UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
ERIC K. SHINSEKI,	)	
Secretary of Veteran Affairs,	)	Vet. App. No. 11-3083
	)	
Appellee,	)	
	)	
and	)	
	)	
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,	)	
	)	
Intervenor.	)	

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I. STATEMENT OF THE CASE

Ms. Cardona, a Navy veteran who served her country honorably appeals to this Court[1] for spousal disability benefits that she would be granted had she married a man. She was denied benefits because 38 U.S.C. § 101(31)[2] and 1 U.S.C. § 7 ("DOMA") define the terms "marriage" and "spouse" to exclude same-sex spouses.[3]

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[1] The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) concedes, as they must, that this Court has "held in a number of other cases that it has the authority to decide constitutional claims." BLAG Br. at 2-3 & n.4; 38 U.S.C. § 7252(a). In the present case, this Court has undisputed jurisdiction to review the decision of the Board of Veterans Appeals (BVA), including for conformity to constitutional requirements. 38 U.S.C. § 7261(a)(1) ("when presented, [the CAVC] shall decide all relevant questions of law, [and] interpret constitutional, statutory, and regulatory provisions"); 38 U.S.C. § 7261(a)(3)(B); *Raugust v. Shinseki*, 23 Vet. App. 475, 479 (2010) (CAVC "has jurisdiction to consider constitutional challenges to statutes . . . pursuant to 38 U.S.C. § 7261(A)(3)(b)"); *Dacoron v. Brown*, 4 Vet. App. 115, 119 (1993) (CAVC has "power to review claims pertaining to the constitutionality of statutory and regulatory provisions. Such authority is inherent in the Court's status as a court of law, and is expressly provided in 38 U.S.C. § 7261(a)(1)"). BLAG argues that this dispute is better left to the democratic process, BLAG Br. at 49-50, but that process elected a Congress which established this Court and conferred jurisdiction on it to review BVA decisions, including for conformity to constitutional requirements.

[2] 38 C.F.R. § 3.50 tracks and implements 38 U.S.C. § 101(31), and is unconstitutional for the same reasons as the statute as set forth in Appellant's principal and reply briefs.

[3] The facts in this case are not in dispute. R. at 10 (3-12); VA Br. at 3 n.1. BLAG "is unclear" whether a statement concerning RH's prior marriage was certified, BLAG Br. at 4, n.6, but does not contend that RH was improperly divorced, *Id.* at 4, n.6 ("R.H.'s prior marriage was dissolved in in [*sic*] 1997.") (citing *V.W. v. R.W.*, Docket. No. FA 0541135S (Conn. Super. Ct. Feb. 25, 1997)); the BVA found that Ms. Cardona and RH are validly married, R. at 8 (3-12); and the regulation on which BLAG relies requires a certified statement of divorce only of the *claimant*, not of the claimant's spouse. *See* Evidence of Dependents and Age, 61 FR 56626-01 (Nov. 4, 1996) (38 C.F.R. § 3.204 and §3.205(b), requiring proof of divorce, refer to "relationships between the *claimant* and another person") (emphasis added). In any event, this is not a finding adverse to the claimant, and therefore is not subject to review by this Court. 38 U.S.C. § 7261(a)(4) (CAVC may review only those findings of material fact that are "adverse to the claimant").

In her opening brief, Ms. Cardona demonstrated that 38 U.S.C. § 101(31) and DOMA violate the equal protection component of the Fifth Amendment Due Process Clause, the Tenth Amendment, and the Bill of Attainder Clause. Appellant Br. (Apr. 19, 2012). BLAG intervened only as to the equal protection claims, contending that the court should apply rational basis review and that the statutes satisfy this standard. BLAG Br. (Aug. 31, 2012). BLAG is wrong. DOMA and 38 U.S.C. § 101(31) are suspect under the law, and therefore subject to heightened scrutiny. Even under rational basis review, which in the particular context of this case would require closer than usual review,[4] the statutes are unconstitutional. Additionally, BLAG fails to advise this Court of, let alone address, several decisions issued after Ms. Cardona's opening brief that expressly reject each contention BLAG has raised here. Tellingly, BLAG offers no argument that the statutes satisfy heightened scrutiny or closer than usual review.

