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.

ANDREW SAUL, in his official capacity as the Commissioner of the Social Security Administration,

Defendant.

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

PLAINTIFFS' REPLY BRIEF ON THE MERITS AND IN SUPPORT OF CLASS CERTIFICATION

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INTRODUCTION

To indulge the fiction that same-sex couples like Ms. Thornton and Ms. Brown have been treated equally by their government, this Court would need to close its eyes to reality and pretend that same-sex couples have always had equal access to marriage. But the history of how this country has long treated lesbian and gay couples cannot simply be ignored. In determining whether Defendant has discriminated against same-sex couples like Ms. Thornton and Ms. Brown, this Court must confront the undeniable legal reality that they did *not* have equal access to marriage. It is therefore not "equal" for Defendant to demand marriage—which was a legal impossibility for these same-sex couples under unconstitutional state law at the time—as a condition for their access to survivor's benefits.

Ms. Thornton's experience illustrates the point. "The Government does not dispute that Washington's marriage laws violated Ms. Thornton's and Ms. Brown's constitutional rights." Def. Br. 29. It also does not dispute *any* of Ms. Thornton's factual evidence supporting her claim, including the evidence that "but for Washington law, Ms. Thornton herself would have married." Def. Br. 35. No matter how the situation is analyzed, the result is always the same: Defendant has violated equal protection and due process, whether by relying upon an unconstitutional state law to deny federal benefits, or by conditioning benefits on discriminatory terms that same-sex couples who were barred from marriage could not satisfy on an equal basis as others. None of the government's interests, under any scrutiny, can justify those violations.

Just as the Court should not turn a blind eye to the harms suffered by Ms. Thornton, neither should it ignore the equally grave harms that others face. This Court has the authority to open the agency doors to all surviving same-sex partners like Ms. Thornton by providing them with the *opportunity* to access survivor's benefits. That does not require the Court to engage in any individualized determination, which the agency is already well situated to handle. Instead, it merely requires the Court to hold that Defendant's sweeping discrimination against those like Ms. Thornton does not comport with the constitutional guarantee of equal treatment and equal dignity for all.

I. Defendant's Reliance on Unconstitutional Marriage Laws Is Unconstitutional.

A. Defendant Relies Upon State Marriage Laws.

Defendant first argues that the agency ("SSA") does not look to state law in determining eligibility for survivor's benefits and therefore has not incorporated any unconstitutional state law into federal law. Specifically, SSA claims that it "does not rely upon an unconstitutional state law" because it instead "relies only on the *federal* definition of 'widow.'" Def. Br. 26 (emphasis added). But that is pure sophistry, because the federal definition of "widow" turns on state law. Under the Social Security Act, an applicant qualifies as a "wife, husband, widow, or widower" to the extent that "*the courts of the State* . . . would find that such applicant and such [deceased] individual were validly married." 42 U.S.C. § 416(h)(1)(A)(i) (emphasis added). The agency's implementing regulations are equally clear: "we look to the laws of the State" to evaluate an applicant's marriage to the deceased individual. 20 C.F.R. § 404.345.

Thus, for example, according to the plain terms of these statutory and regulatory provisions, whether Ms. Thornton was validly married necessarily turns on Washington state law. Defendant attempts to downplay the agency's reliance upon Washington state law in the record, Def. Br. 26 n.14, but the date when any given state permitted same-sex couples to marry is necessarily relevant to determining benefits eligibility. Indeed, the agency's own cited manual includes a chart of when same-sex couples were permitted to marry in all 50 states because, in its words, that date is relevant to determining "whether a marriage was validly entered into."[1] Similarly, the duration of a couple's marriage necessarily turns on their ability to marry, which is governed by state law and any facially discriminatory criteria contained therein.

Courts have confirmed that the Social Security Act incorporates state law in the analogous context of benefits for a surviving child, where eligibility also looks to state law. *See, e.g.*, *Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982). There is no relevant difference between the statutory language that incorporates state law to determine benefits eligibility for a

[1] SSA, POMS, GN 00210.003, Dates States and U.S. Territories Permitted Same-Sex Marriages, *generally available at* https://secure.ssa.gov/poms.nsf/home!readform.

surviving child versus a surviving spouse. *Compare* 42 U.S.C. § 416(h)(2)(A) (analyzing how "the courts of the State" would evaluate an applicant's right to inherit intestate) *with id.* § 416(h)(1)(A)(i) (analyzing how "the courts of the State" would evaluate an applicant's marriage); *accord* 20 C.F.R. § 404.345.

Binding Ninth Circuit precedent also confirms that where the government conditions a benefit on marriage, it necessarily relies upon state law governing eligibility for marriage. In *Diaz*, the State of Arizona provided health insurance benefits to the dependent of a state employee, which was defined by statute to include "'a spouse under the laws of this state.'" *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011). That *particular* statute did not reference sexual orientation or sex—just as Defendant argues here that the Social Security Act's definitions of "widow" and "widower" constitute "facially neutral criteria." Def. Br. 10. But the Ninth Circuit held that the government discriminated against same-sex couples because *other* state laws—upon which that statute necessarily relied—barred them from marriage. *Diaz*, 656 F.3d at 1013-14. By Defendant's reasoning, if the government can simply ignore how a term is actually defined in a law, then *Windsor* also only concerned "facially neutral criteria" because the statutory exemption to the federal estate tax was granted to any "surviving spouse." *United States v. Windsor*, 570 U.S. 744, 753 (2013); 26 U.S.C. § 2056(a).

Other courts have come to the same conclusion as *Diaz*. For example, a Michigan statute provided health insurance benefits to an individual who was "[m]arried to the employee" of the state or who was "eligible to inherit from the employee under the laws of intestate succession in this state." *Bassett v. Snyder*, 951 F. Supp. 2d 939, 948 (E.D. Mich. 2013) (internal quotes omitted). The mere fact that a statute "does not use the term 'sexual orientation'" does not negate that it may nonetheless facially discriminate based on sexual orientation. *Id.* at 963. That is because the statute "incorporates the definitions in the Michigan marriage amendment and the intestacy statute," both of which "distinguish between opposite-sex couples, who are permitted to marry and can inherit intestate, and same-sex couples, who cannot."[2] *Id.* The same applies to

[2] SSA similarly provides survivor's benefits to those with the right to inherit intestate under state law. 42 U.S.C. §

the Social Security Act's incorporation of facially discriminatory state marriage laws.

