UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

No. 11-3083

CARMEN J. CARDONA,

Appellant

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

Appellee

BRIEF OF DISABILITY RIGHTS ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Disability Rights Advocates ("DRA") is a non-profit legal center dedicated to ensuring dignity, equality, and opportunity for people with all types of disabilities, and to securing their civil rights. To further its mission, DRA argues in support of the right of Appellant, a person with a disability, to have her spouse recognized by the Court as the dependent spouse of a person with a disability for the purpose of obtaining spousal benefits under 38 U.S.C. § 1115(1)(B) and 38 C.F.R. § 3.4(b)(2) (2010).

PRELIMINARY STATEMENT

Appellant Carmen J. Cardona ("Ms. Cardona") is a Navy veteran of twelve years of service who has a disability and who was denied dependent spousal benefits by the Board of Veterans' Appeals ("BVA"), solely on the basis of her spouse's sex. The BVA did not reach—and expressed no opinion on—the constitutional issues raised by Ms. Cardona, preferring that those issues be resolved by this Court. *Amicus* submits this brief to aid this Court's constitutional analysis by developing two main points. First, although the denial of benefits was not based on Ms. Cardona's disability,[2] the denial of dependent spousal benefits is particularly onerous and burdensome for individuals who are members of a group doubly subject to discrimination based on prejudice. Here that group is people with disabilities who have same-sex spouses. The myriad of challenges that members of

[1] DRA's outside counsel authored this Brief in whole and prepared this Brief for DRA on a pro bono basis. No other person contributed money that was intended to fund the preparation or submission of this Brief.

[2] Rather, it was based unconstitutionally on her sexual orientation as persuasively demonstrated in her brief on the merits. *See* Appellant's Principal Brief at 2-20, *Cardona v. Shinseki*, Vet. App. No. 11-3083 (Apr. 19, 2012) ("Appellant's Principal Br.").

that group face in obtaining equal treatment under law and in overcoming prejudice and stereotyping on the basis of sexual orientation enhances the adverse impact of the stereotyping and prejudice they face based on disability.

Second, *amicus* and this brief argue that granting dependency payments to married individuals with disabilities, including those married to spouses of the same sex, is fundamental to achieving the equality and independence that are the common overarching objectives of social benefits and civil rights laws enacted to assist and protect individuals with disabilities. Specifically, this brief outlines the two chief approaches to remedying disability-based discrimination: the provision of benefits (often financial) and the protections of the civil rights of individuals with disabilities. The denial of dependency benefits to Ms. Cardona because of her lawful spouse's sex is fundamentally inconsistent with, and indeed threatens to set back, the core objective of disabilities rights law as reflected in both of these types of remediation. This Court should therefore treat as essential the right to have one's lawful spouse recognized as a spouse for disability benefit purposes regardless of that spouse's sex, and it should find irrational the BVA's failure to do so.

The BVA's decision did not consider the practical reality of discrimination against a person with a disability who has a same sex spouse, and therefore it did not address the impact on effective equality for individuals with disabilities. *Amicus* urges this Court to do so and provides the following analysis to be of assistance in that regard.[3]

[3] *Amicus* does not offer a separate statement of the case, the facts—which are not in dispute and are set forth in the BVA's decision, *In the Appeal of Carmen J. Cardona*, No.

ARGUMENT AND AUTHORITIES

Individuals with disabilities are the "largest minority group" in the United States. Barbara Barton, *Dreams Deferred: Disability Definitions, Data, Models, and Perspectives*, 36 J. Soc. & Soc. Welfare 13, 13 (2009). They have faced pervasive discrimination and "are subject to prejudiced attitudes, discriminatory behavior, and institutional and legal constraints that parallel those experienced by . . . other . . . groups" such as racial, gender, and sexual minorities. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 Berkeley J. Emp. & Lab. L. 213, 215 (2000).

Laws and policies directed at eliminating these prejudices and at integrating individuals with disabilities into our society have done so through two distinct approaches: social welfare efforts and civil rights laws. *See generally id.*; *see also* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 Berkeley J. Emp. & Lab. L. 203 (2010). Over time, Congress and the courts have expanded both social welfare laws and civil rights protections. The refusal to provide spousal dependency disability benefits to married veterans is fundamentally inconsistent with both of these approaches to integration.

