No. 2020-1735

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PATRICIA ROLFINGSMEYER,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Petition for review of the Merit Systems Protection Board in
No. PH-0843-16-0235-I-1.

BRIEF FOR RESPONDENT, OFFICE OF PERSONNEL MANAGEMENT

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that she is unaware of any other appeals stemming from this matter which were previously before this Court or any other appellate court, and is unaware of any directly related cases pending in this or any other court.

Respondent's counsel is aware of several cases challenging the Social Security Administration's distribution of survivor benefits as applied to the surviving spouses of same-sex marriages. Three such cases are pending in the United States Court of Appeals for the Ninth Circuit. *Driggs v. Saul*, No. 20-16426; *Ely v. Saul*, No. 20-16427; and *Schmnoll v. Saul*, No. 20-16445. Another case is pending in a district court. *Thorton v. Social Security Administration*, No. 18-01409 (W.D. Wash.).

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STATEMENT OF THE ISSUES

Whether the Government properly relied on the 9-month duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A) in denying Patricia Rolfingsmeyer, the surviving spouse of Tina Sammons, a survivor annuity and a basic employee death benefit under 5 U.S.C. §§ 8442(b)(1)(A)-(B), and whether the Due Process Clause of the Fifth Amendment requires the Court to apply rational-basis review for purposes of determining whether OPM's denial of Federal benefits violated Ms. Rolfingsmeyer's right to equal protection of law.

STATEMENT OF THE CASE

A. Nature Of The Case And Statement Of Jurisdiction

This is a petition for review of an administrative judge's decision, Appx1-13, which became the final decision of the Merit Systems Protection Board (MSPB or the board) on April 10, 2020. Appx20-24.[1] Respondent agrees with Petitioner's Statement Of Jurisdiction at Br.1.[2] The administrative judge determined that: (1) Patricia Rolfingsmeyer was not entitled to payment of a current spouse annuity and a basic employee death benefit (BEDB) under 5 U.S.C. §§ 8442(b)(1)(A)-(B) because she did not meet the 9-month duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A), Appx3; and (2) under equal protection analysis, the 9-month duration-of-marriage requirement is subject to only rational-basis review and is rationally related to Congress's purpose of preventing the abuse of deathbed marriages to obtain survivor benefits. Appx1-13.

[1] On May 26, 2017, Ms. Rolfingsmeyer filed a petition requesting review by the board. Appx31. On March 17, 2020, she withdrew her petition for board review. Appx20, Appx31. On April 10, 2020, the board granted her request, and the administrative judge's decision became the board's final decision. Appx31, Appx20-24.

[2] "Br." refers to Petitioner's Brief. "Obergefell Br." refers to the Brief of Amici Curiae James Obergefell, Michael Ely, and Anthony Gonzales, dated 8/3/2020. ""SAGE Br." refers to the brief of Amici Curiae Services and Advocacy For Gay, Lesbian, Bisexual, and Transgender Elders and Human Rights Campaign, dated 8/4/2020.

B. Statutory And Regulatory Background

1. Eligibility For Survivor's Benefits

The surviving widow or widower of a Federal employee covered by the Federal Employees' Retirement System (FERS) who dies after having completed at least 18 months of creditable civilian service is entitled to certain benefits as provided by 5 U.S.C. § 8442(b), *i.e.*, an annuity (*see* 5 U.S.C. § 8442(b)(1)(B)) and a BEDB (*see* 5 U.S.C. § 8442(b)(1)(A)). The term "**widow**" for purposes of these provisions is defined as:

> For the purpose of this subchapter—
> (1) the term "**widow**" means the surviving wife of an employee, Member, or annuitant, or of a former employee or Member, who—
> (A) was married to him for **at least 9 months immediately before his death. . . .**

5 U.S.C. § 8441(1)(A)(emphasis added).[3]

OPM regulations implement the duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A), and state:

> The current spouse of a retiree, an employee, or a separated employee can qualify for a current spouse annuity or the basic employee death benefit only if—
> (1) The current spouse and the retiree, employee, or

[3] There are two exceptions to the 9-month marriage requirement (not present in this case): when the surviving spouse is "mother of issue of that marriage" or when the employee's death was accidental. *See* 5 U.S.C. §§ 8441(1)(B) and 8442(e)(1); *see also,* 5 C.F.R. § 843.303(a)(2)-(3).

> separated employee had been **married for at least 9 months**, as explained in paragraph (b) of this section; or
> (2) A child was born of the marriage, as explained in paragraph (c) of this section; or
> (3) The death of the retiree, employee, or separated employee was accidental as explained in paragraph (d) of this section.

5 C.F.R. § 843.303(a)(emphasis added).[4] OPM provides the following definitions for terms used in the regulation:

> *Current spouse* means a living person who is married to the employee, separated employee, or retiree at the time of the employee's, separated employee's, or retiree's death. *Current spouse* includes a spouse who is legally separated but not divorced from the employee, separated employee, or retiree.
>
> *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, Member, or retiree. If a jurisdiction would recognize more than one marriage in law or equity, the Office of Personnel Management (OPM) will recognize only one marriage but will defer to the local courts to determine which marriage should be recognized.

5 C.F.R. § 843.102.

[4] Unless otherwise stated, all regulations cited are to the 2014 version, because that is when Ms. Sammons died and Ms. Rolfingsmeyer applied for death benefits.

2. <u>Eligibility Of Same Sex Couples For Survivor's Benefits</u>

Prior to *United States v. Windsor*, 570 U.S. 744 (2013), OPM was legally precluded from recognizing the surviving spouse of a same-sex marriage as a "widow" or "widower" entitled to survivorship benefits. Section 3 of the Defense of Marriage Act (DOMA), then in effect, defined the terms "marriage" and "spouse" as excluding same-sex couples for the purpose of thousands of Federal statutes and regulations. Pub.L. No. 104-199 sec. 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).[5]

During the litigation challenging the constitutionality of DOMA in *Windsor*, the President and the Attorney General concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny," that DOMA was therefore unconstitutional, and that the Department of Justice would no longer defend it. *Windsor*, 570 U.S. at 753-54. Ultimately, the Supreme Court held that, because "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage," section 3 of "DOMA is unconstitutional as a deprivation of liberty of the person protected by

[5] Section 3 stated: "In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

the Fifth Amendment of the Constitution." *Id*. at 774. The Supreme Court did not address section 2 of DOMA, the section that purported to enable States to refuse to recognize same-sex marriages contracted in other jurisdictions.[6]

After that decision, as stated in the Attorney General's memorandum, the President directed the Department of Justice to "immediately beg[i]n working with other federal agencies to make the *Windsor* decision a reality" and "identify every federal law, rule, and policy, in which marital status is a relevant consideration," in order to ensure that married couples receive "equal treatment from the federal government regardless of their sexual orientation." Memorandum from the Attorney General to the President on Implementation of *United States v. Windsor*, at 1 (June 20, 2014).[7] On June 20, 2014, Attorney General Eric Holder, in a Memorandum to the President, announced the successful completion of that project: "I am pleased to report that agencies across the federal government have implemented the *Windsor* decision to treat married same-sex couples the same as

[6] Section 2 stated: "No State, territory, or possession of the United States or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe or a right or claim arising from such relationship."

[7] https://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf

married opposite-sex couples for the benefits and obligations for which marriage is relevant, to the greatest extent possible under the law." *Id.* As relevant to this case, among other changes, OPM changed the criteria for "widow" or "widower" to pay benefits to surviving spouses of same-sex marriages on the same terms and conditions that they are paid to survivors of opposite-sex marriages. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014).

To ensure affected individuals who were in same-sex marriages prior to *Windsor* and who were unconstitutionally prevented from electing a survivor annuity for a same-sex spouse, and to ensure affected individuals received the election rights DOMA unconstitutionally prevented them from exercising, OPM permitted those individuals to make belated elections that they otherwise would not have been able to make. Specifically, OPM provided affected annuitants with two years from the date of the *Windsor* decision to make elections of survivor annuities for same-sex spouses that they should have otherwise been able to have timely made at their retirement but for DOMA. 78 Fed. Reg. 47018 (Aug. 2, 2013). It mattered not whether the affected annuitant resided in a State, such as Pennsylvania, that did not recognize same-sex marriages sanctioned by other jurisdictions. *Id*. Same-sex marriages lawfully contracted in any State are valid marriages for OPM purposes, including the definitions of "current spouse" and

"marriage," 5 C.F.R. § 843.102. *Id*.

