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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Michael Marvin Ely, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

Andrew Saul, in his official capacity as the Commissioner of the Social Security Administration,

Defendant.

Case No. 4:18-cv-00557-TUC-BGM

PLAINTIFF'S REPLY BRIEF ON THE MERITS AND IN SUPPORT OF CLASS CERTIFICATION

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INTRODUCTION

To indulge the fiction that same-sex couples like Mr. Ely and Mr. Taylor have been treated equally by their government here, this Court would need to close its eyes to reality and pretend that same-sex couples have always had equal access to marriage. But the history of how this country has long treated lesbian and gay couples cannot simply be ignored. In determining whether Defendant has discriminated against same-sex couples like Mr. Ely and Mr. Taylor, this Court must confront the undeniable legal reality that they did *not* have equal access to marriage. It is therefore not "equal" for Defendant to demand nine months of marriage—which was a legal impossibility for these same-sex couples under state law at the time—as a condition for their access to survivor's benefits.

No matter how the situation is analyzed, the result is always the same: Defendant has violated equal protection and due process, whether by relying upon unconstitutional state laws to deny federal benefits, or by conditioning benefits on discriminatory terms that same-sex couples could not satisfy on an equal basis as others. None of the government's interests, under any level of scrutiny, can justify those violations.

Just as the Court should not turn a blind eye to the wrenching harms suffered by Mr. Ely, neither should it ignore the equally grave harms that others face. This Court has the authority to open the agency doors to all surviving same-sex spouses like Mr. Ely by providing them with the *opportunity* to access survivor's benefits. That does not require the Court to engage in any individualized determination, which the agency is already well situated to handle. Instead, it merely requires the Court to hold that Defendant's sweeping discrimination against those like Mr. Ely does not comport with the constitutional guarantee of equal treatment and equal dignity for all.

I. Defendant's Reliance on Unconstitutional Marriage Laws Is Unconstitutional.

A. Defendant Relies Upon State Marriage Laws.

Defendant first argues that the agency does not look to state law in determining eligibility for survivor's benefits and therefore has not incorporated any unconstitutional state law into federal law. That remarkable position cannot be reconciled with the plain

language of the Social Security Act. An applicant qualifies as a "wife, husband, widow, or widower" to the extent that "*the courts of the State* . . . would find that such applicant and such [deceased] individual were validly married." 42 U.S.C. § 416(h)(1)(A)(i) (emphasis added). The regulations are equally clear: "we look to the laws of the State" to evaluate an applicant's marriage to the deceased individual. 20 C.F.R. § 404.345.

Thus, for example, according to the plain terms of these statutory and regulatory provisions, whether Mr. Ely was validly married for at least nine months necessarily turns on Arizona state law. Defendant attempts to downplay the agency's reliance upon Arizona state law as "scattered references" in the record, Def. Br. 24 n.10, but the date when any given state permitted same-sex couples to marry is necessarily relevant to determining benefits eligibility. Indeed, the agency's own cited manual includes a chart of when same-sex couples were permitted to marry in all 50 states because, in its words, that date is relevant to determining "whether a marriage was validly entered into."[1]

Defendant nevertheless insists that the agency "did not rely upon an unconstitutional state law" and instead "relied only on the duration-of-marriage requirement." Def. Br. 24. To the extent that Defendant attempts to draw any distinction between those concepts, they are two sides of the same coin: when a same-sex couple was validly married necessarily turns on their ability to marry, which is governed by state law and any facially discriminatory criteria contained therein. Tellingly, Defendant also fails to identify what *other* law to which the Social Security Act looks in evaluating an individual's marriage for these purposes if *not* state law.

Courts have confirmed that the Social Security Act incorporates state law in the analogous context of benefits for a surviving child, where eligibility also looks to state law. *See, e.g.*, *Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982). There is no relevant difference between the statutory language that incorporates state law to determine

[1] SSA, POMS, GN 00210.003, Dates States and U.S. Territories Permitted Same-Sex Marriages, *generally available at* https://secure.ssa.gov/poms.nsf/home!readform.

benefits eligibility for a surviving child versus a surviving spouse. *Compare* 42 U.S.C. § 416(h)(2)(A) (analyzing how "the courts of the State" would evaluate an applicant's right to inherit intestate) *with id.* § 416(h)(1)(A)(i) (analyzing how "the courts of the State" would evaluate an applicant's marriage); *accord* 20 C.F.R. § 404.345.

Binding Ninth Circuit precedent also confirms that where the government conditions a benefit on marriage, it necessarily relies upon state law governing eligibility for marriage. In *Diaz*, the State of Arizona provided health insurance benefits to the dependent of a state employee, which was defined by statute to include "'a spouse under the laws of this state.'" *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011). That *particular* statute did not reference sexual orientation or sex—just as Defendant argues here that the Social Security Act's definitions of "widow" and "widower" constitute "facially neutral criteria." Def. Br. 9. But the Ninth Circuit held that the government discriminated against same-sex couples because *other* state laws—upon which that statute necessarily relied—barred them from marriage. *Diaz*, 656 F.3d at 1013-14. By Defendant's reasoning, if the government can simply ignore how a term is actually defined in a law, then *Windsor* also only concerned "facially neutral criteria" because the statutory exemption to the federal estate tax was granted to any "surviving spouse." *United States v. Windsor*, 570 U.S. 744, 753 (2013); 26 U.S.C. § 2056(a).

