
**IN THE
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 FOR *AMICI CURIAE* RETIRED MILITARY OFFICERS
SUPPORTING APPELLANT

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INTEREST OF *AMICI CURIAE*

Amici are former officers and leaders of the United States military.¹ They have an interest in this case because its outcome will have a substantial impact on the men and women serving in the armed forces and, in turn, on our nation's military capability and effectiveness. The judgment of these *amici* is based on decades of experience in leadership positions in the military. The experience and responsibilities enumerated below do not describe the full scope of their qualifications:

Michael Breen, former Army Captain, served in Afghanistan and Iraq. He is a lawyer and Vice President of the Truman National Security Project.

Keith H. Kerr, retired United States Army Reserve Colonel and retired Brigadier General in the California State Military Reserve, has 43 years of service to the United States and the State of California.

Lawrence J. Korb, retired Naval Reserve Captain, served active duty for four years as a Naval Flight Officer and is a former Assistant Secretary of Defense, where he was responsible for administering approximately 70% of the defense budget.

Virgil A. Richard, retired Brigadier General, served 32 years of active duty in the United State Army, specializing in finance.

Dr. Alan M. Steinman, retired Rear Admiral, is an expert on emergency and cold-water medicine with over 25 years of service in the United States Coast Guard and the Public Health Service.

¹ *Amici* join this brief in their individual capacities. The arguments herein do not reflect the position of any organization with which *amici* are affiliated or employed.

Amici conclude that the denial of benefits to the same-sex spouses of the men and women serving in the armed forces undermines the professionalism and effectiveness of the United States military. Denial of these benefits jeopardizes the armed services' ability to recruit able service members; harms the maintenance of a qualified all-volunteer force by denying service members benefits that would allow or encourage them to re-enlist; threatens military readiness by undermining the armed services' ability to ensure that all service members are able to focus on their mission, knowing that the federal government will attend to the needs of their loved ones; erodes military cohesion by forcing the armed forces to treat some service members differently than others; and decreases the military's credibility with service members and veterans by forcing it to take actions that contradict its own message of nondiscrimination.

BACKGROUND

The United States armed forces—through both the Department of Defense (“DOD”) and the Department of Veterans Affairs (“DVA”)—provide an array of benefits to service members' spouses and dependents to facilitate the recruitment and retention of military personnel and to ensure military readiness. Congress, the President, and the leadership of the armed forces have long recognized that benefits for service members' family members are essential to a strong all-volunteer military. Put simply, the armed forces recruit soldiers, but retain families.

The provision of these benefits to *all* service members' families on equal footing is also essential to an effective military. Equal treatment of every service member is critical to the cohesion of military units. The provision of these benefits to *each* service

member's family is also essential to ensure that each and every service member can focus on the crucial task of attending to our national security.

Appellant Carmen J. Cardona was in active service for twelve years and is rated as having an 80% service-connected disability. Ms. Cardona legally married her same-sex spouse in Connecticut on May 14, 2010. Shortly thereafter, Ms. Cardona applied for additional disability benefits for her dependent spouse. The DVA Regional Office in Hartford, Connecticut denied Ms. Cardona's claim on the ground that, even though Ms. Cardona was legally married, her marriage could not be recognized by DVA because of the definition of "spouse" in 38 C.F.R. § 3.50(a). R. at 147 (147-148) (VA Decision Letter). The Board of Veterans' Appeals affirmed the denial of benefits in August 2011. R. at 5 (3-12) (Board Decision). Ms. Cardona now appeals to this Court, seeking a determination that these statutes and regulations unconstitutionally prevent legally married veterans from accessing the spousal benefits to which they are entitled.

The constitutional issue presented in this appeal has potentially far-reaching implications not only for Ms. Cardona and other veterans married to same-sex spouses, but also the military's ability to recruit and maintain a successful all-volunteer force. Following the 2011 repeal of Don't Ask, Don't Tell ("DADT"), lesbian and gay service members now serve openly in the military for the first time. The armed forces quickly embraced lesbian and gay recruits upon the repeal of DADT, "step[ping] out smartly to faithfully implement this new law," according to Gen. James F. Amos, the commandant

of the Marine Corps.² But in one crucial respect, gay and lesbian service members continue to be treated as inferior to their peers. The federal statutes challenged here deny lesbian and gay service members many benefits routinely provided to service members for their spouses and dependents. This discriminatory treatment has the potential to undermine the military's recruitment and retention efforts, as officers welcome qualified lesbian and gay service members, but then are required to deny many of them the same benefits available to their heterosexual counterparts.