Additionally, when Federal annuitants were married to a same-sex spouse at retirement but died prior to *Windsor*, OPM informed their surviving spouses in a Federal Register notice that they may apply for survivor benefits, and that the annuitant's election of a spousal annuity was unnecessary in this situation because, under pre-existing laws, spouses of Federal employees at retirement are entitled to survivor benefits unless they otherwise have waived their right to this benefit. 79 Fed. Reg. 57589 (Sept. 24, 2014); 5 U.S.C. §§ 8416(a) and 8442(a)(1). As a result of *Windsor*, OPM extended retirement benefits to same-sex spouses of deceased annuitants, employees and former employees who may not have applied for death benefits because of DOMA, or who may have applied but were denied death benefits because of DOMA. 79 Fed. Reg. 57589 (Sept. 25, 2014). OPM viewed the *Windsor* decision as striking down section 3 of DOMA retroactively because the Supreme Court applied its ruling to Ms. Windsor. *Id.*; *Windsor*, 570 U.S. at 572; *see also Schuett v. FedEx Corp*., 119 F. Supp.2d 1155, 1165-66 (N.D. Cal. 2016) (*Windsor* "appears to invalidate § 3 of DOMA retroactive to 1996, the date of its enactment").

One year later, the Supreme Court decided *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584 (2015), which held that the fundamental right to marry is

guaranteed to same-sex couples by the Constitution. The decision declared unconstitutional numerous state laws that prohibited same-sex marriages, as well as those state laws refusing to recognize the validity of same-sex marriages entered into in other jurisdictions. 135 S.Ct. at 2607-08. The Supreme Court's holding also effectively voided section 2 of DOMA, which had purported to enable States to refuse to recognize same-sex marriages contracted in other jurisdictions. *Id.*

As a result of *Windsor* and *Obergefell*, OPM pays benefits to surviving spouses of same-sex marriages on the same terms and conditions as it pays those benefits to survivors of opposite-sex marriages. As relevant to this case, that means that if 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 even if the State in which the deceased spouse was domiciled did not recognize the marriage at the time of death. OPM does not apply or enforce unconstitutional state laws prohibiting same-sex marriage or refusing to recognize same-sex marriages contracted in other jurisdictions. In sum, OPM may not deny a survivor annuity or BEDB to the same-sex spouses of employees who have died in service based on the same-sex status of their marriage. If a same-sex spouse of a deceased Federal employee establishes that he or she has met all of the eligibility requirements necessary to establish entitlement to these benefits, and has

submitted an application for these benefits, OPM must pay the applicant those benefits.

C. Statement Of Facts

In January 1998, Ms. Rolfingsmeyer and Ms. Sammons entered into a committed same-sex relationship in Illinois and began living together from that date forward. Appx2.[8]

On June 20, 1998, Ms. Sammons began her employment with the U.S. Postal Service and continued in service until her death on February 4, 2014. Appx1-2. She was covered by the FERS. Appx2.

In September 2003, 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. Appx2 (citing *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016) (The Illinois legislature abolished common law marriage in 1905.); *In re Marriage of Allen*, 62 N.E.3d 312 (Ill. 2016) (Illinois legally recognized same-sex marriage effective June 1, 2014)). They purchased matching wedding bands, and, in the privacy of their home, placed those bands on each other's fingers and declared that they were now married. Appx3.

[8] Petitioner's "Statement of The Case" makes various unsupported arguments, which we address in our argument section.

In October 2007, Ms. Sammons and Ms. Rolfingsmeyer moved to Pennsylvania and continued living together in the manner of a married couple. Appx2. Neither common-law marriage nor same-sex marriage were then recognized in Pennsylvania. Appx2 (citing 23 Pa.C.S. § 1103 (Common law marriages contracted in Pennsylvania after January 1, 2005, are invalid.); *Commonwealth of Pennsylvania, Dep't of Health v. Hanes*, 78 A.3d 676 (Pa.Commw.Ct. 2013) (recognizing that Pennsylvania law effective at the time defined marriage as being between one man and one woman and pronounced as void same-sex marriages entered into in foreign jurisdictions)).

While Ms. Sammons and Ms. Rolfingsmeyer lived together in Pennsylvania, the law regarding same-sex marriage was changing. Appx2. Effective January 1, 2013, Maryland allowed same-sex marriages. Appx2 (citing Civil Marriage Protection Act, 2012 Md. Laws Ch. 2). On June 26, 2013, the Supreme Court issued its decision in *Windsor*, which as noted, struck down section 3 of DOMA prohibiting the Federal government from treating same-sex marriages contracted under state law as valid marriages for purposes of Federal law. Appx2. Ms. Sammons and Ms. Rolfingsmeyer traveled to Maryland and were married in the Circuit Court for Baltimore County, Maryland on November 25, 2013. Appx126. Ms. Sammons died on February 4, 2014. Appx3.

On February 28, 2014, Ms. Rolfingsmeyer filed with OPM a Standard Form SF 3104, Application for Death Benefit, and applied for a spouse's survivor annuity (5 U.S.C. § 8442(b)(1)(B)), and a BEDB (5 U.S.C. § 8442(b)(1)(A)). Appx3, App84-87.

Despite the fact that Ms. Rolfingsmeyer's November 25, 2013 Maryland marriage was not at that time valid in Pennsylvania, Ms. Sammons's domicile, Br.2, 3, 4, 5, 6 n.1, 8, 10, 20-21, after the *Windsor* decision issued on June 26, 2013, OPM applied the decision retroactively and prospectively, and acknowledged that same-sex marriages contracted in States authorizing such marriages are valid marriages for purposes of determining an applicant's entitlement to death benefits, regardless of the residence of the deceased employee or the applicant. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). On May 20, 2014, the United States District Court for the Middle District of Pennsylvania declared unconstitutional those provisions of Pennsylvania law excluding same-sex couples from marriage or refusing to recognize same-sex marriages. Appx125 (citing *Whitewood v. Wolf*, 992 F. Supp.2d 410 (M.D. Pa. 2014)). On February 11, 2015, OPM concluded that Ms. Rolfingsmeyer was Ms. Sammons's "current spouse" because of Ms. Rolfingsmeyer's November 25, 2013 Maryland marriage to Ms. Sammons, 5

C.F.R. § 843.102, but denied her application only because "she and Ms. Sammons were not married for at least 9 months before Ms. Sammons's death." Appx3, Appx81-87.

Ms. Rolfingsmeyer requested reconsideration. On February 22, 2016, OPM issued a final decision denying her application for the same reason. Appx3, Appx44-45, Appx78-79. During the interim between OPM's initial and final decisions, the Supreme Court issued *Obergefell v. Hodges*, holding that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, there is no "sufficient justification" for state laws excluding same-sex couples from marriage, that "same-sex couples may exercise the fundamental right to marry in all States," and 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." 135 S.Ct. at 2602, 2607-08.

D. Administrative Judge Decision

On April 25, 2017, the administrative judge affirmed OPM's denial of Ms. Rolfingsmeyer's application for death benefits. As OPM detailed in its final decision, under 5 U.S.C. § 8442(b)(1), *see* 5 C.F.R. §§ 843.309, 843.310, if an employee dies after completing 10 years of creditable civilian service under FERS, and is survived by a "widow," the widow is entitled to a current spouse survivor

annuity and a BEDB. Appx4; Appx75-90. Ms. Sammons had completed 10 years of creditable civilian service. Appx4. OPM concluded that Ms. Rolfingsmeyer was Ms. Sammons's "current spouse," 5 C.F.R. § 843.102, because they had lawfully married in Maryland on November 25, 2013. Appx3, Appx77-79, Appx81-87. The issue was whether Ms. Rolfingsmeyer met the definition of a "widow" under 5 U.S.C. § 8441(1)(A). Appx4. That section provides: "'widow' means the surviving wife of an employee . . . who was married to [her] for at least 9 months immediately before [her] death." OPM found that Ms. Rolfingsmeyer had not met the 9-month duration-of-marriage requirement upon Ms. Sammons's death on February 4, 2014. Appx4, Appx77.

