

No. 20-16427

**IN THE 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
No. 4:18-cv-00557-BGM
Bruce G. Macdonald, Magistrate Judge**

**BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, SAGE, AND
ASA, IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

AARP and AARP Foundation

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

SAGE

SAGE does not have a parent corporation, and no corporation owns 10% or more of its stock.

American Society on Aging (ASA)

ASA does not have a parent corporation, and no corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

AARP is the nation’s largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial resilience, and personal fulfillment. AARP’s charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity. Among other things, AARP and AARP Foundation fight for the ability of LGBT older adults to achieve financial security as they age, amass adequate savings for retirement, and access affordable housing and health care, including through participation as amici curiae in state and federal courts. *See, e.g.*, Br. for Impact Fund et al. as Amici Curiae Supporting Petitioners, *Bostock v. Clayton Cnty.*, 17-1618 (U.S. July 3, 2019); Br. for AARP et al. as Amici Curiae Supporting Appellant, *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018); Br. for AARP et al. as Amici Curiae

¹ In accordance with Fed. R. App. P. 29(c)(5), amici hereby state that no party’s counsel authored this brief either in whole or in part, and further, that no party or party’s counsel, or any person or entity other than amici, contributed money intended to fund preparing or submitting this brief. Counsel for all parties have consented to the filing of this brief.

Supporting Plaintiffs, *Whitman Walker Clinic, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:20-cv-01630 (JEB) (D.D.C. July 15, 2020).

Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) is the country's oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, transgender and queer ("LGBT") older adults. In conjunction with 30 affiliated organizations located in 22 states and Puerto Rico, SAGE offers support services and consumer resources to LGBT older adults and their caregivers, provides training for agencies and organizations that serve LGBT older adults, and advocates for public policy changes that address the needs of LGBT people. As part of its mission, SAGE provides services to surviving spouses of same-sex couples who have been deprived of the benefits that accompany marriage. Through its extensive work with LGBT elders, SAGE is uniquely positioned to address the adverse effects that the denial of federal retirement benefits can have on same-sex spouses.

The American Society on Aging (ASA) unites, empowers and champions everyone striving to improve aging. Since 1954, ASA has developed and led the largest, most diverse community of professionals working in aging in America. As a result, ASA has become the go-to source to cultivate leadership, advance knowledge and strengthen the skills of our members and others who work with and on behalf of older adults. As we unite, empower and champion our community, we

have the unique responsibility to be a strong voice and thought leader on critical systemic issues that influence how we age. As America struggles with how best to respond to the need for greater inclusivity, anti-ageism and equity, ASA sees its responsibility as a leader to drive the discourse and advocate for the change necessary to address these issues in aging. Because ASA's members wish to enhance the quality of life of all older adults, and because discrimination of any kind erodes quality of life, ASA has an interest in opposing all forms of discrimination. Early in its history as a national membership organization, ASA embraced LGBT older people and the professionals who serve them as a key constituency. ASA continues to recognize and support the unique needs of LGBT older people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Marriage is an institution with transcendent importance in our society. Michael Ely and James Taylor, Joshua and Glenn Driggs, Harold Glenn Schmoll and Dr. Lowell Houser, and the many LGBT couples like them created lives together, embodying the sanctity and ideals of marriage even when they were denied the attendant legal rights and benefits that different-sex couples take for granted. When laws prohibiting same-sex marriage were rejected by the Supreme Court as unconstitutional, they married. But for them and other LGBT older adults

like them, the legal recognition of their right to marry came too late. They each said their final goodbyes to their spouses less than nine months later.

Although the right to marry was recognized by the Supreme Court, those decisions did not remove the harm of longstanding discrimination experienced by LGBT older adults throughout their lives. Both overt and more subtle forms of discrimination have inhibited LGBT older adults' access to housing, employment, and healthcare. LGBT older adults have a harder time achieving financial security and are at greater risk of poverty than their peers. Moreover, as they age, same-sex spouses often take on the role of caregiver, work that is not only difficult but can also have a detrimental impact on their financial situation.

It is of critical importance that LGBT couples access the social and economic benefits of marriage, including social security survivor benefits. Survivor benefits are designed to protect a spouse when their beloved passes away. Denying these vital benefits to Plaintiff-Appellees and others like them compounds the effects of prior discrimination and subjects them to financial insecurity. It is entirely at odds with the purpose of the Social Security Act and Supreme Court precedent. The district court's decision should be affirmed in its entirety.