Most of the hundreds of benefits that the United States provides to the spouses and family members of service members are contingent on marital status (the legal definition of "spouse") or the definition of "dependent" (which incorporates the legal definition of "spouse"). See U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* 24-26 (2011) ("*Benefits Book*"); 38 U.S.C. § 1115; 38 C.F.R. § 3.4(b)(2). Title 38 of the United States Code, which governs veterans' benefits, defines "spouse" as "a person of the opposite sex who is a wife or husband." 38 U.S.C. § 101(31). Title 38 thus precludes the federal government from providing benefits to the

² Ed O'Keefe, *Troops Get Training on End of "Don't Ask,"* Wash. Post (May 8, 2011), available at http://www.washingtonpost.com/politics/troops-get-training-on-end-of-dont-ask/2011/05/06/AFEMKiSG_story.html; see also Elisabeth Bumiller, *Marines Hit the Ground Running in Seeking Recruits at Gay Center*, N.Y. Times (Sept. 20, 2011), available at <http://www.nytimes.com/2011/09/21/us/marine-recruiters-visit-gay-center-in-oklahoma.htm>.

same-sex spouses of veterans.³ And even if Title 38 did not require this disparate treatment, the military would be precluded from conferring benefits on same-sex spouses because DOMA defines “marriage” as only “a legal union between one man and one woman as husband and wife,” and “spouse” as only “a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7. As the Under Secretary of Defense for Personnel and Readiness conveyed to the Secretaries of the Military Departments upon repeal of DADT, “The Defense of Marriage Act, 1 U.S.C. § 7, and the existing definition of ‘dependent’ in some laws, prohibit the extension of many military benefits—such as medical care, travel and housing allowances, and other benefits—to same-sex couples.”⁴

A service member with a service-connected disability, like Ms. Cardona, has an obvious need for compensation for the financial harm to her family unit. In addition, the DVA provides benefits to service members and their spouses and dependents meant to ease the burden of military life. For example, the DVA provides service members with dependency and indemnity compensation;⁵ death pension benefits;⁶ health care

³ Ironically, the definition of “spouse” in Title 38 was meant to create gender equality in the statute, and not to facilitate discrimination. Two years after the Supreme Court held in *Frontiero v. Richardson*, 411 U.S. 677 (1973), that the military could not distribute benefits differently based on the gender of the service member, Congress removed references in Title 38 to exclusively male veterans and their “widows.” The Senate Committee on Veterans Affairs explained that it “add[ed] the term ‘spouse’ to mean wife or husband and the term ‘surviving spouse’ to mean ‘widow or widower’” to the definition section of Title 38 in order “to eliminate unnecessary gender references.” S. Rep. No. 94-532, at 78 (1975).

⁴ Clifford L. Stanley, Under Secretary of Defense for Personnel and Readiness, *Memorandum for Secretaries of the Military Departments* (Jan. 28, 2011), available at http://www.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_28Jan11.pdf.

⁵ *Benefits Book* 37.

reimbursement;⁷ educational housing and tuition assistance, as well as financial assistance for continuing education;⁸ morale, welfare, and recreation programs;⁹ home loan guaranty;¹⁰ civil service preference;¹¹ and burial in VA cemeteries.¹² Service members married to people of the opposite sex can share these benefits with their spouses. But because these benefits are contingent on the statutory definition of “dependent” and “spouse”—definitions that expressly exclude spouses of the same sex—these benefits cannot be designated by a service member to a same-sex spouse.¹³

DOD also provides an array of benefits to military families; service members in same-sex marriages are likewise precluded from sharing these benefits with their spouses

⁶ *Id.* at 105-106; VA Pamphlet 21-03-1, *VA Benefits for Survivors* (March 2010) (hereinafter “VA Pamphlet 21-03-1”).

⁷ Reimbursements for health care costs through CHAMPVA are available to certain spouses and dependents not eligible for TRICARE; *Benefits Book* 99; VA Pamphlet 21-03-1.

⁸ Spouses and dependents are eligible for several educational assistance programs and grants. *Benefits Book* 106-109. Surviving spouses may also be refunded a deceased veterans’ unused Veterans Educational Assistance Program benefits. VA Pamphlet 21-03-1. The Post-9/11 G.I. Bill makes education benefits transferable to dependents. 38 C.F.R. § 21.9570.

⁹ VA morale, welfare, and recreation programs generally depend on access to the base, for which an ID card is necessary. *See Dep’t of Defense Instruction No. 1000.13: Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals* E4.A1.10 (Dec. 5, 1997).

¹⁰ *Benefits Book* 110; VA Pamphlet 21-03-1.

