U.S. DISTRICT JUDGE JAMES L. ROBART
U.S. MAGISTRATE JUDGE J. RICHARD CREATURA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN JOSEPHINE THORNTON, on behalf of herself and all others similarly situated, and NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE,

Plaintiffs,

vs.

NANCY BERRYHILL, in her official capacity as the Acting Commissioner of the Social Security Administration,

Defendant.

Case No. 2:18-cv-01409-JLR-JRC

PLAINTIFFS' COMBINED OPENING BRIEF ON THE MERITS AND MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
August 12, 2019 (pursuant to ECF No. 52)

ORAL ARGUMENT REQUESTED

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ASSIGNMENT OF ERROR

The categorical exclusion of same-sex couples who were unable to marry from social security survivor's benefits violates the constitutional guarantees of equal protection and due process. Plaintiffs request that the Court enjoin this exclusion and declare it unconstitutional.

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 and inflict present and future harm based on their unconstitutional exclusion from marriage in the past. The Social Security Administration denied survivor's benefits to Plaintiff Helen Thornton because she and her late partner, Margery Brown, were not married—even though Washington barred them from marriage. Although Ms. Thornton and Ms. Brown were in a loving and committed relationship for more than 27 years until Ms. Brown died from cancer, they were barred from marriage throughout that time. Now 64 years old, Ms. Thornton must face the rest of her life without the financial protection that other surviving spouses are able to rely upon.

The federal government's denial of survivor's benefits to Ms. Thornton—and others like her, 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 categorical exclusion of same-sex partners from survivor's benefits that are conditioned upon marriage fails any level of constitutional scrutiny. By imposing criteria for survivor's benefits

that were legally impossible for individuals like Ms. Thornton to satisfy, the government discriminates based on sexual orientation and sex and burdens fundamental liberty interests that protect intimate family relationships. But for Ms. Thornton's same-sex relationship with Ms. Brown—a relationship secured to her by the Constitution and entitled to equal dignity and respect by the government—she would now be eligible to receive survivor's benefits. Her exclusion from survivor's benefits lacks even a rational basis. Requiring Ms. Thornton to have married Ms. Brown when it was legally impossible for same-sex couples to do so in Washington is disconnected from any government interest, such as cost savings, that could justify a marriage requirement for couples who were freely able to marry. Same-sex couples must have an equal opportunity to demonstrate the validity of their relationships.

Survivor's benefits function as a social safety net to catch those left behind after a time of crisis and to mitigate the financial disruption that follows the death of a loved one. There is no basis for carving out surviving same-sex partners like Ms. Thornton from that critical protection. To be clear, survivor's benefits are not government largesse: they are funded by the earning history of the deceased worker, 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 Ms. Thornton but for all surviving same-sex partners denied survivor's benefits because of discriminatory marriage laws. First, that scope of relief is precisely what courts issued when enjoining laws that excluded same-sex couples from marriage itself. Second, providing relief to Plaintiff National Committee to Preserve Social Security and Medicare ("National Committee"), which has members like Ms. Thornton who are harmed, necessitates an agency-wide remedy. Third, Ms. Thornton also moves to certify a class of

similarly situated individuals, which would provide the Court with another independent basis for affording complete relief. While there is a discrete pool of individuals like Ms. Thornton, they will suffer harm for the rest of their lives unless this Court provides a remedy.

STATEMENT OF FACTS

I. Ms. Thornton and Ms. Brown's Committed 27-Year Relationship

For twenty-seven years, Helen Thornton and Margery Brown were in a loving, committed, and intimate relationship. The Administrative Law Judge ("ALJ") for the Social Security Administration ("SSA" or "agency") acknowledged that the facts regarding the committed 27-year relationship of Ms. Thornton and Ms. Brown described below are uncontroverted. Administrative Record ("AR"), ECF Nos. 34 & 50, 172 (record pagination).

Ms. Thornton and Ms. Brown began dating in 1978 for more than a year and formed a committed relationship with each other in 1979. AR 70. They bonded over shared interests such a love of the arts, including film in particular, a passion for current affairs, and the fact that they were both family-oriented and wished to pursue a long-term relationship. AR 70. They jointly rented a home in 1981, and jointly purchased a home in Olympia, Washington in 1983 where Ms. Brown and Ms. Thornton lived together until Ms. Brown's death in July 2006. AR 70-71.

