

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*
SERVICES AND ADVOCACY FOR GAY, LESBIAN,
BISEXUAL, AND TRANSGENDER ELDERS AND
HUMAN RIGHTS CAMPAIGN
IN SUPPORT OF PETITIONER**

JULIA E. ROMANO
PAUL R. JOHNSON
KING & SPALDING LLP
633 W. 5TH STREET, SUITE 1600
LOS ANGELES, CA 90071
TELEPHONE: +1 213 443 4365
FACSIMILE: +1 213 443 4310
jromano@kslaw.com
pjohnson@kslaw.com

August 4, 2020

Counsel for *Amici Curiae*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

CERTIFICATE OF INTEREST

Case Number 20-1735
Short Case Caption *Rolfingsmeyer v. Office of Personnel
Management*
Filing Party/Entity *Amici curiae* Services and Advocacy for Gay,
Lesbian, Bisexual, and Transgender Elders and
Human Rights Campaign

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: August 4, 2020

Signature: /s/ Julia E. Romano

Name: Julia E. Romano

1. Represented Entities Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	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.	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.
Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders	<input checked="" type="checkbox"/> None/Not Applicable	<input checked="" type="checkbox"/> None/Not Applicable
Human Rights Campaign		

N/A 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).

None/ Not Applicable _____ Additional pages attached

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).

None/ Not Applicable _____ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/ Not Applicable _____ Additional pages attached

TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF CONTENTSiv

TABLE OF AUTHORITIESv

INTEREST OF *AMICI CURIAE*.....1

SUMMARY OF THE ARGUMENT2

I. SURVIVOR BENEFITS ARE CRITICAL FOR LGBTQ OLDER
ADULTS, WHO OFTEN FACE ECONOMIC UNCERTAINTY
AFTER A LIFETIME OF DISCRIMINATION4

II. IT IS UNCONSTITUTIONAL TO CONDITION FEDERAL
SURVIVOR BENEFITS ON UNCONSTITUTIONAL STATE
MARRIAGE BANS12

CONCLUSION16

CERTIFICATE OF COMPLIANCE.....17

CERTIFICATE OF SERVICE.....18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Becker v. Office of Personnel Management</i> , 853 F.3d 1311 (Fed. Cir. 2017)	14
<i>Bostock v. Clayton County</i> , 590 U.S. ___, 140 S. Ct. 1731 (2020)	2, 9
<i>Obergefell v. Hodges</i> , 576 U.S. ___, 135 S. Ct. 2584 (2015)	2, 3, 4, 10, 12, 13, 14, 15
<i>Pavan v. Smith</i> , 582 U.S. ___, 137 S. Ct. 2075 (2017)	13, 14
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	2, 10
Rule and Regulations	
Fed. R. App. P. 29.....	1, 17
Fed. R. App. P. 32.....	17
Other Authorities	
Anthony R. D’Augelli, Arnold H. Grossman, Scott L. Hershberger & Timothy S. O’Connell, <i>Aspects Of Mental Health Among Older Lesbian, Gay, And Bisexual Adults</i> , 5 Aging & Mental Health 149 (2001)	5
Arnold H. Grossman, Anthony R. D’Augelli, & Timothy S. O’Connell, <i>Being Lesbian, Gay, Bisexual, and 60 or Older in North America</i> , J. of Gay & Lesbian Soc. Servs. 24 (2001).	5
Charles A. Emlet, <i>Social, Economic, and Health Disparities Among LGBT Older Adults</i> , 40 GENERATIONS – J. of the Am. Soc. on Aging 16 (2016).....	6, 7, 8
Jonathan B. Foreman, <i>Making Social Security Work for Women and Men</i> , 16 N.Y.L. Sch. J. Hum. Rts. 359 (1999).....	10

Karen I. Fredriksen-Goldsen, Charles A. Emlet, Hyun-Jun Kim, Anna Muraco, Elena A. Erosheva, Jayn Goldsen, and Charles P. Hoy-Ellis, *The Physical and Mental Health of Lesbian, Gay Male, and Bisexual (LGB) Older Adults: The Role of Key Health Indicators and Risk and Protective Factors*, 54 *The Gerontologist* 644 (2012).....6