¹¹ VA Pamphlet 21-03-1.

¹² *Benefits Book* 70; VA Pamphlet 21-03-1; *see also Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 239-241 (D. Mass. 2010).

¹³ 38 U.S.C. § 101(31); 1 U.S.C. § 7. Fourteen additional benefits may be designated to any beneficiaries, including same-sex spouses, but these benefits were always available to be designated to any person, even before the repeal of DADT. They are provided automatically to opposite-sex spouses. Clifford L. Stanley, Under Secretary of Defense for Personnel and Readiness, *Repeal of ‘Don’t Ask Don’t Tell’ (DADT): Quick Reference Guide* (Oct. 2011), available at http://www.defense.gov/home/features/2010/0610_dadt/DADT_Repeal-QuickReferenceGuide.pdf.

because of the statutory definitions of “dependent” and “spouse.” Family members of service members are eligible for joint duty assignments;¹⁴ health care;¹⁵ augmented housing allowance for dependents in overseas housing;¹⁶ and spousal privilege in courts martial.¹⁷ In addition, because military families are regularly forced to move, disrupting their schooling and careers, DOD offers job placement programs for spouses of service members in order to promote career stability.¹⁸ DOD is also engaged in a continuing effort to promote career continuity by encouraging states to give special treatment to military spouses for the transfer of licenses.¹⁹ Other DOD benefits are meant to help integrate spouses into the military by ensuring their access to bases and their participation in family programs such as recreation, support groups, counseling, and other services. For example, DOD provides to eligible family members Uniformed Services Identification and Privilege Cards, which, among other benefits, grant family members access to Commissary and Exchange Privileges.²⁰

¹⁴ The Married Army Couples Program (MACP) allows dual-career military married couples to be stationed in the same area. *See* Army Regulation 614-200, *Enlisted Assignments and Utilization Management* 51 (Oct. 11, 2011).

¹⁵ 10 U.S.C. §1074.

¹⁶ 37 U.S.C. § 403.

¹⁷ M.R.E. 504 (2008).

¹⁸ DOD grants the spouses of active duty service members priority consideration for service positions in order to be able to travel with their spouses to their assignments. Dep’t of Defense Civilian Personnel Manual 1400.25-M, Ch. 1800: *Services, Their Dependents, and Other Eligible Individuals* (Dec. 1996).

¹⁹ *See* U.S. Dep’t of the Treasury & U.S. Dep’t of Defense, *Supporting our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines* (Feb. 2012), available at http://www.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF.

²⁰ Dep’t of Defense Instruction No. 1330.17, *Armed Services Commissary Operations* (Oct. 8, 2006); *Benefits Book* 124.

The armed forces have made the considered, professional judgment that provision of these benefits to service members and their families is necessary to ensure military readiness and to encourage service members to choose military service as a lifelong career. Congress has concurred in that judgment and has established comprehensive benefits schemes for service members in active duty and for veterans. As *amici* explain below, the availability of these benefits to all service members on an equal basis is important to the armed forces' ability to recruit and retain a qualified all-volunteer military. Recruitment and retention efforts can only be harmed by denying potential service members benefits that would otherwise encourage them to enlist and re-enlist.

ARGUMENT

I. FAMILY BENEFITS ENABLE THE ARMED FORCES TO RECRUIT AND RETAIN QUALIFIED SERVICE MEMBERS

As the Supreme Court observed in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the introduction of a comprehensive scheme of benefits for service members and their families was prompted by a military effort to recruit the Nation's best and brightest, and to promote lifelong military service through reenlistment. *See id.* at 679 ("In an effort to attract career personnel through reenlistment, Congress established ... a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry."). The military has embraced not only the professional dimension of these benefits, but also the fact that they are integral to service members' morale: Military recruitment and retention efforts are premised on the belief that the armed forces "recruit soldiers, but retain families." The benefits provided to military

spouses and families are an integral part of maintaining an all-volunteer force and have been developed over time with the express purpose of retaining qualified soldiers.

