No. 20-16427

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL MARVIN ELY,

Plaintiff-Appellee,

v.

ANDREW M. SAUL, Commissioner of the Social Security Administration,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona, No. 18-cv-00557-TUC-BGM

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND GLBTQ LEGAL ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae National Center for Lesbian Rights and GLBTQ Legal Advocates & Defenders certify that amici curiae are nonprofit organizations, neither of which has a parent corporation, and neither of which issues public stock.

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INTEREST OF AMICI CURIAE[1]

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has participated as party counsel or amicus in cases addressing the rights of same-sex couples to marry and be recognized as married, as well as cases involving the rights of surviving same-sex spouses to receive spousal benefits.

GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation through strategic litigation, public policy advocacy, and education. GLAD has an enduring interest in equal treatment and respect for LGBTQ persons and families in all aspects of law, including respect for the constitutional rights of married same-sex couples and their children. GLAD's litigation includes both right to marry cases and respect for

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than Amici, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

existing marriages including in, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Massachusetts v. U.S. Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012) (invalidity of federal Defense of Marriage Act as applied to federal programs including Social Security benefits).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The same-sex couples in these cases[2] were committed married couples who intertwined their lives together for decades. After Plaintiffs-Appellees' spouses died, the Social Security Administration denied Plaintiffs-Appellees "widower's insurance benefits"—spousal survivor benefits—because the couples had not been married for nine months when the wage earner passed away. Under well-settled principles that prohibit SSA from incorporating unconstitutional state laws in determining eligibility for benefits, those denials are unlawful. They fail to account for the unconstitutional state laws that prevented these couples from obtaining a marriage license in their state in time to meet the nine-month requirement.

SSA claims to apply a neutral requirement to all couples regardless of sex, but that ignores that same-sex couples were wrongly excluded from the right to marry by unconstitutional state laws. To determine whether a worker's surviving spouse is eligible for survivor benefits, the Social Security Act relies on the law of

[2] In light of the common legal issues, Amici are submitting identical briefs in *Ely v. Saul*, No. 20-16427, *Driggs v. Saul*, No. 20-16426, and *Schmoll v. Saul*, No. 20-16445.

the worker's home state. It requires that the marriage have been: (1) recognized by "the courts of the State" of domicile when the worker died; and (2) entered into at least nine months before the worker died. *See* 42 U.S.C. §§ 416(h)(1)(A)(i), (c)(1), (g)(1). *Obergefell v. Hodges*, 576 U.S. 644 (2015), requires SSA to reconsider how it applies these requirements. SSA already recognizes that it cannot apply the first requirement to surviving same-sex spouses whose home states did not recognize their marriage when the worker died. But *Obergefell* also requires that SSA may not apply the second requirement to exclude same-sex couples who were wrongly barred from meeting the nine-month requirement by the same unconstitutional state laws.

The federal government may not rely on unconstitutional state laws when determining eligibility for survivor benefits. This principle is well-established in the context of Social Security benefits for workers' surviving children, a determination that similarly looks to state law. Courts have consistently held that the Social Security Administration cannot deny survivor benefits to a worker's children based on unconstitutional state intestacy or paternity laws. *See, e.g.*, *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982). The same reasoning applies to determinations for spousal survivor benefits. To "eradicate the constitutional flaw," *id.* at 324, SSA must take into account the unconstitutional state-law barriers that prevented same-sex couples from being married for the required duration.

In addition, *Obergefell* forecloses SSA's argument that to satisfy the marriage duration requirement, same-sex couples excluded from marriage in their home states should have traveled out of state to marry, or that those who did so should have done so sooner. *Obergefell* held that each state was required to permit same-sex couples to exercise the fundamental right to marry, notwithstanding that same-sex couples could already marry in some states. 576 U.S. at 681, 685-86 (App. B). This is consistent with the principle articulated in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), that a state cannot justify unconstitutional discrimination "by requiring resort to opportunities elsewhere." 305 U.S. at 350. The state marriage laws on which SSA relies to determine eligibility for survivor benefits unconstitutionally prevented same-sex couples from exercising their fundamental rights, regardless of whether some couples could have traveled to marry in other jurisdictions. SSA's categorical application of the marriage duration requirement to those whose home states prevented them from marrying replicates the constitutional violations condemned in *Obergefell*.

