UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

FREDERICK J. COLOSIMO, *Plaintiff*, v. NANCY A. BERRYHILL, Acting Commissioner of Social Security, *Defendant*.	No. 1:18-cv-00170-FDW

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF CASE[1]

Plaintiff Frederick J. Colosimo and his late husband Harvey S. Lucas met and formed a loving, committed relationship in 1971. Certified Transcript ("Tr.") 40. They served in the Army Reserve and Army respectively, Tr. 13, 26, and Mr. Colosimo later worked as a Postmaster, while Mr. Lucas worked for Lockheed Martin Corporation. Tr. 13. Despite their inability to enter a ceremonial marriage, their relationship was otherwise similar to that of other married couples. They did "nearly everything jointly," Tr. 51, pooling their finances by jointly acquiring their credit lines, cars, and property over the years. Tr. 26, 51; Colosimo Decl. ¶ 15. They created a trust leaving all possessions to the survivor. Tr. 65. After Mr. Lucas died, Mr. Colosimo shouldered all the couple's remaining financial obligations. Tr. 51.

They also supported each other through sickness and health. In 2004, Mr. Lucas was diagnosed with likely inoperable heart disease. Tr. 64. He was added to the heart transplant list at the University of South Carolina ("USC"). Tr. 51. For the last 10 years of Mr. Lucas' life, Mr. Colosimo was his "constant companion," because Mr. Lucas could not be left alone. Tr. 41, 51, 57. In 2005, Mr. Lucas was medically evacuated to Charlotte, North Carolina after the local medical center determined it could do nothing more for him. Tr. 64. As Mr. Colosimo explained to the Social Security Administration ("SSA" or "agency"), "At this time, I was forced into early retirement to focus all my attention & efforts into keeping him alive." Tr. 64. After five cardiologists deemed Mr. Lucas inoperable, a sixth one agreed to perform a risky nine-hour procedure. Tr. 64-65. It was this surgery that would help sustain Mr. Lucas so that the couple

[1] Under Local Civil Rule 7.2(b)(1), this section must provide details of one's disabling condition, which are irrelevant here. Plaintiff instead reviews the facts relevant to his constitutional claims.

could eventually wed, allowing him to die having finally married the love of his life. Tr. 67.

After a "lengthy" and "horrific" recovery, the surgery succeeded. Tr. 65. However, during the years Mr. Lucas was on the heart transplant list, the couple was warned to stay within three hours of USC, forcing them to secure a South Carolina home. Tr. 65.[2] This, and Mr. Lucas' soaring medical bills, exhausted most of their retirement funds. Tr. 65. At all times, including in South Carolina, they held themselves out and were recognized as a family unit. Tr. 41, 51, 65-67; Colosimo Decl. ¶ 21-22. In 2010-2011, Mr. Lucas developed cancer. Tr. 66. They began shuttling between South Carolina and Georgia for treatment. Tr. 66. Mr. Lucas' vertebrae began deteriorating as he progressed to fourth-stage bone cancer, and he was in "extreme pain." Tr. 66. The couple was cautioned again to stay close for his treatment. Tr. 66.

No surrounding states allowed same-sex couples to enter ceremonial marriage then. Tr. 57, 66. But, as Mr. Colosimo wrote to the agency, "Mr. Lucas's only wish was that our 43 year union in life together should & must be validated before it was too late for him, so in a period of somewhat improvement in Nov. 2013 we took the big chance, when we heard that N.J. had legalized gay-marriage." Tr. 67. Despite the significant pain this caused Mr. Lucas, the couple traveled to New Jersey (where Mr. Colosimo had family). Tr. 57, 67. They were married on November 7, 2013. Tr. 13, 67. Despite the difficulty of traveling hundreds of miles in his condition, Mr. Lucas married Mr. Colosimo 17 days after marriage was available in New Jersey. Tr. 71. After the couple returned to North Carolina, Mr. Lucas succumbed to cancer on June 3, 2014—seven months after their New Jersey marriage. Tr. 26, 67, 71. At age 70, Mr. Colosimo found himself a widower, coping with the emotional and financial burden of losing his spouse.

[2] The Tr. erroneously states that they divided their time between New Jersey and North Carolina, Tr. 6, but instead they shuttled between medical providers in North and South Carolina. Tr. 65.

PROCEDURAL HISTORY

SSA provides widow's and widower's insurance benefits (collectively, "survivor's benefits") to surviving spouses under the Social Security Act. 42 U.S.C. § 402(e); 42 U.S.C. § 402(f). Survivor's benefits provide surviving spouses with a monthly benefit based on the earning record of the deceased spouse. An individual must generally have been married to his or her spouse for at least nine months subject to various exceptions to qualify for survivor's benefits. 42 U.S.C. § 416(g); *see also* 20 C.F.R. § 404.335.

Like other workers, both Mr. Colosimo and Mr. Lucas contributed to Social Security with deductions from every paycheck. Tr. 13. The government, in effect, returns these earnings to workers who live long enough to see their retirement years, and when they die, these earnings fund protections for their surviving spouses. Because Mr. Lucas died only seven months after the couple's New Jersey marriage, however, SSA denied his survivor's benefits claim based on the nine-month marriage duration requirement in the Social Security Act. In other words, because Mr. Lucas died on June 3, 2014, Mr. Colosimo would have needed to be recognized as married Mr. Lucas by September 3, 2013—even though North and South Carolina did not permit or recognize marriages of same-sex couples until after Mr. Lucas' death. Tr. 24. As a result, SSA has and continues to deprive Mr. Colosimo of thousands of dollars in survivor's benefits.

