

1 Brian I. Clymer (AZBA No. 5579)
Autumn J. Menard (AZBA No. 033899)
2 BRIAN CLYMER, ATTORNEY AT LAW
2601 N. Campbell Avenue, Suite 203
3 Tucson, AZ 85716
Email: bclymer@clymerlegal.com
4 Email: amenard@clymerlegal.com
Telephone: 520-323-1234

5 Peter C. Renn (admitted *pro hac vice*)
6 LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
7 4221 Wilshire Blvd., Suite 280
Los Angeles, CA 90010
8 Email: prenn@lambdalegal.org
Telephone: 213-382-7600

9 Tara L. Borelli (admitted *pro hac vice*)
10 LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
11 730 Peachtree Street NE, Ste. 640
Atlanta, GA 30308
12 Email: tborelli@lambdalegal.org
Telephone: 404-897-1880

13 Karen L. Loewy (admitted *pro hac vice*)
14 LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
15 120 Wall Street, 19th Floor
New York, NY 10005
16 Email: kloewy@lambdalegal.org
Telephone: 212-809-8585

17
18 UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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

21 Plaintiff,

22 vs.

23 Nancy Berryhill, in her official capacity as
24 the Acting Commissioner of the Social
Security Administration,

25 Defendant.
26

Case No. 4:18-cv-00557-BPV

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER RELIEF**

NATURE OF ACTION

1
2 1. Plaintiff Michael Marvin Ely (“Named Plaintiff” or “Mr. Ely”), an
3 individual, and the members of the Plaintiff Class (collectively with Mr. Ely, “Plaintiffs”)
4 file this Class Action Complaint against Defendant Nancy Berryhill (“Defendant”), in her
5 official capacity as Acting Commissioner of the United States Social Security
6 Administration (“SSA”). This action challenges SSA’s denial of social security
7 survivor’s benefits to surviving same-sex spouses who were unable to meet the nine-
8 month marriage duration requirement for such benefits because of unconstitutional laws
9 barring same-sex couples from marriage.

10 2. SSA generally relies on marriage to determine federal eligibility for
11 benefits for surviving spouses. Until relatively recent history, however, same-sex couples
12 have been unconstitutionally barred from marriage, and SSA has relied on those
13 unconstitutional barriers to determine federal eligibility for spousal survivor’s benefits.
14 Surviving same-sex spouses like Mr. Ely, who was unable to marry his husband for most
15 of their forty-three-year relationship together because of unconstitutional marriage laws
16 enforced until seven months prior to his husband’s death, are thus barred from accessing
17 spousal survivor’s benefits.

18 3. Like other Americans, workers with same-sex spouses have paid into social
19 security through mandatory deductions from their income, but until recently, rather than
20 funding survivor’s benefits for their own families, these payments have funded survivor’s
21 benefits for those who were married to different-sex spouses. Mr. Ely, now 65 years old,
22 is unable to access the same survivor’s benefits that he would be able to receive in his
23 retirement years if he and his husband had been a different-sex couple who were able to
24 marry at all times.

25 4. For more than forty-three years, Mr. Ely and James Allan Taylor (“Mr.
26 Taylor”) were in a loving, committed, and intimate same-sex relationship. They lived
27 together for over twenty years in the State of California before moving to the State of
28 Arizona, where they lived together for another twenty-plus years. Their relationship

1 began in 1971, when Mr. Ely was 18 years old and Mr. Taylor was 20 years old. They
2 remained a couple until 2015, when cancer claimed Mr. Taylor's life at 63 years of age.
3 Each was the love of the other's life.

4 5. After this Court enjoined Arizona's unconstitutional exclusion of same-sex
5 couples from marriage on October 17, 2014, Mr. Ely and Mr. Taylor married as quickly
6 as they could: they obtained a marriage license within five days and married each other
7 two weeks thereafter, on November 7, 2014, after gathering together their loved ones.
8 Mr. Ely and Mr. Taylor demonstrated their desire to marry each other before November
9 2014 and would have done so but for Arizona's exclusion of same-sex couples from
10 marriage, which was enforced until seven months before Mr. Taylor's death. They cared
11 for each other in sickness and in health until Mr. Taylor's death.

12 6. Mr. Taylor's death was both emotionally and financially devastating for
13 Mr. Ely. Survivor's benefits serve to mitigate some of the financial disruption
14 experienced by a surviving spouse. That financial disruption was particularly acute for
15 Mr. Ely because Mr. Taylor's employment was the primary source of income for the
16 couple. The amount of survivor's benefits one receives is determined by the earning
17 history of the decedent.

18 7. When Mr. Ely applied for survivor's benefits from SSA in 2015, shortly
19 after his 62nd birthday—when he would have otherwise been eligible to collect survivor's
20 benefits—his application was denied. SSA denied his application on the grounds that he
21 was not married to Mr. Taylor for nine months, even though that was a legal
22 impossibility in Arizona, which did not permit same-sex couples to marry until October
23 17, 2014. As a result, Mr. Ely has been denied over a thousand dollars each month that
24 he would have otherwise received, which negatively impacts his quality of life and
25 stretched finances.