The Appellee Secretary of Veterans Affairs Eric K. Shinseki (VA) does not contest that Ms. Cardona has standing to bring a Tenth Amendment claim, that domestic relations have traditionally been regulated by the states, or that the statutes inflict punishment without a judicial trial as required for a bill of attainder claim. VA Br. (June 11, 2012) at 41-45. Accordingly, the only issues before this court are:

(1) Whether the statutes trigger heightened scrutiny or some other form of rational basis review;

[4] "Closer than usual review" is the language used by Judge Boudin, of the First Circuit, to explain the form of rational basis review applied by the Supreme Court in *Romer v. Evans*, 517 U.S. 620, 632 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8, 10 (1st Cir. 2012).

(2) Whether the statutes violate the equal protection component of the Fifth Amendment given the applicable level of review;

(3) Whether the statutes violate the Tenth Amendment by allowing the federal government to intrude upon a power historically held solely by states; and

(4) Whether the statutes target gay and lesbian individuals, and therefore are unconstitutional bills of attainder.

II. 38 U.S.C. § 101(31) AND DOMA VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Appellant Ms. Cardona and Appellee VA have demonstrated that 38 U.S.C. § 101(31) and DOMA are subject to heightened scrutiny because gays and lesbians constitute a suspect class based on the relevant factors identified by the Supreme Court. VA Br. at 8-23; Appellant Br. at 5-16; *see also* Br. of 15 Public Interest Orgs. & Legal Service Orgs. as Amici Curiae at 19-28. This Court should find that the statutes are subject to, and fail, heightened scrutiny. In the alternative, the statutes are subject to "closer than usual" rational basis review, which they cannot survive, because they uniquely burden a disfavored minority and invade a core domain of historic state regulation. *Massachusetts v. U.S. Dept. of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012).

Intervenor BLAG makes no attempt to refute the argument that gays and lesbians fit the criteria of a suspect class or to show that 38 U.S.C. § 101(31) and DOMA survive heightened scrutiny. BLAG ignores several recent decisions that have rejected the precise equal protection arguments that it advances in this appeal. In each of these recent

opinions, courts have held DOMA to be unconstitutional. *See Massachusetts*, 682 F.3d at 15 (applying "closer than usual" rational basis review); *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) (applying rational basis review); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 995 (9th Cir. 2012), *oral arg. stayed*, No. 12-15388 (9th Cir. July 27, 2012) (applying heightened scrutiny); *Pedersen v. Office of Pers. Mgmt.*, 2012 WL 3113883, at *48 (D. Conn. July 31, 2012) (holding that gays and lesbians constitute a suspect class).

Instead, BLAG claims that Ms. Cardona's challenge is foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972), and *Woodward v. United States*, 871 F.2d 1068 (1989). Yet, every court to consider BLAG's *Baker* argument has rejected it. *Massachusetts*, 682 F.3d at 8 (*Baker* does not foreclose DOMA challenge); *Windsor*, 833 F. Supp. 2d at 399-400 (same); *Pedersen*, 2012 WL 3113883 at *10-11 (same). Nor is Ms. Cardona's challenge barred by *Woodward*, as that decision was predicated upon *Bowers v. Hardwick*, 478 U.S. 186 (1986), which the Supreme Court reversed in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). VA Br. at 9-10; Appellant Br. at 15-16; Br. of 15 Public Interest Orgs. & Legal Service Orgs. as Amici Curiae at 15-19.

A. Ms. Cardona's challenge is not foreclosed by *Baker* or *Woodward*.

This Court is in no way foreclosed from hearing Ms. Cardona's challenge or holding that gays and lesbians comprise a suspect class. *Baker* does not reach the issues in this case and is therefore not dispositive. *Massachusetts*, 682 F.3d at 8; VA Br. at 8 n.5. *Baker* is a summary dismissal and as such only "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those

actions." *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker* presented a state constitutional question, *Pedersen*, 2012 WL 3113883, at *11, while this case concerns two federal statutes. Moreover, *Baker* asked whether marriage for same-sex couples was a fundamental right, *Massachusetts*, 682 F.3d at 8, while Appellant makes no such claim and is already married.

