

United States Senate

WASHINGTON, DC 20510

June 30, 2022

The Honorable Denis McDonough
Secretary of Veterans Affairs
U.S. Department of Veterans Affairs
810 Vermont Ave. NW
Washington, D.C. 20420

Dear Secretary McDonough:

We write to inquire about the discriminatory treatment of certain same-sex veteran couples who are being denied full and complete spousal benefits. We must ensure that the unconstitutional laws of the past do not further harm the surviving loved ones of our country's LGBTQ+ veterans.

Each of our veterans and their spouses deserve the same quality care and services once they leave the military – no matter who they love. Our veterans and their families, who selflessly served our nation and have sacrificed so much, must be afforded the benefits they have so rightly earned. This is not only a matter of fairness and equity, it is the morally right thing to do.

Yet, we have recently heard from numerous survivors about issues they are facing when they attempt to access the full Department of Veterans Affairs (VA) benefits that they are entitled to under the law.

It has come to our attention that VA is refusing to deem same-sex marriages as having met the statutory marriage duration or deadline requirements when the couples were legally barred from marrying within that timeframe immediately before the veteran's death. For example, dependency and indemnity compensation (DIC) benefits may only be awarded if the surviving spouse was married to the veteran for at least one year or within 15 years of the veteran's

discharge,¹ and for eight years in the case of enhanced DIC benefits.² Survivor's pension benefits also have a one-year marriage duration requirement.³

By denying benefits in cases where same-sex couples failed to meet marriage duration requirements, VA ignores the reality that discriminatory marriage laws where these couples lived barred them from marrying—even though they were in loving, committed relationships and would have married earlier if they could. It was not until the Supreme Court held in *Obergefell v. Hodges* a constitutional right to marry that same-sex relationships were properly recognized, including the “constellation” of rights associated with marriage, such as the “rights and benefits of survivors.”⁴

After courts found unconstitutional the nine-month marriage duration requirement under the Social Security Act when applied to same-sex couples who were barred from meeting the requirement due to discriminatory marriage laws, the Social Security Administration began accepting and reconsidering claims for survivor benefits by same-sex spouses and partners who were unable to be married for the requisite nine months because of these bans on same-sex marriage.⁵ VA should do the same for veterans survivor benefits. Just like the unconstitutional laws banning same-sex couples from marrying, denials for veterans benefits that are tied to those marriage bans are unconstitutional too.

Specifically, VA must make eligible for benefits *bona fide* same-sex relationships where either the same-sex couple had married but were prevented from being married for the time required under the statute, or where they were prevented from marrying each other at all. While marriage duration requirements may be defensible as a proxy for detecting or deterring sham relationships between opposite-sex couples—who have always enjoyed the right to marry—they cannot serve that function for same-sex couples who were barred from marrying one another. Surviving same-sex partners and spouses of veterans who were unable to marry because of now unconstitutional marriage laws should not be denied benefits solely because they did not meet a strict marriage durational requirement. We urge VA to be mindful of other past, discriminatory practices that upended the lives our veterans and their families – like the Don't Ask, Don't Tell policy – and look primarily to the surviving partner's own statements about whether and when they would have married but for unconstitutional bans on same-sex marriage.

It also has come to our attention that VA's setting of effective dates for benefits furthers these unconstitutional same-sex marriage bans. After the Supreme Court held that the federal government must recognize same-sex marriages under state law in June 2013, the Department of Justice subsequently announced on September 4, 2013, that it would no longer enforce laws

¹ See 38 U.S.C. §§ 1304(2), 1318(c)(1).

² See 38 U.S.C. § 1311.

³ See 38 U.S.C. § 1541.

⁴ 576 U.S. 644, 670 (2015). The Supreme Court again acknowledged these rights in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), reiterating that “same-sex couples, no less than opposite-sex couples, *must have access*” to the benefits of marriage. *Id.* at 2078 (emphasis added).

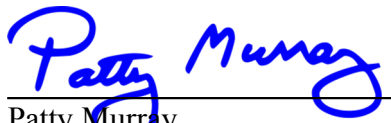
⁵ See Tara Siegel Bernard, *More Same-Sex Couples May be Eligible for Social Security Survivor Benefits*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/business/social-security-same-sex-survivor-benefits.html> (reporting that the Department of Justice and Social Security Administration dropped their Trump-era appeals to two class action lawsuit rulings, both of which had found that surviving same-sex partners who were not able to marry because it was not yet legal were denied fair access to Social Security survivor benefits).

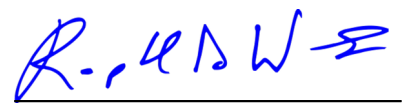
banning benefits to same-sex spouses of veterans.⁶ The VA General Counsel interpreted the announcement to apply retroactively but only “as to claims for benefits based on same-sex marriages that were pending on *direct* review as of” the date of the Attorney General’s announcement.⁷ For claims received or re-applied for *after* the Attorney General’s announcement, “such claims could receive an effective date up to one year prior to receipt of the claim, but in no event earlier than September 4, 2013.”⁸

By setting an effective date no earlier than September 4, 2013, VA is giving credence to the unconstitutional laws that prevented same-sex spouses from obtaining veterans benefits in the first place. A spouse married to an opposite-sex veteran would have had no issues receiving benefits immediately. However, VA is cutting short benefits of those in same-sex marriages who initially applied for such benefits and were denied due to bans on same-sex marriage. Moreover, any delay by a widow of a same-sex veteran in filing a claim for spousal benefits can be directly linked to VA’s enforcement of unconstitutional laws that would have led to the ultimate denial of such benefits. VA must stop its discriminatory treatment of veterans’ spouses based on their sex or sexual orientation, and apply retroactive effective dates as if the unconstitutional laws struck down by the Supreme Court were never enacted. Prior claims not previously appealed should be permitted to be reopened, as well as new claims to be filed.