In response, Ms. Rolfingsmeyer contended that she met the 9-month duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A) because she and Ms. Sammons had a common-law marriage dating back to their private ceremony in Illinois in 2003. Appx4, Appx127-130. In asserting that she had a common-law "marriage," 5 C.F.R. § 843.102, Ms. Rolfingsmeyer contended that: (1) Pennsylvania law applied, Appx127, (2) from 1996 until May 20, 2014, Pennsylvania did not authorize same-sex marriage and refused to recognize same-sex marriages contracted in other jurisdictions, Appx125 (citing *Whitewood v. Wolf*, 992 F. Supp.2d 410 (M.D. Pa. 2014)), and (3) "in light of Pennsylvania's

recent recognition of same sex marriages," her common-law marriage "should now be retroactively recognized" back to 2003. Appx5, Appx8-9, Appx125, Appx129. Ms. Rolfingsmeyer did not assert that unconstitutional Illinois or Pennsylvania laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages entered into in other jurisdictions were incorporated in the definition of marriage, 5 C.F.R. § 843.102. *Id.* Rather, Ms. Rolfingsmeyer recognized that such state laws were declared unconstitutional, Appx125, and implicitly asserted that such provisions were not applicable or enforceable by OPM in evaluating her application. Appx125, Appx129.

The administrative judge emphasized that, in *Obergefell*, the Supreme Court declared unconstitutional state laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages contracted in other jurisdictions. Appx5. The administrative judge agreed that such unconstitutional provisions of state law were unenforceable, and evaluated Ms. Rolfingsmeyer's "claimed common law marriage without regard to its same-sex character." Appx5; *see also* Appx9.

The administrative judge found that, under Pennsylvania law, before its abolition of common-law marriage in 2005, a common-law marriage was created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of marriage be established from that moment forward.

Appx5. Ms. Rolfingsmeyer and Ms. Sammons had had the requisite exchange of words during their private ceremony in Illinois in 2003. Appx6.

However, the administrative judge emphasized that, at the time of their private ceremony, common-law marriage had been abolished in Illinois since 1905. Appx2, Appx6. The administrative judge concluded that the couple's private ceremony was not a valid marriage in Illinois, the State where it was performed, "without regard to its same-sex character." Appx5, Appx6 (citing *In re Estate of Hall*, 707 N.E. 2d 201, 204-05 (Ill. App. Ct. 1998)). Because their private ceremony was not a valid marriage in Illinois, the administrative judge concluded that it was not a marriage that Pennsylvania would recognize, "without regard to its same-sex character." Appx5, Appx6, Appx9.

The administrative judge further reasoned that because Ms. Rolfingsmeyer and Ms. Sammons moved to Pennsylvania after it had abolished common-law marriage in 2005, they never lived together in a State that recognized common-law marriage. Appx8. The administrative judge concluded: "putting the same-sex character of her relationship aside," Appx9, Ms. Rolfingsmeyer failed to demonstrate her "claimed common law marriage" and "did not have a valid marriage in Pennsylvania prior to November 25, 2013." Appx5, Appx8-9.

Ms. Rolfingsmeyer also contended that "the 9-month marriage requirement of 5 U.S.C. § 8441(1)(A) and 5 C.F.R. § 843.303(a)(1) was unconstitutional as applied to her." Appx9. She asserted that, until the Supreme Court issued its *Windsor* decision on June 26, 2013, DOMA would have barred her receipt of a spouse's annuity based on Ms. Sammons's death in service. Appx9-10. She asserted that even if they had married the day that *Windsor* issued, she still would not have met the 9-month duration-of-marriage requirement in view of Ms. Sammons's death eight months later. Appx10. Ms. Rolfingsmeyer asserted that OPM's reliance on the 9-month duration-of-marriage requirement violated her right to equal protection of the law "by making it physically impossible for [her] to qualify for the retirement survivor annuity," while allowing similarly-situated opposite-sex, spouses to enjoy the same benefit. Appx10 (quoting Appx131).

The administrative judge concluded that *Becker v. Office of Personnel Management*, 853 F.3d 1311 (Fed. Cir. 2017), compelled the conclusion that OPM's reliance on the 9-month duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A) as its reason for denying Ms. Rolfingsmeyer's application did not deny her equal protection of the law under the Due Process Clause of the Fifth Amendment. Appx11. The administrative judge reasoned that the fact that Ms. Rolfingsmeyer's marriage was to a person of the same sex and that

Ms. Becker's was a heterosexual marriage was not sufficient reason to distinguish the two cases: "the same basic 'right to marry' is implicated in both." Appx12 (citing *Obergefell*, 135 S.Ct. at 2602 (The right of same-sex couples to marry is part and parcel of the right to marry in general.)). The administrative judge recognized that, in *Becker*, this Court ruled that equal protection principles do not entitle claimants to individualized determinations of their eligibility for benefits when Congress has seen fit to impose a general prophylactic bar to guard against potential abuse. Appx12. The administrative judge also found that it had not been impossible for Ms. Rolfingsmeyer to qualify for a current spouse survivor annuity and a BEDB because she and Ms. Sammons could have been married in any of the several jurisdictions that had legalized same-sex marriage, beginning with Massachusetts in May 2004. Appx10.

The administrative judge found that before the Supreme Court's *Windsor* decision on June 26, 2013, Ms. Rolfingsmeyer was "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" with confidence "that their marriage would be recognized for all legal purposes throughout the United States." Appx10-11. The administrative judge acknowledged that "Congress may not invidiously discriminate among . . .

claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,'" but concluded that "the discriminatory effect of the [9-month duration-of-marriage requirement] . . . is not 'invidious' in this sense, but is merely incidental to the legitimate purpose for which it was enacted and to which it is rationally related." Appx12 n.9 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (quoting *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

SUMMARY OF ARGUMENT

A claimant's entitlement to benefits is determined by applying the law that is in effect when the benefit "becomes due." *Horner v. Benedetto*, 847 F.2d 814 (Fed. Cir. 1988). Under FERS, a surviving spouse is entitled to an annuity if the duration of his or her marriage with the deceased Federal employee was at least nine months. 5 U.S.C. § 8441(1)(A). With her application for benefits, Ms. Rolfingsmeyer provided a copy of her Maryland marriage license and asserted that she married Tina Sammons on November 25, 2013. Appx84-89. She established that she was Ms. Sammons's "current spouse" at death. 5 C.F.R. § 843.102 (defining "current spouse" and "marriage"). OPM acknowledged Ms. Rolfingsmeyer's same-sex marriage in Maryland as a valid marriage, notwithstanding Ms. Sammons's domicile in Pennsylvania, and the fact that

Pennsylvania law prior to Ms. Sammons's death did not recognize same-sex marriages contracted in other jurisdictions. Appx3, Appx77-79, Appx81-87. OPM denied her application solely because she and Ms. Sammons were not married for at least nine months immediately before Ms. Sammons's death on February 4, 2014. Appx3, Appx77-79, Appx81-87. Had Ms. Rolfingsmeyer and Ms. Sammons married in Maryland or any other jurisdiction authorizing same-sex marriage just seven months earlier, the couple then would have been married for nine months prior to Ms. Sammons's death, and OPM would have granted Ms. Rolfingsmeyer's application for death benefits. *Id.*

Ms. Rolfingsmeyer challenges OPM's denial of her application based on the fact that, at the time of Ms. Sammons's death, Pennsylvania did not recognize same-sex marriages licensed in other jurisdictions, Br.2, 3, 4, 5, 6 n.1, 8, 10, 20-21, and the fact that the *Windsor* decision did not address section 2 of DOMA. Br.6 n.1. Both facts were legally irrelevant in OPM's evaluation of her application. The couple's marriage was authorized by Maryland law, and OPM recognized same-sex marriages, 5 C.F.R. § 843.102, regardless of the residency of Ms. Rolfingsmeyer or Ms. Sammons. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014); Appx3, Appx77-79, Appx81-83. Contrary to Ms. Rolfingsmeyer's arguments, Br.5, 31, the unconstitutional laws of

Ms. Sammons's domicile, Pennsylvania, were irrelevant in OPM's evaluation of whether she was Ms. Sammons's "current spouse," 5 C.F.R. 843.102, and the duration of their marriage. *Id*.

