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17
18 UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

19 Michael Marvin Ely,

20 Plaintiff,

21 vs.

22
23 Nancy Berryhill, in her official capacity as
the Acting Commissioner of the Social
24 Security Administration,

25 Defendant.

Case No.

**COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER RELIEF**

NATURE OF ACTION

1
2 1. Plaintiff Michael Marvin Ely (“Plaintiff” or “Mr. Ely”), an individual, files
3 this Complaint against Defendant Nancy Berryhill (“Defendant”), in her official capacity
4 as Acting Commissioner of the United States Social Security Administration (“SSA”).
5 This action challenges SSA’s denial of social security survivor’s benefits to the surviving
6 members of same-sex couples who were unable to meet the nine-month marriage
7 requirement for such benefits because of unconstitutional laws barring same-sex couples
8 from marriage.

9 2. SSA generally relies on marriage to determine federal eligibility for
10 benefits for surviving spouses. Until relatively recent history, however, same-sex couples
11 have been unconstitutionally barred from marriage, and SSA has relied on those
12 unconstitutional barriers to determine federal eligibility for spousal survivor’s benefits.
13 Surviving same-sex spouses like Mr. Ely, who was unable to marry his husband for most
14 of their forty-three-year relationship together because of unconstitutional marriage laws
15 enforced until seven months prior to his husband’s death, are thus barred from accessing
16 spousal survivor’s benefits.

17 3. Like other Americans, workers with same-sex partners have paid into social
18 security through mandatory deductions from their income, but until recently, rather than
19 funding survivor’s benefits for their own families, these payments have funded survivor’s
20 benefits for those who were married to different-sex spouses. Mr. Ely, now 65 years old,
21 is unable to access the same survivor’s benefits that he would be able to receive in his
22 retirement years if he and his husband had been a different-sex couple who were able to
23 marry at all times.

24 4. For more than forty-three years, Mr. Ely and James Allan Taylor (“Mr.
25 Taylor”) were in a loving, committed, and intimate same-sex relationship. They lived
26 together for over twenty years in the State of California before moving to the State of
27 Arizona, where they lived together for another twenty-plus years. Their relationship
28 began in 1971, when Mr. Ely was 18 years old and Mr. Taylor was 20 years old. They

1 remained a couple until 2015, when cancer claimed Mr. Taylor's life at 63 years of age.
2 Each was the love of the other's life.

3 5. After this Court enjoined Arizona's unconstitutional exclusion of same-sex
4 couples from marriage on October 17, 2014, Mr. Ely and Mr. Taylor married as quickly
5 as they could: they obtained a marriage license within five days and married each other
6 two weeks thereafter, on November 7, 2014, after gathering together their loved ones.
7 Mr. Ely and Mr. Taylor demonstrated their desire to marry each other before November
8 2014 and would have done so but for Arizona's exclusion of same-sex couples from
9 marriage, which was enforced until seven months before Mr. Taylor's death. They cared
10 for each other in sickness and in health until Mr. Taylor's death.

11 6. Mr. Taylor's death was both emotionally and financially devastating for
12 Mr. Ely. Survivor's benefits serve to mitigate some of the financial disruption
13 experienced by a surviving spouse. That financial disruption was particularly acute for
14 Mr. Ely because Mr. Taylor's employment was the primary source of income for the
15 couple. The amount of survivor's benefits one receives is determined by the earning
16 history of the decedent.

17 7. When Mr. Ely applied for survivor's benefits from SSA in 2015, shortly
18 after his 62nd birthday—when he would have otherwise been eligible to collect survivor's
19 benefits—his application was denied. SSA denied his application on the grounds that he
20 was not married to Mr. Taylor for nine months, even though that was a legal
21 impossibility in Arizona, which did not permit same couples to marry until October 17,
22 2014. As a result, Mr. Ely has been denied over a thousand dollars each month that he
23 would have otherwise received, which negatively impacts his quality of life and stretched
24 finances.

