

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HELEN J. THORNTON *and*
NATIONAL COMMITTEE TO
PRESERVE SOCIAL SECURITY
AND MEDICARE,

Plaintiffs,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 2:18-cv-01409-JLR-JRC

COMBINED REPORT AND
RECOMMENDATION ON
PLAINTIFFS' COMPLAINT &
MOTION FOR CLASS
CERTIFICATION

NOTED: FEBRUARY 21, 2020

This proposed class action under 42 U.S.C. § 405(g) has been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271–72 (1976).

Plaintiffs request that the court find unconstitutional the portion of the Social Security Administration's statutory scheme that denies surviving spousal benefits ("survivor's benefits") to the surviving partners of same-sex couples who were prohibited from marrying because of now-unconstitutional state laws that banned same-sex marriage. The matter is before the court on

1 plaintiffs' combined opening brief on the merits and motion for class certification. *See* Dkt. 53.
2 Because the parties address the merits and class certification in combined briefing and because
3 both issues are ripe for decision, this combined report and recommendation addresses both the
4 merits of the parties' dispute and the motion for class certification.

5 For the reasons discussed in the merits section (*see infra*, Part II) the undersigned has
6 concluded that the statutory scheme conditioning eligibility for survivor's benefits on
7 unconstitutional state laws that forbade same-sex marriage is itself unconstitutional. For the
8 reasons discussed in the class certification section (*see infra*, Part III) the undersigned recommends
9 that the court grant relief to a defined nation-wide class, including plaintiff Helen Thornton as class
10 representative.

11 At the heart of this case is the requirement that to obtain survivor's benefits based on the
12 higher earnings of a deceased partner, the claimant and the deceased partner must have been
13 validly married at the time of the deceased's death. *See* 42 U.S.C. § 416(c)(1)(E), (g)(1)(E),
14 (h)(1)(A)(i). Laws prohibiting same-sex marriage were declared unconstitutional in 2015. For
15 certain claimants such as Ms. Thornton—who were unable to marry their same-sex partner
16 during the partner's lifetime—those claimants are now unable to obtain survivor's benefits solely
17 because of the now-unconstitutional laws barring same-sex marriage. The question presented in
18 this case is whether the “grave and continuing harm” caused by these unconstitutional laws
19 should bar claimants from recovering survivor's benefits.

20 I. BACKGROUND

21 For twenty-seven years, Helen Thornton and Margery Brown were partners for life in
22 every meaningful way, except sharing a marriage license. It is undisputed that they would have
23 married, but for Washington State's law at the time, which made same-sex marriage illegal.
24

Ms. Thornton and Ms. Brown began dating in 1978 and formed a committed relationship in 1979. *See* Dkt. 34 (“AR”), at 73. They jointly rented a home in 1981 and jointly purchased a home in 1983, in Olympia, Washington. AR 73–74. Ms. Thornton gave birth to a son in 1984, and Ms. Brown adopted him. AR 74, 178. Ms. Thornton and Ms. Brown shared incomes, expenses, and liabilities. AR 73. Ms. Brown was an instructor at Evergreen State College, and Ms. Thornton worked for many years at a food co-op and later as a film programmer at an independent theater. AR 74, 90; *see also* Dkt. 46, at 9. During the course of their lives together, Ms. Brown earned more than Ms. Thornton.

They jointly advocated for same-sex rights, including taking legal action for health insurance benefits for same-sex partners of state employees. AR 75–76. During that effort, Ms. Brown was quoted in a newspaper as saying, “You can’t get benefits because you can’t get married,” adding that she would have married Ms. Thornton if state law allowed it. AR 90. Ms. Brown and Ms. Thornton even executed a document entitled “Declaration of Marriage/Same-Sex Domestic Partnership,” stating that they were “same-sex partners who are barred from a lawful marriage.” AR 156–57 (emphasis removed). During the entire time that Ms. Thornton and Ms. Brown were together, the State of Washington did not allow for same-sex marriage. *See* former RCW § 26.04.010 (1998), *amended by* 2012 Wash. Legis. Serv. Ch. 3 (S.S.B. 6239).

Ms. Thornton cared for Ms. Brown through Ms. Brown’s three-year battle with cancer. AR 74. Ms. Brown died in 2006. AR 76–77. At the time of her death, only a few states had begun to allow for same-sex marriage.¹

¹ In 2003, the Massachusetts Supreme Court held that their state’s constitution guaranteed same-sex marriage, making it the first state to legalize same-sex marriage. *See Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2597 (2015). The Administration concedes that it is not arguing “that the earlier availability of same-sex marriage in other jurisdictions changes the fact

1 In the years that followed, the walls of discrimination against same-sex marriage began to
 2 crumble. Washington State allowed for domestic partnerships in 2007 and legalized same-sex
 3 marriage in 2012—six years after Ms. Brown’s death. RCW § 26.04.010 (2012).

4 In 2013, the Supreme Court decided *United States v. Windsor* and held that the federal
 5 government could not deny federal benefits to same-sex couples who had legally married
 6 pursuant to a valid state law. 570 U.S. 744, 775. In *Windsor*, the federal “Defense of Marriage
 7 Act” (“DOMA”) had excluded same-sex partners from the definition of “spouse” in federal
 8 statutes—even when same-sex couples were legally married under state law. *Id.* at 751. The
 9 Court ruled that “DOMA seeks to injure the very class New York seeks to protect. By doing so
 10 it violates basic due process and equal protection principles applicable to the Federal
 11 Government.” *Id.* at 769–70.

12 If DOMA had been allowed to stand, it could have affected “over 1,000 federal laws” and
 13 “the whole realm of federal regulations” that defined “marriage” and “spouse” by excluding
 14 same-sex partners. *Id.* at 752, 765. That included the Social Security statutory scheme at issue
 15 here, codified in 42 U.S.C. § 416. *See id.* at 752 (DOMA would re-define all statutes referencing
 16 “spouses” or “marriage” to mean only opposite-sex marriages).

17 In June 2014, following the *Windsor* decision, Attorney General Eric Holder issued a
 18 memorandum (“the Holder Memo”) announcing, “I am pleased to report that agencies across the
 19 federal government have implemented the *Windsor* decision to treat married same-sex couples
 20 the same as married opposite-sex couples for the benefits and obligations for which marriage is
 21 relevant, to the greatest extent possible under the law.” OFFICE OF THE ATTORNEY GENERAL,
 22

23 _____
 24 that those who were once prohibited from marrying in their home states were, under *Obergefell*,
 subject to a violation of their constitutional rights.” Dkt. 63, at 34.

1 MEMORANDUM TO THE PRESIDENT: IMPLEMENTATION OF *UNITED STATES V. WINDSOR*, at 1 (June
2 20, 2014).² The Holder Memo was implemented across all federal statutes, including the Social
3 Security Act.

4 Among other changes in interpreting federal statutes, the Administration modified the
5 definitions of “widow” and “widower”—terms defined by statute to mean a woman married to a
6 man or vice-versa (*see* 42 U.S.C. § 416(c)(1)(E), (g)(1)(E))—to include a woman who was
7 married to another woman or a man who was married to another man. *See* 20 C.F.R. § 404.345
8 (“If you and the insured were validly married under State law at the time . . . the insured died . . .
9 the relationship requirement will be met.”); *see also* Dkt. 63, at 10 (“the Social Security
10 Administration’s application of these statutory definitions draws no distinction between
11 surviving partners from same-sex and opposite-sex marriages[.]”). Nevertheless, the stated
12 language of 42 U.S.C. § 416(c)(1)(E) continues to define a “widow” as a woman who was
13 married to a man for nine months before he died.

14 The term “widow” . . . means the surviving wife of an individual, but only if . . .
15 *she* was married to *him* for a period of not less than nine months immediately
prior to the day on which *he* died[.]

16 42 U.S.C. § 416(c)(1)(E) (emphasis added). The definition of a “widower” similarly persists.
17 *See* 42 U.S.C. § 416(g)(1)(E). Further, neither Congress by amendment nor the Administration
18 by regulation have changed the requirement that the couple had to have been validly married at
19 the time of the partner’s death.

20 The case law continued to evolve after *Windsor*. In 2014, the Ninth Circuit evaluated the
21 constitutionality of state statutes that prohibited same-sex marriage and held that state laws
22

23 ² <https://www.justice.gov/opa/pr/one-year-after-supreme-court-s-historic-windsor->
24 [decision-attorney-general-holder-issues.](https://www.justice.gov/opa/pr/one-year-after-supreme-court-s-historic-windsor-)

1 banning same-sex marriage in Idaho and Nevada violated the Equal Protection Clause of the
2 Fourteenth Amendment. *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014).