We promise to take care of all our veterans after they serve our country, and that includes ensuring that their partners have access to full and complete spousal benefits. Correcting this error will help end the discriminatory treatment of potentially thousands of same-sex veteran couples and allow them to access the benefits they are owed. Thank you for your attention to this important matter, and we look forward to hearing back from you soon.

Sincerely,

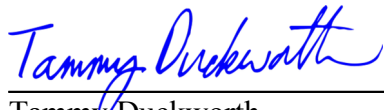

Patty Murray
United States Senator


Raphael G. Warnock
United States Senator


⁶ See Attorney General Holder Announces Move to Extend Veterans Benefits to Same-Sex Married Couples, Press Release (Sep. 4, 2013), *available at* <https://www.justice.gov/opa/pr/attorney-general-holder-announces-move-extend-veterans-benefits-same-sex-married-couples>.

⁷ Memorandum from Department of Veterans Affairs General Counsel to Under Secretary for Benefits, VAOPGCPREC 3-2014 at 4 (June 17, 2014) (emphasis added).

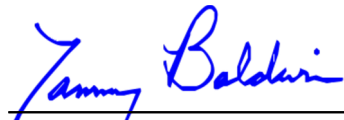
⁸ *Id.*



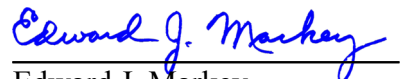
Tammy Duckworth
United States Senator



Richard Blumenthal
United States Senator



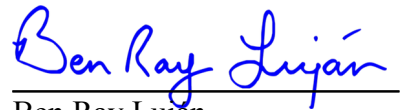
Tammy Baldwin
United States Senator



Edward J. Markey
United States Senator



Mazie K. Hirono
United States Senator



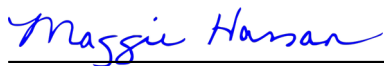
Ben Ray Lujan
United States Senator



Tina Smith
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Sheldon Whitehouse
United States Senator



Margaret Wood Hassan
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Christopher S. Murphy
United States Senator



Bernard Sanders
United States Senator



Kirsten Gillibrand
United States Senator



Martin Heinrich
United States Senator



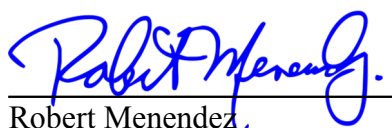
Richard J. Durbin
United States Senator



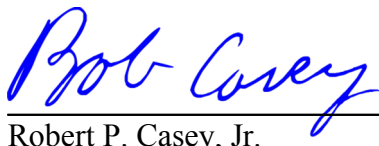
Elizabeth Warren
United States Senator



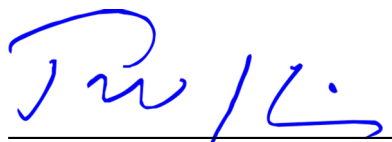
Amy Klobuchar
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Robert Menendez
United States Senator



Robert P. Casey, Jr.
United States Senator



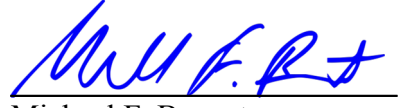
Tim Kaine
United States Senator



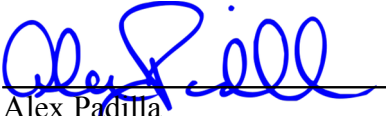
Charles E. Schumer
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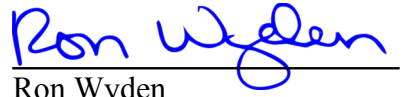
Catherine Cortez Masto
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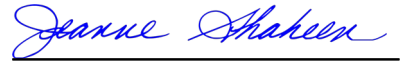
Alex Padilla
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Ron Wyden
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United States Senator



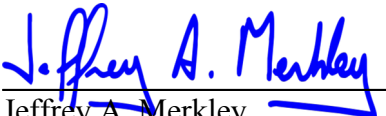
Jeanne Shaheen
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Mark R. Warner
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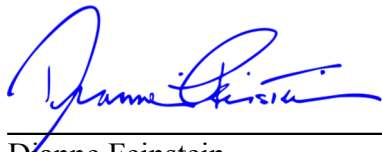
Cory A. Booker
United States Senator



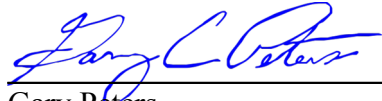
Jeffrey A. Merkley
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Jacky Rosen
United States Senator



Dianne Feinstein
United States Senator



Gary Peters
United States Senator



Sherrod Brown
United States Senator



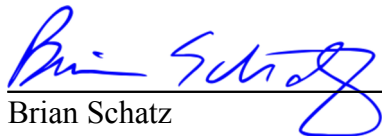
Maria Cantwell
United States Senator



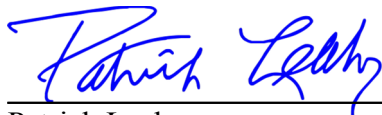
Christopher A. Coons
United States Senator



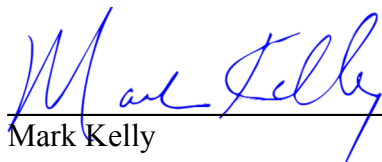
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United States Senator



Brian Schatz
United States Senator



Patrick Leahy
United States Senator



Mark Kelly
United States Senator