**UNITED STATES COURT OF APPEALS**
**FOR VETERANS CLAIMS**

| | | |
|---|---|---|
| CARMEN CARDONA, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ERIC K. SHINSEKI, | ) | Vet. App. No. 11-3083 |
| | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Appellee. | ) | |

**BRIEF OF *AMICI CURIAE* UNITED STATES CONSTITUTIONAL AND FAMILY LAW PROFESSORS IN SUPPORT OF APPELLANT**

THIS BRIEF IS FILED ON BEHALF OF THE FOLLOWING PROFESSORS:

**Naomi R. Cahn**
John Theodore Fey Research Professor of Law
The George Washington University Law School

**Erwin Chemerinsky**
Dean and Distinguished Professor of Law
University of California, Irvine School of Law

**Norman Dorsen**
Stokes Professor of Law and Counselor to the President
New York University School of Law

**Owen M. Fiss**
Sterling Professor Emeritus of Law and Professorial Lecturer in Law
Yale Law School

**Risa L. Goluboff**
Professor of Law and Professor of History
University of Virginia School of Law

**Sylvia A. Law**
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University School of Law

**Diane H. Mazur**
Professor of Law
University of Florida Levin College of Law

**TABLE OF CONTENTS**

## STATEMENT OF INTEREST OF AMICI

Amici, professors of United States constitutional and family law, submit this brief in support of Appellant Carmen H. Cardona to explain how the Veteran Affairs ("VA") law's definition of "spouse" (the "VA Law") violates the equal protection component of the Fifth Amendment Due Process Clause. Amici support Appellant's position that the VA Law illegally classifies individuals on the basis of sexual orientation, thereby depriving them of valuable property (*i.e.*, VA benefits) in direct violation of the United States Constitution. As amici explain below, the VA Law's classification of "spouses" cannot survive strict scrutiny, intermediate scrutiny, or even the rational basis test.

All parties have consented to the filing of this amicus brief.

## SUMMARY OF ARGUMENT

The VA Law defines a "spouse" as "a person of the opposite sex" whose marriage is valid under the laws 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.A. § 101(31) (West 2002); 38 C.F.R. § 3.50(a) (2010); 38 U.S.C.A. § 103(c) (West 2002); 38 C.F.R. § 3.1(j) (2010). While the Board of Veterans' Appeals recognized that Appellant was validly married under Connecticut law, it

nevertheless denied her the same benefits a heterosexual married veteran would be entitled to solely based on the fact that she is married to a woman instead of a man. Setting aside the inherently contradictory position of recognizing Appellant's valid marriage and simultaneously concluding that Appellant is not a "spouse," the VA Law's discriminatory classification cannot survive any standard of scrutiny under a Fifth Amendment equal protection analysis.

The Fifth Amendment Due Process Clause bars "governmental classifications that 'affect some groups of citizens differently than others.'" *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 386 (D. Mass. 2010) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 592 (2008)). "[I]t is because of this 'commitment to the law's neutrality where the rights of persons are at stake' that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny." *Gill*, 699 F. Supp. 2d at 386 (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

Because the VA Law discriminates on the basis of sexual orientation, it should be subjected to at least intermediate scrutiny (also commonly referred to as heightened scrutiny), *see Clark v. Jeter*, 486 U.S. 456, 461 (1988), if not to the strict scrutiny applying to classifications based on race, national origin, or religion, *see Loving v. Virginia*, 388 U.S. 1, 11

(1967); *Larson v. Valente*, 456 U.S. 228, 246 (1982). The VA Law cannot satisfy either demanding standard of review. Furthermore, the VA Law cannot even survive the rational basis test because the classification is not "rationally related to a legitimate state interest." *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Accordingly, this Court should invalidate the VA Law's illegal classification under any standard of review.

## ARGUMENT

### I. THE VA LAW IS SUBJECT TO INTERMEDIATE SCRUTINY AT A MINIMUM

The cornerstone of equal protection of the law is to ensure that "all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439 (citing *Pyler v. Doe*, 457 U.S. 202, 216 (1982)). Because the VA Law's definition of spouse discriminates against a historically and politically persecuted class of people based on an immutable characteristic that has no bearing on their ability to contribute to society, the Constitution mandates that the classification be subjected to intermediate scrutiny at a minimum. *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *Cleburne*, 473 U.S. at 441-42.