Numerous studies conducted by military and non-military scholars show that when service members decide to enlist or re-enlist, they give considerable weight to the fact that their families will have to make significant sacrifices. The assurance that service members' families will be well cared for is fundamental to their decision to enlist or re-enlist. *See, e.g.*, Maj. Jonathan T. Petty, School of Advanced Military Studies, United States Army Command and General Staff College, *Facing the Long War: Factors that Lead Soldiers to Stay in the Army During Persistent Conflict 2* (2011) (family support is one of the eight primary factors that positively affect soldier retention); *Military Compensation: Balancing Cash and Noncash Benefits* CBO Economic and Budget Issue Brief, 4 (Jan. 16, 2004) (“[Q]uality-of-life programs that encourage experienced people to remain in the military or that attract high-quality recruits could be said to enhance readiness.”).²¹

In recent years, in recognition of the important role that family benefits play in service members' enlistment and re-enlistment decision-making, Congress has enhanced

²¹ *See also* Bernard D. Rastker & Curtis L. Gilroy, *The Transition to an All-Volunteer Force: The U.S. Experience*, in *Service to Country: Personnel Policy and the Transformation of Western Militaries* 233, 256 (Curtis L. Gilroy & Cindy Williams eds., 2006) (“Although the military recruits *individuals*, it retains *families*: family considerations are important to the individual's reenlistment decision.”); Joyce Wessel Raezer, *Transforming Support to Military Families and Communities*, in *Filling the Ranks: Transforming the U.S. Military Personnel System* 213, 218-220 (Cindy Williams ed., 2004) (“Because the career servicemembers who make up a higher proportion of the All-Volunteer force are more likely to be married, family well-being became more important in a servicemember's decision to remain in the military.”).

the benefits available to military spouses and dependents. For example, the Post-9/11 G.I. Bill permits, for the first time, service members to transfer educational benefits to their spouses or children. *See* 38 C.F.R. § 21.9570. Congress and military officers explicitly stated that this new provision was intended to assist the Pentagon meet its recruiting and retention goals. *See Post-9/11 Veterans Educational Assistance Improvements Act of 2010: Hearing on S. 3447 Before the S. Comm. on Veterans Affairs, 111th Cong. (2010)* (“Few things, if any, are more important to the Secretary and to the Services than recruiting and retention. We recognize our duty to man the All-Volunteer Force with high-quality, motivated, and well-trained young men and women. The Post-9/11 GI Bill remains a key to our success.”) (statement of Robert E. Clark, Assistant Director for Accession Policy, Office of the Under Secretary of Defense for Personnel & Readiness) *available at* http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=c6043189-fc99-4228-8f5f-cb0187ff35b1; *see also Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans Affairs, 110th Cong. 21 (2008)* (“[T]he transferability of entitlement from service members to their spouses and children... supports the current makeup and retention of the all-volunteer force.”) (statement of Assoc. Deputy Under Secretary, Policy and Program Mgmt., Dept. Veterans Affairs Keith R. Pedigo); *see also 2011 United States Army Posture Statement, Transferability of GI Bill Benefits to Family Members (Mar. 21, 2011)* (“The Army continues to focus on, and provide support to, Soldiers and their Families because it is the right thing to do, and because we understand that we recruit Soldiers, but retain Families.”).

Denying benefits to lesbian and gay service members harms the military's efforts to recruit and retain service members like Ms. Cardona, whose years of service made her a vital asset to the Army. Now that gay and lesbian Americans can serve openly in the military, and now that the armed forces are actively recruiting these individuals, the armed forces' failure to provide family benefits to the lawful spouses of gay and lesbian service members is likely to have deleterious effects on recruitment and retention efforts.

II. FAMILY BENEFITS ENSURE MILITARY READINESS

As Congress has observed in its legislation appropriating benefits for service members and their families:

The families of both active and reserve component members of the Armed Forces, through their sacrifices and their dedication to the Nation and its values, contribute immeasurably to the readiness of the Armed Forces.... Without the continued support of military families, the Nation's ability to sustain a high quality all-volunteer military force would be undermined.

National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 581, 117 Stat. 1489 (2003) (codified at 10 U.S.C. § 1781a). Service members who know that their families are being cared for while they are deployed—and that their families will be cared for in the event they are killed—are not only more likely to stay in the military (as described above), but they are also be more likely to perform well. The military has integrated this understanding into its operations, including through its provision of veterans benefits, and accordingly provides structural support for families of service members before, during, and after deployment. The denial of these benefits to service members in active duty compromises their ability to focus on the singular task before them, and threatens military readiness. *See* Michael A. Jackonis et al., *War, Its*

Aftermath, and U.S. Health Policy: Toward a Comprehensive Health Program for America's Military Personnel, Veterans, and Their Families, 36 J.L. Med & Ethics 677, 678 (2008) (benefits for the families of veterans are a “national security issue”).

