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

REPLY BRIEF FOR PETITIONER

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December 21, 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: December 21, 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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INTRODUCTION

In her opening brief, petitioner made two main arguments, and OPM contests neither of them. First, relying largely on *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982), petitioner explained that it is unconstitutional for a federal agency to rely on unconstitutional state laws to deny federal benefits. *See* Opening Br. 12-23. In its response brief, OPM neither mentions *Cox* nor even attempts to refute that argument. Thus, if OPM's denial of benefits to Ms. Rolfingsmeyer was based even in part on unconstitutional state laws—and, as shown below, it unquestionably was—the denial was concededly unconstitutional.

Second, the opening brief explained that if a violation is found, the appropriate remedy is to place Ms. Rolfingsmeyer in the position she would have occupied but for OPM's unconstitutional action, by awarding her the benefits she seeks. *See id*. at 34-41. OPM does not contest that point either. Thus, if the Court concludes—as it should—that OPM acted unconstitutionally when it relied on unconstitutional state laws to deny benefits to Ms. Rolfingsmeyer, it is uncontested that the proper remedy is to direct that those benefits be paid.

Given OPM's failure to contest those points, the only relevant remaining dispute is whether OPM's denial of benefits in fact relied on unconstitutional state laws. But despite OPM's arguments to the contrary, there is no legitimate disagreement on that point either. OPM concedes that if Ms. Rolfingsmeyer and

Ms. Sammons had been able to marry in Illinois in 2003, or when they moved to Pennsylvania in 2007, Ms. Rolfingsmeyer would have been entitled to the benefits she seeks. *See, e.g.*, OPM Br. 9. OPM also agrees that the couple "attempted to formalize their relationship in Illinois" in September 2003—more than ***ten years*** before Ms. Sammons' death—but were thwarted because "same-sex marriage" was not "recognized in Illinois at the time." *Id.* at 10. And it also agrees that ***six*** years before Ms. Sammons' death, in October 2007, she and Ms. Rolfingsmeyer were "living together [in Pennsylvania] in the manner of a married couple," but could not marry there either, again because "same-sex marriage [was not] then recognized in Pennsylvania." *Id*. at 11. Thus, OPM effectively concedes that the couple would have been married many years before Ms. Sammons' death were it not for the unconstitutional prohibitions, and that such a marriage would have qualified Ms. Rolfingsmeyer for the survivor benefits she now seeks. The only reason OPM denied her those benefits is that, for more than a decade, she was unconstitutionally barred from marrying the person she loved, and OPM deferred uncritically to those unconstitutional state-law bans. These simple, undisputed facts clearly disprove OPM's contention that its denial of benefits did not depend on unconstitutional state laws.

Under clear Supreme Court precedent, OPM's reliance on unconstitutional state law to deny Ms. Rolfingsmeyer the same benefits that the survivor of a

similarly-situated opposite-sex couple would have received warrants reversal by itself. *See* Opening Br. 12-24. But reversal is also appropriate for the independent reason that OPM's challenged Regulation cannot satisfy the heightened scrutiny that traditionally governs such Equal Protection claims. OPM's decision to incorporate discriminatory state-law definitions of marriage brought with it the burden to justify the discrimination the state laws codified. *See id*. at 24-34. Under the Regulation, the survivor of an opposite sex couple similarly situated to Ms. Rolfingsmeyer and Ms. Sammons would have qualified for benefits, but Ms. Rolfingsmeyer did not, solely because of the sex of the person she loved. Because OPM offers ***no*** justification for its discriminatory regulation—much less the exceedingly persuasive justification that could satisfy the Equal Protection analysis—the Regulation cannot withstand scrutiny under that provision.

Rather than seriously contesting petitioner's actual arguments, OPM spends much of its brief arguing instead that the statutory nine-month ***duration-of-marriage*** requirement is constitutional. But petitioner is not challenging the duration requirement on appeal. Her objection is to OPM's denial of benefits on the ground that she was not "married" under state law until 2013, even though it is conceded she would have been married to Ms. Sammons for ***years***—and therefore entitled to benefits—were it not for Illinois' and Pennsylvania's undisputedly unconstitutional bans on same-sex marriage. Petitioner's injury therefore stems

directly from OPM's unconstitutional incorporation of unconstitutional state laws to define marriage for the purposes of FERS benefits.

The appropriate remedy is equally clear. As noted, OPM does not contest petitioner's primary argument that an award of benefits is necessary to put her in the position she undisputedly would have occupied but for OPM's impermissible reliance on unconstitutional laws. Instead, OPM challenges only petitioner's alternative argument that her injury could also be remedied by adoption of a more general, non-discriminatory definition of marriage under the relevant statute. Even if OPM's criticism of that alternative argument were correct (and it is not), OPM has conceded the remedy issue by failing to challenge petitioner's principal contention. The Court should therefore reverse MSPB's decision and order that the benefits be paid.