25 8. SSA's categorical exclusion of surviving same-sex spouses like Mr. Ely
26 from survivor's benefits violates their equal protection and due process rights protected
27 by the United States Constitution. Even before the U.S. Supreme Court recognized that
28 the exclusion of same-sex couples from marriage was unconstitutional, courts recognized

1 that the exclusion of same-sex couples from the legal rights associated with marriage was
2 unconstitutional. SSA's exclusion of same-sex partners from survivor's benefits—a
3 critical legal protection associated with marriage—violates their equal protection and due
4 process rights.

5 9. The U.S. Supreme Court ultimately recognized in *Obergefell v. Hodges*,
6 135 S. Ct. 2584 (2015), that the exclusion of same-sex couples from marriage, as well as
7 from the legal rights associated with marriage, was unconstitutional. The U.S. Supreme
8 Court also recognized in *United States v. Windsor*, (2013), that the federal government
9 may not withhold spousal benefits from same-sex couples. SSA thus cannot rely upon
10 unconstitutional state laws—including the Arizona law that barred Mr. Ely and Mr.
11 Taylor from marrying until October 2014—in determining federal eligibility for
12 survivor's benefits.

13 10. SSA's unconstitutional incorporation of, and reliance upon, discriminatory
14 state laws previously barring same-sex couples from marriage replicates and perpetuates the
15 same basic constitutional violations condemned in *Obergefell*, *Windsor*, and many other
16 decisions. SSA's denial of survivor's benefits to surviving same-sex spouses like Mr. Ely
17 tells them that they are unworthy of federal recognition and equal treatment and demeans
18 their dignity. Despite *Windsor*'s clear mandate that the federal government may not
19 withhold spousal benefits from same-sex couples, by withholding survivor's benefits from
20 same-sex couples barred from marriage by state laws, SSA continues to categorically bar
21 individuals like Mr. Ely from access to this critical safety-net protection.

22 **PARTIES**

23 11. Plaintiff Michael Marvin Ely is a citizen of the United States. He resides
24 within this judicial district and the State of Arizona.

25 12. Defendant Nancy A. Berryhill is the Acting Commissioner of the Social
26 Security Administration and performs the functions of the Commissioner. Ms. Berryhill
27 is the federal official responsible for implementing and enforcing the Social Security Act and
28 its implementing regulations, SSA's policies and procedures, and other laws of the United

1 States applicable to SSA administration. Ms. Berryhill is named in her official capacity only.

2 **JURISDICTION AND VENUE**

3 13. The Court has jurisdiction under 42 U.S.C. § 405(g) and 28 U.S.C. § 1361.
4 Jurisdiction is proper pursuant to 42 U.S.C. § 405(g) because Plaintiff’s claims arise
5 under the Social Security Act and its implementing regulations. The presentment
6 requirement of 42 U.S.C. § 405(g) was met by Mr. Ely when he filed his Application for
7 Widow’s or Widower’s Insurance Benefits (“Application”) in 2015. Mr. Ely thereafter
8 exhausted his administrative remedies. The September 26, 2018 “Notice of Appeals
9 Council Action” denying review of the Administrative Law Judge decision dated October
10 17, 2017 is final agency action regarding Mr. Ely’s Application. This action also raises a
11 constitutional challenge that includes a request for injunctive and declaratory relief that is
12 collateral to an individual determination of benefits and outside SSA’s administrative
13 competence to adjudicate.

14 14. Venue is proper in this judicial district pursuant to 42 U.S.C. § 405(g) and
15 28 U.S.C. § 1391(b) because Mr. Ely is a resident in this judicial district. Venue is
16 proper in the Tucson Division of this district because a substantial part of the events or
17 omissions giving rise to Plaintiff’s claims occurred in Pima County, Arizona, including
18 that the earning record of Mr. Taylor on which Mr. Ely seeks survivor’s benefits is based
19 in part on work that was performed within Pima County.

20 **GENERAL ALLEGATIONS**

21 **The Forty-Three Year Committed Relationship of**
22 **Michael Ely and James Taylor.**

23 15. For forty-three years, Mr. Ely and Mr. Taylor were in a loving, committed,
24 and intimate relationship. They lived the first twenty-three years in California, and the
25 last twenty-plus years in Arizona, where Mr. Taylor’s family resided. They met and
26 formed a committed relationship with each other in 1971. From their very first meeting,
27 Mr. Ely knew had met his soul mate, and he still has the first flower that Mr. Taylor gave
28 to him. They began living together on December 5, 1971, which they celebrated as their

1 anniversary until they were able to marry. From 1971 on, Mr. Ely and Mr. Taylor shared
2 a home until Mr. Taylor's death in May 2015.