The Administrative Law Judge ("ALJ") approved Mr. Colosimo's claim for survivor's benefits, entering a fully favorable decision to Mr. Colosimo on March 21, 2016. Tr. 45-52. As the ALJ recognized, after forming a committed relationship in 1971, Mr. Colosimo and Mr. Lucas cared for one another and held themselves out as being in a committed relationship over their more than four decades together. Tr. 51. The ALJ found that this was done with "the understanding that they would care for and support one another," as evidenced by Mr. Colosimo's constant presence at Mr.

Lucas' side after Mr. Lucas was placed on a heart transplant list, his devoted care for the last decade of Mr. Lucas' life, and his assumption of Mr. Lucas' financial responsibilities after his death. Tr. 51.

The ALJ observed that until Mr. Colosimo and Mr. Lucas "were finally allowed under the law to marry and receive the dignity and benefits accorded any other legally married couple, they had been blocked by the law." Tr. 52. Although only seven months had passed after their New Jersey marriage before cancer claimed Mr. Lucas' life, the ALJ found that "[t]o allow the nine-month standard of section 216(g) to administer one more blocking blow," when for more than four decades "they had acted and lived like a married couple in so far as the technicalities of the law would allow – would be a further, intolerable denial of the equal protection of the law to which Mr. Colosimo is entitled." Tr. 52. The ALJ accordingly found the denial of widower's benefits against equity and good conscience, and that Mr. Colosimo is entitled to surviving spousal benefits. Tr. 52.

The Appeals Council reviewed the ALJ's decision and issued an unfavorable decision on February 8, 2017. Tr. 68-73. Because Mr. Colosimo was not recognized as married to Mr. Lucas for nine months before the latter died on June 3, 2014—and even though neither North or South Carolina would recognize marriages of same-sex couples until months after Mr. Lucas' death—the agency denied survivor's benefits to Mr. Colosimo. Tr. 73. At no point did the agency consider whether the couple had entered a common law marriage in South Carolina, entitling Mr. Colosimo to benefits.

STANDARD OF REVIEW AND RELEVANT LAW

While the Social Security Act, 42 U.S.C. § 405(g), typically limits judicial review to whether SSA's decision is supported by substantial evidence, and applied the correct standards, questions of law and constitutional claims such as those here present "legal issues" that "are subject to *de novo* review." *Mitchell v. Apfel*, 19 F. Supp. 2d 523, 525 (W.D.N.C. 1998), *aff'd sub nom. Mitchell v. Comm'r of the Soc. Sec. Admin.*, 182 F.3d 272 (4th Cir. 1999).

ISSUES PRESENTED

1. Did SSA err by failing to consider the couple's common law marriage under South Carolina law?

2. Does the denial of survivor's benefits to Mr. Colosimo based on unconstitutional marriage laws violate the principles recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *United States v. Windsor*, 570 U.S. 744 (2013)?

3. Does the denial of benefits require heightened scrutiny given that it treats Mr. Colosimo differently based on sex and sexual orientation and burdens fundamental liberty interests?

4. Does the denial of benefits here survive even rational basis review?

ARGUMENT

As one district court wrote in recognizing that same-sex couples must be allowed to marry, "We have arrived upon another moment in history when *We the People* becomes more inclusive, and our freedom more perfect."[3] But some are still waiting to fully realize that promise, including those denied a critical safety net that many seniors rely upon in their retirement years—Social Security spousal survivor's benefits—which one qualifies for after nine months of marriage. Unconstitutional marriage restrictions prevented Mr. Colosimo from meeting that nine-month requirement before cancer claimed his beloved husband's life. Defendant now cites that discrimination as the reason that it must heap yet more inequity upon Mr. Colosimo, by denying him survivor's benefits. This violates federal equal protection and due process guarantees just as surely as the original exclusion from marriage did.

The U.S. Supreme Court has held that the government may not exclude same-sex couples

[3] *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 10022686, at *23 (E.D. Va. Feb. 14, 2014), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

from marriage, or deprive them of the associated benefits, but the federal government continues to discriminate against same-sex couples presently based on their prior unconstitutional exclusion from marriage. SSA denied widower's benefits to Mr. Colosimo because he and his late husband, Harvey Lucas, were not married for at least nine months—even though North and South Carolina would not permit or recognize their marriage during Mr. Lucas' life. Although Mr. Colosimo and Mr. Lucas were in a loving, committed relationship for 43 years, they were only able to enter a ceremonial marriage because they traveled hundreds of miles out-of-state to marry. They experienced life as a married couple for only seven months before cancer claimed Mr. Lucas' life. Now a 75-year-old widower, Mr. Colosimo must go without the financial protection available to different-sex surviving spouses as a matter of course.

The agency first erred in failing to consider whether Mr. Colosimo and Mr. Lucas met the prerequisites for a common law marriage in South Carolina, which permits such marriages. Reversal of that error alone could resolve Mr. Colosimo's claims. If the Court denies relief on that ground, however, it would need to consider the constitutional claims described below.