3 In January of 2015, shortly after her sixtieth birthday, Ms. Thornton applied for Social
4 Security survivor’s benefits based on Ms. Brown’s work history pursuant to 42 U.S.C. § 402.
5 See AR 19–22. On December 8, 2015, the Administration denied Ms. Thornton’s application
6 because Ms. Thornton “was not legally married to the insured [Ms. Brown],” AR 23, 28; see 42
7 U.S.C. § 416(h).

8 She requested a hearing before an administrative law judge (“ALJ”). AR 39. Before that
9 hearing, the Supreme Court issued its ruling in *Obergefell v. Hodges*, declaring that *all* state laws
10 prohibiting same-sex marriage “are now held invalid to the extent they exclude same-sex couples
11 from civil marriage on the same terms and conditions as opposite-sex couples.” __ U.S. __, 135
12 S. Ct. 2584, 2605 (2015). The Court further held that,

13 [t]he right of same-sex couples to marry that is part of the liberty promised by the
14 Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the
equal protection of the laws.

15 *Id.* at 2602. The Court made clear that where “[s]ame-sex couples are denied all the benefits
16 afforded to opposite sex couples, . . . this denial to same-sex couples of the right to marry works
17 a grave and continuing harm.” *Id.* at 2604.

18 After *Obergefell* was decided, the Administration recognized “valid same-sex marriage[s]
19 as of the date of the marriage, including during periods when the . . . state of domicile did not
20 recognize same-sex marriages.” See Social Security Administration, Program Operations
21 Manual System GN 00210.002.³ Of course, this was of little avail to applicants such as Ms.
22 Thornton, who were never able to marry their chosen partner. For those applicants, the
23

24 ³ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210002>

1 Administration's regulations continued to rely on state laws that were in effect at the time of the
2 insured's death, even though those laws had been declared unconstitutional:

3 To decide your relationship as the insured's^[4] widow or widower, we look to the
4 laws of the State where the insured had a permanent home when he or she died
5 If you and the insured were validly married under State law . . . at the time the
6 insured died . . . the relationship requirement will be met[.]

7 20 C.F.R. § 404.345; *see also* 42 U.S.C. § 416(h)(1)(A)(i).

8 Even after *Obergefell*, the Administration failed to recognize any exception from the
9 valid marriage requirement for same-sex couples who would have married, but for the state's
10 now unconstitutional laws that prohibited same-sex marriage.

11 Following this statutory scheme, ALJ James Sherry issued a written decision on January
12 10, 2017, in which the ALJ concluded that Ms. Thornton was not eligible for survivor's benefits
13 pursuant to the Social Security Act. AR 13–15.

14 The ALJ did not question any of the evidence produced by Ms. Thornton and even
15 acknowledged at the hearing that “the facts she is alleging in terms of their relationship are
16 uncontroverted here. We don't have anything that would suggest a reason to question that.” AR
17 175. Among the facts that were undisputed is that but for the Washington statute prohibiting
18 same-sex marriage, Ms. Brown and Ms. Thornton would have married at least nine months prior
19 to Ms. Brown's death. *See* AR 156 (“We are same-sex partners who are barred from a lawful
20 marriage.”).

21 On July 23, 2018, the Appeals Council denied Ms. Thornton's request for review (AR
22 165), making the written decision by the ALJ the final agency decision subject to judicial review.

23 ⁴ For purposes of this analysis, Ms. Brown is “the insured” because she was the
24 higher wage-earner.

AR 5–7. Ms. Thornton filed a complaint in this Court seeking judicial review of the ALJ’s written decision on September 25, 2018. Dkt. 1. Ms. Thornton later amended her complaint to join plaintiff National Committee to Preserve Social Security and Medicare (“National Committee”). *See* Dkt. 15.

This matter centers on the constitutionality of the Administration applying an unconstitutional state law when denying survivor’s benefits to applicants such as Ms. Thornton, who were prohibited from marrying their same sex partner. *See* Dkt. 53, at 15–16.

II. RECOMMENDATION ON THE MERITS

A. Jurisdiction

Pursuant to 42 U.S.C. § 405(g), a claimant may seek judicial review in a federal district court after she obtains from the Commissioner a final judgment of her Social Security claim. *See Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993). The district court has jurisdiction to enter a “judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The factual findings of the Commissioner “if supported by substantial evidence, shall be conclusive[.]” *Id.* The court shall review questions of law with respect to “conformity with such regulations and the validity of such regulations.”⁵ *Id.*

B. Statutes at Issue and Level of Scrutiny

The parties disagree regarding which level of scrutiny applies to plaintiffs’ constitutional challenge to this statutory scheme and whether the Court should apply that level of scrutiny only to the Social Security survivor benefit scheme or to the underlying state statute that banned

⁵ The issue of jurisdiction over the class action and mandamus claims and the standing of the National Committee to bring those claims is discussed further, *infra*.

1 same-sex marriage—or to both. *See* Dkt. 53, at 21; Dkt. 63, at 19. In this court’s opinion, the
2 statutes should be read together, and regardless of the level of scrutiny applied, conditioning
3 federal benefits on unconstitutional state laws runs afoul of the Supreme Court’s precedent
4 interpreting the Fifth and Fourteenth Amendments.

5 In *Windsor*, the Court was evaluating the enforceability of a federal statute, where
6 Congress’s purpose was to discriminate against same-sex marriage that was legalized by the
7 state. *See* 570 U.S. at 769–70. The Court invalidated the federal law that refused to recognize
8 same-sex marriages that were lawful under state law. *Id.* In *Obergefell*, the Court was
9 evaluating the enforceability of state statutes, where the states’ purpose was to discriminate
10 against same-sex marriage that was prohibited in those states. *See* 135 S. Ct. at 2604–05. The
11 Court invalidated those state laws. *Id.* In both cases, the Court concluded that same-sex
12 couples’ right to marry was protected under the due process and equal protection clauses. *Id.* at
13 2604; *Windsor*, 570 U.S. at 774–75.

14 The Supreme Court consistently has held that the same or similar analysis applies to both
15 the due process clause of the Fifth Amendment (applied to federal statutes) and the due process
16 and equal protection clauses of the Fourteenth Amendment (applied to state statutes). *See*
17 *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S.
18 200, 217–18 (1995). As noted in *Windsor*, “the equal protection guarantee of the Fourteenth
19 Amendment makes that Fifth Amendment right [to due process] all the more specific and all the
20 better understood and preserved.” 570 U.S. at 774. Therefore, the interplay of federal statutes
21 and state statutes calls into question the same principles of due process and equal protection of
22 the laws.

1 In this case, since the federal statute providing survivor's benefits conditions benefits on
 2 a state's law defining marriage, both must be read together when evaluating Ms. Windsor's
 3 constitutional rights. Indeed, they are inseparable—the Administration cannot determine a
 4 claimant's eligibility for survivor's benefits without looking to state law. *See* 20 C.F.R. §
 5 404.345 (“To decide your relationship as the insured's widow or widower, we look to the laws of
 6 the State where the insured had a permanent home when he or she died.”). Therefore,
 7 considering the constitutionality of the entire statutory scheme necessarily includes considering
 8 both the federal scheme and the underlying state statutes upon which it relies.

9 Regarding the level of scrutiny to be applied, although Ninth Circuit cases prior to
 10 *Obergefell* referred to the “rational basis” test (*see, e.g., Diaz v. Brewer*, 656 F.3d 1008 (9th Cir.
 11 2011)) or the “heightened scrutiny” test (*see, e.g., SmithKline Beecham Corp. v. Abbott Labs.*,
 12 740 F.3d 471, 489 (9th Cir. 2014); *Latta*, 771 F.3d at 465), the Court in *Obergefell* did not refer
 13 to those levels of scrutiny and simply concluded that the right to marry is a “fundamental right”
 14 and that same-sex couples may not be deprived of that right. 135 S. Ct. 2598. Although prior
 15 cases, and the Administration, discuss which standard to apply based on whether the statute was
 16 “facially neutral” or whether the statute reflected discriminatory “intent” (*see, e.g., Pers. Adm'r*
 17 *of Mass. v. Feeney*, 442 U.S. 256, 273–76 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev.*
 18 *Corp.*, 429 U.S. 252, 264–65 (1977); Dkt. 63, at 20–22), *Obergefell* did not attempt to categorize
 19 statutes in the same way.