Karen I. Fredriksen-Goldsen, Hyun-Jun Kim, Hyunzee Jung, and Jayn Goldsen, *The Evolution of Aging With Pride—National Health, Aging, and Sexuality/Gender Study: Illuminating the Iridescent Life Course of LGBTQ Adults Aged 80 Years and Older in the United States*, 88 *The Int. J. of Aging & Hum. Dev.* 381 (2019).....7

Karen I. Fredriksen-Goldsen, Jane M. Simoni, Hyun-Jun Kim, Keren Lehavot, Anna Muraco, Karina L. Walters, Joyce Yang, and Charles P. Hoy-Ellis, *The Health Equity Promotion Model: Reconceptualization of Lesbian, Gay, Bisexual, and Transgender (LGBT) Health Disparities*, 84 *Am. J. of Orthopsychiatry* 653 (2014)6

Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Understanding Issues Facing LGBT Older Adults* (2016), available at www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf 6, 7, 9, 11

Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75* (2014), available at <https://www.sageusa.org/resource-posts/out-visible-the-experiences-and-attitudes-of-lesbian-gay-bisexual-and-transgender-older-adults-ages-45-75-by-the-numbers-full-report>.....8

Soc. Security Admin., SSA Publication No. 13-11700, Annual Statistical Supplement to the Social Security Buletin, 2013 (Feb. 2014).10

Soon Kyu Choi & Ilan H. Meyer, Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-White-Paper.pdf>..... 5, 6, 7, 8, 9, 11

INTEREST OF *AMICI CURIAE*¹

Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (“SAGE”) is the country’s oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) older adults. In conjunction with 30 affiliated organizations located in 22 states and Puerto Rico, SAGE offers support services and consumer resources to LGBTQ older adults and their caregivers, provides training for agencies and organizations that serve LGBTQ older adults, and advocates for public policy changes that address the needs of LGBTQ people. As part of its mission, SAGE provides services to surviving spouses of same-sex couples who have been deprived of the benefits that accompany marriage. Through its extensive work with LGBTQ elders, SAGE is uniquely positioned to address the adverse effects that the denial of federal retirement benefits can have on same-sex spouses.

The Human Rights Campaign (“HRC”), the largest LGBTQ civil rights organization, envisions an America where LGBTQ people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* certify that no counsel for a party authored this brief in whole or in part; no party, or its counsel, contributed money that was intended to fund preparing or submitting the brief; and no person or entity, other than *amici* and their counsel, made any monetary contribution intended to fund its preparation or submission. This brief is filed with the consent of all parties and pursuant to Fed. R. App. P. 29(a).

community. Among those basic rights is the freedom to marry and obtain the full legal benefits of marriage, and the right to be free from discrimination in the provision of survivor and retirement benefits. HRC has filed *amicus* briefs in a range of cases involving marriage equality, e.g., *United States v. Windsor*, 570 U.S. 744 (2013), *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), and has a strong interest in the implementation of those decisions.

SUMMARY OF THE ARGUMENT

Over the last quarter century, the United States Supreme Court has repeatedly held that LGBTQ persons are entitled to equal dignity in the eyes of the law, including in the institution of marriage, in the workplace, and in interactions with state and federal governments. In its landmark 2015 decision recognizing the freedom to marry under the Constitution, the Court highlighted the “constellation of benefits” connected to marriage, including “inheritance and property rights; rules of intestate succession; . . . [and] the rights and benefits of survivors” *Obergefell*, 135 S. Ct. at 2601-02. This summer, a wide majority of the Court again vindicated the equal rights of LGBTQ persons in the context of federal employment law, a ruling that will help combat discrimination for hundreds of millions of Americans working across all fifty states. *See Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020).