The court's class-wide remedy in *Ely* properly redresses the scope of the constitutional violation. The remedy eliminates the categorical exclusion of class members from access to benefits, but it does not entitle all class members to benefits. Rather, it provides an opportunity for class members to establish

eligibility based on their individual circumstances before SSA, which is well-equipped to make this determination.

ARGUMENT

I. The government's reliance on unconstitutional marriage laws to determine eligibility for survivor benefits replicates the constitutional violations condemned in *Obergefell*.

The government's arguments about the duration of marriage are predicated on the unconstitutional exclusions from marriage rejected by *Obergefell v. Hodges*, 576 U.S. 644 (2015). For the same-sex couples in these cases, nine months of marriage was foreclosed by state laws that unlawfully excluded them from marriage. Conditioning Social Security benefits on a requirement these couples could not satisfy on equal terms replicates the constitutional violations condemned in *Obergefell* by denying "the constellation of benefits that the States have linked to marriage." 576 U.S. at 670.

A. The federal government may not categorically deny Social Security benefits by relying on unconstitutional state laws to determine eligibility.

The federal government may not rely on unconstitutional state laws to deny survivor benefits to those who were unconstitutionally denied the opportunity to establish the required legal status. This principle is well-established in the context of Social Security benefits for workers' surviving children, and the same reasoning applies with respect to workers' surviving spouses.

1. It is well-established that the Social Security Administration may not rely on unconstitutional state laws to deny benefits to workers' surviving children.

In the 1970s and 1980s, the Supreme Court struck down state laws that discriminated against children born outside of marriage, holding that they violated the requirement of equal protection. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mills v. Habluetzel*, 456 U.S. 91 (1982). Under the Social Security Act, a child's eligibility for Social Security survivor benefits depends on how "the courts of the State" would evaluate their right to inherit intestate. 42 U.S.C. § 416(h)(2)(A). After the Supreme Court's decisions, courts evaluating children's eligibility for Social Security survivor benefits determined that the "the Social Security Act's incorporation" of such laws in determining the eligibility of nonmarital children for benefits also "violate[d] equal protection." *Daniels v. Sullivan*, 979 F.2d 1516, 1520 (11th Cir. 1992).

In *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982), the Fifth Circuit reversed the denial of Social Security benefits to a child whose legal relationship to the wage earner had not been recognized due to an unconstitutional Georgia intestacy law.[3] The court reasoned that "the structure and language of 42 U.S.C.A. §

[3] Before *Cox*, other courts evaluating Social Security appeals from surviving children whose legal relationship with the wage earner had not been recognized due to unconstitutional state statutes reached the same outcome, reversing the denial of benefits. *See Gross v. Harris*, 664 F.2d 667 (8th Cir. 1981) (applying *Trimble* retroactively to claims for benefits under the Social Security Act,

416(h)(2)(A) of the Social Security Act, referring to state law on intestate inheritance, makes relevant the issue of the constitutionality of a particular state law." 684 F.2d at 317. Because the Georgia statute was "essentially identical" to the statute struck down in *Trimble*, the court "declare[d] it unconstitutional without further discussion." *Id.* at 322. The court found further support for its holding in *Mathews v. Lucas*, 427 U.S. 495 (1976), which "suggested that if a state intestacy law unconstitutionally discriminated against an illegitimate child applying for survivor's benefits, he or she would be eligible under section 416(h)(2)(A)." *Cox*, 684 F.2d at 318 (citing *Mathews*, 427 U.S. at 515 n.18).