Other courts have come to the same conclusion as *Diaz*. For example, a Michigan statute provided health insurance benefits to an individual who was "[m]arried to the employee" of the state or who was "eligible to inherit from the employee under the laws of intestate succession in this state." *Bassett v. Snyder*, 951 F. Supp. 2d 939, 948 (E.D. Mich. 2013) (internal quotes omitted). The mere fact that a statute "does not use the term 'sexual orientation'" does not negate that it may nonetheless facially discriminate based on sexual orientation. *Id.* at 963. That is because the statute "incorporates the definitions in the Michigan marriage amendment and the intestacy statute," both of which "distinguish between opposite-sex couples, who are permitted to marry and can inherit

intestate, and same-sex couples, who cannot."[2] *Id.* The same applies to the Social Security Act's incorporation of facially discriminatory state marriage laws.

B. Reliance Upon Unconstitutional Marriage Laws Is Unconstitutional.

Having tethered federal law to state law, the constitutionality of the particular federal law here also rises or falls on the constitutionality of state law it incorporated. Defendant does not dispute that basic proposition, nor could it do so, as an overwhelming number of courts have confirmed in the analogous context involving intestacy. When states unconstitutionally excluded children born outside marriage from the right to inherit intestate, courts (including the Fifth, Eighth, and Eleventh Circuit) recognized that the federal government's reliance upon those unconstitutional laws in determining social security benefits eligibility for surviving children was also impermissible. Pl. Br. 10 n.4 (citing cases). Here, because states unconstitutionally excluded same-sex couples from the right to marry, the federal government's reliance upon those unconstitutional laws in providing survivor's benefits is likewise impermissible. The government cannot, as a constitutional matter, accomplish indirectly that which it could not accomplish directly.

SSA's sole response is that it has already discharged its constitutional duties, because it no longer enforces the so-called Defense of Marriage Act ("DOMA"). Def. Br. 25. That is a *non sequitur*. SSA conflates two distinct obligations: those relating to *Windsor* (striking down DOMA), and those relating to *Obergefell* (striking down state marriage exclusions). *Windsor*, 570 U.S. at 770; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). SSA argues that in order to comply with *Windsor*, the agency began to recognize, after 2014, the marriages of same-sex couples without regard to DOMA. Def.

[2] SSA similarly provides survivor's benefits to those with the right to inherit intestate under state law. 42 U.S.C. § 416(h)(1)(A)(ii). But the group at issue here was also unlawfully deprived of that legal benefit of marriage, in addition to its status, which is yet another way in which Defendant has engaged in discrimination. *Accord* Pl. Br. 8. SSA has no response to this point, apart from its unsupported assertion that a claimant must first argue the intricacies of a constitutional claim to an agency with no jurisdiction to consider it. *See, e.g.*, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16 (2012) (explaining that constitutional claims are "'beyond the jurisdiction of administrative agencies'").

Br. 6. But the agency has not come into full compliance with *Obergefell*, issued in 2015, because it continues to rely upon unconstitutional state marriage exclusions in determining benefits eligibility. Just as *Windsor* requires the agency to evaluate benefits eligibility without regard to DOMA, *Obergefell* requires the agency to evaluate benefits eligibility without regard to state marriage exclusions incorporated into federal law.

Far from a "mismatch," that remedy is precisely tailored to the injury inflicted *by Defendant*—the SSA Commissioner—who continues to rely upon unconstitutional marriage laws in excluding individuals like Mr. Ely from survivor's benefits. Defendant's argument that there are *other* government actors (e.g., the State of Arizona) who contributed to that injury, or to other injuries, is no defense. Def. Br. 25. The federal government chose to hitch its wagon here to state marriage laws—along with any constitutional violations contained therein. Nothing compelled that choice. *See Windsor*, 570 U.S. at 765 (noting that SSA can utilize criteria for evaluating relationships "regardless of any particular State's view on these relationships").

Injunctive relief that prevents SSA from continuing to rely upon unconstitutional laws in determining eligibility for benefits does not somehow constitute an award of damages for past constitutional violations, as Defendant insinuates. Def. Br. 25. Rather, it merely prevents SSA from continuing to inflict *present and future* harm based upon unconstitutional laws—a harm that Mr. Ely and others like him currently experience each month they are deprived of benefits and which will persist until their death. That remedy is precisely what courts issued after the Supreme Court struck down unconstitutional state intestacy laws, by refusing to let SSA continue to rely upon them. *See, e.g.*, *Daniels v. Sullivan*, 979 F.2d 1516, 1521 (11th Cir. 1992) ("'the normal judicial remedy is to extend the benefits to the deprived group'"); *Handley v. Schweiker*, 697 F.2d 999, 1001 (11th Cir. 1983) (where the state intestacy law is unconstitutional, the court "must rectify the unconstitutionality by granting [social security] benefits"); *Cox*, 684 F.2d at 324.

