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 FOR PETITIONER

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July 28, 2020

CERTIFICATE OF INTEREST

Case No. 20-1735

Patricia Rolfingsmeyer v. Office of Personnel Management

Filing Party/Entity: Patricia Rolfingsmeyer

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

Date: July 28, 2020 Signature: */s/ Jonathan S. Franklin*

Name: Jonathan S. Franklin

1. Represented Entities (Fed. Cir. R. 47.4(a)(1)) – Provide the full names of all entities represented by undersigned counsel in this case.

Patricia Rolfingsmeyer

2. Real Party in Interest (Fed. Cir. R. 47.4(a)(2)) – 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.

None

3. Parent Corporations and Stockholders (Fed. Cir. R. 47.4(a)(3)) – 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.

None

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).

John W. Purcell; Purcell Krug & Haller

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

6. Organizational Victims and Bankruptcy Crimes – 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

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, petitioner Patricia Rolfingsmeyer states that no other appeal arising out of this action has come before this or any other appellate court, and that no case known to counsel pending in this or any other court will directly affect or will be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

Pursuant to 5 U.S.C. § 8461(e)(l), 5 C.F.R. § 841.308, and 5 C.F.R. § 1201.22, the Merit Systems Protection Board ("MSPB") had jurisdiction over Ms. Rolfingsmeyer's timely appeal of the Office of Personnel Management's ("OPM's") final decision denying her application for survivor benefits. Appx1-19; Appx32. The decision of MSPB affirming OPM's decision became final on April 10, 2020. Appx20-26. Ms. Rolfingsmeyer timely appealed to this Court on April 14, 2020, *see* 5 U.S.C. § 7703(b), and this Court has jurisdiction pursuant to 5 U.S.C. § 7703(a)(1) and 5 C.F.R. § 1201.120.

STATEMENT OF THE ISSUE

Whether it is unlawful for the federal government to rely on a state's concededly unconstitutional definition of marriage to deny survivor benefits to the surviving member of a long-term, committed same-sex couple who would have qualified for such benefits but for that unconstitutional definition of marriage.

STATEMENT OF THE CASE

A. The Couple's Relationship.

Patricia "Patsy" Rolfingsmeyer met Tina Sammons in 1990. Appx157. Although it would be seven more years before their first date, which took place on New Year's Eve 1997, *id.*, that date marked the beginning of a long and committed relationship that led to their marriage. Within one month, in January 1998, the

couple moved in together. Appx2; Appx157. They would live together for the remaining sixteen years of Ms. Sammons' life. Appx157.

The couple lived in two different states during those sixteen years, and they held themselves out as married in both of them. First, in 2003, the couple performed a ceremony at their home in Illinois, Appx2; Appx157, at which they declared that they were married and exchanged matching diamond wedding bands they had purchased for one another. *Id.* In 2007, they moved to Pennsylvania, where they purchased a home that they held jointly in both their names. Appx2.

The undisputed record shows that from 2003 onward, Ms. Rolfingsmeyer and Ms. Sammons held themselves out to be married, Appx2, held their house and other property in both of their names, Appx90; Appx157, and did everything else that could reasonably be expected of them at that time to "formalize their relationship," *see* Appx2-3. But there was, of course, an impediment. For the entire time they lived in Illinois, that state prohibited same-sex couples from marrying. Appx2. And for the entire time they lived in Pennsylvania, that state both prohibited same-sex couples from marrying and refused to recognize otherwise-valid same-sex marriages performed in other states. Pennsylvania's ban was not struck down until May 2014. *See Whitewood v. Wolf*, 992 F. Supp. 2d 410, 415 (M.D. Pa. 2014) (holding that Pennsylvania's same-sex marriage ban was unconstitutional); *see also* Laura Meckler, Wall St. J., *Pennsylvania Gov. Corbett*

Says He Won't Appeal Same-Sex Marriage Ruling (https://tinyurl.com/yawjntd2) (May 21, 2014). But when they exchanged rings at the marriage ceremony in their home in 2003, Ms. Rolfingsmeyer and Ms. Sammons declared that "it may not be legal out there, but it is in here." Appx2; Appx157.

On June 26, 2013, the Supreme Court decided *United States v. Windsor*, 570 U.S. 744, 774-75 (2013), striking down Section 3 of the federal Defense of Marriage Act ("DOMA"), which had defined marriage for federal purposes as only between a man and a woman. In light of that decision, on November 25, 2013, and in an effort to further solemnize and ratify their status as a married couple, Ms. Rolfingsmeyer and Ms. Sammons drove from their family home in Pennsylvania to Maryland, where same-sex marriage had been legalized, to be married once again, using the same rings they had exchanged in 2003. Appx157-158. They did so even though Ms. Sammons was being treated for metastatic breast cancer at that time. Appx130; Appx172. Due to her cancer, she had been too ill to travel earlier. *Id.*

B. Ms. Sammons' Death.

Ms. Sammons died of that cancer just over two months later, on February 4, 2014. Appx1-2. Her death occurred three months before same-sex marriage became legal in Pennsylvania and more than a year before the Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which confirmed that laws

in Pennsylvania and other states banning same-sex marriage have always been unconstitutional. As noted, at the time of Ms. Sammons' death, Pennsylvania refused to recognize same-sex marriages performed in other states even where such marriages were legal. *See supra* at 2-3.

At the time of her death, Ms. Sammons possessed certain financial assets. As a nine-year Air Force Veteran who had moved on to work for the United States Postal Service shortly after her relationship with Ms. Rolfingsmeyer began, Appx1-2; Appx91; Appx125-126; Appx157, Ms. Sammons possessed various retirement accounts and insurance policies. *Id.* Long before their Maryland marriage, she named Ms. Rolfingsmeyer the beneficiary for all of them. *Id.*

Ms. Sammons was also continuously covered by the Federal Employees Retirement System ("FERS") from 1998 until her death. Appx1-2. Under FERS, if an employee dies after completing 10 years of creditable civilian service, his or her surviving spouse is entitled to survivor benefits, which include a basic employee death benefit (which is paid in a lump sum or in installments) and an annuity. Appx4; *see generally* 5 U.S.C. §§ 8442(a), (b); 5 C.F.R. §§ 843.309, 843.310. It is undisputed that Ms. Sammons completed at least ten years of creditable civilian service. Appx1-2; Appx4.

C. Procedural History.

1. Proceedings Before OPM.

Less than a month after Ms. Sammons' death, Ms. Rolfingsmeyer filed with OPM an application for her survivor benefits. Appx84-87. Along with her application, Ms. Rolfingsmeyer wrote a letter attaching "paper verification going back to the year 2000 of things in both [their] names" as well as the receipts for the diamond wedding bands they exchanged in 2003. Appx90. She stated "[t]he only reason we were not married any sooner [than 2013] is the laws prohibited us from doing so. As soon as we learned we could 'legally' be married we did." *Id*.

OPM denied those benefits in two separate orders in early 2015, concluding that Ms. Rolfingsmeyer and Ms. Sammons were not common-law married (because the jurisdictions in which they lived did not recognize common-law marriages when they lived there), and also that they did not satisfy the marriage and duration requirements contained in OPM's regulations. Appx81-83. Those regulations generally require that in order to be eligible for spousal survivor benefits, a claimant must have been married, as recognized under the law of her domicile, for at least nine months before the covered employee's death. *See* 5 C.F.R. § 843.102 (OPM regulation defining marriage); *see also* 5 U.S.C. § 8441(1)(A) (imposing nine-month marriage requirement). As noted, Ms. Rolfingsmeyer could not have satisfied that regulation because Ms. Sammons'

death occurred (1) before Pennsylvania's unconstitutional ban on same-sex marriages was enjoined; and (2) more than a year before *Obergefell*.[1]

Ms. Rolfingsmeyer filed a Request for Reconsideration. *See* Appx78. While that request was pending, the Supreme Court decided *Obergefell*, which held that prohibitions on same-sex marriage and refusals to recognize otherwise-valid, out-of-state same-sex marriages are—and always have been—unconstitutional, and that state laws are thus "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605, 2607-08. In so holding, the Court based its decision largely on the fact that "by virtue of their exclusion from" the "institution" of marriage, "same-sex couples are denied the constellation of benefits that the States have linked to marriage." *Id*. at 2601.