Compared to those sweeping rulings, this case involves a discrete and aberrant action by the U.S. Office of Personnel Management (“OPM”) during a particular period before *Obergefell* was handed down. During this time, while same-sex couples could not yet be married due to state bans, Petitioner Patricia Rolfingsmeyer and Tina Sammons did everything possible to formalize their eleven-year, common law marriage and proclaim their love: exchanging rings, making vows, living together and later traveling to other states where marriage between same-sex couples had just been legalized to marry (once more)—even while Ms. Sammons was being treated for metastatic breast cancer. Soon, Ms. Sammons passed away, and two months later, the Supreme Court recognized what she and Ms. Rolfingsmeyer had known all along: that their love was entitled to all the rights and benefits of marriage too.

When Ms. Rolfingsmeyer later applied for survivor benefits under the Federal Employees Retirement System (“FERS”), it should have been a simple decision. But instead, OPM essentially refused to recognize her marriage as valid because of a nine-month marriage duration requirement—even though Ms. Rolfingsmeyer had long been in a common law marriage and it would have been legally and practically impossible to obtain a marriage certificate under state law for more than nine months before Ms. Sammons’ death.

At best, this case presents a peculiar procedural hiccup in the administration of certain survivor benefits, stuck in the interstices of the federal government for years now, shakily based on an old regulation and a weak administrative decision. But at its core, OPM's decision ratifies and amplifies the effect of unconstitutional state bans on marriage between same-sex couples that once existed—and defies the letter and spirit of *Obergefell*—for no legitimate reason.

OPM's decision cannot stand: as a matter of law, Ms. Rolfingsmeyer is entitled to the same survivor benefits as heterosexual widows and widowers—as are other older LGBTQ adults whose spouses earned such benefits after years of public service. *Amici* therefore respectfully submit that the Court find, even under the most deferential standard of review, the nine month-duration of marriage requirement unconstitutional as applied to Ms. Rolfingsmeyer. SAGE and HRC offer their expert perspective on the circumstances that older LGBTQ couples and surviving spouses often encounter and urge this Court to carefully consider the economic and constitutional importance of the issues at hand.

I. SURVIVOR BENEFITS ARE CRITICAL FOR LGBTQ OLDER ADULTS, WHO OFTEN FACE ECONOMIC UNCERTAINTY AFTER A LIFETIME OF DISCRIMINATION

The type of survivor benefits that Ms. Rolfingsmeyer seeks here are especially significant because of the economic realities facing many LGBTQ older adults. Economic security, along with health, wellbeing and social connections, are

among the cornerstones for successful aging, yet these are areas in which many LGBTQ older adults face substantial barriers—stemming from current discrimination as well as the accumulation of a lifetime of legal and structural discrimination, social stigma and isolation.²

It is important to remember that LGBTQ older adults lived through a time when being gay was considered a “mental disorder” and same-sex intimacy was criminalized.³ Due to the pervasive stigma surrounding same-sex relationships, most LGBTQ people concealed their sexuality from family members, friends and coworkers, out of fear it would lead to humiliation, dishonor and rejection.⁴ The impact of this severe social stigma, particularly when combined with longstanding legal and structural discrimination, has been shown to have significant adverse

² See Soon Kyu Choi & Ilan H. Meyer, Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-White-Paper.pdf> (hereinafter “*Williams LGBT Aging Report*”).

³ Anthony R. D’Augelli, Arnold H. Grossman, Scott L. Hershberger & Timothy S. O’Connell, *Aspects Of Mental Health Among Older Lesbian, Gay, And Bisexual Adults*, 5 *Aging & Mental Health* 149, 149 (2001).

⁴ See *id.*; see also Arnold H. Grossman, Anthony R. D’Augelli, & Timothy S. O’Connell, *Being Lesbian, Gay, Bisexual, and 60 or Older in North America*, *J. of Gay & Lesbian Soc. Servs.* 24, 34-37 (2001).

effects on all aspects of life.⁵ For example, LGBTQ older adults frequently have poorer physical and mental health than other older adults.⁶ Moreover, LGBTQ older adults overall have limited long-term care options and support from family members, and have continuously faced discrimination in housing and employment.⁷ This cumulative impact of discrimination over a lifetime also results in greater financial or economic instability.