Woodward declines to find that gays and lesbians comprise a suspect class solely based on *Bowers* and the notion that "homosexuality is primarily behavioral in nature," so not immutable. 871 F.2d. at 1076. Since *Woodward*, the Supreme Court has overturned *Bowers. Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today."). Further, the Supreme Court has made clear that immutability is not as essential requirement for finding that a class is suspect. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Finally, the Supreme Court has rejected the false distinction between status and conduct as it applies to sexual orientation, which *Woodward* relied upon in determining that sexual orientation is not immutable. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (citing, *inter alia*, *Lawrence*, 539 U.S. at 575).

In considering similar circuit precedent in the post-*Lawrence* era, the *Golinski* court explained: "When the premise for a case's holding has been weakened, the precedential import of the case is subject to question. District courts are not governed by . . . precedent . . . [so] "undercut by higher authority…that it has been effectively overruled by such higher authority." 824 F. Supp. 2d at 983 (internal citations and quotation omitted). The same is true as to *Woodward*.

Finally, BLAG relies on *Loomis v. United States*, 68 Fed. Cl. 503 (2005), to assert that *Woodward* is still controlling. BLAG Br. at 25. *Loomis* held that "sodomy is not a fundamental right." 68 Fed. Cl. at 518. Neither Ms. Cardona nor the VA asserts that sodomy is a fundamental right, nor is that at issue here. *Loomis* never reaches the question of whether gays and lesbians constitute a suspect class. Moreover, the facts in *Loomis* are easily distinguishable from this case, as *Loomis* concerned military affairs—not eligibility for VA benefits—and improper relations between a commanding officer and his subordinate. *See United States v. Stanley*, 483 U.S. 669, 683 (1987) (judicial restraint is warranted in decisions concerning active military affairs). There is no controlling precedent binding this Court to a level of scrutiny regarding classifications based on sexual orientation.

B. The statutes fail heightened scrutiny.

BLAG nowhere disputes that sexual orientation satisfies the criteria determined by the Supreme Court to be relevant in establishing a suspect class. *See Bowen v. Gillard*, 483 U.S. 587, 602-03 (1987). The Supreme Court has yet to reach the question of whether gays and lesbians should be considered a suspect class. *Pedersen*, 2012 WL 3113883 at *14. However, contrary to BLAG's brief, BLAG Br. at 27-28, two district courts—not one—have recently held that gays and lesbians constitute a suspect class. *Golinski*, 824 F. Supp. 2d at 989; *Pedersen*, 2012 WL 3113883 at *35.

The VA and Ms. Cardona have explained why gays and lesbians should be considered a suspect class, VA Br. at 8-23; Appellant Br. at 5-16; *see also* Br. of 15 Public Interest Orgs. & Legal Service Orgs. as Amici Curiae at 19-20, and Ms. Cardona

will not repeat those arguments here. However, BLAG overstates the uniformity of federal court precedent on this matter. BLAG Br. at 28. As Judge Bryant explained in *Pedersen*, case law regarding the appropriate degree of equal protection scrutiny of discrimination against gays and lesbians is "inchoate." 2012 WL 3113883 at *14-15. This is because "many circuits, including ours, have not had occasion to squarely address it. . . . [And] many of the cases relied on by BLAG in turn rely on the reasoning of *Bowers v. Hardwick* . . . which was subsequently overruled." *Id.*

This Court should apply the criteria outlined in *Bowen* here, and conclude that gays and lesbians constitute a suspect class.