3 16. One of their shared passions was music. Mr. Taylor played guitar in a
4 band, and Mr. Ely subsequently served as the lyricist and singer.

5 17. Mr. Ely and Mr. Taylor publicly held themselves out as the loving and
6 committed couple that they were. They attended family and friends' events, such as
7 holidays and birthdays, together as a family. Their friends and family also recognized
8 them as a family.

9 18. Mr. Ely and Mr. Taylor were an integrated economic unit. Mr. Taylor was
10 the breadwinner and worked as a structural mechanic in aerospace. Mr. Ely was the stay-
11 at-home partner and was responsible for maintaining their home, cooking meals, and
12 doing household chores. Mr. Ely and Mr. Taylor had a joint banking account, and Mr.
13 Ely did the couple's banking and paid the bills. Mr. Taylor performed the household
14 repairs.

15 19. Mr. Ely and Mr. Taylor cared for each other in sickness and in health. Mr.
16 Ely was Mr. Taylor's primary caregiver from his diagnosis with cancer in November
17 2013 until his death in May 2015. Mr. Taylor's chemotherapy and other treatments had
18 horrible side effects. Mr. Taylor had terrible chills, night sweats, near continuous
19 vomiting, and was extremely weak, and Mr. Ely cared for him through all of it, providing
20 all of his personal care.

21 20. Mr. Taylor similarly cared for Mr. Ely during their relationship. Indeed,
22 even at the end of Mr. Taylor's life, his main concern was not his own death; it was what
23 would happen to Mr. Ely. Ultimately, Mr. Taylor passed away on May 21, 2015, six
24 months and fourteen days after their November 7, 2014 marriage. This was seven
25 months and four days after October 17, 2014, which is when same-sex couples were first
26 legally able to marry in Arizona.

27 21. Mr. Ely made all the arrangements for Mr. Taylor's funeral and cremation.
28 The death certificate lists Mr. Ely as Mr. Taylor's surviving spouse.

1 **Mr. Ely and Mr. Taylor Would Have Been Married For At Least Nine Months**
2 **But For the Unconstitutional Exclusion of Same-Sex Couples from Marriage.**

3 22. On many occasions during their 43-year relationship, Mr. Ely and Mr.
4 Taylor discussed and demonstrated their desire to marry to each other and to be
5 recognized by the State of Arizona and by the United States as a married couple with the
6 same status and legal rights as married different-sex couples. Throughout their
7 relationship, however, and until October 17, 2014, seven months and four days before
8 Mr. Taylor's death, Arizona barred same-sex couples from marriage.

9 23. Mr. Ely and Mr. Taylor demonstrated their intent and desire to be married
10 under the laws of the State of Arizona by their public commitment to each other, and by
11 their other public actions throughout their 43-year relationship.

12 24. In 1973, at a wedding of their friends, who were a different-sex couple, Mr.
13 Ely and Mr. Taylor discussed marriage, noting that they wished it were an option
14 available to them. Like many same-sex couples of their era, however, Mr. Ely and Mr.
15 Taylor held little hope for a time when they would be legally able to marry. Indeed, they
16 began their relationship in a time when homosexuality was criminalized and was
17 characterized as a mental illness by the American Psychiatric Association. At one point
18 in the 1970s, Mr. Taylor was hospitalized with pneumonia, and hospital staff prohibited
19 Mr. Ely from seeing him after visiting hours, allowing only one hour a day because he
20 was not deemed Mr. Taylor's "family."

