

# United States Senate

WASHINGTON, DC 20510

December 9, 2021

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 reconsider the guidance issued under the Obama Administration that permits certain qualified retirement plans to discriminate against providing survivor benefits to same-sex couples. We should not let the echoes of the bigotry that robbed so many people of the right to marry for so long rob them once again after they have lost their loved ones.

When the Supreme Court struck down state bans on same-sex marriage, tens of thousands of Americans rushed to get married. These LGBTQ+ Americans had been in committed relationships for years—some, for decades—and were finally able to have their love recognized under the law and receive all of the benefits that come with marriage. However, in a painful reminder of the inequality these couples have long faced, some in same-sex relationships who tragically lost their partner shortly after being married or before they were able to legally marry have also been kept from receiving survivor benefits.

For these surviving spouses or partners, difficulties arise where access to benefits depends on the length of their marriage. For example, under current law, certain qualified retirement plans must provide a qualified joint and survivor annuity (“QJSA”) upon retirement to married participants (and generally must provide a qualified preretirement survivor annuity (“QPSA”) to the surviving spouse of a married participant who dies before retirement).<sup>1</sup> A plan, however, does not have to treat a participant as married unless the participant and spouse have been married throughout the one-year period ending on the earlier of the annuity starting date or the date of the participant’s death.<sup>2</sup>

It has come to our attention that some retirement plans are refusing to deem same-sex marriages as having met the one-year requirement when the couples were legally barred from marrying within one-year of the participant’s death.

In 2014, the Internal Revenue Service (“IRS”) issued guidance following the Supreme Court’s decision in *U.S. v. Windsor*, which struck down Section 3 of the Defense of Marriage Act defining marriage as a union between one man and one woman.<sup>3</sup> In Notice 2014-19, the IRS required a qualified retirement plan to recognize the same-sex spouse of a participant as the

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<sup>1</sup> See 26 U.S.C. § 401(a)(11).

<sup>2</sup> See 26 U.S.C. § 417(d); see also 26 CFR § 1.401(a)-20 Q-25.

<sup>3</sup> 570 U.S. 744 (2013).

participant's spouse on and after June 26, 2013, if the participant was domiciled in a state that recognizes same-sex marriages, as well as on and after September 16, 2013, if the participant was domiciled in a state that does not recognize same-sex marriages.<sup>4</sup> The guidance, though, also notably provided that a qualified retirement plan will not be disqualified “merely because it did not recognize the same-sex spouse of a participant as a spouse before June 26, 2013.”

By permitting a plan to disregard same-sex relationships before that date, the IRS ignores the reality that many of these couples were barred from marriage because of discriminatory marriage laws where they lived—even though they were in loving, committed relationships and would have married earlier if they could. It was not until June 26, 2015, that same-sex relationships were properly recognized, when the Supreme Court held in *Obergefell v. Hodges* a constitutional right to marry, including the “constellation” of rights associated with marriage, such as the “rights and benefits of survivors.”<sup>5</sup>

The Social Security Administration recently recognized this reality and will accept and/or reconsider claims for survivor benefits by same-sex spouses and partners who were unable to be married for the required nine months because of state marriage bans.<sup>6</sup> The IRS should do the same for pension survivor benefits. Just as laws barring same-sex couples from marriage are unconstitutional, so, too, are exclusions from survivor benefits that are tied to those marriage bans.

Specifically, the IRS should revise its 2014 guidance to require that qualified retirement plans with marriage duration requirements must recognize as eligible for survivor benefits *bona fide* same-sex relationships where same-sex partners had married their loved ones but were denied equal access to benefits because they were prevented from being married for the time required under the plans' documents, or where they were prevented from marrying their loved ones at all. While the use of a marriage duration requirement may be justified as a proxy for detecting or deterring sham relationships between opposite-sex couples—who have always enjoyed the right to marry—it cannot serve that function for same-sex couples who were banned from marrying one another. Surviving same-sex partners and spouses who were unable to be married because of discriminatory marriage laws should be permitted to submit new claims for survivor benefits or reopen previously denied claims.

Correcting this error will end the discriminatory treatment of potentially thousands of same-sex partners and spouses, and allow them to access the benefits they are owed.

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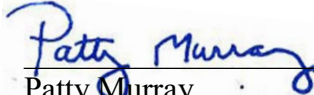
<sup>4</sup> See IRS Notice 2014-19, available at <https://www.irs.gov/pub/irs-drop/n-14-19.pdf>.

<sup>5</sup> 576 U.S. 644, 670 (2015). The Supreme Court further acknowledged these rights in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), repeating that “same-sex couples, no less than opposite-sex couples, *must have access*” to the benefits of marriage. *Id.* at 2078 (emphasis added).


<sup>6</sup> 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).

We look forward to hearing from you. Thank you in advance for your attention to this important matter.