After they were together for a few years, Ms. Brown and Ms. Thornton decided to raise a family together. In 1984, they welcomed the birth of their son, Asa Brown Thornton, whom Ms. Thornton carried and Ms. Brown adopted. AR 71, 175. Ms. Brown and Ms. Thornton are listed as the parents on the birth certificate of Asa Brown Thornton that is filed with, and recognized by, the State of Washington. AR 71.

Throughout their 27-year relationship, Ms. Brown and Ms. Thornton publicly held themselves out to the world as the loving and committed couple that they were. They and their son Asa attended many extended family events (holidays, birthdays, anniversaries, and family reunions) together as a family. AR 76. Their friends and family also recognized them as a family. AR 76.

Ms. Brown and Ms. Thornton were an integrated economic unit, jointly sharing each other's income, assets, and liabilities. AR 70. Ms. Brown worked as an instructor at Evergreen State College in Olympia, Washington, and Ms. Thornton worked for many years at a food coop and later as a film programmer at an independent theater. AR 71. Ms. Brown and Ms. Thornton jointly borrowed funds to acquire their home, to pay for the education of their son, and to pay for other costs of raising and caring for their family. AR 71-72. Together, they remodeled their home. AR 71. They jointly assumed the substantial financial costs of Ms. Brown's graduate school education. AR 72.

Ms. Brown and Ms. Thornton cared for each other in sickness and in health. In 2003, Ms. Brown was diagnosed with ovarian cancer, and Ms. Thornton was the primary caregiver for Ms. Brown from her diagnosis until her death in 2006. AR 73. Ms. Brown suffered horribly during the three years of her cancer treatment, which included multiple of rounds of chemotherapy and lengthy hospital stays. AR 73. Ms. Brown was unable to keep food down for extended periods. She lost all of her hair and suffered from the combined effect of the aggressive ovarian cancer and the equally aggressive cancer treatments. AR 74. Ms. Thornton provided all of Ms. Brown's personal care during her three-year battle with cancer. AR 74.

Ms. Brown and Ms. Thornton were not only committed to each other but to each other's families. During the same period that Ms. Brown was undergoing multiple rounds of chemotherapy and other cancer treatments, tragedy struck a second time when Ms. Brown's sister, Kathy Brown, was diagnosed with life-ending cancer. Ms. Thornton assumed responsibility for caring for both Ms. Brown and her sister Kathy Brown. AR 73. Ms. Brown and Ms. Thornton jointly borrowed substantial funds to pay for Kathy Brown's health and living expenses during Kathy Brown's illness. AR 75.

Ms. Brown entered hospice care at home on May 9, 2006, and died from the cancer on July 9, 2006 at the age of 50. AR 75. Ms. Thornton made all the arrangements for Ms. Brown's funeral and burial. The gravestone lists the dates of Ms. Brown's life and also is engraved with

Ms. Thornton's name and date of birth. Ms. Thornton plans to be buried next to Ms. Brown. AR 75.

The will executed by Ms. Brown states that Ms. Brown is in a domestic partner relationship, and that Asa Brown Thornton is Ms. Brown's son. AR 90. Ms. Brown designated Ms. Thornton as her personal representative, and bequeathed her estate to Ms. Thornton, demonstrating Ms. Brown's intent for whatever financial resources she had at the end of her life to support Ms. Thornton. AR 90-91. Ms. Thornton's will, which was executed in 2004, similarly states that she is in a domestic partner relationship, designated Ms. Brown as her personal representative, and bequeathed her estate to Ms. Brown. AR 96-97.

As Ms. Thornton explains, "[t]he bare recitation of a few of the key facts of our relationship does not do justice to the depth of our love and our commitment to each other. We loved each other completely. We shared in our successes, our failures and our tragedies." AR 75.

II. Ms. Thornton and Ms. Brown's Unconstitutional Exclusion from Marriage

On many occasions during their relationship together, Ms. Thornton and Ms. Brown demonstrated their intent and desire to be married, including through their public commitment to each other, by raising a family together, and by their other public actions throughout their 27-year relationship. AR 60, 69. But throughout that time, same-sex couples were excluded from marriage in Washington and from its full range of corresponding legal rights. It was not until 2012 that Washington ended its exclusion of same-sex couples from marriage. Wash. Rev. Code § 26.04.010.

One consequence of Ms. Thornton and Ms. Brown's exclusion from marriage was their inability to access family health insurance benefits on equal terms as others. Although Ms. Brown was employed as an instructor at a public college, she was unable to enroll Ms. Thornton for health insurance coverage, which other state employees were able to obtain for their spouses. AR 60-61. In December 1999, Ms. Brown and Ms. Thornton, along with other similarly situated same-sex couples, filed a legal claim against the State of Washington challenging the denial of

health insurance benefits to same-sex partners of employees of the State of Washington. AR 60-61, 78-85. Ms. Brown and Ms. Thornton successfully advocated for the State of Washington to provide the same health insurance benefits to the same-sex partners of state employees as those provided to the spouses of state employees. AR 72-73, 119, 132-33, 146.