ARGUMENT

I. OPM FAILS TO JUSTIFY OR EXCUSE ITS UNCONSTITUTIONAL DEFINITION OF MARRIAGE.

A. OPM's Defense of The Duration Requirement Is Irrelevant.

OPM's principal contention is that it "properly relied on the 9-month ***duration-of-marriage*** requirement in 5 U.S.C. § 8441(1)(A)" in denying Ms. Rolfingsmeyer her survivor benefits, *see, e.g.*, OPM Br. 1, 24-26 (emphasis added), and that Ms. Rolfingsmeyer's purported challenge to that statutory

requirement fails, *see, e.g.*, *id.* at 27-32, 36-43, 47-53. That contention is aimed at a straw-man argument that is immaterial to this appeal.

As the opening brief made clear, this appeal is about how OPM defined marriage—not about how long the statute requires a marriage to be. *See*, *e.g.*, Opening Br. 20 ("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."). By promulgating a regulation that deferred to Illinois' and Pennsylvania's discriminatory state marriage laws, OPM denied Ms. Rolfingsmeyer and Ms. Sammons access to the full array of rights relating to marriage that were available to their opposite-sex counterparts. *See* Opening Br. 14-15 (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2601 (2015); *United States v. Windsor*, 570 U.S. 744, 772-73 (2013)); *see also id*. at 16-18 (citing *Cox*, 684 F.2d at 324). OPM's unconstitutional act was to define marriage by reference to state laws that prohibited same-sex marriage, and then to deny benefits on the basis of that unconstitutional definition.

OPM nevertheless argues that because, after *Obergefell*, it recognized Ms. Rolfingsmeyer as married for benefits purposes as of her Maryland marriage ***in 2013***, the marriage definition cannot be the subject of a valid dispute and the case turns solely on an application of the nine-month duration requirement. *Cf.*,

e.g., OPM Br. 31-32. That argument fails. OPM's marriage definition determined not only ***whether*** Ms. Rolfingsmeyer's relationship with Ms. Sammons would be recognized, but also—just as importantly—***as of what date*** it became worthy of recognition. As already noted, it is undisputed that Ms. Rolfingsmeyer would have been deemed married for benefits purposes a decade earlier—therefore satisfying the duration requirement and every other precondition for benefits—if OPM's regulation had not relied on unconstitutional state-law bans in defining marriage in order to establish eligibility criteria for benefits. OPM's extensive defense of the duration requirement is therefore beside the point. *Cf. Schmoll v. Saul*, No. 19-4542, slip op. at 5 (N.D. Cal. Jun. 15, 2020) (rejecting government's defense to benefits denial based on duration-of-marriage requirement where state's "unconstitutional law prohibiting same-sex marriage" was "the sole reason keeping [the applicant] from meeting that requirement").

For that reason, OPM's reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Becker v. Office of Personnel Management*, 853 F.3d 1311 (Fed. Cir. 2017), is misplaced. As even OPM concedes, *Salfi* and *Becker* "did not address the specific as-applied challenge at issue in this case." OPM Br. 44. And that concession is an understatement. Both *Salfi* and *Becker* involved challenges to the duration requirement, not the marriage definition, brought by individuals who, as members of opposite-sex couples never subjected to a ban, had no grounds to

challenge a marriage definition in the first place. *See Salfi*, 422 U.S. at 753; *Becker*, 853 F.3d at 1313. In this appeal, by contrast, petitioner challenges the marriage definition, which was not at issue in either prior case. She does not—and does not need to—dispute the duration requirement's validity, because, as explained, the duration requirement would be easily satisfied if OPM employed any marriage definition that afforded same-sex relationships the equal dignity and recognition the Constitution requires. *See* Opening Br. 20-21.

Nor is petitioner's challenge to the marriage definition new on appeal. *Cf.* OPM Br. 32-33 (suggesting that petitioner "pursued a different argument" below). As the Administrative Judge ("AJ")[1] recognized, petitioner presented several alternative arguments below, one of which was that OPM acted unconstitutionally "'by making it physically impossible for [her] to qualify for the retirement survivor annuity,' while allowing similarly-situated opposite-sex couples to enjoy that same benefit." Appx10 (quoting Appx131). Ms. Rolfingsmeyer also noted, in her initial benefits application (submitted before *Obergefell*), that "[t]he only reason [the couple] were not married any sooner [than 2013] is the laws prohibited [them] from doing so." Appx90. And the AJ both recognized and adjudicated Ms. Rolfingsmeyer's contention that "she should be deemed to have been married

1 The opening brief mistakenly referred to the Administrative Judge who adjudicated this case as an Administrative Law Judge.

to Ms. Sammons for more than 9 months on the basis that the law is unconstitutional as applied to her." Appx4. Indeed, while rejecting that argument, the AJ expressly noted that the unconstitutional state laws OPM relied on placed Ms. Rolfingsmeyer 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.