C. In the alternative, the statutes fail rational basis review.

If this Court declines to hold that sexual orientation classifications merit heightened scrutiny, then it should conclude that 38 U.S.C. § 101(31) and DOMA fail rational basis review, under the "closer than usual review" that is appropriate in this particular context. In *Massachusetts*, Judge Boudin, writing for the panel, synthesized a prevailing trend in equal protection precedent in holding that laws that subject minorities to "discrepant treatment" and implicate core federalism concerns are subject to "intensified scrutiny" or "closer than usual scrutiny." *Massachusetts*, 682 F.3d at 10-12. DOMA and 38 U.S.C. § 101(31) violate equal protection because the justifications advanced by BLAG do not comport with the effects of the statutes and are contrary to Supreme Court precedent.[5] *See Massachusetts*, 682 F.3d at 15.

[5] *See* Appellant Br. at 22-28; VA Br. at 25-31, 38-41. BLAG proffers several additional justifications for the statutes, none persuasive. Ms. Cardona takes these up below.

First, the First Circuit explained that a series of Supreme Court cases specify that rational basis review "in its minimalist form" is not what the Supreme Court has applied in situations involving "discrepant treatment" of minorities. *Massachusetts*, 682 F.3d at 10 (citing *Romer v. Evans*, 517 U.S. 620 (1996)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)); *see also Windsor*, 833 F. Supp. 2d at 402; *Pedersen*, 2012 WL 3113883 at *12; *Lawrence*, 539 U.S. at 579–80 (O'Connor, J., concurring). BLAG concedes that 38 U.S.C. § 101(31) and DOMA treat gays and lesbians, an undisputed minority, differently from heterosexuals.[6] BLAG Br. at 43-44, 46. In cases involving "historic patterns of disadvantage" like that experienced by gays and lesbians, the judiciary, has "undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Massachusetts*, 682 F.3d at 11. That "more careful assessment" is equally appropriate here. *Id.*

Second, as in *Massachusetts*, this case involves not only a historically disadvantaged minority, but also federal invasion of "a realm that has from the start of the nation been primarily confided to state regulation—domestic relations and the definition and incidents of lawful marriage." *Massachusetts*, 682 F.3d at 12; *see also Windsor*, 833 F. Supp. 2d at 405; Appellant Br. at 28-32 (discussing intrusion of 38 U.S.C. § 101(31) and DOMA into power of states to regulate marriage); Br. of State of Conn. as Amicus Curiae at 9-14. In this case, as in *Massachusetts*, "a closer examination of the

[6] This different treatment is far from neutral, but rather significantly disadvantages gays and lesbians who, like Ms. Cardona, are legally married. *Massachusetts*, 682 F.3d at 6.

justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns." *Massachusetts*, 682 F.3d at 13.

In the further alternative, the Court should conclude that the statutes do not survive even the "minimalist" form of rational basis review. Appellant Br. at 20-28; Br. of U.S. Const'l and Family Law Professors as Amici Curiae at 14-15. Here, BLAG, has offered several justifications for DOMA. BLAG Br. at 32-49. In every case in which BLAG has intervened, however, federal courts have rejected these justifications, and none are availing here.[7]

i. The statutes do no preserve uniformity.

DOMA and 38 U.S.C. § 101(31) disrupt uniformity by straying from the previously consistent practice of the federal government of respecting state law definitions of marriage even when those definitions vary significantly. Appellant Br. at 24-26, 30*;* Br. of State of Conn. as Amicus Curiae at 9-14; *infra* Section III. BLAG claims that DOMA advances uniformity, yet every court to consider this argument has

[7] BLAG also suggests that it is virtually impossible for a statute to fail rational basis review. *See* BLAG Br. at 30 ("only once (to our knowledge) has the Supreme Court applied [rational basis review] to strike down a federal statute as an equal protection violation"). However, BLAG's analysis draws a false distinction with respect to equal protection jurisprudence between federal and state laws. *See Massachusetts*, 682 F.3d at 10. In fact, the Supreme Court has twice struck down laws specifically involving disparate treatment of gays and lesbians by applying some form of rational basis review. *See Lawrence*, 539 U.S. 558; *Romer*, 517 U.S. 620; *see also Windsor*, 833 F. Supp. 2d at 402.

rejected it. *Massachusetts*, 682 F.3d at 12; *Windsor*, 833 F. Supp. 2d at 405; *Golinski*, 824 F. Supp. 2d at 1001-2; *Pedersen*, 2012 WL 3113883 at *48.

