

Congress of the United States
Washington, DC 20515

December 1, 2022

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Dear Secretary Yellen and Commissioner Rettig:

We write to urge you to close a loophole in Internal Revenue Service (IRS) policy that denies same-sex couples their survivor retirement benefits in certain cases. The Employee Retirement Income Security Act allows qualified retirement plans to establish a one-year marriage duration requirement for survivor's benefits, and in 2014 the IRS issued guidance clarifying that these rules apply equally to same-sex couples — meaning if a same-sex couple was not married for the required length of time prior to one spouse's death, the surviving spouse would not qualify for pension survivor benefits. However, in many cases, couples were not legally allowed to be married for long enough to meet that requirement, since unconstitutional laws barring same-sex couples from marriage remained in effect until 2015. For same-sex survivors for whom marriage equality came too late, the one-year marriage duration requirement poses a total bar to accessing their loved one's benefits. At present, this discriminatory treatment will prevent thousands of same-sex spouses from accessing the benefits they are owed.

Several cases have been brought to our attention in which a retirement plan refuses to provide full benefits to a surviving spouse because they were not married one year prior to their spouse's death, despite the fact that the couple was legally barred from marrying for that length of time. Denying them access to survivor benefits on this basis, when they were legally not *able* to marry, is not in line with the intent of the law and allows continued unconstitutional discrimination against same-sex couples.

Since the Supreme Court's landmark *Obergefell v. Hodges* decision in June 2015, Americans in same-sex relationships have had the legal right to receive the full extent of protections offered by marriage.¹ This decision allowed for tens of thousands of LGBTQ+ Americans to be legally recognized as married, including receiving the "rights and benefits of survivors."²

Prior to that decision, in 2013 the Supreme Court ruled in *United States v. Windsor* that the federal government cannot discriminate against married same-sex couples for the purposes of determining federal benefits and protections.³ Following this decision, the IRS issued guidance that retirement plans must recognize that legally wed same-sex spouses must stand on equal terms with different-sex spouses and provide full benefits.⁴ This guidance ensured that many

¹See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

² 576 U.S. 644, 670 (2015).

³ See *United States v. Windsor*, 570 U.S. 744 (2013).

⁴ See IRS Notice 2014-19, available at <https://www.irs.gov/pub/irs-drop/n-14-19.pdf>

married LGBTQ+ Americans were eligible for the survivor benefits that they deserved and were treated equally under the law.

However, because the IRS' 2014 guidance had specified that retirement plans could still withhold benefits from survivors if the couple had been married for less than a year before the participant died,⁵ unjust discrimination continues against same-sex couples who were legally not able to meet that requirement.

The intent of the law post- *Windsor* and *Obergefell* is clear. While we understand that excluding same-sex couples who have been in long-term relationships from these benefits was not the intent of the marriage duration requirement, continuing to allow plans to deny recognition to same-sex relationships that were barred from meeting that requirement is robbing surviving spouses all over the country from receiving the benefits that they deserve. It is imperative that the IRS clarify that a qualified retirement plan will be disqualified if it fails to provide these same-sex survivors barred from marrying with an equal path to survivor's benefits despite their having been unable to meet the one-year marriage duration requirement before the employee's death. While plans would retain discretion regarding whether to have a marriage duration requirement at all, where they do so, such requirements should not be allowed to further penalize those same-sex survivors who already felt the sting of discrimination while their loved ones were still alive.

Forty-five of our colleagues in the Senate submitted a similar letter in December 2021 and urged the IRS to reconsider its April 2014 guidance.⁶ However, the guidance has not yet changed, and discriminatory practices by some qualified retirement plans continue. These individuals deserve justice and equality under the law, not continued discrimination.

In November 2021, the Social Security Administration accepted — after two courts ruled that their application of a marriage-related requirement in similar circumstances was unconstitutional — that its laws committed a similar injustice and announced that it would accept and/or reconsider claims for survivors benefits submitted by same-sex spouses and partners who had been legally barred from being married for at least nine months because of state marriage bans.⁷

The IRS does not need to wait for a court to similarly rule against them. The IRS should proactively follow a similar course to the Social Security Administration in order to correct the injustices that denied countless Americans the right to marry for centuries. We urge you to revise your guidance immediately.