Sincerely,


  
Patty Murray  
United States Senator


  
Ron Wyden  
United States Senator

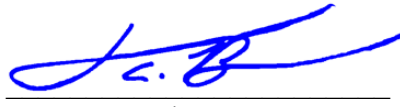
  
Elizabeth Warren  
United States Senator

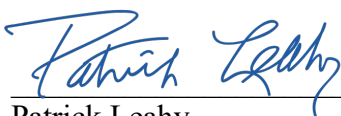
  
Sherrod Brown  
United States Senator

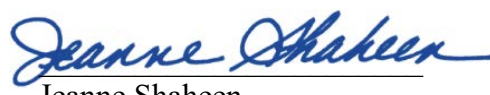
  
Edward J. Markey  
United States Senator


  
Robert P. Casey, Jr.  
United States Senator

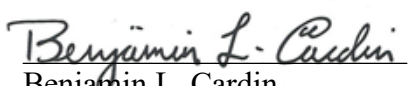
  
Tammy Baldwin  
United States Senator

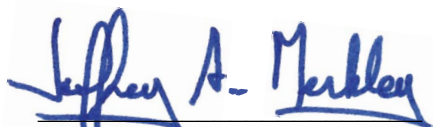
  
Cory A. Booker  
United States Senator

  
Patrick Leahy  
United States Senator

  
Jeanne Shaheen  
United States Senator

  
Tammy Duckworth  
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Benjamin L. Cardin  
United States Senator

  
Jeffrey A. Merkley  
United States Senator

  
Robert Menendez  
United States Senator



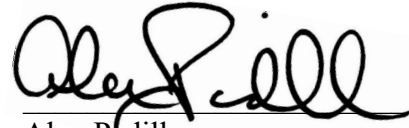
Margaret Wood Hassan  
United States Senator



Tim Kaine  
United States Senator



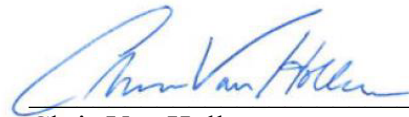
Richard Blumenthal  
United States Senator



Alex Padilla  
United States Senator



Catherine Cortez Masto  
United States Senator



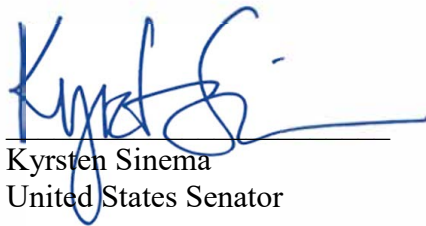
Chris Van Hollen  
United States Senator



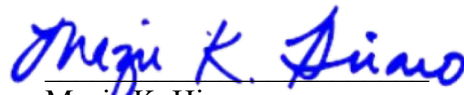
Sheldon Whitehouse  
United States Senator



Bernard Sanders  
United States Senator



Kyrsten Sinema  
United States Senator



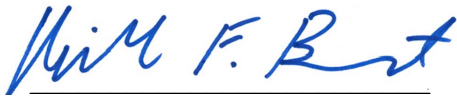
Mazie K. Hirono  
United States Senator



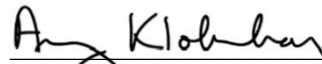
Richard J. Durbin  
United States Senator



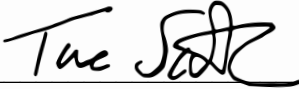
Reverend Raphael Warnock  
United States Senator



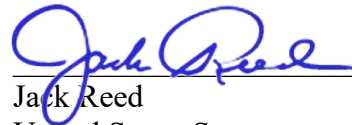
Michael F. Bennet  
United States Senator



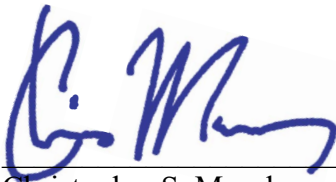
Amy Klobuchar  
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Tina Smith  
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Jack Reed  
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Christopher S. Murphy  
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Christopher A. Coons  
United States Senator



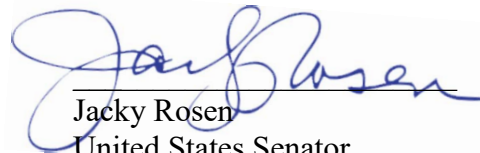
John Hickenlooper  
United States Senator



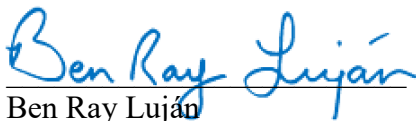
Maria Cantwell  
United States Senator

s/ Martin Heinrich

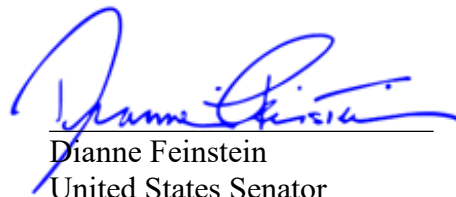
Martin Heinrich  
United States Senator



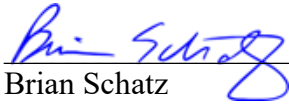
Jacky Rosen  
United States Senator



Ben Ray Lujan  
United States Senator



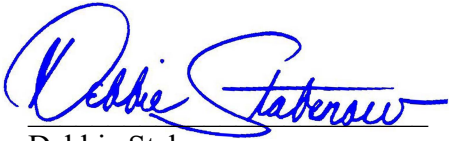
Dianne Feinstein  
United States Senator



Brian Schatz  
United States Senator



Kirsten Gillibrand  
United States Senator



Debbie Stabenow  
United States Senator



Mark Kelly  
United States Senator



Charles E. Schumer  
United States Senator



Gary C. Peters  
United States Senator

/s/ Thomas R. Carper

Thomas R. Carper  
United States Senator