Brian I. Clymer (AZBA No. 5579)
BRIAN CLYMER, ATTORNEY AT LAW
2601 N. Campbell Avenue, Suite 203
Tucson, AZ 85719
bclymer@clymerlegal.com | 520-323-1234

Autumn J. Menard (AZBA No. 033899)
MENARD DISABILITY LAW
177 N. Church Ave., Suite 200
Tucson, AZ 85701
autumn@menarddisabilitylaw.com | 520-276-1576

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

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

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

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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

Plaintiff,

vs.

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

Defendant.

Case No. 4:18-cv-00557-TUC-BGM

PLAINTIFF'S COMBINED OPENING BRIEF AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

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 Michael Ely because he and his late husband, James Taylor, were not married for at least nine months—even though Arizona barred them from marrying until shortly before Mr. Taylor's death. Although Mr. Ely and Mr. Taylor were in a loving and committed relationship for more than 43 years, and married as soon as they were able to do so in Arizona, they were only able to experience life together as a married couple for approximately six months before cancer claimed Mr. Taylor's life. Now a 66-year-old widower, Mr. Ely must face the rest of his life without the financial protection that other surviving spouses are able to rely upon.

The federal government's denial of survivor's benefits to Mr. Ely—and others like him, who are putative class members here—violates equal protection and due process. 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, even if it had not been unlawful to exclude same-sex couples from marriage, the exclusion of individuals like Mr. Ely from survivor's benefits that are conditioned upon marriage fails any level of constitutional scrutiny. By imposing eligibility criteria for survivor's benefits that individuals like Mr. Ely could not satisfy on equal terms as others, the government discriminates based on sexual orientation and

sex and burdens fundamental liberty interests that protect intimate family relationships. But for Mr. Ely's same-sex relationship with Mr. Taylor—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. Ely to have married Mr. Taylor when it was legally impossible for same-sex couples to do so in Arizona is disconnected from any government interest, such as detecting sham relationships, that could justify a marriage duration requirement for couples who were freely able to marry. Same-sex couples must have an equal opportunity to prove the legitimacy of their relationships.

Survivor's benefits function as a social safety net to catch surviving spouses after a time of 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. Ely from that critical protection. To be clear, survivor's benefits are not government largesse: they are funded by the earning history of a deceased spouse, who paid into social security with deductions from income across a lifetime of work. Thus, not only have lesbian and gay couples been stripped of equal access to this vital protection for their families, they have also, in effect, lost part of their income to subsidize benefits for the majority in economic servitude. They have been deprived of the equal fruit of their labor.

This Court has the authority and obligation to provide agency-wide relief commensurate with the scope of the constitutional violation. That includes enjoining the constitutional violation at issue here not only for Mr. Ely but for all surviving same-sex spouses denied survivor's benefits because of discriminatory marriage laws. That type of relief is precisely what courts issued when enjoining laws that excluded same-sex couples from marriage itself. Mr. Ely also moves to certify a class of similarly situated individuals, which would provide the Court with an additional and independent basis for affording complete relief. While there is a discrete pool of individuals like Mr. Ely, they will suffer harm for the rest of their lives unless this Court provides relief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The exclusion of surviving same-sex spouses like Mr. Ely from survivor's benefits violates the constitutional guarantees of equal protection and due process.

STATEMENT OF THE CASE

Mr. Ely applied for survivor's benefits with the Social Security Administration ("SSA" or "agency") on August 5, 2015. Administrative Record ("AR") 10. Because SSA lacks jurisdiction to adjudicate constitutional claims, AR 183, it denied his claim at each administrative stage, as detailed below, based on his inability to satisfy the nine-month marriage duration requirement for such benefits. AR 24-26, 182-84; 42 U.S.C. § 416(g). The administrative process concluded with the Appeals Council's denial of review on September 26, 2018. AR 3-5.

STATEMENT OF FACTS

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

Plaintiff Michael Ely met James Taylor in 1971, when Mr. Ely was 18 years old and Mr. Taylor was 20 years old. AR 88.[1] They met at a bar in Sunset Beach, California, when Mr. Taylor invited Mr. Ely to dance. *Id.* After they talked, in Mr. Ely's words, "I knew right then -- I don't know how I knew -- but I knew had met my soul mate." *Id.*

The two fell in love, and they moved in together on December 5, 1971, which they also celebrated as their anniversary date. AR 88. One of their shared passions that bonded Mr. Ely and Mr. Taylor together was their love for music and, specifically, alternative rock. AR 88, 99. Both were active in bands, with Mr. Taylor generally playing guitar and Mr. Ely performing as a singer and writing songs. AR 88.

Despite their inability to marry throughout most of their relationship, Mr. Ely and

[1] Mr. Ely's personal statement can be found at AR 88-98. Because the visibility of the photographs in that statement is degraded in that copy, a clearer and color copy is separately reproduced here for the Court's convenience. *See* Decl. of Michael Ely.

Mr. Taylor's relationship was otherwise similar to that of other married couples. They held themselves out as a committed couple. AR 91. They each contributed to the household: Mr. Taylor worked as a mechanic on jets and was the breadwinner for the family, while Mr. Ely ran the couple's household by doing the laundry, cooking, cleaning, and managing their bills. AR 90. They also had a joint banking account. *Id.* Mr. Ely was the designated beneficiary of Mr. Taylor's pension from his employer. AR 97. They cared for each other when the other was sick, including when Mr. Taylor was hospitalized with pneumonia in the 1970s, even though hospital staff did not regard Mr. Ely as "family" and only permitted him to see Mr. Taylor for one hour a day. AR 91-92.

Mr. Ely and Mr. Taylor longed to be married, even though they were barred from doing so for most of their relationship. AR 91. In 1973, they served as witnesses for the marriage of their friends, who were a different-sex couple, and discussed their desire to marry one another. *Id.* At the time, however, homosexuality was still regarded as a mental illness, and police would raid gay bars and harass patrons. *Id.* Indeed, when Mr. Ely and Mr. Taylor were in situations where they felt unsafe expressing their love for each other, they would say, "don't forget," which was their shorthand for saying, "don't forget I love you." AR 94. On December 5, 2007—after 36 years of being together as a couple—Mr. Ely and Mr. Taylor held a commitment ceremony before an officiant and a witness, because "[t]hat was as close as [they] could get to marriage at that time." AR 93. They exchanged rings that were engraved with the words "don't forget." AR 94.

It was not until 2014—by which point Mr. Ely and Mr. Taylor had been together as a committed couple for 43 years—that they were finally able to marry in Arizona. On October 17, 2014, this Court enjoined Arizona's exclusion of same-sex couples from marriage as unconstitutional. *Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014); *Connolly v. Jeanes*, 73 F. Supp. 3d 1094, 1096 (D. Ariz. 2014). Mr. Ely and Mr. Taylor acted immediately, obtaining their marriage license just five days later, on October 22, 2014. AR 18. After gathering together their loved ones, they married two weeks thereafter, on November 7, 2014. *Id.* AR 94. They again exchanged the same

rings they had worn since their commitment ceremony engraved with the words "don't forget." *Id.*

Their long-awaited marriage was cut tragically short before they could celebrate even their first wedding anniversary. Mr. Taylor had been diagnosed with cancer in November 2013. AR 93. The thought of losing Mr. Taylor "was like having a rug pulled from under [Mr. Ely]," and "[e]verything unraveled overnight." AR 94. Mr. Ely was by Mr. Taylor's side caring for him throughout chemotherapy and the final stages of cancer, when Mr. Taylor could not stop vomiting, and he would swing from night chills to severe sweats that required Mr. Ely to change the bedding. AR 94-95. They also had to downsize and sell their home and belongings. AR 94. As Mr. Ely explains, "I took a vow to love and care for him, 'in sickness and in health,' and I did." AR 95.