ARGUMENT

I. LGBT COUPLES HAVE BEEN DENIED THE RIGHT TO MARRY FOR MOST OF THEIR LIVES DESPITE THEIR LOVING COMMITTED RELATIONSHIPS

“[M]arriage embodies a love that may endure even past death.” *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). It is a solemn promise that people who have fallen in love make, committing themselves to one another through life’s triumphs and tribulations, vowing to support and care for one another, to build a family together, and to be inextricably linked from that point on. It is also a union that confers a unique legal status on a couple and comes with rights and benefits that are not available outside the institution.

For older people, participating in the institution of marriage has tangible, proven benefits. Married people tend to have lower rates of depression, disability and disease than unmarried people. I-Fen Lin & Susan L. Brown, *Unmarried Baby Boomers Confront Old Age: A National Portrait*, *The Gerontologist* 8 (2012) (unmarried “baby boomers” twice as likely to report a disability as married baby boomers); Adrienne Frech & Kristi Williams, *Depression and the Psychological Benefits of Entering Marriage*, 48 *J. Health & Social Behavior* 149, 149 (2007); Tracey A. Lapierre, *Marital Status and Depressive Symptoms over Time: Age and Gender Variations*, 58(4) *Family Relations* 404, 406 (2009).

Married people live longer than single people. David Roelfs, et al., *The Rising Relative Risk of Mortality for Singles: Meta-Analysis and Meta-Regression*, 174 Am. J. Epidemiology 379 (2011). The effect of marriage may be strong enough that married men may live eight to seventeen years longer than similarly situated single men, while married women may live seven to fifteen years longer than similar single women. Joan Raymond, *Single people may die younger, new study finds*, NBC News (Aug. 18, 2011, 8:55 AM), <https://nbcnews.to/3oTAdsH> (quoting David Roelfs).

Married people also tend to be more financially secure than their unmarried peers. See Ron J. Hammond et al., *Resource Variations and Marital Status Among Later-Life Elderly*, 2 J. Applied Social Science 47, 58 (2008) (People who have never married “have fewer resources than the married elderly.”). For example, married couples in their sixties typically have almost ten times as much in financial assets as single people in the same age group. James Poterba, et al., *Were They Prepared for Retirement? Financial Status at Advanced Ages in the HRS and AHEAD Cohorts* 6 Nat’l Bureau of Econ. Research, Working Paper 17824 (2012), <https://bit.ly/3pKfKI4>.

Married couples’ reliance on their unique legal rights and benefits also becomes more critical to their ability to live successful, secure lives as they age. If one spouse becomes injured or ill, the benefits afforded to married couples are

what enable them to take leave from their jobs to provide care, make medical decisions in the event of incapacity, and be present and visit during hospitalization.

Michael Adams and Johnathan Jacob Nadler, Opinion, *Why marriage equality matters for older Americans*, The Hill (Apr. 23, 2015, 5:00 PM),

<https://bit.ly/3ay8LeW>. If a married person dies without a will, the surviving spouse will owe no taxes on the inheritance. 26 U.S.C. § 2056. And, the surviving spouse can also obtain Social Security survivors benefits. 42 U.S.C. § 402(e) and (f).

Yet, only relatively recently have these physical, social, and legal benefits been made available to same-sex couples. In 2015, the Supreme Court recognized that there is no such thing as “same-sex marriage,” in America; there is only marriage, available to everyone, no matter whom they love. *Obergefell*, 576 U.S. at 675 (“The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.”).

The right to marry was something LGBT older adults had only dreamed of during the course of their lives—lives that were all too often replete with discrimination and marginalization. LGBT older adults have experienced times when being LGBT was not as accepted as it is today—or worse, when LGBT identity was criminalized. LGBT adults born in the 1910s and 1920s grew up during the Great Depression and World War II, when they were “nearly absent

from public discourse.” Movement Advancement Project and SAGE, *Understanding Issues Facing LGBT Older Adults* (2017), at 3, <https://bit.ly/2YK1ovz> (hereinafter “*Understanding Issues Facing LGBT Older Adults*”).