A newspaper article at the time reported on Ms. Brown's legal action. It quoted Ms. Brown and described her desire to marry Ms. Thornton: "'You can't get benefits because you can't get married,' Brown said, adding that she and Thornton would gladly marry if state law allowed it." AR 87. Pursuant to the settlement of the claim against the State of Washington, on November 8, 2000, Ms. Thornton and Ms. Brown executed, and the State of Washington acknowledged, a State of Washington "Declaration of Marriage/Same-Sex Domestic Partnership" certificate. The Declaration required affirmation of several facts concerning their relationship under penalty of perjury, including, among other things, that: they were in a same-sex domestic partnership; they shared the same residence; they agreed to joint responsibility for basic living expenses; they were each other's sole domestic partner and were responsible for each other's common welfare; and they were "same-sex partners who are barred from a lawful marriage." AR 153-54.

PROCEDURAL HISTORY

In January 2015, shortly before her sixtieth birthday, Ms. Thornton applied with SSA for survivor's benefits based on the work history of Ms. Brown. AR 16-19. 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.[1] 42 U.S.C.

[1] 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.

§ 402(e)(1)(B)(i). As relevant here, an individual must generally have been married 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, Ms. Brown contributed to social security with deductions from every paycheck she earned across her 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.

SSA denied Ms. Thornton's application for survivor's benefits. AR 20. It also denied her request for reconsideration because "at the time of Ms. Brown's death in 2006, the State of Washington did not recognize same-sex marriages." AR 190. But SSA acknowledged that documents "show[ed] Ms. Brown and Ms. Thornton were in a domestic relationship that the State of Washington recognized for some benefits as if they were a married couple." AR 190.

Ms. Thornton timely requested a hearing by an administrative law judge ("ALJ"). AR 33. On October 18, 2016, the ALJ conducted a hearing in which Ms. Thornton presented testimony, and Ms. Thornton's counsel presented argument. AR 13. SSA did not contest any of the evidence introduced by Ms. Thornton in the ALJ proceeding, or at any other time during the three-year administrative process. AR 166-187. The ALJ acknowledged that the "the facts [Ms. Thornton] is alleging in terms of their relationship [of Ms. Thornton and Ms. Brown] are uncontroverted here. We don't have anything that would suggest a reason to question that." AR 172.

The ALJ issued a decision dated January 10, 2017 concluding that Ms. Thornton is not eligible for survivor's benefits, because "the claimant was not legally married to the insured." AR 15. The Appeals Council denied review by letter dated July 23, 2018. AR 2.

Ms. Thornton is not alone in her exclusion from survivor's benefits. As detailed below, there are a number of surviving same-sex partners who have been deprived of equal access to survivor's benefits because of unconstitutional laws barring same-sex couples from marriage. That includes putative class member James Martin, who was with his same-sex partner for 37

years, and putative class member Keith Bradkowski, whose same-sex partner was working as a flight attendant on one of the aircraft flown into the World Trade Center on September 11th. Decl. of James Martin ¶ 16; Decl. of Keith Bradkowski ¶ 2. Individuals like Ms. Thornton are also included among the membership of Plaintiff National Committee to Preserve Social Security and Medicare. Decl. of Webster Phillips ¶ 8.

ARGUMENT

I. The Denial of Survivor's Benefits to Ms. Thornton 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 Ms. Thornton is the fact that she was not married to Ms. Brown—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 Ms. Thornton and Ms. Brown from marrying in the first instance, it is also unconstitutional for the government to rely on that exclusion to exclude Ms. Thornton from survivor's benefits for which she 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 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. This dignitary injury also cuts deeply here: notwithstanding the grief of losing the love of her life, the federal government has deemed Ms. Thornton not to be a "widower" under the Social Security Act—all because of her unconstitutional exclusion from marriage. 42 U.S.C. § 402(f); 42 U.S.C. § 416(g).

Because it was unconstitutional for a state like Washington to exclude Ms. Thornton and Ms. Brown, and others like them, from marrying one another, 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.[2] 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—Washington's exclusion of same-sex couples from marriage—as the basis for denying survivor's benefits to Ms. Thornton. Just as the surviving child in *Cox* was ineligible for survivor's benefits because of unconstitutional state intestacy laws, Ms. Thornton is similarly ineligible for survivor's benefits because of an unconstitutional state law barring her from marrying Ms. Brown. 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 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 Ms. Thornton now faces as a same-sex widower is one to which the federal

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[2] *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).