On appeal, Ms. Rolfingsmeyer claims not to be challenging the constitutionality or applicability of the statutory 9-month duration-of-marriage requirement, Br.20, but instead the duration-of-marriage requirement in combination with the definition of "marriage," 5 C.F.R. § 843.102. Br.20-21, 33. Ms. Rolfingsmeyer makes two principal arguments. She contends first that OPM's denial of death benefits violated her right to equal protection of law under the Fifth Amendment because OPM, in its definition of "marriage," 5 C.F.R. § 843.102, allegedly incorporated, relied, and based its denial of her application on Pennsylvania laws excluding same-sex couples from marriage, or refusing to recognize same-sex marriages. Br.12-22. Her second argument is that OPM's denial is subject to heightened scrutiny on equal protection grounds, and fails such heightened scrutiny as well as rational-basis review. Br.23-33.

Both of Ms. Rolfingsmeyer's arguments, and the arguments of amicus curiae, depend on the false contention that OPM denied Ms. Rolfingsmeyer's application because, as applied in her case, OPM's definition of "marriage," 5 C.F.R. § 843.102, incorporated and relied upon Pennsylvania and Illinois laws

excluding same-sex couples from marriage, or refusing to recognize same-sex marriages entered into in other jurisdictions. *See, e.g.*, SAGE Br.15 ("By conditioning survivor benefits on unconstitutional state laws, OPM's regulation discriminates against same-sex widows and widowers. . . ."); Obergefell Br.1 (Ms. Rolfingsmeyer was "denied federal employee survivor's benefits because of the federal government's reliance on unconstitutional marriage laws.").

Neither OPM nor the administrative judge read Pennsylvania or Illinois laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages entered into in other jurisdictions into the definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, or enforced them in denying Ms. Rolfingsmeyer's application. Appx5, Appx9. Indeed, the administrative judge, relying on *Obergefell*, 135 S.Ct. 2584, determined that Ms. Rolfingsmeyer's Maryland marriage *was* valid on November 25, 2013, notwithstanding that Pennsylvania did not then recognize same-sex marriages entered into in other jurisdictions. Appx5, Appx9. And OPM regulations, as they have since OPM implemented the *Windsor* decision in 2013, acknowledge that same-sex marriages contracted in States authorizing such marriages are valid marriages for purposes of determining an applicant's entitlement to death benefits, regardless of the residence of the deceased employee or the applicant. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79

Fed. Reg. 57589 (Sept. 24, 2014).

Ms. Rolfingsmeyer also cannot demonstrate that heightened scrutiny applies to OPM's denial of her application. Br.22-23. According to Ms. Rolfingsmeyer, the definition of "marriage," 5 C.F.R. § 843.102, combined with the 9-month duration-of-marriage requirement, is entitled to heightened scrutiny because it targets same-sex spouses for disparate treatment and denial of benefits. But Congress did not adopt a duration-of-marriage requirement to discriminate on the basis of sexual orientation, but rather to govern the payment of monetary benefits, and this eligibility requirement applies to surviving spouses of same-sex marriages exactly as it does to surviving spouses of heterosexual marriages. All applicants—regardless of gender or sexual orientation, and regardless of the reason why the marriage did not last for nine months—are generally denied benefits when their marriage was shorter than nine months. OPM's denial of death benefits, and the administrative judge's affirmance of that denial, relied on neutral laws, 5 U.S.C. § 8441(1)(A), that do not target a suspect class or burden a fundamental right, and thus are subject to and satisfy rational-basis review. *Becker v. OPM*, 853 F.3d 1311 (Fed. Cir. 2017) (relying on *Weinberger v. Salfi*, 433 U.S. 749 (1975)). There also was no evidence that OPM "invidiously discriminate[d]" against claimants of same-sex marriages. *Salfi*, 422 U.S. at 772.

ARGUMENT

I. Standard Of Review

The Court must affirm the board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Interpretation of statutes and regulations are questions of law that the Court reviews *de novo*. *Springer v. Adkins*, 525 F.3d 1363, 1366 (Fed. Cir. 2008). The constitutionality of an act of Congress or regulation is a question of law that likewise is reviewed *de novo*. *Stauffer v. Brooks Bros. Group, Inc*., 758 F.3d 1314, 1318 (Fed. Cir. 2014).

II. OPM Denied Ms. Rolfingsmeyer's Application Because She Did Not Meet The Statutory Nine-Month Duration-Of-Marriage Requirement; It Did Not Incorporate Unconstitutional State Law.

A. For purposes of establishing entitlement to a current spouse annuity and a BEDB under 5 U.S.C. §§ 8442(b)(1)(A)-(B), it is not enough that the applicant was married to the employee at his or her death. A "current spouse" must establish that he or she was married to the employee "for at least 9 months immediately before" the employee's death. 5 U.S.C. § 8441(1)(A).

OPM denied Ms. Rolfingsmeyer's application only because she did not meet the 9-month duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A). Appx3, Appx77-79, Appx81-87. OPM has no authority to nullify statutory requirements duly enacted by Congress. *Montilla v. United States*, 457 F.2d 978, 987 (Ct.Cl. 1972) ("Unless a law has been repealed or declared unconstitutional, it is part of the supreme law of the land and no officer or agency can by his actions or conduct waive its provisions or nullify its enforcement"). This is true even in cases when unfortunate circumstances may occur as a result of applying this statutory bright-line rule (as they did in this case). *See Gibson v. OPM*, __ Fed. Appx. __, 2020 WL 5406416 (Fed. Cir. 2020) (holding "month" means "calendar month" and affirming denial of survivor-annuity benefits when Gibson's marriage to decedent was six days short of 9-month "anniversary"); *see also* 5 U.S.C. § 8341(a)(1) (the Civil Service Retirement and Disability Fund "is appropriated for the payment of . . . benefits *as provided by* this subchapter . . ." (emphasis added)). OPM may not pay benefits to surviving spouses unless the payments are authorized by Federal law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) ("Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute"); *Koyen v. OPM*, 973 F.2d 919, 922 (Fed. Cir. 1992) ("[D]espite the equities alleged

in this case, we are bound by the dictates of *Richmond*."); *Falso v. OPM*, 116 F.3d 459, 460 (Fed. Cir. 1997); *Iacono v. OPM*, 974 F.2d 1326, 1328 (Fed. Cir. 1992). Federal courts also must "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428.[9]

B. Ms. Rolfingsmeyer asserts that OPM's denial of her application for a current spouse annuity and a BEDB must be reversed because OPM based its denial on incorporation of and reliance on--in the definition of "marriage," 5 C.F.R. § 843.102--unconstitutional provisions of Pennsylvania law excluding same-sex couples from marriage, or refusing to recognize same-sex marriages entered into in other jurisdictions. Br.10-11, 12-23. According to Ms. Rolfingsmeyer, OPM's reliance on these provisions discriminated against her sexual orientation and same-sex marriage and violated her right to equal protection of law under the Due Process Clause of the Fifth Amendment. *Id.* Thus, she claims to challenge the allegedly "unconstitutionally discriminatory definition of

[9] If the board's decision is affirmed, Ms. Rolfingsmeyer may be eligible for a one-time lump-sum payment of the retirement contributions made to Ms. Sammons's retirement fund. 5 U.S.C. § 8424(d). The 9-month duration-of-marriage requirement is not applicable to that benefit.

marriage [5 C.F.R. § 843.102] by which the duration requirement is measured." Br.20.

Ms. Rolfingsmeyer ignores OPM's application and enforcement of *Windsor* and *Obergefell*, including with respect to Federal statutes and the regulatory definitions of "marriage" and "current spouse," 5 C.F.R. § 843.102. Her arguments lack merit because as a factual matter OPM in its definitions of "marriage" and "current spouse," 5 CFR 843.102, did not incorporate or rely upon unconstitutional provisions of state law. Further, consistent with OPM's retroactive application and enforcement of *Windsor* and *Obergefell*, OPM would have granted Ms. Rolfingsmeyer's application for death benefits if Ms. Rolfingsmeyer and Ms. Sammons had married just seven months earlier in Maryland, or in any other jurisdiction authorizing same-sex marriages.

1. Historically, OPM, and its predecessor, the U.S. Civil Service Commission (CSC), looked to state laws defining marriage "only to identify which surviving spouse was married to a decedent at the time of his death," not to determine entitlement to Federal benefits. *Money v. OPM*, 811 F.2d 1474, 1477 (Fed. Cir. 1987). In *Money*, 811 F.2d at 1477, this Court acknowledged that, in *Yarbrough v. United States*, the Court of Claims explained:

> Congress undoubtedly left the determination of whether an employee was married or not up to the laws of the

> individual states. Under traditional doctrine, a marriage is valid everywhere if the requirements of the marriage law are complied with in the state where the contract of marriage takes place. *See* Restatement, Conflict of Laws, § 121.