Mr. Taylor died on May 21, 2015. AR 96. Because of discriminatory marriage laws, Mr. Ely and Mr. Taylor were only able to experience life together as a married couple for exactly 195 days, despite sharing a life together for more than 43 years.

II. SSA's Denial of Survivor's Benefits to Mr. Ely

At 62 years old, Mr. Ely found himself a widower, coping with the emotional and financial devastation of losing his spouse. The financial impact was particularly acute because Mr. Ely had worked inside the home and thus had virtually no earning record of his own on which to collect social security benefits. AR 116. Mr. Ely's only income has been from a small pension from Mr. Taylor's employment in Arizona, which provides $800/month and runs out in less than five years. AR 97. Mr. Ely thus applied with SSA for spousal survivor's benefits beginning as of May 2015. AR 10.

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.[2] 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.

Like other workers, Mr. Taylor contributed to social security with deductions from every paycheck he earned across his lifetime. The government, in effect, returns these earnings to workers in their retirement years, and when they die, these earnings fund survivor's benefits for their surviving spouses.

Because Mr. Ely was only able to be married to Mr. Taylor for approximately six months, however, SSA denied his claim for survivor's benefits based on the nine-month marriage duration requirement. AR 24-26, 182-84. For example, in its reconsideration denial, SSA stated that the State of Arizona had "capitulated" to the Supreme Court's earlier ruling in *United States v. Windsor* by allowing same-sex couples to marry "but only effective as of October 17, 2014 (Arizona law would not recognize the validity of *any* same-sex marriage until that date)." AR 29 (emphasis in original). In other words, because Mr. Taylor died on May 21, 2015, Mr. Ely would have needed to marry Mr. Taylor by August 21, 2014—when Arizona did not permit them to marry—to satisfy the marriage duration requirement.

In connection with the administrative hearing, Mr. Ely provided his own testimony. AR 88-98, 187-192. Individuals who had collectively known the couple for decades also confirmed the legitimacy of their relationship together. AR 103-04. Nevertheless, the ALJ explained that she had no choice but to deny survivor's benefits, because she had no jurisdiction to consider any constitutional claim. AR 183; *accord*

---

[2] By collecting survivor's benefits first, surviving spouses can delay collecting benefits based on any earning record of their own, thereby increasing benefits when they switch to the latter. But survivor's benefits are especially vital to the lower earner in a relationship, because they can obtain greater benefits on the earning record of their spouse.

AR 187 (recognizing that any relief would need to be provided in federal court). As a result of its denial, SSA has already deprived Mr. Ely of thousands of dollars in monthly survivor's benefits for nearly four years, and counting.

Mr. Ely is also not alone. There are others like him—two of whom have also submitted declarations here—included among the class he seeks to certify. *See* Decl. of James Obergefell; Decl. of Anthony Gonzales.[3] Each of these three individuals' stories illustrate the profound harms suffered by surviving same-sex spouses across the country that cry out for judicial relief.

ARGUMENT

I. The Denial of Survivor's Benefits to Mr. Ely 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. Ely is the fact that he was not married to Mr. Taylor 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. Ely and Mr. Taylor from marrying in the first instance, it is also unconstitutional for the government to rely on that exclusion to exclude Mr. Ely from survivor's benefits for which he would have otherwise been eligible. Any contrary holding would permit the government to inflict further injury based on constitutional wrongs that the Supreme Court has struck down.

The Supreme Court's decisions affirming the equal dignity of same-sex

---

[3] The declaration of Mr. Gonzales was originally filed in his own individual case, *Gonzales v. Berryhill*, No. 18-603 (D.N.M.), which has now been stayed pending resolution of class certification here. Litigation involving a surviving same-sex spouse in North Carolina has similarly been stayed pending resolution of class certification here. *Colosimo v. Berryhill*, No. 18-170 (M.D.N.C.). Both cases have been stayed because if this Court provides the agency-wide relief sought here, it could obviate the need for those (and other) individual cases to be separately prosecuted. In addition, there is a pending putative class action involving surviving same-sex partners who were unable to marry at all before their loved ones' deaths because of marriage bans. *Thornton v. Berryhill*, No. 18-1409 (W.D. Wash.). However, that class does not overlap with the class here.

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

The Supreme Court 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*). 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 2601-02. That dignitary

injury cuts especially deep here: in a time of immeasurable grief, the federal government has deemed Mr. Ely 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).

Indeed, James Obergefell himself faces the same injury as Mr. Ely with respect to survivor's benefits. As he powerfully explains in his declaration here, Mr. Obergefell was in a loving and committed relationship with John Arthur for more than two decades. Decl. of James Obergefell ¶ 4. In 2011, Mr. Arthur was diagnosed with ALS, a progressive, debilitating, and incurable disease. *Id.* ¶ 7. Because their home state of Ohio barred same-sex couples from marriage, Mr. Obergefell and Mr. Arthur had to go to extraordinary lengths in order to marry: with financial support from family and friends, they chartered a medically equipped plane to fly to Maryland, which permitted same-sex couples to marry, and married inside the plane while on the tarmac in July 2013. *Id.* ¶ 21. Because Mr. Arthur died in approximately three months later in October 2013, SSA will deny Mr. Obergefell survivor's benefits when he reaches his retirement years. *Id.* ¶¶ 31, 33 (detailing how this harm also impacts his present ability to plan for retirement).

Because it was unconstitutional for a state like Arizona to exclude Mr. Ely and Mr. Taylor, and others like them, from marrying one another nine months before their loved ones' deaths, it is also unconstitutional for SSA to rely on that exclusion in denying them survivor's benefits. 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 a worker's surviving children, who, like surviving spouses, may also qualify for survivor's benefits. Under the Social Security Act, a child who has the right to inherit intestate under state law is eligible for such benefits, 42 U.S.C. § 416(h)(2)(A), but, in 1977, the Supreme Court struck down state intestacy laws to the extent they discriminated against children born outside of marriage. *Trimble v. Gordon*, 430 U.S. 762, 768-76 (1977). Thereafter, courts confronted the

question of how to adjudicate the claims of children whom SSA had denied benefits based on unconstitutional state laws.

Those courts overwhelmingly recognized that the Social Security Act's reliance on unconstitutional state laws was itself unconstitutional.[4] For example, in *Cox v. Schweiker*, 684 F.2d 310, 324 (5th Cir. 1982), the child of a deceased worker was denied survivor's benefits because of "a clearly unconstitutional state intestacy law" like the one that the Supreme Court had struck down. The Fifth Circuit was therefore "bound to eradicate the constitutional flaw" by recognizing the child's right to benefits. *Id.*

Here, as well, SSA cannot rely upon an unconstitutional state law—Arizona's exclusion of same-sex couples from marriage—as the basis for denying survivor's benefits to Mr. Ely. Just as the surviving child in *Cox* was ineligible for survivor's benefits because of unconstitutional state intestacy laws, Mr. Ely is similarly ineligible for survivor's benefits because of an unconstitutional state law barring him from marrying Mr. Taylor nine months before the latter's death. Even before *Obergefell*, the Ninth Circuit recognized that states could not exclude same-sex couples from marriage or deny them "the concrete legal rights, responsibilities, and financial benefits afforded opposite-sex married couples by state and federal law … merely because of their sexual orientation." *Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014).