I. SPOUSAL BENEFITS ARE A VITAL FORM OF BENEFITS FOR INDIVIDUALS WITH DISABILITIES

The social welfare benefit model aids individuals with a disability in attaining personal autonomy by "provid[ing] income and services apart from the institutions that serve the non-disabled majority," such as income through "public assistance or pensions,

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11-01 921 (Aug. 30, 2011)—or the issues, which are set forth in Appellant's brief. Appellant's Principal Br. at 1.

housing, schooling, and even special jobs." Lisa Waddington & Matthew Diller, *Tensions & Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare & Civil Rights Models of Disability in American, European & International Employment Law*, *in* Disability Rights Law and Policy 241, 245, 246 (Mary Lou Breslin & Silvia Yee eds., 2002). These financial safety nets that are so important to individuals with disabilities, those run by the Social Security Administration and by the U.S. Department of Veterans' Affairs ("VA"), rely particularly on spousal benefits to support not only persons with disabilities but their families.

The Social Security system, created in 1935, Social Security Act of 1935 § 203, ch. 531, 49 Stat. 620 (codified at 42 U.S.C. ch.7), was quickly expanded to provide spousal benefits. Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. The purpose of this expansion was "to meet a presumed loss of income . . . ." Peter W. Martin, *Social Security Benefits for Spouses*, 63 Cornell L. Rev. 789, 798 (1978). By the time Congress added disability benefits to Social Security, spousal benefits were an essential part of the system. Social Security Amendments of 1956, ch. 836, 70 Stat. 807.

Moreover, Congress has increasingly liberalized the Social Security Disability Insurance benefit in recognition of its importance. "[T]he same motivations that led to the creation of dependent and survivor benefits later induced Congress to liberalize the terms on which secondary benefits were awarded. Congress passed at least ten such amendments between 1950 and 1977." Martin, *supra*, at 804.[4] Of particular note,

[4] Congress, among other things, "granted wife benefits to younger wives caring for eligible children of retired workers, [ ]extended survivor benefits to divorced former

Congress created a new purely federal test of marital status to protect those couples who were not legally married under state law, but had undertaken a marriage ceremony in good faith, to receive spousal benefits. *Id*. at 805 n.60 (citing Social Security Amendments of 1960, Pub. L. No. 86-778, § 208, 74 Stat. 924 (codified at 42 U.S.C. § 416(h)(1)(B) (1970)) ("For example, a woman who married without knowledge of her husband's prior undissolved marriage could receive benefits.")). In 1965, Congress further expanded benefits to former spouses. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308, 79 Stat. 286 (codified at 42 U.S.C. §§ 402(b)(1), (e)(1), 416(d) (1970)). These two changes reflect Congress's intent that "[p]articipation in marriage"—rather than the celebration of marriage—is the touchstone for determining benefits since they "replace[ ] 'presumed' need arising from the interruption of the working spouse's earnings." Martin, *supra*, at 819. Stated differently, these changes demonstrate a shift in focus from the formality of marriage celebration to the substance of marriage participation through support.

The Veterans Affairs disability benefits scheme has similarly long-provided for spousal benefits. The VA's pension program sought to "'defray the costs of supporting the veteran's . . . dependants' when a service-connected disability is of a certain level hindering the veteran's employment abilities." *Sharp v. Shinseki*, 23 Vet. App. 267, 272 (C.A. Vet. Cl. 2009) (citation omitted). In line with Congress's clear purpose in enacting spousal benefits laws, these benefits represent a substantial addition to the resources on

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wives caring for children of deceased workers," and "reduced from sixty-five to sixty-two the age at which women could collect wife or widow benefits (without having young children in their care), or retired-worker benefits." Martin, *supra*, at 804 & nn.54-57.

which families of veterans with disabilities rely. A veteran with 80% disability without a spouse is entitled to $1,478, while a veteran with 80% disability with a spouse is entitled to $1,602. *See 2012 VA Disability Compensation Rates*, Military.com, http://www.military.com/benefits/ content/veterans-health-care/va-disability-compensation-rates.html (last visited Apr. 25, 2012). Thus, a veteran with 80% disability, such as Mrs. Cardona, is entitled to nearly ten percent more per month if she is married.