⁵ See *Williams LGBT Aging Report*, *supra* note 2, at 4-17.

⁶ See *id.* at 25-27; see also Karen I. Fredriksen-Goldsen, Charles A. Emlet, Hyun-Jun Kim, Anna Muraco, Elena A. Erosheva, Jayn Goldsen, and Charles P. Hoy-Ellis, *The Physical and Mental Health of Lesbian, Gay Male, and Bisexual (LGB) Older Adults: The Role of Key Health Indicators and Risk and Protective Factors*, 54 *The Gerontologist* 644, 645 (2012) (“Data from the California Health Interview Survey indicate that, as compared to their heterosexual counterparts, LGB adults aged 50–70 years have higher rates of diabetes, high blood pressure, physical limitations, and self-reported poor health”); Karen I. Fredriksen-Goldsen, Jane M. Simoni, Hyun-Jun Kim, Keren Lehavot, Anna Muraco, Karina L. Walters, Joyce Yang, and Charles P. Hoy-Ellis, *The Health Equity Promotion Model: Reconceptualization of Lesbian, Gay, Bisexual, and Transgender (LGBT) Health Disparities*, 84 *Am. J. of Orthopsychiatry* 653, 654 (2014); Charles A. Emlet, *Social, Economic, and Health Disparities Among LGBT Older Adults*, 40 *GENERATIONS – J. of the Am. Soc. on Aging* 16, 16-18 (2016) (hereinafter “*Social, Economic, and Health Disparities Among LGBT Older Adults*”).

⁷ See *Williams LGBT Aging Report*, *supra* note 2, at 6-11; see also Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Understanding Issues Facing LGBT Older Adults* (2016) at 6-14, available at www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf (hereinafter “*MAP & SAGE: Understanding Issues Facing LGBT Older Adults*”).

While achieving financial security is a concern for all aging adults, LGBTQ older adults are burdened with additional challenges caused by “disparities in access to legal and social programs, particularly related to recognition of legal partnership, lifetime earnings, and opportunities to build savings.”⁸ The economic evidence abounds:

- Same-sex couples have a disproportionately higher rate of poverty and are at an overall disadvantage in “retirement assets, retirement savings, and the ability to pass on wealth” compared to heterosexual married couples.⁹ This is true even though studies have shown, compared with those of similar age in the general population, LGBTQ adults aged 80 years and older are “more than twice as likely to have a college or advanced degree and nearly twice as likely to be working” (internal citations removed).¹⁰
- “Nearly one-third of LGBTQ older adults ages 65 and older live at or below 200% of the federal poverty level, compared to 26% of non-LGBTQ older adults. (This percentage rises to approximately 40% of LGBTQ older adults 80 and older).”¹¹

⁸ See *Williams LGBT Aging Report*, *supra* note 2, at 8.

⁹ *Id.* at 10.

¹⁰ Karen I. Fredriksen-Goldsen, Hyun-Jun Kim, Hyunzee Jung, and Jayn Goldsen, *The Evolution of Aging With Pride—National Health, Aging, and Sexuality/Gender Study: Illuminating the Iridescent Life Course of LGBTQ Adults Aged 80 Years and Older in the United States*; 88 *The Int. J. of Aging & Hum. Dev.* 381, 393 (2019).

¹¹ *MAP & SAGE, Understanding Issues Facing LGBT Older Adults*, *supra* note 7, at 10; see also *Social, Economic, and Health Disparities Among LGBT Older Adults*, *supra* note 6, at 18.

