

No. 20-1735

IN THE
**United States Court of Appeals for the
Federal Circuit**

PATRICIA ROLFINGSMEYER,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Appeal from the Merit Systems Protection Board
Docket No. PH-0843-16-0235-I-1

**BRIEF OF AMICI CURIAE JAMES OBERGEFELL,
MICHAEL ELY, AND ANTHONY J. GONZALES
SUPPORTING PETITIONER AND REVERSAL**

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August 3, 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 20-1735

Short Case Caption Rolfingsmeyer v. Office of Personnel Management

Filing Party/Entity Amici curiae James Obergefell; Michael Ely; and Anthony J. Gonzales

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 08/03/2020

Signature: /s/ Tara L. Borelli

Name: Tara L. Borelli

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p>
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Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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**STATEMENT OF AMICI CURIAE'S IDENTITY, INTEREST,
AND AUTHORITY TO FILE**

Amici curiae James Obergefell, Michael Ely, and Anthony Gonzales are class representatives and members in a pending case that, similar to the one here, challenges the categorical denial of survivor's benefits to surviving same-sex spouses who were unconstitutionally barred from marriage nine months before the deaths of their loved ones. *Ely v. Saul*, No. 4:18-cv-00557-BGM, 2020 WL 2744138 (D. Ariz. May 27, 2020), *appeal docketed*, No. 20-16427 (9th Cir. July 24, 2020). Absent judicial relief, the Social Security Administration ("SSA") would otherwise deny each of them access to survivor's benefits based on a nine-month marriage requirement, even though unconstitutional state laws barred them from marriage at the relevant time. As here, such a denial would revive and replicate unconstitutional state exclusions, perpetrating further harm against survivors who already suffered marriage discrimination for most of their lives.

Several courts have now struck down SSA's reliance on unconstitutional state laws to deny survivor's benefits to same-sex survivors as unconstitutional. *See, e.g., Ely*, 2020 WL 2744138, at *1. The legal questions in these cases are closely related to the arguments raised by Petitioner Patricia Rolfingsmeyer, who was similarly denied federal employee survivor's benefits because of the federal government's reliance on unconstitutional marriage laws. Because decisions in each of these cases may serve as persuasive authority in the other challenges, amici

curiae submit this brief to illustrate why courts have correctly, and unanimously, rejected federal reliance on unconstitutional state laws as itself unconstitutional.

Amici curiae share their three first-hand stories below to underscore the gravity of the constitutional injuries inflicted by such practices and the absence of any constitutionally adequate justification for such harms. James Obergefell was the lead plaintiff in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Despite the Supreme Court’s affirmation in his case that same-sex couples must have access to the same constellation of rights as different-sex couples, Mr. Obergefell himself faced the prospect of being denied survivor’s benefits by SSA because he was able to be married for only three months—and, even then, only by traveling out-of-state from Ohio to Maryland—before his spouse died of ALS. Michael Ely was similarly denied survivor’s benefits by SSA. Although he and his late husband were in a 43-year-long relationship and married as soon as possible in Arizona, they were barred from marriage nine months before his husband’s death. Anthony Gonzales and his late husband were in a committed relationship for more than fifteen years in New Mexico. They did not wait even one day to marry after marriage became available to them. Despite exercising their fundamental right to marry at the first moment possible, SSA nevertheless denied Mr. Gonzales survivor’s benefits because he was not married for nine months before his spouse died—even though that would have been legally impossible under state law.

**STATEMENT OF AUTHORSHIP,
FUNDING, AND AUTHORITY TO FILE**

No party's counsel authored any part of this brief, nor did any party's counsel or any other person contribute any money intended to fund preparation or submission of this brief. No person other than amici curiae's counsel made a monetary contribution to its preparation or submission.

All parties have consented to the filing of this amicus brief.

ARGUMENT

I. As With Petitioner, the Federal Government Relied on Unconstitutional State Laws to Categorically Deny Survivor's Benefits to Amici Curiae.

Similar to the harms suffered by Ms. Rolfingsmeyer, the federal government denied amici curiae access to social security survivor's benefits based on unconstitutional state laws that excluded them from marriage nine months before their loved ones died. The Social Security Act provides widow's and widower's insurance benefits (referred to here as "survivor's benefits") to surviving spouses. 42 U.S.C. § 402(e), (f). In order to qualify for such benefits, however, an individual must generally have been married for at least nine months. 42 U.S.C. § 416(g); *see also* 20 C.F.R. § 404.335. The amount of benefits that a survivor receives each month is determined by the earning record of his or her deceased spouse, because the benefits are effectively pre-funded by contributions deducted from each paycheck earned by the decedent during his or her lifetime. In other words, benefits are earned.