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 Ms. Thornton 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 Categorical Exclusion of Surviving Same-Sex Partners like Ms. Thornton from Survivor's Benefits Violates Equal Protection and Due Process.

The categorical denial of survivor's benefits to same-sex partners like Ms. Thornton 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 legal benefits conditioned on marriage. Regardless of the level of constitutional scrutiny employed, courts held 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 same-sex partners like Ms. Thornton 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 partners like Ms. Thornton based on both sexual orientation and sex. The government has also penalized her for her relationship with a person of the same sex—an exercise of a fundamental liberty guaranteed by due process—by depriving her 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 Ms. Thornton had been heterosexual, she would have been able to marry her partner, 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 are a vulnerable minority who 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 Ms. Thornton cannot be understood without reference to their sex. If Ms. Thornton had been a man in a relationship with Ms. Brown, her eligibility to marry and thereby obtain survivor's benefits would be unquestioned. But because Ms. Thornton is a woman who was in a relationship with another woman, she was denied the ability to marry 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 based on 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 Ms. Thornton of survivor's benefits because of her sex in relation to Ms. Brown, whom Ms. Thornton was barred from marrying.

The denial of survivor's benefits to same-sex partners 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 Ms. Thornton because she exercised her right to share her life with a woman, whom Ms. Thornton was barred from marrying, rather than a man, whom she would have been able to marry freely. The price that she 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 Partners like Ms. Thornton Fails to Rationally Further Any Legitimate Government Interest.

Although the categorical denial of survivor's benefits to same-sex partners like Ms. Thornton 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: requiring marriage of individuals like Ms. Thornton who were barred from marriage fails to advance any legitimate interest. Courts have consistently recognized that requiring marriage to qualify for benefits served no valid interest with respect to same-sex couples who 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"). 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." *Id.*; *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). Indeed, Ms. Thornton was able to obtain health insurance benefits as the same-sex partner of Ms. Brown, who was a public employee, after the couple pursued similar legal claims.

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. The Court acknowledged its earlier case law upholding the constitutionality of distinctions between married and unmarried different-sex couples in eligibility for death benefits but found that analysis clearly inapplicable to same-sex couples who could not marry. *Id.* at 334.

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.[3] 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).

1. Cost Savings Cannot Justify the Denial Here.

First, to the extent that the marriage requirement seeks to promote cost savings, the

[3] *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, 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).

categorical exclusion of surviving same-sex partners like Ms. Thornton—who were barred from marriage—from survivor's benefits lacks any rational connection to that objective. As a threshold matter, 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). The government "must do more than justify its classification with a concise expression of an intention to discriminate." *Id.*

Nor can the denial here be justified by a desire to limit survivor's benefits to those most likely to be in a close or financially interdependent relationship with the deceased, because the only conceivable proxy for such considerations employed here—marriage—was not 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 thus 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). There is no basis for discriminating against a surviving same-sex partner like Ms. Thornton, whose love and commitment to Ms. Brown was as deep and profound as any heterosexual surviving spouse who was able to marry his or her loved one. The same is true for the immeasurable grief Ms. Thornton felt when that bond was broken by death.

It would also be especially unfair to permit the government to rely upon the notion that it is "saving" money here by categorically excluding same-sex partners like Ms. Thornton from survivor's benefits, because those benefits are funded by the labor of the deceased workers at

issue. Same-sex couples like Ms. Thornton and Ms. Brown have been denied the benefit of the bargain between the government and workers: workers must give up a percentage of their income to fund social security, and in exchange, they and their surviving loved ones receive a specific amount of benefits based on how much the workers paid in to the system. But the government has not provided same-sex couples who were barred from marriage with the benefit of this arrangement. Ms. Thornton simply seeks her fair share of what she is due: survivor's benefits tethered to the earning history of Ms. Brown and, in effect, funded by Ms. Brown's contributions deducted from her earned income.

Any contrary result would not only deny lesbian and gay couples of equal financial security; it would also inflict financial harm by depriving them of earned income in order to subsidize benefits for the majority from which they are excluded. *See Wiesenfeld*, 420 U.S. at 645 (striking down provisions of Social Security Act discriminating based on sex and emphasizing the particular injustice of a situation 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"). Indeed, given the number of same-sex partners barred from marriage over time where *both* individuals in the relationship are now deceased, the social security system has improperly benefited for decades from lesbian and gay couples, by taking part of their earnings while depriving them of equal access to the corresponding benefit that others receive. While there is no remedy that can redress those individuals' injuries, the Court can at least provide a remedy where a surviving partner is still alive.