OPM nowhere argues that petitioner waived the argument that is now renewed on appeal. Nor could it make that contention, given that both OPM and the AJ were clearly on notice of, and the AJ addressed, Ms. Rolfingsmeyer's contention that OPM's denial of benefits violated Due Process and Equal Protection because it rested on unconstitutional state-law marriage bans. *See*, *e.g.*, *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) (quoting *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000)); *see also Pfizer, Inc. v. Lee*, 811 F.3d 466, 471 (Fed. Cir. 2016) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)).

B. OPM's Denial Of Benefits Depended On The Marriage Definition's Unconstitutional Reliance On State Laws.

Understood properly—as a challenge to the Regulation's marriage definition rather than an independent challenge to the statutory duration requirement—petitioner's principal argument is almost entirely uncontested. As noted, OPM does not dispute that it is *per se* unconstitutional for the federal government to deny benefits by incorporating unconstitutional state laws. *See, e.g.*, Opening Br. 16-17 (citing, *inter alia*, *Cox*, 684 F.2d at 324). Nor does OPM dispute that this case involves even more than mere incorporation, since DOMA reflected the federal government's successful effort to encourage precisely the sorts of unconstitutional laws the Regulation incorporates. As the opening brief explained, the federal government was therefore complicit in the state-law discrimination the Regulation incorporated and reinforced. *See id.* at 18. Accordingly, the denial of survivor benefits to Ms. Rolfingsmeyer is an even more egregious constitutional violation than was present in *Cox*.

Having failed to dispute those points, OPM argues only that the Regulation's marriage definition and the agency's denial of benefits did not depend on unconstitutional state laws. *See, e.g.*, OPM Br. 22 ("Neither OPM nor the administrative judge read Pennsylvania or Illinois laws … into the definitions of 'current spouse' and 'marriage,' 5 C.F.R. § 843.102, or enforced them in denying Ms. Rolfingsmeyer's application."). That argument is flatly wrong.

To begin with, the challenged Regulation, on its face, unambiguously defers to state-law definitions of marriage. *See* 5 C.F.R. § 843.102 ("*Marriage* means 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…."). Thus, in accordance with that Regulation, OPM based its initial denial ***solely*** on the fact that Ms. Rolfingsmeyer and Ms. Sammons were not married under Illinois or Pennsylvania law as of any date that would have qualified Ms. Rolfingsmeyer for benefits. *See* Appx82 (denying benefits because "[c]ommon-law marriages are not valid in Pennsylvania after December 31, 2004. Before that you lived in Illinois which does not recognize common law."). And OPM now effectively concedes that the only reason the couple were not married under Illinois or Pennsylvania law at such a time is that those states unconstitutionally discriminated against same-sex couples by refusing to permit them to be married, on either a statutory or common-law basis. *See* OPM Br. 10-11 (noting that "Ms. Sammons and Ms. Rolfingsmeyer attempted to formalize their relationship in Illinois, although neither same-sex marriage nor common-law marriage were recognized in Illinois at that time" and that in 2007 they "moved to Pennsylvania and continued living together in the manner of a married couple" but "[n]either common-law marriage nor same-sex marriage were then recognized in Pennsylvania").

Nor does OPM dispute that if Illinois and/or Pennsylvania ***had*** allowed the couple to marry as of 2003 or 2007, that marriage would have entitled Ms. Rolfingsmeyer to the benefits she seeks. *See id.* at 9 ("[I]f a same-sex couple obtained a marriage license at least nine months before the date of the deceased's death, the surviving spouse is entitled to survivor's benefits[.]"); *see also* Appx90. OPM's benefits denial thus plainly depended on those two states' denials of Ms. Sammons' and Ms. Rolfingmeyer's right to marry and OPM's incorporation of those two unconstitutional bans. Simply put, if the bans had not existed, OPM would have provided benefits, but because the bans did exist, OPM did not. It is therefore clear that OPM incorporated and enforced the unconstitutional state-law bans when it denied Ms. Rolfingsmeyer benefits.

Cox—which OPM entirely ignores—cannot be materially distinguished from this case. *See* 684 F.2d at 324; Opening Br. 17-18, 22. There, incorporating and relying on an unconstitutional state law that gave illegitimate children no inheritance rights, the federal government denied Social Security survivor benefits to such a child. Recognizing that the state law's discrimination against such children was unconstitutional, the Fifth Circuit held it was equally unconstitutional for the federal government to rely on the state law to deny benefits. 684 F.2d at 324. The same analysis governs here. The denial of benefits in this case depended entirely on the conclusion that Ms. Rolfingsmeyer and Ms. Sammons were not

married as of 2003, 2007, or any date earlier than their 2013 marriage in Maryland. And that conclusion, in turn, rested entirely on the unlawful Illinois and Pennsylvania marriage bans, which (as OPM effectively concedes) were the only reason the couple did not have a recognized state-law marriage at those earlier times. The simple, undisputed fact is that if Illinois or Pennsylvania had allowed the couple to marry in 2003 or 2007, they would have done so, *see*, *e.g.*, Appx90, and Ms. Rolfingsmeyer would have received benefits as a result.

