IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Anthony J. Gonzales, Plaintiff, v. Nancy A. Berryhill, Acting Commissioner, Social Security Administration, Defendant.	No. 1:18-cv-00603 RB-KRS

PLAINTIFF'S MOTION TO REVERSE AGENCY DECISION AND MEMORANDUM IN SUPPORT

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Plaintiff Anthony Gonzales hereby moves to reverse the decision of the Social Security Administration denying him widower's benefits. The denial was based on the unconstitutional exclusion of same-sex couples from marriage in New Mexico, which prevented him from marrying nine months before his spouse's death. This legal error requires reversal.

INTRODUCTION

The U.S. Supreme Court has held that the government may not exclude same-sex couples from marriage, or deprive them of benefits associated with marriage, but the federal government continues to discriminate against same-sex couples today, based on their unconstitutional exclusion from marriage in the past. The Social Security Administration denied widower's benefits to Plaintiff Anthony Gonzales because he and his late husband, Mark Johnson, were not married for at least nine months—even though New Mexico barred them from marrying until shortly before Mr. Johnson's death. Although Mr. Gonzales and Mr. Johnson were in a loving and committed relationship for more than fifteen years—and married on literally the very first day in 2013 when they were able to do so in their home county in New Mexico—they were only able to experience life together as a married couple for approximately six months before cancer claimed Mr. Johnson's life. Now a 63-year-old widower, Mr. Gonzales must face his retirement years without the financial protection that other surviving spouses are able to rely upon and that he would have received but for his same-sex relationship with Mr. Johnson.

The federal government's denial of survivor's benefits to Mr. Gonzales violates equal protection and due process for two reasons, each independently sufficient to require reversal. First, because it is unconstitutional to exclude same-sex couples from marriage, it is also

unconstitutional for the federal government to import those unlawful marriage restrictions into federal law. By relying on discriminatory marriage laws to determine eligibility for survivor's benefits, the government revives and replicates the constitutional harms that the Supreme Court condemned in striking down government discrimination against same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *United States v. Windsor*, 570 U.S. 744 (2013). One constitutional violation cannot serve as the justification for another constitutional violation.

Second, and independent of the unlawfulness of Mr. Gonzales' exclusion from marriage, the exclusion of surviving same-sex spouses like Mr. Gonzales from survivor's benefits fails any level of constitutional scrutiny. This exclusion discriminates based on sex and sexual orientation and burdens fundamental liberty interests that protect intimate family relationships. But for Mr. Gonzales' same-sex relationship with Mr. Johnson—a relationship secured to him by the Constitution and entitled to equal dignity and respect by the government—he would have been eligible to receive survivor's benefits. His exclusion from survivor's benefits lacks even a rational basis. Requiring Mr. Gonzales to have married Mr. Johnson when it was legally impossible for same-sex couples to do so in New Mexico is disconnected from any government interest, such as preventing sham relationships that might conceivably justify a marriage duration requirement for couples who were freely able to marry. Indeed, the agency's own Administrative Law Judge—who had no power to address Mr. Gonzales' constitutional claims—"urge[d]" him to seek federal court review and obtain redress for the "unequal treatment of same-sex couples who wished to marry prior to the legalization of same-sex marriage in New Mexico when compared to opposite-sex couples." Administrative Record ("AR") 18.

Survivor's benefits act as a social safety net to catch widows and widowers in a time of

potential crisis and to mitigate the financial disruption that follows the death of one's spouse. There is no basis for carving out surviving same-sex spouses like Mr. Gonzales from that critical protection. Indeed, not only have lesbian and gay couples been stripped of equal access to this vital protection for their families, they must also, in effect, subsidize benefits for the majority in economic servitude. Survivor's benefits are funded by all individuals who have paid into the social security system—including by same-sex couples like Mr. Gonzales and Mr. Johnson—and the Constitution requires that these benefits be accessible to all individuals on equal terms.

FACTS

I. Mr. Gonzales' and Mr. Johnson's Committed 15-Year-Plus Relationship

Plaintiff Anthony Gonzales and his late husband Mark Johnson were both residents of Albuquerque, New Mexico. AR 91. They met and formed a loving, committed relationship in 1998, a point in time when no state in the country permitted same-sex couples to marry. AR 96.

Despite their inability to marry, Mr. Gonzales and Mr. Johnson's relationship was otherwise similar to that of other married couples. They began living together in December 1998, five months after they met. AR 28. They pooled together their finances by opening a joint checking account in January 1999. AR 26. Mr. Gonzales worked for a non-profit organization, the Center for Civic Values, which provides education and resources for public participation in the law, AR 45-49, while Mr. Johnson worked as an elementary school teacher, AR 89. They also took what steps were within their control to protect one another despite their exclusion from marriage. For example, Mr. Gonzales' will executed in 2004 left their shared residence to Mr. Johnson, who was designated as his significant other. AR 21-22. Mr. Johnson likewise designated Mr. Gonzales as the beneficiary in his will, AR 28, and in his retirement benefits, AR