The agency may wish to protect the Social Security Trust Fund; but its budget cannot be balanced on the backs of surviving same-sex partners deprived of equal access to benefits. In any event, after *Obergefell*, the pool of people in Ms. Thornton's situation is necessarily finite and dwindling. *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.

2. Administrative Efficiency Cannot Justify the Denial Here.

Second, the denial of survivor's benefits to surviving same-sex partners like Ms. Thornton cannot be justified by an interest in avoiding the administration of these benefits. Although an interest in administrative efficiency may justify a marriage requirement for different-sex couples who could freely marry, 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 partners 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, e.g., 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 partners like Ms. Thornton 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 partners like Ms. Thornton with a means of accessing survivor's benefits would not embroil the agency in unlimited individual determinations. While the harm to surviving same-sex partners like Ms. Thornton 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. As a result, those who were able to marry nine months before the death of their loved one, as generally required by the Social Security Act, can qualify for survivor's benefits. The removal of an unconstitutional barrier so that individuals in Ms. Thornton's situation can access survivor's benefits would not require unlimited numbers of individualized determinations nor impact otherwise eligible surviving spouses. *Cf. Gross*, 664 F.2d at 671-72.

Surviving same-sex partners like Ms. Thornton who were denied equal access to marriage must have the opportunity to show that they are similarly situated to others entitled to benefits. *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). 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*, 570 U.S. at 765; *see* 20 C.F.R. § 404.726.

Of particular relevance here, SSA already makes individualized determinations as a matter of course regarding whether a state law impediment prevented a claimant from marrying at a point in the past. Specifically, a claimant 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 kind of determination from being made for Ms. Thornton: in the words of Congress, that she "would have … married" at least nine months before Ms. Brown died but could not do so "because such [marriage] would have been unlawful … under the laws of the State."[4] 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, SSA is already readily equipped with the tools to provide survivor's benefits to individuals like Ms. Thornton.

Ms. Thornton's own facts here illustrate the type of proof that surviving same-sex partners can provide to show that unconstitutional marriage laws caused them to be denied survivor's benefits. She and Ms. Brown had long wished to marry, built a life together for nearly three decades, and loved and cared for each other until Ms. Brown's dying breath. AR

[4] The agency's own ALJ made a similar observation in adjudicating the claim of a surviving same-sex spouse who was able to marry but for less than nine months, noting that "[i]n both cases a legal impediment prevented marriage." Renn Decl., Ex. D (ALJ decision in claim of Anthony Gonzales, who is a putative class member in *Ely v. Berryhill*, No. 18-557 (D. Ariz.), which challenges the nine-month marriage duration requirement for same-sex spouses who were barred from marriage for nine months). Although the ALJ 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).

60, 69-76.[5] They even fought for, and obtained, government recognition of their relationship, which allowed Ms. Thornton to access health insurance as the same-sex domestic partner of Ms. Brown. AR 72-73, 119, 146, 153-154. Given that these facts concerning Ms. Thornton's relationship are already before the Court (and were not contested at any time during three-years of administrative proceedings before the SSA), she respectfully requests that the Court order that SSA award her survivor's benefits,[6] while simultaneously clearing a similar pathway for other surviving same-sex partners to show their entitlement to benefits in administrative proceedings. *See, e.g.*, Martin Decl. ¶¶ 16-18 (describing desire and efforts to marry).

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 Ms. Thornton but includes other surviving same-sex partners who were denied survivor's benefits because of unconstitutional marriage bans. She thus requests agency-wide relief enjoining SSA from categorically denying survivor's benefits to these individuals and thereby affording them an equal opportunity to show their entitlement to such benefits. As explained below, this relief is warranted for three reasons, each independently sufficient: first, courts have consistently exercised their authority to remedy the full extent of a constitutional violation; second, relief to Plaintiff National Committee requires agency-wide relief; and third, this case meets all of the criteria for certification of a class action seeking declaratory and injunctive relief.[7]

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[5] The testimony before the ALJ is also instructive. When Ms. Thornton was asked, "would you and Ms. Brown have become a married couple if the law of the State of Washington had allowed or recognized same-sex marriages prior to Marge's death," she responded, "Absolutely. We would have, definitely. We talked about wishing we could be legally married when we were first together. We were first together in 1979 and talked about it periodically throughout our 27-year relationship, that we would like to legally recognize our marriage." AR 177.