BLAG relies on *Nuñez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), a case involving not marriage but immigration—an area of preeminent federal power and one in which there is an express constitutional command of uniformity.[8] U.S. Const. art. I, § 8, cl. 4 (empowering Congress "[t]o establish an uniform Rule of Naturalization . . . throughout the United States"); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (federal power to regulate immigration arises in part from the Naturalization Clause). BLAG further argues that "Congress at various times" has regulated marriage, but cites only one example of a ban on polygamy in federal territories where federal law controls. BLAG Br. at 6. The reality is that "no precedent exists for DOMA's sweeping general 'federal' definition of marriage for all federal statutes and programs." *Massachusetts*, 682 F.3d at 12.

ii. The statutes do not protect the public fisc.

Conserving resources alone is not a valid justification for discrimination under rational basis review, and 38 U.S.C. § 101(31) and DOMA are actually a drain on the public fisc. Appellant Br. at 22-23; VA Br. at 31. BLAG's insistence that conserving

[8] *Nunez* does not concern marriage. Moreover, when Congress has considered marriage in determining immigration status, it has generally accepted marriages as valid if authorized by state law, but then restricted eligibility for immigration benefits where there are indications that the valid state marriage was undertaken for an improper purpose. *See, e.g.*, 8 U.S.C. §1186a(b)(1)(A)(i) (marriage "entered into for the purpose of procuring an alien's admission as an immigrant" does not qualify for purpose of permanent residency). Still, immigration laws first defer to state law to define marital status. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 Wm. & Mary J. Women & L. 537, 550 (2010).

resources justifies discrimination against gays and lesbians has also been rejected by every court to consider it. *See Massachusetts*, 682 F.3d at 14; *Windsor*, 833 F. Supp. 2d at 406; *Golinski*, 824 F. Supp. 2d at 997; *Pedersen*, 2012 WL 3113883 at *45. Moreover, it "has no basis in reality in light of the Congressional Budget Office's June 21, 2004 Report . . . [and] [n]either the House Report nor BLAG's pleadings present any evidence to the contrary." *Pedersen*, 2012 WL 3113883 at *45; *see also Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality as we so often have defined it must find some footing in the realities the subject addressed by the legislation").

iii. The statutes are not justified by tradition.

BLAG asserts that this Court must proceed with caution with regards to marriage of same-sex couples. BLAG Br. at 39-42. But "'caution' seems, in substance, no different than an interest in nurturing the traditional institution of marriage." *Windsor*, 833 F. Supp. 2d at 403; *see also* Appellant Br. at 27-28; VA Brief at 30-31. Moreover, whatever effect marriages of same-sex couples might have on society as a whole, 38 U.S.C. § 101(31) and DOMA do nothing to stymie this evolution. *Windsor*, 833 F. Supp. 2d at 404. Further, as the First Circuit explained, DOMA "was not framed as a temporary time-out; and it has no expiration date." *Massachusetts*, 682 F.3d at 15. Since DOMA was passed, six states, the District of Columbia, and eleven countries have recognized such marriages.[9] The increasing national and global legal recognition of marriages between

[9] *Same-Sex Relationship Recognition Map*, ACLU, http://www.aclu.org/same-sex-relationship-recognition-map-1; *Vietnam Considers Same-Sex Marriage*, USA Today, July 29, 2012, http://www.usatoday.com/news/world/story/2012-07-29/vietnam-gay-marriage/56573384/1.

same-sex couples discredits BLAG's assertion that "for all of recorded history" marriage has been defined as between one man and one woman. BLAG Br. at 31.

iv. The statutes do not encourage responsible procreation.