89. Mr. Johnson also designated Mr. Gonzales as his healthcare power of attorney. AR 24.

It was not until August 2013—by which point Mr. Gonzales, then 58, and Mr. Johnson, then 56, had been together as a committed couple for more than fourteen years—that they were finally able to express their love for one another through marriage in New Mexico. On August 26, 2013, the Second Judicial District Court issued a declaratory judgment holding that New Mexico's statutory exclusion of same-sex couples from marriage violated the New Mexico Constitution and issued an injunction requiring, as relevant here, that the clerk of Bernalillo County issue marriage licenses to same-sex couples. *Griego v. Oliver*, No. D-202-CV-2013-2757, 2013 WL 4716361 (N.M. Dist. Ct. Aug. 26, 2013), *aff'd*, 316 P.3d 865 (N.M. 2013). The Bernalillo County Clerk began issuing marriage licenses on August 27, 2013. AR 96.

Mr. Gonzales and Mr. Johnson did not wait even one day to marry. They married on August 27, 2013, the very first day they were able to do so in Bernalillo County. AR 96. They waited in line for a marriage license along with nearly two hundred other same-sex couples. AR 27. They were also among many jubilant same-sex couples who participated in a mass wedding ceremony at Civic Plaza, and their embrace after exchanging their marriage vows was captured in photos that ran from the *Albuquerque Journal* to the *New York Times*. AR 27; Fernanda Santos and Heath Haussamen, *In New Mexico, a Rush to the Altar*, N.Y. Times, September 3, 2013, at A12, photo attached as Ex. D to Decl. of Anthony Gonzales.

Their long-awaited marriage was, tragically, cut short. Mr. Johnson had previously been diagnosed with cancer and underwent radiation treatment, which was successful. AR 122. But in May 2013, he learned that the cancer had returned, requiring chemotherapy and further radiation. *Id.* Although Mr. Johnson's doctor had expected him to live for a few more years

with treatment, he learned in November 2013 that the cancer had spread. AR 122-23. Mr. Johnson died of cancer a few months later on February 19, 2014, far earlier than expected. AR 92. Despite their fifteen-year-plus relationship together, Mr. Gonzales and Mr. Johnson were only able to experience life together as a married couple for exactly 176 days.

II. SSA's Denial of Widower's Benefits to Mr. Gonzales

At nearly 59 years old, Mr. Gonzales found himself a widower, coping with the emotional and financial devastation of losing his spouse. The following year, on May 7, 2015, one week before he turned 60 years old, Mr. Gonzales filed an application with the Social Security Administration ("SSA" or "agency") for spousal survivor's benefits. AR 14.

SSA provides widow's and widower's insurance benefits (collectively, "survivor's benefits") to surviving spouses under the Social Security Act. 42 U.S.C. § 402(e) (widow's insurance benefits) and 42 U.S.C. § 402(f) (widower's insurance benefits). Survivor's benefits provide surviving spouses with a monthly benefit based on the earning record of the deceased spouse. Benefits can be collected at an individual's full retirement age or beginning at age 60 at a reduced benefit level. 42 U.S.C. § 402(f)(1)(B)(i). As relevant here, an individual must generally have been married to his or her spouse for at least nine months subject to various exceptions in order to qualify for survivor's benefits. 42 U.S.C. § 416(g); *see also* 20 C.F.R. § 404.335.

SSA informed Mr. Gonzales that survivor's benefits would be approximately $1,500 per month based on Mr. Johnson's earning history if Mr. Gonzales was eligible to receive them and started collecting them at age 60.[1] Gonzales Decl. ¶ 42; *see also* AR 119 (showing that,

[1] By collecting survivor's benefits first, surviving spouses can delay collecting benefits based on their own work history, thereby increasing benefits when they switch over to the latter.

alternately, the benefit based on Mr. Johnson's earning history would be $2,015 per month at Mr. Gonzales' full retirement age). Like other workers, Mr. Johnson contributed to social security with deductions from every paycheck he earned across his lifetime. The government, in effect, returns these earnings to workers who live long enough to see their retirement years, and when they die, these earnings fund protections for their surviving spouses.

Because Mr. Gonzales was only able to be married to Mr. Johnson for approximately six months, however, SSA denied his claim for survivor's benefits based on the nine-month marriage duration requirement in the Social Security Act. AR 19 (initial denial, May 21, 2015); AR 31-34 (denial of reconsideration, Jan. 21, 2016); AR 14-18 (administrative law judge denial, Mar. 8, 2017); AR 3-5 (Appeals Council denial of review, May 3, 2018).[2] In other words, because Mr. Johnson died on February 19, 2014, Mr. Gonzales would have needed to marry Mr. Johnson by June 19, 2013—when New Mexico did not permit them to marry. As a result, SSA has deprived Mr. Gonzales of thousands of dollars in monthly survivor's benefits for more than three-and-a-half years, and counting.