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

[7] In the event that the Court rules against Ms. Thornton 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.

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 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. Here, as well, this Court has the inherent constitutional authority to remedy the constitutional violation for all surviving same-sex partners like Ms. Thornton.

B. Agency-Wide Relief is Appropriate to Remedy the Injuries of Plaintiff National Committee to Preserve Social Security and Medicare.

Second, Plaintiff National Committee is an organization with members like Ms. Thornton whom the government has excluded from survivor's benefits, which affords an independent basis for the Court to issue agency-wide relief. The National Committee presented its claims to SSA on behalf of itself and its members by letter on October 15, 2018, requesting that the agency cease applying unconstitutional state marriage bans to deny survivor's benefits to members like Ms. Thornton. Phillips Decl., Ex. A. SSA acknowledged the letter and noted that the matters addressed were the subject of this pending litigation. *Id.*, Ex. B. The National

Committee has thus satisfied the "presentment" requirement for jurisdiction under the Social Security Act. *See Action All. of Senior Citizens v. Johnson*, 607 F. Supp. 2d 33, 39 (D.D.C. 2009), *aff'd sub nom.*, *Action All. of Senior Citizens v. Sebelius*, 607 F.3d 860, 862 n.1 (D.C. Cir. 2010) (holding that organizations satisfied presentment requirement).

An organization has standing when its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977). All of those elements are satisfied here: (a) National Committee members would have standing to sue in their own right, as demonstrated by Ms. Thornton's individual claim; (b) National Committee seeks to ensure that social security benefits are widely accessible, including to same-sex couples, for whom it has advocated, *see* Phillips Decl. ¶¶ 4-6; and (c) National Committee members need not participate for this Court to declare and enjoin as unconstitutional SSA's blanket exclusion of same-sex partners like Ms. Thornton from survivor's benefits. Courts have found broad relief to be especially appropriate in similar contexts where an organizational plaintiff challenged the lawfulness of government conduct. *See Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 809-11 (D. Ariz. 2015) (granting injunctive relief to all DACA recipients—particularly given harms faced by members of an organizational plaintiff—and rejecting government's attempt to narrow relief to the named plaintiffs), *aff'd*, 855 F.3d 957 (9th Cir. 2017).

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

Third, Ms. Thornton 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. The proposed class, on whose behalf Ms. Thornton brings constitutional claims, is defined below. Ms. Thornton further requests an order appointing the undersigned counsel to represent the certified class pursuant to Rule 23(g).

Ms. Thornton seeks to represent a class of similarly situated surviving same-sex partners 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 or will present claims for social security survivor's benefits based on the work history of a same-sex partner; (ii) were denied or will be denied social security spousal survivor's benefits based on not satisfying the marriage requirements of the Social Security Act; and (iii) were barred from marrying and otherwise satisfying such requirements because of unconstitutional laws prohibiting same-sex couples from marriage prior to their partner's death." Second Amended Complaint ("SAC"), ECF No. 46, at ¶ 21.

For the reasons explained below, the Class proposed by Ms. Thornton 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' 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 Ms. Thornton 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. Ms. Thornton's claims are common to, and typical of, those of the Class because Ms. Thornton 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 partners from survivor's benefits when they were unconstitutionally barred from meeting the statutory marriage requirements. Ms. Thornton and her 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* 7AA Charles Alan Wright et al, 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). Ms. Thornton's motion for class certification should be granted.

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

Class relief is permitted in a social security case "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 Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). 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, Ms. Thornton, 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), Ms. Thornton has also invoked the Court's mandamus jurisdiction

under 28 U.S.C. § 1361, which provides an independent ground for jurisdiction. SAC ¶ 18.

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 same-sex partners 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 statutory marriage requirements to surviving same-sex partners barred from meeting them 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 validity 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 safety net benefits designed to protect seniors upon the loss of their loved one 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, "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. Superior Court 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, the uncertainty surrounding Class members' ability to access survivor's benefits also negatively impacts their current ability to plan for retirement, including decisions about when they will be able to retire. *See* Bradkowski Decl. ¶ 27.