20 Instead, Justice Kennedy, writing for the majority, noted that interpreting the
 21 Constitution,

22 has not been reduced to any formula. . . . Rather, it requires courts to exercise
 23 reasoned judgment in identifying interests of the person so fundamental that the
 24 State must accord them its respect. . . . That process is guided by . . . broad
 principles rather than specific requirements. History and tradition guide and

discipline this inquiry but do not set its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present. *Obergefell*, 135 S. Ct. at 2598 (citations omitted). And the Supreme Court in a later case, again without reciting a formula or enunciating which level of scrutiny applied—if either, reiterated its admonition that same-sex couples were entitled to same “constellation of benefits” conferred on opposite sex couples. *See Pavan v. Smith*, ___ U.S. ___, 137 S. Ct. 2075, 2078 (2017) (internal quotation marks and citation omitted).

The Court also recognized that we should be vigilant to eliminate the remaining vestiges of discrimination that may linger after the formal recognition of constitutional rights, such as the right to marry.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insights reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S. Ct. at 2598.

Inextricable from the Court’s discussion of the importance of marriage is the “constellation of benefits that the States have linked to marriage.” *Id.* at 2601. The Court then states that “[t]his harm results in more than just material burdens.” *Id.* Thus it is clear that, in declaring same-sex marriage a fundamental right, the Court intended to cure material burdens withheld from same-sex couples, as well as dignitary ones.

Cognizant of the Supreme Court’s most recent rulings, and using its language, this court has evaluated whether the present denial of federal survivor benefits based on Washington state’s past denial of Ms. Thornton’s fundamental right to same-sex marriage “inflict[s] substantial and

1 continuing harm on same-sex couples” in violation of the Fifth and Fourteenth Amendments.
2 *See id.* at 2607.

3 **2. Substantial and Continuing Harm**

4 The case before the court clearly demonstrates such substantial and continuing harm.
5 Since the Social Security statutes define an applicant’s relationship with the insured based on the
6 laws of the state where they resided at the time of the insured’s death, the federal statutes are
7 inextricably tied to the state statute that defined their relationship. *See* 42 U.S.C. § 416(c)(1),
8 (g)(1), (h)(1)(A). Because Ms. Brown was legally prohibited by the State of Washington from
9 marrying Ms. Thornton, denying Ms. Thornton survivor’s benefits inflicts on her a “substantial
10 and continuing harm” arising from the unconstitutional denial of her fundamental right to marry.

11 The Administration argues that Ms. Thornton was not denied benefits because she had a
12 same-sex partner but because she had not been married to her partner prior to Ms. Brown’s
13 death. *See* Dkt. 63, at 10–11. But this argument sidesteps the obvious—it was a state law of
14 precisely the type declared unconstitutional by *Obergefell* that denied Ms. Thornton the right and
15 the opportunity of marrying Ms. Brown. Granted, the Administration no longer interprets the
16 federal statute to exclude same-sex marriage. But the Administration has not re-interpreted the
17 federal statute’s reliance on unconstitutional state laws prohibiting same-sex marriage to comply
18 with *Obergefell*. Rather it remains part of the “a long history of disapproval of their
19 relationships” to deny same-sex couples the same rights as opposite sex couples. *Obergefell*, 135
20 S. Ct. at 2604. The Administration failed to account for this impact on surviving same-sex
21 partners after *Obergefell*, in the same way that it accounted for the Court’s ruling protecting
22 same-sex marriage after *Windsor*. Its failure to address this “substantial and continuing harm”
23 requires the court to address it now.

1 Ms. Thornton's constitutional rights have been impacted in three ways. First, her
2 fundamental right to marry the person of her choice impacted her rights under the due process
3 clauses of the Fifth and Fourteenth Amendment. *See Obergefell*, 135 S. Ct. at 2604. Second,
4 because she could have married Ms. Brown if she had been a man, she was discriminated against
5 because she was a woman. *See Latta*, 771 F.3d at 479–80 (Berzon, J., concurring). Finally, the
6 bar against same-sex marriage was part of a “long history” of discrimination against same-sex
7 couples. *See Obergefell*, 135 S. Ct. at 2594. Therefore, she was also discriminated against
8 because of her sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Latta*, 771
9 F.3d at 467; *Diaz*, 656 F.3d at 1014; *In re Fonberg*, 736 F.3d 901, 903 (9th Cir. Jud. Council
10 2013). Whether considered separately or together, the impacts on Ms. Thornton's constitutional
11 rights are substantial.

12 The Administration asserts that it was not the Administration, but the state that
13 discriminated—and that the federal statute at issue is not subject to the constitutional infirmities
14 of the state law upon which it relies. The parties have not cited to, and this Court has not found,
15 any Ninth Circuit case addressing whether a federal statute denying survivor's benefits based on
16 an unconstitutional state statute is also unconstitutional. For guidance, the Court finds
17 persuasive the decision in *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982), which considered an
18 analogous circumstance.

19 In that case, the Administration denied survivor's benefits to the child of a deceased
20 father based on a Georgia state statute that did not recognize equal intestate rights of a child born
21 outside of wedlock. *Id.* at 312. Although Georgia law was subsequently changed to remove this
22 barrier, at the time of the father's death, the applicant child did not qualify to recover benefits
23 because of those barriers. *Id.* at 314–15. Therefore, although the Social Security survivor statute
24

1 was facially neutral, the court found that the Administration was denying survivor's benefits
 2 based on a state statute that was substantially similar to other state statutes that had been found to
 3 be unconstitutional by the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Lalli v.*
 4 *Lalli*, 439 U.S. 259 (1978). *Cox*, 684 F.2d at 320.

5 We are convinced that the structure and language of 42 U.S.C.[] § 416(h)(2)(A) of
 6 the Social Security Act, referring to state law on intestate inheritance, makes
 7 relevant the issue of the constitutionality of a particular state law. . . . When a
 8 [state] statute conferring benefits on a certain class of persons is held
 9 unconstitutional due to a violation of the equal protection clause, then the unlawful
 10 discrimination or classification must be eradicated, either by granting the benefits
 to the inappropriately excluded class, or by denying them to the class theretofore
 benefitted unlawfully. *Welsh v. United States*, 398 U.S. 333, 361 . . . (1970). In
 such cases . . . , the normal judicial remedy is to extend the benefits to the deprived
 group. *See Califano v. Westcott*, 443 U.S. 76 . . . (1979) (citing numerous other
 cases involving federal benefits statutes).

11 *Id.* at 317.

12 Indeed, when other courts have reviewed cases where the benefits of marriage have been
 13 wrongfully denied, they have consistently allowed the deprived person the opportunity of the full
 14 benefits that had been taken from them. *See, e.g., Trimble*, 430 U.S. at 768–76 (denial of Social
 15 Security survivor benefits to children born out of wedlock under state law); *Weinberger v.*
 16 *Wiesenfeld*, 420 U.S. 636 (1975) (denial of Social Security survivor benefits to a widower, when
 17 the same benefits would be extended to a widow); *Diaz*, 656 F.3d at 1014 (denial of spousal
 18 health insurance benefits to same-sex partners who could not marry under state law); *cf. Loving*
 19 *v. Virginia*, 388 U.S. 1 (1967) (vacating convictions under state law banning interracial
 20 marriages).

21 The same principle should be applied here. Although the Social Security statute is
 22 facially neutral, it relies on state statutes that have been rendered unconstitutional by the
 23 Supreme Court. The Social Security statute incorporating the unconstitutional state statute
 24

1 should not be enforced in a way that continues to deprive a class of people of their constitutional
 2 rights. “To hold otherwise would in effect amount to a retroactive interference with vested
 3 rights. . . .” *Cox*, 684 F.2d at 318. Because Ms. Thornton can demonstrate that but for the
 4 unconstitutional barrier to same-sex marriage, she would have been a “Widow,” as that term is
 5 otherwise defined, she should be able to recover the same benefits as other persons similarly
 6 situated.

7 This is not a case that seeks to re-do history. Although Ms. Thornton and Ms. Brown
 8 were denied the right to marry prior to Ms. Brown’s death, there was no injury to Ms. Thornton
 9 until after her claim was adjudicated by the ALJ. Ms. Thornton suffers a substantial and
 10 continuing harm every month that she is denied her monthly survivor benefit. Therefore, even
 11 though Ms. Brown did not live long enough to see the fulfillment of her efforts towards marriage
 12 equality, Ms. Thornton did. Granting her benefits would alleviate this “substantial and
 13 continuing harm.”