Although the ALJ was required to enforce the Social Security Act and was powerless to adjudicate any constitutional claims, the clear injustice of applying the nine-month requirement to Mr. Gonzales was not lost upon her. As a factual matter, the ALJ found that Mr. Gonzales and Mr. Anthony married at the first opportunity when they could do so in any county close to their home in New Mexico, not delaying even a single day. AR 16. The ALJ also observed that SSA's various rules governing recognition of relationships—including provisions recognizing

[2] Because the Appeals Council denied review, the decision of the Administrative Law Judge ("ALJ") is the final agency action of the Commissioner for purposes of this case. *Doyal v. Barnhart*, 331 F.3d 758, 759 (10th Cir. 2003); 20 C.F.R. § 404.981.

non-marital legal relationships and even invalid marriages in certain situations—reflect an overall goal "to acknowledge relationships, treat everyone equally, and not penalize marriages that are less than nine months due to no fault of the parties." AR 15.

For example, the ALJ noted that a marriage of less than nine months does not bar benefits where the decedent was married to a prior spouse who was institutionalized. AR 17. If the decedent would have divorced the prior spouse and married the new spouse during the period of institutionalization but for a state law barrier barring the divorce, and did ultimately marry the new spouse within 60 days of when they were able to do so (following the prior spouse's death), the surviving spouse is eligible for survivor's benefits. 42 U.S.C. § 416(g)(2). The ALJ observed that in both this situation and Mr. Gonzales' situation, "a legal impediment prevented marriage" and "[t]he intent of this exception should also encompass a couple who were legally unable to marry in their state but who then did marry when they were permitted." AR 17.

Similarly, the ALJ also noted that SSA deems a marriage to be valid if the parties went through a good faith marriage ceremony, and then lived together, but a legal impediment unknown to them at the time prevented them from actually entering into a valid marriage. AR 17 (discussing 42 U.S.C. § 416(h)(1)(B)(i)). The ALJ found that this provision "illustrates a spirit of accommodation, which suggests that situations such as the claimant's should also be accommodated." AR 17.

Ultimately, however, the ALJ found herself bound by social security's administrative constraints and had no choice but to deny Mr. Gonzales survivor's benefits, given the scope of her adjudicatory authority. AR 14 ("I must deny this claim because the claimant's marriage does not meet this Agency's durational requirements"), 18. But she "urge[d]" Mr. Gonzales to pursue review in federal court because of the clear "unequal treatment of same-sex couples." AR 18.

STANDARD

Judicial review of social security decisions requires this Court to conduct an independent review of whether the Commissioner applied the correct legal standard and whether the agency's decision is free from legal error. *Chapo v. Astrue*, 682 F.3d 1285, 1287 (10th Cir. 2012). "For surely one thing no agency can do is apply the wrong law to citizens who come before it." *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016). Substantial evidence must also support the agency's factual findings. *Chapo*, 682 F.3d at 1287.

ARGUMENT

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

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

The Supreme Court's decisions affirming the equal dignity of same-sex relationships make clear that the government may not deny legal benefits and protections to same-sex couples based on government-imposed barriers excluding them from marriage. *See Obergefell*, 135 S. Ct. at 2601; *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—as well as from the panoply of benefits and protections associated with marriage—unconstitutionally deprived those couples of liberty, equality, and dignity. The Supreme Court affirmed these principles in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), reiterating that "same-sex couples, no less than opposite-sex couples, *must have access*" to the full array of rights related to marriage. *Id.* at 2078 (emphasis added).

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

Moreover, these harms inflict "more than just material burdens" because the government's exclusion "demeans" same-sex couples and consigns them to "an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 135 S. Ct. at 2601.

That dignitary injury cuts especially deep here: in a time of immeasurable grief, the federal government has deemed Mr. Gonzales not to be a "widower" under the Social Security Act—all because of his unconstitutional exclusion from marriage. 42 U.S.C. § 402(f); 42 U.S.C. § 416(g).

Because it was unconstitutional for New Mexico to exclude Mr. Gonzales and Mr. Johnson from marrying one another nine months before Mr. Johnson's death, it is also unconstitutional for SSA to rely on that exclusion in denying survivor's benefits to Mr. Gonzales. The federal government may not rely on unconstitutional state laws in determining eligibility for federal benefits. This principle has been well established in the context of child's survivor's benefits in the aftermath of the Supreme Court decision striking down of intestacy laws denying equal benefits to non-marital children in *Trimble v. Gordon*, 430 U.S. 762, 768-76 (1977). Because the Social Security Act incorporates state intestacy laws in determining a child's eligibility for social security survivor's benefits, 42 U.S.C. § 416(h)(2)(A), the federal government's reliance on unconstitutional state intestacy laws was also unconstitutional. For example, in *Cox v. Schweiker*, 684 F.2d 310, 324 (5th Cir. 1982), the child of a deceased wage earner was denied survivor's benefits because of "a clearly unconstitutional state intestacy law" like the one struck down in *Trimble*. The Fifth Circuit was therefore "bound to eradicate the constitutional flaw" by recognizing the child's right to benefits. *Id.*[3]