The denial of Ms. Cardona's request for dependency compensation for her lawfully married spouse contradicts the clear legislative decisions to expand spousal benefits and the policy goal of furthering individual autonomy and preventing individuals with disabilities from falling victim to poverty. Poverty is a harsh reality for many people with disabilities including those with same-sex spouses. *See, e.g.*, Marj Plumb, *National Needs Assessment and Technical Assistance Audit* 27 (2003), http://www.marjplumb.com/pdfs/SAGE%20National%20Needs %20Assessment.pdf (finding great need for assistance with disability issues in the LGBT population); Barton, *supra*, at 19 (noting that people with disabilities are three times more likely to live in extreme poverty). Given that a service-related disability interferes with Ms. Cardona's (and other veterans') ability to work, providing for herself and her spouse on a day-to-day basis is increasingly challenging. And the importance of receiving spousal benefits for individuals like Ms. Cardona is in no way diminished by the gender of her spouse.

The denial of benefits because of a spouse's sex cannot rationally be reconciled with the importance that Congress has placed on providing and expanding such benefits. Here, the BVA recognized that Ms. Cardona married in good faith, and that her marriage

is in fact valid under Connecticut law. *In the Appeal of Carmen J. Cardona*, No. 01-921, at *6 (Aug. 30, 2011). Spousal dependency benefits are no less important to Ms. Cardona and her family than they would be if her spouse were of the opposite sex. Spousal benefits are just as important to the equality, independence, and security of a person with a disability as they are to those without a disability, and it is irrational to deprive her of an important disability benefit solely because of the sex of her spouse.

II. CIVIL RIGHTS LAWS HAVE INCREASINGLY SOUGHT THE INDEPENDENCE OF AND INTEGRATION FOR INDIVIDUALS WITH DISABILITIES

Efforts aimed at eliminating stigma against individuals with disabilities have also led to an expansive recognition of their protections under U.S. civil rights laws. The civil rights model recognizes that people with disabilities face "many of the stigmatizing experiences" and "social isolation" as most other minority groups. Scotch, *supra* at 215, 221. "Proposing that disability is a social and cultural construct, the civil rights model focuses on the laws and practices that subordinate persons with disabilities [and] insists that government secure the[ir] equality . . . by eliminating the legal, physical, economic, and social barriers that preclude their equal involvement in society." Peter Blanck, et al., *Disability Civil Rights Law and Policy* 6 (2d ed. 2009).[5] The civil rights model, like the benefits model, pursues an overarching goal of equality and autonomy, but, in contrast with the benefits model, seeks to do so by integrating individuals with disabilities into institutions from which they had been excluded and by eliminating negative stereotypes

[5] *See also* Waddington & Diller, *supra*, at 246-47 (noting that the goal of the civil rights model is to "reform mainstream social institutions to include people with disabilities, rather than to maintain a parallel tracking.").

against them. Barton, *supra*, at 18 (citation omitted). Thus, the State, rather than focus on "fixing" individuals with disabilities through medical intervention, now focuses on fixing institutions that discriminate—either actively or passively—against individuals with disabilities. *Id*. (citations omitted).

Of importance here, the laws and precedent achieved under the civil rights model seek to integrate people with disabilities into the community by eliminating barriers to institutions from which they have been excluded and to secure equal treatment in basic aspects of societal living such as employment, education, procreation and marriage. As with the approach taken by the benefits model, civil rights protections are important to individuals with disabilities because, for example, loss of employment due to disability-based discrimination could lead to poverty and thus inability to participate as a fully-integrated member of society and care for one's self independently.

Moreover, underlying this evolving legislation and case law is a recognition of the fundamental role marriage plays in the pursuit of happiness. Notable is the Supreme Court's recognition of such role. Perhaps especially for people with disabilities, it is irrational to deprive lawfully married couples of the full benefits appertaining to this status simply because the spouses are of the same sex.

A. Congress Has Increasingly Protected The Civil Rights Of Individuals With Disabilities In Public Accommodations, Employment, And Education

The first piece of legislation to attempt to remedy discrimination against individuals with disabilities was the Architectural Barriers Act of 1968, which required that certain buildings and facilities constructed with federal funds be accessible to people

with disabilities. *See* 42 U.S.C. §§ 4151-4157. Next, expanding beyond the issue of building access, the Rehabilitation Act of 1973 prohibited discrimination "in federal programs, as part of the larger movement to achieve community integration and inclusion of people with disabilities in society." Eric Rosenthal & Arlene Kanter, *The Right to Community Integration for People with Disabilities Under United States and International Law*, *in* Disability Rights, *supra*, at 309, 312 (citing 29 U.S.C. § 794 (1976)). The statute provides for a broad array of rights for persons with disabilities, including "(2) respect for . . . rights[ ] and equal access . . . ; [and] (3) inclusion, integration, and full participation . . . ." 29 U.S.C. § 701(c).[6] As is apparent, eliminating discrimination at the federal level was the starting point of disability civil rights laws.