II. Heightened Scrutiny is Required Here.

A. Imposing a Requirement that Same-Sex Couples Cannot Satisfy on an Equal Basis Because of Discriminatory Laws Is Not "Neutral."

Even if state marriage bans had never been struck down, SSA's conduct is still unlawful. SSA's defense hinges on the fiction that its marriage duration requirement is "neutral" as to same-sex couples who were barred from marriage for the requisite duration by discriminatory laws that the agency embraced as a condition for benefits. That defense is foreclosed by precedent and divorced from reality and common sense.

Defendant has engaged in sexual orientation and sex discrimination in the exact same way that the government engaged in discrimination in *Diaz*, as explained above. In both cases, eligibility for benefits was conditioned on marriage, and in both cases, same-sex couples were barred by state law from satisfying those marriage-related requirements. The Ninth Circuit conclusively held that this constitutes discrimination based on sexual orientation. *Diaz*, 656 F.3d at 1014 (holding that the district court "correctly" "barr[ed] the State of Arizona from discriminating against same-sex couples in its distribution of . . . benefits"); *accord In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) ("This is plainly discrimination based on sexual orientation.").

Several aspects of *Diaz* are notable. First, there was no separate regulation specific to same-sex couples—as SSA incorrectly believes would need to exist here for it to have engaged in discrimination—because reliance on marriage laws that exclude same-sex couples already functions *identically* to such an imagined regulation. Second, the Ninth Circuit did not, as SSA urges here, view the "spouse" requirement as merely having a disparate impact on lesbian and gay workers. *Accord In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (such discrimination "'cannot be understood as having merely a disparate impact on gay persons'"). That was true even though heterosexual workers with unmarried partners were also excluded from benefits, because such an analysis would wrongly lump together those who *chose* not to marry with those

who were *barred* from doing so by discriminatory laws (including at a particular time).[3]

Federal courts also overwhelmingly rejected the underpinning of Defendant's position in the intestacy cases concerning survivor's benefits for children. The Social Security Act provides benefits to a surviving "child." 42 U.S.C. § 416(h)(2)(A). As here, the agency could not view that word in isolation, while ignoring how it was defined, and simply claim a mere disparate impact on children born outside marriage. Because federal law incorporated state intestacy law, it necessarily discriminated against children born outside marriage where state law did so. *See, e.g.*, *Daniels*, 979 F.2d at 1520 (holding that, regardless of whether state law was unconstitutional, "the Social Security Act's incorporation of the Georgia intestacy scheme violates equal protection").

Defendant's other arguments cannot obviate the discrimination at work here. First, neither of Defendant's hypotheticals (involving an FBI agent shot a week after his marriage and an individual prevented from marrying sooner because of wrongful incarceration[4]) involve discrimination at all, much less involving a suspect classification. They merely illustrate incidental—as opposed to facially intended—effects. Here, the federal government has *affirmatively* imported facially discriminatory state laws into the eligibility criteria it controls and, indeed, helped to maintain those discriminatory state laws for most of modern history. *Windsor*, 570 U.S. at 771. That discrimination is not a mere collateral consequence of a bright-line rule; it is part of the bright-line rule itself.

Second, SSA argues it has not discriminated against Mr. Ely because it was not "impossible" for Mr. Ely or others like him to have married sooner but "only impossible" where they lived. Def. Br. 22. That merely amplifies, rather than negates, the unequal treatment and liberty infringement here. Different-sex couples were not forced to travel

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[3] Nor can *Diaz* be dismissed as a case about animus, particularly given that it did not even address the lawfulness of the underlying marriage exclusion. To the contrary, heightened scrutiny is required even where the government's motivations for its discrimination are purportedly benign. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

[4] Defendant's latter hypothetical ignores that prisoners also cannot be denied the fundamental right to marry. *Turner v. Safley*, 482 U.S. 78 (1987).

out-of-state to marry as a condition for accessing survivor's benefits and, more importantly, when such marriages *were not recognized by their home state*.[5] That some same-sex couples voluntarily did so at all—enduring indignity atop futility—does not change the legal analysis. Def. Br. 33 (describing related *Driggs* case). Requiring James Obergefell to have sooner chartered a medical plane to transport his dying partner across state lines to marry, when heterosexuals were never put to that burden, is not "equal."[6]

Third, SSA argues that it cannot have discriminated against Mr. Ely, because it does not discriminate against *other* groups of differently situated applicants based on their sexual orientation or sex. That does not follow. SSA need not discriminate against *all* lesbian and gay applicants in *all* contexts for it to discriminate here. Discrimination against a subset of a group is still discrimination. To illustrate, refusing to hire female workers with children is still sex discrimination even if an employer is willing to hire female workers without children. *See Latta v. Otter*, 771 F.3d 456, 484-85 (9th Cir. 2014) (Berzon, J., concurring and discussing Supreme Court precedent). Here, SSA argues that it no longer discriminates because survivor's benefits are "now" paid on an equal basis. Def. Br. 5. But that can only logically encompass a different group: those who were not barred from equal access to marriage nine months before their loved ones died. As to Mr. Ely and the group here, however, SSA still discriminates against them.[7] *Cf. Handley*, 697 F.2d at 1003 (focusing on the "subclass" of children denied benefits).