In *Cox*, the court also deemed it immaterial that Georgia had enacted a new law that comported with constitutional requirements, because the old law governed the benefits determination at issue. 684 F.2d at 324. That analysis further elucidates the AJ's error here. Although the AJ concluded that same-sex marriage bans were a "non-issue" in light of the later decision in *Obergefell*, *see* Appx12, it is undisputed, and even the AJ recognized, that those bans were precisely the reason why the couple could not and did not formally marry in Illinois in 2003 or Pennsylvania in 2007. Appx10-11. Thus, far from being a "non-issue," the bans led directly—and undisputedly—to the denial of benefits to Ms. Rolfingsmeyer. *See supra* at 1-2; Opening Br. 19-20 & n.5.

C. It Is Immaterial Whether OPM Recognized Out-Of-State Same-Sex Marriages After *Windsor*.

OPM nevertheless argues that due to adjustments it claims to have made ***after*** *Windsor* was decided on June 26, 2013, it was "not impossible" for a same-

sex couple living in Pennsylvania to obtain federal recognition of their relationship before *Obergefell*. *See* OPM Br. 53. Specifically, OPM notes that in *Windsor*'s wake, it began to recognize marriages contracted "in other jurisdictions" even where a couple's state of residence would not have done so. *Id.* at 9, 12. But that argument fails many times over.

First, same-sex couples are entitled to ***equal*** treatment regarding their marriage rights, because laws are "unconstitutional to the extent they treat[] same-sex couples differently from opposite-sex couples." *Pavan*, 137 S. Ct. at 2078. Thus, merely saying it was "not impossible" for a same-sex couple to eventually obtain recognition of their relationship by traveling to another state to marry, OPM Br. 53, proves, rather than refutes, the marriage definition's invalidity. Because no opposite-sex couple was ever required to travel out of state to have their marriage recognized, OPM's apparent willingness to recognize an out-of-state marriage obtained in 2013 does not erase the discriminatory stain of Illinois' and Pennsylvania's refusal to allow or recognize Ms. Rolfingsmeyer's marriage in the earlier years. And, as already noted, those states' refusals—and OPM's deference to them—provided the entire justification for denying Ms. Rolfingsmeyer benefits.

The AJ's own findings reinforce the point. As he explained, a requirement to travel out of state to attempt to have her relationship recognized placed Ms. Rolfingsmeyer at a clear "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. Nothing in OPM's brief refutes the AJ's finding.

Second, OPM's recognition of out-of-state marriages does not distinguish *Cox*, which, again, OPM ignores. There, the court specifically noted that it was not impossible for a child born out of wedlock qualify for federal benefits. *See* 684 F.2d at 323. For example, if the child had convinced his father to legitimate him under the relevant state law during the father's lifetime, the discrimination against children born out of wedlock would have been irrelevant. *See id.* But that fact did not save the state law—or the federal government's reliance on it—because no child born in wedlock would have had to take that extra step. *Id.* The same principle applies to OPM's claim that it adopted a partial workaround after *Windsor* by allegedly recognizing out-of-state marriages that a claimant's home state would not. Because that partial workaround plainly did not amount to full equality, it does not excuse OPM's unconstitutionally discriminatory actions.

Third, OPM's supposed workaround had nothing to do with the constitutional violation at issue in this appeal. At all times relevant to this case, Pennsylvania law discriminated against same-sex couples ***both*** by refusing to issue marriage licenses to same-sex couples ***and*** by refusing to recognize otherwise-

valid same-sex marriages performed out of state. *See* Opening Br. 13-14 & n.4. While OPM claims to have addressed the second form of discrimination after *Windsor*, it effectively concedes that Ms. Rolfingsmeyer and Ms. Sammons were injured by the first kind, since they would have been married in Pennsylvania (or even earlier in Illinois) but for those states' same-sex-marriage bans. *See* OPM Br. 10-11. Those states' refusals to permit such a marriage within their borders—refusals that remained in effect at all times relevant to this case—were freestanding constitutional deprivations, whether or not the states or OPM would have recognized an otherwise-valid out-of-state marriage. *See Obergefell*, 135 S. Ct. at 2604-05. Yet OPM simply incorporated the unconstitutional state laws as it found them, without accounting for those deprivations. That OPM claims it ceased discriminating against one subset of same-sex couples (those who married out-of-state in time to qualify for benefits) does not ameliorate the fact that it continued to discriminate against another subset (those who would have married in-state but for an unconstitutional ban). *See, e.g.*, *Handley v. Schweiker*, 697 F.2d 999, 1003 (11th Cir. 1983) (focusing on "subclass" of illegitimate children unconstitutionally denied benefits). For that reason, OPM's denial of benefits cannot be squared with *Obergefell*'s core holding.