21 25. In December 2007, Mr. Ely and Mr. Taylor publicly declared their
22 commitment to one another and exchanged rings in a commitment ceremony. Inside the
23 rings was engraved, "don't forget," which was shorthand for, "don't forget I love you."
24 Over their long relationship, they had developed their own code to communicate "I love
25 you" when they were in situations where it was unsafe to express that sentiment. They
26 decided to have the commitment ceremony after a family relative voiced disapproval of
27 the idea that same-sex couples should be allowed to marry, which prompted discussions
28 between them about alternate ways they could publicly express their commitment to each

1 other in light of the fact that they were barred from marrying. They hired a licensed
2 celebrant and invited their closest friend. This was as close as they could get to marriage
3 at the time. They recognized that even if they had flown to Canada to get married, for
4 example, Arizona would not have recognized their marriage, which made the exercise
5 feel like an act of futility.

6 26. On October 17, 2014, Arizona began issuing marriage licenses to same-sex
7 couples. Mr. Ely and Mr. Taylor married as fast as reasonably possible. They obtained
8 their marriage license from the Pima County Superior Court just five days later, on
9 October 22, 2014. They then invited their loved ones, some of whom needed to travel
10 from out of town, to attend their marriage ceremony and were legally married at the Pima
11 County Superior Court, according to the laws of the State of Arizona, on November 7,
12 2014. At the ceremony, they exchanged the same rings that they had worn since their
13 commitment ceremony in 2007.

14 27. The uncontested evidence introduced by Mr. Ely in the administrative
15 process on the Application demonstrated that Mr. Ely and Mr. Taylor would have
16 married earlier, by at least nine months before Mr. Taylor's death, but for Arizona law
17 barring same-sex couples from marriage. The evidence introduced by Mr. Ely in the
18 administrative proceedings documents that on multiple occasions Mr. Ely and Mr. Taylor
19 discussed their desire to be married and to be recognized by the State of Arizona and the
20 United States as a married couple with the same status and legal rights as married
21 different-sex couples. Mr. Ely and Mr. Taylor married in Arizona as soon as they were
22 permitted to do so.

23 28. In 1996, the United States enacted the so-called Defense of Marriage Act,
24 which prohibited federal recognition of marriages between same-sex couples. Although
25 no state permitted same-sex couples to marry at the time, the law was enacted in response
26 to fears that that could change. As the U.S. Supreme Court explained in *Windsor*, the
27 law's "purpose [was] to discourage enactment of state same-sex marriage laws" and the
28 goal of Congress "was 'to put a thumb on the scales and influence a state's decision as to

1 how to shape its own marriage laws.” 570 U.S. at 771.

2 29. In 1996, the Arizona Legislature enacted a statutory ban barring same-sex
3 couples from marriage. Ariz. Rev. Stat. § 25-101(C) (“Marriage between persons of the
4 same sex is void and prohibited.”). In 1999, the Arizona Legislature added yet another
5 provision confirming that exclusion. Ariz. Rev. Stat. § 25-125A (specifying a valid
6 marriage is one “contracted by a male person and a female person with a proper marriage
7 license”). In 2008, Arizona amended its state constitution to bar same-sex couples from
8 marriage. Ariz. Const., Art. 30, § 1 (“Only a union of one man and one woman shall be
9 valid or recognized as a marriage in this state.”). It was not until October 17, 2014, just
10 seven months prior to Mr. Taylor’s death, that Arizona ultimately permitted same-sex
11 couples to marry, after this Court held Arizona’s ban on marriage by same-sex couples
12 unconstitutional. *See Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014);
13 *Connolly v. Jeanes*, 73 F. Supp. 3d 1094, 1096 (D. Ariz. 2014).

14 30. The Supreme Court’s decision in *Obergefell* also confirmed that Arizona’s
15 law excluding same-sex couples from marriage was void *ab initio*. As a result of this
16 unconstitutional law, Mr. Ely and Mr. Taylor were barred from marriage and unable to be
17 recognized as spouses until just seven months prior to Mr. Taylor’s death.