SSA denied same-sex couples like amici curiae and their spouses of the equal fruit of their labor. When the government previously engaged in unlawful sex discrimination with respect to earned benefits, the Supreme Court emphasized the two-fold nature of the injury: the female worker “not only failed to receive the same protection which a similarly situated male worker would have received but she also was deprived a portion of her earnings in order to contribute to the fund out of which benefit would be paid to others.” *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). The same is true with respect to the harms experienced by amici curiae.

Every federal court to have considered the survivor’s benefit claims of individuals like amici curiae—whom state law barred from marriage nine months before their loved ones died—has concluded that the federal government violated the Constitution. *See Ely*, 2020 WL 2744138, at *7 (“The unconstitutional infringement on [their] fundamental right to marriage is now being perpetuated further by the denial of . . . survivor’s benefits”); *Schmoll v. Saul*, No. 19-cv-04542-NC, slip op. at 5 (N.D. Cal. Jun 15, 2020) (“By conditioning eligibility for benefits on an impossible requirement, the SSA perpetuates [the state’s] previous denial of ‘the constellation of benefits that the States have linked to marriage’”), *appeal docketed*, No. 20-16445 (9th Cir. Jul. 28, 2020); *Driggs v. Comm’r*, No. CV-18-03915-PHX-DJH, 2020 WL 2791858, at *4 (D. Ariz. May 29, 2020) (“Defendant’s reliance on the denial of Plaintiff’s equal access to marriage because

of state law also runs afoul of equal protection.”), *appeal docketed*, No. 20-16426 (9th Cir. Jul. 24, 2020); *Thornton v. Comm’r*, No. 2:18-cv-01409-JLR-JRC, slip op. at *20 (W.D. Wash. Jan. 31, 2020) (“[D]enying [plaintiff’s] application for survivor benefits based on an unconstitutional state law violates her due process and equal protection rights”). Just as a state’s exclusion of same-sex couples from marriage and its panoply of benefits is unconstitutional, the federal government’s continued reliance on that exclusion to deny survivor’s benefits is also unconstitutional. The same principle applies here to Ms. Rolfingsmeyer’s claim.

II. Continued Federal Reliance on Unconstitutional Marriage Laws Heaps Further Indignity on Surviving Same-Sex Spouses Such as Amici Curiae, Who Are Categorically Denied Any Pathway to Survivor’s Benefits.

The testimony that amici curiae provided in *Ely*, which is excerpted below, supports several points relevant to this appeal. First, it powerfully illustrates that the federal government inflicts ““substantial and continuing harm”” condemned by *Obergefell* where it relies upon unconstitutional state laws to deny survivor’s benefits. *Thornton*, slip op. at 11-12 (quoting *Obergefell*, 135 S. Ct. at 2607). These are “more than just material burdens” because the government “demeans” same-sex couples by consigning them to “an instability many opposite-sex couples would deem intolerable in their own lives.” *Obergefell*, 135 S. Ct. at 2601.

Second, the experiences of amici curiae, which are similar to those of Ms. Rolfingsmeyer, show that, even when unconstitutionally barred from marriage,

same-sex couples can be similarly situated in every conceivably relevant respect to their heterosexual peers. *Ely*, 2020 WL 2744138, at *9; *cf. Harris v. Millennium Hotel*, 330 P.3d 330, 335 (Alaska 2014) (requiring access to survivor’s benefits because “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). Indeed, precisely because these couples were excluded from the protections afforded through marriage, they often took additional measures to protect and document their relationships.

The depth of these couples’ commitment to one another is beyond question. Some, like Mr. Obergefell and his spouse, moved mountains in order to ultimately marry at all—by traveling out-of-state even though their home states refused to recognize their marriages. And while all marriages begin with the hope that they will endure “till death do us part,” amici curiae fulfilled that aspiration. Mr. Obergefell, Mr. Ely, and Mr. Gonzales each cared for their loved ones, through tremendous adversity, until their dying breath. The government’s categorical denial of access to survivor’s benefits to this entire group of individuals who were barred from nine months of marriage—and particularly on the grounds that it supposedly furthers an interest in detecting “fraudulent” marriages—is unmoored from any adequately tailored justification.