The federal government's denial of survivor's benefits to Mr. Colosimo violates equal protection and due process for two reasons, each independently sufficient to require reversal. First, because it is unconstitutional to exclude same-sex couples from marriage, it is also unconstitutional for the federal government to import those unlawful marriage restrictions into federal law. By relying on discriminatory marriage laws to determine eligibility for survivor's benefits, the government revives and replicates the constitutional harms that the Supreme Court condemned in striking down government discrimination against same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *United States v. Windsor*, 570 U.S. 744 (2013). One constitutional violation cannot serve as the justification for another constitutional violation.

Second, and independent of the unlawfulness of Mr. Colosimo's exclusion from marriage, the exclusion of surviving same-sex spouses like Mr. Colosimo from survivor's benefits fails any level of constitutional scrutiny. This exclusion discriminates based on sex and sexual orientation and burdens fundamental liberty interests that protect intimate family relationships. But for the fact that Mr. Colosimo was in a relationship with a person of the same sex—a relationship secured to him by the Constitution and entitled to equal dignity and respect by the government—he would have been eligible for survivor's benefits. His exclusion from survivor's benefits lacks even a rational basis, let alone an important or compelling one. Requiring Mr. Colosimo to be recognized as married when North and South Carolina refused that protection for their relationship is disconnected from any conceivable government interest that justifies a marriage duration requirement for couples who were freely able to marry.

Survivor's benefits act as a social safety net to catch survivors in a time of potential crisis and to mitigate financial burdens that follow the death of a spouse. Not only have same-sex couples, for whom marriage came too late in their lives together, been stripped of equal access to this vital protection, they must also subsidize benefits for the privileged majority. Survivor's benefits are funded by all individuals who have paid into the Social Security system—including same-sex couples like Mr. Colosimo and Mr. Lucas—and the Constitution requires that these benefits be accessible to all individuals on equal terms.

I. Mr. Colosimo is Entitled to Survivor's Benefits Because He and Mr. Lucas Formed a Common Law Marriage Under South Carolina Law.

Mr. Colosimo and Mr. Lucas were in a common law marriage under South Carolina law, which the agency failed to consider. "A common law marriage is formed when two parties contract to be married." *Callen v. Callen*, 365 S.C. 618, 624 (2005). "No express contract is necessary;" instead, it "may be inferred from the circumstances." *Id.* Because direct evidence of

the requisite intent is often unavailable, "the existence of a common-law marriage is frequently proved by circumstantial evidence." *Barker v. Baker*, 330 S.C. 361 (Ct. App. 1998); *see also Campbell v. Christian*, 235 S.C. 102, 108 (1959).

Notwithstanding South Carolina's unconstitutional exclusion of same-sex couples from marriage at the time, Mr. Colosimo has a right equal to that of an individual in a different-sex relationship to demonstrate a common law marriage under South Carolina law. *See In re Marriage of Hogsett and Neale*, No. 17CA1484, 2018 WL 6564880, at *4 (Colo. Ct. App. Dec. 13, 2018) ("same-sex couples must be accorded the same right as opposite-sex couples to prove a common law marriage even when" it "pre-dates *Obergefell*"); *Roberts v. Berryhill*, 310 F. Supp. 3d 529, 534-36 (E.D. Pa. 2018) (awarding attorneys' fees where survivor's benefits had been wrongfully withheld from surviving same-sex common law spouse); *In re Estate of Carter*, 159 A.3d 970, 977-78 & n.8 (Pa. Super. Ct. 2017) (same-sex couples possess an equal right to establish a common law marriage—including before *Obergefell*); *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 624 (E.D. Tex. 2016) (same).

Here, Mr. Colosimo and Mr. Lucas longed to be married throughout their relationship. Tr. 67. They acted in every respect like a married couple while living in South Carolina, took care of each other as spouses do, and held themselves out as a family unit. Tr. 51, 64-67. This included when Mr. Lucas' medical needs required them to establish a residence in South Carolina beginning in 2004. Tr. 65; Colosimo Decl. ¶¶ 20-22. Accordingly, the agency erred in not considering whether Mr. Colosimo had demonstrated a common law marriage, as the record amply supports. At a minimum, remand is appropriate where the agency failed to consider Mr. Colosimo's eligibility as a South Carolina common law spouse. *See, e.g.*, *Martian v. Berryhill*, No 1:18-cv-00012, 2018 WL 4568603, at *1-2 (E.D. Va. Sept. 24, 2018) (remanding where ALJ

failed to employ proper standards to determine existence of South Carolina common law marriage). Indeed, the Appeals Council stated it "looks to [the deceased worker's] domicile at the time to death to determine if the Administration recognizes a same-sex marriage," Tr. 68, but, in fact, the agency's policy is that it must recognize a same-sex couple's marriage "as of the date of the marriage," including "when the [deceased worker's] state of domicile did not recognize same-sex marriage." SSA Program Operations Manual System GN 00210.002.

Should the Court decline to remand for SSA's consideration of this argument, however, it must instead resolve the constitutional claims below.

II. The Denial of Survivor's Benefits to Mr. Colosimo Based on Unconstitutional Marriage Laws Violates the Principles Recognized in *Obergefell* and *Windsor*.