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[5] Not even SSA began recognizing such out-of-state marriages (entered into by same-sex couples whose home states barred their marriage at the time) until 2015—after it had already been sued. *See, e.g.*, *Williams v. Colvin*, No. 14-8874 (N.D. Ill.). Thus, same-sex couples would not have known at the time that traveling out-of-state would provide any basis for benefits, even if SSA contends they should have done so, given its statutory place-of-domicile rule. 42 U.S.C. § 416(h)(1)(A)(i). Tellingly, SSA now disregards that rule as to same-sex couples, recognizing it would be unconstitutional to apply it to them.

[6] Such a requirement would also infringe upon the "fundamental right of free movement," which encompasses the right of citizens "'to dwell within the limits of their respective [s]tates.'" *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).

[7] Likewise, SSA argues it would have paid survivor's benefits if Mr. Taylor had lived two-and-a-half months longer. Def. Br. 22. That simply restates that SSA would not discriminate against a different group—those not barred from equal access to marriage nine months before their loved ones died—than the group at issue here.

Fourth, Defendant accuses Plaintiff of seeking the "windfall" of an "extra" opportunity for accessing benefits unavailable to different-sex surviving spouses. That makes no sense. Each individual has a single opportunity to access benefits: either through nine months of marriage or—for those prevented from being married for nine months by state marriage laws incorporated into federal law—the opportunity to show that such laws caused them to be denied benefits. *Cf. Diaz*, 656 F.3d at 1014 (requiring a pathway for same-sex couples to access benefits through domestic partnerships where they lacked equal access through marriage). The only windfall here is the one that SSA has long reaped from lesbian and gay couples, by taking part of their earnings while refusing to return them later in life on an equal basis.

Finally, SSA's rebuttal to the sex discrimination claim—that it would have denied survivor's benefits to a female claimant married to a man for seven months—relies on a hypothetical woman who is not similarly situated to Mr. Ely. The proper comparator for Mr. Ely is a woman who also wished to marry the man she loved at least nine months and did so because, unlike here, there was no legal barrier to the marriage. The reason she receives benefits, but Mr. Ely does not, is because Mr. Ely is a man.

B. Defendant Burdens Fundamental Liberty Interests.

Defendant all but ignores Plaintiff's due process claim, which independently requires heightened scrutiny even in the absence of any discrimination. Pl. Br. 15-16. Everyone possesses a fundamental liberty interest in forming an intimate family relationship with a person of their choice. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The marriage duration requirement, however, has burdened individuals like Mr. Ely for their exercise of that liberty, because the laws relied upon by SSA to determine benefits eligibility prevented them from marrying their loved ones for the requisite duration.

SSA claims that it never intervened in Mr. Ely's relationship with Mr. Taylor. Def. Br. 11 n.7. But liberty burdens do not only exist where the government physically restrains an individual from the exercise of a right. That is why the Ninth Circuit required heightened scrutiny in *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008),

where the military burdened the plaintiff's right to a same-sex relationship with the consequence of discharge. The denial of survivor's benefits here is no less consequential. *See Windsor*, 570 U.S. at 772-74. To illustrate, the denial of survivor's benefits has already forced a putative class member, Mr. Driggs, into homelessness twice—sleeping in Walmart parking lots—and to rely upon a local food bank. No. 18-3915, Dkt. 28.

Had individuals like Mr. Driggs forfeited their fundamental liberty interests, and instead entered into the different-sex relationships that the government had historically preferred for them, they would have escaped the harms they now face. But the Constitution does not permit the government to force them into that Hobson's choice.

III. Defendant's Exclusion Fails to Rationally Further Any Legitimate Interest.

Defendant's sweeping denial of survivor's benefits to individuals like Mr. Ely fails rational basis review in any event. Even before the Ninth Circuit confirmed that sexual orientation discrimination requires heightened scrutiny, *SmithKline Beecham v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014), courts recognized that "a classification that adversely affects an unpopular group" requires "'more searching' rational basis review." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). SSA's garden-variety rational basis cases, Def. Br. 14, fail to negate that proposition. And searching review is particularly appropriate here, where it is precisely SSA's reliance on the history of anti-gay discrimination, enshrined in law, that has caused harm.

A. Sham Marriages

Defendant fails to articulate any conceivable way in which the exclusion of individuals like Mr. Ely from survivor's benefits rationally advances the goal of detecting or deterring sham marriages. Incorporating a requirement into federal law that these individuals could not legally satisfy on an equal basis as others is not a rational means of deterring fraud. Rather, it constitutes a sweeping exclusion wholly discontinuous from any valid goal. *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *In re Levenson*, 560 F.3d at 1150-51. And maintaining that exclusion could not deter any sham marriages in the future, because the group at issue here is inherently finite and dwindling.