Those born in the 1930s and 1940s were often more open about their sexual orientations, and a public backlash included criminalization, ostracization, and even the labeling of homosexuality as a medical disorder. *Id.* Those born in the 1950s and 1960s lived through the tumult of the Stonewall revolution, and all three groups lived through the AIDS crisis of the 1980s. *Id.* For all three groups, aging itself became a more frightening proposition than it is for their non-LGBT peers, as a lifetime of discrimination and stigma yielded serious apprehension that they would have to hide their sexual identities if they moved to a retirement home. SAGE, *The Need for LGBT-Inclusive Housing*, Nat’l Res. Ctr. on LGBT Aging (Apr. 2014), <https://bit.ly/36GUxHx> (citing Michael J. Johnson, et. al., *Gay and lesbian perceptions of discrimination in retirement care facilities*, 49(2) *J. of Homosexuality* 83 (2005)). Lack of access to the stability, status, and legal rights conferred by marriage was one longstanding indignity and injustice among many.

Nevertheless, despite being denied the freedom to marry, many LGBT older adults have spent their lives in committed and loving relationships. For example, Edie Windsor and Thea Spyer met in 1963 at a Greenwich Village restaurant.

Robert D. McFadden, *Edith Windsor, Whose Same-Sex Marriage Fight Led to Landmark Ruling, Dies at 88*, N.Y. Times (Sep. 12, 2017), <https://nyti.ms/39KIZoM> (hereinafter “*Edith Windsor Dies at 88*”). They began dating in 1965. *Id.* In 1967, Thea proposed to Edie, presenting her with a diamond brooch in lieu of a ring so that Edie would not have to face questions from her coworkers at IBM about an assumed husband-to-be. Edie Windsor, Suzanne B. Goldberg, Madeline M. Gomez, Andrew Chesley, *A Conversation with Edie Windsor*, 29 Colum. J. Gender & L. 243, 246 (2015). The couple stayed engaged for 40 years. *Id.* They lived together in an apartment in New York City and bought a small vacation home in South Hampton. *Edith Windsor Dies at 88, supra.* They traveled the world and pursued their careers. *Id.*

For most of their relationship, marriage and children seemed “hopelessly beyond reach.” *Id.* In 1977, Thea was diagnosed with multiple sclerosis. *Id.* As Thea’s condition deteriorated Edie became her round-the-clock caregiver. *Id.* In 2007, the couple was told that Thea only had a year left to live, so they flew to Canada to marry. *Id.* Before Thea passed away, Edie said “Married is a magic word.... And it is magic throughout the world. It has to do with our dignity as human beings, to be who we are openly.” *Id.* When Thea passed away in 2009, she left Edie her estate. *United States v. Windsor*, 570 U.S. 744, 753 (2013).

When the IRS denied Edie the spousal exemption from estate taxes, she said “[i]n the midst of my grief I realized that the federal government was treating us as strangers and it meant paying a humongous estate tax. And it meant selling a lot of stuff to do it and it wasn't easy. I live on a fixed income and it wasn't easy.” Molly Redden, *Edith Windsor, icon of gay rights movement, dies aged 88*, The Guardian (Sep. 13, 2017), <https://bit.ly/2YEix9S>.

Edie and Thea were not alone in this struggle. George Martinez and Fred McQuire met in 1969. Plaintiffs’ Motion for Summary Judgement and Memorandum in Support at 4, *Majors v. Horne*, 14 F. Supp. 3d 1313 (No. 2:14-cv-00518-JWS) (D. Ariz. 2014). They are both disabled veterans. *Id.* Fred served in both the Air Force and the Army in Guam, and George served in the Army in Vietnam. *Id.* In 1980, the couple had “a joyous commitment ceremony attended by roughly one hundred guests to celebrate ten years of being together.” *Id.* With age came health challenges; Fred has chronic obstructive pulmonary disease, vascular problems and Parkinson’s disease, while George was diagnosed with Stage IV prostate cancer, attributed to Agent Orange exposure in Vietnam, and later with Stage IV pancreatic cancer. *Id.* at 4-5. Although the couple made the personal choice to travel to California in July 2014 to marry, their out of state marriage did nothing to ameliorate their myriad concerns, including fear of being prevented from being with the other during a hospitalization, and the prospect of Fred’s

economic insecurity if he were not recognized as George's spouse. *Id* at 5. They therefore participated in a lawsuit seeking to invalidate the prohibition on same sex marriage in their home state of Arizona. *Id*.