As the Congressional Budget Office has noted, military programs “that support families—such as subsidized child care or family housing—promote readiness indirectly, as deployed service members who feel that their families are taken care of may perform their jobs more effectively.” *Military Compensation: Balancing Cash and Noncash Benefits* CBO Economic and Budget Issue Brief, 4 (Jan. 16, 2004). Likewise, a 2011 report issued by the President, DOD, DVA, and other agencies, put forth a coordinated approach to support military families because “[t]he well-being of military families is an important indicator of the well-being of the overall force.” *Strengthening Our Military Families: Meeting America's Commitment* 1 (Jan. 2011), available at http://www.defense.gov/home/features/2011/0111_initiatives/Strengthening_our_Military_January_2011.pdf.

For example, Family Readiness Groups (“FRGs”) are organized affiliations of military families that prepare families for deployment and support them during and after deployment, under the credo that “[t]he strength of our Soldiers comes from the strength of our families.”²² FRGs “build soldier and family cohesion and morale,” “reduce soldier and family stress,” “help soldiers focus on their mission during deployments,” and “help families become more self-sufficient.” As one Army representative has explained,

²² *U.S. Army FRG Leader's Handbook* 4 (4th ed. 2010), available at [http://www.carlisle.army.mil/usawc/dclm/family/FRG_Handbook\[1\].pdf](http://www.carlisle.army.mil/usawc/dclm/family/FRG_Handbook[1].pdf) (“Army FRG Handbook”) (quoting Army Family Covenant 2007).

the Army's "missions point to the critical need for strong FRGs—effective FRGs—to help enhance soldier and family morale and success at home and at work. Effective FRGs can even help our soldiers accomplish military missions."²³ Because these groups are convened pursuant to military regulations, *see, e.g.*, Army Regulation 608-1, App'x J, *Army Family Readiness Group Operations* (July 21, 2006), they must be conducted pursuant to federal law—which excludes the same-sex spouses of legally married service members.

The repeal of DADT was meant to make the military stronger. According to Admiral Michael Mullen, "[W]ith implementation of the new law fully in place, we are a *stronger joint force*, a more tolerant force, a force of more character and more honor, more in keeping with our own values."²⁴ But the strength of a newly-integrated military is dependent upon the strength of each service member it comprises. It detracts from the professionalism of the armed services to welcome service members into the military only to then deprive them of the very benefits that the military has insisted on, and Congress has provided, in order to ensure that our men and women in uniform are capable of serving at their maximum potential. Indeed, it is counterproductive to recruit and work to retain these service members while denying them and their family members the benefits that years of military experience have shown to be *essential* to the proper functioning of the armed forces.

²³ Army FRG Handbook 9.

²⁴ Army Sgt. 1st Class Tyrone C. Marshall Jr., American Forces Press Service, *Defense Leaders Laud Repeal, Return of 'Equality'* (Sept. 20, 2011) available at www.defense.gov/home/features/2010/0610_dadt/ (statement of Navy Adm. Mike Mullen).

III. EQUAL TREATMENT OF ALL SERVICE MEMBERS IS ESSENTIAL TO MILITARY READINESS

Under the express direction of Congress, the Department of Defense Military Family Readiness Council is tasked with ensuring that “military family readiness programs and activities of the Department of Defense are available to all military families.” 10 U.S.C. § 1781(b)(3). Yet by virtue of the provisions of DOMA and Title 38 challenged here, many military families are excluded from the very programs that Congress funded, and the military has implemented, to ensure military readiness.

In the judgment and experience of *amici*, structural support for family members before, during, and after deployment is effective only if *all* service members are confident that their families are being supported. Yet service members with same-sex spouses are denied access to the financial and other support afforded to the spouses of their heterosexual married counterparts. This exclusion creates a two-tiered structure that threatens cohesion and readiness by requiring the armed forces to treat service members differently, even though that differential treatment has no relation to their performance or commitment to the mission of the armed services.

Moreover, this differential treatment undermines the military’s ability to act in accordance with its own expressed values. On one hand, the repeal of DADT allows and encourages officers to integrate openly gay and lesbian service members into their units, on equal footing with all other service members, exemplifying the armed forces’ professional commitment to nondiscrimination on the basis of sexual orientation. On the other hand, they are required to treat these gay and lesbian service members differently

and deprive them of benefits long deemed essential to the proper functioning of the United States military. So long as Title 38 and DOMA stand as concrete manifestations of discriminatory treatment, military officers cannot credibly communicate their commitment to nondiscrimination or fully integrate gay and lesbian service members into their companies. *Amici* believe that the repeal of DADT was a tremendous step forward for equal rights and military readiness, and that Title 38 and DOMA stand as obstacles to the fulfillment of those goals.

CONCLUSION

The judgment of the Board of Veterans' Appeals should be reversed.

Respectfully submitted,

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