The only basis for the denial of survivor's benefits to Mr. Colosimo is the fact that he was not recognized as married for at least nine months—which was due to the exclusion of same-sex couples from marriage that the Supreme Court has recognized as unconstitutional. Because it was unconstitutional to exclude Mr. Colosimo and Mr. Lucas from marrying in the first instance, it is also unconstitutional for the government to rely on that exclusion to deny Mr. Colosimo survivor's benefits he would have otherwise received. Any contrary holding would inflict further injury based on constitutional wrongs that the Supreme Court has already struck down.

The Supreme Court's decisions affirming the equal dignity of same-sex relationships make clear that the government may not deny benefits and protections to same-sex couples based on government-imposed barriers to marriage. *See Obergefell*, 135 S. Ct. at 2601; *Windsor*, 570 U.S. at 772-74. In striking down the Defense of Marriage Act ("DOMA"), which barred federal recognition of same-sex couples' marriages, *Windsor* found it unconstitutional for the federal government to carve out same-sex couples from the protections afforded to spouses. *Obergefell* further held that the exclusion of same-sex couples from marriage—as well as from the panoply

of benefits and protections associated with marriage—unconstitutionally deprived those couples of liberty, equality, and dignity. The Supreme Court affirmed these principles in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), reiterating that "same-sex couples, no less than opposite-sex couples, *must have access*" to the full array of rights related to marriage. *Id.* at 2078 (emphasis added).

The Supreme Court has also emphasized the particular indignity of deeming two people who shared a committed relationship to be "strangers even in death" through the government's refusal to recognize their relationship on equal footing as others. *Obergefell*, 135 S. Ct. at 2594. When *Obergefell* canvassed the harm to same-sex couples from being denied the constellation of rights and benefits that the government links to marriage, it specifically included "the rights and benefits of survivors." *Id.* at 2601. And among the many burdens inflicted by DOMA, *Windsor* singled out Social Security survivor's benefits, recognizing that the law "denies or reduces benefits allowed to families upon the loss of a spouse … [which] are an integral part of family security." 570 U.S. at 773. The facts giving rise to *Obergefell* and *Windsor* illustrated these harms: they included the denial of a death certificate recognizing a surviving spouse (*Obergefell*) and the denial of a tax exemption for a surviving spouse (*Windsor*).

Moreover, these harms inflict "more than just material burdens" because the government's exclusion "demeans" same-sex couples and consigns them to "an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 135 S. Ct. at 2601. That dignitary injury cuts especially deep here: in a time of immeasurable grief, the federal government has deemed Mr. Colosimo not to be a "widower" under the Social Security Act—all because of his unconstitutional exclusion from marriage. 42 U.S.C. § 402(f); 42 U.S.C. § 416(g).

Because it was unconstitutional for North and South Carolina to exclude Mr. Colosimo and Mr. Lucas from being recognized as married nine months before Mr. Lucas' death, it is also

unconstitutional for SSA to rely on that exclusion in denying survivor's benefits. The federal government may not rely on unconstitutional state law in determining eligibility for benefits. A classification is discriminatory where it incorporates another law that itself is discriminatory. *See Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (conditioning benefits on marriage, which was denied to same-sex couples, discriminates based on sexual orientation).

Indeed, permitting the federal government to justify its denial of benefits by pointing to marriage exclusions in state law would be particularly unjust given the federal government's role in maintaining those exclusions. As *Windsor* explained, when the federal government enacted DOMA in 1996, its purpose was "to discourage enactment of state same-sex marriage laws" and "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." 570 U.S. at 771 (internal quotes omitted). Thus, the financial burden that Mr. Colosimo now faces as a same-sex widower is one to which the federal government has directly contributed—and, indeed, exactly what it hoped to achieve. But the Constitution "withdraws from Government the power to degrade or demean in [this] way." *Id.* at 774.

The appropriate remedy for a constitutional violation is to restore the plaintiff to the position they would have otherwise occupied, without the unconstitutional action, with respect to the particular injury at issue. *See United States v. Virginia*, 518 U.S. 515, 547 (1996) (the remedy for a constitutional violation "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination]'"); *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (recognizing a court's duty to eliminate effects of discrimination). For an equal protection violation, the remedy is either to extend the benefit to the excluded group or eliminate the benefit for everyone. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017). Given that North and South Carolina have

shown that they prefer to continue providing marriage licenses to both different-sex and same-sex couples rather than to stop issuing marriage licenses for everyone, extension of survivor's benefits to a surviving same-sex spouse like Mr. Colosimo is the appropriate remedy here.

In sum, Mr. Colosimo should be eligible to receive survivor's benefits here because SSA relied on an unconstitutional law in its denial. That is the only remedy that would place him in the position that he would have occupied but for his and Mr. Lucas's unlawful exclusion from marriage. Although nothing can erase the sting of discrimination that they suffered throughout the vast majority of their relationship because of this exclusion, the Constitution requires the government to provide Mr. Colosimo with this important measure of equal dignity.

III. The Exclusion of Surviving Same-Sex Spouses Like Mr. Colosimo from Survivor's Benefits Violates Equal Protection and Due Process.