26 8. Mr. Ely's experience is mirrored by surviving same-sex spouses across the
27 country who were barred from legally securing their committed, intimate relationships
28 until the laws unconstitutionally forbidding their marriages were struck down; who

1 married as quickly as reasonably possible thereafter; who lost their spouses less than nine
2 months later; who sought survivor's benefits from SSA; and who were denied those
3 benefits because their legal relationships did not meet the statutory marriage duration
4 requirements for spousal benefits, even though they were unconstitutionally barred from
5 doing so. SSA has denied the members of the Plaintiff Class critical financial protections
6 they would have received but for their illegal exclusion from marriage.

7 9. SSA's categorical exclusion of surviving same-sex spouses like Mr. Ely
8 and the other members of the Plaintiff Class from survivor's benefits violates their equal
9 protection and due process rights protected by the United States Constitution. Even
10 before the U.S. Supreme Court recognized that the exclusion of same-sex couples from
11 marriage was unconstitutional, courts recognized that the exclusion of same-sex couples
12 from the legal rights associated with marriage was unconstitutional. SSA's exclusion of
13 same-sex spouses from survivor's benefits—a critical legal protection associated with
14 marriage—violates their equal protection and due process rights.

15 10. The U.S. Supreme Court ultimately recognized in *Obergefell v. Hodges*,
16 135 S. Ct. 2584 (2015), that the exclusion of same-sex couples from marriage, as well as
17 from the legal rights associated with marriage, was unconstitutional. The U.S. Supreme
18 Court also recognized in *United States v. Windsor*, 570 U.S. 44 (2013), that the federal
19 government may not withhold spousal benefits from same-sex couples. SSA thus cannot
20 rely upon unconstitutional state laws—including the Arizona law that barred Mr. Ely and
21 Mr. Taylor from marrying until October 2014 and the parallel laws that were in place
22 throughout the country barring all Plaintiffs from marriage—in determining federal
23 eligibility for survivor's benefits.

24 11. SSA's unconstitutional incorporation of, and reliance upon, discriminatory
25 state laws previously barring same-sex couples from marriage replicates and perpetuates the
26 same basic constitutional violations condemned in *Obergefell*, *Windsor*, and many other
27 decisions. SSA's denial of survivor's benefits to surviving same-sex spouses like Plaintiffs
28 tells them that they are unworthy of federal recognition and equal treatment and demeans

1 their dignity. Despite *Windsor*'s clear mandate that the federal government may not
2 withhold spousal benefits from same-sex couples, by withholding survivor's benefits from
3 same-sex couples barred from marriage by state laws, SSA continues to categorically bar
4 surviving same-sex spouses like Plaintiffs from access to this critical safety-net protection.

5 **PARTIES**

6 11. Named Plaintiff Michael Marvin Ely is a citizen of the United States. He
7 resides within this judicial district and the State of Arizona.

8 12. Defendant Nancy A. Berryhill is the Acting Commissioner of the Social
9 Security Administration and performs the functions of the Commissioner. Ms. Berryhill
10 is the federal official responsible for implementing and enforcing the Social Security Act and
11 its implementing regulations, SSA's policies and procedures, and other laws of the United
12 States applicable to SSA administration. Ms. Berryhill is named in her official capacity only.

13 **JURISDICTION AND VENUE**

14 13. The Court has jurisdiction under 42 U.S.C. § 405(g) and 28 U.S.C. § 1361.
15 Jurisdiction is proper pursuant to 42 U.S.C. § 405(g) because Plaintiffs' claims arise
16 under the Social Security Act and its implementing regulations.

17 14. Venue is proper in this judicial district pursuant to 42 U.S.C. § 405(g) and
18 28 U.S.C. § 1391(b) because Mr. Ely is a resident in this judicial district. Venue is
19 proper in the Tucson Division of this district because a substantial part of the events or
20 omissions giving rise to Mr. Ely's claims occurred in Pima County, Arizona, including
21 that the earning record of Mr. Taylor on which Mr. Ely seeks survivor's benefits is based
22 in part on work that was performed within Pima County.

23 **CLASS ACTION ALLEGATIONS**

24 15. Named Plaintiff brings this action for himself and, pursuant to Rules 23(a)
25 and Rules 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of the class of
26 persons similarly situated ("the Class").

27 16. Named Plaintiff proposes the following Class definition, subject to
28 amendment as appropriate:

1 All persons nationwide who (i) presented claims for and were denied, or will
2 present claims for and be denied, social security spousal survivor's benefits based
3 on not being married to a same-sex spouse for at least nine months at the time of
4 the spouse's death and (ii) were barred from being married for at least nine months
5 by unconstitutional laws prohibiting same-sex couples from marriage.