In order to preserve the integrity of their testimony—and to ensure that their own “voices” are heard—amici curiae provide the following excerpts adapted from their first-person testimony, which was provided under penalty of perjury in *Ely*, Dkt. 26-1, 26-2, 26-3, and has been edited here for brevity and clarity:

A. James Obergefell’s Excerpted Testimony

I fell in love with John Arthur, my late spouse, the third time we met. This was before he was diagnosed with amyotrophic lateral sclerosis (“ALS”), before we would have to fly a medically equipped plane for the chance to marry before he died, and before my fight to be listed as a spouse on John’s death certificate would lead to the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I am James Obergefell, the lead plaintiff and namesake of that case.

I could not have conceived any of this would happen when John and I first met in Cincinnati in 1992. We quickly formed a devoted and loving relationship, and led a quiet, contented life together. For many years we both worked in the same field providing information technology consulting services. We paid our taxes, voted, and enjoyed being involved in our community.

My relationship with John was my world, and my life. That world felt like it shattered irretrievably when John was diagnosed with ALS at the age of 45. There is no cure for this disease, and we knew that he only had a few years to live at most.

The symptoms started when John's left foot began slapping the floor harder than the right one when walking; later, his left foot began dragging as if a ten-pound weight was bearing down on his shoe. When it came, the diagnosis of ALS was a death sentence. The neurological disorder attacks the nerve cells in the brain and spinal cord, eventually robbing every muscle in the body of movement, including the diaphragm, which facilitates air flow to the lungs. ALS literally suffocates its victims to death.

As we adjusted to this new life, we moved to a new condominium with hallways wide enough for a wheelchair and windows big enough to let in the sun when John was no longer able to walk outside. At that point, we had purchased over three homes together during the 20 years of our relationship, but I remember the painful moment when John insisted that the final deed be in my name only. It was his way of trying to simplify life for me, and to accept the fact that we would soon be parted by death.

The first winter after the diagnosis was a whirlwind of loss, as John's dwindling functionality progressed. His limbs twitched and spasmed. I coaxed his twitching arms into a dress shirt every morning before I went to work. When John could no longer clasp the buttons, I took him to a tailor and had shirts made with Velcro instead of buttons.

When John started to lose control of his right foot we traded his cane for a

walker. John's disease progressed far faster than either of us imagined, and on the darkest days, when John struggled to hold a fork or brush his hair, I would sneak into an empty room, and bury my face in my hands and cry. Time had been tilted on its side, and I never knew when a new day might be the last with an arm that moved freely or a leg that could bend without pain. I would lay awake long into the night, every night, feeling tormented by my inability to end John's suffering.

As the disease progressed, I helped John go to the bathroom, and when he could no longer use the grab bars we had installed in the shower, I would get into the shower with him each day to help him bathe.

The last limb to go was John's right arm, and with it came a power wheelchair that John's brother called the "urban assault vehicle" in a halfhearted attempt to make John laugh. John hated the chair's bulk and the embarrassing hum it made, and he told me just before Christmas in 2012, "I don't want to go out in that thing. I feel like a spectacle." And so John's world grew smaller and smaller. Then John had to trade the wheelchair for a bed, and it seemed the only thing we could do was wait.

One of the cruelest ironies of ALS is that its victims lose their muscles and motor skills, but not their ability to feel pain. In John's case, the pain often shot down his legs, hot and unrelenting. I spent hours hunched by John's bedside, shifting his position to relieve pressure. I moved to the guest room across the hall.

I tried to stay awake as much as I could, in case John needed his bedpan changed, or his position shifted in bed to help with the pain.

When I finally made the call to a hospice it seemed almost surreal, despite months of living with the menace of this deadly disease. But nearly every limb on John's body had lost function and his speech had started to go. I was shifting between two extremes, numbness and absolute misery, by the time I e-mailed friends in 2013 to say that John could no longer answer calls on his cell phone.

It felt like the clouds broke and some sunshine finally peeked through when the Supreme Court issued its decision in *United States v. Windsor*, 570 U.S. 744 (2013). I remember John watching television coverage of the decision with rapt attention. We started talking about marriage early in our relationship, but made the decision that instead of just having a symbolic ceremony, we would only get married if it actually carried legal weight. With the federal government finally poised to recognize marriages of same-sex couples, I said to John, "Let's get married."