341 F.2d 621, 623 (Ct. Cl. 1965); *see also* Restatement (Second) of Conflict of Laws, § 283 (1971).

This practice of looking to state law to identify the decedent's "current spouse" accorded with the understanding that when Congress legislates in the area of family relationships it is presumed to look to state law to determine those relationships, in the absence of countervailing language. *Windsor*, 570 U.S. at 761 ("the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations") (citing *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("To decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act, "requires reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations.")); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (the regulation of domestic relations is "an area

that has long been regarded as a virtually exclusive province of the States"); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."); *Burden v. Shinseki*, 727 F.3d 1161, 1168 (Fed. Cir. 2013) (Congress required that the VA "look to state law to determine the validity of a marriage").

In 1985, OPM first codified in a regulation the definition of "marriage" used to decide between competing claimants and to identify "the current spouse." 50 Fed. Reg. 20,064 (1985); *see* 5 C.F.R. § 831.603 (defining "marriage" and "current spouse"). It repeatedly had been the case that competing claimants requested surviving spouse benefits because of the death of a Federal employee, separated employee, or retiree. *See, e.g.*, *Yarbrough v. United States*, 341 F.2d 621, 623-24 (Ct. Cl. 1965); *Weinger v. Macy*, 247 F. Supp. 240 (E.D.N.Y. 1965); *Nivert v. OPM*, 10 M.S.P.R. 65 (1982); *Jacobs v. OPM*, 13 M.S.P.R. 23 (1982), *aff'd mem.*, 707 F.2d 513 (5th Cir. 1983); *Money v. OPM*, 811 F.2d 1474 (Fed. Cir. 1987); *Shirar v. OPM*, 55 M.S.P.R. 402 (1992); *Huff v. OPM*, 40 F.3d 35 (3d Cir. 1994); *Rogers v. OPM*, 87 F.3d 471 (Fed. Cir. 1996).

2. Although OPM looks to state law to identify a "current spouse," *i.e.*, "a living person who is married to the employee, separated employee, or retiree at the

time of the employee's, separated employee's, or retiree's death," 5 C.F.R. § 843.102, OPM does not apply or enforce unconstitutional provisions of state law in making that determination. After the Supreme Court's decision in *Windsor*, OPM implemented that decision within this statutory and regulatory scheme by refusing to apply and to enforce provisions of state law declining to authorize same-sex couples to marry or refusing to recognize same-sex marriages entered into in other jurisdictions. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). Contrary to Ms. Rolfingsmeyer's suggestion, OPM did not "elect[] to define marriage by incorporating Pennsylvania's state-law definition of marriage that unconstitutionally prevented all same-sex couples from becoming eligible for benefits." Br.21; *see also* Br.18.

Rather, in evaluating Ms. Rolfingsmeyer's application for benefits, OPM applied the law in effect when the benefit "becomes due," including the Supreme Court's decisions in *Windsor* and *Obergefell*. *Horner v. Benedetto*, 847 F.2d 814 (Fed. Cir. 1988). The applicable Federal law and OPM regulations decidedly did not incorporate or rely upon provisions of state law declared unconstitutional by the Supreme Court.[10] 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589

[10] Indeed, since the Supreme Court announced the principles in *Windsor* and *Obergefell*, state laws inconsistent with those decisions became void, and therefore OPM could not rely upon them. *Marbury v. Madison*, 1 Cranch 137, 177, 180, 2

(Sept. 24, 2014). Before the couple married on November 25, 2013, numerous jurisdictions, but not Pennsylvania, had authorized and licensed same-sex marriages within their own boundaries and recognized the validity of same-sex marriages contracted in other jurisdictions. As a consequence of the *Windsor* decision, all same-sex marriages contracted in jurisdictions that enabled same-sex marriage were valid for OPM purposes, including entitlement to Federal spousal survivor benefits, regardless of the residence of the deceased employee or the applicant. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). When the Supreme Court struck down section 3 of DOMA, the Court voided the law back to the date of its enactment in 1996, and acknowledged Ms. Windsor's same-sex marriage as a valid marriage. *Windsor*, 570 U.S. at 572.

OPM acknowledged that Ms. Rolfingsmeyer was Ms. Sammons's "current spouse," because of her Maryland marriage to Ms. Sammons, 5 C.F.R. § 843.102. As of January 1, 2013, Maryland authorized same-sex marriage. Appx2 (Civil Marriage Protection Act, 2012 Md. Laws Ch. 2); *see also Port v. Cowan*, 426 Md. 435, 44 A.3d 970, 976 (Md. 2012) (Maryland law recognized a person's out-of-state same-sex marriage). OPM denied her application only because she did not meet the separate and independent 9-month duration-of-marriage requirement in 5

L.Ed. 60 (1803).

U.S.C. § 8441(1)(A). Appx3, Appx77-79, Appx81-87.

3. Ms. Rolfingsmeyer emphasizes that, at the time of her November 2013 Maryland marriage, Pennsylvania still refused to recognize same-sex marriages entered into in other jurisdictions. Br.2, 3, 4, 5, 6, 8, 10, 20-21. But, as explained, that fact played no role in OPM's evaluation of Ms. Rolfingsmeyer's application and her eligibility for benefits. Appx3, Appx77-79, Appx81-87. OPM acknowledged that, as of November 25, 2013, Ms. Rolfingsmeyer and Ms. Sammons were married for purposes of Federal law and regulations, including 5 U.S.C. § 8441(1)(A) and 5 C.F.R. §§ 843.102, 843.303(a), no matter where the couple resided. *Id*.; 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014).

4. Although Ms. Rolfingsmeyer contends on appeal that the regulatory definition of marriage incorporates provisions of Pennsylvania law excluding same-sex couples from marriage or refusing to recognize same-sex marriages contracted in other jurisdictions, at the board, she pursued a different argument. Specifically, she asserted that her "claimed common law marriage" to Ms. Sammons "met all the requirements under Pennsylvania Law to be considered a Common Law Marriage," that their common-law marriage should be retroactively recognized back to 2003 in light of "Pennsylvania's recent

recognition of same sex marriages," and that "the parties were clearly married under Common Law, within the nine month restriction." Appx4, Appx113, Appx125, Appx127, Appx129-30, Appx131.

As the administrative judge correctly held, determination of whether an applicant had a common-law marriage and the duration of such marriage do not depend on provisions of state law declared unconstitutional by the Supreme Court. Appx5, Appx9. In *Obergefell*, as the administrative judge recognized, the Supreme Court declared unconstitutional all state laws excluding same-sex couples from marriage on the same terms and conditions as opposite-sex couples, or refusing to recognize same-sex marriages entered into in other jurisdictions. Appx5. Because the Supreme Court struck down such provisions of state law as unconstitutional, the administrative judge refused to apply or to enforce them. Appx5, Appx9. Rather, the administrative judge evaluated the contention that Ms. Rolfingsmeyer "and Ms. Sammons had a valid common law marriage dating back to their 2003 private ceremony in Illinois," "without regard to its same-sex character." Appx5, Appx9. Instead of incorporating, and relying on, unconstitutional state laws, the administrative judge expressly refused to apply or to enforce them in determining the duration of their marriage. Appx5, Appx8-9.

In sum, OPM followed the *Windsor* and *Obergefell* decisions and applied

the law and regulations in effect when a benefit comes due. *Horner,* 847 F.2d at 814. OPM did not incorporate or rely upon in its definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, any state laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages entered into in other jurisdictions. Although the determination of whether a claimant had a common-law marriage is based on the law of the State where the decedent had a permanent home when he or she died, *Dickey v. OPM*, 419 F.3d 1336, 1340 (Fed. Cir. 2005), provisions of state law excluding same-sex couples from marriage or refusing to recognize same-sex marriages entered into in other jurisdictions are not the basis for such determinations. Neither are such provisions incorporated in the regulatory definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102. Appx5, Appx9.

OPM's refusal to apply or to enforce unconstitutional provisions of state law in its definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, and the administrative judge's evaluation of Ms. Rolfingsmeyer's "claimed common law marriage" and the duration of her marriage without regard to its same-sex character are indisputably correct. Appx5, Appx9.

