**No. 20-16427**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

MICHAEL MARVIN ELY,

*Plaintiff-Appellee*,

v.

ANDREW M. SAUL, Commissioner of the Social Security Administration,

*Defendant-Appellant*.

On Appeal from the United States District Court for the District of Arizona

# PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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## INTRODUCTION

The Constitution bars the government from excluding same-sex couples from marriage or the constellation of benefits linked to marriage. Despite that constitutional guarantee of liberty and equality, the Social Security Administration ("SSA" or "Defendant") seeks to deny survivor's benefits to a number of individuals because of their unconstitutional exclusion from marriage. As a condition for benefits, the government requires these individuals to have married nine months before their loved ones died—even where state law prohibited them from marrying their loved ones at that time. The district court correctly held that the Constitution does not permit the government to place them in that Catch-22.

Because laws barring same-sex couples from marriage are inherently unconstitutional, it is also unconstitutional for the government to continue relying on such laws—but that is precisely what SSA did here. Under the agency's criteria for survivor's benefits, eligibility for present-day and future benefits explicitly turns on whether an individual was married at a particular time in the past. It is impossible to separate the marriage duration requirement from unconstitutional state marriage laws, because SSA relies on states as the gatekeepers of marriage—including who can enter into marriage and when they can do so.

Plaintiff Michael Ely's experience is illustrative. SSA denied him survivor's benefits because he and his late husband were not married for at least nine

months—even though Arizona state law barred them from marriage nine months before his husband's death. Although they were in a loving and committed relationship for more than 43 years, and married as soon as Arizona permitted them to do so, they were only able to experience married life for approximately six months before Mr. Ely's husband died of cancer. SSA then denied Mr. Ely survivor's benefits—potentially worth more than $300,000 over the course of his life, and funded by deductions from his husband's earnings—because Mr. Ely was not married on a day when it was *unlawful* for same-sex couples to marry where they lived. That denial robs same-sex couples of the equal fruit of their labor.

As confirmed by every district court to consider the issue, SSA may not rely on yesterday's unconstitutional laws to inflict further harm today. That reliance is itself unconstitutional, but SSA's actions also fail traditional constitutional scrutiny at any level. Requiring same-sex couples to have married at a time when that was prohibited where they lived is disconnected from any rationale, such as detecting sham relationships or boosting administrative efficiency, that could justify a duration-of-marriage requirement for different-sex couples, who could always freely marry. Same-sex couples must have an equal opportunity to prove to SSA that their relationships were not mere shams but real, enduring, and equally worthy of the protection of survivor's benefits. SSA is perfectly capable of determining—as it did here—that an individual would qualify for survivor's benefits but for

unconstitutional laws that barred same-sex couples from marriage.

The district court also did not abuse its discretion in holding that SSA's constitutional violation must be enjoined on an agency-wide basis. Just as SSA's exclusion of access to survivor's benefits is unconstitutional to Mr. Ely, it is equally unconstitutional to others encountering the same barrier. Indeed, the related appeals of Harold Glenn Schmoll and Joshua Driggs powerfully demonstrate why this is a textbook case for class treatment.[1] Each person requires the same remedy: an injunction against SSA's categorical denial of benefits without consideration of whether class members would have qualified but for unconstitutional laws that prevented them from being married for nine months. Indeed, SSA has already taken steps to comply with the injunction on a class-wide basis, eviscerating any pretense that class-wide relief cannot be provided.

## STATEMENT OF JURISDICTION

The district court possessed jurisdiction under both 42 U.S.C. § 405(g) and 28 U.S.C. § 1361, and this Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether it is unconstitutional for SSA to deny access to survivor's

[1] In the interest of judicial economy, Plaintiffs' counsel in *Ely*, *Schmoll*, and *Driggs* have also relied on substantially similar briefing across their three related appeals, Nos. 20-16427, 20-16445, & 20-16246, where feasible.

benefits to surviving same-sex spouses who were not married for at least nine months because of unconstitutional state laws barring same-sex couples from marriage.

2. Whether the district court abused its discretion in enjoining SSA from categorically denying class members access to survivor's benefits without consideration of whether they would otherwise qualify for survivor's benefits but for unconstitutional laws barring same-sex couples from marriage.

## PERTINENT LAWS AND STATUTES

Pertinent laws and statutes are reproduced in the addendum.

## STATEMENT OF THE CASE

### I. Mr. Ely's Committed 43-Year Relationship with Mr. Taylor

Michael Ely ("Michael" or "Mr. Ely") and James Taylor had the type of relationship to which many people aspire: a lifelong commitment to love and care for one another till death do them part. It was also a relationship that blossomed early in each of their lives and then transcended more than four decades of time, overcoming significant legal and social barriers opposing same-sex relationships.

Michael was only 18 years old in 1971 when he met his future husband, James Taylor, who was then 20 years old. Supplemental Excerpts of Record ("SER") 2. Despite his legal name, Mr. Taylor went by the nickname of "Spider," which his father had given to him for always climbing up the walls as a child.

Spider spotted Michael at a bar in Sunset Beach, California and invited him to dance. *Id.* After they talked, in Michael's words, "I knew right then -- I don't know how I knew -- but I knew I had met my soul mate." *Id.*

The two fell in love, and moved in together on December 5, 1971, which they also celebrated as their anniversary date, as same-sex couples were then excluded from marriage. *Id.* They bonded over their shared passion for music and, specifically, alternative rock. *Id.* They were active in bands, with Spider generally playing guitar and Michael singing and writing songs. *Id.*

Despite their exclusion from marriage, Michael and Spider were profoundly committed to one another and built a life together like other married couples. They held themselves out as a committed couple. SER-5. Each contributed to the household: Spider worked as a mechanic on jets and was the family breadwinner, while Michael ran the household by handling the laundry, cooking, cleaning, and bills. SER-4. They shared a joint banking account, and Michael was the designated beneficiary of Spider's pension. *Id.*, SER-11. They cared for each other when the other was sick—even when they had to fight simply to be at each other's side. When Spider was hospitalized with pneumonia in the 1970s, hospital staff did not regard Michael as "family" and only permitted him to see Spider for an hour each day. SER-5-6. They endured hostility as a same-sex couple both in California, where they initially lived, and after they moved in 1994 to Arizona,

where Spider had family. SER-3-6.

Michael and Spider longed to marry, even though they were barred from doing so for most of their relationship. SER-5. In 1973, they served as witnesses for the marriage of friends, who were a different-sex couple, and discussed their desire to marry one another even then. *Id.* At the time, however, homosexuality was still regarded as a mental illness, and police would raid gay bars and harass patrons. *Id.* Indeed, when Michael and Spider were in situations where they felt unsafe expressing their love for each other, they would say, "don't forget," which was their shorthand for saying, "don't forget I love you." SER-8. On December 5, 2007—after 36 anniversaries of being together as a couple—Michael and Spider held a commitment ceremony before an officiant and a witness, because "[t]hat was as close as [they] could get to marriage at that time." SER-7, Certified Administrative Record ("CAR") 19. They exchanged rings that were engraved with the words "don't forget." SER-8.

It was not until 2014—by which point Michael and Spider had been together for 43 years—that they were finally able to marry. On October 17, 2014, Arizona's exclusion of same-sex couples from marriage was enjoined as unconstitutional. *Majors v. Horne*, 14 F. Supp. 3d 1313 (D. Ariz. 2014); *Connolly v. Jeanes*, 73 F. Supp. 3d 1094 (D. Ariz. 2014). Michael and Spider acted immediately, obtaining their marriage license just five days later. SER-15. After

quickly gathering loved ones together, they married two weeks thereafter, on November 7, 2014. SER-8. They again exchanged the same rings they had worn since their commitment ceremony engraved with the words "don't forget." *Id.*

Their long-awaited marriage was cut short before they could celebrate even their first wedding anniversary. When Spider was diagnosed with cancer in November 2013, Michael felt like the rug had been pulled out from under them, causing everything in their life to unravel. SER-7-8. Michael was by Spider's side caring for him throughout chemotherapy and the final stages of cancer, when Spider could not stop vomiting, and he would swing from night chills to severe sweats that required Michael to change the bedding. SER-8-9. They also had to downsize and sell their home and belongings. SER-8. Michael explained: "I took a vow to love and care for him, 'in sickness and in health,' and I did." SER-9.

Spider died on May 21, 2015. SER-10. Because of discriminatory marriage laws, Michael and Spider were only able to experience married life for exactly 195 days, despite sharing a life together for more than 43 years.

## II. SSA's Denial of Benefits and Marriage Duration Requirement

At 62 years old, Michael became a widower, confronted with both the emotional and financial devastation of losing his spouse. The financial impact was particularly acute because Michael had not generally worked outside the home. SER-12. After Spider's death, Michael's only income was from a small pension

from Spider's last employer, which provided $800/month for a few years. *Id.*

In August 2015, Michael applied with SSA for survivor's benefits. CAR-10-13. Like other workers, Spider contributed to social security from every paycheck earned throughout his lifetime. Workers' contributions to social security not only fund their own retirement benefits but benefits for their surviving spouses. 42 U.S.C. § 402(e)-(f) (providing for widow and widower's insurance benefits, hereafter, "survivor's benefits"). In either context, social security functions similar to deferred income: the government requires workers to contribute part of every paycheck to social security, and the government ultimately returns these earnings later in life to workers and their families.

In order to receive survivor's benefits, and subject to various exceptions, SSA generally requires one to have been married "for a period of not less than nine months immediately prior to the day on which [the decedent] died." 42 U.S.C. § 416(g); *see also* 20 C.F.R. § 404.335. Survivor's benefits can be collected as early as age 60 (two years earlier than any retirement benefits) or at age 50 if disabled. 42 U.S.C. § 402(f)(1)(B). These benefits provide critical financial protection to all surviving spouses. For example, by collecting survivor's benefits first, surviving spouses may delay collecting benefits based on any earning record of their own, thereby increasing benefits when they switch to the latter. But survivor's benefits are particularly consequential to the lower wage-earning spouse,

because benefit levels are determined by the deceased worker's earnings.

Because Michael was only able to be married to Spider for approximately six months, SSA denied his claim for survivor's benefits based on the nine-month duration-of-marriage requirement. CAR-24-26, ER-45-47. Given that Spider died on May 21, 2015, SSA required the couple to have married by August 20, 2014, which is "nine months immediately prior to the day on which [he] died," 42 U.S.C. § 416(g)—when Arizona barred them from marrying. In denying his claim, SSA stressed that same-sex couples were permitted to marry in Arizona "only effective as of October 17, 2014" and "Arizona law would not recognize the validity of *any* same-sex marriage until that date." CAR-29 (emphasis in original).