6 17. Named Plaintiff represents and is a member of the Class.

7 18. The Class is so numerous that joinder of all members is impracticable.

8 While the exact number of class members is currently unknown, on information and
9 belief there are, at a minimum, significantly more than forty surviving same-sex spouses
10 who have been denied spousal survivor's benefits because unconstitutional marriage laws
11 prevented them from meeting the statutory marriage duration requirements for those
12 benefits.

13 19. There are questions of law and fact common to the Class including:

14 (i) whether SSA's denial of spousal survivor's benefits to those who would have
15 otherwise qualified for those benefits but for their unconstitutional exclusion from
16 marriage violates the right to equal protection guaranteed by the Fifth Amendment to the
17 U.S. Constitution by discriminating against them on the bases of sexual orientation and
18 sex and by depriving them of equal access to and protections for their fundamental liberty
19 interests in forming an intimate family relationship with a person of the same sex; and

20 (ii) whether SSA's denial of spousal survivor's benefits to those who would have
21 otherwise qualified for those benefits but for their unconstitutional exclusion from
22 marriage violates the right to substantive due process guaranteed by the Fifth Amendment
23 to the U.S. Constitution by infringing upon their fundamental liberty interests in forming
24 an intimate family relationship with a person of the same sex.

25 20. The claims of Named Plaintiff are typical of those of the Class, in that they
26 arise from the same policy and practice of SSA to deny spousal survivor's benefits to
27 same-sex survivors whose marriages did not meet the statutory marriage duration
28

1 requirements for spousal benefits because they were unconstitutionally barred from doing
2 so.

3 21. Named Plaintiff can and will fairly and adequately protect the interests of
4 the Class and does not have any interests antagonistic to the Class. Named Plaintiff and
5 the Class all seek a declaration that Defendants' denial of spousal survivor's benefits to
6 same-sex spouses who were barred from meeting the statutory marriage duration
7 requirements due to unconstitutional marriage bans is itself unconstitutional, as well as
8 injunctive relief requiring Defendants to end this unconstitutional exclusion and process
9 Plaintiffs' claims for benefits.

10 22. SSA's challenged policy and practice apply generally to the Class by
11 precluding all Class members from obtaining spousal survivor's benefits based on
12 statutory marriage duration criteria they were unable to meet due to unconstitutional
13 marriage bans. The final declaratory and injunctive relief sought is appropriate
14 respecting the Class as a whole.

15 **PRESENTMENT AND EXHAUSTION**

16 23. The presentment requirement of 42 U.S.C. § 405(g) was met by Mr. Ely
17 when he filed his Application for Widow's or Widower's Insurance Benefits
18 ("Application") in 2015. Class members have also presented their claims to the
19 Commissioner within the meaning of 42 U.S.C. § 405(g).

20 24. Mr. Ely exhausted his administrative remedies. The September 26, 2018
21 "Notice of Appeals Council Action" denying review of the Administrative Law Judge
22 decision dated October 17, 2017 is the final agency action regarding Mr. Ely's
23 Application. This action also raises a constitutional challenge that includes a request for
24 injunctive and declaratory relief that is collateral to an individual determination of benefits
25 and outside SSA's administrative competence to adjudicate.

26 25. Any exhaustion requirement should be waived as to the Class because Class
27 members' claims are collateral to their respective claims for benefits, Class members are
28 irreparably harmed, and exhaustion would be futile.

GENERAL ALLEGATIONS

**The Forty-Three Year Committed Relationship of
Michael Ely and James Taylor.**

1
2
3
4 26. For forty-three years, Mr. Ely and Mr. Taylor were in a loving, committed,
5 and intimate relationship. They lived the first twenty-three years in California, and the
6 last twenty-plus years in Arizona, where Mr. Taylor's family resided. They met and
7 formed a committed relationship with each other in 1971. From their very first meeting,
8 Mr. Ely knew had met his soul mate, and he still has the first flower that Mr. Taylor gave
9 to him. They began living together on December 5, 1971, which they celebrated as their
10 anniversary until they were able to marry. From 1971 on, Mr. Ely and Mr. Taylor shared
11 a home until Mr. Taylor's death in May 2015.

12 27. One of their shared passions was music. Mr. Taylor played guitar in a
13 band, and Mr. Ely subsequently served as the lyricist and singer.

14 28. Mr. Ely and Mr. Taylor publicly held themselves out as the loving and
15 committed couple that they were. They attended family and friends' events, such as
16 holidays and birthdays, together as a family. Their friends and family also recognized
17 them as a family.

18 29. Mr. Ely and Mr. Taylor were an integrated economic unit. Mr. Taylor was
19 the breadwinner and worked as a structural mechanic in aerospace. Mr. Ely was the stay-
20 at-home partner and was responsible for maintaining their home, cooking meals, and
21 doing household chores. Mr. Ely and Mr. Taylor had a joint banking account, and Mr.
22 Ely did the couple's banking and paid the bills. Mr. Taylor performed the household
23 repairs.