III. Ms. Rolfingsmeyer's Second Argument That OPM's Denial Of Her Application Fails Heightened Scrutiny Also Lacks Merit

Notwithstanding that Ms. Rolfingsmeyer claims not to challenge the

constitutionality of the 9-month duration-of-marriage requirement, Br.21, she does challenge the combination of the statutory duration-of-marriage requirement and the regulatory definition of marriage, as applied in her case. Br.20-21, 30, 33. Specifically, she contends that state laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages entered into in other jurisdictions are subject to heightened scrutiny because they classify persons "based on sex and sexual orientation." Br.23. She further asserts that, in denying her application, OPM incorporated, and relied on, in the definition of "marriage," 5 C.F.R. § 843.102, unconstitutional Pennsylvania and Illinois laws excluding same-sex couples from marriage or refusing to recognize same-sex marriages. Br.23-30. She contends that OPM's denial of her application therefore fails both heightened scrutiny, Br.26-29, and rational-basis review under the equal protection component of the Due Process Clause of the Fifth Amendment. Br.30-34.

These arguments miss the mark. Ms. Rolfingsmeyer's second argument (Br.23-30) is not independent of her first (Br.12-23) and fails for essentially the same reasons. As explained, OPM did not incorporate any unconstitutional state law. *See supra* pp.24-34. Moreover, the duration-of-marriage requirement is subject to only rational basis review, as both this Court in *Becker* and the Supreme Court in *Salfi* have recognized, and it easily withstands such scrutiny. And even

assuming Ms. Rolfingsmeyer could demonstrate a disparate impact on same-sex marriage, she has failed to show the requisite discriminatory purpose.

A. As the Supreme Court and this Court have recognized, the duration-of-marriage requirement is subject to, and survives, rational basis review

1. "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has "attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class," the Court will "uphold the legislative classification so long as it bears a rational relation to some legitimate end," *id.*, and so long as it does not represent a "'bare congressional desire to harm a politically unpopular group.'" *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

In particular, the Supreme Court has recognized that in formulating definitions or establishing categories of beneficiaries, "Congress had to draw the line somewhere," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993), which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v.*

Diaz, 426 U.S. 67, 83 (1976). In these cases, Congress's decision where to draw the line, as a practical matter, is "virtually unreviewable." *Beach*, 508 U.S. at 316.

2. Initially, Congress adopted a two-year duration-of-marriage requirement for a surviving spouse's receipt of an annuity upon the death of a Federal employee who served in the Civil Service. Civil Service Retirement Act—Amendment, Pub.L. No. 80-426 §11, 62 Stat. 48, 54-55 (1948) (codified as amended at 5 U.S.C. § 8341(d)). Congress later reduced the duration-of-marriage requirement for widows and widowers from two-years to one year. Pub.L. No. 93-60, 88 Stat. 76 (1974). The legislative history demonstrates Congress' intent to have a duration-of-marriage requirement for survivor annuity eligibility as an effort to protect the Civil Service Retirement System (CSRS) against deathbed marriages. *See* S.Rep. No. 746, *reprinted in*, 1948 U.S.C.C.A.N. 1107; Conf.Rep. No. 1370, *reprinted in*, 1948 U.S.C.C.A.N. 1116; H.R.Rep. No. 93-882, at 2-4, *reprinted in*, 1974 U.S.C.C.A.N. 2868, 2869.

Congress subsequently adopted the Civil Service Retirement Spouse Equity Act of 1984, Pub.L. No. 98-615, § 2(4), 98 Stat. 3195, 3199, and made significant changes to increase survivor protection. Prior to this Act, a former spouse was not eligible for survivor benefits upon the death of the former employee. The Act extended survivor benefits to former spouses at the election of the Federal

employee, subject to the duration-of-marriage requirement. That marriage requirement was reduced from one year to nine months for both the current spouse and former spouse(s); thus, receipt of a survivor annuity by either a former spouse or a current spouse was conditioned on their marriage with the decedent having lasted "at least nine months." 5 U.S.C. §§ 8331(23) (defining "former spouse"), 8341(a)(1).[11] *See also* 5 U.S.C. § 8401(12) (defining "former spouse" for FERS purposes). Testimony at the hearing had recognized the poverty of older women, especially former spouses. H.R.Rep. No 98-1054 at 12, *reprinted in*, 1984 U.S.C.C.A.N. 5540, 5542; *see also Newman v. Love*, 962 F.2d 1008, 1009 (Fed. Cir. 1992).

In sum, Congress' intent in adopting the 9-month duration-of-marriage requirement was to discourage couples from entering into sham marriages for the purpose of establishing entitlement to retirement benefits. *See* H.R.Rep. No. 98-1054 at 22-24, *reprinted in*, 1984 U.S.C.C.A.N. 5540, 5552-55. Congress simultaneously adopted a 9-month duration-of-marriage requirement to enable Federal retirees to elect a survivor annuity for a former spouse who had contributed

[11] Under the CSRS, when an employee dies in service, a "widow" or "widower" is entitled to a survivor annuity if they can show that their spouse died while employed in a position covered by the CSRS after completing "at least 18 months of civilian service," and they were married to their spouse "for at least nine months immediately before [his or her] death." 5 U.S.C. §§ 8341(a)(1)-(2), 8341(d).

and assumed the responsibility of marriage for at least nine months. H.R.Rep. No. 98-1054 at 12, *reprinted in*, 1984 U.S.C.C.A.N. 5540, 5542.

3. As the Supreme Court and this Court have recognized, the duration-of-marriage requirement at issue in this case is subject to—and survives—rational basis review. The duration-of-marriage requirement is a facially neutral requirement that applies without regard to the sexual orientation or gender of the claimant, and is subject to only rational-basis review.

In *Salfi*, 422 U.S. at 770, the Supreme Court upheld from constitutional attack a 9-month condition on payment of SSA benefits. As the Court explained in that case, "a statutory classification in the area of social welfare" is consistent with the equal protection principles and due process clauses of the Fifth Amendment so long as it "is 'rationally based and free from invidious discrimination.'" *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). The duration-of-marriage requirement is facially neutral, does not burden a fundamental right, and was enacted for the legitimate and important purpose of guarding against "[t]he danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner." *Id.* at 777.

In *Salfi*, just as in this case, the claimant was a surviving spouse whose

application was denied "solely on the basis of [a] duration-of-marriage requirement." 422 U.S. at 777. The claimant in *Salfi* asserted that there should be no doubt that her marriage was authentic, because she could not possibly have anticipated her husband's untimely death from a heart attack less than one month after their marriage. *Id.* at 754. And she claimed that the duration-of-marriage requirement was unconstitutional because it created an irrefutable presumption that her marriage was a sham, and that she should be entitled to a hearing in order to provide evidence that her marriage was not entered into for the sole purpose of obtaining benefits. *Id.* at 755.

In upholding the duration-of-marriage requirement, the Court recognized that the application of the bright-line duration-of-marriage rule "undoubtedly excludes some surviving [spouses] who married with no anticipation of shortly becoming widows," and that it likewise does not necessarily "filter out every [fraudulent] claimant, if a wage earner lingers longer than anticipated." *Salfi*, 422 U.S. at 774, 777-81. But the constitution "permit[s] this latitude to legislative decisions . . . prescribing the conditions upon which funds shall be dispensed from the public treasury." *Id.* at 774. That is because the question under rational basis scrutiny "is not whether [the] statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional

concern reflected in the statute." *Id.* at 777. Instead, the question is whether Congress "could rationally have concluded that a particular limitation or qualification would protect against" the concern "and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.*

In short, the Court held, "Congress could rationally choose to adopt" the duration-of-marriage requirement as a prophylactic approach because it "obviate[s] the necessity for large numbers of individualized determinations" regarding the purpose and legitimacy of a marriage, and it also "protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriage." 442 U.S. at 777. Indeed, the Court explained, the very thing the claimant in *Salfi* sought—an individual hearing to prove that her relationship was not a sham—was contrary to one of the very legitimate government interests motivating the rule: a "substantive policy determination that benefits should be awarded only on the basis of genuine martial relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations." *Id.* at 784.