B. Reliance Upon Unconstitutional Marriage Laws Is Unconstitutional.

Having tethered federal law to state law, the constitutionality of the particular federal law here also rises or falls on the constitutionality of state law it incorporated. Defendant does not dispute that basic proposition, nor could it do so, as an overwhelming number of courts have confirmed in the analogous context involving intestacy. When states unconstitutionally excluded children born outside marriage from the right to inherit intestate, courts (including the Fifth, Eighth, and Eleventh Circuit) recognized that the federal government's reliance upon those unconstitutional laws in determining social security benefits eligibility for surviving children was also impermissible. Pl. Br. 10 n.2 (citing cases). Here, because states unconstitutionally excluded same-sex couples from the right to marry, the federal government's reliance upon those unconstitutional laws in denying benefits is likewise impermissible. The government cannot, as a constitutional matter, accomplish indirectly that which it could not accomplish directly.

SSA's sole response is that it has already discharged its constitutional duties, because it no longer enforces the so-called Defense of Marriage Act ("DOMA"). Def. Br. 27. That is a *non sequitur*. SSA conflates two distinct obligations: those relating to *Windsor* (striking down DOMA), and those relating to *Obergefell* (striking down state marriage exclusions). *Windsor*, 570 U.S. at 770; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). SSA argues that in order to comply with *Windsor*, the agency began to recognize, after 2014, the marriages of same-sex couples without regard to DOMA. Def. Br. 7. But, even setting to one side the harms caused by DOMA in "discourag[ing] [the] enactment of state same-sex marriage laws" for many years, *Windsor*, 670 U.S. at 771, the agency has not come into full compliance with *Obergefell*, issued in 2015. That is because it continues to rely upon unconstitutional state marriage exclusions in

416(h)(1)(A)(ii). But the group at issue here was also unlawfully deprived of the legal benefits of marriage, in addition to its status, which is yet another way in which Defendant has engaged in discrimination. *Accord* Pl. Br. 8 (benefits of marriage cannot be denied). SSA has no response to this point, apart from its unsupported assertion that a claimant must first argue the intricacies of a constitutional claim to an agency with no jurisdiction to consider it. *See, e.g.*, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16 (2012) (explaining that constitutional claims are "'beyond the jurisdiction of administrative agencies'").

determining benefits eligibility. Just as *Windsor* requires the agency to evaluate benefits eligibility without regard to DOMA, *Obergefell* requires the agency to evaluate benefits eligibility without regard to state marriage exclusions incorporated into federal law.

Far from a "mismatch," that remedy is precisely tailored to the injury inflicted *by Defendant*—the SSA Commissioner—who continues to rely upon unconstitutional marriage laws in excluding individuals like Ms. Thornton from survivor's benefits. Defendant's argument that there are *other* government actors (e.g., the State of Washington) who contributed to that injury, or to other injuries, is no defense. Def. Br. 28. The federal government chose to hitch its wagon here to state marriage laws—along with any constitutional violations contained therein. Nothing compelled that choice. *See Windsor*, 570 U.S. at 765 (noting that SSA can use criteria for evaluating relationships "regardless of any particular State's view on these relationships").

Injunctive relief that prevents SSA from continuing to rely upon unconstitutional laws in determining eligibility for benefits does not somehow constitute an award of damages for past constitutional violations, as Defendant insinuates. Def. Br. 28. Rather, it merely prevents SSA from continuing to inflict *present and future* harm based upon unconstitutional laws—a unique harm, as compared to past injuries caused by marriage exclusions, that Ms. Thornton and others like her currently experience each month they are deprived of benefits and which will persist until their death. That remedy is precisely what courts issued after the Supreme Court struck down unconstitutional state intestacy laws, by refusing to let SSA continue to rely upon them. *See, e.g.*, *Daniels v. Sullivan*, 979 F.2d 1516, 1521 (11th Cir. 1992) ("'the normal judicial remedy is to extend the benefits to the deprived group'"); *Handley v. Schweiker*, 697 F.2d 999, 1001 (11th Cir. 1983) (where the state intestacy law is unconstitutional, the court "must rectify the unconstitutionality by granting [social security] benefits"); *Cox*, 684 F.2d at 324.

II. Heightened Scrutiny is Required Here.

A. Imposing a Requirement that Same-Sex Partners Cannot Satisfy on an Equal Basis Because of Discriminatory Laws Is Not "Neutral."

Even if state marriage bans had never been struck down, SSA's conduct is still unlawful.

SSA advances the fiction that its marriage requirement is "neutral" as to same-sex couples who were barred from marriage by discriminatory laws that the agency enforced as a condition for benefits. That defense is foreclosed by precedent and divorced from reality and common sense.

Defendant has engaged in sexual orientation and sex discrimination in the exact same way that the government engaged in discrimination in *Diaz*, as explained above. In both cases, eligibility for benefits was conditioned on marriage, yet same-sex couples were barred by state law from satisfying those marriage-related requirements. The Ninth Circuit conclusively held that this constitutes discrimination based on sexual orientation. *Diaz*, 656 F.3d at 1014 (holding that the district court "correctly" "barr[ed] the State of Arizona from discriminating against same-sex couples in its distribution of . . . benefits"); *accord In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) ("This is plainly discrimination based on sexual orientation.").

Several aspects of *Diaz* are notable. First, there was no separate regulation specific to same-sex couples—as SSA incorrectly believes would need to exist here for it to have engaged in discrimination—because reliance on marriage laws that exclude same-sex couples already functions *identically* to such an imagined regulation. Second, the Ninth Circuit did not, as SSA urges here, view the "spouse" requirement as merely having a disparate impact on lesbian and gay workers. *Accord In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (such discrimination "'cannot be understood as having merely a disparate impact on gay persons'"). That was true even though heterosexual workers with unmarried partners were also excluded from benefits, because such an analysis would wrongly lump together those who *chose* not to marry with those who were *barred* from doing so by discriminatory laws. Third, *Diaz* cannot be dismissed as a case about animus, particularly given that it did not even address the lawfulness of the underlying marriage exclusion. To the contrary, heightened scrutiny is required even where the government's motivations for its discrimination are purportedly benign. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

Federal courts also overwhelmingly rejected the underpinning of Defendant's position in the intestacy cases concerning survivor's benefits for children. The Social Security Act provides

benefits to a surviving "child." 42 U.S.C. § 416(h)(2)(A). As here, the agency could not view that word in isolation, while ignoring how it was defined, and simply claim a mere disparate impact on children born outside marriage. Because federal law incorporated state intestacy law, it necessarily discriminated against children born outside marriage where state law did so. *See, e.g.*, *Daniels*, 979 F.2d at 1520 (regardless of whether state law was unconstitutional, "the Social Security Act's incorporation of the Georgia intestacy scheme violates equal protection").