With the prospect of some legal recognition finally a reality, I began feverishly researching states where we could marry. I researched New York's requirements, because it was one of the closest states at the time with marriage equality. But unfortunately both applicants had to appear at the courthouse to apply for a marriage license, which was impossible for us. I quickly figured out

that only one partner had to apply in person for a marriage license in Maryland, and settled on that as the state where we would wed.

I started researching ambulances, but they were too slow and bumpy, and I was struck again and again by the absurd cruelty of having a bedridden man travel 520 miles, when our local county courthouse was only six blocks away. The best option was a plane fitted with medical equipment, which would get to Maryland quickly and had room for a stretcher. But it would cost nearly \$14,000.

On July 11, 2013, through the loving efforts of our friends and family who fundraised for us, we were able to secure a medically equipped airplane and flew to Maryland. We were married while our plane sat on the tarmac at the Baltimore airport in Maryland. Saying “I thee wed” was the most beautiful moment of my life.



John suffered, however—traveling with bones that ached and skin that burned—so that we could marry and the memory will forever be tinged with the frustration and hurt of knowing that the person I loved went through terrible pain and discomfort just to do something millions of others could take for granted.

Shortly thereafter we sought a temporary restraining order requesting that the state of Ohio be required to recognize our marriage on John’s death certificate, so that I could be listed as his husband. John was in hospice, and we worried that he might only have weeks or days left to live. John wrote in a declaration supporting our motion, “I am married to James Obergefell. I love him and want our last days together to be a celebration of our love. How can we celebrate when Ohio law requires that my death certificate say I am not married and that I have no surviving spouse? ... Only through court action to recognize our marriage in Ohio can James and I receive the dignity that our marriage deserves. Please act soon.”

By this point, John could not even wear his wedding ring because the weight of it hurt his fingers too much; nor could he wear clothing, which made his skin burn. We covered him with an electric blanket instead.

John’s voice had been reduced to a whisper, and he struggled to articulate every word in between long, shallow breaths. But in the days after our marriage, he pushed out a single, perfect word: “husband.” He would say, “Good night, husband,” “good morning, husband,” and “I love you, husband.” I had to bend low

to just hear him, but it was the most beautiful sound I had ever heard.

As much as John suffered in the final months of his life, he was so loving that he remained focused on my wellbeing after he was gone. When we first considered filing a lawsuit to seek recognition for our marriage, he told our lawyer, “I want Jim to be legally taken care of after I die.”

At the end of John’s life he was a gaunt 100 pounds. He had lost the ability to press the buzzer that we had given him to call me for help when he needed it, and so he used a sensor that he could activate by slightly tilting his head to the right on his pillow. ALS had stolen his speech by this time, and when he called for help I sometimes struggled frantically to figure out what he needed, such as when he was struggling to breathe but couldn’t say “inhaler.”

After we were married, I assumed I would qualify for family leave to take care of him, but my employer denied that request because Ohio did not recognize our marriage. I left my job, with no guarantee of a position to which I could return, and lived off of our savings while I cared for him.

John died on October 22, 2013—20 years, nine months, and 22 days after we fell in love. Despite the depth of his suffering as he fell deeper into illness, death came peacefully on that cold October day, and he simply stopped breathing.

I had my wedding ring fused with John’s, and put some of his ashes inside a small channel cut inside the ring, so that he is always with me.

Although I sensed not long after the Supreme Court issued *Obergefell* that its promise of equality might take some time to be fully realized, I did not anticipate that I would again face differential treatment from the government, as vestiges of the historical discrimination against same-sex couples continue to linger. But I now will face discrimination again, when I eventually seek Social Security survivor's benefits. Despite the extraordinary lengths to which John and I went to get married, we were only able to be married for approximately three months.

When I finally had the chance to read *Obergefell* I was in tears, particularly over the passages recognizing that same-sex couples must be accorded equal dignity in sickness and in death. The Court said of my claim, "James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time." *Obergefell*, 135 S. Ct. at 2606. The Court answered this question by recognizing that I and the other plaintiffs were simply asking "for equal dignity in the eyes of the law," and held that the "Constitution grants them that right." *Id.* at 2608.

John's last wish was that I would be taken care of after he passed away. I respectfully ask this Court to make sure that *Obergefell*'s promise does not fail surviving spouses like me, particularly when we need it the most as we age.