14 **3. The Administration’s Arguments**

15 The Administration argues that the subject regulation is simply administrative line-
 16 drawing and that in the absence of any evidence of improper purpose to discriminate, the statute
 17 should be enforced even if it has a disparate impact on a class of persons who have suffered from
 18 discrimination in the past. *See* Dkt. 63, at 21–22. The Administration relies on *Feeney*, 442 U.S.
 19 256. In *Feeney*, the Supreme Court upheld a state statute that gave hiring preference to
 20 “veterans” even though it had a disparate impact on women. *Id.* at 281. The Court found that
 21 over 98% of those persons who benefited from this preference were men. *Id.* at 270. Although
 22 the Supreme Court acknowledged that this statute had a disparate impact on women, it held that
 23 “the history of discrimination against women in the military is not on trial in this case.” *Id.* at
 24

1 278. Using a “rational basis” test, the Court ruled that the Fourteenth Amendment cannot be
2 used for all “ill-advised laws” and upheld the statute. *Id.* at 281.

3 As noted earlier, this “rational basis” analysis has evolved since this 1979 ruling and may
4 not be applied the same today. Even so, Ms. Thornton’s case is different than *Feeney* in several
5 respects. First, in *Feeney*, the Court determined that the state legislature did not enact the statute
6 with the “collateral goal of keeping women in a stereotypic and predefined place in the
7 Massachusetts Civil Service.” *Id.* at 279. The Court held that the statute was adopted to favor
8 veterans—and not for the purpose of discriminating against women. *Id.* at 275. And, indeed, at
9 least some—although a paltry few—women benefited from the hiring preference. *Id.* at 276–77.

10 In Ms. Thornton’s case, however, Washington State’s ban on same-sex marriage, by
11 definition, excluded an entire class of same-sex couples—she was not just restricted, but rather
12 barred from marrying Ms. Brown. In Ms. Thornton’s case, as in *Obergefell*, state laws
13 prohibiting same-sex marriage were part of “a long history of disapproval of their relationships,”
14 and “this denial to same-sex couples of the right to marry works a grave and continuing harm.”
15 *Obergefell*, 135 S. Ct. at 2604. Therefore, even if the same “rational basis” standard used in
16 *Feeney* were to be applied here, it would not be controlling of the outcome.

17 Moreover, the Ninth Circuit applied the rational basis test for denying same-sex couples
18 state-sponsored healthcare benefits in *Diaz* and found that state laws prohibiting same sex
19 domestic partners from receiving state sponsored healthcare did not further a legitimate state
20 interest because they were based on a desire to harm a politically unpopular group. *Diaz*, 656
21 F.3d at 1014–15.

1 Even if the “rational basis” test applies, which is questionable, none of the reasons
2 provided by the Administration can provide a rational basis for denying Ms. Thornton survivor’s
3 benefits.

4 *a. Fraudulent Marriages*

5 The Administration argues that the marriage requirement reduces the risk of fraudulent
6 requests for benefits and that it should be able to impose reasonable limitations on persons
7 recovering benefits even though it inevitably requires denying benefits to some persons who may
8 otherwise be deserving. *See* Dkt. 63, at 23–26 (citing *Weinberger v. Salfi*, 422 U.S. 749 (1975)).

9 In *Salfi*, the Court was considering the “duration-of-relationship” requirement in the same
10 survivor’s benefits statute at issue in this case. *Id.* at 754. Ms. Salfi and her husband had only
11 been married less than a month when he died suddenly. *Id.* She applied for benefits arguing that
12 the nine-month limitation should not be applied to her. *Id.* The Court disagreed. It concluded
13 that even when there is an “inherent imprecision” in the defining statute, “a noncontractual claim
14 to receive funds from the public treasury enjoys no constitutionally protected status[.]” *Id.* at
15 773. Since there was no evidence of invidious discrimination against the claimant, the statute
16 was upheld. *Id.* at 772. Ms. Thornton, however, had been subjected to invidious discrimination
17 by the state. Unlike Ms. Salfi, who chose not to marry her husband until shortly before his death,
18 Ms. Thornton was denied the choice to marry Ms. Brown at all.

19 Perhaps administrative line-drawing may be used as a valid reason to deny benefits to
20 couples who had the legal right to marry, but it could not justify the deprivation of survivor’s
21 benefits to same-sex couples who were denied the right to marry. Therefore, barring Ms.
22 Thornton from recovering the same benefits that would be granted to other persons who enjoyed
23 the benefits of marriage cannot be justified on this basis.

b. Administrative Efficiency

Second, the Administration argues that “administrative efficiency” justifies the nine-month marriage requirement, again citing *Salfi*. Dkt. 63, at 23. In *Salfi*, the statute’s purpose was to avoid the “administrative difficulties of individual eligibility determinations.” 422 U.S. at 784. Ms. Thornton’s constitutional rights outweigh any alleged administrative burden. See *SmithKline*, 740 F.3d at 482. “[T]he Constitution recognizes higher values than speed and efficiency.” *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

Moreover, the Administration is clearly capable of making these case-by-case determinations and does so in every claim it processes. It already has regulations in place to make individualized determinations regarding benefits for people in common-law marriages. See 20 C.F.R. § 404.726. Indeed, the Administration is equipped with myriad internal policies for making the exact factual determinations required to determine whether Ms. Thornton and others similarly situated would have married their partner but for the unconstitutional state law. It recognizes exceptions to the nine-month marriage requirement under certain circumstances when the claimant had “a good faith belief” that the marriage was valid, but the wedding ceremony was flawed for some technical reason. See 42 U.S.C. § 416(h)(1)(B)(i). It also waives the nine-month marriage requirement when state law prevented a claimant from marrying the insured deceased spouse sooner because of a former spouse’s institutionalization. See 42 U.S.C. § 416(c)(2), (g)(2).

In that instance, the Administration makes a factual determination to determine if the applicant “would have . . . married” at least nine months before but could not do so “because such [marriage] would have been unlawful . . . under the laws of the State[.]” See 42 U.S.C. §

1 416(g)(2). It also deems the nine-month requirement satisfied, under certain circumstances, if
 2 the wage earner dies within that period of time and the death is either accidental or occurs when
 3 the wage earner is on active duty and death occurs in the line of duty. *See* 42 U.S.C § 416(k).
 4 Interestingly, the Administration also *denies or reduces* benefits to certain same-sex couples who
 5 otherwise would have been married under state law. “[W]e recognize same-sex couples as
 6 married in all states for purposes of determining eligibility or payment amount for SSI, *including*
 7 *some same-sex couples we earlier determined were unmarried.*” POMS GN 00210.800
 8 (emphasis added).⁶

9 Contrary to the Administration’s argument that this would result in “a morass of
 10 individual determinations about the nature of particular relationships” (Dkt. 63, at 26), nothing
 11 systemically prevents the Administration from making individual determinations. If anything,
 12 the administrative process has demonstrated that it is fully capable of making similar
 13 determinations and already does so regularly.

14 *c. Financial Interdependence*

15 Third, the Administration argues that the statute should be upheld because it is rationally
 16 related to awarding benefits only to those who are most likely to have been in a financially
 17 interdependent relationship with the deceased wage-earner. Dkt. 63, at 23. Aside from the fact
 18 that no Supreme Court decision has yet upheld this reason as a rational basis for denying
 19 constitutional rights (*see* Dkt. 63 at 27), it certainly does not apply here. If anything, the
 20 opposite applies. There is no reason to believe that same-sex couples rely any less on their
 21 partners for financial support than opposite sex couples. And denying same-sex couples the
 22 same benefits because they could not lawfully marry deprives them of the contributions that they
 23

24 ⁶ <https://secure.ssa.gov/poms.nsf/lnx/0200210800>.

1 have paid from their earnings over the years, “in order to contribute to the fund out of which
 2 benefits would be paid to others.” *Weinberger*, 420 U.S. at 645 (striking down provisions of
 3 Social Security Act discriminating based on sex). This is exactly the type of harm that was
 4 recognized by the Supreme Court in *Windsor*, when the Court noted that denying survivor
 5 benefits to same-sex couples who were lawfully married “denies or reduces benefits allowed to
 6 families upon the loss of a spouse and parent, benefits that are an integral part of family
 7 security.” 570 U.S. at 773 (quotation marks and internal citation omitted). If such a rationale
 8 could not be used to deny benefits to same-sex couples who were lawfully married, surely it
 9 could not be used as a reason to deny benefits to same-sex couples who could *not* lawfully
 10 marry.