Fourth, in addition to being legally irrelevant, the supposed workaround OPM relies on offered no semblance of equality on the facts of Ms.

Rolfingsmeyer's case. *Cf.* OPM Br. 12 (citing 78 Fed. Reg. 47,018 (Aug. 2, 2013); 79 Fed. Reg. 57,589 (Sept. 25, 2014)). OPM cannot legitimately argue that Ms. Rolfingsmeyer should have made the effort—which became increasingly difficult and painful in light of Ms. Sammons' condition—to travel out of state to marry ***before*** *Windsor*, when neither the couple's home states (in light of their marriage bans) nor OPM (in light of DOMA) would have recognized that marriage for any purpose. Indeed, as the AJ correctly observed, "it would have made little practical sense for her and Ms. Sammons to undertake the time and expense of traveling to a foreign jurisdiction to obtain a marriage certificate that would not have been recognized by their home state or by the Federal government." Appx10.

Thus, OPM's recognition of out-of-state marriages is relevant, if at all, only to couples who had an opportunity to marry and qualify for benefits ***after*** OPM issued its first post-*Windsor* guidance. Ms. Rolfingsmeyer and Ms. Sammons had no such opportunity. OPM's guidance was published in the Federal Register on ***August 2, 2013***, *see* 78 Fed. Reg. at 47,018, only ***five months*** before Ms. Sammons passed away. Thus, even if Ms. Rolfingsmeyer and Ms. Sammons had read the Federal Register every day, seen and understood the August 2, 2013 notice on the very day it was published, ***and*** traveled to Maryland to get married that same day—all preposterous assumptions—OPM would ***still*** have denied Ms. Rolfingsmeyer survivor benefits under its discriminatory scheme because the

marriage would have come too late. Indeed, even if the couple had ***anticipated*** OPM's guidance on the day *Windsor* was decided on June 26, 2013—an even more unlikely prospect, since *Windsor* did not actually require that guidance[2]—their out-of-state marriage ***still*** would have been too late, because Ms. Sammons died within nine months of *Windsor*. Thus, to the extent OPM contends its post-*Windsor* guidance somehow ameliorated an otherwise-unconstitutional framework, that only highlights OPM's mistreatment of Ms. Rolfingsmeyer, given that the guidance came too late to have any material effect on her case.

Finally, it is far from clear that the post-*Windsor* guidance OPM invokes would have helped Ms. Rolfingsmeyer even if it had been timely. While both Federal Register notices OPM cites provided that the federal government would no longer categorically refuse to recognize same-sex marriages, *see* 78 Fed. Reg. at 47,018; 79 Fed. Reg. at 57,589, neither purported to amend the requirements of the Regulation, which has always—to this very day—defined a marriage as one "recognized in law or equity under the whole law of the jurisdiction with the most

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2 As the opening brief explained, it was not until *Obergefell*—which was decided after Ms. Sammons' death—that the Supreme Court held that states must recognize otherwise-valid same-sex marriages performed in other states. *See* Opening Br. 6 n.1. Thus, at no time during Ms. Sammons' life would Pennsylvania have recognized an out-of-stage marriage between the couple, and it was not until after Ms. Sammons died that the Supreme Court held in *Obergefell* that either Pennsylvania or OPM was required to do so.

significant interest in the marital status of the employee," 5 C.F.R. § 843.102.[3] For the entirety of the relevant period, Pennsylvania (the couple's domicile when Ms. Sammons died) explicitly refused to recognize out-of-state same-sex marriages, *see supra* at 17 n. 2; Opening Br. 2-3, 6 n.1, and an application of the Regulation's plain language would therefore have required to OPM to simply defer to that refusal. It is therefore unclear whether, before *Obergefell*, the notices alone could have authorized OPM to do otherwise.