Similarly, Elvie Jordan and Challis Gibbs were together for over 20 years. They wished to marry to “publicly declare their love and commitment before their family, friends, and community, and to give one another the security and protections that only marriage provides.” Class Action Complaint at 9, *Lee v. Orr*, No. 1:13-cv-8719 (N.D. Ill. Dec. 6, 2013), ECF No. 1. In November 2013, Challis was diagnosed with stage IV neuroendocrine cancer, leaving her with limited functional capacity. *Id*. Concerned that Challis would pass away before June 2014, the date Illinois would lift the prohibition on same sex marriage, and Jordan would be left a legal stranger with no rights, the couple arranged to enter into a civil union at the hospital where Challis was being treated. *Id*. The couple sought to marry so that their family members, including their grandchildren, would understand what they mean to each other. *Id*. Challis said “When I die, I want Elvie to be able to say ‘I lost my wife.’ I don’t want her to have to say, ‘I lost my civil union partner.’” *Id*. at 9-10.

Each of these couples, and so many more like them, had the courage and fortitude to stand up and fight for equality, winning not just the right to legally marry, but also the rights under federal law to adopt children, work, and access

housing and health care. Sage Sohier, author and photographer of “At Home with Themselves: Same Sex Couples In 1980s America” commented that:

It’s a wonderful step forward for the civil rights of this country and our collective humanity that same-sex relationships and marriages have become accepted and celebrated. It’s important, though, to recognize that these relationships have always existed, and, in many cases, thrived. They were often discreet, and many lived their lives in the margins. But the success of the same-sex marriage movement would not be possible without the efforts of all those couples who came before and who worked to achieve this goal. Their private love, and their persistence in going public with it, should never be forgotten.

Maria Popova, *At Home with Themselves: Sage Sohier’s Moving Portraits of Same-Sex Couples in the 1980s*, Brainpickings (Oct. 29, 2014), <https://bit.ly/3jm1Ycj>.

II. LGBT OLDER ADULTS OFTEN FACE ECONOMIC DISADVANTAGES AND UNCERTAINTY AFTER A LIFETIME OF DISCRIMINATION

A. Lifelong Discrimination Against LGBT Older Adults Harms Them Financially and Puts Them at Risk of Economic Insecurity in Older Age

LGBT older adults face an increased risk of poverty as a result of the cumulative impact of a lifetime of discrimination. *Understanding Issues Facing LGBT Older Adults, supra*, at 3. Economic security is further out of LGBT older people’s grasp because they suffer disparities that result in lower lifetime earnings, and fewer opportunities to build savings. *See* Soon Kyu Choi & Ilan H. Meyer,

Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* (2016), at 8, <https://bit.ly/3rhjzF2> (hereinafter “*LGBT Aging: A Review of Research Findings, Needs and Policy Implications*”); see also M.V. Lee Badgett, et al., Williams Inst., *LGBT Poverty in the United States* (2019), <https://bit.ly/3rdqYoO> “Nearly one-third of LGBT older adults ages 65 and older live at or below 200% of the federal poverty level, compared to 26% of non-LGBT older adults. This percentage rises to approximately 40% of LGBT older adults 80 and older.” *Understanding Issues Facing LGBT Older Adults*, *supra*, at 18. Poverty rates are even higher for LGBT older people of color, those aged 80 and older, bisexual older people, and transgender older people. Charles A. Emlet, *Social, Economic, and Health Disparities Among LGBT Older Adults*, 40(2) *Generations* 16-22 (2017). Same-sex couples, as well as individuals, face “disadvantages in retirement assets, retirement savings, and the ability to pass on wealth.” *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, *supra*, at 10.

Both past and ongoing discrimination in housing, employment, health care, credit, education, and day-to-day life, are all contributing factors to LGBT people experiencing lower overall economic well-being compared to their peers. Gary J. Gates, *LGBT Americans Report Lower Well-Being*, Gallup (Aug. 25, 2014), <https://bit.ly/2YE7fm9>. The economic effects of each of these forms of

discrimination are measurable and severe. For instance, in one recent study specifically involving housing for seniors, 48% of same-sex couples faced discrimination in the form of at least one type of adverse, differential treatment such as being charged a higher fee or price because of their same-sex status. The Equal Rts. Ctr., *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples* 14 (2014), <https://bit.ly/3atfyqp>.