24 30. Mr. Ely and Mr. Taylor cared for each other in sickness and in health. Mr.
25 Ely was Mr. Taylor's primary caregiver from his diagnosis with cancer in November
26 2013 until his death in May 2015. Mr. Taylor's chemotherapy and other treatments had
27 horrible side effects. Mr. Taylor had terrible chills, night sweats, near continuous
28 vomiting, and was extremely weak, and Mr. Ely cared for him through all of it, providing

1 all of his personal care.

2 31. Mr. Taylor similarly cared for Mr. Ely during their relationship. Indeed,
3 even at the end of Mr. Taylor's life, his main concern was not his own death; it was what
4 would happen to Mr. Ely. Ultimately, Mr. Taylor passed away on May 21, 2015, six
5 months and fourteen days after their November 7, 2014 marriage. This was seven
6 months and four days after October 17, 2014, which is when same-sex couples were first
7 legally able to marry in Arizona.

8 32. Mr. Ely made all the arrangements for Mr. Taylor's funeral and cremation.
9 The death certificate lists Mr. Ely as Mr. Taylor's surviving spouse.

10 **Mr. Ely and Mr. Taylor Would Have Been Married For At Least Nine Months**
11 **But For the Unconstitutional Exclusion of Same-Sex Couples from Marriage.**

12 33. On many occasions during their 43-year relationship, Mr. Ely and Mr.
13 Taylor discussed and demonstrated their desire to marry to each other and to be
14 recognized by the State of Arizona and by the United States as a married couple with the
15 same status and legal rights as married different-sex couples. Throughout their
16 relationship, however, and until October 17, 2014, seven months and four days before
17 Mr. Taylor's death, Arizona barred same-sex couples from marriage.

18 34. Mr. Ely and Mr. Taylor demonstrated their intent and desire to be married
19 under the laws of the State of Arizona by their public commitment to each other, and by
20 their other public actions throughout their 43-year relationship.

21 35. In 1973, at a wedding of their friends, who were a different-sex couple, Mr.
22 Ely and Mr. Taylor discussed marriage, noting that they wished it were an option
23 available to them. Like many same-sex couples of their era, however, Mr. Ely and Mr.
24 Taylor held little hope for a time when they would be legally able to marry. Indeed, they
25 began their relationship in a time when homosexuality was criminalized and was
26 characterized as a mental illness by the American Psychiatric Association. At one point
27 in the 1970s, Mr. Taylor was hospitalized with pneumonia, and hospital staff prohibited
28 Mr. Ely from seeing him after visiting hours, allowing only one hour a day because he

1 was not deemed Mr. Taylor's "family."

2 36. In December 2007, Mr. Ely and Mr. Taylor publicly declared their
3 commitment to one another and exchanged rings in a commitment ceremony. Inside the
4 rings was engraved, "don't forget," which was shorthand for, "don't forget I love you."
5 Over their long relationship, they had developed their own code to communicate "I love
6 you" when they were in situations where it was unsafe to express that sentiment. They
7 decided to have the commitment ceremony after a family relative voiced disapproval of
8 the idea that same-sex couples should be allowed to marry, which prompted discussions
9 between them about alternate ways they could publicly express their commitment to each
10 other in light of the fact that they were barred from marrying. They hired a licensed
11 celebrant and invited their closest friend. This was as close as they could get to marriage
12 at the time. They recognized that even if they had flown to Canada to get married, for
13 example, Arizona would not have recognized their marriage, which made the exercise
14 feel like an act of futility.

15 37. On October 17, 2014, Arizona began issuing marriage licenses to same-sex
16 couples. Mr. Ely and Mr. Taylor married as fast as reasonably possible. They obtained
17 their marriage license from the Pima County Superior Court just five days later, on
18 October 22, 2014. They then invited their loved ones, some of whom needed to travel
19 from out of town, to attend their marriage ceremony and were legally married at the Pima
20 County Superior Court, according to the laws of the State of Arizona, on November 7,
21 2014. At the ceremony, they exchanged the same rings that they had worn since their
22 commitment ceremony in 2007.

23 38. The uncontested evidence introduced by Mr. Ely in the administrative
24 process on the Application demonstrated that Mr. Ely and Mr. Taylor would have
25 married earlier, by at least nine months before Mr. Taylor's death, but for Arizona law
26 barring same-sex couples from marriage. The evidence introduced by Mr. Ely in the
27 administrative proceedings documents that on multiple occasions Mr. Ely and Mr. Taylor
28 discussed their desire to be married and to be recognized by the State of Arizona and the

1 United States as a married couple with the same status and legal rights as married
2 different-sex couples. Mr. Ely and Mr. Taylor married in Arizona as soon as they were
3 permitted to do so.