But even if OPM, as it now says, began after *Windsor* to recognize other out-of-state marriages that did not satisfy its Regulation, its conclusion that it had the ***power*** to do so only further undermines its position in this case. All Ms. Rolfingsmeyer sought from OPM was for it to recognize and rectify the Regulation's incorporation of unconstitutional state marriage bans that otherwise precluded her from receiving benefits. Having previously disregarded the Regulation's language when it came into conflict with constitutional requirements—even before the Supreme Court struck down the relevant portion of DOMA in *Obergefell*—OPM had no basis for refusing to do so on the facts of this case, particularly given that it decided this case after *Obergefell*. For that reason

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[3] One of the notices provided that OPM would "extend benefits to Federal employees and annuitants who are legally married to spouses of the same sex, regardless of the employees' or annuitants' states of residency." 78 Fed. Reg. at 47,018. But it did not purport to amend the Regulation.

and the many others set forth above, OPM's assertion that, post-*Windsor*, it would recognize out-of-state marriages not recognized by a claimant's state of domicile has no bearing on this case other than to underscore the nature and extent of OPM's unconstitutional discrimination against Ms. Rolfingsmeyer. *See Thornton v. Comm'r*, 2020 WL 6434868 (W.D. Wash. Jan. 31, 2020), at *6 ("The Administration failed to account for this impact on surviving same-sex partners after *Obergefell*, in the same way that it accounted for the Court's ruling protecting same-sex marriage after *Windsor*"), *report and recommendation adopted*, 2020 WL 5494891 (W.D. Wash. Sept. 11, 2020).

II. OPM FAILS TO JUSTIFY ITS RELIANCE ON DISCRIMINATORY STATE LAWS.

Because the Regulation incorporates and enforces unconstitutional same-sex marriage bans, it fails to place committed same-sex relationships on equal footing with opposite-sex ones and is unconstitutional for that reason alone. *See supra* at 4-19; Opening Br. 12-23. There is thus no need for the Court to engage in further analysis in order to hold OPM's denial of benefits unconstitutional. However, as the opening brief explained, the Regulation is also unconstitutional for the independent reason that it cannot survive the traditional scrutiny that applies under the Equal Protection and Due Process Clauses. *See* Opening Br. 23-34.

As to this argument, OPM again spends pages defending the nine-month duration requirement. *See* OPM Br. 36-44, 47-53. But as already explained above,

the duration requirement itself is not independently at issue in this appeal. OPM's extensive defense of that requirement is therefore beside the point.

To the extent OPM defends the marriage definition, it argues that the definition is not discriminatory because it does not "categorically bar" same-sex couples from eligibility for survivor benefits. *See* OPM Br. 44-47. For reasons already explained, that effort also fails on the facts of this case. OPM cannot demonstrate that it treated Ms. Rolfingsmeyer's relationship equally when it denied benefits by simply deferring to the laws of states that unconstitutionally forbade her to marry at all. *See supra* at 12-19; *see also* Opening Br. 24-29.

OPM also cannot argue that the Regulation is facially neutral (and thus immune to any Equal Protection analysis) merely because it does not ***expressly*** refer to withholding benefits from same-sex couples. *Cf.* OPM Br. 47-53. As the opening brief explained, numerous courts have held that regulations that incorporate by reference facially discriminatory laws are themselves inherently discriminatory and must therefore satisfy the requisite heightened level of constitutional scrutiny. *See* Opening Br. 24, 32-33 & n.13 (citing, *inter alia*, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *Ely v. Saul*, 2020 WL 2744138 (D. Ariz. May 27, 2020), *appeal docketed* (9th Cir. July 24, 2020) and *Thornton*, 2020 WL 6434868, at *4).

OPM does not distinguish those cases other than by pointing out that they involved Social Security rather than FERS survivor benefits. *See* OPM Br. 52-53. But OPM offers no reason why application of Equal Protection or Due Process principles should differ between the two kinds of benefits. Moreover, as noted, OPM fails to distinguish *Cox*, in which the federal law at issue similarly incorporated state inheritance laws without expressly mentioning children born out of wedlock. Like the federal laws at issue in *Cox* and the Social Security cases, the Regulation is inherently discriminatory because it incorporates discriminatory laws by reference. OPM must therefore justify its action under the applicable level of scrutiny—here, heightened scrutiny—and the disparate-impact and discriminatory-intent cases OPM cites, *cf.* OPM Br. 48-51, are beside the point.

In particular, this case is unlike *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), which the government has unsuccessfully invoked in the Social Security context. *See, e.g.*, *Thornton*, 2020 WL 6434868, at *8. *Feeney* rejected a sex-discrimination challenge to Massachusetts' veterans preference for civil service employment, concluding that even if a higher percentage of veterans were male than female, the preference was facially neutral and did not "reflect[] invidious gender-based discrimination." 442 U.S at 274. But *Feeney* rested principally on the absence of any claim of an underlying constitutional violation: the plaintiff did not assert that the Constitution protects a right to serve in the

military, did not claim that ***she*** was prevented from serving because of her sex, and made no argument that the sex disparity among veterans had any constitutional implication beyond its disparate impact. *See, e.g.*, *id.* at 275 (noting that "veteran status is not uniquely male"). Thus, *Feeney* makes clear that its reasoning applies only when "some other independent right is not at stake." *Id.* at 272.