11 For the above reasons, the undersigned finds that denying Ms. Thornton’s application for
 12 survivor benefits based on an unconstitutional state law violates her due process and equal
 13 protection rights under the Fifth and Fourteenth Amendments.

14 **III. RECOMMENDATION ON MOTION FOR CLASS CERTIFICATION**

15 **A. Overview**

16 Ms. Thornton is also seeking to represent a class of persons similarly situated pursuant to
 17 Fed. R. Civ. P. 23(a) and (b)(2). Dkt. 46, at 6. Specifically, Ms. Thornton seeks certification
 18 under Fed. R. Civ. P. 23(b)(2), which states that a class may be certified where “final injunctive
 19 relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” Dkt.
 20 54, at 34. Ms. Thornton is a member of the National Committee to Preserve Social Security and
 21 Medicare (“National Committee”). Dkt. 46, at 6. The National Committee alleges that it has
 22 “over two million members and supporters nationwide” and “is committed to ensuring that social
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1 security benefits are widely accessible, including to same-sex spouses.” Dkt. 46, at 5. It has not
2 sought to be named as a class representative.

3 The Administration opposes class certification, stating that relief should be granted, if at
4 all, only on Ms. Thornton’s claim. Dkt. 63, at 38.

5 Because this statutory scheme is applied nationwide, this court agrees that the class
6 should include all persons nationwide. But plaintiffs’ proposed class is overbroad because
7 jurisdiction is limited to only those persons who have presented their claim to the
8 Administration. And, the Administration—not the court—should be principally responsible for
9 addressing how the law applies in each case. Finally, in order to avoid interfering with litigation
10 in another district that potentially involves similar, but not identical issues, the class definition
11 should specifically exclude those putative class members. Therefore, as discussed *infra*, this
12 court recommends that the class be defined in relation to the constitutional issue presented and
13 should include,

14 All persons nationwide who presented claims for social security survivor’s
15 benefits based on the work history of their same-sex partner and who were barred
16 from satisfying the marriage requirements for such benefits because of applicable
laws that prohibited same-sex marriage. This class is intended to exclude any
putative class members in *Ely v. Saul*, No. 4:18-cv-00557-BPV (D. Ariz.)

17 The undersigned recommends certification of this class under Rule 23(b)(2) and, based
18 on finding that the statutory scheme at issue is unconstitutional as discussed *supra*, Part II, the
19 court should issue injunctive relief prohibiting the Administration from denying claims by class
20 members on the basis of the unconstitutional statutory scheme.

21 **B. Jurisdiction**

22 “Section 405(g) specifies the following requirements for judicial review: (1) a final
23 decision of the Secretary made after a hearing; (2) commencement of a civil action within 60
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1 days after the mailing of notice of such decision (or within such further time as the Secretary
2 may allow); and (3) filing of the action in an appropriate district court[.]” *Salfi*, 422 U.S. at 763–
3 64. The second and third—but not the first—requirement may be waived. *Id.* at 764. The first
4 requirement is not waivable because it is “central to the requisite grant of subject-matter
5 jurisdiction[.]” *Id.*

6 A class action may be brought under § 405(g) challenging the constitutionality of a
7 statutory scheme used to determine eligibility for benefits. *See id.* at 753 (involving a class
8 action challenging the nine-month-duration marriage requirement in the definition of “widow”
9 and “child” in 42 U.S.C. § 416); *see also Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).
10 Although here, the Administration argues that a class action is not an allowable form of relief, in
11 *Yamasaki*, the Supreme Court rejected this argument and held that “class relief is appropriate” in
12 cases under § 405(g). 442 U.S. at 700. The Court explained—

13 class relief is consistent with the need for case-by-case adjudication emphasized by
14 the Secretary, at least so long as the membership of the class is limited to those who
15 meet the requirements of § [4]05(g). . . . Where the district court has jurisdiction
16 over the claim of each individual member of the class, Rule 23 provides a procedure
17 by which the court may exercise that jurisdiction over the various individual claims
18 in a single proceeding.
19 *Id.* at 701 (internal citation omitted).

20 Indeed, a class action is “peculiarly appropriate” where—as here—a single question of
21 law applies to each member of the class nationwide. *Id.* Such a class action may seek injunctive
22 relief—“[i]njunctive relief can play an essential role in § [4]05(g) litigation.” *Id.* at 705.

23 As will be discussed *infra*, the court does not have § 405(g) jurisdiction over class
24 members who have not presented their claims to the Administration. *See Salfi*, 422 U.S. at 764.
The undersigned addresses these issues more fully in the discussion of the class definition. *See*
infra, part(III)(C).

1 C. Class Definition

2 As noted above, Ms. Thornton, as class representative, has moved for class certification.
3 Dkt. 53, at 34. She proposes that the class be identified as—

4 [a]ll persons nationwide who (i) presented or will present claims for Social Security
5 survivor's benefits based on the work history of a same-sex partner; (ii) were denied
6 or will be denied Social Security spousal survivor's benefits based on not satisfying
7 the marriage requirements of the Social Security Act; and (iii) were barred from
8 marrying and otherwise satisfying such requirements because of unconstitutional
9 laws prohibiting same-sex couples from marriage prior to their partner's death.
10 Dkt. 53, at 35.

11 The class definition proposed by plaintiffs requires modification to account for several
12 issues raised by the Administration.

13 1. Presentment

14 Plaintiffs' proposed class definition runs afoul of the jurisdictional limitation that class
15 members have presented claims, as it includes people who have not yet presented their claims to
16 the Administration for benefits. *See* Dkt. 53, at 35 (including putative class members who have
17 "presented *or will present* claims" (Emphasis added.)). The Administration asserts that this court
18 lacks jurisdiction over unnamed plaintiffs who have not presented their claims to the
19 Administration. Dkt. 63, at 39. The undersigned agrees.

20 Section 405(g) grants federal court jurisdiction only where claims have been properly
21 presented before the agency and where a final agency decision has been issued. *See Salfi*, 422
22 U.S. at 763–64.

23 The Supreme Court recently reaffirmed prior holdings that presenting a claim to the
24 Administration is a jurisdictional requirement for judicial review. *Smith v. Berryhill*, 139 S. Ct.
1765, 1773 (2019) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)). This is not
waivable. In *Salfi*, the Court examined whether unnamed plaintiffs in a class action who had not

presented their claim to the Administration could proceed—the Court held that they could not. 422 U.S. at 763 (“We conclude that [§ 405(g)] provided jurisdiction only as to the named appellees and not as to the unnamed members of the class.”); *see also id.* at 758, n. 6 (“The entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not in any event award benefits absent an application.”); *accord Grijalva v. Shalala*, No. 93-711 TUC ACM, 1995 WL 523609, at *6 (D. Ariz. July 18, 1995) (in defining a class of claimants for Medicare benefits, ruling that “other individuals who have not filed claims for benefits with the Secretary, such as future claimants of Medicare benefits, cannot satisfy the non-waivable presentment requirement of § 405(g).”).

Although plaintiffs cite cases that suggest otherwise, those cases are not controlling in this district or do not involve § 405(g)’s presentment requirement. *See* Dkt. 64, at 25. Therefore, the undersigned recommends certification of a class including only those who have presented claims to the Administration.

2. Exhaustion

Generally, persons applying for benefits are required to exhaust the administrative process before applying to the court for relief. *See Smith*, 139 S. Ct. at 1773–74; *Salfi*, 422 U.S. at 766. Unlike the presentment requirement, the exhaustion requirement may either be waived by the Administration or excused by the court. *See Smith*, 139 S. Ct. at 1773–74.

The Administration has not waived exhaustion with respect to the claims in this case. *See* Dkt. 49, at 13–14. The Administration claims that the court should not excuse exhaustion because this is a fact-specific inquiry for each claimant and cannot be resolved *en masse*. Dkt. 63, at 40.

1 Plaintiffs argue that the Court should excuse the exhaustion requirement in this matter
2 because exhausting the administrative claims process would have been futile. Dkt. 53, at 37.

3 The undersigned agrees with plaintiffs but modifies the proposed class definition to make
4 it clear that the Administration—and not the court—will be tasked with implementing
5 appropriate regulations to comply with this court’s proposed injunction.