Indeed, permitting the federal government to justify its denial of benefits here 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

---

[4] *See Smith v. Bowen*, 862 F.2d 1165, 1167 (5th Cir. 1989); *Handley v. Schweiker*, 697 F.3d 999, 1001 (11th Cir. 1983); *Gross v. Harris*, 664 F.2d 667, 670 (8th Cir. 1981); *White v. Harris*, 504 F. Supp. 153, 155 (C.D. Ill. 1980); *Ramon v. Califano*, 493 F. Supp. 158, 160 (W.D. Tex. 1980); *cf. Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (a classification is discriminatory where it incorporates another law that is discriminatory).

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. Ely 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 an equal opportunity to seek 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, individuals like Mr. Ely should be eligible to seek survivor's benefits because SSA's denial depends upon an unconstitutional law. Only that remedy would place them in the position that they would have occupied vis-à-vis the agency but for their unlawful exclusion from marriage.

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

The denial of survivor's benefits to individuals like Mr. Ely is also unconstitutional for another reason, which is independent of whether their exclusion from marriage was unlawful. Even before courts recognized that it was unconstitutional to exclude same-sex couples from the ability to marry, they overwhelmingly recognized that it was unconstitutional to exclude them from the legal benefits conditioned on

marriage. Regardless of the level of constitutional scrutiny employed, courts found that excluding loving and committed same-sex couples from the benefits and protections related to marriage served no valid interest. Here, as well, SSA has unjustifiably denied individuals like Mr. Ely of equal access to survivor's benefits, which are conditioned upon being married at a time when same-sex couples were barred from marriage.

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

The government's denial of survivor's benefits here requires heightened scrutiny under equal protection and due process. It discriminates against surviving same-sex spouses like Mr. Ely based on both sexual orientation and sex. The government has also penalized him for his relationship with a person of the same sex—an exercise of 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 Sexual Orientation.

The denial of survivor's benefits here discriminates based on sexual orientation: if Mr. Ely had been heterosexual, he would have been able to marry by nine months before his spouse's death, and this case would not exist. 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. For example, in *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011), the State of Arizona provided health insurance coverage to the "spouse" of a state employee under state law, but the State also excluded same-sex couples from marriage. The Ninth Circuit confirmed that the denial of benefits "discriminate[d] against same-sex couples" because they were unable to marry under state law and become eligible for benefits on equal terms as others. *Id.* at 1014-15. The government had thus "distinguish[ed] between homosexual and heterosexual employees, similarly situated." *Id.* at 1014. The same holds true here.

Similarly, the federal government's denial of spousal health insurance to the same-sex partner of a law clerk—who was unable to marry her same-sex partner under

state law at the time—"is plainly discrimination based on sexual orientation." *In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013). The reason, again, is because different-sex partners of employees "are allowed to marry and thereby gain spousal benefits under federal law." *Id.*; *see also In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (explaining why the denial of benefits to same-sex couples, who are unable to be recognized as married, constitutes discrimination based on sexual orientation); *Bassett*, 951 F. Supp. 2d at 963 (holding that the denial of spousal health insurance to same-sex partners of employees discriminated based on sexual orientation and collecting cases).

Government discrimination based on sexual orientation requires heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014); *see also Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012) (discussing hallmarks of a suspicious classification). Lesbian and gay people have suffered a long and painful history of senseless discrimination at the hands of the government based on an immutable characteristic, *SmithKline*, 740 F.3d at 484-85; *Obergefell*, 135 S. Ct. at 2594, and the government may "neither send nor reinforce" a message of their second-class status through its actions, *SmithKline*, 740 F.3d at 483. Heightened scrutiny requires, at a minimum, that the government satisfy its burden of showing an important if not compelling interest and a substantial relationship between its discrimination and the achievement of its interest. *Virginia*, 518 U.S. at 524.

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

The denial of benefits to individuals like Mr. Ely cannot be understood without reference to their sex. If Mr. Ely had been a woman in a relationship with Mr. Taylor, his eligibility to marry and thereby obtain survivor's benefits would be unquestioned. But because Mr. Ely is a man who was in a relationship with another man, he was denied the ability to marry for most of that relationship and consequently denied benefits. The sex-based discrimination inherent in this denial places a heavy burden on the

government to demonstrate an "'exceedingly persuasive justification.'" *Virginia*, 518 U.S. at 524.

Cases involving the denial of spousal benefits to same-sex couples who were barred from marriage have recognized that such denials not only discriminate based on sexual orientation but also sex. *See, e.g.*, *In re Fonberg*, 736 F.3d at 903 (recognizing that the denial of health insurance to the same-sex partner of a law clerk discriminated "based on the sex of the participants in the union"). Courts reached the same conclusion in a number of challenges to DOMA pre-dating *Windsor*. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 982 n.4 ("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 at 1147.

Courts also recognized the intrinsically sex-based nature of state laws barring same-sex couples from marriage. *See, e.g.*, *Latta*, 771 F.3d at 479-90 ("[S]ame-sex marriage prohibitions facially classify on the basis of sex. Only women may marry men, and only men may marry women.") (Berzon, J., concurring); *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 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 work 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. Ely of survivor's benefits because of his sex

in relation to Mr. Taylor, whom Arizona barred Mr. Ely from marrying nine months before Mr. Taylor died.

The denial of benefits to individuals like Mr. Ely requires 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*, 771 F.3d at 487 (Berzon, J., concurring). Stereotypes "concerning to or with whom a [man] should be attracted, [or] should marry … 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 they constitute an additional reason why heightened scrutiny is required here.

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 government infringement upon liberty interests. These include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity." *Obergefell*, 135 S. Ct. at 2597-98. An individual has the right to form an intimate family relationship with a person of the same sex—"without intervention of the government." *Lawrence v. Texas* 539 U.S. 558, 578 (2003). 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.

The government has exacted a significant penalty on Mr. Ely because he exercised his right to share his life with a man, whom Mr. Ely was barred from marrying for most of their relationship, rather than a woman, whom he would have been able to marry freely. The price that he has paid is the loss of survivor's benefits. This penalty imposes a substantial burden on the right to form and sustain that relationship. *See*

Windsor, 570 U.S. at 772-74. The Ninth Circuit similarly recognized that the discharge of a lesbian service member under the now-repealed "Don't Ask, Don't Tell" policy similarly infringed upon her liberty interest. *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Her military career was conditioned upon the sacrifice of her constitutional right to a same-sex relationship. As a result, the government could only justify its infringement by showing, at a minimum, that its actions bore a significant relationship to important government interests. Defendant here bears the same heavy burden.

B. The Denial of Benefits to Surviving Same-Sex Spouses like Mr. Ely Fails to Rationally Further Any Legitimate Government Interest.

