) (laws that provide disfavored treatment based on the race of one's intimate partner constitute racial discrimination under the Equal Protection Clause).

Here, Chapter 50B's legal protections for victims of domestic violence are explicitly conditioned on the victim and abuser being "persons of the opposite sex." N.C. Gen. Stat. § 50B-1(b)(2), (6). These explicit sex-based distinctions are thus subject to the heightened scrutiny that applies to all laws that discriminate on the basis of sex. *See Virginia*, 518 U.S. at 533.

Under that standard, Chapter 50B's denial of domestic-violence protections to same-sex couples cannot be squared with the federal Constitution. The legislative record provides no explanation at all for the

statute's overt sex-based discrimination, let alone an explanation that furthers an "important governmental objective." *Id.* Indeed, the State can perceive no legitimate governmental objective at all that could be advanced by denying same-sex couples equal legal protections from domestic violence. For this reason alone, Chapter 50B's sex-based distinctions are unconstitutional.

Moreover, the restrictions here are especially suspect because they affirmatively *undermine* the primary purpose of the law: "ending domestic violence." *Benfield v. Pilot Life Ins. Co.*, 82 N.C. App. 293, 295, 346 S.E.2d 283, 295 (1986). Domestic violence between intimate partners arises in all kinds of relationships, including relationships between persons of the same sex. *See supra* pp. 4-5. By irrationally excluding some members of society from the law's protections, Chapter 50B's sex-based distinctions impair the State's ability to prevent and punish domestic violence.

Likewise, Chapter 50B's exclusions are also irrational because they give disfavored treatment to same-sex couples who are unmarried. Chapter 50B protects victims of domestic violence who are married (or who had been married) to their abuser—including same-sex married couples. N.C. Gen. Stat. § 50B-1(b)(1); *see Obergefell*, 135 S. Ct. at 2604. There is no rational

reason to deny these same protections to same-sex couples who cohabitate or who are in dating relationships.

Thus, because denying equal protections from domestic violence to only certain same-sex couples "bears no relation" to any legitimate legislative purpose, Chapter 50B's sex-based distinctions would fail even rational-basis review. *See Doe*, 421 S.C. at 505, 808 S.E.2d at 815 (declining to consider whether intermediate scrutiny applied to similar South Carolina law because the law "cannot even satisfy the rational basis test").

In sum, Chapter 50B's sex-based distinctions violate the U.S. Constitution because they deny some members of society equal legal protections from domestic violence based on their sex.

C. The North Carolina Constitution also requires that same-sex couples receive equal protections from domestic violence.

Chapter 50B's sex-based distinctions also independently violate the North Carolina Constitution. As our Supreme Court has repeatedly held, the state Constitution's Equal Protection Clause provides greater protections for individual rights than its federal counterpart. Thus, regardless of how this Court rules on the federal question here, it should separately invalidate Chapter 50B's sex-based distinctions under state law.

A state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980). The North Carolina Constitution, for example, enumerates protections for individual rights that are "more detailed and specific than the federal Constitution." *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992).

Our Supreme Court, moreover, has gone further, by declaring that the state charter must be given "a liberal interpretation in favor of a citizen, especially with respect to those provisions which are designed to safeguard the liberty and security of the citizens." *Id.* Applying this interpretive rule, "even an identical term" in the North Carolina Constitution can secure greater rights than its parallel federal provision. *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

The state Constitution's Equal Protection Clause does just that. *See* N.C. Const. art. I, § 19. Our Supreme Court has interpreted the clause to confer especially broad protections for individual rights—protections that go beyond those secured by the federal Constitution. *See Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 763 (2009); *Stephenson v. Bartlett*, 355 N.C. 354, 377-81, 562 S.E.2d 377, 393-95 (2002). The special force of the

clause stems from the fact that the "concept of equal protection under the law was inherent in our State Constitution even before" the right was explicitly codified in the Constitution's text. *Dunn v. Pate*, 334 N.C. 115, 116, 431 S.E.2d 178, 179 (1993); *see S.S. Kresge v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971) (same).

In addition, our Supreme Court has explained that the scope of our Constitution's equality guarantee "should be resolved under [our] present understanding of the principle of equal protection." *Dunn*, 334 N.C. at 121, 431 S.E.2d at 182. Applying this evolving standard, the Court has concluded that "the principle of equal protection . . . makes gender-based discrimination presumptively unconstitutional." *Id.* at 116, 431 S.E.2d at 179 (striking down statutory coverture law).

This presumption of unconstitutionality applies fully to the sex-based distinctions at issue here, because Chapter 50B explicitly discriminates on the basis of a victim's sex, as well as the sex of an abuser. *See* N.C. Gen. Stat. § 50B-1(b)(2), (6) (requiring victims and abusers to be "persons of opposite sex"). Thus, with the added *Dunn* presumption, Chapter 50B's sex-based distinctions are even more clearly invalid under the state Constitution than under the federal Constitution. *See supra* pp. 10-14.