This case is entirely different. OPM incorporated and relied upon state laws that ***categorically*** excluded same-sex couples at all relevant times, in clear violation of the Constitution as explicated in *Obergefell*. Unlike the plaintiff in *Feeney*, who did not claim she was excluded from the military on the basis of sex, it is uncontested that Ms. Rolfingsmeyer would have been married under state law but for Illinois' and Pennsylvania's unconstitutional bans incorporated by the OPM regulation. Thus, this case, unlike *Feeney*, does involve an "independent right": the constitutional entitlement of all same-sex couples to the "constellation of benefits … linked to marriage." *Pavan*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601). The Regulation incorporates and endorses outright bans on the enjoyment of that right, thus perpetuating the unconstitutional discrimination. It is therefore no more permissible than if OPM had formulated and adopted the discriminatory marriage definition itself, rather than incorporating the unconstitutional state laws. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 788-89 (Alaska 2005) (noting that "unlike the neutral definition of 'veteran'

in *Feeney*," the challenged definition "of the legal status of 'marriage' (and, hence, who can be a 'spouse') excludes same-sex couples"); *see also* Opening Br. 15-16.

OPM also repeatedly suggests that the discrimination at issue here is in the "past," and that "historical treatment" cannot be the basis of a constitutional challenge. *See* OPM Br. 47-48, 52. That argument reflects another misunderstanding of petitioner's position. Ms. Rolfingsmeyer surely suffered past discrimination, as even OPM does not contest that she would have been married as early as 2003 but for same-sex-marriage bans that were undisputedly unconstitutional. But the question on this appeal is whether OPM may deny benefits ***in the present***—and for the rest of Ms. Rolfingsmeyer's life—by deferring to and enforcing the same unconstitutional marriage laws that effected that discrimination. OPM does not attempt to point to even a rational basis, much less an exceedingly persuasive justification, for doing so. To the contrary, as the opening brief explained, numerous courts have recognized that the purpose of employing a formal marriage requirement is not furthered at all when applied to the class of same-sex couples who were "prohibited from marrying under state law," because in such circumstances, state-law marriages "cannot serve as a proxy" for committed relationships. Opening Br. 32 n.13 (quoting *Harris v. Millennium Hotel*, 330 P.3d 330, 337 (Alaska 2014)). To treat same-sex couples equally, OPM cannot simply rely on discriminatory and unconstitutional state laws. Because

OPM did so here, its denial of benefits is unconstitutional under traditional equal protection scrutiny.

III. THE ONLY PERMISSIBLE REMEDY IS TO PROVIDE SURVIVOR BENEFITS.

A. Ms. Rolfingsmeyer Is Entitled To Benefits In Order To Place Her In The Position She Would Have Occupied But For OPM's Unconstitutional Action.

As the opening brief explained, any permissible remedy must place Ms. Rolfingsmeyer in the position she would have occupied but for OPM's unconstitutional reliance on unconstitutional state laws. *See* Opening Br. 34-46. The most straightforward means of doing so is simply to analyze whether, in the absence of the unconstitutional same-sex-marriage bans at issue, Ms. Rolfingsmeyer and Ms. Sammons would have been married for more than nine months before Ms. Sammons' death. *See* Opening Br. 35 (citing, *inter alia*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). As noted, OPM does not dispute that this is the proper analysis. *See supra* at 1. Nor, as explained above, does OPM dispute the outcome of that analysis: that the couple clearly would have been married for many years in the absence of Illinois' and Pennsylvania's unconstitutional state laws. *Cf.* OPM Br. 10-11.

OPM's only response is to briefly contend that "OPM was not the but-for cause" of the denial of benefits, because (OPM says) it was "not impossible" for Ms. Rolfingsmeyer to qualify for benefits by obtaining a marriage out of state.

OPM Br. 53. That argument is difficult to fathom, because OPM's action was unquestionably the direct cause of its own benefits denial. To the extent OPM instead intends to argue that ***the unconstitutional state-law bans*** were not the but-for cause of the denial, it is wrong for all the reasons noted above. *See supra* at 1-2, 9-12. The possibility of other ways for different people to have obtained benefits does not defeat a finding that the state-law bans were a but-for cause of the denial here, and any suggestion to the contrary misunderstands the test for but-for causation. As the Supreme Court has explained, "a but-for test directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020). "If it does, we have found a but-for cause." *Id.*[4]

Application of that test here is simple. As discussed above, OPM does not dispute that if Illinois and Pennsylvania had allowed same-sex marriages at the relevant times, the couple would have been married in Illinois in 2003, or in Pennsylvania in 2007, and Ms. Rolfingsmeyer would have gotten her benefits. *See supra* at 1-2. It is therefore because of the bans, and OPM's incorporation of them into its own definition of marriage, that the benefits were denied. The proper

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4 As the Court further explained, a but-for cause need not be the "sole[]" cause of an event. *Id.* To the contrary, events "[o]ften … have multiple but-for causes." *Id.* "So long as" unconstitutional discrimination was "one but-for cause" of the denial of benefits—and there is no serious dispute in this case that it was—"that is enough" to warrant a remedy. *See id.*

resolution of this case is thus clear and effectively undisputed: Ms. Rolfingsmeyer is entitled to survivor benefits because that is the only remedy that can place her in the position she would have occupied if OPM had not acted unconstitutionally.