The denial of survivor's benefits to Mr. Colosimo is also unconstitutional for another reason, independent of the unlawfulness of his exclusion from marriage. Even before courts recognized that it was unconstitutional to exclude same-sex couples from marriage, they overwhelmingly recognized that it was unconstitutional to exclude them from the legal benefits of marriage. They found no government interest served by excluding loving and committed same-sex couples who wished to marry—but were barred from doing so—from the benefits and protections related to marriage, regardless of the level of constitutional scrutiny employed. That reasoning fully applies to Mr. Colosimo: SSA has unjustifiably denied him equal access to survivor's benefits, which are conditioned upon him being married at a time when North and South Carolina prohibited same-sex couples from marrying, or being recognized as such.

A. The Denial of Survivor's Benefits to Mr. Colosimo is Subject to Heightened Scrutiny Under Equal Protection and Due Process.

The denial of survivor's benefits to Mr. Colosimo requires heightened scrutiny under

equal protection and due process. This denial discriminates against surviving same-sex spouses like Mr. Colosimo based both on sex and sexual orientation, each independently requiring heightened scrutiny. Heightened scrutiny is also required because the government has infringed Mr. Colosimo's fundamental liberty interest in forming a relationship with Mr. Lucas.

1. The Denial of Survivor's Benefits Here Requires Heightened Scrutiny Because It Discriminates Based on Sex.

The denial of benefits to Mr. Colosimo cannot be understood without reference to his sex. If Mr. Colosimo had been a woman who sought to marry Mr. Lucas, his eligibility to marry and thereby obtain survivor's benefits would be unquestioned. But because Mr. Colosimo is a man who sought to marry another man, which North and South Carolina would not permit or recognize, he is denied benefits. The sex-based discrimination inherent in this denial places a heavy burden on the government: it must demonstrate a substantial relationship between the discrimination and an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524.

Numerous cases striking down similar barriers have recognized that denials like the one here discriminate based on sex. For example, *In re Fonberg* held that the federal government's denial of spousal health insurance to the same-sex partner of a judicial law clerk, who was unable to marry her same-sex partner under state law, discriminated "based on the sex of the participants in the union." 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) (holding that this denial also discriminated based on sexual orientation and violated equal process and due process). Courts applied similar principles in a number of DOMA challenges pre-dating *Windsor*. *See, e.g.*, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not … withhold benefits from her. Thus, DOMA … restrict[s] Ms. Golinski's access to federal benefits because of her sex.");

In re Levenson, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (same).

Courts similarly recognized the intrinsic sex-based restrictions in laws barring same-sex couples from marriage. *See, e.g.*, *Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1281 (D. Neb. 2015), *aff'd on other grounds*, 798 F.3d 682 (8th Cir. 2015) (a law "that mandates that women may only marry men and men may only marry women facially classifies on the basis of gender"); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014) (Utah's marriage laws prohibiting "a man from marrying another man," but not "from marrying a woman," classify based on sex). These cases broke no new ground; they faithfully followed the Supreme Court's instruction that discrimination based on one's relationship with another person violates equal protection just as directly as discrimination against the individual. For example, the Supreme Court had no trouble recognizing the race discrimination at play when Virginia punished Mildred and Richard Loving for marrying because of their race in relation to each other. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Similarly, SSA denied Mr. Colosimo benefits because of his sex in relation to Mr. Lucas, which was the reason state law prevented them from marrying or being recognized as such.

The denial of benefits to Mr. Colosimo must be subjected to heightened scrutiny for the additional reason that it is premised on impermissible sex stereotyping. "[L]egislating on the basis of such stereotypes limits, and is meant to limit, the choices men and women make about the trajectory of their own lives, choices about work, parenting, dress, driving—and yes, marriage." *Latta v. Otter*, 771 F.3d 456, 487 (9th Cir. 2014) (Berzon, J., concurring). Stereotypes "concerning to or with whom a [man] should be attracted, should marry, and/or should have children is discrimination on the basis of sex." *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (finding sex discrimination under the Fair Housing Act). "Such

stereotypical norms are no different from other stereotypes," *id.*, and relying on them to deny survivor's benefits is an additional reason that the denial here offends equal protection.

2. The Denial of Survivor's Benefits Here Requires Heightened Scrutiny Because It Discriminates Based on Sexual Orientation.

Just as the denial of survivor's benefits discriminates based on sex, it also discriminates based on sexual orientation: if Mr. Colosimo had been heterosexual, he would unquestionably have been able to marry more than nine months before his spouse's death and qualify for benefits. Mr. Colosimo and Mr. Lucas, who yearned to marry long before cancer took Mr. Lucas' life, are similarly situated in every relevant respect to heterosexual couples, save their sexual orientation. *Obergefell*, 135 S. Ct. at 2601 ("[t]here is no difference between same- and opposite-sex couples with respect to" the "fundamental character of the marriage right"). Courts have recognized that conditioning benefits on marriage discriminates based on sexual orientation where lesbians and gay men were not able to be recognized as married. *See, e.g.*, *Bassett*, 951 F. Supp. 2d at 963 (holding that the denial of spousal health coverage for employees' same-sex partners discriminated based on sexual orientation; collecting cases).