Defendant's other arguments cannot obviate the discrimination at work here. First, neither of Defendant's hypotheticals (involving an FBI agent shot a week after his marriage and an individual prevented from marrying sooner because of wrongful incarceration[3]) involve discrimination at all, much less involving a suspect classification. They merely illustrate incidental—as opposed to facially intended—effects. Here, the federal government has *affirmatively* imported facially discriminatory state laws into the eligibility criteria that it controls and, indeed, helped to maintain those discriminatory state laws for most of modern history. *Windsor*, 570 U.S. at 771. That discrimination is not a mere collateral consequence of a bright-line rule; it is part of the bright-line rule itself.

Second, SSA argues it has not discriminated against Ms. Thornton because it was not "impossible" for Ms. Thornton or others like her to have married—by traveling to the other side of the country, or outside the country entirely—but "only impossible" where they lived. Def. Br. 25 (arguing that Ms. Thornton could have traveled to the Netherlands, Belgium, Canada, or Spain). That merely amplifies, rather than negates, the unequal treatment and liberty infringement here. Different-sex couples were not forced to travel out-of-state to marry as a condition for accessing survivor's benefits and, more importantly, when such marriages *were not recognized by their home state*.[4] That some same-sex couples voluntarily did so at all—enduring

[3] Defendant's latter hypothetical ignores that prisoners also cannot be denied the fundamental right to marry. *Turner v. Safley*, 482 U.S. 78 (1987).

[4] Not even SSA began recognizing such out-of-state marriages (entered into by same-sex couples whose home states barred their marriage at the time) until 2015—after it had already been sued. *See, e.g.*, *Williams v. Colvin*, No. 14-8874 (N.D. Ill.). Thus, same-sex couples would not have known at the time that traveling out-of-state would provide any basis for benefits, even if SSA contends they should have done so, given its statutory place-of-domicile rule. 42 U.S.C. § 416(h)(1)(A)(i). Tellingly, SSA now disregards that rule as to same-sex couples, recognizing it

indignity atop futility—does not change the legal analysis. No individual is obligated to accept second-class citizenship, much less rush out-of-state to do so. And requiring same-sex couples to travel out-of-state or out-of-country to marry, when heterosexuals were never put to that burden, and when such marriages were not recognized in their home states, is not "equal."[5]

Third, SSA argues that it cannot have discriminated against Ms. Thornton, because it does not discriminate against *other* groups of differently situated applicants based on their sexual orientation or sex. That does not follow. SSA need not discriminate against *all* lesbian and gay applicants in *all* contexts for it to discriminate here. Discrimination against a subset of a group is still discrimination. To illustrate, refusing to hire female workers with children is still sex discrimination even if an employer is willing to hire female workers without children. *See Latta v. Otter*, 771 F.3d 456, 484-85 (9th Cir. 2014) (Berzon, J., concurring and discussing Supreme Court precedent). Here, SSA argues that it no longer discriminates because survivor's benefits are "now" paid on equal terms. Def. Br. 6. But that can only logically encompass a different group: those who were not barred from equal access to marriage before their loved ones died. As to Ms. Thornton and the group here, however, SSA still discriminates against them. *Cf. Handley*, 697 F.2d at 1003 (focusing on the "subclass" of children denied benefits).

Fourth, Defendant accuses Plaintiffs of seeking, for those like Ms. Thornton, the "windfall" of an "extra" opportunity for accessing benefits unavailable to different-sex surviving spouses. Def. Br. 25. That makes no sense. Each individual has a single opportunity: either through marriage or—for those barred from marriage by unconstitutional state laws incorporated into federal law—the opportunity to show that such laws caused them to be denied benefits. *Cf. Diaz*, 656 F.3d at 1014 (requiring a pathway for same-sex couples to access benefits through domestic partnerships where they lacked equal access through marriage). The only windfall here is the one that SSA has long reaped from lesbian and gay couples, by taking part of their

would be unconstitutional to apply it to them.

[5] Such a requirement would also infringe upon the "fundamental right of free movement," which encompasses the right of citizens "'to dwell within the limits of their respective [s]tates.'" *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).

earnings while refusing to return them later in life on an equal basis.

Finally, SSA's rebuttal to the sex discrimination claim—that it would have denied survivor's benefits to a man who was not married to his female partner—plainly relies on someone who is not similarly situated to Ms. Thornton. The proper comparator for Ms. Thornton is a man who also wished to marry the woman he loved long before she died and did so because, unlike here, there was no legal barrier to the marriage. The reason he receives survivor's benefits, but Ms. Thornton does not, is because Ms. Thornton is a woman.

B. Defendant Burdens Fundamental Liberty Interests.

Defendant all but ignores Plaintiffs' due process claim, which independently requires heightened scrutiny even in the absence of any discrimination. Pl. Br. 15. Everyone possesses a fundamental liberty interest in forming an intimate family relationship with a person of their choice. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."). The marriage requirement, however, has burdened individuals like Ms. Thornton for their exercise of that liberty, because the laws relied upon by SSA to determine benefits eligibility prevented them from marrying their loved ones. SSA's claim of "neutral" treatment is nonresponsive to that due process claim, which turns on the burdens imposed by SSA's actions.

SSA claims that it never intervened in Ms. Thornton's relationship with Ms. Brown. Def. Br. 12 n.7. But liberty burdens do not only exist where the government physically restrains an individual from the exercise of a right. That would be a gross "failure to appreciate the extent of liberty at stake." *Lawrence*, 539 U.S. at 567. That is also why the Ninth Circuit required heightened scrutiny in *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008), where the military burdened the plaintiff's right to a same-sex relationship with the consequence of discharge. The denial of survivor's benefits here is no less consequential. *See Windsor*, 570 U.S. at 772-74. To illustrate, the denial of survivor's benefits has already forced a plaintiff in another action (who was able to marry his same-sex spouse but for less than the requisite nine months, Pl. Br. 22 n.4) to experience homelessness twice—sleeping in Walmart parking lots—

and to rely upon a local food bank. *Driggs v. Saul*, No. 18-3915, Dkt. 28 (D. Ariz. 2018).

