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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.	)	

APPELLANT'S PRINCIPAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

CITATIONS TO RECORD BEFORE THE AGENCY

RBA Page:

STATEMENT OF THE ISSUES

The questions presented in this case are whether 38 U.S.C. § 101(31) and 1 U.S.C. § 7 ("DOMA"),[1] as applied to Appellant Carmen Cardona:

1. Violate the equal protection component of the Fifth Amendment Due Process Clause.
2. Violate the Tenth Amendment.
3. Inflict punishment on an easily ascertainable group without judicial trial, in violation of the Bill of Attainder Clause.

STATEMENT OF THE CASE

Appellant Carmen Cardona is a disabled U.S. Navy veteran who served her country honorably for eighteen years. She is married to another woman under the laws of the State of Connecticut. However, the U.S. Department of Veterans' Affairs (VA) has dishonored Ms. Cardona's service and her marriage by denying her the spousal disability benefits to which she is entitled.

The facts in this case are not in dispute. R. at 10 (3-12). Ms. Cardona received numerous commendations and ribbons recognizing her service in the U.S. Navy. *Id.* at 52 (51-52), 55 (54-55), 57, 59, 61, 63. In 2002, she applied for and was granted service-connected disability benefits for carpal tunnel syndrome, a product of years working as

[1] We refer to 1 U.S.C. § 7 as "DOMA" even though it is only one part of the Defense of Marriage Act.

an aviation mechanic and Navy cook. *Id.* at 483 (483-488). Ms. Cardona's combined disability evaluation for VA compensation benefits is currently 80 percent. *Id.* at 168-169.

In 2002, Ms. Cardona also met her future wife. In 2008, the Connecticut Supreme Court held that a state statutory prohibition against same-sex marriage violated the Connecticut Constitution. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). On May 14, 2010, eight years after they first met, Ms. Cardona and her wife married under the laws of Connecticut. R. at 4 (3-12). Connecticut fully recognizes Ms. Cardona's wife as her spouse, and grants the couple the same legal status as any other married couple. *Id*.

Shortly after she was married, Ms. Cardona applied for additional disability benefits for her dependent spouse, *id.* at 149-152, benefits she would indisputably be entitled to had she married a man. 38 U.S.C. § 1115 (any veteran rated at least 30 percent disabled is entitled to increased benefits for dependent spouse). However, the VA is barred from recognizing Ms. Cardona's marriage under 38 U.S.C. § 101(31), which defines a "spouse" as "a person of the opposite sex," and DOMA, which defines "marriage" as between "one man and one woman." Thus, although Ms. Cardona is a disabled veteran in a marriage legally recognized by the state in which she resides, the VA Regional Office (VARO) in Hartford, Connecticut denied her claim for service-connected disability benefits for her dependent wife. R. at 147 (147-148).

Ms. Cardona timely appealed to the Board of Veterans' Appeals (BVA) in January

2011. *Id.* at 130. The next month, Attorney General Eric Holder notified Congress of President Obama's determination that DOMA violates the equal protection component of the Fifth Amendment. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, at 1 (Feb. 23, 2011) (hereafter "Holder DOMA Letter") (copy attached as Exhibit A). The Attorney General also stated that he would instruct Justice Department attorneys not to defend that statute against equal protection challenges. *Id*. at 5-6.

In April 2011, Ms. Cardona moved to advance her case on the docket, on the grounds that the BVA lacked jurisdiction to adjudicate her constitutional challenge. R. at 26 (26-33). The BVA granted the motion to advance, *id.* at 4 (3-12), and in August 2011 confirmed the VARO's denial of disability allowance benefits based on the 38 U.S.C. § 101(31) definition of "spouse" as "a person of the opposite sex." *Id*. at 6 (3-12) (quoting 38 U.S.C. § 101(31)); *id*. at 3-12; *see also* 1 U.S.C. § 7. The BVA did not reach the constitutional issues due to lack of jurisdiction. R. at 10 (3-12).

Soon after, on September 20, 2011, the repeal of the United States military's "Don't Ask, Don't Tell" policy ("DADT") went into effect. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321 (repealing former 10 U.S.C. § 654). On October 13, 2011, Ms. Cardona timely filed her appeal to this Court. R. at 130.