B. Michael Ely's Excerpted Testimony

James and I were together for 43 years. Everyone called him "Spider," a childhood nickname given to him by his father. We met in 1971, when I was 18 and he was 20. I don't know how, but I knew right then that I had met my soul mate. I still have the first flower he gave me, and our first fortune cookie fortunes. We started living together on December 5, 1971, and that was our anniversary until we got married in November 2014.

We moved to Arizona in 1994. We moved to Oro Valley, a more conservative suburb of Tucson. We weren't the type to be out there marching with signs about gay rights, but we always lived openly gay before it was done. Our idea was that we'd just set an example to our neighbors. They would see us coming home from the store after shopping, or walking our dog, or doing our yard work, and they'd realize we're no different than they are.

Spider worked for Boeing, and then for Bombardier, as a structure mechanic. He was the breadwinner, and I was the person who took care of the house. I did the laundry, scrubbed toilets, vacuumed, dusted, and did almost all of the cooking. I used to tease him that he couldn't boil water. I also did all the banking and paid all the bills.



Michael and Spider in 2004.

For all intents and purposes Spider and I were married. From the beginning, we held ourselves out as a committed couple. We did everything else that married couples did. I remember in about 1973, two friends married. We were the “witnesses” and that’s when we first talked about, “wouldn’t it be nice if we could get married?”

From the early 1970s until just a few years ago, I never believed we would be allowed to marry. When we first got together in 1971, it was still illegal to be gay. Homosexuality was listed as a mental illness. Gay bars were hidden away,

and police would raid them and rough up patrons. Soon after we started living openly together, our cat was murdered. One time in the 1970s, Spider was hospitalized with pneumonia, and hospital staff prohibited me from seeing him after visiting hours, allowing me one hour a day because I wasn't "family."

When California allowed gay marriage, I actually started thinking, "Oh, maybe there is hope" for us to marry. But we lived in Arizona, a more conservative state, and in Oro Valley, a more conservative town. We didn't see marriage becoming legal in Arizona any time soon. Getting married somewhere else felt futile. 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.

We did other things to show we were a committed couple. On certain forms you have to fill out, there was never a box for "significant other." So we made our own little box next to the other boxes and put "gay couple," or "domestic partners." Then we would check it.

Spider's Aunt Margie used to visit us, and when California passed gay marriage the first time she voiced her disapproval. In our case, Aunt Margie said there should be "one step below marriage." And I guess that kind of made us angry, that someone that we were so close to, a family member, would say that.

Aunt Margie’s comment proved to be a catalyst. We just said, “Let’s have a commitment ceremony. We’re gonna wear rings.” On December 5, 2007—36 years after we started living together—we had a commitment ceremony. There were just three of us—Spider, me and our friend Cindy—and the woman who served as our celebrant. Back in the days when slaves couldn’t get married, they would hold hands and jump over a broom to get married. So, we jumped over a broom. That was as close as we could get to marriage at that time.

Six years later, in November 2013, Spider was diagnosed with cancer. Suddenly the person that I loved so much was dying. The thought of losing him was like having a rug pulled from under me. Everything unraveled overnight. We had to sell our beautiful home and our stuff, and move into a townhouse while Spider was getting chemo. My whole world was upended.

When we finally were able to marry in 2014, there was no need for a down-on-one-knee proposal. We had been together for 43 years, and were already like an old married couple. We exchanged the same rings that we had worn since our commitment ceremony in 2007. Inside the rings was engraved, “Don’t forget,” short for, “Don’t forget I love you.” At times when we were in unsafe situations, we made up our own code to convey certain things we couldn’t say. “Don’t forget”—that was like me saying “I love you.”



Marriage ceremony at the Pima County Courthouse, November 7, 2014.

Spider did not live to see our first anniversary, but he tried. During his final illness, Spider would get horrible chills, and I would wrap him in blankets in the middle of the night. Other times he would sweat, soaking the bed. Sometimes, he couldn't stop throwing up. I read about people who abandon partners at times like that, and I can't relate. I took a vow to love and care for him, "in sickness and in health," and I did.

Soon after we got married we went to the Social Security office. Spider was in a wheelchair, and it just wasn't a very positive experience. The woman at Social Security said, "Well, you have to be married for nine months." Spider said, "I don't know if I can make it." It seemed so unfair. But Spider kept telling me over

and over and over, “I’m going to live long enough and I’m going to outlive what the doctors are saying.” And he tried. Toward the very end his main concern was not dying. Rather, it was “what’s going to happen to Michael?”