Had individuals like this plaintiff forfeited their fundamental liberty interests, and instead entered into the different-sex relationships that the government had historically preferred for them, they would have escaped the harms they now face. But the Constitution does not permit the government to force them into that Hobson's choice.

III. Defendant's Exclusion Fails to Rationally Further Any Legitimate Interest.

Defendant's sweeping denial of survivor's benefits to individuals like Ms. Thornton fails rational basis review in any event. Even before the Ninth Circuit confirmed that sexual orientation discrimination requires heightened scrutiny, *SmithKline Beecham v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014), courts recognized that "a classification that adversely affects an unpopular group" requires "'more searching' rational basis review." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). SSA's garden-variety rational basis cases, Def. Br. 14-15, fail to negate that specific proposition. And searching review is particularly appropriate here, where SSA relies on an unconstitutional state law that starkly illustrates the anti-gay discrimination denounced in *Obergefell* and *Windsor*.[6]

A. Sham Marriages

Defendant argues that the wholesale exclusion of individuals like Ms. Thornton from survivor's benefits rationally advances the goal of detecting or deterring sham marriages—that is, "marriages [entered] for purposes of obtaining benefits." Def. Br. 4. That argument is incomprehensible on its face: the group at issue here consists only of same-sex couples who were barred from marriage in the first place, so any concern that they needed to be deterred from marrying for an *improper* purpose puts the cart before the horse. They were barred from marriage in their states for *any* purpose.

In defending the exclusion of same-sex couples from marriage, states similarly invoked

[6] 1998 Wash. Laws, ch. 1, § 1 ("It is the intent of the legislature . . . to fully exercise authority granted the individual states by Congress in [DOMA] to establish public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington, even if they are made legal in other states").

general concerns about avoiding fraudulent marriages entered solely for obtaining benefits. But courts recognized that a "purported interest in minimizing marriage fraud is in no way furthered by excluding one segment of the [] population from the right to marry based upon that segment's sexual orientation." *Bostic v. Rainey*, No. 2:13CV395, 2014 WL 10022686, at *14 (E.D. Va. Feb. 14, 2014). Requiring surviving same-sex partners like Ms. Thornton to have married their loved ones at a time when state law prevented them from doing so also "in no way further[s]" an interest in avoiding sham marriages. Rather, it erects an unlawful barrier that deprives same-sex couples like Ms. Thornton and Ms. Brown of an equal opportunity to demonstrate the non-fraudulent nature of their relationship through marriage. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (finding that the "blanket and conclusive exclusion" of a group from social security benefits was not "reasonably related to the prevention of spurious claims"). It is not rational for the government to treat one-hundred percent of the same-sex couples at issue here—who were prevented from marrying because state law prohibited their marriage—as fraudsters.

The difference in treatment is stark: whereas a heterosexual couple married for only nine months is entitled to survivor's benefits, a same-sex couple committed to each other for nearly thirty years, but unable to marry, is barred from such benefits. That sweeping exclusion is wholly discontinuous from any valid goal. *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *In re Levenson*, 560 F.3d at 1150-51. And maintaining that exclusion could not deter any sham marriages in the future, because the group at issue here is inherently finite and dwindling.

Using the duration of marriages as a proxy for whether they are non-fraudulent is only rational where the group has not been excluded from the right to marry in the first place. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court upheld the application of the nine-month marriage duration requirement to a woman who was only married to her husband for six months. Had Mr. and Mrs. Salfi married earlier, the government would have had greater confidence that their marriage was not a sham entered for purposes of obtaining benefits. But Ms. Thornton is not similarly situated to Ms. Salfi. While the use of a nine-month duration requirement may be justified as a proxy for detecting or deterring sham relationships between

different-sex couples—who have always enjoyed the ability to marry each other—it plainly cannot serve that function for same-sex couples like Ms. Thornton and Ms. Brown who lacked equal access to marriage. Defendant's rationale thus lacks even the minimally required "footing" in reality as to the group at issue here. *Heller v. Doe*, 509 U.S. 312, 321 (1993). As Defendant readily concedes, *Salfi* "did not address Plaintiffs' primary argument." Def. Br. 17.

SSA instead attacks a straw man—proceeding as if Plaintiffs challenge marriage-related requirements even as to those never barred by state marriage exclusions. Def. Br. 17-18. Not so. The remedy sought, which would still require claimants to demonstrate their entitlement to benefits, is limited to those whom Defendant has excluded from eligibility for survivor's benefits because they were barred from equal access to marriage. It would not provide relief to anyone else—including those like Mrs. Salfi with potentially non-fraudulent marriages, but who already had an opportunity to show that non-fraudulent nature through their marriages' duration. *See Harris v. Millennium Hotel*, 330 P.3d 330, 337 (Alaska 2014) (providing similar scope of relief).

B. Administrative Efficiency

Administrative efficiency also cannot justify excluding individuals like Ms. Thornton from survivor's benefits. The Ninth Circuit has already rejected reliance on "administrative burdens" as a rational basis for denying marriage-related benefits to same-sex couples where marriage bans prevented them from qualifying for such benefits—which is exactly the situation here. *Diaz*, 656 F.3d at 1014. That was true even though administering such benefits required a process for determining whether any particular same-sex couple was similarly situated to other couples eligible for benefits. The Ninth Circuit did not dismiss such a process as relying upon a "counterfactual universe." *Cf.* Def. Br. 3. Ultimately, the committed relationships of same-sex couples can be verified—whether through domestic partnership criteria or another means.[7]

SSA does not dispute that it *can* determine whether the marriage exclusions that it

[7] SSA already routinely makes fact-specific determinations regarding relationships, showing its clear ability to do so. That includes determining whether a couple was in a common-law marriage recognized under state law, 20 C.F.R. § 404.726, where every couple "will have a different story to tell." Def. Br. 4; *see also* Pl. Br. 21. And SSA is incorrect that survivor's benefits never turn on "the reason *why* the couple did not marry in time." Def. Br. 10. The situation of an institutionalized former spouse is one example among many. Def. Br. 22-23.

incorporated into federal law caused an individual to be denied survivor's benefits. That is illustrated by the fact that it has now made precisely such a determination for Ms. Thornton. Def. Br. 35; *accord* Def. Br. 36 (agreeing that there are a variety of "objective indicia" of committed relationships). SSA also does not deny that the agency could make the exact same determinations for, say, James Martin, Keith Bradkowski, or other members of the discrete group here. That it would simply rather not do so—for convenience—does not make it constitutional.