Here, as well, SSA cannot rely upon an unconstitutional state law—New Mexico's

[3] *See also Greer by Greer v. Hecker*, 756 F.2d 794, 796 n.1 (10th Cir. 1985) (determination of child's eligibility for social security survivor's benefits could not turn on application of intestacy statutes in effect at wage earner's death because they were unconstitutional under *Trimble*); *Smith v. Bowen*, 862 F.2d 1165 (5th Cir. 1989); *White v. Harris*, 504 F. Supp. 153 (C.D. Ill. 1980); *Ramon v. Califano*, 493 F. Supp. 158 (W.D. Tex. 1980); *cf. Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (a classification is discriminatory where it incorporates another law that is discriminatory).

exclusion of same-sex couples from marriage—as the basis for denying survivor's benefits to Mr. Gonzales. Just as the surviving child in *Cox* would have qualified for survivor's benefits but for unconstitutional state intestacy laws, Mr. Gonzales would similarly have qualified for survivor's benefits but for an unconstitutional state law barring him from marrying Mr. Johnson until six months before the latter's death. AR 122. Even before *Obergefell*, the Tenth Circuit had recognized that Utah could not "constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry[.]" *Kitchen v. Herbert*, 755 F.3d 1193, 1198 (10th Cir. 2014). Yet SSA's denial of survivor's benefits to Mr. Gonzales continues to do precisely that. It "burden[s] the ability of one class of citizens to make [] intimate and personal choices" concerning the fundamental right to marry by stripping them of benefits based on their desire to marry a person of the same sex. *Id.* at 1224.

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

The appropriate remedy for a constitutional violation is to restore the plaintiff to the position they would have otherwise occupied, without the unconstitutional action, with respect to

the particular injury at issue. *See United States v. Virginia*, 518 U.S. 515, 547 (1996) (the remedy for a constitutional violation "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination]'"); *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (recognizing a court's duty to eliminate effects of discrimination). For example, the typical remedy for an equal protection violation is to provide the excluded class with the benefit denied. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (affirming the extension of social security benefits to individuals who had been excluded from such benefits in violation of equal protection).

Just like the plaintiff in *Cox*, 684 F.2d at 324, Mr. Gonzales should be eligible to receive survivor's benefits here because SSA relied on an unconstitutional law in its denial. That is the only remedy that would place him in the position that he would have occupied vis-à-vis the agency but for his and Mr. Johnson's unlawful exclusion from marriage. Although nothing can erase the sting of discrimination that they suffered throughout the vast majority of their relationship because of this exclusion, the Constitution requires the government to provide Mr. Gonzales with this small but important measure of equal dignity.

II. The Exclusion of Surviving Same-Sex Spouses, like Mr. Gonzales, from Survivor's Benefits Violates Equal Protection and Due Process.

The denial of survivor's benefits to Mr. Gonzales is also unconstitutional for another reason, independent of the unconstitutionality of his exclusion from marriage. Even before courts recognized that it was unconstitutional to exclude same-sex couples from marriage, they overwhelmingly recognized that it was unconstitutional to exclude them from the legal benefits of marriage. They found no government interest served by excluding loving and committed same-sex couples who wished to marry—but who were barred from doing so—from the benefits

and protections related to marriage, regardless of the level of constitutional scrutiny employed. That reasoning fully applies to Mr. Gonzales: SSA has unjustifiably denied him equal access to survivor's benefits, which are conditioned upon him being married at a time when New Mexico excluded him from marrying Mr. Johnson.

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

The government's denial of survivor's benefits to Mr. Gonzales requires heightened scrutiny under equal protection and due process. The federal equal protection guarantee embodies a "profound recognition of the essential and radical equality of all human beings," and the fundamental command that "like cases [be] treated alike." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). As the Tenth Circuit has recognized, "[e]xtending the benefits and protections of a civil society to some but not all similarly situated families violates this critical guarantee." *Kitchen*, 775 F.3d at 1222. That is the same wrong that the federal government now inflicts on Mr. Gonzales. The government's denial discriminates against surviving same-sex spouses like Mr. Gonzales based both on sex and sexual orientation, and each requires heightened scrutiny. Heightened scrutiny is also required under due process. The government has penalized Mr. Gonzales for his relationship with a person of the same sex—a fundamental liberty guaranteed by due process—by depriving him of survivor's benefits.

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

The denial of benefits to Mr. Gonzales cannot be understood without reference to his sex. If Mr. Gonzales had been a woman who sought to marry Mr. Johnson, his eligibility to marry and thereby obtain survivor's benefits would be unquestioned. But because Mr. Gonzales is a

man who sought to marry another man, which New Mexico barred until six months before the death of the man he sought to marry, he is denied those benefits. The sex-based discrimination inherent in this denial places a heavy burden on the government: it must demonstrate an "exceedingly persuasive justification" in which the discrimination bears a substantial relationship to the achievement of important objectives. *Virginia*, 518 U.S. at 524 (internal quotes omitted).