Although the denial of survivor's benefits to surviving same-sex spouses like Mr. Ely requires heightened scrutiny, it fails even rational basis review. Rational basis review is never "toothless," and courts have also applied more searching rational basis review depending on context, including where the government has disadvantaged an unpopular minority or burdened intimate family relationships. *Windsor*, 699 F.3d 169, 180 (2d Cir. 2013) ("'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 v. Evans*, 517 U.S. 620, 632 (1996) (invalidating state law denying protection to gay people); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

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 legitimate 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*, 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 at 1014 (holding that this distinction "between homosexual and heterosexual employees, similarly situated, … cannot survive rational basis review").

Likewise, the Alaska Supreme Court held that the government could not deny spousal death benefits to the surviving same-sex partner of a worker who had died in a work-related injury. *Harris v. Millennium Hotel*, 330 P.3d 330 (Alaska 2014). State law provided death benefits to a "widow or widower," which necessarily excluded surviving same-sex partners by operation of state law. *Id.* at 331. In holding that this exclusion violated the state equal protection clause, the court 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." *Id.* at 337.

A legion of other courts reached similar conclusions in holding that the denial of spousal benefits to same-sex couples who were unable to marry was unlawful.[5] Indeed, even the dissent in *Obergefell*, while disagreeing that same-sex couples have a constitutional right 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).

---

[5] *See, e.g.*, *In re Fonberg*, 736 F.3d at 903; *Bassett*, 951 F. Supp. 2d at 965-68; *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012); *Collins v. Brewer*, 727 F. Supp. 2d 797, 803-07 (D. Ariz. 2010); *In re Madrone*, 350 P.3d 495, 496 (Or. 2015); *State v. Schmidt*, 323 P.3d 647, 659 (Alaska 2014); *Lewis v. Harris*, 908 A.2d 196, 212-21 (N.J. 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, 787-93 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004); *Baker v. State*, 744 A.2d 864, 880-86 (Vt. 1999). Indeed, the fact that same-sex couples were unconstitutionally deprived of intestacy rights as surviving spouses under state law, which would have also entitled them to receive social security survivor's 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 the exclusion of same-sex couples from intestacy rights).

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 like Mr. Ely—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. Ely 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. Ely and Mr. Taylor who lacked equal access to marriage.

In holding that same-sex couples must have access, at the very least, to the legal 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. In *Diaz*, the Ninth Circuit noted 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." 656 F.3d at 1014; *accord Harris*, 330 P.3d at 334 (acknowledging earlier case law upholding the constitutionality of distinctions between married and unmarried different-sex couples in eligibility for death benefits and explaining its clear inapplicability to same-sex couples who could not marry); *cf. U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (finding no rational basis for excluding from food stamp program a group that included those with legitimate need and who lacked any practical means of retaining eligibility).

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); *see also Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (finding that the "blanket and conclusive exclusion" of a group was not "reasonably related to the prevention of spurious claims"). Requiring surviving same-sex spouses like Mr. Ely 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. Ely and Mr. Taylor of an equal opportunity to demonstrate the non-fraudulent nature of their marriage through its duration.

As discussed below, surviving same-sex spouses like Mr. Ely must have the opportunity to show that unconstitutional marriage bans caused them to be denied survivor's benefits for which they would have otherwise been eligible. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (finding especially "pernicious" discrimination that did not give a widower even the opportunity to show that he was similarly situated to widows, whom Social Security Act treated more favorably). Indeed, the extraordinary obstacles related to marriage bans that many individuals—like James Obergefell—had to overcome in order to marry their spouses illustrates that their love and commitment is as deep and profound as that of those to whom the government provides 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 v. Doe*, 457 U.S. 202, 227 (1982). Nor can the denial here be justified by a desire to limit survivor's benefits to those most likely to be in a close, financially interdependent, or non-fraudulent relationship with the deceased, because the only conceivable proxy for such considerations employed here—nine

months of marriage—was not equally available to lesbian and gay couples in light of marriage exclusions. The government "may not protect the public fisc by drawing an invidious distinction between classes of its citizens." *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974); *accord Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("The saving of … costs cannot justify an otherwise invidious classification.").

Courts have accordingly rejected cost savings as a justification for excluding same-sex couples from benefits conditioned on marriage when they were simultaneously barred from marrying. For example, the Ninth Circuit recognized in *Diaz* that any cost "savings depend upon distinguishing between homosexual and heterosexual employees," which "cannot survive rational basis review." *Diaz*, 656 F.3d at 1014; *accord 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." *Salfi*, 422 U.S. at 772.

Mr. Ely simply seeks his fair share of what he is due: survivor's benefits tethered to the earning history of Mr. Taylor and, in effect, funded by Mr. Taylor's contributions deducted from his income. *Cf. Wiesenfeld*, 420 U.S. at 645 (emphasizing the particular injustice where a female worker "not only failed to receive for her family the same protection which a similarly situated male worker would have received but [] also was deprived of a portion of her earnings in order to contribute to the fund out of which benefits would be paid to others"). The budget of the Social Security Trust Fund cannot be balanced on the backs of surviving same-sex spouses deprived of equal access to benefits. In any event, after *Obergefell*, the pool of people in Mr. Ely's situation is necessarily finite. *Cf. Gross*, 664 F.2d at 671-72 (noting that the extension of survivor's benefits to non-marital children excluded by unconstitutional state laws would not have any significant impact on other beneficiaries). Although equal protection is not only provided where it is free, cost savings cannot justify the discrimination at issue here.

3. Administrative Efficiency Cannot Justify the Denial Here.

Finally, the denial of survivor's benefits to surviving same-sex spouses like Mr. Ely 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, *Salfi*, 422 U.S. at 772, it cannot justify the deprivation of survivor's benefits to same-sex couples who could not do so. The constitutional interests of these surviving same-sex spouses outweigh any alleged burden in the government's administration of benefits. *SmithKline*, 740 F.3d at 482; *cf. Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

"[A]lthough efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (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). Notably, they did so over unfounded objections concerning the purported difficulty of determining whether a same-sex partner should be entitled to benefits. Excluding surviving same-sex spouses

like Mr. Ely from survivor's benefits "explicitly disdains present realities in deference to past formalities" and "needlessly risks running roughshod over the important interests" in avoiding invidious discrimination. *Stanley*, 405 U.S. at 657.

Furthermore, providing same-sex spouses like Mr. Ely with a means of accessing survivor's benefits would not embroil the agency in unlimited individual determinations. While the harm to surviving same-sex spouses like Mr. Ely 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. Accordingly, the removal of an unconstitutional barrier so that individuals in Mr. Ely's situation can access survivor's benefits would not require large numbers of individualized determinations nor impact otherwise eligible surviving spouses. *Cf. Gross*, 664 F.2d at 671-72.

Surviving same-sex spouses like Mr. Ely denied equal access to marriage must have the opportunity to show that they are similarly situated to others entitled to benefits, and that determination is reasonably ascertainable based on indicia that SSA already considers on a regular basis. The federal government "can make determinations that bear on marital rights and privileges … regardless of state law." *Kitchen v. Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014) (internal quotes omitted). To illustrate, SSA recognizes common-law marriages 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.

