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 THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT, CARMEN CARDONA

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PARTY WHOM THE AMICUS CURIAE SUPPORTS

The State of Connecticut, as amicus curiae, is submitting this brief in support of the Appellant, Carmen Cardona, pursuant to Rule 29 of the Rules of Practice and Procedure for the United States Court of Appeals for Veterans Claims.

INTEREST AND IDENTITY OF THE AMICUS CURIAE

The amicus curiae State of Connecticut has a vital interest in this case because it discriminatorily divests a validly married Connecticut citizen, based solely on her sex and sexual orientation, of rights to which other married Connecticut citizens are entitled, and unconstitutionally intrudes on Connecticut's sovereign authority under the Tenth Amendment to define what constitutes a valid "marriage" of its citizens for purposes of state and federal law.

The federal laws and Department of Veterans Affairs ("VA") regulations at issue provide dependency compensation to the dependent spouse of a disabled veteran, but define "spouse" as a person of the opposite sex. The veteran appellant in the present case, Carmen Cardona, is a resident of Connecticut, who is validly married under Connecticut state law to a spouse of the same sex and entitled, under the Connecticut constitution and state statutes, to all the rights, benefits, and responsibilities of marriage accorded to opposite-sex married couples. Because federal laws and VA regulations do not recognize same-sex marriages, the Department of Veterans Affairs Regional Office and the Board of Veterans' Appeals have denied Ms. Cardona's request for dependency compensation. Based solely on Ms. Cardona's sex and sexual orientation, this discriminatory ruling deprives Ms. Cardona of benefits to which she would otherwise be entitled under

Connecticut law, and thereby unconstitutionally intrudes on, and completely disrespects, Connecticut's long-held sovereign authority to determine the marital status of its citizens. Accordingly, the State of Connecticut has a vital interest in reversal of the Board's decision.

STATEMENT OF THE CASE

This is an appeal by a disabled veteran woman, Carmen Cardona, from a decision by the Board of Veterans' Appeals (the "Board") affirming the decision of the Department of Veterans Affairs Regional Office ("Regional Office") denying Ms. Cardona additional dependency benefits for her same sex spouse.

Ms. Cardona served in the active duty military from July, 1988 to May, 2000. R. at 231 (231-235). Effective November 4, 2005, the VA determined that Ms. Cardona suffered from carpal tunnel syndrome in both hands, which was service-connected and 80% disabling. R. at 231-235 (231-235). Pursuant to 38 U.S.C. § 1115 and 38 C.F.R. § 3.4(b)(2), when a veteran is entitled to compensation for a disability evaluated as 30% or more disabling, he or she may receive additional compensation for a spouse to whom he or she is validly married under the law of the place where the parties resided at the time of the marriage or at the time when the right to benefits accrued.

On May 24, 2010, Ms. Cardona applied for additional compensation for her spouse, whom she validly married under Connecticut law on May 14, 2010. R. at 17 (17). On June 4, 2010, the Regional Office denied Ms. Cardona's claim because Ms. Cardona and her spouse are of the same sex, and federal law, specifically 38 U.S.C. § 101(31), 1 U.S.C. § 7, and 38 C.F.R. § 3.50(a), defines "spouse" for purposes of veterans' benefits

as "a person of the opposite sex." R. at 147 (147-148). On January 11, 2011, Ms. Cardona appealed to the Board, which affirmed the denial of her claim on August 30, 2011. R at 3-12 (3-12).

SUMMARY OF ARGUMENT

Since the adoption of the United States Constitution, the authority to determine marital status has been the exclusive sovereign prerogative of the states. For all purposes, both state and federal, state law has been the means for determining whether a couple is validly married, notwithstanding differences among states' laws defining marriage. Pursuant to its sovereign authority, the State of Connecticut has adopted laws permitting all individuals who meet certain qualifications to marry, regardless of their sex. Such laws are vital to Connecticut's sovereign interest in protecting the state constitutional rights of same-sex couples residing in the State by ensuring that they are legally entitled to the same rights and benefits of marriage to which opposite-sex couples are entitled and are not discriminated against based on their sex or sexual orientation.