4 39. In 1996, the United States enacted the so-called Defense of Marriage Act,
5 which prohibited federal recognition of marriages between same-sex couples. Although
6 no state permitted same-sex couples to marry at the time, the law was enacted in response
7 to fears that that could change. As the U.S. Supreme Court explained in *Windsor*, the
8 law’s “purpose [was] to discourage enactment of state same-sex marriage laws” and the
9 goal of Congress “was ‘to put a thumb on the scales and influence a state’s decision as to
10 how to shape its own marriage laws.’” 570 U.S. at 771.

11 40. In 1996, the Arizona Legislature enacted a statutory ban barring same-sex
12 couples from marriage. Ariz. Rev. Stat. § 25-101(C) (“Marriage between persons of the
13 same sex is void and prohibited.”). In 1999, the Arizona Legislature added yet another
14 provision confirming that exclusion. Ariz. Rev. Stat. § 25-125A (specifying a valid
15 marriage is one “contracted by a male person and a female person with a proper marriage
16 license”). In 2008, Arizona amended its state constitution to bar same-sex couples from
17 marriage. Ariz. Const., Art. 30, § 1 (“Only a union of one man and one woman shall be
18 valid or recognized as a marriage in this state.”). It was not until October 17, 2014, just
19 seven months prior to Mr. Taylor’s death, that Arizona ultimately permitted same-sex
20 couples to marry, after this Court held Arizona’s ban on marriage by same-sex couples
21 unconstitutional. *See Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014);
22 *Connolly v. Jeanes*, 73 F. Supp. 3d 1094, 1096 (D. Ariz. 2014).

23 41. The Supreme Court’s decision in *Obergefell* also confirmed that Arizona’s
24 law excluding same-sex couples from marriage was void *ab initio*. As a result of this
25 unconstitutional law, Mr. Ely and Mr. Taylor were barred from marriage and unable to be
26 recognized as spouses until just seven months prior to Mr. Taylor’s death.

27 **The Social Security Act Provisions Regarding Surviving Spouse Benefits**

28 42. On August 14, 1935, President Franklin Roosevelt signed into law the Social

1 Security Act, Pub. L. 74-271, 49 Stat. 620, now codified at 42 U.S.C. ch. 7. Enacted during
2 the Great Depression, the Act authorizes the collection of funds to allow the federal
3 government to provide financial assistance to elderly and disabled individuals. The Act in its
4 current form provides for, among other things, the payment of old-age insurance benefits,
5 survivor's benefits for widows and widowers, and lump-sum death benefits. As stated in a
6 1955 report of the House of Representatives Committee on Ways and Means, "[t]he old-age
7 and survivors insurance system is the basic program which provides protection for America's
8 families against the loss of earned income upon the retirement or death of the family
9 provider." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 2. (1955).

10 43. The Act as initially passed did not include survivor's benefits for widows or
11 widowers. However, the need for greater financial protection for workers' family members
12 was recognized as early as 1938 by the Advisory Council on Social Security, a government-
13 appointed body representing employees, employers, and the general public. In 1939,
14 Congress amended the Act to adopt the Advisory Council's recommendation that social
15 security benefits should be provided to workers' dependents, including their widows. The
16 Advisory Council's core observation—that financial benefits are critical to the security,
17 stability, and dignity of aging and surviving spouses—remains as true today as in 1938.

18 44. Americans earn the right to participate in social security by working and
19 contributing to the program throughout their working lives. Through payroll deductions over
20 the course of their employment, workers earn the security of being able to rely on social
21 security benefits, and for their spouses to rely on such benefits, after the workers' retirement,
22 death, or disability.

23 45. Generally, an individual must be fully insured under the social security
24 program before benefits may be paid—whether directly to the individual or to his or her
25 spouse or survivors. With some exceptions, status as an insured person is earned through
26 years worked and wages earned. To be fully insured, generally a worker needs at least
27 one quarter of covered work for each calendar year between the time he or she turned 21
28 and the earliest of: (1) the year before the worker attained age 62; (2) the year before the

1 worker died; or (3) the year before the worker became disabled. 42 U.S.C. §§ 413-14; 20
2 C.F.R. 404.110.

3 46. Under the Act and SSA's interpreting regulations, the surviving spouse of a
4 deceased insured person is eligible to be paid monthly survivor's benefits. 42 U.S.C.
5 § 402(e) (widow's insurance benefits) and 42 U.S.C. § 402(f) (widower's insurance
6 benefits); *see also* 20 C.F.R. 404.335. A widow or widower may receive full survivor's
7 benefits at full retirement age, which is age 66 for widows or widowers born during the
8 years 1945 to 1956. Reduced survivor's benefits can be received as early as age 60 (or age
9 50 if the individual is disabled).

10 47. Section 216 of the Social Security Act provides the primary means by which a
11 person may qualify as a surviving spouse for social security benefits. It provides in relevant
12 part: "[a]n applicant is the . . . widow, or widower of a fully or currently insured individual . .
13 . if . . . the courts of the State in which he was domiciled at the time of death . . . would find
14 that such applicant and such insured individual were validly married . . . at the time he died."
15 42 U.S.C. § 416(h)(1)(A)(i).