The Supreme Court has consistently applied heightened scrutiny where a group has suffered a history of discrimination and the classification has no bearing on the ability to perform in society. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). In addition, the Supreme Court has sometimes considered whether the group is a politically vulnerable minority, and whether there is an "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). No single hallmark is dispositive: each serves as a warning sign that a particular form of discrimination is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). While the presence of all

the hallmarks is not required, they all exist with respect to sexual orientation discrimination.[4] *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1012-14 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

History of Discrimination. "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence v. Texas*, 539 U.S. 558, 559 (2003). For much of this country's history, "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Obergefell*, 135 S. Ct. at 2596. Until judicial intervention in 2003, states were able to "demean [lesbian, gay, and bisexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578. There have also been sweeping attacks in legislatures and at the ballot box, producing patently unconstitutional laws requiring reversal by the courts. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635-36 (1996); *Windsor*, 570 U.S. at 775; *Obergefell*, 135 S. Ct. at 2608. These attacks continue into the present day. *See Carcaño v. Cooper*, No. 1:16-cv-236, 2018 WL 4717897, at *12 (M.D.N.C. Sept. 30, 2018) (law stripping local antidiscrimination protections).

Ability to Contribute to Society. Sexual orientation bears no relationship to the ability to contribute to society. Courageous lesbian and gay Americans now bravely serve their country in

[4] No controlling case law governs the level of scrutiny for sexual orientation classifications. While this circuit previously applied rational basis review, *see Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996), it has recognized that the appropriate level of scrutiny is now an open question because its older decisions were premised on the absence of constitutional protection for same-sex relationships, which is incorrect now. *Compare Thomasson*, 80 F.3d at 929 (noting that "it is legitimate for Congress to proscribe homosexual acts"), *with Bostic*, 760 F.3d at 375 n.6 (because marriage exclusions violate the fundamental right to marry, the court "need not reach the question of whether *Thomasson* . . . remain[s] good law"). Other district courts in the circuit similarly recognize that the question remains open. *See Bostic*, 2014 WL 10022686, at *22 n.16 (finding it unnecessary to decide, but stating that if the court considered whether the marriage exclusion "warrant[ed] heightened scrutiny, it would be inclined to so find").

the military every day. Pub. L. No. 111-321, 124 Stat. 3516 (2010) (eliminating ban on military service). Just like different-sex couples, "many same-sex couples provide loving and nurturing homes to their children" in families deserving of equal dignity and integrity. *Obergefell*, 135 S. Ct. at 2600; *Bostic*, 2014 WL 10022686, at *13 ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships."); *see also Golinski*, 824 F. Supp. 2d at 986; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 320 (D. Conn. 2012).

Immutability. When considering immutability, courts have recognized that the purpose is to identify characteristics that individuals either cannot change or should not be required to change as a condition of equal treatment. *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977). Sexual orientation is precisely such a trait, as *Obergefell* conclusively held. 135 S. Ct. at 2594 (recognizing the "immutable nature" of individuals seeking to marry others of the same sex) & 2596 (psychiatrists and other experts now recognize that sexual orientation is "immutable"); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010) ("[n]o credible evidence supports a finding that an individual may … change his or her sexual orientation").

Relative Political Power. This consideration examines relative rather than absolute political power—*i.e.*, whether the "discrimination is unlikely to be *soon rectified* by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (emphasis added); *Windsor v. United States*, 699 F.3d 169, 184 (2d Cir. 2012). When the Supreme Court applied heightened scrutiny to sex discrimination in *Frontiero v. Richardson*, Congress had already "manifested an increasing sensitivity to sex-based classifications" by enacting express federal employment and equal pay protections, and approving the Equal Rights Amendment for ratification by the states. 411 U.S. 677, 685–687 (1973) (plurality). Gay people lack any such

express protections. Lacking sufficient political strength to protect themselves at the ballot box, they also "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997).

3. The Denial of Survivor's Benefits Here Requires Heightened Scrutiny Because It Burdens Fundamental Liberty Interests.

The constitutional guarantee of due process protects individuals from governmental infringement upon fundamental liberty interests. These include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597-98. An individual has the right to form an intimate family relationship with a person of the same sex "without intervention of the government." *Lawrence*, 539 U.S. at 578. Choices concerning family relationships are constitutionally protected because they "shape an individual's destiny," and this is "true for all persons, whatever their sexual orientation." *Obergefell*, 135 S. Ct. at 2599. As the Fourth Circuit has held, the choices "individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377.

The government has exacted a significant penalty on Mr. Colosimo because he exercised the right to share his life with a man, where state law barred Mr. Colosimo from marrying Mr. Lucas or being recognized as such. The price that he has paid is the loss of survivor's benefits. The deprivation of legal protections to shelter a relationship imposes a substantial burden on the right to form and sustain that relationship. *See Windsor*, 570 U.S. at 772-74; *Obergefell*, 135 S. Ct. at 2601. This burden upon Mr. Colosimo's fundamental liberty interests requires the government to show, at a minimum, that its actions bear a significant relationship to important government interests. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (applying heightened scrutiny based on burdening of liberty interests protected by *Lawrence*).

Additionally, under the "Equal Protection Clause[], interference with a fundamental right"—in the form of discrimination with respect to the exercise of that right—also warrants heightened scrutiny. *Bostic*, 760 F.3d at 375. Here, the government discriminates against Mr. Colosimo for having exercised his fundamental right in a disfavored way, by sharing his life with a man rather than a woman, which requires close scrutiny by this Court. *See Witt*, 527 F.3d at 817; *Bostic*, 760 F.3d at 375; *Kitchen*, 755 F.3d at 1218.

B. The Denial of Survivor's Benefits to Surviving Spouses Like Mr. Colosimo Fails to Even Rationally Further Any Legitimate Government Interest.