Numerous cases striking down similar barriers have recognized that denials like the one here discriminate based on sex. For example, *In re Fonberg* held that the federal government's denial of spousal health insurance to the same-sex partner of a judicial law clerk, who was unable to marry her same-sex partner under state law, discriminated "based on the sex of the participants in the union." 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) (holding that this denial also discriminated based on sexual orientation and violated equal process and due process). Courts applied similar principles in a number of DOMA challenges pre-dating *Windsor*. *See, e.g.*, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not … withhold benefits from her. Thus, DOMA … restrict[s] Ms. Golinski's access to federal benefits because of her sex."); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (same).

Courts similarly recognized the intrinsic sex-based restrictions in state laws barring same-sex couples from marriage. *See, e.g.*, *Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1281 (D. Neb. 2015), *aff'd on other grounds*, 798 F.3d 682 (8th Cir. 2015) (a law "that mandates that women may only marry men and men may only marry women facially classifies on the basis of gender"); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd on other*

grounds, 755 F.3d 1193 (10th Cir. 2014) (finding that Utah's marriage laws prohibiting "a man from marrying another man," but not "from marrying a woman," classify based on sex). These cases broke no new ground; they faithfully followed the Supreme Court's instruction that discrimination based on one's relationship with another person violates equal protection just as directly as discrimination against the individual. For example, the Supreme Court had no trouble recognizing the race-based discrimination at play when Virginia punished Mildred and Richard Loving for marrying because of their race in relation to each other. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Similarly, SSA has denied Mr. Gonzales of survivor's benefits because of his sex in relation to Mr. Johnson, whom New Mexico barred Mr. Gonzales from marrying until shortly before Mr. Johnson died.

The denial of benefits to Mr. Gonzales must be subjected to heightened scrutiny for the additional reason that it is premised on impermissible sex stereotyping. "[L]egislating on the basis of such stereotypes limits, and is meant to limit, the choices men and women make about the trajectory of their own lives, choices about work, parenting, dress, driving—and yes, marriage." *Latta v. Otter*, 771 F.3d 456, 487 (9th Cir. 2014) (Berzon, J., concurring). Stereotypes "concerning to or with whom a [man] should be attracted, should marry, and/or should have children is discrimination on the basis of sex." *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (finding sex discrimination under the Fair Housing Act). "Such stereotypical norms are no different from other stereotypes," *id.*, and relying on them to deny survivor's benefits is an additional reason that the denial here offends equal protection.

2. The Denial of Survivor's Benefits Here Requires Heightened Scrutiny

Because It Discriminates Based on Sexual Orientation.

Just as the denial of survivor's benefits here discriminates based on sex, it also discriminates based on sexual orientation: if Mr. Gonzales had been heterosexual, he would have been able to marry more than nine months before his spouse's death, and this case would not exist. Same-sex couples who wished to marry by nine months before one of them died are similarly situated to different-sex couples who wished to marry by nine months before one of them died; the difference is their sexual orientation and, as explained above, their sex. Courts have recognized that conditioning benefits on marriage discriminates based on sexual orientation to the extent that lesbians and gay men were not able to marry. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (collecting cases and holding that the denial of spousal health insurance to same-sex partners of employees discriminated based on sexual orientation).

The Supreme Court has consistently applied heightened scrutiny where the group at issue has suffered a history of discrimination and the classification has no bearing on a person's ability to perform in society. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (explaining that heightened scrutiny is warranted where a classified group has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). In addition, the Supreme Court has sometimes considered whether the group is a politically vulnerable minority, and whether there is an "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). No single hallmark is dispositive: each serves as a warning sign that a particular form of discrimination is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate

objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). While the presence of all the hallmarks is not required, they all exist with respect to sexual orientation discrimination.[4] *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *see also Griego*, 316 P.3d at 880-84 (concluding that heightened scrutiny is required under the New Mexico Constitution based on an analysis of similar considerations).

History of Discrimination. "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence v. Texas*, 539 U.S. 558, 559 (2003). Indeed, "[n]ot until contemporary times have laws stigmatizing … gay men and women been felled, allowing their relationships to surface to an open society." *Kitchen*, 755 F.3d at 1218. The Supreme Court itself has recognized the dark stain of this history. *Obergefell*, 135 S. Ct. at 2596 ("[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate"). Yet discrimination against lesbians and gay men is not a historical relic. Until judicial intervention in 2003, states were able to "demean [lesbian, gay, and bisexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578. There have also been sweeping attacks in legislatures and at the ballot box, producing

[4] The appropriate level of scrutiny for sexual orientation discrimination remains an open question in this circuit. Some older decisions, which predated *Windsor* and *Obergefell*, found equal protection violations based on rational basis review, without needing to decide whether heightened scrutiny applied. *E.g.*, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008) (noting that plaintiff also did not argue on appeal that heightened scrutiny applied). The Tenth Circuit has recognized that doctrinal developments have reshaped the legal landscape and overtaken even Supreme Court decisions that "pre-date[] the Court's opinion in *Windsor*." *Kitchen*, 755 F.3d at 1205 (holding that Supreme Court's earlier summary dismissal of case seeking marriage for same-sex couples did not bar relief); *accord SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (*Windsor*'s "level of scrutiny for [sexual orientation] classifications … is unquestionably higher than rational basis review").

patently unconstitutional laws requiring reversal by the courts. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (constitutional amendment denying antidiscrimination protections); *Windsor*, 570 U.S. at 775 (DOMA); *Obergefell*, 135 S. Ct. at 2608 (marriage restrictions). These attacks continue into the present day. *See Carcaño v. Cooper*, No. 1:16-cv-236, 2018 WL 4717897, at *12 (M.D.N.C. Sept. 30, 2018) (law stripping local antidiscrimination protections).

