



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

October 13, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *Ely v. Commissioner of Social Security Administration*, No. 18-cv-557 (D. Ariz. May 27, 2020), *appeal filed* No. 20-16427 (9th Cir.); *Driggs v. Commissioner of Social Security Administration*, No. 18-cv-3915 (D. Ariz. May 29, 2020), *appeal filed* No. 20-16426 (9th Cir.); *Schmoll v. Commissioner of Social Security Administration*, No. 19-cv-4542 (N.D. Cal. June 15, 2020), *appeal filed* No. 20-16445 (9th Cir.); *Thornton v. Commissioner of Social Security Administration*, No. 18-cv-1409 (W.D. Wash. Nov. 25, 2020), *appeal filed* Nos. 21-35067 & 21-35068 (9th Cir.)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek further review of the above-referenced decisions of the United States District Courts for the District of Arizona, the Northern District of California, and the Western District of Washington. Copies of the decisions are attached.

These cases involve the criteria for determining certain benefits under the Social Security Act, 42 U.S.C. 301 *et seq.* Under Title II of the Act, retirees are entitled to Social Security insurance benefits based upon either their own work history, or, if a retiree is a “widow” or “widower,” the work history of their deceased spouse. 42 U.S.C. 402(e)-(f). To qualify as a “widow” or “widower,” an applicant generally must show that the courts of the State where the deceased was domiciled “would find that [the] applicant and [the] insured individual were validly married,” 42 U.S.C. 416(h)(1)(A)(i), and, subject to exceptions not relevant here, that the marriage lasted for “not less than nine months,” 42 U.S.C. 416(c)(1) and (g)(1). If the relevant state courts would not find that the couple was validly married, the applicant can nevertheless qualify as a widow or widower if the applicant would be entitled to a spouse’s share of intestate inheritance under the laws of the State of domicile. 42 U.S.C. 416(h)(1)(A)(ii).

Plaintiffs in these cases are individuals who have sought or will seek Social Security insurance benefits based on the work history of a deceased same-sex partner or spouse, but who were not married for at least nine months before their spouse’s death because their marriage was prevented or delayed by state laws prohibiting same-sex marriage. The Supreme Court held those state laws unconstitutional in *Obergefell v. Hodges*, 576 U.S. 644, 680-681 (2015). In

each of the four cases, the district court held that the Social Security Administration (SSA) engaged in unconstitutional discrimination when it denied plaintiffs' claims for benefits because they had failed to satisfy the nine-month duration-of-marriage requirement.

Two of the cases are class actions. In *Ely v. Commissioner of Social Security*, No. 18-cv-557 (D. Ariz.), the district court certified a class of all persons who had been denied widow's or widower's benefits or faced future denial of benefits "based upon not being married to a same-sex spouse for at least nine months at the time of the spouse's death" and who "were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months." Order at 23, Dkt. No. 51 (May 27, 2020). The court enjoined SSA from denying benefits to these class members "without consideration of whether survivors of same-sex couples who were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months would otherwise qualify." *Id.* at 31. In *Thornton v. Saul*, No. 18-cv-1409 (W.D. Wash.), the district court certified a class of all persons "who presented claims for" widow's or widower's benefits on or before November 25, 2020 (the district court determined it lacked jurisdiction as to other claimants), and "who were barred from satisfying" the Social Security Act's "marriage requirements for such benefits because of applicable laws that prohibited same-sex marriage." Order at 16, Dkt. No. 86 (Sept. 11, 2020). The district court ordered SSA to re-adjudicate all class members' claims and determine whether the class members would have qualified for widow's or widower's benefits "but for applicable laws that prohibited same sex marriage." Order at 7, Dkt. No. 93 (Nov. 24, 2020). The *Ely* and *Thornton* injunctions were not stayed, and the SSA has been adjudicating claims from class members in compliance with the district courts' orders.

The Department of Justice filed notices of appeal on behalf of the SSA in all four cases. The plaintiffs in *Thornton* also cross-appealed to expand the district court's certified class to include all persons who have presented or will present claims for benefits after November 25, 2020. The Department filed opening briefs in *Ely*, *Driggs*, and *Schmoll* on November 2, 2020.

The Department continues to believe that the nine-month duration-of-marriage requirement for widow's and widower's insurance benefits is constitutional, and the Department will defend the constitutionality of that requirement in the future. Nonetheless, the Department has concluded that continued litigation of that question is not warranted in the particular circumstances presented by these cases and has instead agreed to a settlement. That decision was based on a combination of several considerations.

First, these cases involve a closed and relatively small class of people affected by circumstances that are unlikely to recur in the future: People who have applied or will apply for Social Security insurance benefits based upon the work history of a same-sex spouse or partner; who did not satisfy the nine-month duration-of-marriage requirement; but who would have satisfied that requirement had they not been prevented from marrying by a state law declared unconstitutional in *Obergefell*. By definition, that class includes only people whose same-sex spouse or partner died before or shortly after the 2015 decision *Obergefell*. The SSA has identified and sent notices to approximately 700 potential class members, which SSA believes includes all living potential class members who can be identified with reasonable diligence.

Second, continuing to pursue these appeals would carry litigation risk. The district court decisions in these cases are not precedential. An adverse decision from the Ninth Circuit would establish appellate precedent, and a broad constitutional ruling from that court could threaten to affect not just the narrow class at issue here, but also other important governmental interests involving the application of equal protection principles to federal statutes and regulations. Continued appeals could also produce adverse precedent on district courts' jurisdiction over claims by individuals who have yet to seek benefits from the SSA.

Third, even if the United States had prevailed in the pending appeals, that would not necessarily have settled the dispute over the affected individuals' entitlement to widow's and widower's benefits. Under the statute, eligibility for benefits depends on whether courts in the state where the deceased partner was domiciled would find that the couple was "validly married" or that the surviving partner would be entitled to a spouse's share of intestate inheritance. 42 U.S.C. 416(h)(1)(A). The application of those criteria to the members of the plaintiff class thus depends on how state courts would apply state law and *Obergefell* in the unusual circumstances presented here—that is, on whether the courts of the relevant State would treat a same-sex couple as having been married, or would award a spouse's share of intestate inheritance, based on a showing that the couple *would have* married but for a state law later held unconstitutional in *Obergefell*. In States that recognize common-law marriage, most courts have held that *Obergefell* retroactively entitles a same-sex couple to establish a common-law marriage on the same terms as an opposite-sex couple. See *Lafleur v. Pyfer*, 479 P.3d 869, 882-883 (Colo. 2021) (collecting cases). In other States, a member of the plaintiff class could similarly claim an entitlement to Social Security benefits based on an assertion that the relevant state courts would have granted them marital status or a spouse's share of intestate inheritance—or that *Obergefell* would require state courts to do so. It appears that few state courts have considered that question. Resolving such claims would require the SSA to engage in a cumbersome state-by-state inquiry, which would be complicated by the lack of applicable state precedent. And claimants who disagreed with the SSA's determination could challenge it in court, leading to further litigation.

Under these unusual circumstances the Department has determined that settlement rather than continued litigation is in the best interests of the United States. Under the terms of the settlement, the parties will jointly stipulate to a dismissal of all appeals on November 1, 2021. Please let me know if I can be of any further assistance in this matter.

Sincerely,



Brian H. Fletcher
Acting Solicitor General

Enclosures