6 Waiver is appropriate where the action is “collateral to a substantive claim of
7 entitlement,” the economic hardship suffered by plaintiffs while awaiting exhaustion constitutes
8 irreparable injury, and there is no advantage to compiling an administrative record. *See Johnson*,
9 2 F.3d at 921–23. Citing the Supreme Court decision in *Bowen v. New York*, 476 U.S. 467
10 (1986), district courts have held that exhaustion requirements may be waived where exhaustion
11 would be futile. *See also Salfi*, 422 U.S. at 767. Where there is no dispute regarding the facts or
12 application of statutory law, and the only issue is the constitutionality of a statutory requirement,
13 waiver of exhaustion is particularly appropriate. *See Salfi*, 422 U.S. at 766–67.

14 While each case may present unique questions regarding whether or not any particular
15 claimant would have been married to his or her deceased partner but for their state’s law
16 prohibiting such a marriage, answering those unique questions is not determinative of the
17 constitutional issue presented to this court. Because the Administration does not even consider
18 claims for persons who were not married, requiring claimants to exhaust the administrative
19 remedies would be futile. As noted above, although the Administration is uniquely qualified to
20 make these factual, case-by-case determinations, it has chosen not to do so because of its policy
21 not to consider such claims. It is not hard to imagine that a person who files a claim and is
22 informed that the claim was denied because of the Administration’s policy prohibiting such
23 claims would simply choose to give up rather than exhaust the administrative process. That is
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1 the definition of “futile.” Because this challenge to the policy “rises and falls on its own,
2 separate from the merits of their claim for benefits,” putative class members should not be
3 excluded simply because they failed to exhaust their administrative remedies. *See Johnson*, 2
4 F.3d 921–22 (internal quotation marks and citation omitted); *see also Mathews*, 424 U.S. at 330–
5 31 (finding that a constitutional challenge is collateral to the substantive claim of entitlement;
6 therefore, waiving exhaustion is proper.)

7 Therefore, the undersigned recommends certifying a class that would include even those
8 who have not yet exhausted their claims.

9 **3. 60-Day Statute of Limitations**

10 The Administration also argues that the purported class should not include those who
11 received a final agency decision but did not bring suit in federal court within 60 days, as required
12 by 42 U.S.C. § 405(g). Although the Administration has not waived this defense (*see* Dkt. 49, at
13 13), it concedes that this is not jurisdictional and that the court may excuse it. Dkt. 63, at 41
14 (citing *Vernon v. Heckler*, 811 F.2d 1274, 1278 (9th Cir. 1987)).

15 In *Bowen*, the Supreme Court held that while the Administration will usually determine
16 whether or not to extend the 60-day limitation on filing a district court appeal after exhaustion of
17 administrative remedies, “cases may arise where the equities in favor of tolling the limitations
18 period are so great that deference to the agency’s judgment is inappropriate.” 476 U.S. at 480
19 (internal quotation marks and citation omitted).

20 Here, the equities favor waiving the 60-day filing requirement for those persons who
21 filed claims. Since the undersigned is recommending that persons be excused from exhausting
22 their administrative remedies, and exhaustion is usually a requirement before filing a court
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1 action, it stands to reason that the requirement to file a federal action within 60 days of the
2 agency's final decision should be waived as well.

3 Therefore, the undersigned recommends certifying a class that includes those who have
4 not filed a federal action within 60 days of a final agency decision.

5 **4. "Applicable law."**

6 In their supplemental briefing regarding numerosity, the parties also addressed the
7 Court's proposal to limit the class to claimants unable to obtain survivor's benefits due to "their
8 state's laws prohibiting same-sex marriage." Dkt. 69, at 1. Plaintiffs objected to this language
9 on the basis that it would not include same-sex couples who lived in jurisdictions such as Puerto
10 Rico or the District of Columbia. *See* Dkt. 71, at 9. The Administration countered that "their
11 state" was an appropriate limitation as the regulations track similar language. *See* Dkt. 73, at 8.

12 The legal question presented is whether *any* law banning same-sex marriage impacted a
13 claimant's right to recover benefits. The constitutional question is not limited to any particular
14 state's borders. It is intended to include the District of Columbia, Puerto Rico, and any other
15 jurisdiction that previously banned same-sex marriage. Therefore, the undersigned recommends
16 that the class definition more broadly include any person who was denied benefits based on
17 "applicable law" that banned same-sex marriage.

18 **D. Rule 23(a) Prerequisites**

19 Having determined the appropriate class definition, the undersigned turns to whether
20 plaintiffs have shown that the proposed class satisfies Rule 23(a)'s prerequisites to maintain a
21 class action.

22 Under Rule 23(a), one or more class members may represent the class so long as "(1) the
23 class is so numerous that joinder of all members is impracticable; (2) there are questions of law
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1 or fact common to the class; (3) the claims or defenses of the representative parties are typical of
 2 the claims or defenses of the class; and (4) the representative parties will fairly and adequately
 3 protect the interests of the class. Fed. R. Civ. P. 23(a)(1)–(4). The court has an independent duty
 4 to conduct a meaningful inquiry into the requisites of Rule 23(a). *Int’l Woodworkers of Am. v.*
 5 *Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267 (4th Cir. 1981). Class certification is
 6 proper “only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule
 7 23(a) have been satisfied[.]’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)
 8 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

9 **1. Numerosity**

10 A class representative may be sued on behalf of all members where “the class is so
 11 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. Rule 23(a)(1). Although
 12 the parties did not dispute that the proposed class is sufficiently numerous (*see* Dkt. 63, at 42–
 13 26), the undersigned requested additional briefing on this issue to satisfy the court’s duty to
 14 conduct a meaningful inquiry into whether the Rule 23(a) prerequisites were satisfied. *See* Dkt.
 15 69.

16 Plaintiff posited that “there are at least several dozen individuals throughout the country
 17 who are still living today whose loved ones died before marriage was available to them in their
 18 state.” Dkt. 53, at 41. In response to the Court’s request for supplemental briefing, plaintiff
 19 asserts that even limiting the proposed class to only those who have already presented claims
 20 results in a sufficiently numerous class since joinder of persons throughout the country is
 21 impracticable and class members by definition have limited financial resources to press their
 22 own claims. *See* Dkt. 71, at 4–8. Moreover, plaintiff asserts that “[g]iven the thousands of
 23 same-sex couples who were barred from marriage over time, and the reality that some
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1 individuals within that group died before marriage was available thus leaving a surviving partner,
2 only a small fraction would need to have presented claims to make joinder impracticable.” Dkt.
3 71, at 7–8. Plaintiff relies on evidence that at least 22 people have inquired about benefits for
4 surviving same-sex partners since 2013 and have appeared likely to fall within the class
5 definition—representing only a small minority of those actually included. *See* Dkt. 71, at 8.

6 “[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or
7 more members and will find that it has not been satisfied when the class comprises 21 or fewer.”
8 *Celano v. Marriott Int’l*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). The court may infer that the
9 numerosity requirement is met by “general knowledge” and “common sense.” *See Nw.*
10 *Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 325 F.R.D. 669, 679 (W.D.
11 Wash. 2018). “[T]he numerosity requirement is relaxed for classes seeking injunctive relief.”
12 *Skaar v. Wilkie*, __ Vet. App. __, 2019 WL 6647587, at *21 (Dec. 6, 2019) (citing *Sueoka v.*
13 *United States*, 101 F. App’x 649, 653 (9th Cir. 2004)). When injunctive relief is the only relief
14 requested, even speculative or conclusory representations regarding numerosity will suffice to
15 permit class certification. *Horn v. Ass’n Wholesale Grocers, Inc.*, 555 F.2d 270, 275–76 (10th
16 Cir. 1977).

17 The Administration asserts that plaintiffs’ evidence about “22 phone records of callers”
18 inquiring about survivors’ benefits is inadequate because it is hearsay and does not specify
19 individuals who presented their claims. *See* Dkt. 73, at 5–6. To the extent that the
20 Administration raises hearsay objections, the Court denies them— “[i]n determining whether
21 class certification is appropriate under Rule 23, courts may consider all material evidence
22 submitted by the parties . . . and need not consider the ultimate admissibility of evidence
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1 proffered by the parties.” *Blair v. CBE Grp., Inc.*, 309 F.R.D. 621, 627 (S.D. Cal. 2015) (internal
2 quotation marks and citation omitted).