Despite Connecticut's long-standing and well established sovereign authority to define marriage, the federal government has adopted laws governing veterans' affairs that trample on the sovereign authority of Connecticut, and all states, by defining "spouse" as a person of the opposite sex, regardless of state law. The federal government has adopted this definition, which blatantly discriminates against same-sex couples on the basis of sex and sexual orientation, despite continuing to respect all other variations in state marriage laws among the states. Moreover, it has done so in flagrant disregard of the Supreme Court's repeated admonition that "the whole subject of 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." Rose v. Rose, 481 U.S. 619, 625 (1987). Because the federal government's unprecedented intrusion on Connecticut's sovereign authority to define marriage violates the Tenth Amendment, this Court should declare 38 U.S.C. § 101(31), 1 U.S.C. § 7, and 38 C.F.R. § 3.50(a) unconstitutional and reverse the Board's decision denying veteran's benefits to Ms. Cardona based on the sex of her spouse.

ARGUMENT

THE FEDERAL LAWS AND VETERANS AFFAIRS REGULATION DEFINING THE TERM "SPOUSE" TO EXCLUDE A SAME-SEX SPOUSE UNCONSTITUTIONALLY INTRUDE ON THE STATE OF CONNECTICUT'S SOVEREIGN AUTHORITY TO DETERMINE THE MARITAL STATUS OF ITS CITIZENS AND PROTECT THE EQUAL RIGHTS OF ALL MARRIED COUPLES IN THE STATE.

By defining "spouse" for purposes of veterans' benefits as "a person of the opposite sex," 38 U.S.C. § 101(31), 1 U.S.C. § 7, and 38 C.F.R. § 3.50(a), do far more than bar Ms. Cardona from receiving spousal dependency benefits – they flout the constitutionally protected sovereign authority of the State of Connecticut, and of all states, to define what constitutes a valid "marriage" of its citizens and seriously undercut Connecticut's commitment, enshrined in its state constitution, laws, and public policy, to ensuring equal rights for same-sex couples residing in the State.

A. Connecticut's Constitution, Laws, And Public Policy Guarantee Equal Rights For Same-Sex Couples And Prohibit Discrimination Based On Sexual Orientation.

The State of Connecticut is firmly committed to providing equal rights to same-sex couples in all aspects of their lives, including marriage.

"For centuries, the prevailing attitude toward gay persons has been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 176, 957 A.2d 407 (2008)(internal quotation marks omitted). "[H]omosexuals are hated, quite irrationally, for what they are." Id. at 199. "These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self acceptance and a greater likelihood of hiding sexual orientation." Id. at 177. "The American Psychiatric Association has noted that when compared to other social groups, homosexuals are still among the most stigmatized groups in the nation." Id. at 176 (brackets and ellipsis omitted).

Seeking to protect its citizens from pervasive and invidious discrimination on the basis of sexual orientation, Kerrigan, 289 Conn. at 208, and recognizing that "homosexual orientation is no more relevant to a person's ability to perform and contribute to society than is heterosexual orientation," id. at 182, the State has long prohibited sexual orientation discrimination in employment, public accommodation, housing, membership in licensed professional organizations, credit practices, state agency employment, educational and vocational programs, state licensure, and the allocation of state benefits. Conn. Gen. Stat. §§ 46a-81a through 46a-81r; 1991 Conn. Pub. Acts No. 91-58. The State requires all state contractors to warrant that they will not discriminate on the basis of sexual orientation, or allow their subcontractors to do so, Conn. Gen. Stat. § 4a-60a, and has criminalized intimidation and bias based on sexual orientation. Conn.

Gen. Stat.§§ 53a-181j through 53a-181*l*. For more than ten years, the State has also explicitly permitted same sex couples to adopt children and provide foster care. Conn. Gen. Stat. § 45a-727(a)(3)(D); 2000 Conn. Pub. Acts No. 00-228.