Using the duration of marriages as a proxy for whether they are non-fraudulent is only rational where the group has not been excluded from the right to marry in the first place. The facts of *Weinberger v. Salfi*, 422 U.S. 749 (1976), illustrate the point: had Mr. and Mrs. Salfi married earlier, the government would have had greater confidence that their marriage was not fraudulent. But that rationale lacks even the minimally required footing in reality, *Heller v. Doe*, 509 U.S. 312, 321 (1993), as to the group of same-sex couples at issue here, who were illegally barred from being married under state law for nine months before one of them died. *See Diaz*, 656 F.3d at 1014. As Defendant readily concedes, *Salfi* "did not address Plaintiff's primary argument." Def. Br. 16.

Defendant instead attacks a straw man—proceeding as if Plaintiff challenges the marriage duration requirement even as to those never barred by state marriage exclusions. Def. Br. 17. Not so. The remedy sought, which would still require claimants to demonstrate their entitlement to benefits, is limited to those whom Defendant has excluded from eligibility for survivor's benefits because they were barred from equal access to marriage. It would not provide relief to anyone else—including those like Mrs. Salfi with potentially non-fraudulent marriages, but who already had an opportunity to show that non-fraudulent nature through the duration of their marriages. *See Harris v. Millennium Hotel*, 330 P.3d 330, 337 (Alaska 2014) (explaining similar scope of relief).

B. Administrative Efficiency

Administrative efficiency also cannot justify excluding individuals like Mr. Ely from survivor's benefits. The Ninth Circuit has already rejected reliance on "administrative burdens" as a rational basis for denying marriage-related benefits to same-sex couples where marriage bans prevented them from qualifying for such benefits—which is exactly the situation here. *Diaz*, 656 F.3d at 1014. That was true even though administering such benefits required a process for determining whether any particular same-sex couple was similarly situated to other couples eligible for benefits.

SSA does not dispute that it *can* determine whether the marriage exclusions that it incorporated into federal law caused an individual to be denied survivor's benefits. That

is illustrated by the fact that it has now made precisely such a determination for Mr. Ely. SSA also does not deny that the agency could make the exact same determinations for, say, James Obergefell, Anthony Gonzales, or other members of the discrete group here. That it would rather not do so—for convenience—does not make it constitutional.[8]

SSA admits there are those with "compelling" facts while speculating that there could be some with "weaker" facts. Def. Br. 32. But that does not make it rational to deny even the latter of simply the *opportunity* to demonstrate to SSA that their exclusion from marriage caused them to be denied survivor's benefits. That is the only relief sought here for members of the class—not an award of benefits by this Court. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974) (requiring SSA to afford the opportunity to establish eligibility rather than conclusively denying benefits to the subclass at issue). After all, SSA admits that its staff can engage in any "fact-specific inquiry" requiring "individualized adjudication." Def. Br. 28. But the problem is that, at present, they have no reason or legal basis for making those factual determinations unless this Court first holds what the Constitution requires. *Cf. Harris*, 330 P.3d at 337 (holding the exclusion of same-sex couples from death benefits unconstitutional while leaving any factual determinations to the agency). SSA admits its current limits: "the only relevant factual question before the agency was the length of Mr. Ely's marriage." Def. Br. 2.

Defendant's reliance on *Salfi*—again, a case about a heterosexual couple—is misplaced. Def. Br. 19. The problem is not that the government failed to create an "exception" for same-sex couples like Mr. Ely and Mr. Taylor; it is that the government

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[8] SSA is incorrect that administering the marriage duration requirement otherwise "requires only consulting the dates printed on two pieces of paper—one marriage certificate and one death certificate." Def. Br. 15. For example, SSA already routinely makes fact-specific determinations regarding whether a couple was in a common-law marriage recognized under state law, *see* Pl. Br. 22 (citing 20 C.F.R. § 404.726), where every couple "will have a different story to tell," Def. Br. 3. SSA is also incorrect that benefits "never turn[] on the *reason why* a claimant's marriage was . . . shorter than nine months." Def. Br. 21. The situation of an institutionalized former spouse is one example among many. Def. Br. 5.

excluded them from equal access to survivor's benefits in the first instance. That is not a quibble about nudging the dividing line to the left or right—such as whether nine versus ten months of marriage should be required—but an unconstitutional exclusion of a class of people built into the law itself by virtue of relying on state marriage laws. Notably, the relief in *Diaz* was also not framed as a domestic partner "exception" to the general rule that required marriage for benefits. As here, it was curing an unconstitutional exclusion. That is singularly "the courts' authority and responsibility"—not a duty that can be abdicated to the legislature that caused the constitutional violation. *See Golinski*, 824 F. Supp. 2d at 1002; *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

IV. Agency-Wide Relief is Required to Remedy the Constitutional Violation.

A. Agency-Wide Relief is Tailored to the Scope of the Violation.

Agency-wide relief should be granted because the agency's policy with respect to surviving same-sex spouses like Mr. Ely unconstitutionally deprives all of them of the same thing: "equal footing in its quest for a benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 667 (1993). Defendant claims that Article III constrains this Court from granting relief to anyone *except* Mr. Ely, but that is incorrect. There is no question that Mr. Ely has standing to bring his claims, and enjoining enforcement of an unconstitutional law is intrinsic to the judiciary's authority. Pl. Br. 25; *see, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). This is equally true of a statutory scheme that is unconstitutional as applied to a vulnerable minority, such as the same-sex couples at issue here. The Ninth Circuit enjoined just such a scheme in *Diaz*, blocking that statute's application to all Arizona employees with a same-sex partner, because they could not marry as required to access family health coverage. 656 F.3d at 1010.