B. Alternatively, Ms. Rolfingsmeyer And Ms. Sammons' Relationship Satisfies Any Conceivable Constitutional Standard.

As a backup and alternative to the fact-specific inquiry proposed above, the opening brief also suggested that this Court could formulate, in place of OPM's unconstitutional deference to impermissible state-law standards, a non-discriminatory definition of "marriage" as a remedial matter. *See* Opening Br. 41-46. It is now uncontested that Ms. Rolfingsmeyer and Ms. Sammons would satisfy any such standard, however formulated. *See id.* But because OPM nowhere disputes Ms. Rolfingsmeyer's principal remedial argument, the Court need not even reach that issue. Instead, the Court should simply undertake the straightforward, fact-based inquiry set forth above and direct that benefits be paid in order to place Ms. Rolfingsmeyer in the position she would have occupied but for OPM's unconstitutional reliance on unconstitutional state laws.

Nevertheless, it would be neither unusual nor beyond this Court's role to adopt a more general rule defining marriage for benefits purposes in a non-discriminatory manner in order to remedy the violation on the facts of this case. The governing statute, 5 U.S.C. § 8441(1)(A), contains no definition of "married"; rather, that term must be applied—through rulemaking, adjudication, or

litigation—in a manner that comports with the Constitution. Because OPM's Regulation violates the Constitution as applied to Ms. Rolfingsmeyer,[5] the adoption of a definition other than one that simply defers to unconstitutional state law is necessary to remedy the constitutional violation in the event Ms. Rolfingsmeyer's primary (and uncontested) remedial theory is not adopted.

In suggesting that the Court cannot employ such a definition in the course of remedying the discrimination engendered by its OPM's unconstitutional Regulation, OPM invokes only a speech from Justice O'Connor and citations to *Windsor*. *See* OPM Br. 55. Neither source supports OPM's position. Even if Justice O'Connor's speech had precedential value, and of course it does not, it only notes the undisputed proposition that states are ordinarily better positioned to legislate on family law matters. But the states plainly failed here. As *Obergefell* held, the federal Constitution disabled states like Illinois and Pennsylvania from excluding same-sex couples from marriage and the benefits it entails. And OPM's reliance on *Windsor* is bizarre. On one of the very pages OPM cites, that decision expressly notes that "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges" and "when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of

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[5] Petitioner and her counsel are not aware of any similarly situated individuals with live claims for FERS survivor benefits.

the mechanisms and means to adopt," including "decid[ing] that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships." *Windsor*, 570 U.S. at 764-65. Thus, as the opening brief showed, *see* Opening Br. 43-44, and as OPM does not dispute, it is not at all unusual for the federal government to adopt its own marriage definitions where state laws do not suffice. Accordingly, given that the governing statute here contains no definition of marriage, there is no impediment to this Court applying for this case, as a remedial matter, a non-discriminatory interpretation of the statute that does not defer to unconstitutional state laws.

Tellingly, while OPM contests whether the Court would have the ability to employ such a non-discriminatory marriage definition as a remedial matter, it never contests the basic proposition—set forth in the opening brief, *see* Opening Br. 44-46 & n.20—that Ms. Rolfingsmeyer and Ms. Sammons' relationship would satisfy any conceivable definition given the undisputed facts regarding their solemn commitment to each other and their holding themselves out as married during the entirety of their more than 10-year relationship. Indeed, OPM concedes that the couple "attempted to formalize their relationship in Illinois," and "moved to Pennsylvania and continued living together in the manner of a married couple." OPM Br. 10-11. Accordingly, if the Court were to reach and adopt petitioner's

alternative remedial argument, there would be no need for a remand because it is effectively uncontested that Ms. Rolfingsmeyer and Ms. Sammons' relationship would satisfy any conceivable non-discriminatory marriage definition.

CONCLUSION

The Court should reverse MSPB's judgment and direct OPM to provide Ms. Rolfingsmeyer with spousal survivor benefits under FERS.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

Case No. 20-1735

Patricia Rolfingsmeyer v. Office of Personnel Management

I certify that the foregoing filing is proportionately spaced in 14-point font and, according to the word processing program in which it was generated, contains 6,699 words excluding parts of the document exempted by Federal Circuit Rule 27(d).

Date: December 21, 2020

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