Finally, requiring Class members, who challenge the constitutionality of SSA's policy of denying survivor's benefits to same-sex partners barred from meeting the marriage requirements, 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 923-24. Indeed, Ms. Thornton's case illustrates the point: her claim was pending in administrative proceedings for more than three years, but each decision-maker in that administrative process was powerless to adjudicate her 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; *W.C. v. Heckler*, 629 F. Supp. 791, 806 (W.D. Wash. 1985). It is also satisfied by future claimants. *See Johnson*, 2 F.3d at 924 (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 § 405(g), Ms. Thornton has also invoked the Court's mandamus jurisdiction under 28 U.S.C. § 1361. SAC ¶ 18. 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 § 1361 "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); *see also Kildare*, 325 F.3d at 1083-84. Here, were the Court to conclude that Class members do not meet the requirements of § 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, Ms. Thornton 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). Ms. Thornton satisfies each of these four requirements.

a. Joinder of All 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 40 or more members generally raises a presumption of impracticability of joinder. Rubenstein, et al., 1 *Newberg on Class Actions*, § 3.12; *see also McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (finding numerosity requirement satisfied for class with 27 known members).

The precise number of putative Class members who have faced the same type of discrimination as Ms. Thornton is difficult to determine, but it is reasonable to conclude that it exceeds the threshold of forty. To be sure, same-sex households comprise a tiny minority of

American households,[8] and the number of unconstitutional marriage bans across the country decreased gradually from 2004 until 2015. But, given the periods when those exclusions were in effect, it is reasonable to infer that there are at least several dozen individuals throughout the country who are still living today whose loved ones died before marriage was available to them in their state. While few of these survivors may have already presented claims to SSA in light of the legal barriers to having their relationships recognized by the agency, all of them may do so in the future, and all of them will be denied pursuant to SSA's marriage requirements.[9] Under these circumstances, "general knowledge" and "common sense" allow the Court to infer that the numerosity requirement is met. *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 325 F.R.D. 671, 693 (W.D. Wash. 2016) (quotation omitted). *See also Does 1-10 v. Univ. of Wash.*, 326 F.R.D. 669, 679 (W.D. Wash. 2018) ("[A] court may draw a reasonable inference of class size from the facts before it.") (quotation omitted). As Ms. Thornton seeks only injunctive and declaratory relief on behalf of the Class, the numerosity requirement is relaxed in any event, and the reasonable inference 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); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1326-28 (W.D. Wash. 2015).

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 lawsuits difficult.

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[8] Same-sex couple households made up less than 1% of households in the United States in the 2010 Census. *See* Martin O'Connell & Sarah Feliz, U.S. Census Bureau, *Same-Sex Couple Household Statistics from the 2010 Census*, at 7 (Sept. 2011), *available at* https://www.census.gov/library/working-papers/2011/demo/SEHSD-WP2011-26.html.

[9] It bears noting that the putative Class is a finite group. As a practical matter, it is limited to individuals still living, whose partners died before marriage was available to them (with the last marriage bans being struck down in 2015), who did not possess rights of intestate succession (such as through domestic partnerships or civil unions) already making them eligible for survivor's benefits, 42 U.S.C. § 416(h)(1)(A)(ii), and whose eligibility has not been ended by a subsequent marriage to another person, 42 U.S.C. § 402(e)(1)(F)(ii) & (f)(1)(F)(ii), among other limitations.

See Jordan v. Los Angeles Cty., 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." *Id*. 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). "[C]ommonality poses a 'limited burden' because it 'only requires a single significant question of law or fact.'" *Dunakin*, 99 F. Supp. 3d at 1328 (quoting *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012)). 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 Fed. Prac. & Proc. Civ. § 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 partners barred by unconstitutional marriage laws from meeting the statutory requirements 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 partners 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.

SAC ¶¶ 87-103. 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. Ms. Thornton and the Class members collectively challenge SSA's denial of survivor's benefits to those surviving same-sex partners who would have met the statutory requirements but for unconstitutional laws that barred them from marrying.

Nor is commonality defeated by the varied timing and circumstances surrounding Class members' relationships, the demise of the unconstitutional laws preventing their marriages, or their applications for survivor's benefits. Some Class members, like Ms. Thornton and James Martin, spent decades sharing a life with their deceased partners, holding themselves out as a committed, intimate couple in every way. AR 69-76; Martin Decl. ¶¶ 9-17. Others were deprived of decades together by death. Bradkowski Decl. ¶¶ 4-8, 26. Some live in places where marriage bans remained in effect for a number of years after their partner's deaths, AR 189, while others may have lost their partners with the prospect of marriage around the corner. Some lost their partners after a lengthy illness, AR 74; Martin Decl. ¶¶ 21-24, and some lost them to sudden tragedy, Bradkowski Decl. ¶¶ 2, 26. Some, like Ms. Thornton, seek survivor's benefits because their partner was the primary wage earner, SAC ¶ 5; Martin Decl. ¶¶ 9, 27-29, while others seek survivor's benefits to allow them to retire or delay collecting on their own work history in order to maximize their income over time, Bradkowski Decl. ¶ 27.