## III. District Court Proceedings

After exhausting his administrative avenues—which took more than three years, despite the various decision-makers' lack of authority to adjudicate constitutional claims, CAR-183—Mr. Ely filed suit in 2018 on behalf of himself and others similarly situated. The district court issued a ruling in 2020. It thus took a total of five years, from applying for benefits in 2015 to the court's decision in 2020, for Mr. Ely's claim to reach disposition, during which he was deprived of thousands of dollars in monthly benefits.

The district court found that SSA's actions were unconstitutional because SSA's marriage duration requirement was inextricably intertwined with

unconstitutional state laws excluding same-sex couples from marriage. Indeed, the court noted that the agency's own regulations require it to "'look to the laws of the State.'" ER-17 (quoting 20 C.F.R. § 404.345). It therefore rejected SSA's attempt to read the duration requirement "in a vacuum" divorced from state law. ER-16. Because the denial of Mr. Ely's claim was based upon an unconstitutional state law, it failed to withstand scrutiny at any level. ER-17.

The court did not then "waive" the duration requirement, as SSA suggests, Def. Br. 14, but instead recognized that an individual is entitled to show that they would have satisfied that requirement but for their unconstitutional exclusion from marriage. Because SSA had already conceded that Mr. Ely would have been married for at least nine months but for unconstitutional state marriage laws, there was nothing left for the court to do but to award him benefits. Dist. Ct. Dkt. 34 at 42; ER-20. To put these benefits into context, a surviving spouse who collects an average of $1,750/month (approximately what Mr. Ely now receives) from age 62 until their death at an average life expectancy of 78 would receive $336,000 total—which can make the difference between financial security and financial destitution.[2]

The district court also certified a class under Rule 23(b)(2) for agency-wide

[2] These benefits dwarf the one-time $255 benefit referenced by SSA. Def. Br. 11. And providing that *one* benefit does not remotely establish that SSA thus provided Mr. Ely with access to *all* of the marriage-related benefits to which he is entitled.

injunctive relief commensurate with the scope of the constitutional violation. The class consists of individuals presenting claims for survivor's benefits and facing denial "based on not being married to a same-sex spouse for at least nine months at the time of the spouse's death" even though they "were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months." ER-26.

James Obergefell himself—the namesake of *Obergefell v. Hodges*, 576 U.S. 644 (2015), recognizing same-sex couples' right to marriage—falls within its scope. ER-7-9. The class also includes Anthony Gonzales—who married on the *very first day* when it was permitted where he lived. ER-9-10. And the class encompasses Harold Glenn Schmoll and Joshua Driggs, whose related appeals are also pending.[3] Schmoll-ER-4-12; Driggs-ER-5-14. Class certification obviated the need for individual actions that class members had previously filed to be prosecuted and adjudicated piecemeal.[4] *See, e.g.*, *Gonzales v. Saul*, No. 18-603

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[3] For the Court's convenience, citations to the *Schmoll* and *Driggs* district court orders rely on the same pagination of the excerpts of record used in those respective appeals. *Schmoll v. Saul*, No. 19-4542 (N.D. Cal. Jun. 15, 2020), order reproduced in addendum pursuant to Fed. R. App. P. 32.1(b); *Driggs v. Comm'r of Soc. Sec'y Admin.*, No. 18-3915, 2020 WL 2791858 (D. Ariz. May 29, 2020).

[4] By the same token, affirmance of the ruling in favor of the *Ely* class would resolve the appeals of class members Mr. Schmoll and Mr. Driggs. There is also a related class action, *Thornton v. Comm'r of Soc. Sec'y*, No. 18-1409, 2020 WL 6434868 (W.D. Wash. Jan. 31, 2020), *report and recommendation adopted*, 2020

(D.N.M.); *Colosimo v. Saul*, No. 18-170 (W.D.N.C.); *Jordan v. Saul*, No. 19-7737 (N.D. Ill.); *Deshotel v. Saul*, No. 19-402 (W.D. La.).

To remedy the agency's unconstitutional practice, the court enjoined SSA from denying class members of access to survivor's benefits without considering whether they would otherwise qualify for benefits but for unconstitutional laws barring them from nine months of marriage. ER-34.

The court rejected SSA's jurisdictional argument that it must be allowed to continue discriminating against individuals seeking survivor's benefits after the entry of judgment. Instead, the court exercised its mandamus jurisdiction to constrain SSA from perpetuating the same unconstitutional conduct against others in the future. It recognized that this "is an extraordinary case" and those standing in harm's way "deserve an extraordinary remedy." ER-26.

After judgment in May 2020, SSA took steps to comply with the injunction on a class-wide basis. Class members now have a pathway to survivor's benefits, and a number have already started receiving the benefits to which they are entitled.

## SUMMARY OF ARGUMENT

SSA's sweeping denial of access to survivor's benefits to Mr. Ely and others

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WL 5494891 (W.D. Wash. Sept. 11, 2020), on behalf of surviving same-sex partners barred from marriage before their loved ones died, which is on appeal, No. 21-35068. While the legal issues in *Ely* and *Thornton* are substantially related, the cases seek relief on behalf of two different groups.

like him is unconstitutional for two independent reasons.

First, because it is unconstitutional for states to exclude same-sex couples from marriage and its protections, it is also unconstitutional for the federal government to rely upon those unlawful marriage restrictions. Yet whether an individual was married nine months before the death of their loved one, and thus eligible for survivor's benefits, directly turns on state law and any facially discriminatory criteria contained therein. That is not mere disparate impact but, rather, the statutory scheme working exactly as intended: it requires SSA to follow state law on marriage—lock, stock, and barrel. In doing so, SSA revived and replicated the constitutional harms that the Supreme Court condemned in striking down government discrimination against same-sex couples in *Obergefell* and *United States v. Windsor*, 570 U.S. 744 (2013). One constitutional violation cannot serve as the justification for another constitutional violation.

The principle that the federal government may not rely upon unconstitutional state laws was well established in a strikingly similar chapter of American history. The Supreme Court had struck down state inheritance laws that discriminated against children born outside marriage. But the Social Security Act also relied on such laws to determine eligibility for benefits. Courts agreed that the agency's reliance on those state laws was itself unconstitutional as well. This Court may affirm the district court on this basis alone, without more.

Second, even setting aside that it was unconstitutional to bar same-sex couples from marriage, SSA's actions here also independently fail traditional constitutional analysis. That analysis requires heightened scrutiny because SSA has conditioned benefits on criteria that both discriminate against surviving same-sex spouses like Mr. Ely and burden their fundamental liberty interests. Conditioning benefits on marriage where state law *facially barred* same-sex couples from marriage at the relevant time is not "neutral" in the slightest. That is not an open question of law; it is settled and binding precedent under *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

Furthermore, same-sex couples not only have a fundamental right to marry but to access the protections of marriage. Here, SSA's marriage duration requirement also plainly burdens the latter right of individuals like Mr. Ely, whom state law barred from marriage at the relevant time. Thus, regardless of whether SSA even-handedly applied its marriage duration requirement to the group at issue, its undeniable burden on their right to access an important protection of marriage independently triggers heightened scrutiny.

In any event, the district court correctly found that the government's justifications fail even rational basis review. There is no rational connection between the blanket exclusion of Mr. Ely and others like him from access to survivor's benefits and any of the government's interests, like preventing sham

marriages or improving administrative efficiency. Relying on the duration of a marriage as a proxy for its legitimacy may be rational with respect to different-sex couples, who were *never* subject to state laws excluding them from marriage; but it is the epitome of irrationality with respect to the entire class of same-sex couples who *were barred* from marriage by state law for the requisite duration. It robs them of an equal pathway to access the survivor's benefits to which they equally contributed. Administrative efficiency also cannot excuse invidious discrimination, and especially not here, where SSA already makes individualized determinations about the existence and duration of other marital relationships.

Finally, the district court did not abuse its discretion in certifying a class under Rule 23(b)(2), which specifically authorizes injunctive or declaratory relief that can be provided on a class-wide basis. Every class member here requires the same relief: an injunction against SSA's categorical denial of survivor's benefits without consideration of whether class members would have qualified but for unconstitutional laws that prevented them from being married for nine months. There was no abuse of discretion in lifting that unlawful barrier in one fell swoop. Doing so also did not require the district court to engage in any individualized determination whatsoever. SSA has now taken steps to comply with the injunction on a class-wide basis, demonstrating its understanding of the class definition and its ability to administer the relief required.

Nor did the district court abuse its discretion in exercising mandamus jurisdiction over class members who apply for survivor's benefits in the future and would otherwise confront the same unconstitutional barrier as Mr. Ely. That includes individuals like James Obergefell, who is not yet 60 years old and age-eligible for survivor's benefits. This Court can also affirm on the alternate grounds that the Social Security Act itself provides jurisdiction over future applicants. Federal courts have overwhelmingly held that nothing in that statute prohibits prospective relief, which only springs into force at the point an individual presents a claim to the agency. Either way, the district court was correct to end SSA's constitutional violations, once and for all, without requiring countless future lawsuits to re-litigate the same issues.

## STANDARD OF REVIEW

SSA's standards of review, Def. Br. 20, omit two relevant standards. First, decisions regarding class certification are reviewed for abuse of discretion. *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020). This Court "accords the district court noticeably more deference to a grant of certification than when it reviews a denial." *Walker v. Life Insurance Co. of the Sw.*, 953 F.3d 624, 629 (9th Cir. 2020) (quotation and modifications omitted); *id.* at 637 ("leav[ing] undisturbed the district court's legally sound, if imperfect, certification order"). Second, whether the elements of mandamus are satisfied presents a question of law reviewed de

novo, although the district court "retains discretion in ordering mandamus relief." *Indep. Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997).

## ARGUMENT

### I. SSA's Denial of Access to Survivor's Benefits is Unconstitutional Because It Relies Upon Unconstitutional State Marriage Laws.

A simple and well-established principle resolves this case: federal action that relies on unconstitutional state laws is itself unconstitutional. The only basis for the government's denial of survivor's benefits to Mr. Ely is that he was not married nine months before Mr. Taylor's death; but same-sex couples were barred from marriage at that time by unconstitutional state laws. Because it was unconstitutional to exclude Mr. Ely and Mr. Taylor from marriage in the first instance, it is also unconstitutional for the federal government to rely on that exclusion to deny Mr. Ely access to survivor's benefits. Any contrary holding would permit the government to inflict further injury based on constitutional wrongs that the Supreme Court has struck down.

#### A. *Obergefell* and *Windsor* Bar the Government from Excluding Same-Sex Couples from Access to Marriage or its Benefits.