16 48. The Act defines "widow" and "widower," in relevant part, as "the surviving
17 [spouse] of an individual, but only if . . . [he or she] was married to [the deceased
18 individual] for a period of not less than nine months immediately prior to the day on
19 which [he or she] died." 42 U.S.C. §§ 416(c)(1), (g)(1).

20 49. Although they were lawfully married to their same-sex spouses, survivors
21 like Mr. Ely are categorically excluded from meeting that eligibility criterion because
22 they were barred from marriage until it was too late, by laws that have since been held
23 unconstitutional.

24 50. The exclusion of surviving same-sex spouses like Mr. Ely from eligibility
25 for survivor's benefits based on discriminatory marriage laws deprives them of an
26 important legal protection. As the Supreme Court recognized in *Windsor*, the federal
27 government's refusal to recognize same-sex couples' relationships "denies or reduces
28 benefits allowed to families upon the loss of a spouse and parent, benefits that are an

1 integral part of family security.” 570 U.S. at 773. The Supreme Court again recognized
2 in *Obergefell* that it was unconstitutional to deprive same-sex couples of “the rights and
3 benefits of survivors” afforded through marriage. 135 S. Ct. at 2601.

4 51. Survivor’s benefits are as important to surviving same-sex spouses who
5 would have married their loved ones earlier but for discriminatory marriage laws, as they
6 are to surviving different-sex spouses who had the opportunity to marry their loved ones
7 at all times. Both groups are similarly situated in every relevant respect. The only
8 distinction between them is the unconstitutional barrier to marriage faced by the same-sex
9 spouses.

10 52. Because Mr. Ely spent over forty years managing the couple’s household rather
11 than working outside the home and is thus ineligible for retirement benefits based on his own
12 earnings, Mr. Ely faces significant financial hardship without survivor’s benefits. Despite
13 having downsized from the home that he and Mr. Taylor shared, and living modestly, Mr. Ely
14 does not have the financial resources to sustain himself for the rest of his life.

15 53. The denial of survivor’s benefits negatively impacts on Mr. Ely’s quality of life
16 and stretched finances. Mr. Ely’s monthly income consists of Mr. Taylor’s pension benefit
17 from his work at Bombardier in Arizona. Mr. Ely receives just over \$800 per month, and this
18 benefit will cease in less than five years.

19 54. There is no rational—let alone important or compelling—justification for
20 excluding same-sex surviving spouses like Mr. Ely from survivor’s benefits. The cost of
21 providing survivor’s benefits to surviving same-sex spouses who would have qualified
22 for such benefits but for unconstitutional marriage exclusions is not greater than the cost
23 of providing survivor’s benefits to surviving different-sex spouses. The administration of
24 benefits to surviving same-sex spouses like Mr. Ely is also no more burdensome than the
25 factual determinations that SSA makes in adjudicating other spousal benefits, including
26 where SSA determines whether a common law marriage existed between a couple.

27 55. SSA’s incorporation of, and reliance upon, discriminatory state laws
28 previously barring same-sex couples from marriage in making a federal benefits

1 determination violates the constitutional rights of Mr. Ely and other similarly situated
2 surviving same-sex spouses.

3 **Administrative Proceedings**

4 56. Mr. Ely exhausted his administrative remedies regarding the claims herein.

5 57. In August 2015, Mr. Ely filed with SSA the Application for surviving
6 spouse benefits under the Social Security Act. SSA denied the Application.

7 58. On October 29, 2015, Mr. Ely timely filed a Request for Reconsideration of
8 the denial of his Application with SSA.

9 59. By letter dated November 4, 2015, SSA denied Mr. Ely's Request for
10 Reconsideration.

11 60. SSA's denial of reconsideration stated that the State of Arizona
12 "capitulated" to the Supreme Court's decision in *Windsor* by "recognizing same-sex
13 marriages legally entered into in Arizona . . . but only effective as of October 17, 2014
14 (Arizona would not recognize the validity of any same-sex marriage until that date)." It
15 further stated that the reason Mr. Ely was denied survivor's benefits on the record of Mr.
16 Taylor was that "you and James had not been legally married under Arizona law for 9
17 months prior to his death."

18 61. On December 2, 2015, Mr. Ely timely filed a Request for Hearing by an
19 Administrative Law Judge ("ALJ"). Prior to the hearing, Mr. Ely submitted a personal
20 statement and evidence supporting his claim.

21 62. On May 10, 2017, the ALJ conducted a hearing on Mr. Ely's Application.
22 Mr. Ely presented additional testimony, and Mr. Ely's counsel presented argument. No
23 witness contested any of the evidence introduced by Mr. Ely during the hearing.