In 2005, Connecticut became the second state in the country to pass legislation permitting same-sex couples to enter into civil unions with all the same benefits, protections, and responsibilities as marriage. 2005 Conn. Pub. Acts No. 05-10. The State adopted the legislation voluntarily, not in response to a court order, thereby significantly advancing the State's firm commitment to ensuring equal rights for same-sex couples and eliminating discrimination based on sexual orientation.

Finally, in 2009, to protect same-sex couples' state constitutional right to equal treatment under the law announced by the Connecticut Supreme Court in Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008), the Connecticut General Assembly redefined the term "marriage" to make it applicable to all couples who meet the qualifications for marriage, regardless of the sex of the parties. 2009 Conn. Pub. Acts No. 09-13. As the Connecticut Supreme Court pointed out, "extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities." Kerrigan, 289 Conn. at 248. "[C]hildren reared by married couples[,] and married couples themselves[,] benefit greatly from marriage – apart from any legal benefits conferred on the family." Id. at 248 n. 75. "Benefits to the married couple include greater longevity, greater wealth, more fulfilling sexual relationships, and greater happiness." Id.

Accordingly, since 2009, Connecticut has defined "marriage" as "the legal union of two persons," with no requirement that the individuals be of the opposite sex. Conn. Gen. Stat. § 46b-20. The only eligibility requirements for marriage in Connecticut are, with minor exceptions, that both individuals be at least eighteen years old, not under the supervision or control of a conservator, not related to each other by certain degrees of kinship, and not currently in a marriage or in a relationship with a third party that provides substantially the same rights, benefits, and responsibilities as a marriage. Conn. Gen. Stat. § 46b-20a. When two individuals who satisfy these requirements apply for a marriage license to the registrar of voters for the town where the marriage is to be performed, the registrar must issue a license, regardless of the sex of the individuals. Conn. Gen. Stat. § 46b-25.

To further ensure equal rights for same sex couples, Connecticut law recognizes the validity of any marriage or similar union that is entered into in another state, recognized as valid in that state, and not expressly prohibited by the laws of Connecticut. Thus, a same sex couple who is married in another state, or enters into a union that provides substantially the same rights, benefits, and responsibilities as marriage in another state, will be treated under Connecticut law as validly married. Conn. Gen. Stat. § 46b-28a.

Similarly, if a same sex couple validly married in Connecticut moves to or resides in another state, Connecticut law states that their marriage may be recognized as valid in the other state. Conn. Gen. Stat. § 46b-28b. Although this provision does not compel other states to recognize the validity of a Connecticut same-sex marriage, it clearly

informs other jurisdictions that it is Connecticut's intent that such unions be recognized as valid outside of Connecticut.

As a result of Connecticut's strong state constitutional and legislative commitment to ensuring equal rights for same sex couples, over 6,200 same-sex marriages have taken place in Connecticut since November, 2008. One such marriage was that of the appellant, Carmen Cardona. Under Connecticut law, Ms. Cardona and her spouse are validly married and entitled under the Connecticut constitution and state statutes to all of the same rights, benefits, and responsibilities of marriage to which all other validly married couples in Connecticut are entitled. Were it not for 38 U.S.C. § 101(31), 38 C.F.R. § 3.50(a), and 1 U.S.C. § 7, Ms. Cardona and her spouse would be entitled to veterans' dependency benefits to the same extent as an opposite-sex married couple. The same is true of other benefits for married veterans, such as survivor's benefits, that are not at issue in this case, but will never be available to Ms. Cardona solely because she and her spouse are of the same sex. By denying benefits to Ms. Cardona and other married veterans, even though they fully qualify for the benefits, the federal government's policy forces the State to shoulder the significant financial burden that arises when veterans must seek alternative state support to make up for the benefits that the federal government has denied. Most significantly, however, by denying benefits to Ms. Cardona and veterans like her, the federal government's policy establishes and enforces sex and sexual orientation discrimination among Connecticut's citizens, and unequal treatment of same-sex married couples, all of which Connecticut's constitution, laws, and public policy squarely prohibit.