President Obama and Attorney General Holder have concluded that "classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny under equal protection principles." Letter from Eric H. Holder,

Jr. to John A. Boehner regarding *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.), dated February 17, 2012 ("Holder 2012 Letter"). The President and the Attorney General have determined that the VA Law "classif[ies] on the basis of sexual orientation . . . by denying veterans' benefits to legally married same-sex married couples for which opposite-sex married couples would be eligible." *Id.* Accordingly, the President and the Attorney General have advised that heightened scrutiny is the applicable standard of review for equal protection challenges to the VA Law.

### A. Sexual Orientation Discrimination Requires Intermediate Scrutiny At The Very Least

The Supreme Court has not determined what level of scrutiny applies to laws that discriminate on the basis of sexual orientation. *See* Letter from Eric J. Holder, Jr. to John A. Boehner regarding the Defense of Marriage Act ("DOMA"), dated February 23, 2011 ("Holder 2011 Letter"). Some courts have noted that "gays and lesbians are the type of minority strict scrutiny was designed to protect." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). There is no principled basis—in the law or logic—for applying strict scrutiny to classifications based on race or national origin or religion and applying a less demanding standard of review for classifications based on sexual orientation.

Even if this Court finds that strict scrutiny is not the proper standard of review, the VA Law must be examined under heightened scrutiny at the very least. In analyzing whether a classification should be subjected to heightened scrutiny, the Supreme Court has adopted a test that analyzes four factors. *See* Holder 2011 Letter. The two primary criteria examine whether "(1) the group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to perform or contribute to society." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (outlining the Supreme Court's jurisprudence) (internal citations and quotation marks omitted); *see also, e.g., Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). Courts also consider two additional factors: (1) whether the characteristic defining the group is immutable or "so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change [it] . . . in order to avoid discriminatory treatment," *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008); *Bowen*, 483 U.S. at 602-03; and (2) whether the group is a minority or politically powerless, *id.*; *Cleburne*, 473 U.S. at 442-46. An analysis of these factors can reveal that a classification was based upon "deep-seated prejudice rather than legislative

rationality in pursuit of some legitimate objective." *Pyler*, 457 U.S. at 216 n.14 (1982).

**1. It is Undisputed that Lesbians and Gays Have Suffered a History of Discrimination**

Discrimination against gays and lesbians has unfortunately been a part of this country's history from its inception. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014-15 (1985) (Brennan & Marshall, J., dissenting from denial of writ of certiorari) ("homosexuals have historically been the object of pernicious and sustained hostility"). Until less than ten years ago, state laws have "demean[ed] the[] existence" of homosexuals "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Furthermore, opponents of equal rights fight to overturn legislation designed to promote equal rights for gays and lesbians. *See* Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, *available at* http://www.law.umaryland.edu/academics/journals/mdlr/print/articles/71_2_471.pdf (noting that "Republicans in New Hampshire are pressing a major legislative effort to revoke same-sex marriage" in New Hampshire). It is unquestionable that the federal government, state governments, and private parties have discriminated against gay individuals since the beginning of this country's history.

**2. Sexual Orientation Does Not Affect an Individual's Ability to Participate In or Contribute to Society**

As the Attorney General has noted, "there is a growing acknowledgment that sexual orientation 'bears no relation to ability to perform or contribute to society.'" *See* Holder 2011 Letter (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality)); *see also id.* (citing Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")). The American Psychiatric Association stated decades ago that "homosexuality per se implies no impairment in judgment, stability, reliability or general social and vocational capabilities." Resolution of the Am. Psychiatric Ass'n (Dec. 15, 1973). Disparate treatment of individuals based on sexual orientation is necessarily rooted in discrimination and inveterate prejudice and cannot be justified by a spurious argument that gays and lesbians are somehow less able to contribute to society.