24 63. The ALJ issued a decision dated October 17, 2017 concluding that Mr. Ely
25 is not eligible for surviving spouse benefits, because "the Claimant did not meet the nine
26 month requirement for entitlement of Widower's Benefits."

27 64. On December 14, 2017, Mr. Ely timely filed a Request for Appeals Council
28 Review of the ALJ Decision and a Statement of Facts and Law with the SSA.

1 65. By letter dated September 26, 2018, SSA's Office of Appellate Operations
2 sent to Mr. Ely a "Notice of Appeals Council Action." The Notice states "We found no
3 reason under our rules to review the Administrative Law Judge's decision. Therefore, we
4 have denied your request for review." The Notice of Appeals Council Action provides
5 no other justification for, or any facts in support of, the denial of Mr. Ely's request for
6 review of the ALJ Decision.

7 66. Taken together, SSA's actions violate the holdings of *Obergefell*, *Windsor*,
8 and similar lower court decisions. The denial of Mr. Ely's Application is based on SSA's
9 reliance on Arizona's unconstitutional and discriminatory marriage law and
10 unconstitutionally deprives him of equality and liberty.

11 **CLAIMS FOR RELIEF**

12 **FIRST CLAIM:**

13 **VIOLATION OF EQUAL PROTECTION**

14 67. Plaintiffs reallege paragraphs 1 through and including paragraph 66 as if
15 fully set forth herein.

16 68. Defendant has violated the right to equal protection guaranteed by the Fifth
17 Amendment to the U.S. Constitution by discriminating against Plaintiffs who would have
18 otherwise qualified for survivor's benefits under the Social Security Act but for their
19 exclusion from marriage. These individuals are treated differently from surviving
20 different-sex spouses who were able to qualify for survivor's benefits.

21 69. Defendant's differential treatment—including its incorporation of, and reliance
22 upon, discriminatory state laws excluding same-sex couples from marriage—discriminates
23 on the basis of sexual orientation, and is therefore subject to heightened scrutiny, which
24 Defendant's actions cannot withstand. Defendant's actions discriminated against Plaintiffs
25 because of their sexual orientation.

26 70. Gay men and lesbians have suffered a long and painful history of
27 discrimination in the United States.

28 71. Sexual orientation bears no relation to an individual's ability to contribute

1 to society.

2 72. Sexual orientation is a core, defining trait so fundamental to one's identity and
3 conscience that a person may not legitimately be required to abandon (even if that were
4 possible) as a condition of equal treatment.

5 73. Sexual orientation is generally fixed at an early age and is highly resistant to
6 change through intervention. No credible evidence supports the notion that such
7 interventions are either effective or safe; indeed, they often are harmful and damaging. No
8 mainstream mental health professional organization approves interventions that attempt to
9 change sexual orientation, and virtually all of them have adopted policy statements
10 cautioning professionals and the public about these treatments.

11 74. Gay men and lesbians are a discrete and insular minority, and ongoing
12 prejudice against them continues seriously to curtail the operation of those political processes
13 that might ordinarily be relied upon to protect minorities. Gay men and lesbians lack express
14 statutory protection against discrimination in employment, public accommodations, and
15 housing at the federal level and in more than half the states. They are systematically
16 underrepresented in federal, state, and local democratic bodies. And 30 states have
17 historically sought to strip them of the right to marry by passing state constitutional
18 amendments barring them from marriage.

19 75. Defendant's differential treatment also discriminates based on sex, by
20 applying standards to deny social security benefits based on state laws barring marriage to a
21 person of the same sex. Defendant's application of this sex-based classification deprives
22 Plaintiffs of survivor's benefits because of their sex; if Mr. Ely were a woman, the laws of
23 the State of Arizona would have allowed Mr. Ely and Mr. Taylor to marry at all times, and
24 Mr. Ely and Mr. Taylor would be recognized as married for purposes of social security
25 benefits. Such sex-based classifications are subject to intermediate scrutiny.

26 76. This discrimination also impermissibly enforces conformity with sex
27 stereotypes by excluding Plaintiffs from social security benefits because they have failed to
28 conform to the sex-based stereotypes that men should marry women, and that women

1 should marry men. This, too, requires intermediate scrutiny.

2 77. Moreover, Defendant denied Plaintiffs of equal access to and protections for
3 their fundamental liberty interests in forming an intimate family relationship with a person
4 of the same sex.

5 78. Defendant cannot articulate any legitimate or rational basis—let alone a
6 compelling or important and sufficiently-tailored government interest—for
7 discriminating against Plaintiffs.

8 **SECOND CLAIM:**

9 **VIOLATION OF DUE PROCESS**

10 79. Plaintiffs reallege and incorporate by reference all allegations contained in
11 paragraphs 1 through and including paragraph 78 as if fully set forth herein.

12 80. Defendant has violated the right to substantive due process guaranteed by
13 the Fifth Amendment to the U.S. Constitution by denying spousal survivor's benefits to
14 Plaintiffs who would have otherwise qualified for survivor's benefits but for their
15 exclusion from marriage.