- “51% of LGBTQ older people are very or extremely concerned about having enough money to live on, as compared to 36% of non-LGBTQ older people.”¹²
- “44% of LGBTQ older people are very or extremely concerned that they will have to work well beyond retirement age just to have enough money to live, as compared to 26% of non-LGBTQ older people.”¹³
- “While most (70%) LGBTQ older people ages 60-75 are retired, 13% anticipate that, on average, they will have to work until age 69 before they can retire. Another 10% feel that they will never be able to retire or don’t know when they can retire.”¹⁴
- “43% of LGBTQ older people are very or extremely concerned that they will not be able to deal with unexpected, major emergencies in retirement, as compared to 30% of non-LGBTQ older people.”¹⁵
- Lesbian older couples are “10-20% less likely to have retirement income or interest and dividend income” than opposite-sex couples.”¹⁶
- Lesbian older adults “reported higher levels of financial barriers to care compared to their heterosexual peers.”¹⁷

¹² Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75* (2014) at 12, available at <https://www.sageusa.org/resource-posts/out-visible-the-experiences-and-attitudes-of-lesbian-gay-bisexual-and-transgender-older-adults-ages-45-75-by-the-numbers-full-report> (hereinafter “*SAGE Out & Visible*”).

¹³ *Id.* at 15.

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 15.

¹⁶ *Williams LGBT Aging Report*, *supra* note 2, at 10.

¹⁷ *Social, Economic, and Health Disparities Among LGBT Older Adults*, *supra* note 6, at 18.

These economic disadvantages stem from several sources. For one, the LGBTQ community has historically experienced discrimination in the workplace.¹⁸ In fact, until just a couple of months ago, it was still legal in many states to fire an employee based on their sexual orientation. *Bostock*, 140 S. Ct. at 1754. This historic and systemic discrimination translates into a cascade of economic inequities for members of the LGBTQ community: fewer job opportunities, lower income and fewer opportunities to build savings and accumulate wealth for older LGBTQ adults.

The cumulative impact of these economic and social inequities comes to a head in retirement, manifesting in physical and mental health issues, and financial insecurity.¹⁹ Compared to heterosexual couples, same-sex couples have a disproportionately higher rate of poverty and are at an overall disadvantage in “retirement assets, retirement savings, and the ability to pass on wealth.”²⁰ For all

¹⁸ *MAP & SAGE: Understanding Issues Facing LGBT Older Adults*, *supra* note 7, at 6.

¹⁹ *See Williams LGBT Aging Report*, *supra* note 2, at 10.

²⁰ *Id.* at 10 (noting that “[l]esbian older couples, in particular, are 10-20% less likely than different-sex couples to have retirement income or interest and dividend income, and are much more likely to receive public assistance”) (citation omitted); *see also MAP & SAGE, Understanding Issues Facing LGBT Older Adults*, *supra* note 7, at 10 (“Nearly one-third of LGBT[Q] older adults ages 65 and older live at or below 200% of the federal poverty level, compared to a quarter of non-LGBT older adults. (This percentage rises to 40% of LGBT older adults 80 and older.)

these reasons, the safety net of benefits available to surviving spouses is of paramount importance to LGBTQ older adults, in particular.

Chief among those benefits are social security benefits, the primary source of support for many older and disabled Americans.²¹ Given the elevated rates of poverty in the LGBTQ community, these benefits are acutely important.²² *See, e.g. Br. of Amici Curiae James Obergefell, Michael Ely, and Anthony J. Gonzales.* Moreover, some same-sex widows or widowers who were married before *Obergefell* face additional procedural hurdles in applying for retirement, pension and veteran's benefits. This repeatedly arose during a unique period of time between the Supreme Court's decisions in *Windsor*, 570 U.S. 744 and *Obergefell*, 135 S. Ct. 2584 where there was a patchwork of incompatible and confusing state

Bisexuals 65 and older have shocking poverty rates: 47% of bisexual older men and 48% of bisexual women live at or below 200% of the federal poverty level. And transgender older adults have similar rates to bisexual older adults. One study found that 48% of transgender older adults live at or below 200% of the federal poverty level") (internal citations omitted).

²¹ Soc. Security Admin., SSA Publication No. 13-11700, Annual Statistical Supplement to the Social Security Bulletin, 2013, at Table 3.C4 and Table 3.C5 (Feb. 2014).