Although the denial of survivor's benefits to Mr. Colosimo requires heightened scrutiny, it fails even rational basis review. Rational basis review is never "toothless," and courts have also applied a more searching form of rational basis review depending on context, including where the government has disadvantaged an unpopular minority or burdened intimate family relationships. *Windsor*, 699 F.3d at 180 ("'rational basis analysis can vary by context'") (quote omitted); *accord Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012). "Irrational classifications or laws motivated by the desire to harm an unpopular group fail rational basis scrutiny." *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999). In all events, the court must inquire into "the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632 (invalidating state law denying protection to gay people); *see also Cleburne*, 473 U.S. at 446.

There is no such relationship here, for a simple reason: imposing a nine-month marriage duration requirement on individuals prevented from marrying or being recognized as such nine months before the death of their same-sex spouse fails to advance any governmental interest. Courts have analogously held that requiring marriage to qualify for benefits served no valid interest where same-sex couples could not be recognized as married. For example, in *Diaz v.*

Brewer, the Ninth Circuit held that denying spousal health insurance to state employees' same-sex partners—who were unable to marry under state law—lacked any rational basis. 656 F.3d 1008, 1014 (9th Cir. 2011) (the distinction "between homosexual and heterosexual employees, similarly situated, … cannot survive rational basis review"); *see also Bassett*, 951 F. Supp. 2d at 963. Likewise, in *Harris v. Millennium Hotel*, the Alaska Supreme Court held that the government could not deny spousal death benefits to a worker's surviving same-sex partner: "marriage may serve as an adequate proxy [of close or dependent relationships] for opposite-sex couples"—but "it cannot serve as a proxy for same-sex couples because same-sex couples are absolutely prohibited from marrying under [state] law." 330 P.3d 330, 337 (Alaska 2014).

A legion of other courts reached similar conclusions.[5] Indeed, even the dissent in *Obergefell*, while rejecting that same-sex couples should be able to marry, agreed that "a more focused challenge to the denial of certain tangible benefits" related to marriage would have resulted in a different equal protection analysis. 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

1. Avoidance of Sham Marriages Cannot Justify the Denial Here.

First, to the extent that the nine-month marriage duration requirement seeks to filter out or discourage sham marriages entered solely to obtain survivor's benefits, the exclusion of same-sex surviving spouses who did not have equal access to marriage nine months before their loved ones died lacks any rational connection to that objective. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court upheld the application of the nine-month requirement to

[5] *See In re Fonberg*, 736 F.3d at 903; *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012); *Collins v. Brewer*, 727 F. Supp. 2d 797, 803-07 (D. Ariz. 2010); *In re Madrone*, 271 Or. App. 116, 118 (2015); *State v. Schmidt*, 323 P.3d 647 (Alaska 2014); *Lewis v. Harris*, 188 N.J. 415 (2006); *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229/230, 2006 WL 1217283, at *6 (N.H. Super. Ct. May 3, 2006); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).

a woman who was only married to her husband for six months. But Mr. Colosimo is not similarly situated to Ms. Salfi. While a nine-month requirement may be justified as a proxy for detecting or deterring sham relationships between different-sex couples—who have always been able to marry—it cannot serve that function for same-sex couples like Mr. Colosimo and Mr. Lucas, who were barred from being recognized as married despite 43 years of commitment.

In holding that same-sex couples must have access, at the least, to various benefits related to marriage, courts recognized that the rationales permitting the government to condition benefits on marriage for different-sex couples had no footing in the context of same-sex couples who could not be recognized as married. *See Harris*, 330 P.3d at 334 (acknowledging earlier case law upholding distinctions between married and unmarried different-sex couples in eligibility for death benefits and explaining its clear inapplicability to same-sex couples who could not marry); *Diaz*, 656 F.3d at 1014 (because health insurance "was limited to married couples, different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so" but state law "prohibit[ed] same-sex couples from doing so"); *cf. U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (finding an exclusion of certain households from food stamps irrational where they were not the ones likely to abuse the program).

In defending the exclusion of same-sex couples from marriage, states similarly invoked concerns about avoiding fraudulent marriages entered solely for obtaining benefits. But courts recognized that a "purported interest in minimizing marriage fraud is in no way furthered by excluding one segment of the [] population … based upon that segment's sexual orientation." *Bostic*, 2014 WL 10022686, at *14. Requiring surviving same-sex spouses to have married or to have been recognized as such when state law prevented it "in no way further[s]" an interest in avoiding sham marriages. Rather, it erects an unlawful barrier that deprives them of an equal

opportunity to demonstrate the non-fraudulent nature of their marriage through its duration. Surviving same-sex spouses who can show they would have satisfied the nine-month requirement but for unconstitutional marriage bans must have equal access to survivor's benefits.

2. Cost Savings Cannot Justify the Denial Here.

For similar reasons, the denial here also cannot be justified by cost savings. Because it will always save money to exclude any group from benefits, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. Nor can the denial here be justified by a desire to limit survivor's benefits to those most likely to be dependent on the deceased, because the only conceivable proxy for dependence employed here—nine months of marriage—was not equally available in light of marriage exclusions. It is well established that "[t]he saving of … costs cannot justify an otherwise invidious classification." *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

Courts have accordingly rejected cost savings as a justification for excluding same-sex couples from various benefits conditioned on marriage when they were simultaneously barred from marrying. *See, e.g.*, *Diaz*, 656 F.3d at 1014; *Bassett*, 951 F. Supp. 2d at 967. Mr. Colosimo simply seeks his fair share of what he is due: survivor's benefits tethered to the earning history of Mr. Lucas and, in effect, funded by Mr. Lucas' Social Security contributions. The budget of the Social Security Trust Fund cannot be balanced on the backs of surviving same-sex spouses deprived of equal access to marriage, and thus survivor's benefits.