16 81. Plaintiffs have a fundamental liberty interest in forming an intimate family
17 relationship with a person of the same sex without intrusion, interference, or penalty by
18 the government. Defendant's deprivation of survivor's benefits, which are an integral part
19 of family security, substantially infringes upon that liberty interest.

20 82. Defendant's incorporation of, and reliance upon, discriminatory and
21 unconstitutional state laws denying same-sex couples of the right to marry violates the
22 liberty interests recognized in *Obergefell* and *Windsor*. Defendant denies same-sex
23 couples like Mr. Ely and Mr. Taylor of equal recognition of their relationships and the
24 important social security protections that flow from that recognition.

25 83. Defendant cannot articulate any legitimate or rational basis—let alone a
26 compelling or important government interest—for infringing upon the liberty interests of
27 Plaintiffs.

28

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

- 1. Certify this action to be a proper class action pursuant to Fed. R. Civ. P. 23, establishing a Class the Court deems appropriate, finding that Named Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing the Named Plaintiff as Counsel for the Class;
- 2. Declare that Defendant’s denial of social security survivor’s benefits to Plaintiffs who would have otherwise qualified for survivor’s benefits but for laws excluding same-sex couples from marriage is unconstitutional.
- 3. Declare that the Defendant’s incorporation of, and reliance upon, laws excluding same-sex couples from marriage to determine eligibility for social security survivor’s benefits is unconstitutional and cannot be used as a basis for denying benefits to Plaintiffs.
- 4. Issue an order requiring Defendant to approve the Application of Michael Marvin Ely for social security survivor’s benefits, including a recalculation of benefits to the extent necessary to afford complete relief.
- 5. Grant a permanent injunction:
 - a) prohibiting Acting Commissioner Berryhill, her successors in office, her agents, employees, and all persons acting in concert with her or her successors from:
 - (1) excluding Plaintiffs from eligibility for social security survivor’s benefits; and
 - (2) applying laws excluding same-sex couples from marriage to the determination of eligibility for social security survivor’s benefits;
 - b) requiring Acting Commissioner Berryhill, her successors in office, her agents, employees, and all persons acting in concert with her or her successors to reverse and re-adjudicate all of Class

1 Members' claims for spousal survivor's benefits that had been
2 denied based solely on their inability to meet the statutory
3 marriage duration requirements due to unconstitutional marriage
4 bans;

5 c) requiring Acting Commissioner Berryhill, her successors in office,
6 her agents, employees, and all persons acting in concert with her
7 or her successors to recognize Michael Marvin Ely as entitled to
8 social security widower's benefits based on the work history of
9 James Allan Taylor;

10 d) ordering Acting Commissioner Berryhill, her successors in office,
11 her agents, employees, and all persons acting in concert with her
12 or her successors to revise any agency rules or regulations that
13 apply or rely upon laws barring same-sex couples from marriage
14 for social security benefit determinations;

15 e) requiring Acting Commissioner Berryhill, her successors in office,
16 her agents, employees, and all persons acting in concert with her
17 or her successors to direct all SSA staff who render social security
18 benefit decisions at any level to correct any internal guidelines,
19 directives, or other written material that apply or rely upon laws
20 barring same-sex couples from marriage for social security benefit
21 determinations.

22 5. Award reasonable attorneys' fees and allowed costs pursuant to the Equal
23 Access to Justice Act, 28 U.S.C. § 2412, or any other applicable statutory
24 provision.

25 6. Grant such other relief as the Court may deem just and proper.
26
27
28

1 Date: February 13, 2019

Respectfully submitted,

2
3 /s/ Brian I. Clymer

4 Brian I. Clymer (AZBA No. 5579)
5 Autumn J. Menard (AZBA No. 033899)
6 BRIAN CLYMER, ATTORNEY AT LAW
7 2601 N. Campbell Avenue, Suite 203
8 Tucson, AZ 85716

9 Peter C. Renn (admitted *pro hac vice*)
10 LAMBDA LEGAL DEFENSE AND
11 EDUCATION FUND, INC.
12 4221 Wilshire Blvd., Suite 280
13 Los Angeles, CA 90010

14 Tara L. Borelli (admitted *pro hac vice*)
15 LAMBDA LEGAL DEFENSE AND
16 EDUCATION FUND, INC.
17 730 Peachtree Street NE, Ste. 640
18 Atlanta, GA 30308

19 Karen L. Loewy (admitted *pro hac vice*)
20 LAMBDA LEGAL DEFENSE AND
21 EDUCATION FUND, INC.
22 120 Wall Street, 19th Floor
23 New York, NY 10005

24
25
26
27
28
Counsel for Plaintiff Michael Marvin Ely

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I served the foregoing document on Defendant Nancy Berryhill through the CM/ECF system.

/s/ Jamie Farnsworth
Jamie Farnsworth
Paralegal