In *Becker*, 853 F.3d at 1313-14, this Court relied on *Salfi*, and held that, notwithstanding the fundamental rights to marry and procreate, the 9-month

duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A) was entitled to only rational-basis review because it concerned "the receipt of public funds under a noncontractual basis." This Court observed that the purpose of the 9-month duration-of-marriage requirement was to condition receipt of public funds on "the assumption of responsibilities normally associated with marriage," and to prevent abuse of the survivor annuity benefit by excluding sham marriages that were contracted shortly before the employee's death for the purpose of receiving benefits. *Becker*, 853 F.3d at 1314 (quoting *Salfi*, 442 U.S. at 781).

Just as in *Salfi* and *Becker*, the duration-of-marriage requirement is constitutional in this case. The requirement is facially neutral: in every case, a claimant does not qualify for survivor's benefits unless he or she was married to the deceased Federal employee for at least nine months or meets one of the alternative statutory criteria, such as having been the father or "mother of issue of that marriage." 5 U.S.C. § 8441(1)(B).[12] And, as relevant in this case, the

[12] OPM regulations, 5 C.F.R. § 843.303(c), clarify the "issue of such marriage" requirement:

> For satisfying the child-born-of-the-marriage requirement of paragraph (a)(2) of this section, any child, including a posthumous child, born to the spouse and the retiree, employee, or separated employee is included. This includes a child born out of wedlock if the parents later married or of a prior marriage between the same parties.

requirement applies identically to the surviving spouses of same-sex and opposite-sex marriages. *See also Hirschfield v. OPM*, 725 Fed. Appx. 934 (Fed. Cir. 2018) (when, after retirement, a Federal annuitant married a same-sex spouse, the statute, 5 U.S.C. § 8418, requiring a deposit when a federal employee enters into a post-retirement marriage and elects a survivor annuity, did not impose unequal burdens on same-sex couples and did not violate annuitant's right to equal protection of law).

The duration-of-marriage requirement also does not "burden[] a fundamental right." *Romer*, 517 U.S. at 631. Indeed, although the Supreme Court has held in certain contexts that marriage is a fundamental right, *e.g. Turner v. Safley*, 482 U.S. 78 (1987), the requirement that a person has been married for nine months in order to receive survivor's benefits places no burden on anyone's right to marry the person of his or her choosing. Instead, it places objective, facially neutral criteria on the disbursement of Federal benefits. Accordingly, in *Becke*r, this Court held that the Supreme Court's decision in *Obergefell* (which declared state laws banning same-sex marriage unconstitutional) did nothing to alter the application of the duration-of-marriage requirement. 853 F.3d at 1313-14 ("Nothing in *Obergefell* changes the required approach to evaluating the kind of line-drawing for public funds that is presented here").

5. Although *Salfi* and *Becker* did not address the specific as-applied challenge at issue in this case, the concerns identified in *Salfi* and *Becker* apply with equal force to the surviving spouses of same-sex marriages. In this case, as in *Salfi* and *Becker*, Ms. Rolfingsmeyer has compelling proof that her marriage was not a sham, and that the timing of her marriage proximately to her late wife's death was not proof that she sought to marry solely for the purpose of benefits. But that cannot alter whether the statutory requirement applies, or whether it survives rational-basis review. Survivors of *any* short marriage are automatically denied benefits under the duration-of-marriage requirement, regardless of sexual orientation, gender, or whether their marriage was genuine. And that is so because Congress made both a "substantive policy determination that benefits should be awarded only on the basis of genuine martial relationships," *Salfi*, 442 U.S. at 777, and "a substantive policy determination that limited resources would not be well spent in making individual determinations," *id.* at 778, and therefore imposed a bright-line temporal test for eligibility.

Ms. Rolfingsmeyer attempts to distinguish *Becker* by asserting that, in her case, the definition of "marriage," 5 C.F.R. § 843.102, combined with the duration-of-marriage requirement in 5 U.S.C. § 8441(1)(A), "categorically bar same sex couples who were unable to marry due to unconstitutional state laws" from receipt

of Federal benefits. Br.30, 21. According to Ms. Rolfingsmeyer, this alleged "categorical[] bar" demonstrates that the definition of marriage, combined with the 9-month duration-of-marriage requirement, is subject to heightened scrutiny, and the Government must demonstrate that this categorical bar is "substantially related" to the Government's aims. Br.30 (quoting *United States v. Virginia*, 518 U.S. 515, 545 (1996) (applying heightened scrutiny to gender-based classification)).

This argument is erroneous. There was not an unconstitutional, categorical bar to Ms. Rolfingsmeyer's receipt of Federal benefits. Before Ms. Rolfingsmeyer and Ms. Sammons married in Maryland on November 25, 2013, numerous jurisdictions had authorized same-sex marriages within their own boundaries as well as recognizing the validity of same-sex marriages contracted in other jurisdictions. As a consequence of the *Windsor* decision, all same-sex marriages contracted in jurisdictions that authorized same-sex marriages were valid for purposes of Federal law and OPM regulations, including the definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, without regard to where the decedent or applicant resided. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). In addition, when the Supreme Court struck down section 3 of DOMA on June 26, 2013, it did so retroactively, voiding the law back to the date

of its enactment in 1996 and acknowledging Ms. Windsor's same-sex marriage as valid. *Windsor*, 570 U.S. at 572.

In asserting "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," Br.25, Ms. Rolfingsmeyer again ignores the fact that Maryland law authorized her same-sex marriage, and the fact that the definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, do not incorporate provisions of state law declared unconstitutional by the Supreme Court. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). The fact that as of November 25, 2013, Pennsylvania did not recognize their same-sex marriage is irrelevant. *Id*. OPM evaluated her application and determined that Ms. Rolfingsmeyer was Ms. Sammons's "current spouse." *Id*. Ms. Rolfingsmeyer's assertion also ignores the fact that she and Ms. Sammons could have married in a number of jurisdictions that authorized same-sex marriage, and did in fact get married in the neighboring state of Maryland, a marriage that OPM recognized despite the fact that the couple resided in Pennsylvania. 78 Fed. Reg. 47018 (Aug. 2, 2013); 79 Fed. Reg. 57589 (Sept. 24, 2014). Had the couple married in Maryland or elsewhere just seven months earlier, then Ms. Rolfingsmeyer would have qualified for full benefits.

Thus, application to Ms. Rolfingsmeyer of the 9-month statutory duration-

of-marriage requirement combined with the definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, did not categorically bar her receipt of benefits. Ms. Rolfingsmeyer was Ms. Sammons's "current spouse" because of their Maryland "marriage," 5 C.F.R. § 843.102, and the 9-month duration-of-marriage requirement applies equally to surviving spouses of all marriages—same-sex marriages and heterosexual marriages—and precludes surviving spouses of marriages shorter than nine-months from receipt of benefits. Appx3, Appx77-79, Appx81-87; *see Gibson v. OPM*, __ Fed. Appx. __, 2020 WL 5406416 (Fed. Cir. 2020). It is therefore simply inaccurate to say that OPM's denial of Ms. Rolfingsmeyer's application for benefits was based on unconstitutional provisions of Pennsylvania law or that the Federal law and OPM regulations, *i.e.*, 5 C.F.R. § 843.102, prevented her from meeting the eligibility requirements for benefits.

B. The fact that a facially neutral law like the duration-of-marriage requirement may have a disproportionate impact on same-sex couples is insufficient to establish a constitutional violation

As explained, the duration-of-marriage requirement applies identically to surviving spouses of same-sex marriages and opposite-sex marriages. Prior to *Obergefell*, various state laws distinguished between marriage between a man and a woman and marriage between two individuals of the same sex. That disparate historical treatment does not, however, render the duration-of-marriage

requirement unconstitutional. As the Supreme Court has repeatedly made clear "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S.Ct. 2305, 2324 (2018) (citation omitted); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (holding that the Constitution guarantees "equal laws, not equal results," even when the laws operate in a space of historic discrimination).

1. In order to establish that a facially neutral law is unconstitutional, a plaintiff must show not only that application of the law has a disparate impact on a suspect class, the challenger must also provide some showing of discriminatory *intent*. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1988) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal protection Clause."); *Feeney*, 442 U.S. at 273-76 ("The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped" the facially neutral law.); *see also Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013).