Because the Rehabilitation Act was limited in scope, however, in 1990, Congress passed the expansive and far-reaching Americans with Disabilities Act (the "ADA"), in a bipartisan vote, to prohibit discrimination by private entities and state and local governments, and "against a backdrop of pervasive unequal treatment" faced by people with disabilities. *Tennessee v. Lane*, 541 U.S. 509, 510 (2004). With the ADA Congress "complete[d] the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964," H.R. Rep. No. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449. The ADA is thus aimed at achieving "inclusion and integration"

[6] Notably, the Rehabilitation Act's implementing regulations specifically prohibited programs conducted under or receiving funds from the Department of Veterans' Affairs from discriminating on the basis of disability in the provision of access or benefits. *See generally* 38 C.F.R. part 15 & §§ 18.401-18.410.

for people with disabilities. *Id.* The ADA prohibits discrimination against certain individuals with disabilities in employment, 42 U.S.C. § 12112(a); in the use of services, programs, and activities of public entities, 42 U.S.C. § 12132; in the enjoyment of public accommodations, 42 U.S.C. § 12182(a); and in telecommunications. 47 U.S.C. § 225(b)(1). Notably, the requirements of the ADA mimic those of the Civil Rights Act of 1964 and apply "to all aspects of society . . . ." Barry, *supra*, at 221.

Next, in 2008, Congress passed the ADA Amendments Act of 2008 (the "ADAAA"), primarily to reject and reverse narrow readings of the ADA. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2, 112 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 (2009)). The ADAAA provides that construction of the statute should be in favor of "broad coverage." 42 U.S.C. § 12102(4)(A). Most importantly, the ADAAA instructs courts to focus on whether an individual faces discrimination rather than on whether an individual's impairment constitutes a disability in order to determine whether that individual is within the scope of the Act. 154 Cong. Rec. H8286, 8288-89 (daily ed. Sept. 17, 2008) (statement of Rep. Jerrold Nadler). Moreover, the ADAAA extends protections to those who are "regarded as" being disabled, which "makes clear that it is attitudes, not impairments themselves, that 'disable.'" Barry, *supra*, at 279 (citations omitted). In other words, to prove a violation of the ADA, individuals with disabilities must show that "others limited them because of their impairments." *Id*. at 283. By shifting the focus of how to define disability, these changes reflect Congress's desire to expand the civil rights protections for people with disabilities.

At the same time, over the last four decades, Congress has increasingly provided civil rights protections for individuals with disabilities in the context of education, integrating students with and without disabilities. *See, e.g.*, Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 246 (1994) ("[i]n the 1970s, advocates for children with disabilities began demanding access to public schools, echoing the constitutional and public policy issues raised in the landmark *Brown* . . . decision . . . .") (citations omitted). In 1975 Congress enacted the first comprehensive piece of legislation protecting the civil rights of students with disabilities, Education for All Handicapped Children Act of 1975 ("EAHCA"), after finding that "the educational needs of millions of children with disabilities were not being fully met because . . . [among other things], the children were excluded entirely from the public school system . . . ." 20 U.S.C. § 1400(c)(2)(B).

In 1990, after determining that students with disabilities needed greater protections than EAHCA provided, Congress passed the Individuals with Disabilities Education Act (the "IDEA"). Under the IDEA, schools must integrate children with disabilities in any case where segregation is not the least restrictive environment. *See* 20 U.S.C. § 1412(a)(5)(A). The IDEA requires that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . . ." *Id.*[7]

[7] Students with disabilities may be placed into separate classes or schools "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id*.

Congress has worked for decades to integrate individuals with disabilities into places of employment, public accommodations, and schools—institutions in which one must be able to participate fully to be an equal member of society. In requesting spousal dependency benefits, Ms. Cardona merely seeks integration into another institution that would make her an equal member of society—marriage.

B. The Courts Have Increasingly Protected The Civil Rights Of Individuals With Disabilities In Other Important Areas Of Life From Which They Have Been Excluded Such As Procreation And Marriage

The courts have also specifically protected the civil rights of individuals with disabilities in other important areas of life such as procreation and marriage.