The Fifth Circuit built on *Cox* in reversing the denial of Social Security benefits to a child whose relationship with the worker had not been recognized due to an unconstitutional Texas law in *Smith v. Bowen*, 862 F.2d 1165 (5th Cir. 1989). When the child applied for benefits, the "Texas law afforded him no opportunity to establish his paternity because of the unconstitutionally short Texas statute of limitations." *Id.* at 1167. Because the evidence showed that a state court would have recognized the child's paternity "had he been afforded an opportunity to

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including those not pending when *Trimble* was decided); *Fulton v. Harris*, 658 F.2d 641, 643 (8th Cir. 1981) (applying *Trimble* to Social Security claim pending when *Trimble* was decided); *White v. Harris*, 504 F. Supp. 153, 155 (C.D. Ill. 1980); *Ramon v. Califano*, 493 F. Supp. 158, 160 (W.D. Tex. 1980); *Allen v. Califano*, 456 F. Supp. 168, 172 (D. Md. 1978).

establish it," the court reversed the denial of benefits and directed SSA to pay benefits to the plaintiff. *Id.* at 1167–68.

The Eleventh Circuit followed *Cox* in *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983). In *Handley*, the child's father was injured in a car accident four months before the child's birth. He remained in a coma until he died four months after the child was born. Alabama's statutory scheme provided several ways for a non-marital child to inherit from an intestate father, including by bringing a paternity proceeding during the father's lifetime. *See id.* at 1001. The court noted that "if the Alabama intestacy scheme is unconstitutional as to appellant[,] we must rectify the unconstitutionality by granting her children's benefits under section 416(h)(2)(A)." *Id.* Because Alabama law provided no mechanism for a nonmarital child to establish paternity or inherit intestate under these circumstances, the court found that "Alabama's intestacy scheme effectively denied appellant any means through which to become legitimated or qualify herself to inherit from her father's estate." *Id.* It noted that the child had been denied benefits "because of a procedural requirement . . . which has nothing to do with her needs or her father's wishes, and which both she and her father were powerless to change." *Id.* at 1003. It also noted that the mother "had at most four months during which to sue [for paternity]—virtually no time at all with which to cope with the disruption caused by her child's birth and by the fatal illness of the child's father." *Id.* at 1002. The

court concluded that "access to the legal means of legitimation was never effectively open under the Alabama intestacy scheme," and that the statutory scheme violated the child's constitutional rights. *Id.* at 1003. The court therefore reversed the ruling below and held that the child was entitled to benefits. *Id*. at 1006.

The Eleventh Circuit confirmed these principles in *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992), holding that the SSA's "incorporation" of the state statutory scheme violated the plaintiff's right to equal protection. *Id.* at 1520. Like *Cox* and *Handley*, *Daniels* concerned "the constitutionality of the Secretary's denial of survivors benefits" to a worker's child who could not inherit intestate under state law. *Id*. at 1519. The plaintiff argued that Georgia's requirement to establish paternity during the father's lifetime violated his right to equal protection. *Id.* at 1518. The court concluded that "the Social Security Act's incorporation of the Georgia intestacy scheme violates equal protection." *Id.* at 1520. Because "the Secretary [of Health and Human Services] violated [the child's] right to equal protection," the court "consider[ed] the 'remedy necessary to bring the . . . scheme into comportment with constitutional requirements . . . .'" *Id.* at 1521 (quoting *Handley*, 697 F.2d at 1006). Following *Cox* and *Handley*, it held that the child was entitled to benefits. *See id*. at 1521–22.

Only the Fourth Circuit has taken a different view, but when it most recently considered this issue, the Supreme Court granted certiorari, vacated, and remanded due to the government's concession that it cannot rely on unconstitutional state laws to deny benefits. *Lawrence v. Chater*, 516 U.S. 163, 165 (1996) (per curiam) (noting SSA's changed interpretation of the Social Security Act as "requir[ing] a determination, at least in some circumstances, of whether the state intestacy statute is constitutional"), *granting cert., vacating, and remanding Lawrence v. Shalala*, 47 F.3d 1165 (4th Cir. 1995).

2. The reasoning in the cases involving survivor benefits for children applies with equal force to survivor benefits for spouses.