Ability to Contribute to Society. Sexual orientation bears no relationship to the ability to be a productive contributor to society. Courageous lesbian, gay, and bisexual Americans now bravely serve their country in the military every day. Pub. L. No. 111-321, 124 Stat. 3516 (2010) (eliminating ban on open military service). Just like different-sex couples, "many same-sex couples provide loving and nurturing homes to their children" in families deserving of equal dignity and integrity. *Obergefell*, 135 S. Ct. at 2600. As *Obergefell* observed, "psychiatrists and others [now] recognize[] that sexual orientation is [] a normal expression of human sexuality." *Id.* at 2596; *see also Golinski*, 824 F. Supp. 2d at 986.

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

Relative Political Power. This consideration examines relative rather than absolute

political power – *i.e.*, whether the "discrimination is unlikely to be *soon rectified* by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (emphasis added); *Windsor v. United States*, 699 F.3d 169, 184 (2d Cir. 2012). When the Supreme Court applied heightened scrutiny to sex discrimination in *Frontiero v. Richardson*, Congress had already "manifested an increasing sensitivity to sex-based classifications" by enacting express federal employment and equal pay protections, and approving the Equal Rights Amendment for ratification by the states. 411 U.S. 677, 685–687 (1973) (plurality). Gay people lack any such express protections.[5] Lacking sufficient political strength to protect themselves at the ballot box, they also "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997).

In sum, because lesbian and gay people have been subject to a history of ugly discrimination based on an immutable characteristic unrelated to their ability to contribute to society, and they remain a politically vulnerable minority, heightened scrutiny is required.

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

The constitutional guarantee of due process protects individuals from governmental infringement upon fundamental liberty interests. These include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597-98. An individual has the right to form an intimate family relationship with a person of the same sex—"without intervention of the government."

[5] Moreover, the relevant inquiry is not simply the degree of current political powerlessness. The Supreme Court has reaffirmed heightened scrutiny for race- and sex-based classifications despite subsequent political progress by racial minorities and women. *See Virginia*, 518 U.S. at 524; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Lawrence, 539 U.S. at 578. Choices concerning family relationships are constitutionally protected because they "shape an individual's destiny," and this is "true for all persons, whatever their sexual orientation." *Obergefell*, 135 S. Ct. at 2599; *see also Kitchen*, 755 F.3d at 1216.

The government has exacted a significant penalty on Mr. Gonzales because he exercised the right to share his life with a man, whom Mr. Gonzales was barred from marrying under state law. The price that he has paid is the loss of survivor's benefits. The deprivation of legal protections to shelter a relationship imposes a substantial burden on the right to form and sustain that relationship. *See Windsor*, 570 U.S. at 772-74; *Kitchen*, 755 F.3d at 1224. This burden upon Mr. Gonzales' fundamental liberty interests requires the government to show, at a minimum, that its actions bear a significant relationship to important government interests. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (applying heightened scrutiny based on burdening of liberty interests protected by *Lawrence*).

B. The Denial of Survivor's Benefits to Surviving Same-Sex Spouses, like Mr. Gonzales, Fails to Rationally Further Any Legitimate Government Interest.

Although the denial of survivor's benefits to surviving same-sex spouses like Mr. Gonzales requires heightened scrutiny, it fails even rational basis review. Rational basis review is never "toothless," and courts have also applied a more searching form of rational basis review depending on context, including where the government has disadvantaged an unpopular minority or burdened intimate family relationships. *Windsor*, 699 F.3d at 180 ("'rational basis analysis can vary by context'"); *accord Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012). In all events, the court must conduct an inquiry into "the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632 (invalidating state law denying protection to gay people); *see also Cleburne*, 473 U.S. at 446.

There is no such relationship here, for a simple reason: imposing a nine-month marriage duration requirement on individuals who were prevented from marrying until shortly before the death of their same-sex spouses fails to advance any governmental interest. Courts analogously recognized that requiring marriage to qualify for benefits served no valid interest where same-sex couples were barred from marriage. For example, in *Diaz v. Brewer*, the Ninth Circuit held that the denial of spousal health insurance to the same-sex partners of state employees—who were unable to marry under state law—lacked any rational basis. 656 F.3d 1008, 1014 (9th Cir. 2011) (holding that this distinction "between homosexual and heterosexual employees, similarly situated, … cannot survive rational basis review"). Likewise, in *Harris v. Millennium Hotel*, the Alaska Supreme Court held that the government could not deny spousal death benefits to the surviving same-sex partner of a worker: it acknowledged that "marriage may serve as an adequate proxy [of close or dependent relationships] for opposite-sex couples"—but "it cannot serve as a proxy for same-sex couples because same-sex couples are absolutely prohibited from marrying under [state] law." 330 P.3d 330, 337 (Alaska 2014).