With regard to the marriage duration requirement in particular, SSA already makes individual determinations as a matter of course regarding whether a state law impediment prevented a surviving spouse from marrying sooner. Specifically, a surviving spouse who was married for less than nine months can receive survivor's benefits where the deceased worker was married to a prior spouse who was institutionalized, thereby preventing a divorce that would have permitted the subsequent marriage to occur sooner. *See* 42 U.S.C. §§ 416(c)(2), (g)(2). The marriage duration

requirement is treated as satisfied if, during the period of institutionalization, the deceased worker "would have divorced the [institutionalized spouse] and married the surviving [spouse], but the [deceased worker] did not do so because such divorce would have been unlawful, by reason of the … institutionalization, under the laws of the State." *Id.*

Nothing prevents the same of type determination from being made for Mr. Ely: in the words of Congress, that he "would have … married" by nine months before Mr. Taylor died but could not do so "because such [marriage] would have been unlawful … under the laws of the State."[6] 42 U.S.C. § 416(g)(2). Indeed, given that SSA makes this type of determination even where the state law impediment to marriage (i.e., preventing divorce where a spouse is institutionalized) is *lawful*, there is no justification for its refusal to do where the state law impediment to marriage (i.e., prohibiting marriage between same-sex couples) is *unconstitutional*. The inquiry here is even more straightforward than the one involving institutionalization, because it does not require a factual determination about divorce from a third party. In sum, the government is readily equipped with the tools to provide survivor's benefits to individuals like Mr. Ely.

Mr. Ely's own facts here illustrate the type of proof that surviving same-sex spouses can provide to show that unconstitutional marriage laws caused them to be denied survivor's benefits. AR 88-98. He and Mr. Taylor had long wished to marry, built a life together for more than four decades, married as soon as they were able to do so, and loved and cared for each other until Mr. Taylor's dying breath. AR 88-98;

---

[6] The agency's own ALJ made this same observation in adjudicating a similar claim of a surviving same-sex spouse (who is also a putative class member here), noting that "[i]n both cases a legal impediment prevented marriage." Gonzales Decl., Attachment 1 at 4. Although she lacked jurisdiction to consider his constitutional claim, and thus had no choice but to deny him benefits, the ALJ explained that the purpose of the Social Security Act is not to "penalize marriages that are less than nine months due to no fault of the parties." *Id.* at 2; *accord* 42 U.S.C. § 416(k). As another example, 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).

accord Gonzales Decl. ¶¶ 23-29 (putative class member Gonzales married on literally the first day when marriage licenses were issued where he lived in New Mexico). Given that these facts concerning Mr. Ely's relationship are already before the Court, he respectfully requests that the Court order that SSA award him survivor's benefits,[7] while simultaneously clearing a similar pathway for other surviving same-sex spouses to show their entitlement to benefits in administrative proceedings.

III. Agency-Wide Declaratory and Injunctive Relief Is Warranted.

This Court has the authority and obligation to issue relief that mirrors the scope of a constitutional violation. That violation here is not limited to Mr. Ely but includes other surviving same-sex spouses who were denied survivor's benefits because of unconstitutional marriage bans. He thus requests agency-wide relief enjoining SSA from categorically denying survivor's benefits to all of these individuals and thereby affording them an equal opportunity to show their entitlement to such benefits. As explained below, this relief is warranted for two reasons, each independently sufficient: first, courts have consistently exercised their authority to remedy the full extent of a constitutional violation, and second, this case meets all of the criteria for certification of a class action seeking declaratory and injunctive relief.[8]

A. Courts Have Consistently Exercised Their Inherent Constitutional Authority to Remedy the Full Scope of a Constitutional Violation.

First, "the scope of injunctive relief is dictated by the extent of the violation established." *Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, 138 S. Ct. 377 (2017). When confronted with an unconstitutional exclusion, the appropriate remedy is not to

---

[7] In the alternative, to the extent the Court deems a further agency hearing is necessary, Mr. Ely requests that the Court order SSA to conduct such a hearing within 30 days.

[8] In the event that the Court rules against Mr. Ely on the merits, however, it need not rule upon the motion for class certification, because the question of what scope of relief is appropriate (e.g., individual versus agency-wide relief) will be moot at that point.

surgically excise one individual from its reach; it is to enjoin enforcement of the exclusion as a whole. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (refusing to stay portion of injunction that "covered not just [plaintiffs], but parties similarly situated to them"); *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (declining to narrow scope of injunction to cover fewer individuals); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining government action "unconstitutional on its face, and not simply in its application to certain plaintiffs"). Indeed, the relief ordered in cases involving same-sex couples seeking access to marriage, which generally were not brought as class actions, illustrates the point: the appropriate remedy was to enjoin the enforcement of that unconstitutional exclusion as a whole—not merely to permit only the named plaintiffs to marry. *See, e.g.*, *Latta*, 771 F.3d at 476-77; *Majors*, 14 F. Supp. 3d at 1315. Here, as well, this Court has the inherent constitutional authority to remedy the constitutional violation for all surviving same-sex spouses like Mr. Ely.

B. Class Certification and Class-Wide Relief is Warranted.

Second, Mr. Ely also seeks an order certifying a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permits class treatment where class-wide declaratory or injunctive relief is appropriate. Class certification would provide a separate and independent basis for affording agency-wide relief, in addition to the Court's inherent constitutional authority. The proposed class, on whose behalf Mr. Ely brings constitutional claims, is defined below. Mr. Ely further requests an order appointing the undersigned counsel to represent the certified class pursuant to Rule 23(g).

Mr. Ely seeks to represent a class of similarly situated surviving same-sex spouses who face the same discriminatory treatment by SSA. As set forth in the complaint, the proposed class ("Class") is defined as follows: "All persons nationwide who (i) presented claims for and were denied, or will present claims for and be denied, social security spousal survivor's benefits based on not being married to a same-sex

spouse for at least nine months at the time of the spouse's death and (ii) were barred from being married for at least nine months by unconstitutional laws prohibiting same-sex couples from marriage." First Amended Complaint ("FAC"), ECF No. 18, at ¶ 16.

For the reasons explained below, the Class proposed by Mr. Ely should be certified. As a threshold matter, the Court has authority to adjudicate the claims of the putative Class members challenging SSA actions. By definition, Class members meet the presentment requirement of the Social Security Act, 42 U.S.C. § 405(g), and any exhaustion requirement should be waived. Class members' constitutional claims are collateral to their respective claims for benefits, they are irreparably harmed, and exhaustion would be futile. Class members also meet the statute of limitations, and venue is proper in this district because Mr. Ely resides herein.

The Class also satisfies all the requirements for certification under Rule 23. Joinder of all putative Class members is impracticable not only because of their numerosity, which exceeds the common threshold of forty individuals, but because they are geographically dispersed across the country, their financial circumstances may prevent them from pursuing individual cases, and they include future applicants for survivor's benefits. Mr. Ely's claims are common to, and typical of, those of the Class because Mr. Ely and all members of the Class raise the same constitutional questions and experience the same constitutional injury resulting from SSA's exclusion of same-sex spouses from survivor's benefits when they were unconstitutionally barred from meeting the marriage duration requirement. Mr. Ely and his counsel will also fairly and adequately represent and protect the interests of the Class.