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[1] Although Ms. Rolfingsmeyer and Ms. Sammons married in Maryland after *Windsor* in the hope of having that marriage recognized in their home state of Pennsylvania, *Windsor* did not actually require such recognition. *Windsor* left in place Section 2 of DOMA, which allowed states to refuse to recognize the marriages of same-sex couples performed under the laws of other states. Section 2 of DOMA was not invalidated until *Obergefell* in 2015. *See Windsor*, 570 U.S. at 752 (noting that "Section 2 … has not been challenged here"); *see also Obergefell*, 135 S. Ct. 2607-08 (holding that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character"). In fact, at no time during Ms. Sammons' life would Pennsylvania have recognized even their Maryland marriage. *See supra* at 2-3.

OPM nevertheless declined to reconsider its decision. It wrote to Ms. Rolfingsmeyer that "[w]hile we sympathize with the circumstances you have presented, the law is specific on this point, and we have no administrative discretion in this matter. We sincerely regret that we could not provide you with a more favorable response." Appx79.

For purposes of this appeal, the pertinent "law" is 5 C.F.R. § 843.102 (the "Regulation"), an OPM regulation interpreting 5 U.S.C. § 8441(1)(A). While the statute provides that spousal benefits are available to individuals who were "married" to a covered decedent for more than nine months before death, it does not define marriage.[2] That task thus falls to the Regulation, which provides that a

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[2] The statute uses gendered terms, defining "widow" as the surviving wife of a covered employee who was married to "him" for at least nine months before "his" death, and "widower" as the surviving husband of a covered employee who was married to "her" for at least nine months before "her" death. 5 U.S.C. §§ 8441(1)(A), (2)(A); *see also* 5 U.S.C. § 8442 (incorporating definitions of "widow" and "widower" for FERS survivor benefits). But the federal government has recognized that the statute's gendered language is unconstitutional to the extent it precludes recognition of same-sex marriages. *See Ely v. Saul*, 2020 WL 2744138, at *6 (D. Ariz. May 27, 2020) (considering functionally equivalent language of Social Security Act), *appeal docketed* (9th Cir. July 24, 2020); OPM, *Frequently Asked Questions*, *Benefits for LGBT Federal Employees and Annuitants* (https://www.opm.gov/faqs/topic/benefitsforlgbt/index.aspx?cid=a5fc8619-aab9-4716-9131-bf6bd4978873). Thus, notwithstanding the gendered language of Section 8441, the federal government currently provides FERS benefits to surviving spouses of same-sex marriages entered into under state law more than nine months before the covered employee's death. *Id*.

"marriage" is "a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee, Member, or retiree." 5 C.F.R. § 843.102. It is undisputed that in this case that jurisdiction was Pennsylvania, which unconstitutionally refused to permit same-sex marriages or recognize otherwise valid, out-of-state same-sex marriages until after Ms. Sammons' death.

2. Proceedings Before MSPB.

Ms. Rolfingsmeyer then timely appealed to MSPB. Appx1; Appx32. The appeal was assigned to an Administrative Law Judge ("ALJ"). Appx47. The ALJ issued his decision in April of 2017.[3] In it, he acknowledged that "neither of the two states in which the appellant and Ms. Sammons resided recognized same-sex marriage during the relevant time period." Appx5. As such, he went on, Ms. Rolfingsmeyer "faced practical obstacles to contracting a valid marriage that [opposite-sex individuals] did not face, and. . . these obstacles stemmed from longstanding violations of equal protection principles." Appx12 (citing *Obergefell*, 135 S. Ct. at 2604-05; *Windsor*, 133 S. Ct. at 2695). Moreover, he explained, application of the nine-month marriage requirement to this case would "in no way

[3] The ALJ held a hearing prior to his decision, but, due to a technical malfunction, that hearing was not recorded. Appx115-116; Appx153-154. He subsequently permitted the development of a paper record to account for the lost recording. *See* Appx153-159; Appx172-173.

further[]" the policy behind that rule—*i.e.*, the interest in "screen[ing] out sham marriages"—because Ms. Rolfingsmeyer's relationship with Ms. Sammons was plainly legitimate. *Id.* As the ALJ put it, Ms. Rolfingsmeyer "and Ms. Sammons formally committed to each other in 2003." *Id.*

Those clear findings should have resulted in a holding that OPM had unlawfully denied Ms. Rolfingsmeyer's claim by incorporating state statutes that even the ALJ found were longstanding constitutional violations and do not in any way further the policy behind OPM's rule. Nevertheless, for three reasons, the ALJ rejected Ms. Rolfingsmeyer's claim that the Regulation "is unconstitutional as applied to her." Appx12. First, he wrote, the unconstitutional prohibitions on same-sex marriage were "a non-issue . . . in light of the Supreme Court's decision in *Obergefell*," even though that decision came after Ms. Sammons' death. Appx5. Second, he continued, this Court's finding in *Becker v. Office of Personnel Management*, 853 F.3d 1311 (Fed. Cir. 2017)—that the duration-of-marriage requirement has a rational basis because it serves as a prophylactic to exclude sham marriages—categorically foreclosed any equal-protection challenge to either the duration or the marriage requirement, even though *Becker* involved an ***opposite-sex*** couple who had faced no legal impediment to a longer-than-nine-month marriage. Appx11-12. And third, the ALJ deemed himself unable to "rule that [Ms. Rolfingsmeyer's] circumstances, however compelling, are sufficient to

authorize payment" of benefits, on the theory that only Congress can authorize the payment of funds. Appx13 ("[T]he equities of this case do not empower me to decide in [Ms. Rolfingsmeyer's] favor because the Appropriations Clause is explicit that '[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' U.S. Const. art. 1, § 9, cl. 7. In other words, the payment of money from the Treasury must be authorized by a statute.") (citing *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)). In making that last point, the ALJ failed to note that Ms. Rolfingsmeyer's challenge was to ***the Regulation***, not a statute, or to consider whether Congress may withhold such payments on an unconstitutional basis. *Id.*

The ALJ's decision became the final decision of MSPB on April 10, 2020, Appx20, and Ms. Rolfingsmeyer timely noticed this appeal on April 14.

SUMMARY OF ARGUMENT

A simple and well-settled principle resolves this case: federal action is unconstitutional when it relies on unconstitutional state law. OPM's denial of benefits to Ms. Rolfingsmeyer incorporated, approved, and exacerbated the harms caused by the unconstitutionally discriminatory marriage bans in Illinois and Pennsylvania at the time Ms. Rolfingsmeyer lived in those states. By uncritically deferring to those unconstitutional regimes, OPM violated the constitution by denying Ms. Rolfingsmeyer the same "constellation of benefits" she would have

enjoyed as a member of an opposite-sex couple. *Obergefell*, 135 S. Ct. at 2601. OPM could not have denied the benefits by employing its own unconstitutional definition of marriage, and it cannot avoid that result merely because it elected to incorporate and rely on unconstitutional state-law definitions instead.

Although OPM's denial of the "constellation of benefits" associated with marriage alone suffices to justify reversal, application of the traditional equal protection doctrine reinforces the conclusion that the ALJ's judgment should be reversed. The Regulation, by incorporating state laws limiting marriage to opposite-sex couples, discriminates based on sex and sexual orientation and is therefore subject to heightened scrutiny for those two independent reasons. And the Regulation cannot satisfy heightened scrutiny—or even rational basis review—both because the interests the Regulation purports to advance are insignificant and because those interests are not furthered by the blanket denial of benefits to same-sex couples who were subject to unconstitutional state-law marriage bans.

Given the patent invalidity of OPM's action, the proper remedy is clear. Ms. Rolfingsmeyer is entitled to full spousal survivor benefits, which is the only remedy that can place her in the position she would have occupied had OPM not impermissibly relied on unconstitutionally discriminatory definitions of marriage in order to deny those benefits. The record is undisputed that Ms. Rolfingsmeyer and Ms. Sammons would have been validly married in either Illinois or

Pennsylvania but for those states' unconstitutional bans; they took the additional step of ratifying their marriage by traveling to Maryland to obtain a marriage license; and their relationship satisfies any definition of marriage OPM could constitutionally employ to apply the statute. Thus, no matter what remedial test is applied, Ms. Rolfingsmeyer is entitled to the full benefits she would have received in the absence of Illinois' and Pennsylvania's unconstitutional bans. MSPB's judgment therefore should be reversed, and Ms. Rolfingsmeyer should be granted her survivor benefits. Alternatively, and at the very least, Ms. Rolfingsmeyer is entitled to a determination on remand under a constitutionally permissible rule.