Generally, of course, the Supreme Court has squarely held that "irrational prejudice" against individuals with disabilities is an insufficient basis on which to ground legislation affecting their rights, and in doing so rejected a zoning ordinance that would have marginalized a group home for individuals with disabilities. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). But, of specific importance here, the Court has also demonstrated hostility to laws restricting the right to reproduce, the motivations for which were often eugenic in nature. In the early twentieth century, self-proclaimed "eugenicists" attempted to limit "dysgenic" individuals by "discourag[ing them] from reproducing." Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. Contemp. Health L. & Pol'y 1, 3 (1996). Eugenicists defined "[d]ysgenic individuals"—presumably based on negative stereotypes existing at the time—to include widely disparate categories such as: "the feebleminded, the insane, the criminalistic, the epileptic, the inebriated or the drug

addicted, the diseased . . . , the blind, the deaf, the deformed, and dependents . . . ." *Id.* As a result of these ideas, the states routinely passed sterilization laws. *Id*. at 12.

Although the Supreme Court sadly initially embraced such laws, validating eugenicists' negative stereotypes of individuals with disabilities by holding in *Buck v. Bell* that Virginia's Eugenical Sterilization Act was constitutional, *see* 274 U.S. 200, 207 (1927) (finding that the sterilization of Ms. Buck was justified and noting that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."), the Court has backed far away from such holdings.

In *Skinner v. Oklahoma ex rel. Williamson*, the court struck down Oklahoma's Habitual Criminal Sterilization Act, which provided for the sterilization of certain "habitual criminal[s]." 316 U.S. 535, 536, 543 (1942). In his concurrence, Justice Jackson warned that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes." *Id*. at 546 (Jackson, J., concurring). The *Skinner* decision, along with the Congressional efforts described above, make it crystal clear that national policy has become to accommodate people with disabilities rather than subject them to prejudice and discrimination based on stereotypes.

These same advancements operate in the area of marriage. Historically, states "attempt[ed] to stem reproduction among the 'unfit' by . . . enact[ing] laws forbidding

certain categories of people to marry . . . ." Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 Yale L. & Pol'y Rev. 481, 483 (2002) (citations omitted). Courts in the nineteenth century thus recognized some forms of disability "as grounds for prohibiting or annulling marriages," and "[b]y 1929, 29 states barred 'imbeciles,' 'idiots,' 'lunatics,' the 'feebleminded,' and those of 'unsound mind' from marriage." Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 Law & Soc. Inquiry 541, 542 (1998) (citations omitted).[8]

While neither Congress nor the Supreme Court has directly addressed the right of individuals with disabilities to marry, the Court has recognized the importance of marriage as part of a person's attempt to live a fulfilled life. *Loving v. Virginia*, 388 U.S. 1, 12 (1957). In *Turner v. Safley*, for example, the Court held that a Missouri regulation requiring prisoners to obtain approval from the warden before marrying was unconstitutional. 482 U.S. 78, 82, 100 (1987). The Court went so far as to find that there is "a constitutionally protected marital relationship in the prison context." *Id*. at 96.

This recognition of the importance of marriage has particular force given that Ms. Cardona is in fact lawfully married to her spouse. This Court need not decide whether Ms. Cardona and her spouse had a legal right to marry since they are legally married.

[8] Courts also upheld laws prohibiting individuals with epilepsy to marry, reasoning that it was well within a legislature's purview to seek to "'guard[ ]' against the 'perpetuation' of such atrocities.'" *Id.* at 573 (citation omitted).

The issue is whether disability benefits based on marital status can lawfully be denied to a person with a disability because that person is married to a person of the same sex.

Historically, individuals with disabilities have been excluded from social and legal institutions because of negative stereotypes concerning such individuals. Over the last half century, as detailed above, both Congress and the Supreme Court have recognized the need to integrate individuals with disabilities into all institutions—including employment, public accommodations, and education—and the Supreme Court has viewed laws restricting fundamental rights of all individuals—such as reproduction and marriage—unfavorably. As in the case of the social welfare advances for people with disabilities, these civil rights advancements cannot be logically reconciled with denying a person with a disability important disability based on marital status by reason of the sex of the spouse. This discrimination in disability benefits between two lawfully married people is therefore irrational.

CONCLUSION

For the reasons set forth above, the decision of the BVA should be reversed.

DATED: April 26, 2012

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CERTIFICATION OF SERVICE

I hereby certify that, on April 26, 2012, copies of Brief of Disability Rights Advocates as *Amicus Curiae* in Support of Appellant 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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