The reasoning in the cases involving survivor benefits for children applies with equal force to survivor benefits for spouses who were unconstitutionally prevented from being able to establish their legal relationship with the wage earner nine months before their spouses passed away. Plaintiffs-Appellees are similar to the plaintiff in *Cox*, who would have received an order establishing the legal relationship with the wage earner "[h]ad Georgia made available . . . a procedure," 684 F.2d at 323, and to the plaintiff in *Handley*, for whom "access to the legal means of legitimation was never effectively open under the Alabama intestacy scheme," 697 F.2d at 1003. Like the plaintiff in *Handley*, the couples here were denied Social Security benefits because of a legal requirement under state law they

"were powerless to change." *Id*. While the Social Security Administration had not prevented the children in these cases from obtaining state recognition of their relationships with the wage earners in the first instance, its "incorporation" of state laws with respect to the plaintiffs violated equal protection, and its "determination of eligibility for Social Security survivors benefits was unconstitutional." *Daniels*, 979 F.2d at 1520, 1521 n.6.

In relying on state law to determine same-sex spouses' eligibility for survivor benefits, the Social Security Administration cannot ignore the unconstitutional state-law barriers that prevented same-sex couples from being married for nine months. In invalidating the "Defense of Marriage Act" under the Fifth Amendment and holding that the Fourteenth Amendment's liberty and equality guarantees required states to allow same-sex couples to marry, the Supreme Court in *Windsor* and *Obergefell* clarified what that should mean with respect to protections and responsibilities of marriage. *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013). Specifically, "aspects of marital status" include "the rights and benefits of survivors," and "[v]alid marriage under state law is also a significant status for over a thousand provisions of federal law." *Obergefell*, 576 U.S. at 670 (citing *Windsor*, 570 U.S. at 765–66). In *Pavan*, the Supreme Court reiterated "*Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked

to marriage." *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam) (citing *Obergefell*, 576 U.S. at 670). The Social Security Administration's application of the marriage duration requirement to same-sex surviving spouses who were unconstitutionally prevented for many years from marrying their loved ones is unconstitutional.

B. *Obergefell* forecloses SSA's arguments that same-sex couples should have traveled out of state to marry, or that those who married in other jurisdictions should have done so sooner.

Obergefell held that each state must permit same-sex couples to marry, even though such couples could already obtain marriage licenses in some states. 576 U.S. at 681, 685-86 (App. B). This is consistent with the longstanding principle that equal treatment "is an obligation the burden of which cannot be cast by one State upon another." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). SSA does not dispute that unconstitutional state laws prevented Plaintiffs-Appellees from marrying in their home states nine months before their spouses died. Regardless of whether Plaintiffs-Appellees could have traveled to other jurisdictions to marry nine months before their spouses died, SSA's categorical application of the marriage duration requirement to these couples replicates the states' violations of equal protection and due process condemned in *Obergefell*. *Obergefell* thus forecloses SSA's arguments that to satisfy the marriage duration requirement, same-sex couples should have traveled to marry, or that those who

married in other jurisdictions should have done so sooner. To access Social Security survivor benefits, different-sex couples did not have to travel out of state to marry, let alone do so when their marriage would not be recognized in their home states.

Although the availability of marriage in other jurisdictions does not change the constitutional analysis here, as a practical matter, many same-sex couples did not travel to other states to marry because doing so would not have given them any rights in their home states. As Mr. Ely explained, "We didn't go to California to get married because we felt like we lived in Arizona and had for almost 20 years, and we didn't see marriage becoming legal in Arizona any time soon." *Ely v. Saul*, No. 20-16427, SER-6 ("*Ely* SER"). "Getting married somewhere else felt futile" to Mr. Ely and his husband, as "What was the point if it wasn't recognized where we lived? We could have flown to Canada too, but what good would it do us in Arizona? We also didn't have a lot of money. It costs money to travel and get married." *Id.* Although Mr. Ely and his husband had been together since 1971 and had a commitment ceremony in 2007, they did not legally marry until November 2014, only weeks after Arizona began permitting same-sex marriages. *Ely* SER-2, 7–8.