STANDARD OF REVIEW

The MSPB's decision should be reversed if, *inter alia*, it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or unsupported by substantial evidence. 5 U.S.C. § 7703(c). Because the Regulation's constitutionality is a question of law, review is *de novo*. *See*, *e.g.*, *King v. Merit Sys. Prot. Bd.*, 105 F.3d 635, 638 (Fed. Cir. 1997).

ARGUMENT

I. OPM'S REGULATION IS UNCONSTITUTIONAL BECAUSE IT RELIES ON UNCONSTITUTIONAL STATE LAWS TO DENY BENEFITS TO SAME-SEX COUPLES.

The only basis for OPM's denial of survivor benefits to Ms. Rolfingsmeyer is the fact that, according to Pennsylvania law, she was not married to Ms.

Sammons before May 4, 2013—*i.e.*, for more than nine months before Ms. Sammons' death. *See supra* at 5-8. And it is undisputed that the only reason Ms. Rolfingsmeyer and Ms. Sammons were not married under Pennsylvania law for more than nine months—or, for that matter, at any time during Ms. Sammons' life—is that for the entire sixteen years they were together, Pennsylvania banned same-sex marriage and refused to recognize otherwise-valid same-sex marriages performed in other states. *See*, *e.g.*, 23 Pa. Cons. Stat. § 1704 ("*Marriage between persons of the same sex*. It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."), *invalidated by Whitewood*, 992 F. Supp. 2d at 415; *see also Whitewood*, 992 F. Supp. 2d at 415-16 (recounting circumstances surrounding adoption of Pennsylvania's same-sex marriage ban). Pennsylvania's law was unconstitutional from the moment of its enactment. *See Obergefell*, 135 S. Ct. at 2604-05.[4] And by applying the Regulation to Ms. Rolfingsmeyer, OPM

[4] Illinois' same-sex marriage ban was also plainly unconstitutional. *See* 750 Ill. Comp. Stat. 5/212 (2006) (prohibiting "a marriage between 2 individuals of the same sex"), *superseded by* 750 Ill. Comp. Stat. 5/212 (2014). But the Pennsylvania law to which OPM deferred in this case effectively renders Illinois' unconstitutional ban irrelevant, because Pennsylvania would not have recognized

has rubber-stamped and perpetuated Pennsylvania's unconstitutional same-sex marriage ban, thus violating the basic, black-letter principle that "same-sex couples, no less than opposite sex couples, must have access" to the full array of rights related to marriage. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017). The ALJ's decision should therefore be reversed with directions to award Ms. Rolfingsmeyer the survivor benefits to which she is entitled.

A. OPM May Not Deny Benefits To A Person Who Would Have Been Entitled To Those Benefits But For Unconstitutional Same-Sex Marriage Bans.

The Supreme Court has unambiguously held that it is unconstitutional for the federal government to carve out same-sex couples from the protections generally afforded to spouses. *See*, *e.g.*, *Windsor*, 570 U.S. at 772-73; *see also id.* at 768 (holding that "injury and indignity" resulting from exclusion from benefits associated with marriage "is a deprivation of an essential part of the liberty protected by the Fifth Amendment" (citing U.S. Const. amend. V)). The Court extended that holding in *Obergefell*, when it concluded that the exclusion of same-sex couples from marriage and the panoply of benefits and protections that come with it is an unconstitutional deprivation of liberty, equality, and dignity. *See Obergefell*, 135 S. Ct. at 2594. And two years later, in *Pavan*, 137 S. Ct. at 2078,

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the 2003 Illinois marriage at the time of Ms. Sammons' death even if that marriage had been legal in Illinois. *See* 23 Pa. Cons. Stat. § 1704.

the Court reaffirmed those principles, holding that "same-sex couples, no less than opposite sex couples, must have access" to the full array of rights related to marriage. In that case, the Court held that the Constitution requires states to include a woman's female spouse on the woman's child's birth certificate.

There can be no doubt that OPM would violate the basic holdings of *Windsor*, *Obergefell*, and *Pavan* if it relied on ***its own*** discriminatory definition of marriage to deny benefits to a surviving member of a same-sex couple. In *Obergefell* itself, the Supreme Court emphasized the particular indignity of deeming two people who shared a loving, committed, lasting relationship to be "strangers even in death" through the government's refusal to recognize their relationship. *Obergefell*, 135 S. Ct. at 2594. And both *Obergefell* and *Windsor* singled out the unavailability of survivor benefits as a particularly invidious injury arising from the denial of the right to marry. *See id.* at 2601 (noting that loss of "the rights and benefits of survivors" is among the injuries suffered by those who are unconstitutionally deprived of the right to marry); *Windsor*, 570 U.S. at 773 (noting that DOMA "denies or reduces benefits allowed to families upon the loss of a spouse. . . [which] are an integral part of family security"). Indeed, OPM itself has recognized that the gendered definitions of "widow" and "widower" in the survivor benefits statute, 5 U.S.C. §§ 8441(1)(A), (2)(A), are unconstitutional under *Windsor* and *Obergefell*, and OPM therefore ignores those statutory

definitions in providing survivor benefits to married same-sex couples. *See supra* at 7 n.2. It follows that OPM itself could not permissibly enact a regulation defining marriage to exclude same-sex couples for purposes of awarding benefits.

It makes no constitutional difference that the Regulation at issue here discriminates by incorporating state laws, rather than by excluding same-sex couples in its own text. Indeed, in the nearly identical context of Social Security survivor benefits, lower courts have uniformly recognized that the government cannot incorporate unconstitutional state-law prohibitions to deny benefits to same-sex couples unable to marry under those invalid laws. *See Driggs v. Comm'r of Soc. Sec. Admin.*, 2020 WL 2791858, at *3 (D. Ariz. May 29, 2020); *Ely*, 2020 WL 2744138, at *7; Report and Recommendation at 13-15, *Thornton v. Commissioner*, No. 2:18-cv-01409-JLR-JRC (W.D. Wash. Feb. 21, 2020), Dkt. 74. As those courts have held, "[b]ecause the duration of marriage requirement is based upon an unconstitutional [state] law, it cannot withstand scrutiny at any level." *Ely*, 2020 WL 2744138, at *7.

These holdings merely apply well-settled law. In the related context of survivor-benefits regimes that refer to state inheritance laws, courts have overwhelmingly concluded that the federal government cannot permissibly incorporate laws that violate the Constitution by, for example, excluding children born out of wedlock. In *Trimble v. Gordon*, 430 U.S. 762, 763-66 (1977), the

Supreme Court struck down, on equal protection grounds, state intestacy laws that discriminate against illegitimate children. Following that decision, lower courts then held it was *per se* unconstitutional for the federal government to deny Social Security benefits by incorporating unconstitutional state intestacy laws. For instance, in *Cox v. Schweiker*, 684 F.2d 310, 324 (5th Cir. 1982), the Fifth Circuit held it was unlawful for the federal government to deny Social Security survivor benefits to the illegitimate child of a wage earner, where the federal statute incorporated and relied on a Georgia intestacy law that was unconstitutional under *Trimble*. As the court explained, the claimant was "denied entitlement to survivor's benefits on the basis of a clearly unconstitutional state intestacy law. Were we to affirm this denial simply because. . . the state law is in reality a federal law by incorporation, we would be hard put to ground our decision in anything but *ad hoc* reasoning." *Id*. The overwhelming weight of authority is to the same effect. *See*, *e.g.*, *Smith ex rel. Sisk v. Bowen*, 862 F.2d 1165, 1167-68 (5th Cir. 1989); *Handley ex rel. Herron v. Schweiker*, 697 F.2d 999, 1001-02 (11th Cir. 1983); *Gross v. Harris*, 664 F.2d 667, 670 (8th Cir. 1981); *White v. Harris*, 504 F. Supp. 153, 155 (C.D. Ill. 1980); *Ramon v. Califano*, 493 F. Supp. 158, 160 (W.D. Tex. 1980); *cf. Bassett v. Snyder*, 951 F. Supp. 2d 939, 963-64 (E.D. Mich. 2013) (a classification is discriminatory where it incorporates another law that is discriminatory); *see also*, *e.g.*, *Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa.*, 220

F.3d 193 (3d Cir. 2000) (holding that policies that did not mention age were nevertheless facially age-discriminatory, and thus invalid under Age Discrimination in Employment Act, because they incorporated other policies with explicit age restrictions); *Johnson v. State of New York*, 49 F.3d 75 (2d Cir. 1995) (similar).