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 before their partners' 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. *See also Does 1-10*, 326 F.R.D. at 680 (commonality satisfied where "the ultimate legal question in th[e] case … applies to all members of the proposed class … and its answer drives th[e] litigation."). All Class members whom Ms. Thornton 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. Ms. Thornton's Claims Are Representative of the Claims of the Class.

To meet the typicality requirement, Ms. Thornton'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. Typicality concerns "the nature of the claim or defense of the class representative, and not … the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation omitted).

Ms. Thornton satisfies the typicality requirement for the same reasons she satisfies the commonality requirement. Like all putative Class members, Ms. Thornton's claims arise from the consistent policy of SSA to deny survivor's benefits to same-sex partners barred by unconstitutional marriage laws from meeting the statutory eligibility requirements. Ms.

Thornton 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 Ms. Thornton 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. Ms. Thornton 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 Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (internal quotation marks and citations omitted). Stated differently, the Court must examine whether the named plaintiff and her counsel "(1) have any conflicts of interest with other class members and (2) will prosecute the actions vigorously on behalf of the class." *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671, 687 (W.D. Wash. 2018) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)).

Ms. Thornton 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 others. Ms. Thornton is committed to the vigorous prosecution of this suit and views her 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 and class actions.

3. Ms. Thornton 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 injunctive relief is appropriate respecting the class as a whole." Certification of a 23(b)(2) class "is intended for situations when broad class-wide injunctive relief is necessary to redress group-wide injury." *Williams v. Boeing Co.*, 225 F.R.D. 626, 631 (W.D. Wash. 2005). 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. 2009); 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 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). *Rodriguez*, 591 F.3d at 1125; *see also 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."). When "the relief sought is systemic, rather than individual, classwide injunctive or declaratory relief may be appropriate" under Rule 23(b)(2). *Wilbur v. City of Mount Vernon*, 298 F.R.D. 665, 669 (W.D. Wash. 2012).

Ms. Thornton and all members of the Class have 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. Ms. Thornton seeks to permanently enjoin SSA from categorically excluding all Class members from eligibility for survivor's benefits, which would afford all of them an equal opportunity to show their entitlement to such benefits as other survivors.

4. The Court Should Designate Plaintiffs' 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 and Nossaman LLP (collectively, "Plaintiffs' Counsel"), which will jointly serve as counsel for the Class if the Court so designates them, satisfy each of these requirements.

Plaintiffs' Counsel have worked with Ms. Thornton for more than three years as she navigated administrative proceedings and prepared for this litigation. Throughout that time, Plaintiffs' Counsel have worked to identify and assess Ms. Thornton's claims and monitored and evaluated the claims and administrative appeals of other putative Class members. *See* Decl. of Peter Renn; Decl. of Robert D. Thornton. Plaintiffs' Counsel have significant experience with class actions and complex constitutional litigation, providing substantial knowledge of the relevant legal principles. Nossaman and its counsel involved in this case are experienced litigators with a strong background in class action litigation and extensive knowledge of the facts in this case. R. Thornton Decl. ¶¶ 2, 5-7. Lambda Legal and its counsel involved in this

case have considerable 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. Plaintiffs' 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 Ms. Thornton and others like her have experienced.

Plaintiffs respectfully request an order (1) reversing the agency's decision, (2) enjoining the agency from excluding surviving same-sex partners like Ms. Thornton, who were denied equal access to marriage nine months before their partners' 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 Ms. Thornton, including that the agency perform any necessary recalculation of benefits, or, to the extent this Court deems a further administrative hearing warranted, directing that such a hearing take place within 30 days.

Furthermore, Plaintiffs respectfully request that this Court certify, pursuant to Rules 23(a) and (b)(2), a Class consisting of all persons nationwide who (i) presented or will present claims for social security survivor's benefits based on the work history of a same-sex partner; (ii) were denied or will be denied social security spousal survivor's benefits based on not satisfying the marriage requirements of the Social Security Act; and (iii) were barred from

marrying and otherwise satisfying such requirements because of unconstitutional laws prohibiting same-sex couples from marriage prior to their partner's death. Plaintiffs also request that the Court appoint the undersigned as class counsel pursuant to Rule 23(g).

Date: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing document will be accomplished by the CM/ECF system on May 28, 2019.

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