There is no rational relationship between the goal of encouraging "responsible procreation" and denying additional dependency benefits to Ms. Cardona's marriage. Appellant Br. at 26-27; VA Br. at 27-30; Br. of 15 Public Interest Orgs. & Legal Service Orgs. as Amici Curiae at 18; Br. of U.S. Const'l and Family Law Professors as Amici Curiae at 13-14. The statutes, 38 U.S.C. § 101(31) and DOMA, affect only married same-sex couples. *See Windsor*, 833 F. Supp. 2d at 404 ("DOMA has no direct impact on heterosexual couples. . . . It does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people (opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation."). Rather, the statutes merely prevent married same-sex couples, like Ms. Cardona and her wife, from experiencing the full benefits of marriage.

* * *

In sum, the statutes that operate to deny additional dependency benefits to Ms. Cardona because she is married to a woman fail heightened scrutiny. Even if they are reviewed only for a rational basis, the statutes are appropriately subject to closer than usual review, as they discriminate against a historically disfavored minority and improperly invade a core area of traditional state regulation. The laws violate the constitutional guarantee of equal protection under law, and are invalid.

III. THE STATUTES VIOLATE THE TENTH AMENDMENT.

The Secretary does not dispute that Ms. Cardona has standing to bring her Tenth Amendment claim, nor that family relations are an area of traditional state regulation. BLAG does not defend the statutes against this claim at all. Accordingly, the only issue in dispute between the parties is whether the statutes *impermissibly* invade an area of core state concern.

A. 38 U.S.C. § 101(31) and DOMA exceed congressional authority.

The VA contends that Congress may create a federal definition of marriage because it has an interest in who is deemed married for purposes of federal programs. VA Brief at 42-43. However, Congress has neither the enumerated power to enter this area of state sovereignty nor a "permissible federal interest," *Massachusetts*, 682 F.3d at 16, that would justify the denial of federal benefits that DOMA and 38 U.S.C. § 101(31) entail. U.S. Const. amend. X (reserving unenumerated powers to the states); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2576 (2012) ("If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted.").

Before DOMA, the federal government "fully embraced" state marital status determinations, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391 (D. Mass. 2012), *aff'd on other grounds*, *Massachusetts*, 682 F.3d 1, and federal legislation repeatedly demonstrates explicit deference to state sovereignty in this area. *See, e.g.*, 38 U.S.C. § 103(c) (deferring to state law in determining spousal benefits for veterans); 5 U.S.C. § 8341(establishing annuities for surviving spouses and children of government employees); *Yarbrough v. United States*, 341 F.2d 621, 623 (Ct. Cl. Feb. 19, 1965) ("In

enacting [5 U.S.C. § 8341], Congress undoubtedly left the determination of whether an employee was married or not up to the laws of the individual states."); Br. of Nat'l Veterans' Service Orgs. as Amici Curiae at 10.

Federal courts have recognized and long endorsed this federal deference to state marital status determinations. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Rose v. Rose*, 481 U.S. 619, 625 (1987); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) ("[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"); *Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, 785 F.2d 1317, 1318 (5th Cir. 1986) (noting "few instances in which state interests are accorded more deference by federal courts than in defining familial status"). Most recently, in *Astrue v. Capato*, 132 S. Ct. 2021 (2012), the Supreme Court described as "anything but anomalous" that the Social Security Act "avoid[ed] congressional entanglement in the traditional state-law realm of family relations" by deferring to state kinship definitions. *Id.* at 2031. The Social Security Act exemplifies Congress' respect for state authority over domestic relations.

The First Circuit held that DOMA does not violate the Tenth Amendment. *Massachusetts*, 682 F.3d at 11. This is erroneous because the statute, along with 38 U.S.C. §101(31), reaches beyond the enumerated powers allotted to the Congress in the Constitution. *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce."), *overruled on other grounds, Williams v. North Carolina*, 317 U.S. 287 (1942); *see also* Br. of State of Conn. as Amicus Curiae at 11-12. The Court recognizes

that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *Massachusetts*, 682 F.3d at 12 (internal quotation and citation omitted); *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (marriage); *In re Burrus*, 136 U.S. 586, 593–94 (1890), but declines to follow precedent because, it concludes, "Supreme Court interpretations of the Tenth Amendment have varied over the years," *Massachusetts*, 682 F.3d at 12 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992)).