Shortly before the Supreme Court held this past year that federal law prohibits workplace discrimination on the basis of sexual orientation and gender identity, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), one in four LGBT workers experienced workplace discrimination because of their sexual orientation or gender identity. Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Ctr. for Am. Progress (May 2, 2017), <https://ampr.gs/39IRFfa>.

Discrimination to which LGBT workers are subjected undermines their equal opportunities in the workplace and leads to lower wages and higher rates of economic insecurity. Twenty-five percent of LGBT individuals earn less than \$24,000 a year, compared to eighteen percent of non-LGBT individuals. The Williams Inst., *LGBT Demographic Data Interactive* (Jan. 2019), <https://bit.ly/2YIDTTG>. The impact on older LGBT adults is significant because of the cumulative effect of having earned less money because of experiencing a

lifetime discrimination in employment. *Understanding Issues Facing LGBT Older Adults, supra*, at 6.

LGBT older adults also face economic barriers to obtaining quality health care. A survey of LGBT adults revealed that they are twice as likely to be uninsured than their non-LGBT counterparts. Kellan Baker & Laura E. Durso, *Why Repealing the Affordable Care Act is Bad Medicine for LGBT Communities*, Ctr. for Am. Progress, March 22, 2017, <https://ampr.gs/3oM2D7O>. Among other challenges, “legal restrictions on visitation, medical decision-making and family leave for friends and chosen family, and overt discrimination from health care providers” inhibit access to quality care. *Understanding Issues Facing LGBT Older Adults, supra*, at 17. LGBT veterans discharged during “Don’t Ask, Don’t Tell” are sometimes ineligible for physical and mental health care services, and for those who are eligible, mental healthcare and LGBT competency are often lacking. *Id.* Health insurance frequently does not cover crucial health services for transgender individuals. *Id.* at 16. Predictably, health outcomes are typically worse for older LGBT adults in a number of areas, including “high blood pressure, cholesterol, diabetes, heart disease, HIV/AIDS, depression and more.” *Id.* at 13.

B. LGBT Adults Have Justified Ongoing Fears About Their Economic Security as They Age, Compounded by Social and Structural Factors That Isolate and Disadvantage Them.

As a result of the many forms of discrimination described above, 51% of LGBT older adults are very or extremely concerned about having enough money to live on as they age, as compared to 36% of their non-LGBT peers. SAGE, *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75* (2014), at 12, <https://bit.ly/3jeHh1M> (hereinafter “SAGE *Out & Visible*”). Many LGBT older adults (44%), are very or extremely concerned that they will have to work well beyond retirement age just to have enough money to live, as compared to 26% of non-LGBT older adults. *Id.* at 15. And while most (70%) LGBT older people ages 60-75 are retired, 13% anticipate that, on average, they will have to work until age 69 before they can retire. *Id.* at 16. Another 10% feel that they will never be able to retire or don’t know when they can retire. *Id.*

Achieving economic security will continue to be difficult for LGBT individuals and couples for quite some time. Despite the Supreme Court’s decision in *Bostock*, cultural norms do not change overnight. Subtle harassment and discrimination can mean that LGBT people get passed over for a promotion or don’t get hired at all. In a 2018 survey, 46 percent of LGBT workers said they were “closeted” at work, which can impact performance and well-being. Hum. Rts.

Campaign, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide*, at 6, <https://bit.ly/3cy0ASC>. Older LGBT adults who may need to continue to work in retirement, or build skills or find satisfaction through volunteer opportunities, are concerned about discrimination if they are open about their sexual orientation. *SAGE Out & Visible, supra*, at 17.

In addition, older LGBT adults are more concerned than their non-LGBT counterparts about maintaining their independence, experiencing loneliness in older age, and not having support systems. *Id.* at 12. The sad reality is that they are more likely to be socially isolated, to have smaller support networks, and to have their support networks decline in size as they age. *Id.* at 18. In particular, LGBT older adults are also less likely to have children to care for them and less likely to have someone to call on in time of need. Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 *Tex. J. of Women, Gender & L.* 1, 8 n. 28, 29 (2014). LGBT adults whose biological families rejected them often rely on chosen families. *Understanding Issues Facing LGBT Older Adults, supra*, at 11.

Add to this multitude of factors that LGBT older couples who were in loving, committed, inter-dependent relationships were unable to access the social and economic benefits of marriage, including access to each other's pension, retiree health, and Social Security benefits. *Id.* at 8. That is why it is critically

important that LGBT older couples be able to take advantage of the economic benefits of marriage to which they are entitled.