There is no material distinction between those cases and this one. The Pennsylvania and Illinois same-sex marriage bans were indisputably unconstitutional not just from the date of *Obergefell*, but from the date they were adopted. *See*, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.") Accordingly, OPM cannot deny Ms. Rolfingsmeyer spousal survivor benefits merely by incorporating into the Regulation those states' unconstitutional definitions of marriage. Indeed, if anything, the federal government's incorporation of discriminatory marriage laws here is even ***less*** permissible than was the incorporation of discriminatory inheritance laws in *Cox* and similar cases, since the purpose of DOMA was "to put a thumb on the scales" and "to discourage enactment of state same-sex marriage laws." *See Windsor*, 570 U.S. at 771. The federal government was therefore complicit in the unconstitutional state-law regimes. Relying on those unconstitutional laws to deny benefits to same-sex couples who would otherwise have been married is plainly unconstitutional.

B. The Agency's Contrary Conclusion Is Erroneous.

Despite noting that "neither of the two states in which [Ms. Rolfingsmeyer] resided recognized same-sex marriage during the relevant time period," the ALJ concluded that those unconstitutional laws were "a non-issue. . . in light of the Supreme Court's decision in *Obergefell*." Appx5. That reasoning was erroneous as a matter of law.

To begin with, it is undisputed—and even the ALJ found—that notwithstanding *Obergefell*, Ms. Rolfingsmeyer and Ms. Sammons ***were*** injured by OPM's unconstitutional incorporation of Pennsylvania's and Illinois' discriminatory marriage laws. As the ALJ put it, the couple "faced practical obstacles to contracting a valid marriage" ***before*** *Obergefell*, and "these obstacles stemmed from longstanding violations of equal protection." Appx12 (citing *Obergefell,* 135 S. Ct. at 2604-05; *Windsor*, 133 S. Ct. at 2695). Indeed, given the copious, undisputed record evidence of their earnest commitment, any reasonable factfinder would have to conclude that, if their states of residence had permitted them to do so, Ms. Rolfingsmeyer and Ms. Sammons would have been married many years before Ms. Sammons' death. *See* Appx90 ("The only reason we were not married any sooner is the laws prohibited us from doing so. As soon as we learned we could 'legally' be married we did."); *see also supra* at 1-3, 5, 8-9; *infra* at 35-36. Denying benefits to Ms. Rolfingsmeyer simply because she was not

married under the laws of those states thus perpetuates and exacerbates the deprivation of rights and continuing harms the state laws caused. The decision in *Obergefell* did nothing to redress that deprivation.[5] And given that *Obergefell* was not decided (and Pennsylvania did not begin recognizing same-sex marriages) until ***after*** Ms. Sammons' death, the ALJ's contrary conclusion was nonsensical.

The ALJ's decision also cannot be justified by reference to this Court's decision in *Becker*, 853 F.3d at 1311, which applied the Supreme Court's ruling in *Weinberger v. Salfi,* 422 U.S. 749 (1975). *Cf.* Appx12-13. Both of those cases upheld different applications of the nine-month marriage requirement as rational, prophylactic responses to the possibility of fraudulent marriages entered into to obtain benefits. But Ms. Rolfingsmeyer's challenge is not to the duration requirement—it is to the unconstitutionally discriminatory definition of marriage by which the duration requirement is measured. Thus, the question of whether the government's interests in preventing possible fraud can justify a reasonable duration requirement has nothing to do with this case. The problem is not that the

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5 As a matter of common sense, the ALJ's reasoning—which left Ms. Rolfingsmeyer ***worse*** off because of *Obergefell*—was entirely backwards. The clarity with which the Supreme Court condemned same-sex marriage bans provides more reason, not less, to conclude that OPM cannot permissibly perpetuate the injury those bans caused. Far from showing that the unconstitutional state laws were a "non-issue," *Obergefell* shows that they should have been a ***non-factor*** in OPM's benefits determination.

government has elected to award survivor benefits only to people married for more than nine months, it is that OPM elected to define marriage by incorporating Pennsylvania's state-law definition that unconstitutionally prevented ***all*** same-sex couples from becoming eligible for benefits. Nothing in *Becker* or *Salfi* even speaks to this issue, much less suggests that OPM was entitled to adopt unconstitutional state-law definitions of marriage.

In any event, while a durational requirement may have a rational connection to the aim of detecting or deterring sham relationships between opposite-sex couples such as the litigants in *Becker* and *Salfi*—who always enjoyed the ability to marry—it serves no such function for same-sex couples like Ms. Rolfingsmeyer and Ms. Sammons, who lacked equal access to marriage in the first place. As applied to same-sex couples who were unconstitutionally prohibited from marrying at any time before the covered employee's death, OPM's regulatory regime does not separate fraudulent from non-fraudulent marriages at all. Rather, it serves as a categorical bar on benefits and results in the perpetuation of unconstitutionally discriminatory treatment. *See*, *e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1010, 1014-15 (9th Cir. 2011) (holding, even before *Windsor* and *Obergefell*, that a state's provision of health insurance to "spouse[s]" of state employees "discriminate[d] against same-sex couples" because state did not permit such couples to marry). *Becker* and *Salfi* thus have no application to this case.

The ALJ's final justification for withholding survivor benefits from Ms. Rolfingsmeyer—that Congress has not authorized such distribution of funds, Appx12-13—is just as wrong. Financial or not, Congress cannot withhold an otherwise-available benefit on grounds that violate the constitution. *See, e.g.*, *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (holding that Congress violated equal protection guarantee by denying food stamps to households containing non-relatives); *Cox*, 684 F.2d at 324 (applying equal protection analysis to denial of Social Security benefits).[6] And, even more basic, payment of survivor benefits to Ms. Rolfingsmeyer ***is consistent with Congress' authorization***, pursuant to which such benefits are to be paid to surviving spouses who were "married" to the decedent-employee for more than nine months, without defining

[6] *Office of Personnel Management v. Richmond*, the case on which the ALJ relied, is not to the contrary. That case held only that "erroneous oral and written advice given by a Government employee to a benefits claimant" cannot "give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law." 496 U.S. at 415-16. Neither that principle nor anything else in *Richmond* comes close to establishing that classifications used in appropriations are immune to constitutional scrutiny. On the contrary, as Justices White and Blackmun recognized in casting their decisive votes in that 6-3 case, even statutory limitations on appropriations must give way when the Constitution requires it. *Id.* at 435 (White, J., concurring).

that term. *See* 5 U.S.C. § 8441(1)(A).[7] It is only OPM, through its implementing regulation, that defined that term to exclude Ms. Rolfingsmeyer.

Because the Regulation denies same-sex couples the full "constellation of benefits" associated with marriage, *see Pavan*, 137 S. Ct. at 2078, by incorporating unconstitutional state-law definitions of marriage, it is itself unconstitutional. Ms. Rolfingsmeyer is entitled to her benefits for that reason alone.