**3. Sexual Orientation is Immutable**

The Attorney General has recognized that "while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable." *See* Holder 2011 Letter (citing Richard A.

Posner, Sex and Reason 101 (1992)). Sexual orientation is a core element of one's identity. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (finding that "sexual orientation and sexual identity are immutable" for purposes of determining whether gays and lesbians were members of a "particular social group" eligible for asylum), *overruled in part on other grounds*, *Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005). Furthermore, sexual orientation is innate and not something that can be changed at will, as largely recognized in the scientific community. *See e.g.*, G.M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults* 7:176-200, *available at* http://www.springerlink.com/content/k18624464727292 4/fulltext.pdf (noting in a national probability sample of self-identified lesbian, gay, and bisexual adults that 95 percent of the gay men and 84 percent of lesbian women reported that they experienced little or no choice about their sexual orientation); *see also* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (concluding that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm").

Furthermore, as case law explains, for equal protection purposes, immutability does not require "strict" immutability, but rather "effective" immutability:

> It is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class . . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity . . . . With these principles in mind, I have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine.

*Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

**4. Lesbians and Gays Are Minorities Lacking Political Power**

Forty-four states continue to exclude same-sex couples from marriage, and through DOMA, the federal government deprives legally married same-sex couples from over a thousand federal protections that come with marriage. *See DOMA: Federal Discrimination Against Same-Sex Married Couples*, *available at* http://www.glad.org/uploads/docs/publications/doma-flyer.pdf. In addition, the federal government and state governments have failed to enact legislation specifically protecting gays and lesbians (*e.g.*, by failing to bar employment discrimination on the basis of sexual orientation). Likewise, state governments and private parties treat gays and lesbians as minorities. For example, Colorado voters adopted by statewide referendum an

amendment to the Colorado Constitution, which precluded all action, at any level of state or local government, designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *See Romer*, 517 U.S. at 620.

* * *

Applying the factors of the Supreme Court's intermediate scrutiny analysis, it is clear that the VA Law warrants heightened scrutiny at the very least.

## II. THE VA LAW FAILS TO PASS INTERMEDIATE SCRUTINY

To survive intermediate scrutiny, the government must establish that the classification is "***substantially related*** to an ***important government objective***." *Clark*, 486 U.S. at 461 (emphasis added). Under this standard, "a tenable justification must describe ***actual*** state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-36 (emphasis added). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 533.

Significantly, the Attorney General stressed that the legislative record of the VA Law "contains *no rationale* for providing veterans' benefits to opposite-sex spouses of veterans but not to legally married same-sex spouses of veterans." *Id.* (emphasis added). Thus, the VA Law was not specifically

designed with a government objective in mind, let alone an important justification. The President and the Attorney General thus concluded that the relevant provision "cannot survive heightened scrutiny because [it is] not 'substantially related to an important government objective.'" Holder 2012 Letter (quoting *Clark*, 486 U.S. at 461).

At its core, there is no justification for this classification scheme that is not directly rooted in discrimination, deep-rooted prejudice, and fallacies. Withholding benefits from a veteran who served our country simply because that individual is gay does not impact in any way whatsoever how straight individuals lead their lives. Treating gay individuals differently—and, indeed, regulating the lives of gay individuals in any manner—does not affect heterosexuals or influence their decisions to marry, have children, or lead their lives. Ultimately, such illegal classifications are designed only to discriminate and serve no other purpose.

Setting aside the fact that any attempt to articulate a purported justification for the relevant provision will be an impermissible *post hoc* rationalization, any alleged objective will almost certainly track the justifications used to support DOMA and other classifications that discriminate against lesbians and gays. Congress claimed that DOMA promotes the "government's interest in traditional notions of morality."

H.R. Rep. No. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-23 ("H.R. Rep."); *see also* H.R. Rep. at 15-16 ("[J]udgment [opposing same sex-marriage] entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."). As former Supreme Court Justice O'Connor noted in her concurrence in *Lawrence*, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classification must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" 539 U.S. at 583 (citations omitted).