The Supreme Court's decisions in *Obergefell* and *Windsor* make clear that the government may not deny legal benefits and protections to same-sex couples based on government-imposed barriers excluding them from marriage. *See Obergefell*, 576 U.S. at 669-70; *Windsor*, 570 U.S. at 772-74. In striking down

the so-called Defense of Marriage Act (DOMA), which barred federal recognition of same-sex couples' marriages, *Windsor* held that it was 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—and the constellation of benefits associated with marriage—wrongly deprived those couples of liberty, equality, and dignity. The Supreme Court again 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 recognized the profound indignity of deeming two people who shared a loving, committed, and lasting relationship to be "strangers even in death" when the government fails to recognize their relationship on equal footing to others. *Obergefell*, 576 U.S. at 658. When *Obergefell* canvassed the harm to same-sex couples from being denied the "constellation" of rights linked to marriage, it specifically included "the rights and benefits of survivors." *Id.* at 670. 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. 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*, 576 U.S. at 670.

Indeed, James Obergefell himself faces the same situation as Mr. Ely with respect to survivor's benefits. Mr. Obergefell was in a loving and committed relationship for more than two decades with John Arthur, who was ultimately diagnosed with ALS, a progressive and debilitating disease. SER-17-18. Because their home state of Ohio barred same-sex couples from marriage, Mr. Obergefell and Mr. Arthur had to go to extraordinary lengths in order to marry: in 2013, with financial support from family and friends, they chartered a medically equipped plane to fly to Maryland, which permitted same-sex couples to marry, and married inside the plane while on the tarmac. SER-20-21. Because Mr. Arthur died approximately three months later, SSA would deny Mr. Obergefell survivor's benefits once he reaches his retirement years based on its marriage duration requirement, but for the injunction protecting the class here.

### B. SSA's Continued Reliance on Unconstitutional State Laws Is Itself Unconstitutional.

This action and the ruling below were necessitated by SSA's failure to implement the full scope of its constitutional obligations as delineated in *Obergefell*, *Windsor*, and *Pavan*. Because it was always unconstitutional for a state like Arizona to exclude same-sex couples like Mr. Ely and Mr. Taylor from marriage—including nine months before one of them died—it was also

unconstitutional for SSA to rely on that exclusion in denying survivor's benefits.

The federal government may not rely on unconstitutional state laws in determining eligibility for federal benefits. Indeed, this principle is well established in the specific context of social security benefits. Under the Social Security Act, a child who has the right to inherit intestate under state law is, in turn, eligible under federal law for child survivor's benefits after a parent's death. 42 U.S.C. § 416(h)(2)(A). In 1977, however, the Supreme Court struck down state intestacy laws as unconstitutional to the extent they discriminated against children born outside of marriage and deprived them of their inheritance rights. *Trimble v. Gordon*, 430 U.S. 762, 768-76 (1977). Thereafter, courts confronted the question of how to adjudicate the claims of children whom SSA had denied survivor's benefits based on unconstitutional state laws.

Federal courts overwhelmingly recognized that the Social Security Act's reliance on unconstitutional state laws was itself unconstitutional. For example, in *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982), SSA had denied survivor's benefits to a child, because he lacked inheritance rights under a state law similar to the one struck down by the Supreme Court in *Trimble*. The Fifth Circuit was "convinced that the structure and language … of the Social Security Act, referring to state law on intestate inheritance, makes relevant the issue of the constitutionality of a particular state law." *Id.* at 317. Because SSA had denied

survivor's benefits "on the basis of a clearly unconstitutional state intestacy law," the Fifth Circuit was "bound to eradicate the constitutional flaw" by recognizing the child's right to benefits. *Id.* at 324. Other courts came to the same conclusion. *See, e.g.*, *Daniels v. Sullivan*, 979 F.2d 1516, 1520-21 (11th Cir. 1992); *Smith v. Bowen*, 862 F.2d 1165, 1167 (5th Cir. 1989); *Handley v. Schweiker*, 697 F.2d 999, 1001 (11th Cir. 1983); *Gross v. Harris*, 664 F.2d 667, 670 (8th Cir. 1981); *White v. Harris*, 504 F. Supp. 153, 155 (C.D. Ill. 1980); *Ramon v. Califano*, 493 F. Supp. 158, 160 (W.D. Tex. 1980); *cf. Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (recognizing that a classification is discriminatory where it incorporates another law that is discriminatory).

The district court here correctly followed the reasoning of these authorities, which SSA simply ignores. It held that SSA cannot rely upon an unconstitutional state law—Arizona's exclusion of same-sex couples from marriage—as the basis for denying survivor's benefits to Mr. Ely. ER-17 (analyzing *Cox*); *accord* Schmoll-ER-7. Just as SSA denied the surviving child in *Cox* of eligibility for survivor's benefits because of unconstitutional state intestacy laws, SSA similarly denied Mr. Ely of eligibility for survivor's benefits because of an unconstitutional state marriage law, which barred him from marrying nine months before Mr. Taylor's death. That denial inflicts "'substantial and continuing harm' arising from the unconstitutional denial of [his] fundamental right to marry." *Thornton*,

2020 WL 6434868, at *6 (quoting *Obergefell*, 576 U.S. at 680).

SSA's reliance on state law to evaluate a couple's marriage is apparent on the face of its governing law. The Social Security Act states that 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); *cf. Cox*, 684 F.2d at 314 n.5 (analyzing analogous language providing survivor's benefits where child would have right to inherit according to "the courts of the State"). The agency's regulations are also 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. As the district court observed, there is an "unequivocal direction to look to State law." ER-17; *accord* Schmoll-ER-8.

Indeed, the federal government's reliance upon unconstitutional state laws here is even more egregious than in *Cox* because of its role in helping to maintain those unconstitutional state laws. As *Windsor* explained, when Congress enacted DOMA, 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 (quotation omitted). Thus, the financial insecurity that Mr. Ely experienced as a same-sex widower is one to which the federal government 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. And merely halting enforcement of DOMA going forward does nothing to address the denial of benefits that are still conditioned on being married at a point in the past.

SSA's two arguments attempting to disclaim its reliance on unconstitutional state law both fall flat. Def. Br. 30-33. First, SSA dances on the head of a pin by insisting that it only looked to state law for purposes of whether a couple was validly married—not for the duration of the marriage. Def. Br. 30-31. But those are two sides of the same coin: *when* a same-sex couple like Mr. Ely and Mr. Taylor were validly married necessarily turns on *whether* they were able to marry under state law. To illustrate, the couple held a commitment ceremony in 2006, because "that was as close as [they] could get to marriage at that time." SER-7. But SSA does not recognize that they were validly married as of that date because of state law.

Every district court below thus correctly rejected SSA's attempt to portray its duration requirement as independent of state law. ER-16 ("the duration of marriage requirement cannot be read in a vacuum"); Driggs-ER-11 ("The durational requirement is not an amorphous requirement. It is a duration of *marriage* requirement.") (emphasis in original); Schmoll-ER-8 ("the duration-of-marriage requirement … cannot be severed from California's unconstitutional

law").[5] Tellingly, SSA also fails to identify what *other* law to which the Social Security Act looks in measuring an individual's marriage for purposes of survivor's benefits if *not* state law.

Second, it does not help SSA to admit that it was constitutionally obligated to disregard state law in cases where same-sex couples somehow obtained marriage certificates even when state law barred their marriage. That includes four instances where same-sex couples either misrepresented themselves as a different-sex couple or located county clerks willing to violate state law. Def. Br. 31-32.

As an initial matter, that SSA did not rely on unconstitutional state laws in *other* cases does not establish that SSA did not rely on unconstitutional state laws *here*. Plainly, its obligation to comply with *Obergefell* is not limited to four cases. Wherever an unconstitutional state law stands as a barrier to federal benefits, the agency cannot give it force. SSA admits that unconstitutional state laws "can have no legal effect in rendering benefits determinations." Def. Br. 31. Those principles are not magically limited to the handful of instances where a same-sex couple managed to procure a marriage certificate in violation of state law. Indeed, it would be paradoxical to regard unconstitutional marriage laws as having greater

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[5] These conclusions are reinforced by SSA's own manual, which contains a chart of when same-sex couples were permitted to marry in all 50 states, because that date is relevant to determining "whether a marriage was validly entered into." POMS, GN 00210.003, https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210003.

"legal effect" for those couples, who managed to finagle marriage certificates, than for all the same-sex couples who were blocked from doing so do, as state law intended.

If anything, these four instances show that the agency plainly understands that it not only has the *ability* to disregard the Social Security Act—which regarded the marriages at issue as invalid—but that it has the constitutional *obligation* to do so. Indeed, the agency understands that other aspects of the statute are unconstitutional as well. The Social Security Act also requires evaluating the validity of a marriage based on the decedent's state of domicile at death. 42 U.S.C. § 416(h)(1)(A)(i). After *Obergefell*, however, SSA recognized that it was constitutionally obligated to disregard that statute with respect to same-sex couples then barred from marriage in their home state. *See* Driggs-ER-12.

The district court also awarded the appropriate remedy: the agency must restore individuals to the position they would have otherwise occupied without its unconstitutional action. *See United States v. Virginia*, 518 U.S. 515, 547 (1996); *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Here, SSA conceded that "but for Arizona state law, Mr. Ely himself would have married earlier." Dist. Ct. Dkt. 34 at 42. Accordingly, the district court properly awarded him benefits while opening a pathway for other class members to demonstrate their same entitlement to benefits—without the barrier posed by the agency's incorporation of

unconstitutional state laws.

## II. SSA's Denial of Access to Marriage-Related Benefits Requires Heightened Scrutiny but Fails Even Rational Basis Review.

The foregoing provides a sufficient basis to affirm, without needing to proceed any further. But even if state marriage bans had never been declared unconstitutional, SSA's actions here would still be unlawful for an independent reason: the agency deprived same-sex couples of equal access to marriage-related benefits. Even before courts recognized that it was unconstitutional to exclude same-sex couples from the *status* of marriage, courts recognized that it was unconstitutional to exclude them from its *benefits*. As explained below, that denial of access to marriage-related benefits thus triggers heightened scrutiny because (1) it discriminates against same-sex couples based on sexual orientation and sex, *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014), and (2) burdens their fundamental liberty interests. But it also fails even rational basis review.