This logic is flawed because cases such as *Printz* and *New York* did not weaken Tenth Amendment doctrine with respect to domestic relations. In fact, neither case discussed family law, and in both the Supreme Court found that a federal statute had violated the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997). The truth remains that the Supreme Court has repeatedly held that domestic relations is the domain of the states, not the federal government. Thus, enactment of DOMA and 38 U.S.C. § 101(31) exceed congressional authority under the Constitution.

B. The statutes improperly override state law that does not damage federal interests.

The VA contends that DOMA does not violate the Tenth Amendment because Congress has exclusive power to define the meaning and scope of federal statutes. VA Br. at 42. "The scope of a federal right is . . . a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially

true where a statute deals with a familiar relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (internal citations and quotations omitted); *see also Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946) (deference due state definition of real property for tax purposes); *Board of Com'rs of Jackson County v. United States*, 308 U.S. 343, 351-352 (1939) ("[w]ith reference to…federal rights, the state law has been absorbed… as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy.").

DOMA and 38 U.S.C. § 101(31) do not advance federal interests, and therefore state law is the appropriate source in determining the scope of federal interests in this case. Providing veterans' benefits advances the federal interest in supporting the families of disabled veterans. Br. of Disability Rights Advocates as Amicus Curiae at 5-6; Br. of Nat'l Veterans Orgs. as Amici Curiae at 4-7. Connecticut's marriage laws do not damage this federal interest. On the contrary, Connecticut's commitment to marriage equality furthers the federal interest in secure veteran families by enabling all disabled veterans in Connecticut to provide for their families regardless of their sexual orientation. By contrast, DOMA and 38 U.S.C. § 101(31) frustrate Congress' interest[10] in military

[10] This is not the only instance in which DOMA places Congress in an inconsistent or self-defeating position. DOMA's definition of marriage arguably undermines federal ethics laws, 5 U.S.C. § 102(e)(1)(A)-(D), 5 U.S.C. § 501(c), and abuse reporting requirements in the military, 10 U.S.C. § 1787(a), as it excludes same-sex married couples. DOMA may also confuse anti-nepotism provisions, 5 U.S.C. § 3110(a)(3), 5 U.S.C. § 3110(b), 5 U.S.C. § 2302(b)(7); judicial recusals, 28 U.S.C. § 455(b)(4),

recruitment and supporting veteran families by denying critical support to the spouses of disabled veterans. Br. of Nat'l Veterans' Service Orgs. as Amici Curiae at 13-15; Br. of Retired Military Officers as Amici Curiae at 8. When it enforces DOMA and 38 U.S.C. § 101(31), the federal government acts against its own interest.

C. 38 U.S.C. § 101(31) and DOMA interfere with Connecticut's interest in defining marriage.

The premise of the VA's Tenth Amendment argument is that the statutes "leave entirely unaffected a state's interest in defining family relations." VA Br. at 43. This misrepresents the statutes' impact. DOMA enables inconsistent and damaging federal treatment of states by respecting some valid variations in marriage law but not others. Br. of State of Conn. as Amicus Curiae at 3. When the federal government denies gay and lesbian veterans benefits under DOMA, those veterans must turn to their states to seek alternative dependency benefits. *Id.* at 14; *Massachusetts*, 682 F.3d at 12. In this case, Connecticut must assume the financial burden of providing support for veterans the federal government has rejected due to Connecticut's constitutionally sound marriage equality laws. Br. of State of Conn. as Amicus Curiae at 8, 14.