Defendant's arguments would strip federal courts of authority ever to enjoin an unconstitutional law beyond the individuals before it. Under Defendant's logic, Mildred and Richard Loving would have been the only interracial couple free from criminal prosecution under Virginia's anti-miscegenation law; Edie Windsor's marriage alone

would have been recognized while DOMA continued to erase all others under federal law; and only the individual *Obergefell* plaintiffs could have married while other same-sex couples would have remained barred. *Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Windsor*, 570 U.S. at 749-52; *Obergefell*, 135 S. Ct. at 2593. But that has never been the law or historical practice. Moreover, Defendant's suggestion, unsupported by precedent, would increase judicial and individual burdens from piecemeal litigation. The Ninth Circuit was thus "unpersuaded by the Administration's arguments in favor of a blanket restriction on all nationwide injunctions" in the very case that Defendant cites. *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018); *cf.* Pl. Br. 24-25.

Defendant also cites *Marbury v. Madison*, but that case affirms that "a law repugnant to the constitution is void." 5 U.S. at 180. Nor is this a case like *Gill v. Whitford*, 138 S. Ct. 1916 (2018), where dilution of a plaintiff's "individual and personal" right to vote is not common to all other voters in the state, but instead occurs through "packing and cracking" votes based on factors particular to "specific districts." *Id.* at 1929-30 (quote omitted). Here, in contrast, the challenged policy is a singular, sweeping exclusion that applies in the same way to all same-sex survivors who were blocked from satisfying the nine-month requirement by unconstitutional marriage laws. *Alvarez v. Smith*, 558 U.S. 87 (2009), is still further afield. Def. Br. 37. Defendant relies on *Alvarez*'s instruction that "no justiciable controversy exists" once an injury has been "remedied," but nothing about Mr. Ely's injury has been redressed, in contrast to the situation of mootness of *Alvarez*. Defendant also points to the guidance in *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), Def. Br. 38, but that case confirmed that "there is no bar against nationwide relief . . . even if the case was not certified as a class action," as the many examples previously discussed illustrate.

The fact that Mr. Ely qualifies both to represent a class of similarly situated surviving spouses, and to obtain agency-wide relief independently, does not constitute some underhanded effort to seek "two bites at the apple," Def. Br. 39, but simply follows from the nature of his claims. The relief sought here would enjoin the agency's absolute

bar on allowing any same-sex survivor prevented from marrying nine months before their loved one's death to make their case before the agency. Dkt. 18 at 19-20. Mr. Ely seeks no adjudication of others' "uniquely personal" marriage details or benefits by this Court. Def. Br. 39-40. He asks merely to open the agency doors for others to make their own case. Dkt. 18 at 19-20. This is thus not a case where "further findings" are necessary before that relief can be granted. Def. Br. 39. Rather, the invalidity of a rule categorically blocking a group of surviving same-sex spouses from the safety net that others receive—based solely on unconstitutional marriage restrictions—is clear as a matter of law. In any event, the record here confirms the nationwide impact of the challenged agency conduct. And, as with marriage exclusions, only systemic relief can prevent Defendant from "reinforc[ing] messages of stigma or second-class status," which is necessary for complete relief to any individual. *SmithKline Beecham*, 740 F.3d at 483.

B. Class-Wide Relief is Both Appropriate and Warranted.

SSA's objections to class certification are fatally flawed. Having misconstrued the Court's authority, the scope of the proposed class, and the requested relief, SSA fails to undermine the propriety and necessity of certifying the proposed class.[9]

1. The Court Has Jurisdiction Over the Proposed Class.

SSA's objections to this Court's jurisdiction, whether under 42 U.S.C. § 405(g) or mandamus, are unsupportable. First, class members who will present their claims for benefits to SSA in the future meet § 405(g)'s presentment requirement. "The inclusion of future class members in a class is not itself unusual or objectionable," and "[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010). The same principle

[9] SSA argues that even if the Court rules against Plaintiff on the merits, it should go on to certify the class. But that would be gratuitous to the outcome (where no one is afforded relief in any event), and it would have the needlessly harsh consequence of depriving those who filed their own cases, such as Mr. Driggs, of the chance to be heard directly.