SSA admits there are individuals, like Ms. Thornton, with "a compelling argument that the reason they did not marry on time was because of state law," while speculating that there could be some with "weaker" facts. Def. Br. 34. But that does not make it rational to deny even the latter of simply the *opportunity* to demonstrate to SSA that their exclusion from marriage caused them to be denied survivor's benefits. That is the only relief sought here for other members of the class—not an award of benefits by this Court. *Cf. Jimenez*, 417 U.S. at 636-37 (requiring SSA to afford the opportunity to establish eligibility rather than conclusively denying benefits to the subclass at issue). SSA agrees that its staff can engage in "fact-specific inquiry" requiring "individualized adjudication." Def. Br. 31. But the problem is that, at present, they have no reason or legal basis for making those factual determinations unless this Court first holds what the Constitution requires. *Cf. Harris*, 330 P.3d at 337 (holding the exclusion of same-sex couples from death benefits unconstitutional while leaving any factual determinations to the agency). SSA admits its current limits: "the only relevant factual question[] before the agency . . . [was] whether [Ms. Thornton] was married." Def. Br. 2.

Defendant's reliance on *Salfi*—again, a case about a heterosexual couple—is misplaced. Def. Br. 23. The problem is not that the government failed to create an "exception" for same-sex couples like Ms. Thornton and Ms. Brown; it is that the government excluded them from equal access to survivor's benefits in the first instance. That is not a quibble about nudging the dividing line to the left or right but an unconstitutional exclusion of a class of people built into the law itself by virtue of relying on state marriage laws. Notably, the relief in *Diaz* was also not framed as a domestic partner "exception" to the general rule that required marriage for benefits.

As here, it was curing an unconstitutional exclusion. That is singularly "the courts' authority and responsibility"—not a duty that can be abdicated to the legislature that caused the constitutional violation. *See Golinski*, 824 F. Supp. 2d at 1002; *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

C. Limiting Benefits Based on Financial Dependence

For many of the same reasons why avoidance of sham marriages fails to provide a rational basis for the discrimination at issue here, the goal of distributing survivor's benefits based on financial dependence fares no better in providing a rational basis for denying benefits to same-sex couples who have been barred from marriage.

"[M]arriage may serve as an adequate proxy [of financial dependence] for opposite sex couples," but for same-sex couples who have been barred from marrying one another, "marriage cannot serve as the way to determine whether . . . the survivor is 'sufficiently dependent to justify awarding benefits.'" *Harris*, 330 P.3d at 337. It is not rational to treat same-sex couples who were barred from marriage as somehow incapable of forming relationships that are profoundly committed in every respect—including mutual financial support. *Diaz* confirmed the point: the government had limited health insurance coverage to an employee's "dependents," which was defined to include spouses, but the Ninth Circuit held that the government had impermissibly excluded same-sex partners from qualifying as dependents to the extent they were barred from marriage. 656 F.3d at 1010. Financial interdependence is no less common between committed same-sex couples who wished to (but could not) marry than between similarly situated heterosexual couples who could do so. *See Harris*, 122 P.3d at 335 (observing that "same-sex couples have the same level of love, commitment, and mutual economic and emotional support as married couples and would choose to get married if they were not prohibited by law from doing so") (quotes omitted); *see, e.g.*, AR 71-72, 153; Martin Decl. ¶ 9; Bradkowski Decl. ¶ 19.

In providing child survivor's benefits to those with the right to inherit intestate, Congress may have also sought to utilize a proxy for financial dependence; but courts recognized that such a proxy impermissibly denied benefits to the subset of children who were born outside marriage

and who had been excluded from state intestacy laws. *Cox*, 684 F.2d at 313-14, 323.

SSA's cited authority supports, rather than undermines, Plaintiffs' position. *Califano v. Jobst*, 434 U.S. 47, 53 (1977). It confirms that the government "may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Id.* Like race and religion, sex and sexual orientation are also "totally irrelevant," *id.*, to one's capacity and likelihood of forming financially interdependent relationships. Indeed, the case cites the specific example of *Loving v. Virginia*, 388 U.S. 1 (1967), where there was unconstitutional discrimination in access to marriage, as an obvious contrast to situation before the Court, where that was not at issue. *Jobst*, 434 U.S. at 54 & n.11 (noting that government cannot "interfere with the individual's freedom to make a decision as important as marriage" nor "foist orthodoxy on the unwilling by banning . . . nonconforming marriages").

Finally, "preserving the limited financial resources of the Social Security program," Def. Br. 20—which are funded by the earnings of individuals like Ms. Brown—is not a valid basis for refusing to return those earnings to surviving same-sex partners on an equal basis. Pl. Br. 18-19.

IV. Agency-Wide Relief is Required to Remedy the Constitutional Violation.

A. Agency-Wide Relief is Tailored to the Nature and Scope of the Violation.

Agency-wide relief should be granted because the agency's policy with respect to surviving same-sex partners like Ms. Thornton unconstitutionally deprives all of them of the same thing: "equal footing in [their] quest for a benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 667 (1993). Defendant claims that Article III constrains this Court from granting relief to anyone *except* Ms. Thornton, but that is incorrect. There is no question that Ms. Thornton has standing to bring her claims, and enjoining enforcement of an unconstitutional law is intrinsic to the judiciary's authority. Pl. Br. 24; *see, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). This is equally true of a statutory scheme that is unconstitutional as applied to a vulnerable minority, such as the same-sex couples here who were prevented from meeting marriage-related requirements by state marriage laws. The Ninth Circuit enjoined just such a scheme in *Diaz*,

blocking that statute's application to all Arizona employees with a same-sex partner, because they could not marry as required to access family health coverage. 656 F.3d at 1010.