Finally, even though Chapter 50B's sex distinctions are also invalid under federal law, the State respectfully requests that this Court make an independent ruling under the state Constitution. A separate state-law ruling would benefit the State by "continuing to develop North Carolina's body of state constitutional law." Justice Harry Martin, *The State As a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1751 (1992). Indeed, because state courts have "final and binding" authority to construe state constitutions, some North Carolina jurists have expressed the view that our courts should, if possible, resolve cases first on state-law grounds. *State v. Cofield*, 320 N.C. 297, 311, 357 S.E.2d 622, 630 (1987) (Mitchell, J., concurring) (considerations of "practicality" and "judicial restraint" dictate that "the Court should decide the issue before it on the basis of . . . the Constitution of North Carolina").

After all, "the very purpose of having a state constitution" is so "the rights of the people of North Carolina are protected by *two* constitutions." Martin, J., *supra*, at 1752. This Court would honor that federal system by vindicating the equal-protection rights of all domestic-violence victims, regardless of their sexual orientation, under our state's foundational charter.

II. The Proper Remedy Here Is to Extend Chapter 50B's Protections to Persons in Same-Sex Relationships.

To cure the constitutional violation here, this Court should hold that requests for a protective order under Chapter 50B may not be denied based on a victim's sexual orientation. This remedy fully vindicates the constitutional rights of same-sex couples, while also preserving the State's considerable law-enforcement interests in preventing and punishing all forms of domestic violence.

When courts identify a constitutional flaw in a statute, the preferred remedy is one that fixes the constitutional defect while doing the least amount of damage to the overall statutory scheme. *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-30 (2006). Thus, the "normal rule" is for courts to nullify only a statute's "problematic portions while leaving the remainder intact." *Id.* at 328. Indeed, as our Supreme Court has held, the valid parts of a statute "*must* remain" so long as they "are capable of separation" from any unconstitutional applications. *R.R. v. Reid*, 187 N.C. 320, 325, 121 S.E. 534, 537 (1924); *see also State v. McCleary*, 65 N.C. App. 174, 178-79, 308 S.E.2d 883, 887-88 (1983) (same), *aff'd*, 311 N.C. 397, 316 S.E.2d 870 (1984).

In the equal-protection context, moreover, courts apply an additional presumption that favors a narrow remedy here. Specifically, when a statute unconstitutionally denies equal legal protections to a disfavored class, courts generally elevate the disfavored group to equality—rather than reducing the rights of all. *Califano v. Westcott*, 443 U.S. 76, 87 (1979) ("Where a statute is defective because of underinclusion . . . extension [of rights], rather than nullification, is the proper course"). This presumption in favor of rights-extension reflects "equitable considerations," as well as likely legislative intent. *Id.* at 90. A legislature can be expected to disfavor a remedy that "would impose hardship on beneficiaries whom [it] plainly meant to protect." *Id.* at 84 (curing unconstitutional sex discrimination by extending statutory benefits to women).

Under these principles, the proper remedy here would be to extend Chapter 50B's protections to persons in same-sex relationships. This remedy would allow the statute's existing protections for opposite-sex couples to remain undisturbed. After all, the statute's sex-based distinctions do not violate the constitutional rights of persons in opposite-sex relationships.

Thus, both the narrowest and most-effective remedy would be to hold that Chapter 50B's sex-based distinctions are unconstitutional as applied to

same-sex couples—and go no further. This remedy would fully cure the statute's constitutional harms, while also preserving its existing protections against domestic violence.

Indeed, by lifting unconstitutional limits on the scope of the law's protections, this requested remedy would actually enhance the State's ability to protect all North Carolinians from domestic violence. In this way, the remedy would be broadly consistent with Chapter 50B's overall "purpose of ending domestic violence." *Benfield*, 82 N.C. App. at 295, 346 S.E.2d at 295.

By contrast, a more-intrusive remedy could severely undermine the State's law-enforcement interests. For example, if this Court chose to achieve equality by eliminating protections for opposite-sex couples, millions of North Carolinians would immediately lose legal protections from domestic violence. Principles of judicial restraint counsel against this Court imposing a remedy that would so drastically undermine the legislature's statutory scheme for protecting the public from domestic violence.

In sum, the Court should apply the normal rule and remedy the constitutional violations here by extending equal rights to same-sex couples. *See Califano*, 443 U.S. at 87.

CONCLUSION

For the above reasons, the State of North Carolina, acting through its Attorney General Joshua H. Stein, respectfully submits that Chapter 50B unconstitutionally denies equal legal protections to persons in same-sex relationships. To cure this constitutional defect, the State requests that this Court extend equal rights to all North Carolinians, regardless of their sexual orientation. This result would not only vindicate the constitutional rights of same-sex couples, but would also bolster the State's strong law-enforcement interests in preventing and punishing domestic violence.

This 7th day of January, 2019.

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