18 **The Social Security Act Provisions Regarding Surviving Spouse Benefits**

19 31. On August 14, 1935, President Franklin Roosevelt signed into law the Social
20 Security Act, Pub. L. 74-271, 49 Stat. 620, now codified at 42 U.S.C. ch. 7. Enacted during
21 the Great Depression, the Act authorizes the collection of funds to allow the federal
22 government to provide financial assistance to elderly and disabled individuals. The Act in its
23 current form provides for, among other things, the payment of old-age insurance benefits,
24 survivor’s benefits for widows and widowers, and lump-sum death benefits. As stated in a
25 1955 report of the House of Representatives Committee on Ways and Means, “[t]he old-age
26 and survivors insurance system is the basic program which provides protection for America’s
27 families against the loss of earned income upon the retirement or death of the family
28 provider.” H.R. Rep. No. 1189, 84th Cong., 1st Sess. 2. (1955).

1 32. The Act as initially passed did not include survivor benefits for widows or
2 widowers. However, the need for greater financial protection for workers' family members
3 was recognized as early as 1938 by the Advisory Council on Social Security, a government-
4 appointed body representing employees, employers, and the general public. In 1939,
5 Congress amended the Act to adopt the Advisory Council's recommendation that social
6 security benefits should be provided to workers' dependents, including their widows. The
7 Advisory Council's core observation—that financial benefits are critical to the security,
8 stability, and dignity of aging and surviving spouses—remains as true today as in 1938.

9 33. Americans earn the right to participate in social security by working and
10 contributing to the program throughout their working lives. Through payroll deductions over
11 the course of their employment, workers earn the security of being able to rely on social
12 security benefits, and for their spouses to rely on such benefits, after the workers' retirement,
13 death, or disability.

14 34. Generally, an individual must be fully insured under the social security
15 program before benefits may be paid—whether directly to the individual or to his or her
16 spouse or survivors. With some exceptions, status as an insured person is earned through
17 years worked and wages earned. To be fully insured, generally a worker needs at least
18 one quarter of covered work for each calendar year between the time he or she turned 21
19 and the earliest of: (1) the year before the worker attained age 62; (2) the year before the
20 worker died; or (3) the year before the worker became disabled. 42 U.S.C. §§ 413-14; 20
21 C.F.R. 404.110.

22 35. Under the Act and SSA's interpreting regulations, the surviving spouse of a
23 deceased insured person is eligible to be paid monthly survivor's benefits. 42 U.S.C.
24 § 402(e) (widow's insurance benefits) and 42 U.S.C. § 402(f) (widower's insurance
25 benefits); *see also* 20 C.F.R. 404.335. A widow or widower may receive full survivor's
26 benefits at full retirement age, which is age 66 for widows or widowers born during the
27 years 1945 to 1956. Reduced survivor's benefits can be received as early as age 60 (or age
28 50 if the individual is disabled).

1 36. Section 216 of the Social Security Act provides the primary means by which a
2 person may qualify as a surviving spouse for social security benefits. It provides in relevant
3 part: “[a]n applicant is the . . . widow, or widower of a fully or currently insured individual . .
4 . if . . . the courts of the State in which he was domiciled at the time of death . . . would find
5 that such applicant and such insured individual were validly married . . . at the time he died.”
6 42 U.S.C. § 416(h)(1)(A)(i).

7 37. The Act defines “widow” and “widower,” in relevant part, as “the surviving
8 [spouse] of an individual, but only if . . . [he or she] was married to [the deceased
9 individual] for a period of not less than nine months immediately prior to the day on
10 which [he or she] died.” 42 U.S.C. §§ 416(c)(1), (g)(1).

11 38. Although they were lawfully married to their same-sex spouses, survivors
12 like Mr. Ely are categorically excluded from meeting that eligibility criterion because
13 they were barred from marriage until it was too late, by laws that have since been held
14 unconstitutional.

15 39. The exclusion of surviving same-sex spouses like Mr. Ely from eligibility
16 for survivor’s benefits based on discriminatory marriage laws deprives them of an
17 important legal protection. As the Supreme Court recognized in *Windsor*, the federal
18 government’s refusal to recognize same-sex couples’ relationships “denies or reduces
19 benefits allowed to families upon the loss of a spouse and parent, benefits that are an
20 integral part of family security.” 570 U.S. at 773. The Supreme Court again recognized
21 in *Obergefell* that it was unconstitutional to deprive same-sex couples of “the rights and
22 benefits of survivors” afforded through marriage. 135 S. Ct. at 2601.