Finally, like other class actions challenging statutes on constitutional grounds, this action seeks declaratory and injunctive relief applicable to all Class members and is properly certified under Rule 23(b)(2). *See, e.g., Plyler*, 457 U.S. at 202 (class action challenging Texas statute barring undocumented immigrant children from school as violating right to equal protection); *Zablocki v. Redhail*, 434 U.S. 374, 376-77 (1978) (class action challenging Wisconsin statute barring parents with outstanding child

support obligations from marrying without a court order as violating rights to equal protection and due process); *see also* Charles Alan Wright et al., 7AA Federal Practice & Procedure § 1776.1 (3d ed.) (Rule 23(b)(2) "has been utilized to protect a variety of constitutional rights," including in actions challenging statutes on equal protection and due process grounds). Plaintiff's motion for class certification should be granted.

1. The Court Has Authority to Adjudicate Class Members' Claims.

Class relief is authorized under the Social Security Act "so long as the membership of the class is limited to those who meet the requirements of [42 U.S.C. § 405(g)]." *Yamasaki*, 442 U.S. at 701. Section 405(g) of the Social Security Act sets forth the requirements for judicial review of social security decisions, including that the Secretary has rendered a final decision and that the case be brought within sixty days of a final decision in the district where the claimant resides. 42 U.S.C. § 405(g). In *Eldridge*, 424 U.S. at 328, the Supreme Court addressed the "final decision" requirement, holding that the only jurisdictional element of section 405(g) is the "presentment" requirement—that a claim for benefits have actually been presented to SSA. *Id*. at 328. The other prong of the "final decision" requirement—that a claimant exhaust administrative remedies—is waivable, either by SSA or the court. *Id*. So, too, are the statute of limitations and venue requirements. *See Salfi*, 422 U.S. at 764. As set forth below, the proposed Class meets the presentment and statute of limitations requirements, and the exhaustion requirement should be waived. The Class also meets the venue requirement because the named plaintiff, Mr. Ely, resides in the district. *See In re Bozic*, 888 F.3d 1048, 1053 (9th Cir. 2018).

Additionally, should the Court find it does not have authority over Class members' claims under section 405(g), Mr. Ely has also invoked the Court's mandamus jurisdiction under 28 U.S.C. § 1361, which provides an independent ground for jurisdiction.

a. The Proposed Class Meets the Presentment Requirement.

The proposed Class, by its definition, meets the presentment requirement. The Class is framed in terms of surviving spouses who have presented, or will present in the future, claims for survivor's benefits to SSA. That is all that is required. *See Eldridge*, 424 U.S. at 328; *Dixon v. Bowen*, 673 F. Supp. 123, 127 (S.D.N.Y. 1987) (inclusion of future claimants in class deemed appropriate because "'such individuals will not actually be covered by any order or judgment until they do make a claim for benefits in some form, thus satisfying the presentment requirement'").

b. Exhaustion Should be Waived for Class Members.

The exhaustion requirement should be waived as to the Class. Waiver is appropriate where the claim is "(1) collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility)." *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993). The proposed Class meets all of these considerations.

First, Class members' claims challenge the constitutionality of SSA's application of the marriage duration requirement to surviving same-sex spouses barred from meeting it by unconstitutional marriage laws—an attack to the policy itself, not to the ultimate specific determination of their own benefits. Because "their challenge to the policy rises and falls on its own, separate from the merits of their claim for benefits," *id*. at 921-22 (quotation omitted), it meets the requirement of collaterality. *See also Eldridge*, 424 U.S. at 330 (constitutional challenge to SSA policy is collateral to substantive claim of entitlement to benefits). Class members are entitled an injunction against the unconstitutional barrier that currently deprives them of an equal opportunity to demonstrate the legitimacy of their relationships, and that is true regardless of whether a particular claimant is ultimately awarded survivor's benefits. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (holding that an individual suffers an equal protection injury from "the inability

to compete on an equal footing" with others, "not the loss of" the benefit itself).

Second, insisting that each Class member exhaust would result in irreparable injury. Each Class member has been denied equal access to safety-net benefits designed to protect seniors upon the loss of a spouse and without which they may struggle to make ends meet. *See Massachusetts*, 682 F.3d at 11 (noting that same-sex spouses' loss of survivor's benefits is a "major detriment[] on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans"). As the Ninth Circuit has made clear in this context, "economic hardship constitutes irreparable harm: back payments cannot 'erase either the experience or the entire effect of several months without food, shelter or other necessities.'" *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) (quoting *Briggs v. Sullivan*, 886 F.2d 1132, 1140 (9th Cir. 1989)); *see also Johnson*, 2 F.3d at 922 ("economic hardship suffered by the plaintiffs while awaiting administrative review constitutes irreparable injury"). Furthermore, the deprivation of constitutional rights "will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (loss of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable injury"). As a practical matter, even the uncertainty surrounding Class members' ability to access survivor's benefits also negatively impacts their current ability to plan around retirement, including life-altering decisions about when they will be able to retire. *See, e.g.*, Obergefell Decl. ¶ 33; Gonzales Decl. ¶ 45.

Finally, requiring Class members, who challenge the constitutionality of SSA's policy of denying survivor's benefits to same-sex spouses barred from meeting the marriage duration requirement, to exhaust administrative remedies would be futile. As the Supreme Court has held, "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109

(1977). In a constitutional challenge to a system-wide policy, there is no need for every claimant to present a detailed factual record before the constitutional claim can be addressed, nor would the court benefit from agency expertise. *See Briggs*, 886 F.2d at 1140. Under these circumstances, "[r]equiring each individual to exhaust his administrative remedies would result in a considerable waste of judicial resources." *Johnson*, 2 F.3d at 923. Indeed, Mr. Ely's case illustrates the point: his claim was pending in administrative proceedings for more than three years, but each decision-maker in that administrative process was powerless to adjudicate his constitutional claim.

c. Class Members Meet the Sixty-Day Filing Requirement.

There is no question that the statute of limitations—which generally requires claimants to file in federal court within sixty days after a final decision by SSA, 42 U.S.C. § 405(g)—is satisfied by Class members who have been denied survivor's benefits by SSA at any administrative level within sixty days of the filing of the complaint here or who have live claims for benefits pending in the pipeline of administrative appeals. *See Johnson*, 2 F.3d at 923-24. It is also satisfied by future claimants. *See id.* at 923-24 (citing *Briggs*, 886 F.2d at 1146). To the extent that SSA contends that there are any Class members who have failed to meet this requirement, it should be waived, under the circumstances of this constitutional challenge. *See Lopez v. Heckler*, 725 F.2d 1489, 1505-06 (9th Cir. 1984), *judgment vacated on other grounds*, 469 U.S. 1082 (1984).

d. The Court Has Mandamus Jurisdiction Over the Class.

Alternatively, should the Court find it does not have authority over Class members' claims under section 405(g) of the Social Security Act, Mr. Ely has also invoked the Court's mandamus jurisdiction under 28 U.S.C. § 1361. The Ninth Circuit has held that mandamus actions may lie against the Secretary to compel compliance with constitutional requirements. *See Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983) (holding that 28 U.S.C. § 1361 is "an independently adequate ground for

jurisdiction" over "challenges to the execution of constitutional duties"). Mandamus jurisdiction is available "to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984). Here, were the Court to conclude that Class members do not meet the requirements of section 405(g), "the remedy would be inadequate and mandamus jurisdiction would be fully available as an alternative basis of jurisdiction." *Lopez*, 725 F.2d at 1507-08. The Secretary owes Class members the clear, nondiscretionary duty not to violate their rights to equal protection and due process in administering the Social Security Act. She "has no discretion to provide less than that constitutionally required." *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part, rev'd in part on other grounds*, *Yamasaki*, 442 U.S. at 682. The Court therefore has mandamus jurisdiction over the Class.