The Supreme Court's decision in *Feeney*, for example, is particularly instructive. In *Feeney*, the Supreme Court addressed a challenge to a

Massachusetts statute that gave military veterans a "well-nigh absolute advantage" over non-veterans in competing for civil service employment. 442 U.S. at 264. A three-judge district court held that the statute inherently discriminated on the basis of sex, even though the law was facially neutral, because the law unintentionally "favor[ed] a class from which women have traditionally been excluded." *Id.* at 260. The Supreme Court reversed, explaining that although the "enlistment policies of the armed services may well have discriminat[ed] on the basis of sex," the veterans' preference law itself did not. The "definition of 'veterans' in the statute has always been neutral as to gender," and Massachusetts had "consistently defined veteran status in a way that has been inclusive of women who have served in the military." *Id.* at 275.

Although the veterans-preference law might disproportionately provide a hiring preference to men as a result of the military's historic practices, there was no evidence that Massachusetts "enacted or subsequently reaffirmed" the law "for the purpose of giving an advantage to males." *Id.* at 277. To the contrary, "when the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not men over women." *Id.* at 280. Because there was no discriminatory purpose, the Supreme

Court held that the law was constitutional notwithstanding the disproportionate effect on women.

Likewise, in *Village of Arlington Heights*, the Supreme Court addressed a challenge to a decision by the zoning board of an overwhelmingly white Chicago suburb, which denied a request to rezone a parcel of land as "low-and moderate-income housing . . . that would probably be racially integrated." 429 U.S. at 255, 258. There too, the Supreme Court affirmed the now-settled principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65. Instead, to establish a claim of unconstitutional discrimination, plaintiffs must show that "discriminatory purpose was a motivating factor in the decision," such as when there is a "clear pattern, unexplainable on grounds other than race," for imposing the law in a manner that disproportionately affected a suspect class. *Id.* at 267. In that case, the Court concluded that the plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor' because "[t]he rezoning request proceeded according to the usual procedures,"; "[t]he statements by the . . . Board members," "focused almost exclusively on the zoning aspects" of the petition; and the "zoning factors on which they relied" had been applied "too consistently for

[the Court] to infer discriminatory purpose from its application in this case." *Id.* at 270.

2. Any showing of discriminatory purpose is wholly lacking in this case. Appx12 n.9. As discussed, OPM has fully implemented the Supreme Court's holdings in *Windsor* and *Obergefell*, and same-sex couples are eligible for benefits on the same terms and conditions as heterosexual couples. As relevant in this case, both must have been married for at least nine months in order to qualify for benefits, or have met either of the two statutory exceptions to the nine-month requirement, *see* 5 U.S.C. §§ 8441(1)(B) and 8442(e)(1). Further, there is simply no evidence that the facially neutral duration-of-marriage requirement at issue was enacted, or applied in this case, with the purpose of harming a suspect class. OPM applies the same requirement to all claimants, even when the application of the eligibility criteria leads to harsh results. *See, e.g.*, *Gibson v. OPM*, __ Fed. Appx. __, 2020 WL 5406416 (Fed. Cir. 2020).

Ms. Rolfingsmeyer's marriage was cut short by Ms. Sammons's death; regrettably, her marriage therefore did not meet the nine-month marriage requirement. For that reason, and that reason alone, OPM denied her application for survivor's benefits. The Government does not dispute that prior marriage laws of Illinois and Pennsylvania violated Ms. Rolfingsmeyer's constitutional rights and

imposed unequal hardships on their lives, *see Obergefell*, 135 S.Ct. at 2388. But under binding Supreme Court precedent, including *Feeney*, that historical discrimination does not render unconstitutional the application of facially neutral criteria governing the payment of benefits.

In the absence of a showing that OPM applied the facially neutral eligibility criteria at issue to Ms. Rolfingsmeyer with some showing of discriminatory *purpose*—a showing that is entirely absent, when the agency applied the same criteria to Ms. Rolfingsmeyer on the same basis as it does every other claimant—there is no basis to assume that the law covertly draws classifications based upon sexual orientation or is a pretext for discrimination, and thus, the law must be upheld. The "[p]ast discrimination" imposed by Illinois or Pennsylvania "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S.Ct. at 2324 (citation omitted); *Feeney*, 442 U.S. at 273 (holding that the Constitution guarantees "equal laws, not equal results," even when the laws operate in a space of historic discrimination).

3. Ms. Rolfingsmeyer (Br.16, 28 n.11, 32-33, n.13) and the amicus curiae similarly err in relying on non-precedential district court decisions applying the terms "widow" and "widower" in Social Security insurance benefits cases. *See Ely v. Saul, Acting Commissioner of SSA*, No. 4:18-cv-00557-BGM, 2020 WL

2744138 (D. Ariz. May 27, 2020), appeal docketed, No. 20-16427 (9th Cir. July 24, 2020); *Driggs v. Comm'n of Social Sec. Admin.*, 2020 WL 2791858 (D. Ariz. May 29, 2020), appeal docketed, No. 20-16426 (9th Cir. July 24, 2020); *Schmoll v. Saul, Commissioner of SSA*, No. 19-cv-04542-NC (N.D. Cal. July 15, 2020), appeal docketed, No. 20-16445 (9th Cir. July 26, 2020); *Thorton v. Commissioner*, No. 2:18-cv-01409-JLR-JRC (W.D. Wash. Feb. 21, 2020).

These cases involve 42 U.S.C. § 416(c)(1), the 9-month marriage duration requirement associated with establishing entitlement to "widow" or "widower" Social Security insurance benefits, and are—as of yet—unresolved and otherwise not controlling. Decisions related to the administration of Social Security "widow" and "widower" survivor annuity benefits, governed by provisions promulgated under the Social Security Act, and subject to precedents related to those provisions, do not govern payment of a FERS current spouse annuity and a BEDB.

IV. Petitioner's Discussion Of Potential Remedies Is Not Decisive

Contrary to Ms. Rolfingsmeyer's argument, Br.35, OPM was not the but-for cause of her failure to obtain Federal benefits. As the administrative judge found, it was not impossible for her and Ms. Sammons to have married earlier and had they done so she could have met the nine-month duration-of-marriage requirement before Ms. Sammons's death. Appx10. Ms. Rolfingsmeyer attempts to undercut

this factual finding by asserting that she and Ms. Sammons held themselves out to be married, and they "ratified that longstanding marriage in Maryland in the hope it would be recognized *if Pennsylvania's ban were lifted*." Br.38 (emphasis added). Again, Ms. Rolfingsmeyer misconstrues Federal law and OPM regulations, including the definition of marriage, 5 C.F.R. § 843.102. Once Ms. Rolfingsmeyer and Ms. Sammons married in Maryland on November 25, 2013, they were married for OPM purposes, including the definitions of "current spouse" and "marriage," 5 C.F.R. § 843.102, no matter where they resided.

Ms. Rolfingsmeyer proposes that this Court, or OPM on remand, undertake the project of ascertaining under what circumstances two persons in a same-sex relationship would be deemed to have entered into a common-law marriage—at least for purposes of entitlement to Federal benefits, notwithstanding the fact that they never resided together in a State that authorized common-law marriage. Br.40.

It would be counter to history, tradition, and Supreme Court precedent for this Court to embark on creation of a Federal common-law of marriage doctrine even if only for the purpose of evaluating an applicant's entitlement to a spouse's survivor benefits. In remarks at the University of Pennsylvania Sesquicentennial Celebration and Family Law 2000 Symposium, Associate Justice Sandra O'Conner

addressed the wisdom of the "Framers' decision to leave the creation and administration of family law to the States":

> It makes good sense to allow those who work most closely with families to use their experience to shape judgments about what laws and policies are best to keep children safe, to keep families nourished and sheltered, and to keep marriages together or, when they are beyond repair, to make the spilt as equitable as possible.

Sandra Day O'Conner, Associate Justice, Supreme Court of the United States, "The Supreme Court And The Family," 3 U. Pa. J. Const. L. 573 (April 2001); *see also Windsor*, 570 U.S. at 764, 766-68.

Congress has not concluded that the circumstances presented by this case warrant the recognition of a Federal common-law marriage, with individualized consideration of the extent of couples' relationships, intentions, and commitments. The fashioning of such a rule as would require individualized consideration of the contours of personal relationships, presumably for both same-sex couples and heterosexual couples who have not lived in States authorizing common-law marriage, is not a mission for the Court or OPM.

CONCLUSION

For these reasons, the board's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Federal Circuit Rule 32, I certify that this brief contains 11,993 words as calculated by the word processing system used to prepare this brief.

/s/Domenique Kirchner