A legion of other courts reached similar conclusions.[6] Indeed, even the dissent in

[6] *See In re Fonberg*, 736 F.3d at 903; *Bassett*, 951 F. Supp. 2d at 965-68; *Dragovich v. United States Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012); *Collins v. Brewer*, 727 F. Supp. 2d 797, 803-07 (D. Ariz. 2010); *In re Madrone*, 271 Or. App. 116, 118 (2015); *State v. Schmidt*, 323 P.3d 647 (Alaska 2014); *Lewis v. Harris*, 188 N.J. 415 (2006); *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229/230, 2006 WL 1217283, at *6 (N.H. Super. Ct. May 3, 2006); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005); *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). Indeed, the fact that same-sex couples were unconstitutionally deprived of intestacy rights as surviving spouses under New Mexico law, *see Griego*, 316 P.3d at 888, which would have entitled them to receive social security survivor benefits, 42 U.S.C. § 416(h)(1)(A)(ii), independently provides a basis for reversal. *Cf. Cox*, 684 F.2d at 324; *Bassett*, 951 F. Supp. 2d at 964 (discussing exclusion of same-sex couples from intestacy rights).

Obergefell, while rejecting that same-sex couples should be able to marry, agreed that "a more focused challenge to the denial of certain tangible benefits" related to marriage would have resulted in a different equal protection analysis. 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

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

First, to the extent that the nine-month marriage duration requirement seeks to filter out or discourage sham marriages entered solely to obtain survivor's benefits, the exclusion of same-sex surviving spouses who did not have equal access to marriage nine months before their loved ones died lacks any rational connection to that objective. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court upheld the application of the nine-month marriage duration requirement to a woman who was only married to her husband for six months. But Mr. Gonzales is not similarly situated to Ms. Salfi. While the use of a nine-month duration requirement may be justified as a proxy for detecting or deterring sham relationships between different-sex couples—who have always enjoyed the ability to marry each other—it plainly cannot serve that function for same-sex couples like Mr. Gonzales and Mr. Johnson who were barred from marrying until six months before one of them died.

In holding that same-sex couples must have access, at the least, to various benefits related to marriage, courts recognized that the rationales permitting the government to condition benefits on marriage for different-sex couples had no footing in the context of same-sex couples who could not marry. *See Harris*, 330 P.3d at 334 (acknowledging earlier case law upholding the constitutionality of distinguishing between married and unmarried different-sex couples in eligibility for death benefits and explaining its clear inapplicability to same-sex couples who could not marry); *Diaz*, 656 F.3d at 1014 (observing that because health insurance "was limited

to married couples, different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so" but state law "prohibit[ed] same-sex couples from doing so"); *cf. U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973) (finding no rational basis for exclusion of unpopular group from food stamp program).

In defending the exclusion of same-sex couples from marriage, states similarly invoked general concerns about avoiding fraudulent marriages entered solely for obtaining benefits. But courts recognized that a "purported interest in minimizing marriage fraud is in no way furthered by excluding one segment of the [] population from the right to marry based upon that segment's sexual orientation." *Bostic v. Rainey*, No. 2:13CV395, 2014 WL 10022686, at *14 (E.D. Va. Feb. 14, 2014). Requiring surviving same-sex spouses like Mr. Gonzales to have married their loved ones at a time when state law prevented them from doing so also "in no way further[s]" an interest in avoiding sham marriages. Rather, it erects an unlawful barrier that deprives same-sex couples like Mr. Gonzales and Mr. Johnson of an equal opportunity to demonstrate the non-fraudulent nature of their marriage through its duration. As noted below, surviving same-sex spouses like Mr. Gonzales who can show they would have satisfied the nine-month duration requirement but for unconstitutional marriage bans must have equal access to survivor's benefits.

2. Cost Savings Cannot Justify the Denial Here.

For similar reasons, the denial here also cannot be justified by cost savings. Because it will always save money to exclude any group from benefits, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. Nor can the denial here be justified by a desire to limit survivor's benefits to those most likely to be dependent on the deceased, because the only conceivable

proxy for dependence employed here—nine months of marriage—was not equally available in light of marriage exclusions. It is well established that "[t]he saving of … costs cannot justify an otherwise invidious classification." *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

Courts have accordingly rejected cost savings as a justification for excluding same-sex couples from various benefits conditioned on marriage when they were simultaneously barred from marrying. *See, e.g.*, *Diaz*, 656 F.3d at 1014 (recognizing that any cost "savings depend upon distinguishing between homosexual and heterosexual employees" which "cannot survive rational basis review"); *Bassett*, 951 F. Supp. 2d at 967 (rejecting cost savings as a rational basis for denying spousal health insurance to same-sex partners of employees). Indeed, even when the Supreme Court upheld the nine-month marriage requirement as to a woman who had been married to her husband for six months, it simultaneously caveated: "of course Congress may not invidiously discriminate among such claimants." *Weinberger*, 422 U.S. at 772.