III. DENYING SOCIAL SECURITY SURVIVOR BENEFITS TO MR. ELY AND THE CLASS WOULD THWART THE PURPOSE OF THE SOCIAL SECURITY ACT AND THE BENEFITS OF MARRIAGE PRONOUNCED IN *OBERGEFELL*.

“[J]ust as a couple vows to support each other, so does society pledge to support the couple.” *Obergefell*, 576 U.S. at 669. Survivor benefits are one way American society fulfills that pledge. Ely and Tyler exemplify the crucial purpose of those benefits and the injustice of denying them to LGBT couples who were legally unable to marry for so many years—because of state and federal discrimination.

A. Survivor Benefits Are an Indispensable Component of the Social Safety Net for Older Adults.

Of all sources of income in retirement, Social Security benefits are the most important. Irena Dushi, Howard M. Iams & Brad Trenkamp, *The Importance of Social Security Benefits to the Income of the Aged Population*, 77(2) Soc. Sec. Bull. 12017 (2017), <https://bit.ly/2YEK1ks>. About half of the population aged 65 or older lives in households that receive at least 50 percent of their family income from Social Security benefits and about 25 percent of such households rely on Social Security benefits for at least 90 percent of their family income. *Id.* One of the most important protections that the Social Security system provides is lifelong

guaranteed benefits to each retiree, no matter how long they live. This benefit protects against complete financial penury in the face of actuarial risk or inadequacy of retirement planning. Neil H. Buchanan, *Social Security Is Fair to All Generations: Demystifying the Trust Fund, Solvency, and the Promise to Younger Americans*, 27 Cornell L. Rev. 237, 252 (2017).

Social Security also provides retirement security through survivor benefits. Congress amended the Social Security Act in 1939 in response to the growing concern of older men that their widows would be left in need after their death. David A. Weaver, *Widows and Social Security*, 70(3) Soc. Sec. Bull. (2010), <https://bit.ly/3pPIkI0>. As the Social Security Administration explains, “[t]he loss of the family wage earner can be devastating both emotionally and financially. Social Security helps by providing income for the families of workers who die.” Soc. Sec. Admin., *Survivor Benefits*, Publ’n No. 05-10084 (2019), <https://bit.ly/2NYC4zD>. On December 31, 2020, there were 5,874,648 recipients of survivor benefits and 49,357,832 recipients of Social Security retirement benefits. Soc. Sec. Admin., *Social Security Beneficiary Statistics*, <https://bit.ly/39KLfwg>.

Survivor benefits are based on the working spouse’s work history. Soc. Sec. Admin., *Survivor Benefits*, Publ’n No. 05-10084 (2019), <https://bit.ly/2NYC4zD>. Survivor benefits are most helpful in marriages where the wages of the spouses who passes away first were significantly greater than the surviving spouse—for

instance, where one spouse stayed at home for all or part of the marriage for reasons of homemaking, child rearing, or caregiving. *Id.* Mr. Ely was both a homemaker and later a caregiver for his husband. First Amended Class Action Complaint for Declaratory, Injunctive, and Other Relief at 8, *Ely v. Saul*, D. Ariz. May 26, 2020 (No. CV-18-0557-TUC-BGM), 2020 U.S. Dist. LEXIS 92121, ECF No. 18.

Mr. Ely is not unique in providing hands-on care to his husband. About six and a half million adults in America provide hands-on care to a spouse or partner to help them with an activity-of-daily-living, such as dressing, bathing, eating, or cooking. AARP and Nat'l All. for Caregiving, *Caregiving in the United States 2020* 9, 16 (2020), <https://bit.ly/3to69sC>. Of the half of American retirees that reported retiring early in 2015, 22% left their employment earlier than they wanted to because they took on the job of caring for a loved one. Ruth Helman, Craig Copeland & Jack Vanderhei, *The 2015 Retirement Confidence Survey: Having a Retirement Savings Plan a Key Factor in Americans' Retirement Confidence*, Emp. Benefits Rsch. Inst., April 2015, at 26, <https://bit.ly/36EV7Wi>. Each of the four couples described in Part I of this brief lived up to the highest ideals of marriage. Truly in health and in sickness, they provided to the other “assurance that while both still live there will be someone to care for the other.” *Obergefell*, 576 U.S. at 667.