II. ALTERNATIVELY, OPM'S DENIAL OF ACCESS TO BENEFITS FAILS EQUAL PROTECTION SCRUTINY.

Because the Regulation is unconstitutional under *Obergefell* and *Pavan* for the reasons set forth above, any analysis under the "tiers-of-scrutiny" framework that has sometimes governed equal protection challenges is unnecessary. Nevertheless, the Regulation fails that analysis as well. For the reasons set forth above, OPM's decision to incorporate state-law definitions of marriage, specifically those of Pennsylvania and Illinois, brought with it the burden to justify the discrimination those states employed as of the relevant times. *See supra* at 14-18. And because both states' laws classified based on sex and sexual orientation, that burden takes the form of heightened scrutiny. Moreover, like the state laws themselves, OPM's application of the Regulation to same-sex couples who would

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[7] As noted, even OPM agrees that where Congress itself imposed unconstitutional requirements for the payment of survivor benefits, those requirements cannot be enforced. *See supra* at 7 n.2.

have been married had they been permitted is not supported by the sort of "exceedingly persuasive justification" necessary to overcome such scrutiny. *See Berkley v. United States*, 287 F.3d 1076, 1082 n.1 (Fed. Cir. 2002) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Indeed, OPM's incorporation of such invidious discrimination into its benefits regime lacks even a rational basis, as it serves no valid governmental interest at all.

A. The Regulation Is Subject To Heightened Scrutiny Because It Discriminates On The Basis of Sex And Sexual Orientation.

The Regulation imports facially discriminatory state laws into its eligibility criteria. Because those state laws themselves discriminate based on both sex and sexual orientation, the Regulation does so as well. *See*, *e.g.*, *Diaz*, 656 F.3d at 1014-15. The Regulation therefore must satisfy heightened scrutiny.

1. Heightened Scrutiny Is Warranted Because The Regulation Discriminates Based On Sex.

Laws and regulations that discriminate on the basis of sex are subject to heightened scrutiny. *Berkley*, 287 F.3d at 1082 n.1 (citing *Virginia*, 518 U.S. at 533); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). And the Regulation discriminates based on sex. As the Supreme Court recently held, discrimination on the basis of sexual orientation is necessarily discrimination on the basis of sex, because sex "plays a necessary and undisguisable role" in such discrimination. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020)

(interpreting Title VII of Civil Rights Act of 1964).[8] That reasoning applies equally to the constitutional claim at issue here: if Ms. Rolfingsmeyer had been a man, she would have been permitted to marry Ms. Sammons under any of the state laws the Regulation incorporates.[9] Thus, both Illinois and Pennsylvania refused to

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[8] The holding that "discrimination based on homosexuality or transgender status ***necessarily*** entails discrimination based on sex; the first cannot happen without the second," *id.* at 1747, affirmed a well-accepted view among state and lower courts in both statutory and constitutional contexts. *See*, *e.g.*, *In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council 2013) (recognizing that the denial of health insurance to the same-sex partner of a law clerk discriminated "based on the sex of the participants in the union"); *see also Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (stereotype "concerning to or with whom a woman should be attracted, [or] should marry … is discrimination on the basis of sex"); *Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (by withholding benefits because petitioner's significant other was a woman, "DOMA . . . restrict[s] Ms. Golinski's access to federal benefits because of her sex"); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) ("Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex . . . . Thus, the denial of benefits at issue here was sex-based . . . ."); *Baker v. State*, 744 A.2d 194, 251-52 (Vt. 1999) (Johnson, J., dissenting in part) ("Although I concur with the majority's conclusion that Vermont law unconstitutionally excludes same-sex couples from the benefits of marriage, I write separately to state my belief that this is a straightforward case of sex discrimination.").

[9] Dissenting in *Bostock*, Justice Alito recognized the constitutional implications of the majority's holding that sexual-orientation discrimination constitutes discrimination "on the basis of sex" under Title VII. As he noted, "[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex," the majority provided "a ground for subjecting all three forms of discrimination to the same exacting standard of review." *Bostock*, 140 S. Ct. 1731, 1783 (Alito, J., dissenting) (citations omitted).

allow Ms. Rolfingsmeyer to marry Ms. Sammons based simply on Ms. Rolfingsmeyer's sex. Just as in *Bostock*, sex thus "play[ed] a necessary and undisguisable role" in the states' refusal to allow same-sex marriage, and, accordingly, in OPM's denial of benefits that relied on those discriminatory laws. Heightened scrutiny therefore applies.

2. Heightened Scrutiny Is Warranted Because The Regulation Discriminates Based On Sexual Orientation.

Heightened scrutiny is also warranted because the Regulation discriminates on the basis of sexual orientation. OPM denied benefits based solely on state laws that unconstitutionally prohibited Ms. Rolfingsmeyer and Ms. Sammons from marrying because they were both women. That is textbook sexual-orientation discrimination. *See, e.g.*, *Diaz*, 656 F.3d at 1014-15 (state's provision of health insurance to "spouse[s]" of state employees "discriminate[d] against same-sex couples" because state did not permit same-sex couples to marry).[10]

As both the Second and Ninth Circuits have squarely held, "homosexuals compose a class that is subject to heightened scrutiny." *Windsor v. United States*,

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10 *See also Bassett*, 951 F. Supp. 2d at 963, 965 (noting that "[s]everal courts have found that statutes restricting benefits on the basis of marriage intentionally classify on the basis of sexual orientation where gays and lesbians cannot legally marry," and proceeding to hold the same); *Levenson*, 560 F.3d at 1147 (explaining why denial of benefits to same-sex couples, who are unable to be recognized as married, constitutes discrimination based on sexual orientation); *Alaska Civ. Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005) (same).

699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). Indeed, the Ninth Circuit has held that Supreme Court case law unambiguously compels that result. *See SmithKline Beecham Corp.*, 740 F.3d at 484 (citing *Windsor*, 133 S. Ct. at 2692, 2693). In *SmithKline*, the Ninth Circuit noted that *Windsor* treated sexual orientation as a suspect class. *Id.* at 482. Rather than considering the potential rational bases for the law, the Ninth Circuit noted, the Supreme Court looked to DOMA's "design, purpose, and effect" and evaluated the law's real-world purposes. *Id*. at 481. As the *SmithKline* Court explained, such an analysis is not mere rational basis review. *Id.* at 481-82.

Further, in *Windsor*, the Supreme Court demanded that Congress' purpose "justify disparate treatment of the group"—conducting a balancing test that did not afford DOMA the strong presumption in favor of the constitutionality of laws that would be consistent with rational basis review. *See id.* at 482 (noting that *Windsor*'s consideration of "harm," "injury," and the "effect" of the legislation are rare in rational basis analyses). And in *Obergefell*, the Supreme Court noted that sexual orientation satisfies every hallmark of heightened protection: (1) same-sex individuals have long been discriminated against, 135 S. Ct. at 2596-97; (2) being gay or lesbian has no bearing on an individual's ability to contribute to society and is instead "a normal expression of human sexuality," *id*. at 2596; (3) sexual

orientation is "immutable," *id.* at 2594, 2596; and (4) gays and lesbians lack the degree of political power necessary to prevent discrimination solely through electoral means, *id*. at 2596-97, 2606. Thus, precedent from both the Supreme Court and other circuits favors the application of heightened scrutiny to classifications based on sexual orientation. And a wide array of district courts agree. *See, e.g.*, *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).[11]

That conclusion accords with courts' general approach to the tiers-of-scrutiny analysis. Heightened scrutiny applies to classifications that have "traditionally" been "used as a tool for the oppression and subordination of

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11 *See also Henderson v. Adams*, 209 F. Supp. 3d 1059, 1072 (S.D. Ind. 2016), *order clarified*, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016) (applying heightened scrutiny to gender and sexual-orientation classifications), *aff'd in part, vacated in part, remanded sub nom. Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020); *Love v. Beshear*, 989 F. Supp. 2d 536, 545 (W.D. Ky. 2014) (concluding that gays and lesbians are a quasi-suspect class and classifications based on sexual orientation are subject to intermediate scrutiny); *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1063-64 (D. Alaska Oct. 12, 2014) (applying heightened scrutiny to Alaska's ban on same-sex marriage); *Majors v. Jeanes*, 48 F. Supp. 3d 1310, 1313 (D. Ariz. 2014) ("[D]iscrimination based on sexual orientation must be evaluated using a heightened standard of review."); *Whitewood*, 992 F. Supp. 2d at 430 ("[G]ay and lesbian persons compose a class that is subject to heightened scrutiny."); *Pedersen v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012) ("[S]tatutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny."); Order Reversing Decision of Commissioner and Remanding for Payment of Benefits at 6-7, *Schmoll v. Saul*, No. 19-cv-04542-NC (N.D. Cal. June 15, 2020), Dkt. 36.

minority groups," particularly where the groups are defined by an immutable trait. *Hassan v. City of New York*, 804 F.3d 277, 303 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (internal citations omitted). "Accordingly, a classification is more likely to receive heightened scrutiny if it discriminates against individuals based on a characteristic that they either cannot realistically change or ought not be compelled to change because it is fundamental to their identities." *Id*. at 301-02.

Relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court once held that homosexuality is not a suspect or quasi-suspect class because homosexuality is not an immutable characteristic but rather is "primarily behavioral in nature [and] . . . [t]he conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989). The Supreme Court, however, has since overruled *Bowers*, *see Lawrence v. Texas*, 539 U.S. 558 (2003), and squarely rejected that reasoning. *See Obergefell,* 135 S. Ct. at 2594, 2596. In *Obergefell*, the Court recognized that "sexual orientation is both a normal expression of human sexuality ***and immutable***." *Obergefell,* 135 S. Ct. at 2596 (emphasis added; citation omitted). *Woodward* is therefore no longer good law, and heightened scrutiny applies for the alternative reason that the Regulation discriminates based on sexual orientation.

B. The Regulation Cannot Satisfy Heightened Or Even Rational Basis Scrutiny.

The Regulation's discrimination based on sex and sexual orientation cannot satisfy heightened scrutiny. Supreme Court precedent forecloses any contention that there is an exceedingly persuasive justification for denying benefits to same-sex couples in committed relationships. *See*, *e.g. Pavan*, 137 S. Ct. at 2078. And to the extent the government has sought to justify the marriage and duration requirements as prophylactic rules intended to weed out sham relationships, the fact that those rules ***categorically bar*** same-sex couples who were unable to marry due to unconstitutional state laws confirms that the rules are not "substantially related" to the government's aims. *See Virginia*, 518 U.S. at 545.

Indeed, OPM's incorporation of unconstitutional state laws to deny survivor benefits cannot withstand even rational basis scrutiny. Even before *Obergefell*, because of the historic patterns of discrimination suffered by homosexuals, the Supreme Court subjected discrimination against them to a "more searching form of rational basis review." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).[12]

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12 The Supreme Court has applied that rational basis "plus" standard numerous times, including in the context of sexual-orientation discrimination. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (law classifying on the basis of sexual orientation); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (law classifying between households where the members were related to one another and households where they were not); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 448 (1985) (law classifying on the basis of intellectual

The Regulation fails that standard and traditional rational basis review as well. As this case reveals, for same-sex couples prohibited by their state's law from marrying, the lack of a marriage recognized by their domicile bears ***no relation at all*** to the stated objective of identifying fraudulent relationships. As the ALJ expressly found, "[Ms. Rolfingsmeyer] and Ms. Sammons formally committed to each other in 2003—well before there was any indication that the appellant might one day be able to share in Ms. Sammons' FERS annuity benefits, and they stuck together for many years after that with no realistic prospect of the appellant ever qualifying for those benefits until shortly before Ms. Sammons' death." Appx12; *compare Obergefell*, 135 S. Ct. at 2594 (describing how Mr. Obergefell and his partner "fell in love and started a life together, establishing a lasting, committed relation[,]" that lasted more than twenty years, and how—after Mr. Arthur was diagnosed with ALS—they traveled from Ohio to Maryland, where same-sex

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disability); *see also Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998) ("The analysis set forth in *Romer*, *Cleburne Living Ctr*., and *Palmore* differed from traditional rational basis review because it forced the government to justify its discrimination. Moreover, the Court did not simply defer to the government; it scrutinized the justifications offered by the government to determine whether they were rational."); *Massachusetts v. U.S. Dep't of Health & Hum. Servs*., 682 F.3d 1, 10 (1st Cir. 2012) ("These three decisions [*Moreno*, *City of Cleburne*, *Romer*] did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.").

marriage was legal, in order to obtain a marriage certificate in a state that recognized marriages of same-sex couples before Mr. Arthur died). The Regulation's rational basis—preventing fraud—has no justification in that context. *See supra* at 20-21 (explaining why the holdings in *Becker* and *Salfi* do not apply to this case).[13]

In similar contexts, the government has also argued that deferring to unconstitutional state marriage laws is justified because it is administratively convenient. But "the Constitution recognizes higher values than speed and efficiency." *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *see also Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Accordingly, the government may not violate the Constitution simply because it is easier to do so. *See*, *e.g.*, *Diaz*, 656

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13 *See Ely*, 2020 WL 2744138, at *8 ("In light of Defendant's reliance on an unconstitutional law underlying the duration-of-marriage requirement, the Social Security Administration cannot be said to be acting in furtherance of a legitimate state interest."); *Thornton*, *supra* at 16, slip op. at 17 ("Perhaps administrative line-drawing may be used as a valid reason to deny benefits to couples who had the legal right to marry, but it could not justify the deprivation of survivor's benefits to same-sex couples who were denied the right to marry."); *Harris v. Millennium Hotel*, 330 P.3d 330, 337 (Alaska 2014) (noting that while "marriage may serve as an adequate proxy [of close or dependent relationships] for opposite-sex couples," it "cannot serve as a proxy for same-sex couples" if "same-sex couples are absolutely prohibited from marrying under [state] law"); *Bostic v. Rainey*, 2014 WL 10022686, at *14 (E.D. Va. Feb. 14, 2014) ("Virginia's purported interest in minimizing marriage fraud is in no way furthered by excluding one segment of the Commonwealth's population from the right to marry based upon that segment's sexual orientation."), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

F.3d at 1014 ("[Where] savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, . . . such a distinction cannot survive rational basis review."); *Ely*, 2020 WL 2744138, at *9 ("Reliance on the efficiency of a statute that impermissibly denies same-sex survivor benefits to [same-sex couples] disdains present realities in deference to past formalities, [and] needlessly risks running roughshod over the important interests of avoiding ongoing discrimination.") (quoting *Stanley*, 405 U.S. at 657 (internal quotation marks omitted)); *Millennium Hotel*, 330 P.3d at 337-38 (similar). Whatever administrative efficiencies might be obtained by deferring to state law are immaterial where the state laws are unconstitutional as applied.

In any event, there is no material administrative burden here. As noted, the ALJ has already found that Ms. Rolfingsmeyer would have legally married Ms. Sammons if state law had not prevented her from doing so, and the record is undisputed on that point. Appx9-12; Appx90. Further, the number of other people in her situation is small if, in fact, there are any others at all. The issue in this case affects only individuals who (1) are survivors of same-sex couples that included a covered FERS employee; (2) were prohibited by unconstitutionally discriminatory state laws from satisfying the marriage and duration requirements; and (3) timely presented and continued to pursue their claims for FERS benefits. Moreover, a decision in Ms. Rolfingsmeyer's favor would not prevent OPM, in the future, from

treating formal marriage as "a valid proxy for those couples who [could and now] can lawfully marry," *Millennium Hotel*, 330 P.3d at 337, since such individuals cannot show injury from bans that no longer exist.[14] Thus, any administrative burden from a decision in this case would be minimal and may extend no further than the ministerial act of providing Ms. Rolfingsmeyer the benefits to which she is entitled.

III. THE ONLY PERMISSIBLE REMEDY FOR OPM'S UNCONSTITUTIONAL DENIAL IS TO PROVIDE MS. ROLFINGSMEYER SURVIVOR BENEFITS.

As explained above, Ms. Rolfingsmeyer was constitutionally entitled to a determination of her eligibility for benefits that did not simply incorporate an unconstitutional state-law marriage ban. This case's factual record reveals that any reasonable factfinder, applying any conceivable constitutionally permissible standard, would conclude that Ms. Rolfingsmeyer is entitled to spousal survivor benefits. The Court should therefore reverse and grant Ms. Rolfingsmeyer her survivor benefits, or at a minimum, remand for further consideration consistent with its ruling.

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[14] As noted, OPM has conceded that it must award FERS spousal benefits to any member of a same-sex couple who was married under state law to an eligible employee more than nine months before the employee's death, notwithstanding the statute's gendered language. *See supra* at 7 n.2.

A. Ms. Rolfingsmeyer Is Entitled To Benefits Because, As A Matter Of Undisputed Fact, She Would Satisfy The Marriage and Duration Requirements But For The Unconstitutional State Laws.