In addition, the same-sex couples in these cases could not have known that traveling out of state to marry could ultimately qualify them at some later date for

Social Security survivor benefits. SSA did not recognize any marriages between same-sex spouses before *Windsor*, even in states that recognized those marriages. *Windsor*, 570 U.S. at 771 (noting that the "Defense of Marriage Act" controlled "laws pertaining to Social Security"). Mr. Schmoll and his husband, for example, married in California in 2008. They could not have known at the time that traveling somewhere else to marry sooner could someday qualify them for federal benefits. Moreover, before *Obergefell*, the federal government continued to interpret the Social Security Act as foreclosing spousal benefits for same-sex couples living in states that did not recognize their marriages. The Social Security Act looks to whether "the courts of the State in which [the insured individual] was domiciled at the time of death . . . would find that such applicant and such insured individual were validly married . . . at the time he died." 42 U.S.C. § 416(h)(1)(A)(i). In 2014, the Department of Justice stated that SSA was "required by law to confer certain marriage-related benefits based on the law of the state in which the married couple resides or resided, preventing the extension of benefits to same-sex married couples living in states that do not allow or recognize same-sex marriages."[4]

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[4] Memorandum from the Att'y Gen. to the President on Implementation of *United States v. Windsor* 3 (June 20, 2014), https://perma.cc/P3BJ-F93G. SSA concurrently issued a press release stating it "consulted with the Department of Justice and determined that the Social Security Act requires the agency to follow state law in Social Security cases." Soc. Sec. Admin, *Social Security Defines Policy for Same-Sex Married Couples* (June 20, 2014) (click https://www.ssa.gov/news/press/releases/, then search by title).

Accordingly, SSA's Program Operations Manual System, the agency's guidance manual for processing claims, instructed employees to deny spousal benefits to married same-sex spouses where the couple's state of domicile did not recognize the marriage. *See* Soc. Sec. Admin., POMS GN 00210.002 (Aug. 18, 2014), https://perma.cc/6KNF-2JWB.

SSA now recognizes the validity of same-sex marriages even where the state of domicile did not recognize them at the time of the worker's death. But it did not begin doing so until some months after *Obergefell*, following several lawsuits. *See Murphy v. Colvin*, No. 1:14-cv-01764-RC (D.D.C) (filed Oct. 22, 2014; resolved Mar. 4, 2016); *Williams v. Colvin*, No. 1:14-cv-08874 (N.D. Ill.) (filed Nov. 6, 2014; remanded Oct. 26, 2015 with instruction to recognize the plaintiff's marriage as valid as of the date of celebration). And it did not update its guidance manual until 2016.[5]

While some same-sex couples traveled out of state to marry, this does not excuse SSA's fundamental obligation to excise unconstitutional state marriage laws from its benefits administration. And for those who were able to overcome

[5] *See* Teresa S. Renaker & Julie Wilensky, *Employee Benefits Issues Affecting Employees in Same-Sex Marriages, Civil Unions, and Domestic Partnerships* 33–34 (Nat'l Employment Lawyers Ass'n 2016 Annual Convention, May 9, 2016) (on file with authors) (citing February 2016 revisions to POMS GN 00210.000, POMS GN 00210.001, and POMS GN 00210.002 for processing claims based on same-sex marriages).

obstacles to travel and marry for an uncertain future, the lengths they went do so and the difficulties they encountered underscores the unconstitutionality of imposing such a requirement as a condition of receiving benefits. *Ely* class member James Obergefell, one of the plaintiffs in *Obergefell v. Hodges*, described his efforts to find a place where he could marry his husband, as they were prohibited from marrying in their home state of Ohio. *Ely* SER-20–21. Mr. Obergefell's husband had Amyotrophic Lateral Sclerosis (ALS), which made travel exceedingly difficult. *Id.* Ultimately, family and friends helped Mr. Obergefell raise nearly $14,000 to charter a plane "fitted with medical equipment" that "had room for a stretcher" to transport the couple to Maryland, where the couple was married inside the plane on the tarmac at the Baltimore airport. *See id.* Plaintiff-Appellee Joshua Driggs also traveled out of state to marry when his husband had cancer and other significant health issues. *See Driggs v. Comm'r of Soc. Sec. Admin*., No. 18-cv-03915-PHX-DJH, 2020 WL 2791858, at *1 (D. Ariz. May 29, 2020); *Driggs v. Saul*, No. 20-16426, ER-40–41 ("*Driggs* ER"). To require that same-sex couples living in states that barred them from marriage go to such lengths in order to qualify for federal survivor benefits would compound their unequal treatment, imposing on them a requirement that is not imposed on other married couples.