²² Jonathan B. Foreman, *Making Social Security Work for Women and Men*, 16 N.Y.L. Sch. J. Hum. Rts. 359, 366 (1999) ("Social Security alone has not provided adequate income for retirees, yet it is virtually the only source of income for the lowest 40 percent of Americans").

and federal laws on marital benefits which LGBTQ persons were forced to navigate.

LGBTQ older adults whose spouses died before marriage between same-sex couples was legally recognized may have been denied access to their partner's retirement or pension benefits, and left without recourse to change the plan once their spouse retired.²³ The same legal and structural accessibility obstacles extend outward to other essential survivor benefits, such as healthcare coverage, social security and veteran's benefits; which would also have been denied to surviving same-sex spouses whose marriages were not legally recognized prior to retirement or death.²⁴ Thus, a lack of retirement or pension income compounded with the unknown variable as to whether they will be entitled to surviving spouse retirement, social security or veteran's benefits further aggravates economic insecurity for LGBTQ older adults.

²³ *MAP & SAGE, Understanding Issues Facing LGBT Older Adults*, *supra* note 7, at 9; *see also Williams LGBT Aging Report*, *supra* note 2, at 8-9.

²⁴ *Id.*

II. IT IS UNCONSTITUTIONAL TO CONDITION FEDERAL SURVIVOR BENEFITS ON UNCONSTITUTIONAL STATE MARRIAGE BANS

Ms. Rolfingsmeyer's opening brief aptly enumerates the central constitutional problems with the application of OPM's regulation and the Administrative Law Judge's ("ALJ") decision. *See e.g.*, Pet. Br. at 12-34. *Amici* endorse Ms. Rolfingsmeyer's arguments about why OPM's action here is unconstitutional under either rational basis review or heightened scrutiny.

SAGE and HRC weigh in to register three additional points: First, should the Court reach the constitutional issues at bar, they are directly controlled by *Obergefell* and its progeny. Indeed, *Obergefell* detailed at length the economic and social importance of marital benefits, including survivor benefits:

[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. [States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates . . . Valid marriage under state law is also a significant status for over a thousand provisions of federal law.

Obergefell, 135 S. Ct. at 2601 (citations omitted). In reaching its decision, the Court underscored how these "constellation of benefits" support the stability and dignity of same-sex couples:

There is no difference between same- and opposite-sex couples Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

Id. at 2601-02. The Supreme Court further explicitly rejected a “slower, case-by-case determination of the required availability of specific public benefits to same-sex couples,” as such approach “still would deny gays and lesbians many rights and responsibilities intertwined with marriage.” *Id.* at 2606. Finally, the Court stressed that legal limitations on marriage “may long have seemed natural and just, but [their] inconsistency with the central meaning of the fundamental right to marry is now manifest.” *Id.* at 2602.

The subsequent implementation of *Obergefell*, particularly the decision of *Pavan v. Smith*, 582 U.S. ___, 137 S. Ct. 2075 (2017), is also illuminating. There, the Supreme Court summarily rejected a state's attempt to erode the freedom to marry by whittling away at marital benefits, even non-pecuniary benefits like a same-sex spouse being listed on a child's birth certificate. *Id.* at 2078-79. In a per

curiam opinion, the Court proclaimed “*Obergefell* proscribes such disparate treatment” and invoked the long list of benefits linked to marriage:

As we explained [in *Obergefell*], a State may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” []. Indeed, in listing those terms and conditions—the “rights, benefits, and responsibilities” to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified “birth and death certificates.” []. That was no accident: Several of the plaintiffs in *Obergefell* challenged a State’s refusal to recognize their same-sex spouses on their children’s birth certificates. [] In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. [] That holding applies with equal force to [state limitations on birth certificates].

Id. at 2078 (citations omitted). The logic of *Pavan* inescapably applies here,²⁵ since the same “constellation of benefits” includes “the rights and benefits of survivors.” *See, e.g. Obergefell*, 135 S. Ct. at 2601-02.