### A. SSA's Denial of Access to Benefits Requires Heightened Scrutiny.

#### 1. Requiring Marriage for Benefits When Same-Sex Couples Were Barred from Marriage Is Discriminatory.

First, SSA's assertion that it has acted "neutrally" towards same-sex couples is foreclosed by a well-settled and unassailable principle: where the government conditions benefits on marriage, but same-sex couples are barred from marriage, the government necessarily discriminates against same-sex couples. That principle

emerged in a litany of cases before marriage equality, when courts grappled with the narrower question of whether same-sex couples were constitutionally entitled to access the benefits of marriage, regardless of whether they had a constitutional right to marry. The threshold question was whether there was any discrimination against same-sex couples at all—or if the government's marriage requirement discriminated against all unmarried couples (whether same-sex or different-sex), and merely had a disparate impact on same-sex couples, as SSA argues here. Where laws are facially discriminatory, no separate showing of an "intent" to treat the group differently is required—much less a showing of "animus" against the group. *Latta*, 771 F.3d at 481 (Reinhardt, J., concurring); *cf.* Def. Br. 26-28 (relying on authorities that only apply where laws are facially neutral).

This Court, and many others, held that conditioning benefits on marriage discriminates based on sexual orientation where same-sex couples were barred from marriage. For example, in *Diaz*, the State of Arizona limited health insurance coverage to the "spouse" of a state employee under a state statute known as Section O. 656 F.3d at 1010. Section O did not specify that only a different-sex partner could be a "spouse"—it simply stated that coverage was limited to "a spouse under the laws of this state." Ariz. Rev. Stat. § 38-651(O). But the Arizona Constitution did limit who could be a "spouse." Ariz. Const., art. 30, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this

state.").

This Court did *not* decide the constitutionality of the state marriage ban. Rather, it held that *Section O's* limitation of benefits to spouses "discriminate[d] against same-sex couples" because they were barred from marriage by operation of state law. *Diaz*, 656 F.3d at 1014. Different-sex couples, by contrast, could marry under state law and thus qualify for benefits. Thus, Section O had "distinguish[ed] between homosexual and heterosexual employees, similarly situated." *Id.* Similarly, "[s]everal courts have found that statutes restricting benefits on the basis of marriage intentionally classify on the basis of sexual orientation where gays and lesbians cannot legally marry." *Bassett*, 951 F. Supp. 2d at 963 (collecting cases).

SSA has attempted to characterize *Diaz* as a case about a facially neutral law with discriminatory intent, but that reading does not help SSA one bit: even if that erroneous interpretation were correct, the same discriminatory intent is present here *in the exact same way*. If Section O was facially neutral, but its reliance on state law governing who could be a "spouse" carried forward the discriminatory intent that motivated the state law barring same-sex couples from marriage, then the same principle dooms SSA. Even if the Social Security Act's marriage duration requirement were facially neutral, it has nonetheless similarly carried forward the discriminatory intent that motivated state laws barring same-sex couples from marriage at the relevant time. The district court in *Driggs* came to

this same conclusion. Driggs-ER-12. To be clear, this case is not about some faint echo of discrimination. Rather, it is about the original discriminatory marriage laws themselves still being given legal force. Survivor's benefits specifically turn on whether someone was married on a particular day *in the past*.

SSA's authority only reinforces the point. In a case concerning alleged racial gerrymandering, the Supreme Court stressed that the state legislature did not "use criteria that arguably carried forward the effects of any discriminatory intent" from the earlier legislature alleged to have acted with such intent. *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). Here, not only were the state marriage bans facially discriminatory (thereby obviating any separate or further need to show an "intent" to discriminate) but SSA then incorporated them into federal law and necessarily "carried forward" that discriminatory purpose when denying benefits.

The federal government engages in discrimination when it relies on facially discriminatory state marriage laws. For example, the Office of Personnel Management (OPM) denied spousal health insurance in 2009 to the same-sex partner of a federal law clerk, whom Oregon state law then barred from marriage. *In re Fonberg*, 736 F.3d 901, 902 (9th Cir. Jud. Council 2013) (Clifton, Kozinski, & Beistline, JJ.). The same-sex couple was "treated differently from opposite-sex partners who are allowed to marry and thereby gain spousal benefits under federal law. This is plainly discrimination based on sexual orientation." *Id.* at 903. SSA's

discrimination here is no different from OPM's discrimination. That is also necessarily discrimination based on sex under settled law. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020); *In re Fonberg*, 736 F.3d at 903.

When the federal government relies on state marriage laws, it makes an intentional choice. As *Windsor* explained, nothing compels the federal government to follow lockstep with state law. In fact, even where the Social Security Act generally follows state law on marriage, it carves out circumstances where it wishes to depart from state law, thus regarding an individual as married (e.g., to determine eligibility for income-based benefits) even when state law would not. *Windsor*, 570 U.S. at 765 (observing that the federal government treats the couple as married "regardless of any particular State's view on these relationships"). Here, however, Congress chose to incorporate state-law criteria that, on their face, excluded same-sex couples from marriage.

The facially discriminatory nature of SSA's statutory scheme is not obviated by the fact that it is divided across two sets of laws (federal and state) rather than housed solely within one law. No court can possibly analyze whether any law is "facially neutral" without *reading the definitions* of the terms used—which are equally part of the "face" of a law. Facial discrimination is not erased where a law proceeds in two steps rather than one. Here, as well, the Social Security Act's marriage requirements are incomprehensible without also "look[ing] to the laws of

the State," 20 C.F.R. § 404.345, whose facially discriminatory terms are incorporated by reference. *Bassett*, 951 F. Supp. 2d at 963.

SSA also argues that it could not have discriminated against surviving same-sex spouses like Mr. Ely because while it was legally impossible for them to marry where they lived, they could have traveled out-of-state to marry. Def. Br. 34. That argument fails many times over. To begin, such an out-of-state marriage would not have been recognized upon returning home. It is difficult to overstate the significance of that point, and many same-sex couples understandably declined to engage in what they perceived to be a humiliating act of futility. Moreover, SSA stubbornly misapprehends what constitutes discrimination. *Trimble*, 430 U.S. at 773-74 ("the focus on the presence or absence of an insurmountable barrier … loses sight of the essential question: the constitutionality of discrimination"). Here, different-sex couples were not forced to travel out-of-state to marry and access survivor's benefits. That some same-sex couples voluntarily did so at all, enduring indignity atop futility, does not change the legal analysis. Requiring Mr. Obergefell to have chartered a medical plane earlier in order to transport his partner across state lines to marry, when heterosexuals were never put to that burden, is not "equal."[6]

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[6] Such a requirement would also infringe individuals' "fundamental right of free movement," which includes the right "'to dwell within the limits of their respective

Not even SSA began recognizing such out-of-state marriages until after *Obergefell* in 2015. Same-sex couples like Mr. Driggs and his partner, for example, thus had no pathway to survivor's benefits during their relationship that was discernible to them. Driggs-ER-12. That only underscores the irrationality of categorically denying class members of benefits on the grounds that they may have entered sham marriages to obtain such benefits. *See infra* II.B.1. That was legally impossible during the lifetime of the deceased spouse.

SSA's discrimination is also not erased by the existence of statutory exceptions for survivor's benefits, such as accidental death. Def. Br. 34-35. By that logic, requiring twelve months of marriage for widowers but only nine months for widows would not be discriminatory either, because widowers could nonetheless obtain benefits if there was an accidental death. That makes no sense. And SSA could not escape heightened scrutiny by claiming that sex discrimination was not "the only reason" for a denial. Def. Br. 35.

Finally, the district court correctly rejected SSA's reliance on *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), involving a veteran's preference law. First, *Feeney* was a disparate impact case that did not involve a categorical barrier, unlike the marriage laws here. Schmoll-ER-8. There is no indication that the plaintiff herself was barred from enlisting where she lived and thus joining the

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[s]tates.'" *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).

hundreds of thousands of then-existing female veterans. *Feeney*, 442 U.S. at 269 n.21. Here, by contrast, Arizona state law categorically barred Mr. Ely from marriage nine months before Mr. Taylor died. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 788-89 (Alaska 2005) (explaining that "unlike the neutral definition of 'veteran' in *Feeney*, Alaska's definition of the legal status of 'marriage' (and, hence, who can be a 'spouse') excludes same-sex couples"). Second, the Supreme Court found no underlying constitutional violation in *Feeney* and upheld the exclusion of women from the draft. *Rostker v. Goldberg*, 453 U.S. 57 (1981). But excluding same-sex couples from marriage and its benefits unquestionably violates equal protection and liberty. *Obergefell*, 576 U.S. at 670; *Latta*, 771 F.3d at 467. Third, unlike *Feeney*, the federal government helped to maintain state marriage exclusions. *Windsor*, 570 U.S. at 771. It cannot credibly claim that federal law is "facially neutral" where it incorporates state laws that not only barred same-sex couples from marriage but did so with active federal support.

**2. SSA Burdened Class Members' Fundamental Liberty to Access the Constellation of Benefits Linked to Marriage.**

Even setting aside that same-sex couples have a fundamental right to marry, Def. Br. 22-23, SSA wholly ignores that the Constitution also safeguards their liberty to access the *benefits* linked to marriage, which SSA's actions have burdened. Contrary to SSA's assertion, the Supreme Court has confirmed that, even where same-sex couples have been granted marriage certificates, denying

them "access" to the constellation of benefits linked to marriage independently burdens their liberty. *Pavan*, 137 S. Ct. at 2078; *see also Latta*, 771 F.3d at 467.

SSA's actions have burdened the right of surviving same-sex spouses like Mr. Ely to access survivor's benefits, because they were barred from satisfying the criteria for such benefits under their state law. Even where a law is facially neutral (which the statutory scheme here intertwining federal and state law is decidedly not), that is irrelevant where the government has burdened a fundamental liberty, which itself triggers heightened scrutiny. *Cf. Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1076 n.19 (9th Cir. 2008).

Indeed, the burden on liberty here is substantial. The ban against marriage for same-sex couples was legally insurmountable in Mr. Ely's home state nine months before Mr. Taylor's death. SSA exacted a terrible price by robbing Mr. Ely of thousands of dollars in hard-earned survivor's benefits essential to financial security in older age. That burden is no less significant than the denial of an estate tax exemption to the plaintiff in *Windsor*. This Court similarly recognized that the government burdened the liberty interests of a lesbian service member by conditioning her continued employment on compliance with the "Don't Ask, Don't Tell" policy. *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008); *see also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (protecting the exercise of liberty from "intervention of the government"). That liberty burden alone requires

heightened scrutiny.