In any event, marriage was unavailable due to unconstitutional reasons, and therefore SSA cannot simply apply its statutory nine-month durational rule

categorically for married same-sex couples. SSA admits that Mr. Ely and his husband, Mr. Taylor, "could not have obtained an Arizona marriage license nine months prior to Mr. Taylor's death," but notes that "jurisdictions outside the state of Arizona began issuing same-sex marriage licenses as early as 2004." *Ely* Gov't Br. 34. SSA contends that "had they made a different choice . . . they would have satisfied the duration-of-marriage requirement . . . ." *Id.* SSA similarly argues that "[a]lthough Mr. Driggs and his husband could have not obtained an Arizona marriage license" nine months before Mr. Driggs's spouse died, the couple could have married "*earlier* in another state—as they ultimately did." *Driggs* Gov't Br. 16.

As noted above, *Obergefell* forecloses this argument. The Supreme Court declined to hold in *Obergefell* that the Constitution merely requires a state to recognize a marriage lawfully performed in another state. *See Obergefell*, 576 U.S. at 681 (holding that "same-sex couples may exercise the fundamental right to marry in all States"). As the Supreme Court held in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), a state cannot be "excused from performance" of its constitutional obligations "by what another State may do or fail to do." *Gaines*, 305 U.S. at 350. *Gaines* held that Missouri could not justify excluding a Black student from its state law school by arranging for Black students to attend law school in another state. *See id.* The Supreme Court reasoned that because each state

has an independent obligation to respect the constitutional rights of people within its jurisdiction, it was "impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere." *Id.* Here, SSA attempts to justify its denial of benefits by pointing out that the same-sex couples in these cases could have married in other jurisdictions nine months before the wage earner died. But the same-sex couples in these cases faced unconstitutional burdens that different-sex couples did not face, regardless of whether or when they could travel to marry. By categorically applying the marriage duration requirement to same-sex couples whose states unconstitutionally barred them from exercising the fundamental right to marry, SSA replicates the constitutional violations condemned in *Obergefell*.

II. The remedy in *Ely* properly redresses the scope of the constitutional violation and will be straightforward and workable to implement.

The district court in *Ely* enjoined the agency from "denying class members benefits without consideration of whether survivors of same-sex couples who were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months would otherwise qualify for survivor's benefits." *Ely v. Saul*, No. 18-cv-0557-TUC-BGM, 2020 WL 2744138, at *17 (D. Ariz. May 27, 2020). This remedy appropriately redresses the constitutional violation by eliminating the categorical exclusion of class members from access to survivor

benefits. It does not entitle all class members to benefits. Instead, it provides an opportunity for class members to establish eligibility based on their individual circumstances before the SSA, which is well-equipped to make such determinations.

A. The appropriate remedy for a constitutional violation is make-whole relief.

The district court's remedy in *Ely* properly removes the unconstitutional barrier for class members. 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].'" *United States v. Virginia*, 518 U.S. 515, 547 (1996) (citation omitted). In constitutional challenges to federal benefits statutes, extending the benefits to the unconstitutionally excluded class is the "proper course." *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *see also Cox*, 684 F.2d at 317 (noting that "the unlawful discrimination or classification must be eradicated" and that "the normal judicial remedy is to extend the benefits to the deprived group").

A class-wide injunction is proper because each class member in *Ely* has been subjected to the same constitutional violation. *See* Fed. R. Civ. P. 23(b)(2) (listing requirement that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

As the Supreme Court has observed, "[i]njunctions can play an essential role" in litigation involving determinations for benefits under Section 405(g) of the Social Security Act. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). Class-wide relief is "peculiarly appropriate" in cases, like *Ely*, involving determinations of Social Security benefits that "turn on questions of law applicable in the same manner to each member of the class." *Id.* at 701. SSA's application of the marriage duration requirement to same-sex couples who were barred by state law from marrying sooner is unconstitutional with respect to every class member. A narrower remedy would not redress the scope of this harm.

B. The district court's remedy is straightforward and workable.

The district courts properly concluded that Mr. Ely and Mr. Schmoll established their eligibility for survivor benefits. *Ely*, 2020 WL 2744138, at *17; *Schmoll v. Saul*, No. 20-16445, ER-10 ("*Schmoll* ER"). Mr. Driggs, like other class members, will have an opportunity to prove his eligibility to SSA. *Driggs*, 2020 WL 2791858, at *5. This remedy is straightforward and workable.