I had a good life with Spider and that’s why I’m fighting for survivor benefits. He paid into Social Security for over 40 years. I am his legal husband, and we were a committed couple for more than 40 years. The benefits would make a significant difference in my life. Currently, my only income is from Spider’s pension from his work at Bombardier in Arizona, which he left to me.

I live modestly. The \$800-a-month Bombardier pension runs out in six years. Then I have no income. I don’t have my own Social Security because I did not work outside the house. Without my husband’s Social Security what am I supposed to live on?



Michael and Spider in May 2015.

C. Anthony Gonzales' Excerpted Testimony

I met the love of my life, Mark Johnson, in July 1998. When Mark and I met, I was working at a non-profit organization as an accountant. Mark, at the time, had only moved New Mexico a few weeks earlier, and would eventually go on to teach at elementary and high schools in Albuquerque.

Our relationship was serious from the beginning. A few months into our relationship, I decided to look for a house to buy. Mark was involved in that process, and we visited houses for sale together. We jointly picked a house that was close to both where Mark was going to school at the time and my job. We moved in together into our home on December 7, 1998.

From the very start, we lived as a couple. We introduced ourselves to our neighbors as a couple and started to build our life together. We intertwined our lives together, and we were as devoted to each other as any other married couple, despite the fact that we were barred from marrying. We opened a joint checking account into which we both deposited money, and we paid the mortgage and other household expenses from that account. Working together, we transformed the house into our home. We loved to travel when we had the means to do so, and our favorite place to visit was Hawai'i. Below is a photo from a visit in 2012.

Although I was a nervous traveler, Mark always put me at ease.



Mark and I worked through life's ups and downs together, and we were devoted to creating a relationship built on love and mutual respect.

In 2011, Mark was having a regular check-up with his doctor, who noticed something irregular and referred him to an oncologist. The oncologist then diagnosed him with cancer. Learning about the diagnosis was devastating for both of us. Mark was determined to fight the cancer. He went through a series of radiation treatments and, at least initially, the radiation treatment was successful.

Early in 2013, however, Mark was told that the cancer had spread and that he should seek further treatment. The doctor told us that, with extensive treatment, he could extend his life for approximately three to five years.

Mark took a leave of absence from his teaching job. I continued to work while taking care of Mark, scheduling his appointments, refilling his prescriptions,

cooking, running the household, taking him to chemotherapy and doctor appointments, and doing anything else to lessen his stress. I was Mark's only support during his treatment as his family was out-of-state and had shown no response to his illness. Meanwhile I was burning the candle at both ends.

The issue of marriage for same-sex couples came to the forefront in New Mexico by the summer of 2013. As the legal challenges seeking access to marriage unfolded, we were filled with hope. We had long wanted to be married. When we attended family weddings—like the wedding of Mark's nephew in 2005 and the wedding of my nephew in 2007—we talked about how we wished that we could also celebrate our love through marriage. Likewise, Mark and I talked about wanting to marry when marriage equality came to New York, where he had previously lived, in 2011. But it did not make sense in our minds to marry elsewhere, away from family and friends, only to come home and potentially have our marriage vanish when we crossed back into New Mexico. We wanted to be married in the eyes of the state that we were proud to call home.

On August 26, 2013, I ran into the county clerk, who told me the judge had ordered Bernalillo County to issue marriage licenses to same-sex couples. Her office was ready to start issuing licenses the next day.

I immediately called Mark. We decided that, the next morning, we would go down to the county clerk's office and get our marriage license. Mark called a

florist and ordered two boutonnieres for us. We stopped by the florist, picked them up, and pinned them to each other's sports coats.

When we got to the clerk's office, it was a beehive of excitement. We checked in at the front, got a number, and took a seat. While we were waiting, we met a couple who had been together for more than 40 years. Every time a couple came out with their license in hand, a big cheer would go up.

Finally, our turn came. We paid our fees, signed our documents, and finally received the license to express our love for each other through marriage that we had always wanted. Below is a photograph of us getting our marriage license in our sports coats with the boutonnieres that Mark had bought for us.



An announcement was made that there was going to be a mass marriage ceremony in the Civic Plaza. Mark and I turned to each other and said, “let’s do it!” There were a lot of people who had shown up to show support. It was quite overwhelming.