Any constitutional remedy "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of' the violation." *See*, *e.g.*, *Virginia*, 518 U.S. at 547 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); *see also*, *e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995) (holding that "remedies" should be designed "to restore the victims of [wrongful] conduct to the position they would have occupied in the absence of such conduct") (quotation omitted); *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) ("[An] injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."). Hence, the proper resolution of this case is clear: Ms. Rolfingsmeyer is entitled to her survivor benefits because that is the only remedy that can place her in the position she would have occupied in the absence of OPM's reliance on unconstitutional state marriage laws.

It is undisputed that Ms. Rolfingsmeyer and Ms. Sammons would have been married long before Ms. Sammons' death but for the same-sex marriage bans in Illinois and Pennsylvania. As the ALJ acknowledged, those unconstitutional state laws "put the appellant at a disadvantage as compared to the situation she would have found herself in with an opposite-sex partner, whom she could have married

at any time in her state of residence and been confident that the marriage would be recognized for all legal purposes throughout the United States." Appx10-11. Further, the ALJ found, the couple took every step they could have "to formalize their relationship" notwithstanding the state-law bans. Appx2. Not only does substantial evidence support those findings, but the record on the point is undisputed. Ms. Rolfingsmeyer stated without rebuttal that "[t]he only reason we were not married any sooner [than 2013] is the laws prohibited us from doing so." Appx90.

As noted, where a constitutional violation occurs, it is routine—and required—for courts to fashion a remedy by asking what would have occurred in the violation's absence. *See supra* at 35. Accordingly, there would be nothing unusual about either this Court or an agency looking beyond unconstitutional or otherwise illegitimate state-law definitions of marriage to determine whether two individuals would have been married but for those invidious laws more than nine months before one of their deaths. Doing so would be no different than resolving the remedial inquiry that arises in virtually any case where a claimant seeks to be placed in the position she would have occupied but for some illegal act.

Indeed, for more than a century, courts have had no difficulty recognizing the legitimacy of committed relationships that were illegitimately prevented from being called "marriages" under state laws. For example, under the odious

institution of slavery, enslaved people could not lawfully marry each other. But after emancipation, courts retroactively recognized marriages performed during slavery, because the couples had held themselves out as a married or had taken acts to ratify those marriages.[15] Once the marriages were ratified, they were ratified as of the date at which the *de facto* marriage was entered into. *See, e.g.*, *Ray v. Ray*, 172 La. 559, 559–60 (1931) (backdating previously unrecognized slave marriage and recognizing children born of that marriage for purposes of distributing estate where parties continued to cohabitate after emancipation and therefore ratified their marriage).[16] Although Ms. Rolfingsmeyer is obviously not in the same

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15 *See generally* Darlene Goring, *The History of Slave Marriage in the United States*, LSU Digital Commons Journal Articles (2006), *available at* https://digitalcommons.law.lsu.edu/faculty_scholarship/262; *see also*, *e.g.*, *Ray,* 134 So. at 744 (slave marriages "understood by the parties to be a marriage and not a mere loose union, required no special or formal ceremony, and produced their full civil effects if followed by cohabitation both before and after emancipation"); *Kennedy v. Pawnee Tr. Co.*, 126 P. 548, 551 (Okla. 1912) ("[T]o have had any effect after emancipation, the latter having been a slave, they must have lived and cohabited together as man and wife at the time of or after emancipation."); *see also Wood v. Cole*, 60 S.W. 992, 993 (Tex. Civ. App. 1901) (1901) ("[I]f, having married after the manner of slaves during bondage, [formerly enslaved people] voluntarily continued the relation of husband and wife after their emancipation, such continuance of the relation would be deemed a valid common-law marriage.").

16 *Butler v. Butler*, 44 N.E. 203, 204 (Ill. 1896) ("'[T]here are cases in which marriages contracted between parties not capable of contracting at the time of the marriage are made valid by the subsequent ratification of the parties, as in the case of lunatics and infants; and that without any other or new celebration . . . . [T]he

circumstances as a freed slave, the issues of marital recognition are largely analogous: she and Ms. Sammons held themselves out to be married for many years despite unconstitutional bans, and they ratified that longstanding marriage in Maryland in the hope it would be recognized if Pennsylvania's ban were lifted.

Other historical analogs exist as well. After the Supreme Court invalidated so-called "antimiscegenation statutes" in *Loving v. Virginia*, 388 U.S. 1 (1967), a court recognized that a common-law interracial marriage could have been formed in Texas even though that state had unconstitutionally banned interracial marriage for the husband's entire lifetime. *See Prudential Ins. Co. of Am. v. Lewis*, 306 F. Supp. 1177, 1183 (N.D. Ala. 1969); *see also Dick v. Reaves*, 434 P.2d 295, 298 (Okla. 1967) (affirming validity of pre-*Loving* ceremonial marriage that allegedly violated state law banning interracial marriages).

And much more recently, courts confronting facts that cannot be materially distinguished from those presented here have applied similar principles. In *Ayala v. Armstrong*, 2018 WL 3636524, at *4 (D. Idaho July 30, 2018), the court held that a non-birth-mother parent in a committed same-sex relationship must be added to her partner's child's birth certificate because the mothers "would have been married at the time of [the child's] conception or birth, but for the same-sex

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same law should apply to cases of marriages between slaves, who ratify the marriage after they become free.'") (quoting *Jones v. Jones*, 36 Md. 447 (1872)).

marriage ban in Idaho." Similarly, in *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016), the court recognized a same-sex marriage ceremony for the purposes of ERISA spousal benefits, even though the ceremony was performed when same-sex marriage was illegal in California, because "there would be no question that plaintiff and [decedent]" would have been married but for the unconstitutional prohibition. *Cf. Barse v. Pasternak*, 2015 WL 600973, at *10 (Conn. Super. Ct. Jan. 16, 2015) (applying to civil unions the presumption that parties to marriage are legal parents of child born within marriage). And further, in the Social Security context, courts have uniformly recognized that survivors of committed same-sex relationships are entitled to Social Security spousal survivor benefits, or other benefits, where the claimants could demonstrate—as Ms. Rolfingsmeyer indisputably did here—that they would have been legally married but for the unconstitutional bans on same-sex marriage.[17] Indeed, the Social Security Administration ("SSA") is currently subject to an injunction requiring it to

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[17] *See*, *e.g.*, *Driggs*, 2020 WL 2791858, at *5 (remanding for ALJ to determine whether "Plaintiff would have married sufficiently early to satisfy the durational requirement but for unconstitutional state laws prohibiting same-sex marriage" thereby entitling plaintiff to Social Security benefits); *Schmoll*, *supra* at 28, slip op. at 8 (reversing denial of social security benefits based on duration at to same-sex couple where "the ALJ already found that the authenticity and commitment level of [the] marriage was not at issue"); *Ely*, 2020 WL 2744138, at *8 (plaintiff entitled to Social Security survivor benefits where he would have married covered individual sooner but for unconstitutional state laws).

"consider[] . . . 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*, 2020 WL 2744138, at *17.

In none of those contexts have courts hesitated to undertake or require the factual analysis as to whether the claimant would have been married in the absence of the illegitimate prohibition. Nor is there anything unusual about an agency undertaking such an inquiry itself. Even without court orders, federal agencies regularly make such individualized determinations about applicants' marriage statuses. Indeed, the SSA is legally required to deem certain applicants for benefits to be married if they establish "that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage[.]" 42 U.S.C. § 416(h)(1)(B)(i). Likewise, the Veterans Affairs Department will deem an applicant who is not married under state law to be married where the applicant establishes that he or she entered into a marriage, "without knowledge of any legal impediment," that the marriage would have been valid absent the unknown legal impediment, and that the claimant "thereafter cohabited with the veteran for one year or more immediately before the veteran's death." 38 U.S.C. § 103(a). Similarly, under the

Railroad Retirement Act, applicants will be deemed to have been married even if a ceremonial or common-law marriage relationship cannot be established under state law, "if the person's marriage to the employee would have been valid under State law except for a legal impediment" and the claimant married the employee "in a civil or religious ceremony[,]" that was undertaken in "good faith," and "was living in the same household as the employee" at the applicable times. 20 C.F.R. § 222.14. Agencies face no undue administrative burdens in making these routine decisions.