### B. SSA's Exclusion Fails Even Rational Basis Review.

Although the denial of survivor's benefits to surviving same-sex spouses like Mr. Ely requires heightened scrutiny, the district court recognized "it cannot withstand scrutiny at any level." ER-17. Rational basis review is never "toothless," and courts have also applied more searching rational basis review depending on context, including where the government has disadvantaged an unpopular minority or burdened intimate family relationships. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). In all events, the court must conduct an inquiry into "the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

#### 1. Denying a Class Barred from Marriage of Access to Benefits Does Not Rationally Prevent Sham Marriages.

SSA cannot articulate any conceivable way in which the categorical denial of survivor's benefits to the class at issue here—those not married for nine months because of unconstitutional laws barring them from marriage—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 preventing fraud. Rather, it constitutes a sweeping exclusion wholly "discontinuous" from any valid goal. *Romer*, 517 U.S. at 632. Maintaining that exclusion also could not deter any sham marriages in the future,

because the class at issue here is inherently finite and dwindling. Conversely, lifting that exclusion does not affect the "otherwise permissible" application of the duration requirement to other couples, who were not barred from marriage. Driggs-ER-13; *see also Thornton*, 2020 WL 5494891, at *3.

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. Because different-sex couples have never been categorically excluded from marriage as a class, the government may rationally rely on marriage duration as a proxy for marriage legitimacy. *Weinberger v. Salfi*, 422 U.S. 749 (1975). But same-sex couples were categorically excluded from marriage as a class. Thus, relying on marriage duration as a proxy for marriage legitimacy is not at all rational with respect to surviving same-sex spouses who were barred from marriage at the relevant time, like runners released from starting blocks decades after their peers. It lacks the footing in reality required even under rational basis review. *Golinski*, 824 F. Supp. 2d at 998.

It is well settled that the government's usual justifications for line-drawing around marriage-related benefits cannot be transposed onto same-sex couples who were barred from marriage. *See, e.g.*, *Diaz*, 656 F.3d at 1014 (finding no rational basis in denying spousal benefits to same-sex couples "ineligible to marry"); *Alaska Civil Liberties Union*, 122 P.3d at 791-93. As one court explained in

holding that same-sex couples were equally entitled to access survivor's benefits: "marriage may serve as an adequate proxy [of committed 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." *Harris v. Millennium Hotel*, 330 P.3d 330, 337 (Alaska 2014). That is also true here, where class members were barred from marriage at the relevant time.

The facts of *Salfi* provide one illustration of the difference between the two groups. Because state laws never excluded different-sex couples from marriage, Mr. and Mrs. Salfi could have married earlier under the laws of their state—including nine months before Mr. Salfi died—in which case the government would have regarded their marriage as non-fraudulent. But, as the district courts below recognized, the *choice* by different-sex couples to not marry earlier is worlds apart from the situation faced by the same-sex couples here, where the government made that choice for them. ER-18; Schmoll-ER-10. *Diaz* also held that difference was material. 656 F.3d at 1014 ("different-sex couples wishing to retain their … benefits could alter their status—marry—to do so" but state law "prohibits same-sex couples from doing so"). As SSA admits, "*Salfi* did not address the specific [] challenge at issue here," to put it mildly. Def. Br. 25.

To be clear, the irrationality of the government's justification is not simply because Mr. Ely "has compelling proof that his marriage was perfectly valid,"

which is the straw-man argument constructed by SSA. Def. Br. 25. Rather, it is because relying on nine months of marriage as a gauge of its non-fraudulent nature is irrational with respect to the *entire class* of same-sex couples at issue here. The government's sweeping denial of access to benefits for that entire class of people cannot be shrugged off as a harsh individual result produced by a bright-line rule.

Even when they were barred from doing so, there is no doubt that same-sex couples who wished to marry had "the same level of love, commitment, and mutual economic and emotional support" as married different-sex couples. *Harris*, 330 P.3d at 335 (quotation omitted); *see also Diaz*, 656 F.3d at 1011. Indeed, only death separated Mr. Ely from Mr. Taylor, and the class is replete with similarly enduring bonds, including that of Mr. Obergefell. It is not rational for SSA to categorically regard one-hundred percent of the surviving same-sex spouses in the class as fraudsters. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (finding especially "pernicious" discrimination where SSA did not give a widower even the opportunity to show that he was similarly situated to widows treated more favorably); *Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974). Where a same-sex couple would have been married for at least nine months but for laws excluding from marriage, there is no basis for regarding their relationship as more likely to be a sham than other couples eligible for benefits.

### 2. Administrative Efficiency Cannot Justify Depriving the Class of Access to Benefits.

The district courts below correctly and uniformly rejected SSA's reliance on administrative efficiency as a justification for denying class members of access to survivor's benefits. ER-19-20; Schmoll-ER-10-11; *accord Thornton*, 2020 WL 6434868, at *9-10.

SSA's defense fails as a matter of law. This Court already rejected reliance on "reducing 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. It did so even though administering benefits required the government to employ eligibility criteria for same-sex couples, to assess whether they were similarly situated to other couples eligible for benefits. *Accord Harris*, 330 P.3d at 336-37. To be sure, it may have been more convenient for the government not to provide a pathway for same-sex couples to access benefits, but the administrative savings would "depend upon distinguishing between homosexual and heterosexual employees," which "cannot survive rational basis review." *Diaz*, 656 F.3d at 1014.

The same applies to any "cost savings" from depriving same-sex couples of benefits they worked equally hard to earn. *Id.* The inequities are even sharper in the social security context here: class members were not only deprived of access to survivor's benefits, but they were forced to give up family earnings as well. *Cf.*

*Wiesenfeld*, 420 U.S. at 645 (emphasizing that a female worker "not only failed to receive for her family the same protection which a similarly situated male worker would have received but [] also was deprived of a portion of her earnings in order to contribute to the fund out of which benefits would be paid to others").

"Although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Excluding the class here from access to 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 v. Illinois*, 405 U.S. 645, 657 (1972).

SSA's reliance on *Salfi* again misses the mark. Administrative efficiency may provide a rational basis for the government's reliance on marriage-required requirements as to different-sex couples, who were never excluded from marriage; but it fails to provide a rational basis for the class here, who were barred from marriage at the relevant time. ER-18-19; Schmoll-ER-9-10. Notably, the relief ordered by the district court has no effect on SSA's reliance on the marriage duration requirement with respect to different-sex couples, whose entitlement to benefits remains undisturbed. *Cf. Gross*, 664 F.2d at 671-72.

Furthermore, SSA is uniquely well-situated to provide relief to class

members, because it already routinely makes factual determinations about relationships in a variety of contexts. ER-19-20. As the district court recognized, SSA "is clearly capable of making these case-by-case determinations." ER-19. For example, SSA must determine the existence and duration of common-law marriages, which can require an individualized determination regarding a couple's relationship. ER-19; Schmoll-ER-11. That analysis is no less "fact-bound and subjective," Def. Br. 36, than anything required of SSA to provide benefits to class members here.

Similarly, despite SSA's assertion that "[s]urvivors of *any* short marriage are automatically denied benefits," Def. Br. 25, its brief canvasses the many statutory provisions proving that false, Def. Br. 6-7. SSA's treatment of claims involving an institutionalized spouse warrants special attention. There, SSA makes a factual determination about whether an individual's marriage was shorter than nine months because of a state law barrier (preventing an earlier divorce from an institutionalized spouse). 42 U.S.C. §§ 416(c)(2), (g)(2). Congress agreed that SSA was perfectly capable of making the factual determination of whether the individual "would have" married earlier but for the state law barrier. *Id.* As the district courts recognized, that directly undermines SSA's assertion that it cannot perform the same type of determination for class members here. ER-20; Schmoll-ER-6; *see also* SER-54 (ALJ making the same observation with respect to class

member Anthony Gonzales). Indeed, its refusal to do so paints a stark picture contrasting the kinds of people whom the government believes are worthy of its administrative resources—and those whom it deems not worthy of its time.

Tellingly, SSA had no difficulty recognizing that individuals like Mr. Ely or Mr. Schmoll would have otherwise qualified for survivor's benefits but for state laws then excluding them from marriage. It can look to the same types of facts to make the same kinds of determinations for other class members. *See, e.g.*, CAR-88-98; SER-33-34. Indeed, SSA has been under an obligation to make such determinations for class members after the injunction in May 2020 and has developed criteria in order to do so. *Infra* III.A.1.a.

## III. The District Court Properly Granted Systemic Relief to All Surviving Same-Sex Spouses Barred from Meeting the Duration Requirement by Unconstitutional Marriage Laws.

Just as SSA violated Michael Ely's constitutional rights, so, too, does the agency violate the rights of all other surviving same-sex spouses denied survivor's benefits based on not satisfying the duration requirement because of unconstitutional marriage laws. The district court's recognition of the need to put an end to this systemic discrimination, both to remedy the harms experienced by those already denied and to enjoin SSA from violating the rights of other survivors in the future, was well within its broad discretion.

### A. The District Court Did Not Abuse Its Discretion in Certifying the Class.

Class actions are a critical tool for vindicating civil rights. *See* 7AA Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1776 (3d ed.) ("[T]he class suit is a uniquely appropriate procedure in civil-rights cases, which generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals."); *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). This is no less the case in the context of SSA's denial of survivor's benefits to surviving same-sex spouses barred from meeting the duration requirement because of discriminatory marriage laws. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (holding class action in constitutional challenge to SSA procedures to be "peculiarly appropriate"). The certified class properly includes all surviving spouses in the same position as Mr. Ely, reflecting the need to put an end to SSA's unconstitutional policy once and for all.

#### 1. The Class Meets All Relevant Rule 23 Requirements.

The district court certified a class to include "All persons nationwide who (i) presented claims for and were denied, or will present claims for and be denied, social security spousal survivor's benefits based on not being married to a same-sex spouse for at least nine months at the time of the spouse's death and (ii) were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months." ER-34. This certification acknowledged that all

surviving same-sex spouses denied equal opportunity to qualify for survivor's benefits because of discriminatory marriage laws present the same legal issue, share the same constitutional violation, and would have that injury remedied by a single injunction ending SSA's categorical exclusion. Concluding that Plaintiff met his burden of satisfying all relevant requirements of Rule 23, the district court's grant of class-wide relief was well within the court's discretion.

**a. The Class Is Clearly Defined.**

SSA attacks the properly certified class, claiming its vagueness makes it too challenging to determine "whether a particular individual is a member of the class." Def. Br. 46. This argument is simply unavailing. The district court rejected SSA's prior attempt to inject ambiguity where none exists. ER-29 (recognizing "the denial of survivor's benefits to those widows and widowers who could not meet the nine-month durational requirement due to their home state's unconstitutional ban on same-sex marriage as the common issue for all putative class members"); ER-31 (concluding that each class member "has been, or would have been, denied survivor's benefits based on their inability to meet the durational requirement due to same-sex marriage bans"). This Court should similarly neither accept SSA's invitation in this regard nor be swayed by SSA's faux confusion.

Setting aside that this Court has rejected an ascertainability requirement for class definitions, *see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th

Cir. 2017), this class definition is clear. Membership can be determined by objective criteria to establish whether unconstitutional marriage bans in the couple's home state caused the couple to be married for less than nine months.