B. The Federal Laws And VA Regulation Defining "Spouse" Unconstitutionally Impair The State's Long-Established Sovereign Authority To Define Marriage For Its Citizens And To Guarantee All Married Couples Equal Rights And Benefits Under The Law.

By refusing to recognize Ms. Cardona's spouse, and blatantly disrespecting Connecticut's long-established sovereign authority to define what constitutes a "marriage" of its citizens for purposes of state and federal law, the federal government is violating the Tenth Amendment.

The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. As this language confirms, "the plan of the Constitutional Convention did not contemplate 'an entire consolidation of the States into one complete national sovereignty,' but only a partial consolidation in which 'the State governments would clearly retain all of the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.'" United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 801 (1995) (italics omitted), quoting The Federalist No. 32, at 198. Thus, under our federal allocation of powers, "[t]he States . . . retain 'a residuary and inviolable sovereignty.'" Alden v. Maine, 527 U.S. 706, 715 (1999), quoting The Federalist No. 39, at 245.

"The Federal Government, by contrast, 'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'" Alden, 527 U.S. at 739, quoting

Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816). As the Supreme Court recently emphasized, "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States." Bond v. United States, 131 S. Ct. 2355, 2366 (2011)(citation omitted). Thus, the Tenth Amendment protects the states from federal government intrusion into areas of exclusive state authority.

There is no dispute that "the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce." Haddock v. Haddock, 201 U.S. 562, 575 (1906), overruled on other grounds, Williams v. North Carolina, 317 U.S. 287 (1942). "Prior to the American Revolution, colonial legislatures, rather than Parliament, established the rules and regulations regarding marriage in the colonies." Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services, 698 F. Supp. 2d 234, 236-237 (D. Mass. 2010), appeal pending, No. 10-2204 (1st Cir.). "[W]hen the United States first declared its independence from England, the founding legislation of each state included regulations regarding marital status determinations." Id. at 237. By the time the framers drafted the Constitution, "the field of domestic relations was regarded as such an essential element of state power that the subject of marriage was not even broached." Id. at 250. At that time, "states had exclusive power over marriage rules as a central part of the individual states' 'police power' – meaning their responsibility (subject to the requirements and protections of the federal Constitution) for the health, safety and welfare of their populations." Id. at 237. Accordingly, "the Constitution

delegated no authority to the Government of the United States on the subject of marriage and divorce." Haddock v. Haddock, 201 U.S. 562, 575 (1906), overruled on other grounds, Williams v. North Carolina, 317 U.S. 287 (1942). Instead, authority over domestic relations was, and continues to be, the "virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975).

Since the adoption of the Constitution, the Supreme Court has "consistently recognized that 'the 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.'" Rose v. Rose, 481 U.S. 619, 625 (1987), quoting In re Burrus, 136 U.S. 586, 593-594 (1890); see also Elk Grove Unified School District v. Newdow, 542 U.S. 1, 12 (2004); McCarty v. McCarty, 453 U.S. 210, 220 (1981); Pennoyer v. Neff, 95 U.S. 714, 734-735 (1878)("[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"). Consistent with this view, and notwithstanding widespread variations in state law, federal law has long applied state law to determine questions of marital status. For example, in in Slessinger v. Secretary of Health & Human Services, 835 F.2d 937, 939 (1st Cir. 1987), the court refused to apply federal common law to determine whether a party was divorced for purposes of the Social Security Act, holding that state law governed because "matters of divorce and marital status are uniquely of state, not federal, concern." Similarly, in De Sylva v. Ballentine, 351 U.S. 570 (1956), the Court looked to state law to define "child" for purposes of the federal Copyright Act, and in Tidewater Marine Towing, Inc. v. Vicknair, 785 F.2d 1317, 1318 (5th Cir. 1986), the court rejected the use of a federal common law

rule to determine marital status for purposes of maritime law, noting that it was "aware of few instances in which state interests are accorded more deference by federal courts than in defining familial status."