applies to social security class actions. Surviving spouses like Mr. Ely "who 'will file' claims will become members of the class only *after* they have presented their applications for benefits to the [agency]." *Hill v. Sullivan*, 125 F.R.D. 86, 94 (S.D.N.Y. 1989). They therefore "will not actually be covered by any order or judgment until they do so." *Andre v. Chater*, 910 F. Supp. 1352, 1357-58 (S.D. Ind. 1995). Inclusion of class members who will present their claims in the future is particularly proper in an action challenging continuing SSA practices. *See, e.g., Small v. Sullivan*, 820 F. Supp. 1098, 1112 (S.D. Ill. 1992); *Dixon v. Bowen*, 673 F. Supp. 123 (S.D.N.Y. 1987). As the Court found in *Dixon*,

> Inclusion in the class of those who apply for benefits after the entry of the [injunctive relief] protects applicants who would otherwise have to wait for [an unconstitutional denial of their benefits] before they seek a post-hoc remedy. Such unnecessary harm and repetitive litigation is precisely what the class action device is designed to prevent. Where the challenged practice is alleged to be continuing . . . the class properly includes future as well as past applicants who will be affected by it.

673 F. Supp. at 127 (quotation omitted). Thus, "individuals become class members only when they apply for benefits." *Id*; *see also, e.g.*, *Alexander v. Price*, 275 F. Supp. 3d 313 (D. Conn. 2017) (certifying class including future claims of Medicare recipients); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560 (N.D. Cal. 2007) (certifying class including future claims presented by dual eligible individuals challenging denial of prescription drug programs).[10] The same is true of the proposed class here.

Second, with regard to the exhaustion requirement, SSA merely states that the Court should not waive it without refuting that class members' claims meet the established criteria for waiver: collaterality, irreparability, and futility. Def. Br. 28. At most, SSA's focus on the allegedly "highly fact-specific" nature of class members' claims, *id*., can be construed as an attack on the collaterality of those claims to class members' entitlement to benefits. But SSA fundamentally misjudges the nature of the claims before the Court, which center not on class members' individual entitlements to

[10] SSA misreads this opinion, Def. Br. 28, which indicates that future claimants fulfill the presentment requirement and does not address exhaustion. *Id*. at 557, 560.

benefits but on the agency's blanket application of the marriage duration requirement to them—an unconstitutional barrier that denies them equal footing in seeking survivor's benefits. *Cf. Ne. Fla. Chapter*, 508 U.S. at 666.[11] "They [seek] the invalidation of a rule used to determine eligibility for benefits rather than the denial of benefits in a particular case," *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993), as "the right to equal treatment . . . is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). This is the essence of collaterality, and because SSA's systemic policy controls the outcome for all class members, "nothing is gained 'from permitting the compilation of a detailed factual record, or from agency expertise.'" *Johnson*, 2 F.3d at 922.

Third, citing only that the standard for waiving the 60-day limitations period for class members is "daunting," Defendant fails to address why the nature of this constitutional challenge should not overcome that standard. Def. Br. 28-29. To the extent the Court declines to waive the limitations period, the class definition can be modified to include those class members who applied for spousal survivor's benefits and were denied at any administrative level within sixty days of the filing of Mr. Ely's complaint, those whose claims are presently in the administrative process, and those who will apply and be denied in the future.[12]

Finally, the Ninth Circuit has repeatedly recognized that mandamus actions may lie against the Commissioner. *See*, *e.g.*, *Kildare v. Saenz*, 325 F.3d 1078, 1084-85 (9th Cir. 2003); *Johnson*, 2 F.3d at 924-25; Pl. Br. 30-31. Such jurisdiction is particularly appropriate in matters challenging the Commissioner's execution of constitutional duties,

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[11] In truth, the facts SSA claims need development relate to whether particular individuals qualify as class members, which, as discussed *infra* and as SSA concedes, Def. Br. 28, are matters the agency is well qualified to make in carrying out this Court's mandate to cease the unconstitutional application of the marriage duration requirement.

[12] Given that prior denials were based on Defendant's unconstitutional application of the law, any such claims excluded as untimely should nonetheless be deemed eligible for reopening pursuant to 20 C.F.R. §§ 404.987(b), 416.1487(b). *Cf.* Social Security Ruling (SSR 17-1p), https://www.ssa.gov/OP_Home/rulings/oasi/33/SSR2017-01-oasi-33.html; POMS GN 00210.030.

see, e.g., *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983), and is appropriate even for class members whose claims were not exhausted. *See Briggs v. Sullivan*, 886 F.2d 1132, 1141-42 (9th Cir. 1989). Mandamus thus provides an independent, alternative basis for this Court's jurisdiction over the class members' claims.

2. The Class is Clearly Defined and Satisfies Rule 23.

SSA's objections to the class definition attempt to inject ambiguity where none exists. SSA acknowledges that the framing of Plaintiffs' constitutional claims makes clear that clause (ii) of the class definition means that unconstitutional laws barring same-sex couples from marrying prevented class members from being married for at least nine months. Def. Br. 30. SSA clearly grasps that, both semantically and practically, this refers to "someone who could prove that, but for unconstitutional state laws prohibiting same-sex marriage, they would have married earlier and thus satisfied the nine-month duration-of-marriage requirement."[13] *Id*. at 31. The class is sufficiently definite.[14]

SSA essentially argues that confirmation of class membership will be administratively difficult, but the Ninth Circuit has expressly rejected that any such purported burden bars certification of the class. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017) (Rule 23 "neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification[.]").[15] In actuality, whether an individual is a class member subject to this Court's injunctive relief is the type of determination squarely within SSA's expertise. For example, proving that a same-sex couple would have been married for nine months but for the unconstitutional law in their state is directly parallel

[13] This acknowledgement defeats any suggestion that a sur-reply would be appropriate.