In short, courts and agencies faced with the effects of unconstitutional marriage laws have routinely awarded benefits to claimants who would have been entitled to those benefits but for those unconstitutional laws. The Court should do so here as well, in order to place Ms. Rolfingsmeyer in the position she would have occupied but for OPM's unconstitutional Regulation. Because it is undisputed on the Agency record that Ms. Rolfingsmeyer and Ms. Sammons would have been married many years before Ms. Sammons' death were it not for the unconstitutional state-law bans, she is entitled to the benefits she seeks.

B. Alternatively, Ms. Rolfingsmeyer And Ms. Sammons Satisfy Any Conceivable Constitutional Standard.

There is no need for the Court to proceed any further in order to award Ms. Rolfingsmeyer the benefits that were unconstitutionally denied her. But the deprivation of Ms. Rolfingsmeyer's constitutional rights could alternatively be

remedied by application of a non-discriminatory legal standard in place of the unconstitutional one OPM applied. Congress has not defined who is "married" for purposes of FERS survivor benefits. *See* 5 U.S.C. § 8441(1)(A). Rather, that role has been left to OPM to perform consistent with the Constitution. As such, there is no statutory or other legal impediment to employing a federal definition of the statutory term "married" to evaluate Ms. Rolfingsmeyer's claim, in place of the unconstitutional state-law definitions relied on by OPM. Rather than asking whether Ms. Rolfingsmeyer and Ms. Sammons would have been married as a matter of fact, the agency could alternatively remedy the violation by applying a definition of marriage that does not unconstitutionally exclude same-sex couples.

There would be nothing unusual about a court or federal agency undertaking such an analysis as a substitute for otherwise-unconstitutional deference to an unlawful state-law regime.[18] The federal government regularly "make[s] determinations that bear on marital rights and privileges" in a manner that deviates from state law. *Windsor*, 570 U.S. at 764-65 (providing examples of such

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18 In the proceedings below, the ALJ rejected Ms. Rolfingsmeyer's argument that she had a valid common-law marriage under the laws of Illinois or Pennsylvania on the ground that neither state recognized common law marriage when the couple lived there. Appx9. Ms. Rolfingsmeyer is not renewing that specific argument on appeal. Instead, she argues, in the alternative, that the Court or OPM could apply a federally-crafted statutory standard in order to remedy the unconstitutional definition incorporated by OPM.

deviations from state law); *see also* 8 U.S.C. § 1186a(b)(1) (deeming "sham" marriages, even if recognized under state law, to be invalid for immigration purposes). Indeed, the SSA already recognizes a federal "marriage" standard for the purpose of federal benefits, in addition to the facts-and-circumstances inquiries discussed above. By statute, the SSA is required to deem a couple married for the purposes of certain benefits if they "hold[] themselves out to the community in which they reside as husband and wife." 42 U.S.C. § 1382c(d)(2).[19] Interpreting that instruction, the SSA has concluded that in addition to deferring to any state-law conclusion that a couple is common-law married, it must "look at the specific relationship between the [couple] themselves" and deem married for federal purposes, irrespective of state law, any couple who "treat one another" as spouses and "indicate to others in the surrounding area in which they live that they are" spouses. *See* SSR-76-27, *Section 1614(d)(2) and 1614(f)(1) (42 U.S.C. 1382c(d)(2) and 1382c(f)(1))—Supplemental Security Income—Marital Relationship* (https://www.ssa.gov/OP_Home/rulings/ssi/01/SSR76-27-ssi-

19 To the extent this statute uses gendered language, applying that language to the detriment of same-sex couples is plainly unconstitutional in light of *Obergefell*. *See supra* at 7 n.2; *see also Ely*, 2020 WL 2744138, at *6 ("The Social Security Act contains gendered language; however, since the Supreme Court of the United States' decision in *Windsor*, the Act applies to both opposite and same-sex couples.").

01.html); *see also* 20 C.F.R. §§ 416.1003(b), (c); *id.* § 416.1806(a).[20] Similarly, for the purpose of determining eligibility for emotional damages under the terrorism exception to the Foreign Sovereign Immunities Act, which are available to immediate family members and their "functional equivalents," federal courts have determined who qualifies as the "functional equivalent[]" of a spouse by applying both factual and legal tests.[21] There is no valid reason why OPM should

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[20] As of Ms. Sammons' death in 2014, eleven states and the District of Columbia recognized common law marriage: Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, and Utah. *See Thomas v. Thomas*, 279 So. 3d 1180, 1181-82 (Ala. Civ. App. 2019); *Gill v. Nostrand*, 206 A.3d 869, 875 (D.C. 2019); *In re Marriage of Wade*, 2000 WL 766112, at *1 (Iowa Ct. App. June 14, 2000); *In re Marriage of Seymour*, 2012 WL 309332, at *3 (Kan. Ct. App. 2012); *In re J.K.N.A.*, 454 P.3d 642, 649 (Mont. 2019); *Branch v. Acting Comm'r of U.S. Soc. Sec. Admin.*, 2018 WL 1532613, at *3 (D.N.H. Mar. 29, 2018); *Standefer v. Standefer*, 26 P.3d 104, 107 (Okla. 2001); *Fravala v. City of Cranston ex rel. Baron*, 996 A.2d 696, 703 (R.I. 2010); *Stone v. Thompson*, 833 S.E.2d 266, 267, 270 (S.C. 2019); *Van Hooff v. Anderson*, 2016 WL 193172, at *3 (Tex. App. Jan. 14, 2016); Utah Code Ann. § 30-1-4.5. Ms. Rolfingsmeyer's relationship with Ms. Sammons would satisfy any of those states' definitions of common-law marriage, as constitutionally applied. *See*, *e.g.*, *Gill*, 206 A.3d at 875 (noting that common law marriage will exist through "cohabitation following an express mutual agreement, which must be in words of the present tense, to be permanent partners with the same degree of commitment as the spouses in a ceremonial marriage," and retroactively recognizing that parties "must be given the opportunity to prove a common law marriage, even at time when same-sex marriage was not legal").

[21] *In re Terrorist Attacks on Sept. 11, 2001*, 2016 WL 8711419, at *10 (S.D.N.Y. Oct. 14, 2016), *report and recommendation adopted* 2016 WL 6465922 (S.D.N.Y. Oct. 31, 2016) (damages appropriate for same-sex partner of September 11 victim because it was "overwhelmingly likely that [the plaintiff and the victim] would have been married had the state of the law been different at the time"); *In re*

not be expected to undertake a similar inquiry, where the statute it implements does not itself define marriage and unquestioning deference to unconstitutional state laws is impermissible.

OPM's denial of survivor benefits to Ms. Rolfingsmeyer based on Pennsylvania's unconstitutional definition of marriage was itself plainly unconstitutional. That denial can be remedied either by adopting the ALJ's factual finding, consistent with the undisputed record evidence, that Ms. Rolfingsmeyer and Ms. Sammons would have been married before May 2013 (nine months before Ms. Sammons' death) in the absence of Pennsylvania's and Illinois' unconstitutional bans, or by applying a nondiscriminatory legal test to evaluate what constitutes a "marriage" under the statute. Either way, no reasonable factfinder could determine that the couple's sixteen-year, committed relationship—during which they continuously held themselves out as married and took every reasonable step to solemnize and "formalize" that relationship despite unconstitutional legal impediments—should not be recognized as marriage for

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Terrorist Attacks on Sept. 11, 2001, 2018 WL 4659474, at *3 (S.D.N.Y. Sept. 13, 2018) (considering "the length of the relationship," the "degree of mutual financial dependence and investments in a common life together," and the "duration of cohabitation," and concluding that victim's same-sex partner was functional equivalent of spouse).

purposes of FERS survivor benefits. OPM's denial of benefits defies both the Constitution and the undisputed factual record. It should be reversed.

CONCLUSION

The Court should reverse MSPB's judgment and direct OPM to provide Ms. Rolfingsmeyer with spousal survivor benefits under FERS, or, in the alternative, remand to the agency to assess Ms. Rolfingsmeyer's entitlement to survivor benefits under a constitutionally permissible standard.

Respectfully submitted,

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July 28, 2020