"So strong is [the Supreme Court's] deference to state law in this area that [the Court] ha[s] recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'" Elk Grove Unified School District v. Newdow, 542 U.S. 1, 12 (2004), quoting Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992). According to the Court, although "rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." Elk Grove, 542 U.S. at 13 (2004)(internal citation and footnote omitted).

Such deference, invoking the states' "absolute right" to prescribe the conditions for marriage, is also evident in federal court decisions upholding, or abstaining from interfering with, state laws limiting marriage to opposite-sex couples. See, e.g., Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006)("[o]ur rational-basis review begins with an historical fact – the institution of marriage has always been, in our federal system, the predominant concern of state government"); Smelt v. County of Orange, 447 F.3d 673, 680 (9th Cir.), cert. denied, 549 U.S. 959 (2006)("[t]he State . . . has absolute right to prescribe the conditions of marriage"). Ironically, it is only now -- when states have begun passing laws allowing and recognizing same-sex marriage -- that the federal government has decided marriage is a matter of federal concern.

Appropriately recognizing that "the authority to regulate marital status is a sovereign attribute of statehood," the court in Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services, 698 F. Supp. 2d 234, 251 (2010), appeal pending, No. 10-2204 (1st Cir.), recently struck down the federal Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), as a violation of the Tenth Amendment. Like 38 U.S.C. § 101(31) and 38 C.F.R. § 3.50(a), DOMA defines "spouse" to include only the union of a man and a women and, like 38 U.S.C. § 101(31) and 38 C.F.R. § 3.50(a), applies this definition to federal programs irrespective of contrary state law. The result is that same-sex couples, who are validly married under state law, are denied federal benefits that are available to opposite-sex married couples, and states that seek to protect the equal rights of all state citizens, including same-sex couples, are barred from doing so. Concluding that marital status determinations have long been an attribute of state sovereignty and that "the federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state," the court held that DOMA violated the Tenth Amendment.

The same is true of 38 U.S.C. § 101(31) and 38 C.F.R. § 3.50(a). The federal government's mandate that a "spouse" for VA purposes can only be a person of the opposite sex completely, and unconstitutionally, upends the federal government's long-standing respect for state sovereign authority in the area of domestic relations. Federal statutes governing veterans' benefits purport to apply state marriage laws, stating that "[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the

Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c). But by limiting the definition of the term "spouse" to "a person of the opposite sex," 38 U.S.C. § 101(31) and 38 C.F.R. § 3.50(a), as well as 1 U.S.C. § 7, render the stated deference to state law meaningless in states such as Connecticut where state law defines marriage to include same-sex couples. The result is that the federal government blatantly discriminates based on sex and sexual orientation against Connecticut same-sex couples, in complete disregard for Connecticut's laws protecting the equal rights of all Connecticut citizens to marry. Connecticut is thereby precluded from protecting the state constitutional rights of its citizens and, to the extent that veterans must seek alternative state support to make up for dependency benefits that the federal government has withheld, is forced to shoulder a financial burden that it would not have to bear if its state marriage laws were respected. Because this unprecedented and intolerable intrusion on Connecticut's sovereign authority squarely violates the Tenth Amendment, 38 U.S.C. § 101(31), 38 C.F.R. § 3.50(a), and 1 U.S.C. § 7 should be struck down and the Board's decision denying benefits to Ms. Cardona should be reversed.

CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, the State of Connecticut respectfully requests that this Court reverse the decision of the Board and grant Ms. Cardona's application for additional dependency benefits for her same-sex spouse.

Respectfully submitted,

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Dated: April 25, 2012

CERTIFICATION OF SERVICE

I hereby certify that on April 25, 2012, a copy of the foregoing Brief of the State of Connecticut as Amicus Curiae was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email 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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