Survivors benefits ameliorate the negative economic effects of caregiving. Caregivers may opt for early retirement, and even when caregivers continue to work, negative economic consequences arise from lower productivity at work, decreased work hours, and leaves of absence. Lynn Feinberg & Rita Choula, AARP Pub. Pol. Inst., *Understanding the Impact of Family Caregiving on Work* 1-3 (Oct. 2012), <https://bit.ly/3oNG82w>. One study determined that the deleterious economic effects of caregiving on an individual over the age of 50 averaged \$303,880 in income and benefits over the course of their lifetime. Peter S. Arno et al., The MetLife Mature Market Inst., *Caregiving Costs to Working Caregivers* 12 (2011), <https://bit.ly/3pPJTGa>. Yet, it would be impossible to provide all the long term-care and support that our aging population needs without the help of family caregivers. In 2017, family caregivers provided an estimated \$470 billion of care, an amount greater than all out-of-pocket spending on health care in the U.S. Susan P. Reinhard, et al., *Valuing the Invaluable: 2019 Update Charting a Path Forward*, AARP Pub. Pol. Inst., at 3 (Nov. 2019), <https://bit.ly/3jdneRz>. Survivor benefits help guarantee that older adults can act as caregivers for their families—including their spouses—while still maintaining financial security and avoiding poverty.

Plaintiffs have demonstrated that they are precisely the committed partners that survivor benefits are intended for—not the sham spouses the nine-month durational rule was created to guard against. *Weinberger v. Salfi*, 422 U.S. 749, 777

(1975) (discussing “[t]he danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner”). Many, like named plaintiffs, took intimate care of each other, which is “objective evidence of the assumption of marital responsibilities[.]” *Weinberger*, 422 U.S. at 781. Countless of them waited decades for their legal right to be married. For the Plaintiffs, it was only the unconstitutional bar to same sex marriage that kept them from legally marrying—an injustice that SSA and the Court must not compound.

B. Benefits Are Particularly Important for LGBT Older Adults Who Lived and Loved at a Historically Unique Moment.

In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that states could not deprive same-sex couples of the fundamental right to marry. In so holding, the Court declared that same-sex couples’ “hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law.” *Id.* at 2608. Mr. Ely, Mr. Driggs, Mr. Schmoll, and members of the class certified by the District Court deserve to be recognized by SSA as their beloved’s surviving spouse and partake in that equal dignity.

Indeed, now that LGBT couples may lawfully marry in the United States, they are increasingly doing so. In late 2017, two years after *Obergefell*, an AARP research survey found that a record 43% of lesbians, 27% of gay men, and 35% of

all LGBT persons aged 45 and older were married. AARP, *Maintaining Dignity: Understanding and Responding to the Challenges Facing Older LGBT Americans* (2018), <https://bit.ly/3to5pE2>. And, 75% of all lesbians and gays have reported wanting to marry someday. Karen E. Smith, et. al, Urb. Inst., *How Might Legal Recognition of Same-Sex Marriage Affect Retirement Incomes and Federal Programs?*, at 61 (2017), <https://urbn.is/39I0R3x>.

The trend towards marriage for LGBT older adults ameliorates some of the historical and current disadvantages they experience. The opportunity to marry will, on average, improve the financial security of older LGBT people such that the poverty rate for those ages 62 and older are projected to decline from 18% in 2015 to 5% in 2065. *Id.* at 62. The financial benefits arise from several factors, including the pooling of income, the ability of couples to survive financial hardships better, and in particular the access to spousal benefits including private retiree and Social Security benefits. *Id.* at 62-63.

Those who come before the court in this case seeking relief are individuals who have faced for innumerable years society's approbation because of who they were and whom they loved. They entered the bonds of matrimony when the doors to legal marriage were opened to them. "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they

were.” *Obergefell*, 576 U.S. at 681. The Plaintiffs faced the grief of their spouse’s death. To deny them their spousal survivor’s benefits because their state barred same-sex marriage nine months prior to their death is cruel and unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court’s decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 4,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point typeface using Microsoft Word 2010.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 8, 2021 the foregoing Brief of Amici Curiae AARP, AARP Foundation, SAGE, and ASA, Supporting Plaintiffs-Appellants, was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Ninth Circuit using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

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