⁵ Ibid.

⁶ See U.S. Senate Committee on Health, Education, Labor and Pensions, *Murray, Wyden Lead Senate Democrats in Call to Ensure All Eligible Same-Sex Couples Receive Pension Survivor Benefits*, Press Release (Dec. 10, 2021), <https://www.help.senate.gov/chair/newsroom/press/murray-wyden-lead-senate-democrats-in-call-to-ensure-all-eligible-same-sex-couples-receive-pension-survivor-benefits>

⁷ See *Ely v. Saul*, 572 F. Supp. 3d 751, 766 (D. Ariz. 2020) (“For married couples ... who could not meet the durational requirement due to the same-sex marriage ban in their home state, [SSA’s duration requirement] has ‘denied [these] married same-sex couples access to the “constellation of benefits that the Stat[e] ha[s] linked to marriage.”’) (quoting *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017); *Obergefell*, 576 U.S. at 670); *Thornton v. Comm’r of Soc. Security*, 570 F. Supp. 3d 1010, 1024 (W.D. Wash. 2020) (holding unconstitutional SSA’s denial of benefits to same-sex surviving partner barred from marriage before her partner’s death); Tara Siegel Bernard, *More Same-Sex Couples May Be Eligible for Social Security Survivor Benefits*, NY Times (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/business/social-security-same-sex-survivor-benefits.html>.

Thank you for your consideration, and we look forward to your response.

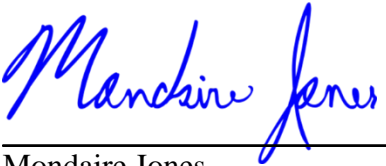
Sincerely,



Raul Ruiz, M.D.
Member of Congress



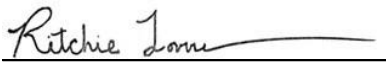
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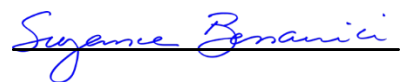
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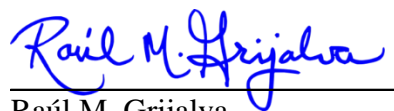
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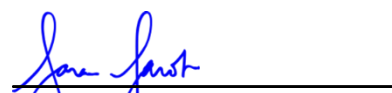
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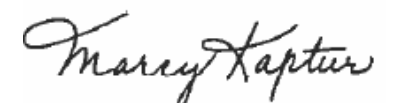
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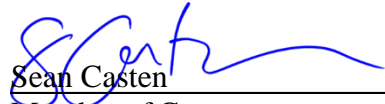
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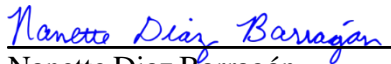
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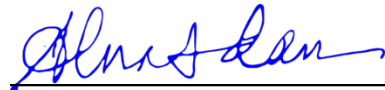
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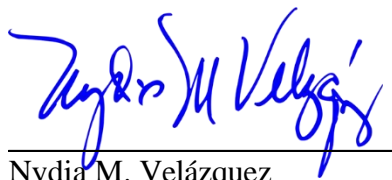
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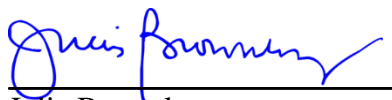
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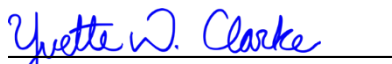
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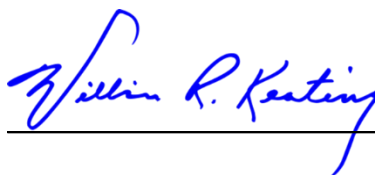
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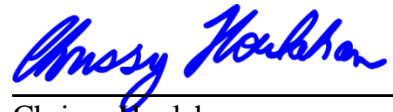
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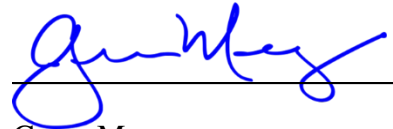
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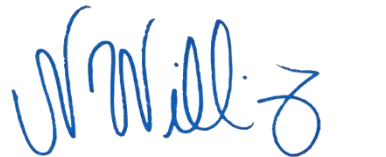
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