Even the agency's own theoretical musings—about how access to marriage in states without unconstitutional exclusions, and other reasons a couple might not have married, affect the determination of class membership—all redound to the same conclusion: the relevant inquiry for determining class membership is whether a causal connection exists between a class member being married for less than nine months and their home state's unconstitutional marriage ban. Def. Br. 47. Just as a couple's home-state laws generally control SSA's evaluation of their marriage, *supra* I.B, the role of the couple's home-state laws in limiting their marriage's duration defines class membership. Although SSA now suggests that some great ambiguity exists about whether Mr. Driggs would be considered a class member, Def. Br. 48-49, the agency tellingly had no such concern below when unequivocally asserting, "Mr. Driggs is already a member of the putative class in *Ely*[.]" Dist. Ct. Dkt. 31-1 at 2, 6. The contours of the class are clear.

SSA also wrongly questions whether there is or should be a heightened causation requirement for class membership *exceeding* but-for causation. Def. Br. 47-48, 51-52 (listing hypotheticals). For example, as explained in his brief, it is indisputable that but for the unconstitutional laws of Mr. Driggs' home state, he

would have qualified for survivor's benefits, because he applied for and was denied a marriage license there more than nine months before his husband's death. SSA nonetheless questions whether Mr. Driggs might still need to show *more* than but-for causation, given that he could have traveled out-of-state earlier to marry. There is no such requirement—either in the class definition or in constitutional law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (but-for causation standard applicable to most constitutional violations); *cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993) (equal protection injury arises when discriminatory treatment prevents plaintiff from competing on equal footing).

SSA's arguments essentially boil down to concerns that confirming class membership will be administratively difficult for the agency, but this Court has expressly rejected that the burden of compliance bars certification of the class. *See Briseno*, 844 F.3d at 1133 ("demonstrat[ing] an administratively feasible way to identify class members" is not a prerequisite to class certification). The district court was well within its discretion, having made clear the threshold inquiry for class membership, to leave the means of determining whether an individual claimant meets the class definition to SSA. SSA makes these determinations whenever a class challenging a systemic agency policy is certified—namely, determining whether particular claimants are members of the class, and then

providing the required relief. The agency's own law manual has an entire chapter dedicated to implementation of class-wide injunctions, imparting instructions for determining class membership and for processing class members' claims. *See* SSA, *Hearings, Appeals, and Litigation Law Manual*, ch. I-5-4, https://www.ssa.gov/OP_Home/hallex/I-05/I-5-4.html. The district court's class definition sets forth a clear, central inquiry for determining class membership that will fit easily within that chapter.

Nor is there anything uniquely challenging about SSA's having to determine whether a couple would have been married for at least nine months before a worker's death but for unconstitutional laws barring their marriage. SSA makes comparable inquiries routinely. Aside from determining whether a couple would have met the duration requirement had state law not barred one of them from divorcing an institutionalized prior spouse, discussed *supra* II.B.2, SSA regularly evaluates the existence of marital relationships in the contexts of common-law marriage and SSI holding-out provisions. It does so by assessing verifiable indicia of a relationship and relying on statements from claimants, their family, and friends, and other forms of "satisfactory evidence." *See* POMS, GN 00305.065 https://secure.ssa.gov/poms.nsf/lnx/0200305065; POMS, SI 00501.152, https://secure.ssa.gov/apps10/poms.nsf/lnx/0500501152.

SSA's own actions after the district court's injunction demonstrate that SSA is fully capable of figuring out whether a claimant is a class member. SSA sought no stay pending appeal and has thus begun processing class members' claims. SSA has not sought clarification from the district court regarding standards for determining class membership, and seemingly has been implementing the injunction for over eight months and counting. This includes issuing instructions to SSA staff on which claims are implicated by the district court's ruling and what to do with those claims.[7] Just as in analogous contexts, SSA has figured out how to assess whether a couple did not meet the duration requirement because of unconstitutional marriage laws and thereby determine whether a claimant is a class member. Thus, SSA's belated complaints to the contrary, the agency apparently has been able to give its staff sufficient instruction for determining which claimants meet the class definition. Their argument that the class definition lacks sufficient clarity fails.

**b. The Class Satisfies the Commonality and Typicality Requirements of Rule 23(a) and Rule 23(b)(2).**

For the same reasons, SSA's challenge to the district court's finding that the class meets the requirements of commonality, typicality, and indivisible injunctive

[7] These instructions are attached to the Motion to Take Judicial Notice.

relief must fail.[8] "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quotation omitted). Typicality "assure[s] that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citations omitted). And Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Wal-Mart*, 564 U.S. at 360 (emphasis in original).

The district court's conclusion that the class met each of these requirements was not erroneous. Mr. Ely and every person across the country who meets the class definition raise the same constitutional question, ER-30; face the same constitutional violation, ER-31; and need the same injunctive relief to remove the categorical barrier denying them an equal opportunity to seek survivor's benefits, ER-32. Indeed, the nearly identical constitutional briefing across *Ely*, *Schmoll*, and *Driggs* palpably illustrates that reality. SSA repeatedly mischaracterizes class

[8] SSA did not challenge that the class satisfies Rule 23(a)'s requirements of numerosity or adequacy of representation, and the district court held those requirements met. ER-28, ER-31.

members as having individualized "as-applied" constitutional challenges, distinct from one another, but SSA's reliance on state marriage bans is unconstitutional as applied to the class *as a whole*, in the same way for *every* person that satisfies the class definition, and this barrier must be lifted for them all. Thus, the injunction against SSA's unconstitutional application of the statute remedies the constitutional violation experienced by *all* class members, requiring SSA to provide them with an equal opportunity to show they are otherwise eligible for survivor's benefits.

SSA's emphasis on Mr. Ely's particular facts underscores rather than undermines the district court's findings of commonality and typicality. At the center of the district court's determination that SSA violated Mr. Ely's constitutional rights was the factual determination that he was "'prohibited by unconstitutional state laws' from meeting the duration-of-marriage requirement." Def. Br. 46. The heart of the district court's findings of commonality and typicality are that SSA violates the Constitution every single time it denies survivor's benefits to surviving same-sex spouses who can meet the same factual determination—that they were "'prohibited by unconstitutional state laws' from meeting the duration-of-marriage requirement." Every such surviving same-sex spouse has "suffered the same injury" of being denied an equal opportunity to seek

survivor's benefits, *Wal-Mart*, 564 U.S. at 350, and their interests are aligned with Mr. Ely's in putting an end to SSA's categorical exclusion.

SSA cannot overcome that this central inquiry defines the class by raising irrelevant hypothetical facts about potential class members. Def. Br. 51-52. SSA's imagined variations on different couples' circumstances conflate the question of *who* is a member of the class with the question of whether all class members' rights are violated in a manner that can be remedied by a single injunction under Rule 23(b)(2). In implementing the injunction, SSA might determine that a particular surviving spouse does not meet the class definition because discriminatory state marriage laws were not the but-for cause of the couple not meeting the duration requirement. But that is a different matter entirely from the district court's determination that all surviving spouses who *can* make that showing have had their constitutional rights infringed. Whether class members seek uniform relief "does not require an examination of the viability or bases of the class members' claims for relief," but "only whether 'the party opposing the class has acted or refused to act on grounds that apply generally to the class.'" *Parsons*, 754 F.3d at 687-88 (quoting Rule 23(b)(2)); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (though details of class members' claims varied, "the constitutional issue at the heart of each class member's claim for relief is common."). SSA unconstitutionally deprives all people who can make the

required showing that they are class members of the same thing: "equal footing in [their] quest for a benefit." *Ne. Fla. Chapter*, 508 U.S. at 667. The district court's injunction ends that constitutional violation for every class member.[9]

SSA attempts to draw a parallel to the class rejected in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), which alleged individual violations of the same law requiring individual determinations of liability and individual remedial injunctive relief. Def. Br. 51. No such parallel can be drawn. Plaintiff class members here "have not brought a concatenation of individual claims that must be redressed through individual injunctions," but present "unified claims that a specified set of centralized [SSA] policies and practices of uniform … application have placed them at a substantial risk of harm" such that "[a] single, indivisible injunction ordering [SSA] to abate those policies and practices would provide relief to each member of the class, thus satisfying Rule 23(b)(2)." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) (quotations omitted), *cert. denied sub nom.*, 140 S. Ct. 2509 (2020). The district court made a singular determination of SSA's liability for its categorical exclusion and ordered a

[9] The injunction levels the playing field by ensuring that the constitutional violation is not the reason class members are denied benefits. That does not mean that all class members necessarily receive survivor's benefits. *See Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993) (order requiring SSA's readjudication of claims was proper even though for some class members "readjudication will make no difference").

single remedy for the infringement of all class members' constitutional rights in enjoining that exclusion. This was no abuse of the district court's discretion.

### 2. The District Court Did Not Abuse Its Discretion in Exercising Jurisdiction Over All Class Members.

In certifying the class, the district court included surviving same-sex spouses barred from meeting the duration requirement who will present their benefits claims to SSA in the future and would otherwise face SSA's unconstitutional policy. The court did not abuse its discretion in doing so. This Court has held that "[t]he inclusion of future class members in a class is not itself unusual or objectionable," recognizing that their claims ripen upon meeting the class definition. *Rodriguez*, 591 F.3d at 1118.

Including those future applicants here was necessary "in order to ensure that injunctive relief won by the named plaintiffs runs in favor of the future members." 6A Fed. Proc., L. Ed. § 12:53. The surviving same-sex spouses unconstitutionally barred from meeting the duration requirement who have not yet applied for benefits—whether because the plain language of the Social Security Act made them believe applying for benefits would be futile, or because they have not yet reached eligibility age for benefits—should not have to bear the gargantuan burden of having to re-litigate these constitutional issues against the federal government. That is particularly the case for James Obergefell, who has not yet turned 60, but the Supreme Court has already declared that the refusal to recognize his marriage

on equal footing as others is unconstitutional. *See Obergefell*, 576 U.S. at 658, 681 ("no lawful basis" exists for treating the couple as "strangers even in death").

Finding it "untenable that widows and widowers who have suffered the indignity of the denial of their fundamental right to marry while their beloved was still alive, must face continued marginalization of their relationship after their spouse's death," ER-25-26, but having concluded (albeit erroneously) that 42 U.S.C. § 405(g) did not support jurisdiction over future presenters, the district court exercised mandamus jurisdiction under 28 U.S.C. § 1361 to include them in the class. The court did not abuse its discretion in concluding that this was an extraordinary case warranting a commensurate remedy.