2. The Numerosity, Commonality, Typicality, and Adequacy Requirements of Rule 23(a) Are Satisfied Here.

A lawsuit can be maintained as a class action if it satisfies the threshold requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *See Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998). Here, Mr. Ely seeks certification of a class that clearly meets the standards of both Rule 23(a) and Rule 23(b)(2).

Under Rule 23(a), a class should be certified if the named plaintiff in the litigation can fulfill the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Mr. Ely satisfies each of these four requirements.

a. Joinder of All Class Members Is Impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although there is no fixed number of class members necessary to satisfy the numerosity requirement, a class with forty or more members generally raises a presumption of impracticability of joinder. William Rubenstein, et al., 1 Newberg on Class Actions § 3.12 (5th ed.).

Here, Mr. Ely has submitted expert testimony identifying several hundred

putative Class members, based on a detailed analysis of statistical and Census data on same-sex households. Expert Decl. of Gary J. Gates, Ph.D. ¶ 21. Specifically, Dr. Gates conservatively estimates that in the fourteen states that wholly barred same-sex couples from marriage until after the Supreme Court's June 26, 2015 decision in *Obergefell*, 405 of the same-sex couples who married in 2015 also experienced the death of one spouse and left a surviving spouse from a marriage of less than approximately six months in duration. *Id*. Because this analysis provides an estimate only from the states where marriage bans were struck down by *Obergefell*, there are undoubtedly surviving same-sex spouses in the other thirty-six states whose loved ones also died fewer than nine months after the unconstitutional barriers to their marriages were removed.

To be clear, these statistical analyses do not capture how many of these surviving spouses have already presented claims to SSA for survivor's benefits, but all of these surviving spouses either already have done so or may do so in the future, and all of them will be denied pursuant to SSA's marriage duration requirement.[9] Under these circumstances, "'common sense and reasonable inferences from the available facts show that the numerosity requirement is met.'" *Lowe v. Maxwell & Morgan PC*, 322 F.R.D. 393, 399 (D. Ariz. 2017). As Mr. Ely seeks only injunctive and declaratory relief on behalf of the Class, the numerosity requirement is relaxed in any event, and the reasonable inference from Dr. Gates's analysis is that the number of Class members who have been and will be denied survivor's benefits is sufficient to make joinder impracticable. *See Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004).

Sheer numbers, however, are not the only measure of impracticability of joinder. The proposed Class is also dispersed across the country, and as it is composed of people being denied critical safety-net benefits, limited financial resources may make individual

[9] It bears noting that the putative Class is a finite group, as the last marriage bans were struck down in 2015. As there are age limitations on applying for survivor's benefits, 42 U.S.C. §§ 402(e)(1)(B), 402(f)(1)(B), however, many may not yet have applied.

lawsuits difficult. *See Jordan v. Cty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982) ("other factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder"), *cert. granted, judgment vacated on other grounds sub nom. Cty. of Los Angeles v. Jordan*, 459 U.S. 810 (1982). Finally, the Class includes future members who will present claims for survivor's benefits and be denied. "The joinder of unknown individuals is inherently impracticable." *Jordan*, 669 F.2d at 1320. For all of these reasons, joinder of putative class members is impracticable and Rule 23(a)(1) is satisfied.

b. There Are Common Questions of Law or Fact.

Rule 23(a)(2)'s commonality requirement mandates the presence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Even a single common question can satisfy this requirement so long as "the class members have suffered the same injury" and their claims stem from a common contention "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation and internal quotation marks omitted). In a civil rights suit, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). *See also* Wright, 7AA Federal Practice & Procedure, at § 1763 ("class suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)").

As explained in greater detail above in the merits discussion, the complaint identifies questions of law or fact common to the Class. These include whether SSA's denial of survivor's benefits to surviving same-sex spouses barred by unconstitutional marriage laws from meeting the marriage duration requirement for such benefits:

(1) violates the right to equal protection guaranteed by the Fifth Amendment to the U.S. Constitution by discriminating against these same-sex surviving

spouses on the bases of sexual orientation and sex and by denying them equal access to and protections for their fundamental liberty interests in forming an intimate family relationship with a person of the same sex, all without adequate justification, and

(2) violates the right to substantive due process guaranteed by the Fifth Amendment to the U.S. Constitution by infringing on the fundamental liberty interest in forming an intimate family relationship with a person of the same sex without intrusion, interference, or penalty by the government, all without adequate justification.

FAC ¶¶ 67-83. The putative Class members all suffer the same injury from SSA's denial of survivor's benefits, raising questions that apply to the Class generally and that do not materially vary by individual. Mr. Ely and the Class members collectively challenge SSA's denial of survivor's benefits to those surviving same-sex spouses who married as soon as practicable but were still unable to meet the marriage duration requirement because of unconstitutional laws that barred them from marrying sooner.

Nor is commonality defeated by the varied timing and circumstances surrounding Class members' marriages, the demise of the unconstitutional laws preventing those marriages, or their applications for survivor's benefits. Some Class members, like Mr. Ely, spent decades sharing their lives with their loved ones before their exclusion from marriage was struck down. *See, e.g.*, AR 94; Obergefell Decl. Some live in places where marriage bans remained in effect until the Supreme Court ruled them unconstitutional, *see*, *e.g.*, Obergefell Decl. ¶¶ 22, 34 (Ohio), while others live or married in places where state legislatures, state courts, or lower federal courts took action to end their unconstitutional exclusion from marriage, *see, e.g.*, *id.* at ¶ 19 (Maryland); Gonzales Decl. ¶ 23 (New Mexico); FAC ¶ 40 (Arizona). Some married the very first day when marriage licenses were issued where they lived, *see* Gonzales Decl. ¶¶ 23-28, while others, like Mr. Ely, married as soon as gathering together loved ones to share in their celebration, AR 94. Some moved mountains to be able to marry as their

loved one battled illness, Obergefell Decl. ¶¶ 19-21; *Obergefell*, 135 S. Ct. at 2594, and fought until the end to ensure their marriage would be recognized, Obergefell Decl. ¶¶ 22, 25-26; 135 S. Ct. at 2594-95. Some, like Mr. Ely, seek survivor's benefits because their spouse was the sole wage earner, AR 90, or higher wage earner, Obergefell Decl. ¶ 33, while others seek survivor's benefits starting at age 60 as the law permits, Gonzales Dec. ¶¶ 41-42.

But the relevant point is this: ***all*** Class members were or will be denied equal access to survivor's benefits, because they were prevented from marrying by nine months before their spouses' deaths by unconstitutional marriage bans, despite the Supreme Court's recognition of the constitutional harm from being forced to "remain strangers even in death." *Obergefell*, 135 S. Ct. at 2594. These kinds of differences in the factual background of each claim do not alter the ultimate legal questions, which are "applicable in the same matter to each member of the class." *Yamasaki,* 442 U.S. at 701. All Class members whom Mr. Ely seeks to represent raise these same constitutional questions. Those questions will "generate common answers apt to drive the resolution of the litigation," and the injunctive and declaratory relief sought in this action will resolve the class claims "in one stroke." *Wal-Mart*, 564 U.S. at 350.

c. Mr. Ely's Claims Are Representative of the Claims of the Class.