Consistent with the President's determination one year earlier regarding DOMA, on February 17, 2012, Attorney General Eric Holder informed Congress of his conclusion that 38 U.S.C. § 101(31) violates the equal protection component of the Fifth

Amendment. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, at 2 (Feb. 17, 2012) (hereafter "Holder Title 38 Letter") (copy attached as Exhibit B). Attorney General Holder explained that the VA had not identified any justifications that would warrant treating 38 U.S.C. § 101(31) differently from DOMA. Attorney General Holder further informed Congress that he would instruct Justice Department attorneys not to defend 38 U.S.C. § 101(31) against the equal protection claims presented in *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. filed Oct. 27, 2011). *Id.*

The equal protection challenge to 38 U.S.C. § 101(31) and DOMA in this case are indistinguishable from those at issue in *McLaughlin v. Panetta*. Accordingly, Ms. Cardona expects that the VA will not defend the constitutionality of those statutes as applied to her in this case.

ARGUMENT

I. 38 U.S.C. § 101(31) and DOMA violate equal protection.

By defining "marriage" and "spouse" to exclude same-sex spouses, 38 U.S.C. § 101(31) and DOMA discriminate against married same-sex couples. Sexual orientation classifications like these should be considered suspect under the law, and therefore subject to strict judicial scrutiny by this Court. In the alternative, this Court should treat these statutes' sexual orientation classifications as quasi-suspect, and also as discriminating on the basis of sex, and thus subject to intermediate scrutiny by the courts. Finally, even if the statutes are subject only to rational basis review, they violate the

Constitution, as they are not rationally related to a legitimate government interest. The Attorney General concurs that 38 U.S.C. § 101(31) and DOMA, as applied to legally married same-sex couples, violate the equal protection component of the Fifth Amendment. *See* Holder Title 38 Letter at 2; Holder DOMA Letter at 1. This Court should similarly conclude that the statutes impermissibly discriminate against Ms. Cardona and instruct the VA to award her the dependency benefits she has earned.

A. 38 U.S.C. § 101(31) and DOMA fail strict scrutiny.

1. Sexual orientation classifications are suspect.

A statute that discriminates against a "suspect class" is subject to strict scrutiny. *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1318 (Fed. Cir. 2001). Courts may consider four factors in determining whether courts should be suspicious of a government classification: whether (1) the group has experienced a history of discrimination; (2) the characteristic that defines the group is unrelated to its ability to perform or contribute to society; (3) the group is a minority or politically powerless; and (4) the group exhibits obvious, immutable, or distinguishing characteristics that define it as a discrete group. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987). The Supreme Court has placed "far greater weight" on the first two of these factors, *Kerrigan*, 957 A.2d at 427, repeatedly ignoring or downplaying the latter two factors, *see, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (finding classification suspect even though individuals could voluntarily withdraw from the class). Gay and lesbian individuals fulfill all four criteria.

First, gays and lesbians have "experienced a history of purposeful unequal treatment," *Witt v. Dep't of the Air Force*, 527 F.3d 806, 824 (9th Cir. 2008), as evidenced by the "longstanding criminal prohibition of homosexual sodomy," *Lawrence v. Texas*, 539 U.S. 558, 559 (2003); *see also Perry v. Brown*, 671 F.3d 1052, 1094-95 (9th Cir. 2012) (referring to years of anti-gay ballot measures). For decades, federal, state, and local governments banned or terminated gays and lesbians from government employment, discrimination that was subsequently copied by private employers. *See, e.g.*, Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953) (identifying "sexual perversion" as grounds for investigation and possible dismissal from federal service); Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, ch. 5 at 2-9, 18-34 (Sept. 2009), *available at* http://williamsinstitute.law.ucla.edu/ research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/ ("Williams Report"); *see also* Superseding Br. for U.S. Dep't of Health & Human Services *et al.* ("HHS Brief") at 30-34, 37-38, *Gill v. Office of Pers. Mgmt.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. *appeal docketed* Oct. 20, 2010) (describing history of anti-gay employment discrimination). To root out homosexual applicants or employees, federal agencies used polygraph tests and interrogation techniques, and the Post Office Department surveyed individuals who initiated correspondence with suspected homosexuals. Williams Report, *supra*, at 7; Edward Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602

(2006).