This Court has repeatedly recognized that mandamus "is an appropriate basis for jurisdiction in an action challenging procedures used in administering social security benefits." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (citing *Johnson*, 2 F.3d at 924-25). Such jurisdiction is particularly apt in matters challenging the Commissioner's execution of constitutional duties, *see, e.g., Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983), and may extend even to class members whose claims were not exhausted, *see Briggs v. Sullivan*, 886 F.2d 1132, 1141-42 (9th Cir. 1989), or presented. *See City of New York v. Heckler*, 742 F.2d 729, 739 n.7 (2d Cir. 1984), *aff'd sub nom.*, 476 U.S. 467 (1986).

Mandamus jurisdiction was appropriate here because the claims of these future presenters are clear and certain, and the Commissioner owes them the unambiguous, nondiscretionary duty not to violate their equal protection and due process rights in administering the Social Security Act. He "has no discretion to provide less than that constitutionally required." *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part, rev'd in part on other grounds, Yamasaki*, 442 U.S. at 682. Assuming, *arguendo*, that § 405(g) foreclosed relief, these future applicants have no other adequate remedy. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984). SSA cavalierly contends there is another "adequate" avenue: each individual otherwise excluded from relief should file their own lawsuit and marshal the resources to re-litigate the constitutional issues anew. But while litigation is pending, some individuals deprived of safety-net benefits become homeless and go hungry. The agony and humiliation that Mr. Driggs suffered, for example, should not be needlessly visited upon any other soul for even one day—much less for the *years* that litigation can take. SSA's suggestion that this dispute is merely about "convenien[ce]" is utterly blind to reality. Def. Br. 44.

Alternatively, the Court can affirm the district court's jurisdiction over future applicants based on the Social Security Act.[10] For decades, federal courts

[10] Setting aside mandamus jurisdiction, appellate review of subject matter jurisdiction is de novo. *Int'l Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1282 (9th Cir. 1994).

have nearly unanimously held § 405(g)'s jurisdictional presentment requirement satisfied by those who will file claims in the future, and thereby become members of the class, particularly in actions challenging continuing SSA practices. *See, e.g., Alexander v. Price*, 275 F. Supp. 3d 313 (D. Conn. 2017); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560 (N.D. Cal. 2007); *Andre v. Chater*, 910 F. Supp. 1352, 1358 (S.D. Ind. 1995); *Small v. Sullivan*, 820 F. Supp. 1098, 1112 (S.D. Ill. 1992); *Dixon v. Bowen*, 673 F. Supp. 123 (S.D.N.Y. 1987).

> 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.

*Dixon*, 673 F. Supp. at 127 (quotation omitted). In essence, the district court's exercise of jurisdiction is springing in nature: it comes into effect *only* at the point such individuals present their claims—not before. Exercising jurisdiction over those who join the class upon presenting their claims is consistent with the prospective nature of the injunctive relief being sought. *See Andre*, 910 F. Supp. at 1358 ("Since prospective relief looks to the future, it follows that the class of claimants to which this decision will apply should be subject to addition of future members."). The district court's holding in this regard was a dramatic outlier.

The cases cited by SSA do not alter the court's jurisdiction under § 405(g).[11] Most simply state the general requirement that actions arising under the Social Security Act must proceed under § 405(g), and therefore claimants must meet the presentment requirement before they are entitled to relief. Def. Br. 41-42 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 12-13 (2000); *Ringer*, 466 U.S. at 615-16; *Haro v. Sebelius*, 747 F.3d 1099, 1112-14 (9th Cir. 2014)).[12]

SSA's reliance on *Salfi* is once again unavailing. Def. Br. 41. *Salfi* rejected jurisdiction where there were no allegations of any claims being filed by unnamed class members—or even that they would do so. 422 U.S. at 764. The same is true of *Haro*, which rejected jurisdiction over a class where no one—including the class representatives—had sufficiently presented a claim. 747 F.3d at 1112-14. Here, it is inherent in the class definition that the claims be presented. These are not "merely potential claims," Def. Br. 40; these claims will actually be presented, satisfying this requirement.

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[11] SSA challenges only presentment, the sole jurisdictional requirement of § 405(g). *See Matthews v. Eldridge*, 424 U.S. 319, 330 (1975). Though SSA argued against waiver of administrative exhaustion and the limitations period before the district court, SSA has abandoned those arguments on appeal. *See Johnson*, 2 F.3d at 921-23 (exhaustion requirement and 60-day appeal limit are not jurisdictional; can be waived by either SSA or the courts); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

[12] SSA also cited *Guadamuz v. Bowen*, 859 F.2d 762, 767 (9th Cir. 1988), Def. Br. 42, which does not even discuss presentment.

Moreover, *Yamasaki*, issued four years after *Salfi*, approved a class composed in part of future presenters—those entitled to relief "*when* they claim a waiver" (the means of presentment in that case)—and declined jurisdiction only over those "who had not filed requests for reconsideration or waiver in the past and *would not do so in the future*." 442 U.S. at 704 (emphasis added) (quotation omitted). The Supreme Court stated that "injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation." 442 U.S. at 705. This reference to absent class members is nonsensical if future presenters are excluded. *See also Tataranowicz v. Sullivan*, 959 F.2d 268, 272 (D.C. Cir. 1992) (*Yamasaki* "approve[d] a class including persons who had not yet satisfied § 405(g) but would ultimately do so").

Whether under § 405(g) or mandamus jurisdiction, the district court was right to end SSA's unconstitutional exclusion for all whose constitutional rights would be violated without requiring endless litigation addressing the same constitutional question.

### B. The District Court Did Not Abuse Its Discretion in Ordering Nationwide Injunctive Relief.

Recognizing that SSA's discrimination burdened surviving same-sex spouses across the country, the district court certified a nationwide class and granted nationwide relief. ER-32-33. SSA has not challenged on appeal the

nationwide character of the class or scope of relief.

Even had the district court not certified the class, however, nationwide relief would nonetheless have been appropriate as inherent in the court's authority to tailor a remedy that mirrors the scope of the constitutional violation. When confronted with an unconstitutional exclusion, the appropriate remedy is not to surgically excise one individual from its reach; it is to enjoin enforcement of the exclusion as a whole. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Indeed, the relief ordered in cases challenging marriage bans, which were not brought generally as class actions, illustrates the point: even before ever reaching the Supreme Court, the appropriate remedy was to enjoin the enforcement of the unconstitutional exclusion as a whole—not merely to permit only the named plaintiffs to marry. *See, e.g.*, *Latta*, 771 F.3d at 476-77. This is precisely the type of "exceptional case[]" requiring a nationwide injunction to remedy the full scope of harm inflicted by the government. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (quotation omitted). And the equities here weigh sharply in favor of protecting all those standing in harm's way. *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020).

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: February 1, 2021

Respectfully submitted,

/s/ Peter C. Renn

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## STATEMENT OF RELATED CASES

Plaintiff supplements Defendant's Statement of Related Cases to note that one case identified by Defendant as raising closely related legal issues concerning the constitutionality of the denial of survivor's benefits to surviving same-sex partners barred from marriage, *Thornton v. Saul*, No. 18-1409 (W.D. Wash.), is now pending before this Court on appeal, Nos. 21-35067, 21-35068.

s/ Peter C. Renn
Peter C. Renn

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,997 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Peter C. Renn
Peter C. Renn

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
Peter C. Renn

# ADDENDUM

# TABLE OF CONTENTS

Except for the following, all applicable laws and statutes are contained in the addendum of Appellant Commissioner Saul:

**42 U.S.C. § 416**

**§ 416. Additional definitions (excerpt)**

**(h) Determination of family status**

**(2)(A)** In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

**Ariz. Rev. Stat. § 38-651**

**§ 38-651. Expenditure of monies for health and accident insurance; definition (excerpt)**

**O.** For the purposes of this section, "dependent" means a spouse under the laws of this state, a child who is under twenty-six years of age or a child who was disabled before reaching nineteen years of age, who continues to be disabled under 42 United States Code § 1382c and for whom the employee had custody before reaching nineteen years of age.

## Ariz. Const., art. 30, § 1

### § 1. Marriage

Section 1. Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HAROLD GLENN SCHMOLL,

Plaintiff,

v.

ANDREW M. SAUL,

Defendant.

Case No. 19-cv-04542-NC

**ORDER REVERSING DECISION OF COMMISSIONER AND REMANDING FOR PAYMENT OF BENEFITS**

Re: Dkt. Nos. 24, 26

Plaintiff Harold Glenn Schmoll appeals from defendant Commissioner Andrew M. Saul's denial of his application for Social Security Widower's Insurance Benefits. Before the Court are the parties' cross-motions for summary judgment. At issue is whether the Social Security Administration unconstitutionally discriminated against Schmoll when it applied a duration-of-marriage requirement when the only reason Schmoll could not satisfy that requirement was because of California's refusal to recognize same-sex marriage. As applied here, the duration-of-marriage requirement was discriminatory and the Court accordingly GRANTS Schmoll's motion for summary judgment.

## I. Background

Harold Glenn Schmoll and his late husband, Dr. Lowell Houser, met in November 1961 and were together for almost 47 years. *See* Dkt. No. 22 ("AR") at 112. In 1996, exactly 35 years after they met, Schmoll and Dr. Houser shared a commitment ceremony

in San Francisco in the presence of their family and friends to renew their love for one another. *Id.* at 55–56, 146–47, 149–51. Schmoll and Dr. Houser were unable to marry, however, until July 25, 2008, one month after same-sex marriage became legal in California. *Id.* at 16, 29. Dr. Houser passed away shortly after on August 16, 2008. *Id.* at 126.

On December 10, 2014, Schmoll applied for widower's insurance benefits from the Social Security Administration ("SSA"). *Id.* at 19–21. The SSA denied Schmoll's application, explaining that Schmoll did not qualify for widower's insurance benefits because his marriage to Dr. Houser did not last at least nine months. *Id.* at 31–33, 38. The SSA further stated that Schmoll and Dr. Houser's 1996 commitment ceremony did not qualify as proof of a domestic partnership because they did not register their partnership with the state. *Id.*

On August 4, 2016, Schmoll requested a hearing before an administrative law judge ("ALJ"). *Id.* at 49–54. The ALJ again denied Schmoll's application. *Id.* at 17. Although the ALJ found that the commitment level and authenticity of Schmoll's marriage was not at issue, she concluded that there was "no basis in the law for finding that a marriage existed prior to July 25, 2008." *Id.* at 16. Schmoll appealed and the Appeals Council affirmed. *Id.* at 5–8.

Schmoll now seeks judicial review of the SSA's decision. *See* Dkt. No. 1. All parties have consented to the jurisdiction of a magistrate judge. *See* Dkt. Nos. 10, 12.