3. Administrative Efficiency Cannot Justify the Denial Here.

Finally, the denial of survivor's benefits to surviving same-sex spouses like Mr. Colosimo cannot be justified by an interest in avoiding the administration of these benefits. Although an interest in administrative efficiency may justify the nine-month marriage duration

requirement as to different-sex couples who could freely marry, *Weinberger*, 422 U.S. at 772, it cannot justify the deprivation of survivor's benefits to same-sex couples who could not do so.

"[A]lthough efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero*, 411 U.S. at 690 (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). Constitutional promises of liberty and equality "were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials." *Stanley*, 405 U.S. at 656; *Frontiero*, 411 U.S. at 690-91.

Courts have thus repeatedly rejected administrative efficiency as a justification for depriving same-sex couples who were barred from marrying of benefits related to marriage. *See Diaz*, 656 F.3d at 1014 (holding that the exclusion of same-sex partners from spousal health insurance was not rationally related to "reducing administrative burdens"); *Harris*, 330 P.3d at 336-37 (recognizing the desire for efficiency in administering benefits but finding the exclusion of same-sex couples from death benefits lacked an adequate nexus to that goal). Excluding same-sex spouses from survivor's benefits "explicitly disdains present realities in deference to past formalities" and "needlessly risks running roughshod over the important interests" in avoiding invidious discrimination. *Stanley*, 405 U.S. at 657.

Furthermore, providing survivor's benefits to same-sex spouses like Mr. Colosimo would neither embroil the agency in unlimited individual determinations nor require inquiries outside of the agency's usual practices. While the harm to surviving same-sex spouses like Mr. Colosimo is significant, the pool of individuals in this situation is limited and finite: *Obergefell* struck down the remaining barriers to marriage for same-sex couples, and those who were able to marry for nine months could qualify for survivor's benefits. Removing an unconstitutional barrier so

that individuals in Mr. Colosimo's situation can access survivor's benefits will not require large numbers of individualized determinations nor impact otherwise eligible surviving spouses.

Proof that surviving same-sex spouses like Mr. Colosimo would have married sooner but for their unconstitutional exclusion is reasonably determinable based on indicia that SSA considers on a regular basis. For example, SSA recognizes common-law marriages in eligibility for certain Social Security benefits—"regardless of any particular State's view on these relationships." *Windsor*, 570 U.S. at 765; *see* 20 C.F.R. § 404.726. Similarly, when an applicant for spousal benefits turns out not to be lawfully married to a worker, SSA will deem them to be married if they had a ceremony with the good faith belief that it resulted in a marriage, despite a legal impediment that undermined its validity. 42 U.S.C. § 416(h)(1)(B)(i).

With regard to the marriage duration requirement, SSA also regularly makes individualized determinations regarding whether a state law impediment prevented an applicant from being able to satisfy the nine-month marriage duration requirement. *See, e.g.*, 42 U.S.C. §§ 416(c)(2), (g)(2), (k). For example, a claimant married for less than nine months is able to receive survivor's benefits where the deceased worker was married to a prior spouse who was institutionalized. The marriage duration requirement is treated as satisfied if the claimant can show that (a) the deceased worker would have divorced the institutionalized spouse but for the state law preventing it and (b) the deceased worker married the claimant within 60 days of the institutionalized spouse's death. *See* 42 U.S.C. §§ 416 (c)(2), (g)(2).

Here, the factual inquiry is even more straightforward: Mr. Colosimo and Mr. Lucas married even *before* North or South Carolina would recognize them as such. Indeed, they were also advised not to travel because of Mr. Lucas' illness; but during a period of some improvement, they nevertheless traveled to get married, because their desire to marry one

another was so significant. And they did so even though their home states did not even recognize their marriage upon their return. Tr. 71. In sum, the government is readily equipped with the tools to provide survivor's benefits to surviving same-sex spouses like Mr. Colosimo.

CONCLUSION AND RELIEF REQUESTED

The Constitution "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). No one would accept for themselves, or their loved ones, the inequality and indignity that Mr. Colosimo has experienced. He respectfully requests an order (1) granting his motion for summary judgment, and denying SSA summary judgment; (2) reversing SSA's decision, (3) enjoining SSA from relying on unconstitutional laws excluding same-sex couples from marriage to determine eligibility for survivor's benefits, and (4) directing payment of such benefits to Mr. Colosimo or, to the extent this Court deems a further administrative hearing warranted, remanding the matter for a further hearing.

Dated: January 17, 2019

Respectfully submitted,

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CERTIFICATE OF LENGTH

Pursuant to Local Civil Rule 7.1(d), I hereby certify that the memorandum of law above does not exceed 25 pages.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System on January 17, 2019. I further certify that all case participants are registered CM/ECF users, and that the foregoing document was thereby served on all counsel of record.

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