3 Here, relying on common sense and the more relaxed numerosity standard when
4 addressing the proposed injunctive relief, the undersigned concludes that plaintiffs have satisfied
5 this requirement. As a practical matter, it is impossible to know how many claimants nationwide
6 were impacted by the Administration’s blanket refusal to award benefits to the defined class.
7 And, although this information may be exclusively within the records of the Administration, it
8 has not chosen to offer up such information. Nevertheless, considering the widespread and
9 growing population of same-sex marriages in this country, it stands to reason that a significant
10 number of same-sex surviving partners would fall within the purview of the proposed
11 injunction—at least more than 26, and probably more than 40 nationwide. Therefore, in light of
12 the fact that plaintiff seeks solely injunctive relief, the undersigned finds that plaintiff has
13 adequately satisfied the numerosity prerequisite to bring a class action under 23(b)(2).

14 **2. Commonality**

15 The commonality requirement states that there must be “questions of law or fact common
16 to the class.” Fed. R. Civ. P. Rule 23(a)(2). The Administration asserts that the commonality
17 requirement is not met because there are too many factual determinations and that plaintiffs’
18 claim is “[m]erely alleging a ‘violation of the same provision of law’ [which] does not satisfy
19 commonality.” Dkt. 63, at 34 (quoting *B.K. v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019)).

20 Both sides cite *Wal-Mart Stores, Inc.*, for their opposite positions on this issue. The
21 undersigned agrees that this case is determinative and aligns with plaintiffs’ position. In *Wal-*
22 *Mart*, the Court held that a class action against Wal-Mart because of alleged unequal pay and
23 promotions for women employees was not appropriate under Title VII of the Civil Rights Act.
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1 564 U.S. at 343. Fatally, plaintiffs in that case could not point to any single corporate policy
2 against women but rather a “corporate culture” that permitted bias against women. *Id.* at 345.
3 The Court concluded that there was no “common contention” that could be resolved by a class-
4 wide resolution. *See id.* at 350. Each employment decision may or may not have been driven by
5 the alleged discriminatory “corporate culture.” *Id.* Since plaintiffs were seeking an award of
6 money damages, each determination would require individualized resolution.

7 Here, the common contention is class-wide—can *any* same-sex partner recover survivor
8 benefits when the couple was prevented from marrying by state law? The Administration’s
9 policy against awarding benefits to same-sex survivors in that circumstance is absolute.

10 Although each claimant will have an individual case to be made to support his or her claim for
11 survivor benefits, certifying the class will give each class member the opportunity to make that
12 claim—something they have been unable to do in the past. Plaintiffs seek an agency-wide
13 injunction. The *Wal-Mart* decision makes clear that when the issue to be resolved “is central to
14 the validity of each one of the claims in one stroke,” a class-wide resolution is appropriate. *See*
15 *id.* at 350. Such is the case here.

16 In a case decided in this District, *Moussouris v. Microsoft*, the court denied class
17 certification in a sexual discrimination claim very much like the *Wal-Mart* case. *See* C15-1483
18 JLR, 2018 WL 3328418, at *26 (W.D. Wash. June 25, 2018), *affirmed*, __ F. App’x __, 2019
19 WL 7176331 (9th Cir. Dec. 24, 2019). Again, Microsoft’s employment practices delegated
20 discretionary employment decisions broadly, and plaintiffs could not identify any single
21 employment practice that presented a common question sufficient to certify a class. *Id.* at *23.
22 The court noted that without the “glue” that held all of the individual claims of discrimination
23 together, class action was unwarranted. *Id.* Here, the “glue” is the immutable position of the
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Administration that a surviving same-sex partner can never recover survivor's benefits even if state law prohibited her from marrying. Class certification to resolve that common question overrides the individual determinations that the Administration will make in each claimant's case. Plaintiffs have met that burden here.

3. Typicality

The representative party must have "claims or defenses . . . [that] are typical of the claims or defenses of the class." Fed. R. Civ. P. Rule 23(a)(3). The Administration argues that Ms. Thornton's claims are not typical of the class because the factual circumstances surrounding her relationship with Ms. Brown may not be typical of other class members. For example, the Administration argues that some couples may have eventually broken up or remarried. Dkt. 63, at 42–43. And the Administration argues that Ms. Thornton and Ms. Brown are the rare exception who would be able to prove unequivocally that but for state law they would have married but that many other same-sex couples would not have similarly compelling stories. Dkt. 63, at 44–45.

Plaintiffs counter that these individual questions for each claimant are not before the court but will be investigated at the administrative level when the putative class members present their claims for benefits. Plaintiffs assert that they are seeking threshold entry for class members who are similarly situated to Ms. Thornton to have their claims reassessed on equal footing with opposite-sex couples when seeking survival benefits. Dkt. 53, at 44–45.

As noted by the Court in *Wal-Mart*, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." 564 U.S. at 349 n.5 (internal quotation marks and citation omitted). Without repeating the discussion above, suffice it to say that Ms. Thornton's claim is typical of all other putative class members to the extent that they all suffered the same constitutional injury.

How that plays out in each individual claim will be decided at the administrative level. But they should not be denied the opportunity of making that claim by a blanket refusal to recognize the continuing impact of state laws barred same-sex marriage.

4. Adequate Representation

The representative party must “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. Rule 23(a)(4). “Adequate representation depends on the qualification of counsel for the representatives, an absence of antagonism, a sharing of interest between representatives and absentees, and the unlikelihood that the suit is collusive.” *Local Joint Exec. Bd. of Culinary /Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (internal quotation marks and citations omitted).

The Administration does not address this issue in its opposition to class certification other than by repeating its arguments against typicality. *See* Dkt. 63, at 46 n.22. Nor does the Administration challenge plaintiffs’ choice of class counsel. *See* Dkt 63. The undersigned has examined the materials submitted by Ms. Thornton and her counsel. Plaintiffs’ counsel is competent and experienced in relevant constitutional litigation and class actions and has presented sufficient information to the court to satisfy this requirement. No party has identified any conflicts that would prevent Ms. Thornton or her counsel from adequately representing the class.

E. Nationwide Injunctive Relief

The Administration argues that even if a class action may be certified under § 405(g), the class cannot be nationwide. Dkt. 63, at 47. The Court recommends certifying a class that includes class members outside of Washington State and granting injunctive relief that extends to all class members. Such relief is appropriate in this case for the reasons discussed below.

1 In *Yamasaki*, the Court authorized a nationwide class under Rule 23(b)(2), explaining—
 2 Nothing in Rule 23, however, limits the geographical scope of a class action
 3 that is brought in conformity with that Rule. Since the class here was certified in
 4 accordance with Rule 23(b)(2), the limitations on class size associated with Rule
 5 23(b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with
 6 principles of equity jurisprudence, since *the scope of injunctive relief is dictated by*
 7 *the extent of the violation established*, not by the geographical extent of the plaintiff
 8 class. . . . If a class action is otherwise proper, and if jurisdiction lies over the claims
 9 of the members of the class, the fact that the class is nationwide in scope does not
 10 necessarily mean that the relief afforded the plaintiffs will be more burdensome
 11 than necessary to redress the complaining parties.
 12 442 U.S. at 702 (emphasis added) (citation omitted); *see also L.A. Haven Hospice, Inc. v.*
 13 *Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (“Our Supreme Court has cautioned that ‘injunctive
 14 relief should be no more burdensome to the defendant than necessary to provide complete relief
 15 to the plaintiffs’ before the court. . . . *This rule applies with special force when there is no class*
 16 *certification.*”) (quoting *Yamasaki*, 442 U.S. at 702)). Therefore, since the denial of survivor
 17 benefits at issue in this case is being applied nationally, because class certification is appropriate,
 18 and because the Court has jurisdiction over all claims presented by the class members, the
 19 undersigned recommends that the class be certified nationally.

20 Recent Ninth Circuit case law dictates that before this court recommends nationwide
 21 relief, the court must analyze whether nationwide relief is “‘*necessary to give prevailing parties*
 22 *the relief to which they are entitled.*’” *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1030
 23 (9th Cir. 2019) (quoting *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018)). Of note, *East*
 24 *Bay* did not involve a class action lawsuit, as is the case here. *See E. Bay Sanctuary Covenant v.*
Barr, 385 F. Supp. 3d 922, 935 (N.D. Cal. July 24, 2019). The class action rules are specifically
 designed to address the question of geographic scope and, therefore, are not of a similar nature as
 the type of nationwide injunction of concern in *East Bay Sanctuary* and similar cases cited by
 that court.