23 40. Survivor’s benefits are as important to surviving same-sex partners who
24 would have married their loved ones earlier but for discriminatory marriage laws, as they
25 are to surviving different-sex spouses who had the opportunity to marry their loved ones
26 at all times. Both groups are similarly situated in every relevant respect. The only
27 distinction between them is the unconstitutional barrier to marriage faced by the same-sex
28 partners.

1 Reconsideration.

2 49. SSA's denial of reconsideration stated that the State of Arizona
3 "capitulated" to the Supreme Court's decision in *Windsor* by "recognizing same-sex
4 marriages legally entered into in Arizona . . . but only effective as of October 17, 2014
5 (Arizona would not recognize the validity of any same-sex marriage until that date)." It
6 further stated that the reason Mr. Ely was denied survivor's benefits on the record of Mr.
7 Taylor was that "you and James had not been legally married under Arizona law for 9
8 months prior to his death."

9 50. On December 2, 2015, Mr. Ely timely filed a Request for Hearing by an
10 Administrative Law Judge ("ALJ"). Prior to the hearing, Mr. Ely submitted a personal
11 statement and evidence supporting his claim.

12 51. On May 10, 2017, the ALJ conducted a hearing on Mr. Ely's Application.
13 Mr. Ely presented additional testimony, and Mr. Ely's counsel presented argument. No
14 witness contested any of the evidence introduced by Mr. Ely during the hearing.

15 52. The ALJ issued a decision dated October 17, 2017 concluding that Mr. Ely
16 is not eligible for surviving spouse benefits, because "the Claimant did not meet the nine
17 month requirement for entitlement of Widower's Benefits."

18 53. On December 14, 2017, Mr. Ely timely filed a Request for Appeals Council
19 Review of the ALJ Decision and a Statement of Facts and Law with the SSA.

20 54. By letter dated September 26, 2018, SSA's Office of Appellate Operations
21 sent to Mr. Ely a "Notice of Appeals Council Action." The Notice states "We found no
22 reason under our rules to review the Administrative Law Judge's decision. Therefore, we
23 have denied your request for review." The Notice of Appeals Council Action provides
24 no other justification for, or any facts in support of, the denial of Plaintiff's request for
25 review of the ALJ Decision.

26 55. Taken together, SSA's actions violate the holdings of *Obergefell*, *Windsor*,
27 and similar lower court decisions. The denial of Mr. Ely's Application is based on SSA's
28 reliance on Arizona's unconstitutional and discriminatory marriage law and

1 unconstitutionally deprives him of equality and liberty.

2 **CLAIMS FOR RELIEF**

3 **FIRST CLAIM:**

4 **VIOLATION OF EQUAL PROTECTION**

5 56. Plaintiff realleges paragraphs 1 through and including paragraph 55 as if
6 fully set forth herein.

7 57. Defendant has violated the right to equal protection guaranteed by the Fifth
8 Amendment to the U.S. Constitution by discriminating against Plaintiff and other same-
9 sex surviving spouses and partners who would have otherwise qualified for survivor's
10 benefits under the Social Security Act but for their exclusion from marriage. These
11 individuals are treated differently from surviving different-sex spouses who were able to
12 qualify for survivor's benefits.

13 58. Defendant's differential treatment—including its incorporation of, and reliance
14 upon, discriminatory state laws excluding same-sex couples from marriage—discriminates
15 on the basis of sexual orientation, and is therefore subject to heightened scrutiny, which
16 Defendant's actions cannot withstand. Defendant's actions discriminated against Plaintiff
17 because he is a gay man.

18 59. Gay men and lesbians have suffered a long and painful history of
19 discrimination in the United States.

20 60. Sexual orientation bears no relation to an individual's ability to contribute
21 to society.

22 61. Sexual orientation is a core, defining trait so fundamental to one's identity and
23 conscience that a person may not legitimately be required to abandon (even if that were
24 possible) as a condition of equal treatment.