Second, conditioning survivor benefits upon unconstitutional state laws unconstitutionally deprives same-sex spouses of equal rights. As the Supreme Court recognized in *Obergefell*, denying same-sex couples the same “constellation

²⁵ Nor can OPM resist this conclusion by relying on this Court’s holding in *Becker v. Office of Personnel Management*, 853 F.3d 1311 (Fed. Cir. 2017). In *Becker*, the petitioner—who was in a different-sex relationship—challenged the nine-month duration requirement under FERS as unconstitutional in light of *Obergefell*. *Id.* at 1314-15. This Court responded, “[n]othing in *Obergefell* changes the required approach to evaluating the kind of line-drawing for eligibility for public funds that is presented here. *Obergefell* did not involve such a measure; it involved state bans on recognition of same-sex marriages.” *Id.* at 1315. Three months later, however, the Supreme Court clarified its ruling in *Pavan*.

of benefits” afforded to opposite-sex couples is inherently unequal and prohibited under the Equal Protection Clause:

It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

Obergefell, 135 S. Ct. at 2604. By conditioning survivor benefits on unconstitutional state laws, OPM’s regulation discriminates against same-sex widows and widowers, like Ms. Rolfingsmeyer, whose spouses did not survive long enough to satisfy the nine-month duration requirement. As applied to this particular subset of LGBT older adults, OPM’s regulation categorically deprives same-sex surviving spouses of the fundamental right to marriage on the “same terms and conditions as opposite-sex couples”; and thus, cannot withstand scrutiny at any level. *See id.* at 2604-05.

Third, the ALJ’s treatment of *Obergefell* was curt and unconvincing. The ALJ only stated that unconstitutional prohibitions on same-sex marriage were “a non-issue . . . in light of the Supreme Court’s decision in *Obergefell*,” Appx5. But that makes little sense, since *Obergefell* came two months *after* Ms. Sammons’

death. If the ALJ meant to imply that Ms. Rolfingsmeyer's claim was insignificant because *future* claimants would have the freedom to marry and could *prospectively* satisfy the nine-month duration requirement, that is both personally dismissive and legally non-responsive to the claim at hand. A quarter century of Supreme Court case law upholding the equal dignity of LGBTQ persons requires a more serious analysis, if nothing else.

CONCLUSION

The Court should reverse the Merit Systems Protection Board's judgment and direct OPM to provide Ms. Rolfingsmeyer with spousal survivor benefits under FERS.

Dated: August 4, 2020

Respectfully submitted,

/s/ Julia E. Romano
JULIA E. ROMANO
PAUL R. JOHNSON
KING & SPALDING LLP
633 W. 5TH STREET, SUITE 1600
LOS ANGELES, CA 90071
TELEPHONE: +1 213 443 4365
FACSIMILE: +1 213 443 4310
jromano@kslaw.com
pjohnson@kslaw.com

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Case Number 20-1735
Short Case Caption *Rolfingsmeyer v. Office of Personnel Management*
Filing Party/Entity *Amici curiae* Services and Advocacy for Gay, Lesbian,
Bisexual, and Transgender Elders and Human Rights
Campaign

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 3,805 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 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 4, 2020

/s/ Julia E. Romano
JULIA E. ROMANO
KING & SPALDING LLP
633 W. 5TH STREET, SUITE 1600
LOS ANGELES, CA 90071
TELEPHONE: +1 213 443 4365
FACSIMILE: +1 213 443 4310
jromano@kslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2020, a true and correct copy of the Brief of *Amici Curiae* Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders and Human Rights Campaign in Support of Petitioner was electronically filed with the Clerk of the Court using the appellate CM/ECF system. Counsel for all parties to the case that are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Julia E. Romano
JULIA E. ROMANO
KING & SPALDING LLP
633 W. 5TH STREET, SUITE 1600
LOS ANGELES, CA 90071
TELEPHONE: +1 213 443 4365
FACSIMILE: +1 213 443 4310
jromano@kslaw.com