

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-3083

CARMEN J. CARDONA

APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE

BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES

INTERVENOR.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On November 8, 2012, Intervenor, the Bipartisan Legal Advisory Group (BLAG), filed a motion to postpone the oral argument currently set for November 29, 2012. BLAG requests a 45-day postponement of the oral argument pending the U.S. Supreme Court's disposition of eight petitions for writs of certiorari in cases addressing the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which at the time of BLAG's filing was scheduled for November 20, 2012. The constitutionality of DOMA and 38 U.S.C. § 101(31), which define "marriage" and "spouse," respectively, to exclude same-sex couples, are at issue in this appeal. BLAG seeks a 45-day postponement of the oral argument in the interest of judicial efficiency because "the [Supreme] Court is likely to grant one of the eight petitions under consideration." Intervenor's Motion to Postpone Oral Argument at 5.

On November 13, 2012, Ms. Cardona filed a response opposing BLAG's motion to postpone oral argument. Ms. Cardona asserts that (1) the Court expedited this matter and has previously granted a motion to postpone oral argument, (2) regardless of whether the Supreme Court grants certiorari in a case involving DOMA, her case involves the constitutionality of 38 U.S.C. § 101(31), which this Court must still address, (3) BLAG was aware of the pending petitions for certiorari when the Court set oral argument for November 29, (4) it is uncertain when the Supreme Court will announce its decision to grant or deny certiorari on these petitions, and (5) further delay will burden her because she already has requested time off from work and purchased non-refundable airplane tickets to attend the November 29th argument, and the continued deprivation of spousal benefits causes an economic hardship on her family. Appellant's Opposition to Intervenor's Motion to Postpone Oral Argument at 2-6. On November 15, Ms. Cardona filed a Notice of Supplemental

Authority that the Supreme Court had changed the date of its review of the various petitions for writs of certiorari in cases addressing the constitutionality of DOMA to November 30, 2012, which she suggests reflects the complexity of the issues and indicates a decision from the Supreme Court might not be forthcoming for some period of time.

The Court's Rules of Practice and Procedure provide that a request for postponement of an argument "shall be made by motion filed reasonably in advance of the date fixed for argument and shall contain a showing of good cause." U.S. VET. APP. R. 34(d). Although Ms. Cardona correctly notes that this matter was expedited and has had oral argument rescheduled once, the basis for expediting this case was the Secretary's assertion that he would not be contesting Ms. Cardona's argument that DOMA and 38 U.S.C. § 101(31) are unconstitutional, and therefore did not need the full briefing period to prepare his brief. Since then, BLAG has intervened and the Supreme Court only recently announced that it would hold a conference to consider the several petitions for writs of certiorari in cases involving DOMA.

The briefs filed in this case indicate that whether classification based on sexual orientation is suspect is a primary legal issue common to a review of the constitutionality of both DOMA and 38 U.S.C. § 101(31). Thus, the Supreme Court's decision may have a direct impact on Ms. Cardona's appeal. Although no one can assure that the Supreme Court will grant a petition for a writ of certiorari in a case involving DOMA, we note that a common basis for granting certiorari is when, as here, federal courts have struck down as unconstitutional a federal statute of wide applicability. *See, e.g., United States v. Morrison*, 529 U.S. 598, 605 (2000). Assuming arguendo that the Supreme Court's delay in conferencing to consider the several petitions for writs of certiorari in cases involving DOMA reflects the complexity of the issues, we believe this supports postponing oral argument to see if the Supreme Court might undertake review and possibly decide such complex issues, which would foster judicial efficiency. Overall, while the Court is aware of and sympathetic to the burdens to Ms. Cardona in postponing oral argument, her articulated reasons for opposing the motion do not outweigh the interests of judicial efficiency apparent in this case, which weigh in favor of postponement.

Accordingly, we conclude that good cause exists for postponing the oral argument. U.S. VET. APP. R. 34(d). In addition, if the Supreme Court grants a petition for writ of certiorari, this case may also be stayed pending the issuance of its decision considering the constitutionality of DOMA. U.S. VET. APP. R. 5(a) (allowing the stay of cases in the interests of judicial efficiency).

On consideration of the foregoing, it is

ORDERED that BLAG's motion to postpone oral argument for 45 days is granted.

DATED: November 15, 2012

PER CURIAM

Copies to:

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