Defendant's arguments would strip federal courts of authority ever to enjoin an unconstitutional law beyond the individuals before it. Under Defendant's logic, Mildred and Richard Loving would have been the only interracial couple free from criminal prosecution under Virginia's anti-miscegenation law; Edie Windsor's marriage alone would have been recognized while DOMA continued to erase all others under federal law; and only the individual *Obergefell* plaintiffs could have married while other same-sex couples would have remained barred. *Loving*, 388 U.S. at 2; *Windsor*, 570 U.S. at 749-52; *Obergefell*, 135 S. Ct. at 2593. But that has never been the law or historical practice. Moreover, Defendant's suggestion, unsupported by precedent, would increase judicial and individual burdens from piecemeal litigation. The Ninth Circuit was thus "unpersuaded by the Administration's arguments in favor of a blanket restriction on all nationwide injunctions" in the very case that Defendant cites. *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018); *cf.* Pl. Br. 24.

Defendant also cites *Marbury v. Madison*, but that case affirms that "a law repugnant to the constitution is void." 5 U.S. at 180. Nor is this a case like *Gill v. Whitford*, 138 S. Ct. 1916 (2018), where dilution of a plaintiff's "individual and personal" right to vote is not common to all other voters in the state, but instead occurs through "packing and cracking" votes based on factors particular to "specific districts." *Id.* at 1929-30 (quote omitted). Here, in contrast, the challenged policy is a singular, sweeping exclusion that applies in the same way to all same-sex survivors who were blocked from satisfying the marriage requirement by unconstitutional marriage laws. *Alvarez v. Smith*, 558 U.S. 87 (2009), is still further afield. Def. Br. 39-40. Defendant relies on *Alvarez*'s instruction that "no justiciable controversy exists" once an injury has been "remedied," but nothing about Ms. Thornton's injury has been redressed, in contrast to the situation of mootness of *Alvarez*. Defendant also points to the guidance in *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), Def. Br. 40, but that case confirmed that "there is no bar against nationwide relief . . . even if the case was not certified as

a class action," as the many examples previously discussed illustrate.

The fact that Ms. Thornton qualifies both to represent a class of similarly situated surviving partners, and to obtain agency-wide relief independently, does not constitute some underhanded effort to seek "two bites at the apple," Def. Br. 41, but simply follows from the nature of her claims. The relief sought here would enjoin the agency's absolute bar on allowing any same-sex survivor barred from marrying their loved one to make their case before the agency. Dkt. 46 at 21-22. Ms. Thornton seeks no adjudication of others' "uniquely personal" marriage details or benefits by this Court. Def. Br. 42. She asks merely to open the agency doors for others to make their own case. Dkt. 46 at 21-22. This is thus not a case where "further findings" are necessary before that relief can be granted. Def. Br. 39. Rather, the invalidity of a rule categorically blocking a group of same-sex surviving partners from the safety net that others receive—based solely on unconstitutional marriage restrictions—is clear as a matter of law. In any event, the record here confirms the nationwide impact of the challenged agency conduct. And, as with marriage exclusions, only systemic relief can prevent Defendant from "reinforc[ing] messages of stigma or second-class status," which is necessary for complete relief to any individual. *SmithKline Beecham*, 740 F.3d at 483.

B. The National Committee Has Standing to Remedy Its Members' Injuries.

The National Committee has associational standing to sue on behalf of its members and to obtain relief for them. Lacking any substantive objection, Defendant instead tries to diminish the National Committee as a "nominal" plaintiff that has "purportedly" brought claims. Def. Br. 42.

First, Defendant asserts that the National Committee "appears not to be asserting any claims," Def. Br. 42, but that blatantly distorts the complaint. The complaint expressly defines "Plaintiffs" to include all named plaintiffs, including the National Committee, Dkt. 46 ¶ 1, and alleges both constitutional claims on behalf of all Plaintiffs. *Id.* ¶¶ 87, 99; *see also* ¶ 12 ("Together, Ms. Thornton and the National Committee respectfully ask this Court to declare unlawful and enjoin" Defendant's unconstitutional conduct); ¶ 86 (Defendant's conduct "violates the constitutional rights of Ms. Thornton and other similarly situated surviving same-sex partners,

including National Committee members, to equality and liberty"). Defendant's suggestion that the National Committee "has not asserted any claim" is patently false. Def. Br. 43.

Second, Defendant protests that the National Committee identifies "only" Ms. Thornton as a member, and claims that is inadequate for representational standing. Def. Br. 44. Defendant's argument—while inventive—is not the law, as its own cited authorities demonstrate. For example, Defendant relies on *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004). But *Smith* affirmed the standing of an organization on the same facts, which are commonplace in representational standing cases: an organization asserted representational standing based on one identified member, who was also an individual plaintiff. 358 F.3d at 1100. The Ninth Circuit confirmed the organization's "representational standing" on that basis. *Id.* at 1104; *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977) (an "association must allege that . . . *any one of*" its members is suffering injury—not two) (emphasis added; quote omitted). Ms. Thornton is that identified member, and the case law makes clear that this is sufficient—regardless of whether that member also has sued in their individual capacity.[8] And Defendant's rank speculation that the National Committee's membership could not include anyone else barred from marrying their same-sex partner is contrary to the record and illogical.

Finally, Defendant appears to suggest that no organization could *ever* satisfy the presentment requirement, but it cites no case for that proposition. That would be contrary to both well-settled associational standing cases, confirming that organizations can assert the rights of even one member, and to on-point authority in the social security context. Pl. Br. 25. Defendant does not dispute that if the National Committee is a proper party, relief is required for its members.