The next day, we woke up to find out photo on the front page of the Albuquerque Journal. The following week our photo was in an article in the print edition of the New York Times. Below is a copy of the latter photo.



Meanwhile, Mark’s battle with cancer continued.

Mark kept getting weaker and weaker. I was still working, and I hired a neighbor to spend the day with him, and to feed him while I was at work. I would

take him to radiation treatments, which were frequent, and since I was missing a lot of work, friends offered to jump in and take him to the Cancer Center.

I cannot tell you what it is like to see someone you love, once a 6'0" and 180-pound man, waste away in front of you. Mark had wanted to live so badly, so that we could have even a little more time together, that he was willing to undergo painful chemotherapy and radiation treatments in order to prolong his life.

Mark's health declined precipitously in early 2014. When I took his temperature, it registered 102, so the Cancer Center told me to take him to the hospital. A doctor came to examine him. She took me out into the hallway and said that Mark's cancer was terminal and that she estimated that he had less than two weeks to live. There was nothing more they could do.

Mark decided to go into hospice. Eventually, I exhausted all my vacation and sick leave hours staying home to take care of Mark. I would get help from friends and my sisters, who would spend nights so that I could get some rest.

Finally, after being home for a month, Mark fell into a coma. My family and friends sat vigil, and we reminisced about good times with Mark. On February 19, 2014, one of my sisters who was helping me care for Mark woke me up and said, "I think this is it." I held Mark's hand as he took his last breath and died at 3:35 am.

I took some time off from my job after Mark passed. My job was also in

limbo. A program that paid most of my salary was being moved to another organization and, as a result, I lost my job. In 2015, I had an appointment with the local Social Security office to apply for spousal survivor's benefits. The individual who processed my application told me that my survivor's benefits based on Mark's earning history would be about \$1,500 per month.

Shortly thereafter, I received a notification from SSA that it had denied my application for survivor's benefits, as I had not been married for nine months, even though Mark and I married on the very first day when we could do so in Albuquerque.

Mark and I paid into the Social Security system our entire working lives. We got married the first day it was legal in Bernalillo County. And now I feel that I am being punished for something that is totally out of my control.

I miss Mark every day, and many things remind me of our time together. In 2015, I took Mark's ashes to our favorite place to visit, Hawai'i, where I dropped them in the Pacific Ocean. I hope he has found peace there.

III. There is No Constitutional Justification for the Categorical Denial of Survivor's Benefits to Same-Sex Spouses Unconstitutionally Barred from Nine Months of Marriage.

The sweeping exclusion of individuals like Mr. Obergefell, Mr. Ely, Mr. Gonzales, and Ms. Rolfingsmeyer from access to survivor's benefits lacks even a rational relationship to any government interest behind a nine-month marriage

requirement. There is no constitutional justification for that categorical denial. *See Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (finding that the “blanket and conclusive exclusion” of a group was not “reasonably related to the prevention of spurious claims”); *Wiesenfeld*, 420 U.S. at 645 (striking down sex discrimination that denied a widower even the opportunity to show that he was similarly situated to widows). When the government “has intentionally conferred some type of benefit upon one group and thereby unconstitutionally deprived another, the normal judicial remedy is to extend the benefits to the deprived group.” *Daniels v. Sullivan*, 979 F.2d 1516, 1521 (11th Cir. 1992) (quotes omitted). Indeed, as confirmed by each of their stories, there is no question that amici curiae and Ms. Rolfingsmeyer would be eligible for the survivor’s benefits at issue but for the unconstitutional barriers they faced.

CONCLUSION

Same-sex couples have suffered for decades under discriminatory marriage laws that treated them as second-class citizens, and robbed them of the very safety-net benefits to which their spouses contributed to throughout their entire working lives. After suffering a lifetime of being denied the benefits of formal relationship recognition, no survivor should be told that—because of those same discriminatory laws—they must now spend their later years further impoverished or without the same economic security afforded to others. As described above, this is both wrong

on the law, and inflicts needless suffering during the already searingly painful aftermath of having lost the love of their life. Amici curiae respectfully urge this Court to reverse the judgment denying survivor's benefits to Ms. Rolfingsmeyer.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing filing complies with the relevant type-volume limitation and typeface requirements of the Federal Rules of Appellate Procedure and Federal Circuit Rules.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,295 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2006 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: August 3, 2020

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