1 The court in *East Bay Sanctuary* also points out that nation-wide injunctions are only
2 appropriate in “‘exceptional cases’” because they may “‘stymie novel legal challenges and robust
3 debate’ arising in different judicial districts.” 934 F.3d at 1029 (quoting *City & Cty. of S.F. v.*
4 *Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)). That does not appear to be the case here.
5 Although the Administration advised the court during oral argument that there are cases in other
6 districts that involve same-sex partner survivor benefits, the Administration also stated that this
7 case is unique in that it involves a claimant whose partner died before state law allowed for
8 same-sex marriage and whose claim was denied after *Obergefell* was decided. Therefore, it does
9 not appear that this court will be interfering with the decisions of other courts that may be
10 considering similar, but not identical, issues. Indeed, the Court recommends that the class be re-
11 defined to explicitly exclude members of the *Ely* class action. *See supra*, part III(A).

12 Finally, the court in *East Bay Sanctuary* cautions that the injunction should be narrowly
13 tailored to remedy the specific harm shown. 934 F.3d at 1029. The proposed injunction would
14 be narrowly tailored to address only the constitutional issue and not address each individual set
15 of facts that may arise in each claim. That would be more properly addressed by the
16 Administration during the claims process. Tellingly, in *Yamasaki*, the Court was reviewing two
17 class action cases interpreting the constitutionality of the same Social Security provision that
18 were consolidated for consideration. 442 U.S. at 690. One district court limited the class to
19 residents in the State of Hawaii. *Id.* at 687. The other district court authorized a nation-wide
20 class. *See id.* at 689–90. The Court concluded that the nationwide class was not inappropriate
21 because it “saves the resources of both the courts and the parties by permitting an issue
22 potentially affecting every social security beneficiary to be litigated in an economical fashion
23 under Rule 23.” *Id.* at 701.

For the foregoing reasons, the court concludes that granting nationwide relief is “*necessary* to give prevailing parties the relief to which they are entitled.” *E. Bay Sanctuary Covenant*, 934 F.3d at 1030 (internal quotation marks and citation omitted).

F. Mandamus Jurisdiction and the National Committee

Plaintiffs argue in the alternative that if jurisdiction does not lie under § 405(g) for their claims, then this Court has mandamus jurisdiction under 28 U.S.C. § 1361. *See* Dkt. 53, at 36–37. The Court disagrees and recommends the exercise of jurisdiction exclusively under § 405(g).

The Supreme Court has not yet decided whether 42 U.S.C. § 405(h)—the portion of § 405 barring review “except as herein provided”—is the sole means of reviewing a decision of the Commissioner of Social Security. *See, e.g., Yamasaki*, 442 U.S. at 698; *see also Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (“We have on numerous occasions declined to decide whether the third sentence of § 405(h) bars mandamus jurisdiction over claims arising under the Social Security Act[.]”).

The undersigned agrees with plaintiff’s primary argument that jurisdiction lies under § 405(g). Moreover, mandamus—which is an extraordinary remedy—is only available to compel a federal official to perform a duty if “(1) the individual’s claim is clear and certain; (2) the officials’ duty is non-discretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.” *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (internal quotation marks and citation omitted). Here, (3) is not satisfied because it appears that an adequate remedy is available under § 405(g)—certifying the class defined above and granting judgment in their favor of the plaintiff class, enjoining the Administration’s unconstitutional blanket denial of benefits to class members.

1 Plaintiffs argue that if the Court declines to include in the class definition those who have
2 yet to present claims to the Administration because of § 405(g)'s presentment requirement, then
3 jurisdiction must sound under § 1361 to afford those who have not-yet-presented claims full
4 relief. Plaintiffs rely on *Briggs v. Sullivan*, 886 F.2d 1132, 1141–42 (9th Cir. 1989)—a case
5 holding that claimants with unexhausted claims may bring actions under § 1361. As this case
6 involved claims that were presented to the Administration, it is not helpful here. *See Briggs*, 886
7 F.2d at 1139. Plaintiffs offer no authority to support the conclusion that a writ of mandamus lies
8 where claims have not been presented to the Administration. Therefore, to the extent that they
9 argue that a remedy lies in mandamus for claims that were not presented to the Administration,
10 the undersigned is not persuaded.

11 For these reasons, the undersigned concludes that § 405(g) jurisdiction is sufficient to
12 provide complete relief to the parties and sees no reason to grant 28 U.S.C. § 1361 mandamus
13 relief to the National Committee—whose role in this case has been fulfilled simply by
14 “support[ing]” Ms. Thornton’s claim. *See* Dkt. 46, at 16.

15 Again, it should be noted that the National Committee does not seek to represent the class
16 for purposes of § 405 jurisdiction. Because § 405 jurisdiction is appropriate and because the
17 National Committee neither seeks to be certified as a class representative nor to assert any claims
18 independent of its members—who are class members (*see* Dkt. 46, at 4, 16; Dkt. 53, at 11, 33)—
19 claims brought by the National Committee are redundant with those brought by the class.
20 Therefore, the undersigned recommends that the National Committee be dismissed as a party.

21 CONCLUSION

22 Based on these reasons, and the relevant record, the undersigned recommends that
23 plaintiffs’ motion for class certification be granted and the class be defined as set forth above.
24

1 Plaintiff Thornton should be identified as the class representative, class counsel should be
 2 appointed, and the court should issue a nation-wide **INJUNCTION** requiring the Administration
 3 to consider whether survivors of same-sex couples who were denied their constitutional right to
 4 marry would otherwise qualify for survivor's benefits.

5 Further, as to Ms. Thornton, personally, the court recommends that this matter be
 6 **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the
 7 Commissioner for further proceedings consistent with this Report and Recommendation.


8 Finally, the National Committee should be dismissed, as its function has been fulfilled.

9 **JUDGMENT** should be for **PLAINTIFF THORNTON** and the **CLASS** and the case
 10 should be closed.

11 **OBJECTIONS**

12 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
 13 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
 14 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
 15 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
 16 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on February 21,
 17 2020, as noted in the caption.

18 Dated this 31st day of January, 2020.

19
 20
 21 

22 J. Richard Creatura
 23 United States Magistrate Judge
 24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN J. THORNTON, *et al.*,

Plaintiffs,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 2:18-cv-01409-JLR-JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Magistrate Judge J. Richard Creatura, any objections to the Report and Recommendation, and the remaining record, does hereby find and **ORDER** as follows:

(1) The Report and Recommendation is **ADOPTED**;

(2) plaintiff National Committee is dismissed from this matter;

(3) the motion for class certification (Dkt. 53) is granted for a class represented by Ms. Thornton and defined as—

///

1 All persons nationwide who presented claims for social security survivor's benefits
2 based on the work history of their same-sex partner and who were barred from
3 satisfying the marriage requirements for such benefits because of applicable laws
that prohibited same-sex marriage. This class is intended to exclude any putative
class members in *Ely v. Saul*, No. 4:18-cv-00557-BPV (D. Ariz.);

4 (4) relief is granted to the class in the form of a nationwide injunction requiring the
5 Administration to consider whether to grant survivor's benefits to survivors of same-sex couples
6 who would qualify for survivor's benefits other than their inability to lawfully marry because of
7 applicable law prohibiting same-sex marriage;

8 (5) Ms. Thornton's claim is reversed and remanded for further proceedings consistent
9 with this Order and the Report and Recommendation; and

10 (6) judgment is for plaintiff Thornton and the class, and the case is closed.

11 The Clerk shall send copies of this Order to plaintiffs and to Magistrate Judge Creatura.

12 Dated this ___ day of [Pick the date].

13
14 _____
James L. Robart
15 United States District Judge
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24

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN J. THORNTON, *et al.*,

Plaintiffs,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NO. 2:18-cv-01409-JLR-JRC

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT plaintiff National Committee is dismissed from this matter and the motion for class certification (Dkt. 53) is granted. Relief is granted to the class in the form of a nationwide injunction requiring the Administration to consider whether to grant surviving spouse benefits to survivors of same-sex couples who would qualify for survivor's benefits other than the their inability to lawfully marry because of applicable law prohibiting same-sex marriage. Ms. Thornton's claim is reversed and remanded for further proceedings consistent with the Court's Order. Judgment is for plaintiff Thornton and the class, and the case is closed.

Dated [Pick the date]

William M. McCool

Clerk of Court

s/[Author]

Deputy Clerk