25 62. Sexual orientation is generally fixed at an early age and is highly resistant to
26 change through intervention. No credible evidence supports the notion that such
27 interventions are either effective or safe; indeed, they often are harmful and damaging. No
28 mainstream mental health professional organization approves interventions that attempt to

1 change sexual orientation, and virtually all of them have adopted policy statements
2 cautioning professionals and the public about these treatments.

3 63. Gay men and lesbians are a discrete and insular minority, and ongoing
4 prejudice against them continues seriously to curtail the operation of those political processes
5 that might ordinarily be relied upon to protect minorities. Gay men and lesbians lack express
6 statutory protection against discrimination in employment, public accommodations, and
7 housing at the federal level and in more than half the states. They are systematically
8 underrepresented in federal, state, and local democratic bodies. And 30 states have
9 historically sought to strip them of the right to marry by passing state constitutional
10 amendments barring them from marriage.

11 64. Defendant's differential treatment also discriminates based on sex, by
12 applying standards to deny social security benefits based on state laws barring marriage to a
13 person of the same sex. Defendant's application of this sex-based classification deprives
14 Plaintiff of survivor's benefits because he is a man and not a woman; if he were a woman,
15 the laws of the State of Arizona would have allowed Mr. Ely and Mr. Taylor to marry at all
16 times, and Mr. Ely and Mr. Taylor would be recognized as married for purposes of social
17 security benefits. Such sex-based classifications are subject to intermediate scrutiny.

18 65. This discrimination also impermissibly enforces conformity with sex
19 stereotypes by excluding Plaintiff and other surviving same-sex partners from social security
20 benefits because they have failed to conform to the sex-based stereotypes that men should
21 marry women, and that women should marry men. This, too, requires intermediate scrutiny.

22 66. Moreover, Defendant denied Plaintiff and other surviving same-sex spouses
23 and partners of equal access to and protections for their fundamental liberty interests in
24 forming an intimate family relationship with a person of the same sex.

25 67. Defendant cannot articulate any legitimate or rational basis—let alone a
26 compelling or important and sufficiently-tailored government interest—for
27 discriminating against Plaintiff and other surviving same-sex spouses and partners.
28

1 excluding same-sex couples from marriage to determine eligibility for social
2 security survivor’s benefits—including the laws of the State of Arizona—is
3 unconstitutional and cannot be used as a basis for denying benefits to Plaintiff and
4 other surviving same-sex spouses and partners who would have married but for
5 laws excluding same-sex couples from marriage.

6 3. Issue an order requiring Defendant to approve the Application of Michael
7 Marvin Ely for social security survivor’s benefits, including a recalculation of
8 benefits to the extent necessary to afford complete relief.

9 4. Grant a permanent injunction:

- 10 a) prohibiting Acting Commissioner Berryhill, her successors in
11 office, her agents, employees, and all persons acting in concert
12 with her or her successors from:
 - 13 (1) excluding same-sex surviving spouses and partners who
14 would have married but for laws barring marriage between
15 same-sex couples from eligibility for social security
16 survivor’s benefits; and
 - 17 (2) applying laws excluding same-sex couples from marriage to
18 the determination of eligibility for social security survivor’s
19 benefits;
- 20 b) requiring Acting Commissioner Berryhill, her successors in office,
21 her agents, employees, and all persons acting in concert with her
22 or her successors to recognize Michael Marvin Ely as entitled to
23 social security widower’s benefits based on the work history of
24 James Allan Taylor;
- 25 c) ordering Acting Commissioner Berryhill, her successors in office,
26 her agents, employees, and all persons acting in concert with her
27 or her successors to revise any agency rules or regulations that
28 apply or rely upon laws barring same-sex couples from marriage

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for social security benefit determinations;

d) requiring Acting Commissioner Berryhill, her successors in office, her agents, employees, and all persons acting in concert with her or her successors to direct all SSA staff who render social security benefit decisions at any level to correct any internal guidelines, directives, or other written material that apply or rely upon laws barring same-sex couples from marriage for social security benefit determinations.

5. Award reasonable attorneys’ fees and allowed costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, or any other applicable statutory provision.

6. Grant such other relief as the Court may deem just and proper.

Date: November 20, 2018

Respectfully submitted,

/s/ Brian I. Clymer
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