[14] To the extent the Court deems additional precision necessary, however, the Court can modify the language to achieve that goal. *See Moore's Federal Practice* § 23.21 (3d ed. 2009); Def. Br. 32 (arguing that the class should be limited to individuals who can demonstrate a causal connection between the marriage exclusions in their state of domicile and their inability to satisfy the nine-month requirement).

[15] This is particularly the case for classes seeking injunctive relief under Rule 23(b)(2). *See, e.g.*, *Ms. L. v. U.S. Immigration & Customs Enf't*, 330 F.R.D. 284, 290-91 (S.D. Cal. 2019); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1325-26 (W.D. Wash. 2015).

to the inquiries SSA makes to determine whether a couple would have been married for nine months but for state law barring divorce from an institutionalized spouse. *See* SSA, POMS, GN 00305.115, NH Unable to Divorce Institutionalized Prior Spouse. As well, the agency regularly evaluates the existence of marital relationships in the contexts of common law marriage and SSI holding out provisions, by assessing verifiable indicia of a relationship and relying on statements from claimants, their family, and friends, and other forms of "satisfactory evidence." *Id.*; *see also* SSA, POMS, GN 00305.065 Development of Common-Law (Non-Ceremonial) Marriages; SSA, POMS, SI 00501.152 Determining Whether Two Individuals Are Holding Themselves Out as a Married Couple. The class definition offers sufficient guidance for SSA to make these kinds of determinations here.

Turning to the actual requirements of Rule 23, SSA does not challenge either numerosity or adequacy of representation, but argues against a finding that the requirements for commonality, typicality, and injunctive relief under Rule 23(b)(2) have been met. Def. Br. 32-35. Each of these arguments ignores the nature of the relief the class seeks: a declaration that SSA's blanket application of the marriage duration requirement to the class here is unconstitutional, and an injunction both preventing that unconstitutional application and remedying its unconstitutional application to date.

SSA asserts that the facts of each individual's relationship are unique, but that is a distraction, because it ignores that the challenge here is to the categorical barrier that denies all class members of an equal opportunity to seek survivor's benefits. Though "the circumstances of each particular class member vary," they "retain a common core" of legal issues among them, thus establishing commonality. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quotation omitted). Class members do not merely allege a violation of the same law; they challenge "the constitutionality of [SSA's] policies and practices, which is a 'common question of law or fact' that can be litigated in 'one stroke.'" *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 969 (9th Cir. 2019).

SSA's arguments against typicality similarly fail. SSA essentially argues that Mr. Ely exemplifies the class definition *too* well, so his claims are not typical. But typicality

does not mean that other members have to meet the class definition in exactly the same way as Mr. Ely. It means that their injuries must result from the same unconstitutional course of conduct. *See Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

Finally, there is simply no question that the relief sought here is a unified injunction against SSA's unconstitutional practices, as anticipated by Rule 23(b)(2). The result of that requested injunction is not individual "litigation," as SSA suggests, but ordinary implementation of that injunction, forcing the agency to both cease and remedy its unconstitutional actions. The Court is not being asked to make individualized determinations about anything—whether a specific surviving spouse's membership in the class or a specific surviving spouse's entitlement to benefits. Those are determinations to be made by the agency in complying with the injunction, which SSA has had to do on countless occasions.[16] Contrary to SSA's tortured hypotheticals, Def. Br. 30-31, its duty is both straightforward and constitutionally routine: it must restore claimants "to the position they would have enjoyed" in the absence of discrimination. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). That does not mean every class member will receive benefits—merely that they have an opportunity to seek them. By certifying the class, the Court puts SSA on notice that anyone who meets the class definition, however they may meet it, is covered by the injunction.

CONCLUSION

"Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding [discriminatory] system." *Milliken*, 433 U.S. at 283. This Court should hold the challenged agency conduct unconstitutional, award Mr. Ely benefits, and certify the class so that others may have an opportunity to seek benefits.

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[16] *See, e.g.*, *Johnson*, 2 F.3d at 921 (court ordered SSA to "readjudicate those claims that were denied under the [invalidated] policy"); SSA, *Hearings, Appeals, and Litigation Law Manual*, Chapter I-1-7. Class Actions, https://www.ssa.gov/OP_Home/hallex/I-01/I-1-7.html (addressing class action implementation, including processes for screening for eligibility for class relief, adjudicating claims post-remand (including for unnamed class members), and flagging open claims of class members).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12th, 2019, I served the foregoing document on Defendant Andrew Saul through the CM/ECF system.

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