Certain other purported justifications the VA might attempt to proffer, such as the promotion of heterosexuality and the promotion of heterosexual marriage, are not important government objectives. Given that heterosexuality is an immutable characteristic, it is not possible for the government to promote heterosexuality. Additionally, promoting heterosexual marriages at the expense of same-sex marriages is nothing more than poorly veiled discrimination against gays and lesbians, and thus cannot constitute an important government objective. *See In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) ("the denial of federal benefits to same-sex spouses cannot be justified simply by a distaste for or disapproval of same-sex marriage").

Furthermore, withholding benefits from gay and lesbian veterans has no effect on heterosexual marriages and heterosexual individuals' decisions to get married or not. *See id.* at 932 ("denying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of defending traditional notions of morality . . . [or] defending and nurturing the institution of traditional, heterosexual marriage") (internal quotation marks and citations omitted); *Cleburne*, 473 U.S. at 447 (underscoring that "a bare desire to harm a politically unpopular group" cannot provide a rational basis for governmental discrimination). *See also* M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, Sexuality Research & Social Policy: Journal of NSRC, Sept. 2004 at 1-10 (finding that "heterosexual marriage rates and divorce rates in Denmark, Norway, Sweden, Iceland, and the Netherlands displayed no significant change in trends after implementation of rights for gay couples"); *see also id.* (noting that because the United States gives many more incentives for heterosexual couples to marry than European countries, any effects of gay marriage . . . in this country would be even less likely to have an impact on the status of heterosexual marriage").

Any contention that the VA Law's classification serves to promote responsible procreation and child-rearing fails to

survive heightened scrutiny. There is simply no evidence that withholding benefits from a veteran who happens to be married to a member of the same sex influences a straight individual's decision to have children or impacts his/her conduct as a parent. Because the government is not capable of establishing that the classification is substantially related to any important government objective, the VA Law is unconstitutional.

**III. THE VA LAW ALSO FAILS THE RATIONAL BASIS TEST**

While intermediate scrutiny is the lowest appropriate standard that should be applied here, the VA Law would likewise fail to satisfy even the rational basis standard. In order to survive rational basis review, "the classification . . . [must be] rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440; *see also Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)("the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made") (internal quotation marks and citations omitted). The Supreme Court has underscored that there must be a "link between classification and objective." *Romer*, 517 U.S. at 632. For the very same reasons that the classification at issue does not promote any important government objectives, it likewise fails to advance any legitimate state interests. Furthermore, as discussed above, even if the government could

articulate any legitimate state interests, it would not be able to show that the classification is "rationally related to" any of those objectives.

## CONCLUSION

The VA Law's illegal classification scheme strips lesbian and gay veterans (and their families) of benefits to which they would otherwise be entitled if they were straight. As determined by the President and the Attorney General, the Supreme Court's constitutional framework requires such classification to satisfy at least intermediate scrutiny. Because the legislative record contains no rationale for providing benefits to opposite-sex spouses of veterans but not to legally married same-sex spouses of veterans, the classification is unconstitutional. Any alleged justification for this illegal classification is offered purely to discriminate. Withholding benefits to the spouse of a gay or lesbian veteran is not rationally related to, and does not advance, *any* government interest, no matter how significant. The United States Constitution mandates that such classification be invalidated. For all the foregoing reasons, amici respectfully request 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,

*AMICI CURIAE*

By /s/ Joseph F. Tringali
Joseph F. Tringali
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-3840
Facsimile: (212) 455-2502
Email: jtringali@stblaw.com

Dated: April 25, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2012, a copy of the foregoing brief was submitted electronically. 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 will be able to access this filing through the court's CM/ECF system. The following parties or counsel were served by electronic means:

Ronen Morris
Appellate Attorney
Office of the General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
Tel: (202) 443-5059

Michael J. Wishnie
Supervising Attorney
Jerome N. Frank Legal Services Organization
Veterans Legal Services Clinic
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-4800

/s/ Joseph F. Tringali
Joseph F. Tringali
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-3840
Facsimile: (212) 455-2502
Email: jtringali@stblaw.com