IV. 38 U.S.C. § 101(31) AND DOMA ARE UNCONSTITUTIONAL BILLS OF ATTAINDER THAT TARGET AN IDENTIFIABLE GROUP.

Bills of attainder are prohibited by U.S. Const. art. I, § 9, cl. 3. Bills of attainder are statutes that (1) target a named individual or an easily ascertainable group and (2) inflict punishment (3) without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315-

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restrictions on receipt of gifts, 2 U.S.C. § 31–32(a), and on travel reimbursement, 31 U.S.C. § 1353(a); and the crimes of bribery of federal officials, 18 U.S.C. § 208(a), and threats to family members of federal officials, 18 U.S.C. § 115.

16 (1946); *Nagac v. Derwinski*, 933 F.2d 990, 990 (Fed. Cir. 1991); *Latham v. Brown*, 4 Vet. App. 265, 268 (1993). The VA does not contest that 38 U.S.C. § 101(31) and DOMA inflict punishment without a judicial trial, but rather argues only that the statutes do not target a named individual or an identifiable group. VA Br. at 45. BLAG does not address the bill of attainder claim. BLAG Br. at 1 n.1.

The VA fails to address controlling case law that holds that a statute need not name specific people or target a "fixed" class to be a bill of attainder. For example, in *United States v. Brown*, 381 U.S. 437 (1965), the Supreme Court held that a statute directed at the Communist Party was an unconstitutional bill of attainder, even though the group's membership varied constantly. *Id.* at 461. The VA also overlooks *Ex parte Garland*, 71 U.S. 333 (1866) and *Cummings v. State of Missouri*, 71 U.S. 277 (1866), in which the Supreme Court held that laws directed against anyone who rebelled against the United States–an open-ended group of unnamed persons–were unconstitutional bills of attainder.

The VA also argues that "[t]here is no evidence Congress had any knowledge or intent to target an identifiable group of individuals based on prior conduct." VA Br. at 45. However, as the VA is aware, Congress passed DOMA specifically to condemn homosexual individuals, including those in committed relationships. H.R. Rep. No. 104-664, at 15-16 (1996) (DOMA was passed to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); VA Br. at 25-26 (House Report

claimed DOMA upheld traditional values by condemning homosexuality and by expressing disapproval of gays and lesbians and their committed relationships).

The VA's contention that it would be impossible for DOMA to have been targeted at a specific class because there were no same-sex married couples at the time it was enacted is also flawed because, as the VA notes, Congress intentionally passed the bill in response to states liberalizing their marriage laws, VA Br. at 4 n. 2 ("In large part, DOMA was enacted in response to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), in which the Hawaii Supreme Court raised the prospect of state-sanctioned same-sex marriages.") (citing H.R. Rep. No. 104-664, 2 (H.R. 3396 is response to "very particular development in the State of Hawaii.")), effectively targeting gay and lesbian couples whom Congress believed would imminently have the right to marry.

Moreover, 38 U.S.C. § 101(31) and DOMA, by stigmatizing individuals' sexuality, target all gays and lesbians, not just those married to individuals of the same sex. H.R. Rep. No. 104-664 at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality."); VA Br. at 25 ("The legislative history of section 3 [of DOMA] demonstrates . . . that its enactment was motivated in significant part by animus toward gays and lesbians and their intimate family relationships."). Gay and lesbian individuals have long been targeted in this country because of their sexual orientation, Br. of 15 Public Interest Orgs. & Legal Service Orgs. as Amici Curiae at 20; Br. of U.S. Const'l and Family Law Professors as Amici Curiae at 6; VA Br. at 11-17, and DOMA and 38 U.S.C. § 101(31) are simply

further examples of formal, targeted stigmatization of gay and lesbian individuals, and as such are unconstitutional bills of attainder.

V. CONCLUSION

For the foregoing reasons, Ms. Cardona respectfully requests that this Court hold that 38 U.S.C. § 101(31), DOMA, and 38 C.F.R. §3.50 violate the Fifth Amendment, Tenth Amendment, and Bill of Attainder Clause as applied to her, and reverse the BVA's denial of her application for additional disability benefits for her dependent spouse.

Dated: September 14, 2012
New Haven, CT

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CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2012, a copy of the foregoing Reply Brief was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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