To meet the typicality requirement, Mr. Ely's claims must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The Ninth Circuit has instructed that "[t]he purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted). When the challenged conduct is a policy or practice affecting all class members, the commonality and typicality inquiries are similar, but "the typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class." *Armstrong*, 275 F.3d at 868-69. "In assessing typicality, the court considers the

nature of the claim or defense of the class representative, and not … the specific facts from which it arose or the relief sought." *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 241 (D. Ariz. 2001) (citation and internal quotation marks omitted).

Mr. Ely satisfies the typicality requirement for the same reasons he satisfies the commonality requirement. Like all putative Class members, Mr. Ely's claims stem from the consistent policy of SSA to deny survivor's benefits to same-sex spouses barred by unconstitutional marriage laws from meeting its marriage duration requirement. Mr. Ely and Class members have identical constitutional claims: in excluding them from eligibility for those benefits, SSA has deprived them all of equal protection and due process. Although the precise financial ramifications caused by the denial of survivor's benefits will vary for each Class member, it is the constitutional injury caused by the denial that Mr. Ely and all Class members share. *See Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (differences in effect of policy on class members does not alter that policy is unconstitutional as to every class member).

d. Mr. Ely Will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)'s final requirement is that the representative plaintiff must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). "Adequate representation depends on the qualification of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (internal quotation marks and citations omitted).

Mr. Ely will fairly and adequately protect the interests of Class members because they all have a common interest in securing equal access to survivor's benefits as compared to others. Mr. Ely is committed to the vigorous prosecution of this suit and views his interests as coextensive with the Class members, both known and unknown. Moreover, as shown below, Plaintiffs' counsel are competent and experienced in

relevant constitutional litigation, social security cases, and class actions.

3. Mr. Ely Satisfies the Requirements of Rule 23(b)(2).

In addition to satisfying Rule 23(a), a class action must meet the requirements of one of the provisions of Rule 23(b). This case fits squarely within Rule 23(b)(2), which authorizes class certification if "[t]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As the Ninth Circuit has explained, "the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686; *see also Walters*, 145 F.3d at 1047.

Whether a class may be certified under Rule 23(b)(2) depends on "whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010); see *Wal-Mart*, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory relief warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (internal quotation marks and citation omitted). That particular class members may have suffered different financial injuries—or no financial injury at all—as a result of the policy does not bar certification under Rule 23(b)(2). *Id.*; *see Walters*, 145 F.3d at 1047 ("We note that with respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. … It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole.").

Mr. Ely and all members of the Class have suffered or will suffer a violation of their rights to equal protection and due process as a result of SSA's denial of equal access to survivor's benefits. For the reasons detailed above, that denial discriminates on the basis of their sexual orientation and sex, and it infringes upon their fundamental liberty interests in forming an intimate family relationship with a person of the same sex.

This is precisely the type of charge of "unlawful, class-based discrimination" that the Supreme Court has described as a "prime example[]" of a Rule 23(b)(2) class action. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Because these same constitutional violations have been committed against each member of the Class, injunctive and declaratory relief for the Class as a whole is appropriate. Mr. Ely seeks to permanently enjoin SSA from categorically excluding all Class members from eligibility for survivor's benefits, thereby affording them an equal opportunity to show their entitlement to such benefits as other surviving spouses.

4. The Court Should Designate Plaintiff's Counsel as Class Counsel Under Rule 23(g)(1).

In conjunction with the certification of the class, Rule 23(g) requires that the district court appoint class counsel, ensuring that the attorneys appointed will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). The Court must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Lambda Legal, the office of Brian Clymer, Attorney at Law, and Menard Disability Law (collectively, "Plaintiff's Counsel"), which will jointly serve as counsel for the Class if the Court so designates them, satisfy each of these requirements.

Plaintiff's Counsel have worked with Mr. Ely for more than three years as he navigated administrative proceedings and prepared for this litigation. Throughout that time, Plaintiff's Counsel have worked to identify and assess Mr. Ely's claims and monitored and evaluated the claims and administrative appeals of other putative Class members. *See* Decl. of Peter Renn ¶¶ 2-4; Decl. of Brian Clymer ¶ 2. Plaintiff's Counsel have significant experience in both the substantive intricacies of social security law and complex constitutional litigation, providing substantial knowledge of the

relevant legal principles. Attorneys Clymer and Menard specialize in social security claims and have deep substantive expertise in this area. Clymer Decl. ¶¶ 1, 3. Lambda Legal and its counsel involved in this case have extensive experience litigating constitutional issues and actions seeking system-wide relief, including class actions challenging violations of federal constitutional law, as well as significant experience litigating on behalf of same-sex couples and lesbian, gay, bisexual, and transgender individuals seeking recognition of their civil rights at the local, state, and federal levels. Renn Decl. ¶¶ 5-12. Plaintiff's litigation team has dedicated, and will continue to commit, the appropriate staffing and material resources to the representation of the Class. In sum, Plaintiffs' counsel fully satisfy the criteria for class counsel set forth in Rule 23(g).

CONCLUSION

One of the greatest protections against unreasonable government action is "to require that the principles of law which officials would impose upon a minority must be imposed generally." *Diaz*, 656 F.3d at 1014 (internal quotation marks omitted). No one would accept for themselves, or their loved ones, the inequality and indignity that Mr. Ely and others like him have experienced.

Mr. Ely respectfully requests an order (1) reversing the agency's decision, (2) enjoining the agency from excluding surviving same-sex spouses like Mr. Ely, who were denied equal access to marriage nine months before their spouses' deaths by unconstitutional marriage laws, from survivor's benefits, and directing the agency to provide such individuals with an equal opportunity to show that they are otherwise entitled to survivor's benefits, (3) declaring the agency's exclusion of such individuals from survivor's benefits unconstitutional, and (4) directing payment of survivor's benefits to Mr. Ely or, to the extent this Court deems a further administrative hearing warranted, directing that such a hearing take place within 30 days.

Furthermore, Mr. Ely respectfully request that this Court certify, pursuant to Rules 23(a) and (b)(2), a Class consisting of all persons nationwide who (i) presented

claims for and were denied, or will present claims for and be denied, social security spousal survivor's benefits based on not being married to a same-sex spouse for at least nine months at the time of the spouse's death and (ii) were barred from being married for at least nine months by unconstitutional laws prohibiting same-sex couples from marriage. Mr. Ely also requests that the Court appoint the undersigned as class counsel pursuant to Rule 23(g).

Date: April 30, 2019

Respectfully submitted,

/s/ Peter C. Renn

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

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

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

Brian I. Clymer (AZBA No. 5579)
BRIAN CLYMER, ATTORNEY AT LAW
2601 N. Campbell Avenue, Suite 203
Tucson, AZ 85719

Autumn J. Menard (AZBA No. 033899)
MENARD DISABILITY LAW
177 N. Church Ave., Suite 200
Tucson, AZ 85701

Counsel for Plaintiff Michael Marvin Ely

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, I served the foregoing document on Defendant Nancy Berryhill through the CM/ECF system.

/s/ Jamie Farnsworth
Jamie Farnsworth
Paralegal