C. Class-Wide Relief is Both Appropriate and Warranted.

SSA's objections to class certification are fatally flawed. Having misconstrued the Court's authority, the scope of the proposed class, and the requested relief, SSA fails to

[8] *See, e.g.*, *Vietnam Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 205 (N.D. Cal. 2012) ("the Ninth Circuit has allowed associations to represent classes along with individual plaintiffs"); *Levine v. Johanns*, No. C 05-04764 MHP, 2006 WL 8441742, at *2, 10, 19 (N.D. Cal. Sept. 6, 2006) (finding sufficient allegations of harm where organizational members also sued as individual plaintiffs).

undermine the propriety and necessity of certifying the proposed class.[9]

1. The Court Has Jurisdiction Over the Proposed Class.

SSA's objections to this Court's jurisdiction, whether under 42 U.S.C. § 405(g) or mandamus, are unsupportable. First, class members who will present their claims for benefits to SSA in the future meet § 405(g)'s presentment requirement. "The inclusion of future class members in a class is not itself unusual or objectionable," and "[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010). The same principle applies to social security class actions. Surviving same-sex partners like Ms. Thornton "who 'will file' claims will become members of the class only *after* they have presented their applications for benefits to the [agency]." *Hill v. Sullivan*, 125 F.R.D. 86, 94 (S.D.N.Y. 1989). They therefore "will not actually be covered by any order or judgment until they do so." *Andre v. Chater*, 910 F. Supp. 1352, 1357–58 (S.D. Ind. 1995). Inclusion of class members who will present their claims in the future is particularly proper in an action challenging continuing social security adjudication practices. *See*, *e.g.*, *Small v. Sullivan*, 820 F. Supp. 1098, 1112 (S.D. Ill. 1992); *Dixon v. Bowen*, 673 F. Supp. 123 (S.D.N.Y. 1987). As the Court found in *Dixon*,

> Inclusion in the class of those who apply for benefits after the entry of the [injunctive relief] protects applicants who would otherwise have to wait for [an unconstitutional denial of their benefits] before they seek a post-hoc remedy. Such unnecessary harm and repetitive litigation is precisely what the class action device is designed to prevent. Where the challenged practice is alleged to be continuing . . . the class properly includes future as well as past applicants who will be affected by it.

673 F. Supp. at 127 (quotation omitted). Thus, "individuals become class members only when they apply for benefits." *Id*; *see also*, *e.g.*, *Alexander v. Price*, 275 F. Supp. 3d 313 (D. Conn. 2017) (certifying class including future claims of Medicare recipients); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560 (N.D. Cal. 2007) (certifying class including future claims presented by dual

[9] SSA argues that even if the Court rules against Plaintiffs on the merits, it should go on to certify the class. But that would be gratuitous to the outcome (where no one is afforded relief in any event), and it would have the needlessly harsh consequence of depriving those who file their own individual cases of the chance to be heard directly.

eligible individuals challenging denial of prescription drug programs).[10] The same is true here.

Second, with regard to the exhaustion requirement, SSA merely states that the Court should not waive it, but SSA fails to refute that class members' claims meet the established criteria for waiver: collaterality, irreparability, and futility. Def. Br. 31. At most, SSA's focus on the allegedly "highly fact-specific" nature of class members' claims, *id*., can be construed as an attack on the collaterality of those claims to class members' entitlement to benefits. But SSA fundamentally misjudges the nature of the claims before the Court, which center not on class members' individual entitlements to benefits but on the agency's blanket application of the marriage requirement to them—an unconstitutional barrier that denies them equal footing in seeking survivor's benefits.[11] *Cf. Ne. Fla. Chapter*, 508 U.S. at 666. "They [seek] the invalidation of a rule used to determine eligibility for benefits rather than the denial of benefits in a particular case," *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993), as "the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). This is the essence of collaterality, and because SSA's systemic policy controls the outcome for all class members, "nothing is gained 'from permitting the compilation of a detailed factual record, or from agency expertise.'" *Johnson*, 2 F.3d at 922.

Third, citing only that the standard for waiving the 60-day limitations period for class members is "daunting," Defendant fails to address why the nature of this constitutional challenge should not overcome that standard. Def. Br. 31-32. To the extent the Court declines to waive the limitations period, the class definition can be modified to include those class members who applied for spousal survivor's benefits and were denied at any administrative level within sixty days of the filing of Ms. Thornton's complaint, those whose claims are presently in the administrative process, and those who will apply and be denied in the future.

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[10] SSA misreads this opinion, Def. Br. 31, which indicates that future claimants fulfill the presentment requirement and does not address exhaustion. *Id*. at 557, 560.

[11] In truth, the facts SSA claims need development relate to whether particular individuals qualify as class members, which, as discussed *infra* and as SSA concedes, Def. Br. 31, are assessments the agency is well qualified to make in carrying out this Court's mandate to cease the unconstitutional application of the marriage requirement.

Finally, the Ninth Circuit has repeatedly recognized that mandamus actions may lie against the Commissioner. *See*, *e.g.*, *Kildare v. Saenz*, 325 F.3d 1078, 1084–85 (9th Cir. 2003); *Johnson*, 2 F.3d at 924-25; Pl. Br. 30-31. Such jurisdiction is particularly appropriate in matters challenging the Commissioner's execution of constitutional duties, *see*, *e.g.*, *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983), and is appropriate even for class members whose claims were not exhausted. *See Briggs v. Sullivan*, 886 F.2d 1132, 1141-42 (9th Cir. 1989). Mandamus thus provides an independent, alternative basis for this Court's jurisdiction over the class members' claims.

2. The Class is Clearly Defined and Satisfies Rule 23.

SSA's objections to the class definition attempt to inject ambiguity where none exists. As the framing of Plaintiffs' constitutional claims makes clear, clause (iii) of the class definition means that but for unconstitutional laws barring same-sex couples from marriage, these individuals would have been married for at least nine months at the time the deceased partner died. Both semantically and practically, these are the elements of the marriage requirements of the Social Security Act, 42 U.S.C. § 416(c) and (g), that surviving same-sex partners are precluded from ever meeting because of unconstitutional state marriage bans. SSA attempts to inject other statutory qualifications for benefits into the class definition, Def. Br. 32-33, but whether the relationship came to an end prior to the partner's death, or whether the surviving partner has remarried, are next-level agency inquiries that do not come into play until SSA's unconstitutional application of the marriage requirements is enjoined. Every person who meets the class definition is in need of the injunctive relief sought here in order to have their applications for survivor's benefits processed on equal terms. The class is sufficiently definite.[12]

SSA essentially argues that confirmation of class membership will be administratively difficult, but the Ninth Circuit has expressly rejected that any such purported burden bars certification of the class. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir.

[12] To the extent the Court deems additional precision necessary, however, the Court can modify the language to achieve that goal. *See Moore's Federal Practice* § 23.21 (3d ed. 2009).