Mr. Gonzales simply seeks his fair share of what he is due: survivor's benefits tethered to the earning history of Mr. Johnson and, in effect, funded by Mr. Johnson's social security contributions. The budget of the Social Security Trust Fund cannot be balanced on the backs of surviving same-sex spouses deprived of equal access to survivor's benefits.

3. Administrative Efficiency Cannot Justify the Denial Here.

Finally, the denial of survivor's benefits to surviving same-sex spouses like Mr. Gonzales cannot be justified by an interest in avoiding the administration of these benefits. Although an interest in administrative efficiency may justify the nine-month marriage duration requirement as to different-sex couples who could freely marry, *Weinberger*, 422 U.S. at 772, it cannot justify the deprivation of survivor's benefits to same-sex couples who could not do so. Any alleged

burden in administration of the latter cannot outweigh the interests of these surviving same-sex spouses. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). On the contrary, the interests of these individuals clearly outweigh government interests in promoting administrative efficiency.

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

Convenience and efficiency in the administration of governmental programs cannot legitimize invidious discrimination. Under these circumstances, "'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." *Frontiero*, 411 U.S. at 690–91. Courts have thus repeatedly rejected administrative efficiency as a justification for depriving same-sex couples who were barred from marrying of benefits related to marriage. *See Diaz*, 656 F.3d at 1014 (holding that the exclusion of same-sex partners from spousal health insurance was not rationally related to "reducing administrative burdens"); *Harris*, 330 P.3d at 336-37 (recognizing the desire for efficiency in administering benefits but finding that the exclusion of same-sex couples from death benefits lacked an adequate nexus to that goal). Excluding surviving same-sex spouses like Mr. Gonzales from survivor's benefits "explicitly disdains present realities in deference to past formalities" and "needlessly risks running roughshod over the important interests" in avoiding invidious discrimination. *Stanley*, 405 U.S. at 657; *see also Rainbow Coal. of Okla. v. Okla. State Election Bd*., 844 F.2d 740, 747 (10th Cir.

1988) ("an administrative burden in and of itself would not be sufficient to justify infringing important associational rights").

Furthermore, providing survivor's benefits to same-sex spouses like Mr. Gonzales would neither embroil the agency in unlimited individual determinations nor require inquiries outside of the agency's usual practices. While the harm to surviving same-sex spouses like Mr. Gonzales is significant, the pool of individuals in this situation is limited and finite: *Obergefell* struck down the remaining barriers to marriage for same-sex couples, and those who were able to marry for nine months could qualify for survivor's benefits. Removing an unconstitutional barrier so that individuals in Mr. Gonzales' situation can access survivor's benefits will not require large numbers of individualized determinations nor impact otherwise eligible surviving spouses.

Proof that surviving same-sex spouses like Mr. Gonzales would have married sooner but for their unconstitutional exclusion is both reasonably determinable and is precisely the type of indicia of genuineness SSA considers on a regular basis. The federal government "can make determinations that bear on marital rights and privileges … regardless of state law." *Kitchen*, 755 F.3d at 1207 (internal quotes omitted). For example, SSA recognizes common-law marriages in eligibility for certain social security benefits—"regardless of any particular State's view on these relationships." *Windsor*, 540 U.S. at 765; *see* 20 C.F.R. § 404.726. As well, when an applicant for spousal benefits turns out not to be lawfully married to a worker, SSA will deem them to be married if they had a ceremony with the good faith belief that it resulted in a marriage, despite a legal impediment that undermined its validity. 42 U.S.C. § 416(h)(1)(B)(i).

With regard to the marriage duration requirement, SSA also regularly makes individualized determinations regarding whether a state law impediment prevented an applicant

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

Here, as the ALJ emphasized, the factual inquiry is even more straightforward: Mr. Gonzales did not wait even a single day—let alone sixty—to marry Mr. Johnson once the state law barrier to their marriage was lifted. AR 16. In sum, the government is readily equipped with the tools to provide survivor's benefits to surviving same-sex spouses like Mr. Gonzales.

CONCLUSION

"[W]hen majorities are forced to abide the same rules they seek to impose on minorities, we can rest much surer of the soundness of our legal edifice." *SECSYS*, 666 F.3d at 684. No one would accept for themselves, or their loved ones, the inequality and indignity that Mr. Gonzales has experienced. He respectfully requests an order (1) reversing the agency's decision, (2) enjoining the agency from relying on unconstitutional laws excluding same-sex couples from marriage in determining eligibility for survivor's benefits, and (3) directing payment of such benefits to Mr. Gonzales or, to the extent this Court deems a further administrative hearing warranted, directing that such a hearing take place within 60 days.

Respectfully submitted this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means:

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