Federal immigration statutes banned gay and lesbian noncitizens from entering the country, and gays and lesbians were barred from serving openly in the military until 2011. *See, e.g.*, 10 U.S.C. § 654 (2007) (barring open military service by gays and lesbians), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010 (effective Sept. 20, 2011); *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571-73 (N.D. Cal. 1982) (describing history of immigration policies denying entry to gays and lesbians), *aff'd, Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). States and localities denied child custody and visitation rights to gay and lesbian parents. *See, e.g.*, *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998) (upholding denial of custody to gay man); *see also* HHS Brief, *supra*, at 34-35 (looking to other states and localities). Liquor license and lewd or disorderly conduct laws were used—and in some cases, continue to be used—by states, localities, and their police departments to harass gays and lesbians and shut down the businesses where they associate. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703, 762-66 (1997) (describing such use of liquor licenses in 1950s and 1960s); *see, e.g.*, *Pryor v. Mun. Court*, 599 P.2d 636, 644 (Cal. 1979) (noting that studies showed that most arrests for violation of lewd or dissolute conduct laws involved male homosexuals); *see also* HHS Brief, *supra*, at 35-36 (describing history in more detail).

Gays and lesbians continue to face discrimination today. Over 17% of the violent hate crimes from 1995 to 2008 targeted gays and lesbians, a group that represents only an

estimated 3.5% of the adult population. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?* 1 (Williams Institute); Mary Potok, *Anti-Gay Hate Crimes: Doing the Math* (2010). Actual or perceived sexual orientation is second only to physical appearance as the most common reason for bullying in schools. Harris Interactive & Gay, Lesbian, and Straight Educ. Network, *From Teasing to Torment: School Climate in America – A Survey of Students and Teachers*, at 30 (2005). One recent study found that 38% of gays and lesbians who were out at work experienced some form of discrimination. Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, Executive Summary at 2 (2009). Another study concluded that gays and lesbians employed in the public sector filed discrimination complaints at the same rate as people of color and females. Williams Institute, *Evidence of Employment Discrimination on the Basis of Sexual Orientation in State and Local Government* 2 (2011). This evidence of past and present discrimination against gays and lesbians weighs heavily in favor of finding that gays and lesbians constitute a suspect class.

Second, the characteristics that define gays and lesbians are unrelated to their ability to perform or contribute to society. Gays and lesbians have suffered discrimination "on the basis of stereotyped characteristics not truly indicative of their abilities." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985). To date, at least

thirteen federal and state cases have suggested that sexual orientation is not related to ability to contribute to society.[2] Almost forty years ago, the American Psychiatric Association concluded that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the Am. Psychiatric Ass'n (Dec. 15, 1973). "By every available metric . . . as partners, parents and citizens, opposite-sex couples and same-sex couples are equal." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff'd on other grounds*, *Perry*, 671 F.3d 1052 (9th Cir. 2012).

Ms. Cardona exemplifies this point. She served her country honorably for eighteen years, earning excellent performance reviews and several ribbons and commendations. R. at 52 (51-52), 55 (54-55), 57, 59, 61, 63. In one notable instance, she discovered a broken

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[2] *See, e.g.*, *Watkins v. U.S. Army*, 847 F.2d 1329, 1346 (9th Cir. 1988), *op. withdrawn on rehearing*, 875 F.2d 699 (9th Cir. 1989); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff'd on other grounds*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *Able v. United States*, 968 F. Supp. 850, 859 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998); *Equal. Found. v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); *Ben Shalom v. Marsh*, 703 F. Supp. 1372, 1379 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369-70 (N.D. Cal. 1987), *rev'd in part and vacated in part*, 895 F. 2d 563 (9th Cir. 1990); *Kerrigan*, 957 A.2d at 432, 434-36; *In re Marriage Cases*, 43 Cal. 4th 757, 843 (Cal. 2008), *superseded by constitutional amendment as stated in Strauss v. Horton*, 46 Cal. 4th 364 (Cal. 2009); *Dean v. District of Columbia*, 653 A.2d 307, 345 (D.C. Ct. App. 1995); *Varnum v. Brien*, 763 N.W.2d 862, 892 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 609, 613 (Md. Ct. App. 2007); *Snetsinger v. Mont. Univ. Sys.*, 325 Mont. 148, 162 (2004) (Nelson, J., concurring).

cable that "would have caused severe and possibly fatal injuries to the aircrew member." *Id.* at 51 (51-52). Ms. Cardona's "attentiveness in finding this discrepancy set an outstanding example for all to follow," *Id.*, and her "willingness to step up and take charge was the key to maintaining the outstanding service to the ship's staff and visiting officers." *Id.* at 55 (54-55).

After discharge, Ms. Cardona continued as a member of the Navy Reserve and began working as a corrections officer for the Connecticut Department of Correction. In 2000, she helped save the life of a co-worker during a fire in her facility's kitchen. *Id.* at 65, 67. Along with her fellow gay and lesbian servicemembers and civilians, Ms. Cardona's sexual orientation has had "no relation to [her] ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Third, gays and lesbians make up a numeric minority of the United States population and lack significant political power. The Supreme Court has noted that numeric minority status alone is enough to meet the third consideration. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("minority *or* politically powerless") (emphasis added). Gays and lesbians make up only an estimated 3.5% of the adult population. Gates, *supra*, at 1.