2017) (Rule 23 "neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification[.]"). This is particularly the case for classes seeking injunctive relief under Rule 23(b)(2). *See Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1325-26 (W.D. Wash. 2015).

In actuality, whether an individual is a class member subject to this Court's injunctive relief is the type of determination squarely within SSA's expertise. For example, confirming that a same-sex couple would have been married for at least nine months but for the unconstitutional law in their state is directly parallel to—and no more "counterfactual" than—the inquiries SSA makes to determine whether a couple would have been married for nine months but for state law barring the deceased worker from divorcing an institutionalized spouse. *See* SSA, POMS, GN 00305.115, NH Unable to Divorce Institutionalized Prior Spouse. As well, the agency regularly engages in "fact-finding about the nature of specific romantic relationships," Def. Br. 33, in the contexts of common law marriage and SSI holding out provisions, by assessing verifiable indicia of a relationship and relying on statements from claimants, their family, and friends, and other credible evidence corroborating that the couple has integrated their lives. *See* SSA, POMS, GN 00305.065 Development of Common-Law (Non-Ceremonial) Marriages; SSA, POMS, SI 00501.152 Determining Whether Two Individuals Are Holding Themselves Out as a Married Couple. This includes situations "in which one of the two key witnesses will always be deceased, by definition." Def. Br. 33. *See* SSA, POMS, GN 00305.065(B)(3),(4) (identifying evidence to support common law marriage determinations when one spouse is deceased).[13] The class definition offers sufficient guidance for SSA to make these kinds of determinations here.

Turning to the actual requirements of Rule 23, SSA does not challenge either numerosity or adequacy of representation, but argues against a finding that the requirements for commonality, typicality, and injunctive relief under Rule 23(b)(2) have been met. Def. Br. 33-

[13] SSA requires the surviving spouse and certain family members to complete forms SSA has devised to gather this type of information. *See* Form SSA-754-F4, Statement of Marital Relationship (By One of the Parties), https://www.ssa.gov/forms/ssa-754.pdf; SSA, Form SSA-753, Statement Regarding Marriage, https://www.ssa.gov/forms/ssa-753.pdf.

38. Each of these arguments ignores the nature of the relief the class seeks: a declaration that SSA's blanket application of the marriage requirement to the class here is unconstitutional, and an injunction preventing that unconstitutional application and remedying its application to date.

SSA asserts that the facts of each individual's relationship are unique, but that is a distraction, because it ignores that the challenge here is to the categorical barrier that denies all class members of an equal opportunity to seek survivor's benefits. Though "the circumstances of each particular class member vary," they "retain a common core" of legal issues among them, thus establishing commonality. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quotation omitted). Class members do not merely allege a violation of the same law; they challenge "the constitutionality of [SSA's] policies and practices, which is a 'common question of law or fact' that can be litigated in 'one stroke.'" *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 969 (9th Cir. 2019) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

SSA's arguments against typicality fail for the same reason. SSA essentially argues that Ms. Thornton exemplifies the class definition *too* well, so her claims are not typical. Def. Br. 35-37. But typicality does not mean that other members have to meet the class definition in exactly the same way as Ms. Thornton. It means that their injuries must result from the same unconstitutional course of conduct. *See Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

Based on assumptions unsupported by the record,[14] SSA points to Ms. Thornton and Ms. Brown's son to suggest that Ms. Thornton's claims are not typical of the class. Def. Br. 36. While sharing a child is a factor that the agency may consider in analyzing a couple's relationship,[15] it is hardly necessary to Ms. Thornton's constitutional claims presented here, nor does it undermine the typicality of claims of the class, which turn on SSA's unconstitutional foreclosing of their ability to meet any of the marriage requirements of 42 U.S.C. § 416.

Finally, there is simply no question that the relief sought here is a unified declaration of

[14] Although Ms. Thornton and Ms. Brown jointly raised their son, Ms. Brown did not formally adopt him until he was 19 years old. *Cf.* Def. Br. 36 (discussing adoption of a minor).

[15] SSA's speculation that evidence of a family relationship based on having a shared child "will be unavailable to most class members," Def. Br. 36, is baseless, and ignores the "tens of thousands of children now being raised by same-sex couples." *Windsor*, 570 U.S. at 772.

and injunction against SSA's unconstitutional practices, as anticipated by Rule 23(b)(2). The result of that requested injunction is not individual "litigation," as SSA suggests, but ordinary implementation of that injunction. That this implementation process will involve SSA's adjudication of individual claims does not defeat the availability of Rule 23(b)(2) certification because "'questions of manageability . . . are irrelevant to [Rule] 23(b)(2) class actions.'" *Does 1-10 v. Univ. of Wash.*, 326 F.R.D. 669, 684 (W.D. Wash. 2018). In truth, the Court is not being asked to make individualized determinations about anything—whether a specific surviving partner's membership in the class or entitlement to benefits. Those are determinations to be made by the agency in complying with the injunction, which SSA has had to do on countless occasions.[16] Nor does the fact that disputes may arise over whether a particular class member is entitled to benefits change the unified nature of the injunctive relief; "such theoretical disputes do not defeat the availability of Rule 23(b)(2) certification." *Id.* at 684. Enjoining SSA's unconstitutional application of the marriage requirements does not mean every class member will receive benefits—merely that they have an opportunity to seek them. Contrary to SSA's tortured hypotheticals, Def. Br. 33-35, its duty is straightforward and constitutionally routine: it must restore class members "to the position they would have enjoyed" in the absence of discrimination. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). By certifying the class, the Court puts SSA on notice that anyone who meets the class definition, however they may meet it, is entitled to coverage of the injunction.

CONCLUSION

"Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding [discriminatory] system." *Milliken*, 433 U.S. at 283. This Court should hold the challenged agency conduct unconstitutional, award Ms. Thornton benefits, and certify the class so that others may have an opportunity to seek benefits.

[16] *See, e.g.*, *Johnson*, 2 F.3d at 921 (court ordered SSA to "readjudicate those claims that were denied under the [invalidated] policy"); SSA, *Hearings, Appeals, and Litigation Law Manual*, Chapter I-1-7. Class Actions, https://www.ssa.gov/OP_Home/hallex/I-01/I-1-7.html (addressing class action implementation, including processes for screening for eligibility for class relief, and adjudicating claims post-remand, including for unnamed class members).

Date: September 13, 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 September 13, 2019.

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