## II. Legal Standard

Section 405 of the Social Security Act permits judicial review of any final decision by the Commissioner of Social Security. 42 U.S.C. § 405(g). The reviewing court has the "power to enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Judicial review is limited to determining whether the Commissioner's decision is supported by substantial evidence and whether it applied the correct legal standards. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014).

## III. Discussion

### A. Statutory Framework

The Social Security Act provides for widow's and widower's insurance benefits, or survivor's benefits, to surviving spouses. *See* 42 U.S.C. § 402(e)–(f). These two provisions allow a surviving spouse to collect a monthly stipend based on their deceased spouse's previous income. In relevant part, the Act defines a "widower" as "the surviving husband of an individual, but only if . . . he was married to her for a period of not less than nine months immediately prior to the day on which she died . . . ." 42 U.S.C. § 416(g)(1). Survivors of non-marital legal relationships in which the survivor has the same intestate inheritance rights as a surviving spouse are also considered "widows" and "widowers" for purposes of Social Security benefits. *See* 42 U.S.C. § 416(h)(1)(A)(ii). To make this determination, the Act requires the SSA to assess whether the State in which the deceased individual was domiciled would find that individual was validly married at the time of death. *See* 42 U.S.C. § 416(h)(1)(A).

The duration-of-marriage requirement was enacted "as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights" and not the "traditional benefits" of marriage. *Weinberger v. Salfi*, 422 U.S. 749, 777, 780 (1975) (citing H.R. Rep. No. 92-231, p. 55 (1971); U.S. Code Cong. & Admin. News 1972, p. 5042). Thus, to mitigate potentially harsh results, several exceptions to this requirement exist, including accidental death, death in the line of duty as an active serviceperson, or where a couple had been previously married for more than nine months prior to their first divorce. 42 U.S.C. § 416(k). The duration-of-marriage requirement also does not apply in cases involving delayed marriage to a second spouse due to state laws prohibiting divorce of an institutionalized first spouse. *See* 42 U.S.C. § 416(g)(2). Likewise, a surviving spouse also qualifies for survivor's benefits notwithstanding the duration-of-marriage requirement if he is the biological or adoptive parent of the deceased individual's child. *See* 42 U.S.C. § 416(c)(1), (g)(1).

Although the Act uses gendered language, there is no longer any requirement that

the surviving spouse was the opposite sex of the deceased since the Supreme Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013). In *Windsor*, the Supreme Court held that Section 3 of the Defense of Marriage Act ("DOMA"), which excluded "same-sex partner[s] from the definition of 'spouse' as that term [wa]s used in federal statutes," was unconstitutional. *Id.* at 751–52, 774. To implement the Supreme Court's decision in *Windsor*, the SSA now pays benefits to surviving spouses of same-sex marriages on the same terms and conditions that they are paid to survivors of opposite-sex marriages. *See Same-Sex Couples*, Social Security Administration, https://www.ssa.gov/people/same-sexcouples; *Introduction to Same-Sex Marriage Claims*, Social Security POMS GN 00210.001, https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210001.

**B. Level of Scrutiny**

As a threshold matter, the Court must first determine the appropriate level of scrutiny. If, as the SSA argues, the duration-of-marriage requirement is facially neutral and merely disproportionately impacts same-sex couples, then the Court must apply rational basis review. *Cf. Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."). On the other hand, if the duration-of-marriage requirement incorporates and relies on state law that discriminates on the basis of sexual orientation, it is subject to a heightened level of scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) ("*Windsor*'s heightened scrutiny applies to classifications based on sexual orientation.").

The duration-of-marriage requirement is inextricable from underlying California law which classifies on the basis of sexual orientation. *Cf. Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982) (By "explicitly referring to state law on [marriage], makes relevant the issue of the constitutionality of a particular state law."). Relevant here, the Act provides two qualifications before an individual is considered a widower for Social Security purposes. First, an individual is a widower if "the courts of the State in which he was domiciled at the time of death . . . would find that such applicant and such insured

individual were validly married at the time such insured individual . . . died." 42 U.S.C. § 416(h)(1)(A). Second, an individual qualifies as a widower "only if . . . he was married to her for a period of not less than nine months immediately prior to the day on which she died." 42 U.S.C. § 416(g)(1). The Act's explicit command to consider state law requires the Commissioner to rely on California law regarding marriage when adjudicating Schmoll's application.

The SSA contends that its reliance on California law was limited to California law as it existed in August 2008—*i.e.*, when it recognized same-sex marriages—because § 416(h) only requires the Commissioner to consider state law at the time of the insured individual's death. *See* Dkt. No. 32 at 4. Once it determined that Schmoll's marriage was valid, the SSA considered the duration-of-marriage requirement in § 416(g) and found that Schmoll did not qualify. The SSA's mechanistic application of § 416(g) and (h), however, ignores the broader context of California law. Until the California Supreme Court's decision in *In re Marriage Cases*, 43 Cal. 4th 757 (2008), California prohibited same-sex marriage. *See also* Cal. Fam. Code § 308.5 (repealed 2015). Thus, it was legally impossible for Schmoll and Dr. Houser to have been married for nine or more months prior to Dr. Houser's death in August 2008. The SSA's reliance on the duration-of-marriage requirement to deny Schmoll's application cannot be severed from California's unconstitutional law prohibiting same-sex marriage when that law was the sole reason keeping Schmoll from meeting that requirement. By conditioning eligibility for benefits on an impossible requirement, the SSA perpetuates California's previous denial of "the constellation of benefits that the States have linked to marriage . . . ." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

The SSA's comparison of this case to disparate impact cases is not apt. *See, e.g.*, Dkt. No. 26 at 18–20. In each of those cases, the underlying law did not facially discriminate on an improper basis. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 274, 277 (1979) (upholding veteran's preference in state civil-service employment because it "was gender-neutral on its face" and "not originally enacted or

subsequently reaffirmed for the purpose of giving an advantage to males."). By contrast, California's ban on same-sex marriage was intentionally discriminatory and discriminated on an improper basis.

Because the SSA's decision is inextricable from an unconstitutional California law that discriminates on the basis of sexual orientation, rational basis review is inappropriate and the Court will apply heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) ("*Windsor*'s heightened scrutiny applies to classifications based on sexual orientation.").

**C. Heightened Scrutiny**

Heightened scrutiny requires the government to provide "a tenable justification [that] describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). Where, as here, the application of heightened scrutiny is as-applied rather than facial, the government must demonstrate that a justification exists for the policy as applied to the individual in question. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). Those justifications must demonstrate that the government's policy significantly furthers important governmental interests and less intrusive means are unlikely to achieve substantially those interests. *Id.*

Citing *Weinberger v. Salfi*, 422 U.S. 749 (1975), the SSA provides two justifications for the duration-of-marriage requirement. *See* Dkt. No. 26 at 21. The SSA argues that the duration-of-marriage requirement is justified by the government's need to protect against sham marriages and administrative efficiency. *See id.* Neither justification withstands heightened scrutiny as applied to Schmoll.

First, the Court notes that *Salfi* is distinguishable and not controlling here. In *Salfi*, the Supreme Court applied rational basis review to the duration-of-marriage requirement as applied to a widow. 422 U.S. at 754. Rational basis review applied because "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status . . . ." *Id.* at 772. Because the duration-of-marriage requirement was

rationally related to Congressional objectives to prevent sham applicants and administrative efficiency, it survived rational basis review. *Id.* at 781–84. *Salfi*, however, did not concern an applicant who was unconstitutionally prohibited from meeting the nine-month bar and was decided before the Supreme Court's decision in *Obergefell*. *See Obergefell*, 135 S. Ct. at 2604. Unlike Schmoll, the widow in *Salfi* was not unconstitutionally barred from marrying her deceased husband nine months prior to his death. *See id.* at 753–54. Here, however, Schmoll was prevented from meeting the duration-of-marriage requirement solely because of discriminatory state law. The SSA's decision to rely on that discrimination denied Schmoll "access to the 'constellation of benefits that the Stat[e] ha[s] linked to marriage." *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (citing *Obergefell*, 135 S. Ct. at 2601). This invidious discrimination makes rational basis review inappropriate. Indeed, *Salfi* recognized that "Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group . . . .'" *Id.* (quoting *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508, 513–14 (1973)).

Next, the Court turns to the SSA's purported justifications. There is no question that the SSA's interest in guarding against abuse through sham marriages is an important one. The SSA fails to show, however, that its interest in preventing abuse could not be served through less intrusive means, such as an evidentiary hearing. Indeed, the record shows that the bright-line rule was a poor tool in this case. After an administrative hearing, the ALJ explicitly found that there was "persuasive and consistent evidence" showing that the authenticity and commitment level of Schmoll's marriage was not at issue. *See* AR at 28, 31. Instead of weeding out sham relationships, the SSA's application of the duration-of-marriage requirement in this case denied benefits to an authentic and committed marriage.

Likewise, administrative efficiency does not justify the duration-of-marriage requirement here. In the realm of heightened scrutiny, "there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates

constitutionality." *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Moreover, it is not clear that the efficiency of a bright-line rule is necessary. As the court noted in *Thornton v. Commissioner of Social Security*, "the Administration is clearly capable of making these case-by-case determinations and does so in every claim it processes." Dkt. No. 27, *Thornton v. Comm'r of SSA*, No. CV-18-01409-JLR-JRC, Report and Recommendation at 18 (W.D. Wash. Jan. 31, 2020). The SSA already makes individualized determinations for individuals in common-law marriages (*see* 20 C.F.R. § 404.726) and those who fit various exceptions (*see* 42 U.S.C. § 416(c)(2), (h)(1), (g)(2)).

Almost five years ago, the Supreme Court held that "[t]he right to marry is fundamental as a matter of history and tradition." *Obergefell*, 135 S. Ct. at 2602. "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* at 2604. Excluding same-sex couples from "the constellation of benefits that the States have linked to marriage . . . consigned [them] to an instability many opposite-sex couples would deem intolerable in their own lives." *Id.* at 2601. Those benefits include "the rights and benefits of survivors" such as those at issue here. *Id.*

Because the SSA's application of the duration-of-marriage requirement to Schmoll relies on California's unconstitutional discrimination against same-sex couples and does not survive heightened scrutiny, the Court finds that Schmoll is entitled to survivor benefits. Further proceedings are unnecessary as the ALJ already found that the authenticity and commitment level of Schmoll's marriage was not at issue. *See* AR at 28. Accordingly, the Court GRANTS Schmoll's motion, reverses the Commissioner's decision, and orders payment of survivor's benefits.

**IV. Conclusion**

The Court GRANTS Schmoll's motion, reverses the Commissioner's decision, and REMANDS this case for calculation and payment of survivor's benefits.

**IT IS SO ORDERED.**

Dated: June 15, 2020

NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California