1. The steps same-sex couples took to celebrate and protect their relationships are indicia of a committed relationship.

The facts about the relationships in these cases demonstrate the type of evidence on which class members can rely to establish eligibility. The couples were responsible for each other's welfare and supported each other financially and emotionally, including through periods of illness. *Ely* SER-4, 9 (Decl. of Michael

Ely); *Ely* SER-28–31, 34–36 (Decl. of Anthony J. Gonzales); *Driggs* SER-10; *see generally Ely* SER-16–25 (Decl. of James Obergefell). They lived together for many years and held joint accounts and assets, for example. *See, e.g.*, *Ely* SER-29 (Gonzales Decl.), SER-4, 10 (Ely Decl.). Some were known to be a committed couple by their friends, neighbors, and family members, although not all were able to be fully open about their relationship due to the risk of discrimination.[6] *Ely* SER-3, 5, 7 (Ely Decl.); *Ely* SER-29–30 (Gonzales Decl.); *Ely* SER-17–18 (Obergefell Decl.); *Cf. Driggs* ER-37–38. Long before they were permitted to marry, some of the couples affirmed their relationship by exchanging rings and holding commitment ceremonies. *Ely* SER-7 (Ely Decl.); *Schmoll* ER-21. As Mr. Gonzales put it, "we intertwined our lives together" and "were as devoted to each

[6] Many same-sex couples are not able to be open about their relationships, given the prevalence of discrimination and violence against LGBTQ people. A 2020 survey of LGBTQ people found that more than half of respondents had "hid a personal relationship" to avoid experiencing discrimination. Sharita Gruberg et al., *The State of the LGBTQ Community in 2020* (Oct. 6, 2020), https://perma.cc/86C7-AJEA; *see also Hogsett v. Neale*, No. 19SC44, 2021 WL 79536, at *8–9 (Colo. Jan. 11, 2021) (holding that requirements for common-law marriage must be "flexible" for same-sex couples, as a requirement that a couple hold themselves out as married "fails to account for the precarious legal and social status LGBTQ people and their relationships have occupied for most of this nation's history"); *Obergefell*, 576 U.S. at 661 (noting that until recently, "[s]ame-sex intimacy remained a crime in many [s]tates" and that "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate").

other as any other married couple, despite the fact we were barred from marrying." *Ely* SER-29 (Gonzales Decl.).

2. SSA is well-equipped to evaluate class members' eligibility for benefits, as it already makes fact-intensive determinations about couples' relationships.

SSA will easily be able to evaluate whether class members are otherwise eligible for survivor benefits absent state marriage laws that prevented them from meeting the marriage duration requirement, as this determination is like other fact-intensive determinations SSA makes about marital relationships. For example, SSA is already required to determine in certain circumstances whether a surviving spouse who was married for fewer than nine months can show, "based on evidence satisfactory to the Commissioner of Social Security," that the deceased worker "would have" divorced their prior spouse earlier but could not do so under state law because the prior spouse was institutionalized. 42 U.S.C. §§ 416(c)(2), (g)(2). SSA also "makes common-law marriage determination in accordance with state law," which requires developing factual evidence about the couple's relationship and applying state law criteria. *See* Soc. Sec. Admin., POMS GN 00305.065 (Sept. 5, 2013), https://perma.cc/ZV45-BLU5.

Evaluating class members' eligibility for benefits is no different. In Mr. Schmoll's case, for example, the ALJ found "persuasive and consistent evidence indicating that there was a long-term committed relationship." *Schmoll* ER-21. In

addition, SSA makes determinations in other contexts that are more legally and factually complex, such as applying twenty exception to the definition of "wages" used to calculate retirement benefits, 42 U.S.C. § 409(a), or applying the five-step evaluation of whether a claimant seeking disability insurance benefits is disabled, 20 C.F.R. § 404.1520. The straightforward determinations for class members here will not be burdensome and are well within SSA's capacity.

CONCLUSION

For the reasons above, this Court should affirm the judgment of the district court.

Dated: February 8, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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