Moreover, the political power of gays and lesbians is exponentially smaller than their numbers in American society. If gays and lesbians were represented proportionally in elected office, there would be 17,500 openly gay officials. However, of approximately half a million elected officials in America, fewer than 500 are openly gay or lesbian. Gay and Lesbian Victory Fund, *Database of Out Officials*,

www.victoryinstitute.org/out_officials (last visited Apr. 2, 2012) (follow "Advanced Search" hyperlink; then specify "United States" for the "Country" and "Elected"; then follow "Search" hyperlink). No openly gay person has ever served in the U.S. Senate, in the U.S. Cabinet, or on the U.S. Supreme Court, and there are only four openly gay members of Congress, and four openly gay federal judges (three of whom were appointed in the past year). *See* Gay and Lesbian Victory Fund, *2010 Annual Report* 4 (2011); Bob Egelko, *Michael Fitzgerald 1st Openly Gay U.S. Judge in CA*, San Francisco Chronicle (Mar. 16, 2012).

Gays and lesbians are politically powerless because they are unable to "get [legislatures or electorates] to do something [they] would not otherwise do." Robert A. Dahl, *The Concept of Power*, 2 Behav. Sci. 201, 202-03 (1957).[3] Forty-four states do not permit same-sex couples to marry. *See* ACLU, *Same-Sex Relationship Recognition Map*, http://www.aclu.org/same-sex-relationship-recognition-map-1. Twenty-nine states allow employment discrimination based on sexual orientation, Human Rights Campaign, *Pass ENDA Now*, http://sites.hrc.org/sites/passendanow/index.asp; nineteen states do not

[3] The classic definition of power is: "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do." Steven L. Winter, *The "Power" Thing*, 82 Va. L. Rev. 721, 764 (1996) (quoting Dahl, *supra*, at 202-03). In other words, an individual does not have power over someone who already agrees with him. *See* Dahl, *supra*, at 202-03. Nor does the power of an individual's allies inflate the individual's own power; instead, it merely reflects the power of those allies, who may choose to stop assisting the individual at any time. *See id*; Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* 24, 329 (1967).

include crimes based on sexual orientation in their definition of a hate crime, Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act* 4 (2011); and three states restrict the ability of gay and lesbian people to adopt children, ACLU, *States with Restrictions on Adoption or Fostering by LGB People*, https://www.aclu.org/files/assets/aclu_map1.pdf. The gains that have been made are geographically limited to areas with populations that already support gay rights. *See, e.g.*, ACLU, *Same-Sex Relationship Recognition Map*, *supra*. Moreover, state-level victories for gay rights are extraordinarily vulnerable, as referenda and initiatives limiting gay rights pass the overwhelming majority of the time. Donald P. Haider-Markel *et al.*, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 312-13 (2007). In 2004, all eleven states that had same-sex marriage-bans on the ballot passed the measure. *Id.* at 306, 311-12. During the 2006 and 2008 elections, ten more states, including California, passed amendments to their state constitutions banning marriages between individuals of the same sex. CNN, *Key Ballot Measures*, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/ (last visited Apr. 18, 2012); CNN, *Ballot Measures*, http://www.cnn.com/ELECTION/2008/results/ballot.measures/ (last visited Apr. 18, 2012).

The power of gays and lesbians at the national level is particularly negligible,[4] as evidenced by the failure to repeal 38 U.S.C. § 101(31) and DOMA or to enact a federal bill prohibiting anti-gay employment discrimination. *See* Christin L. Munsch & C. Elizabeth Hirsh, *Gender Variance in the Fortune 500: The Inclusion of Gender Identity and Expression in Nondiscrimination Corporate Policy*, *in* Gender and Sexuality in the Workplace 151, 152 (Christine L. Williams & Kirsten Dellinger eds., 2010) (noting that

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[4] The few instances in which the federal government has opposed discrimination against gays and lesbians are not evidence of gays and lesbians' power. The Supreme Court has considered groups politically powerless even where they enjoy legislative protections. For example, federal legislation already protected women from sex-based employment discrimination at the time the Court held that sex-based classifications were subject to heightened scrutiny. *See Frontiero*, 411 U.S. at 687. Race-based classifications are still subject to strict scrutiny even though African Americans are protected by "several major federal Civil Rights Acts of the nineteenth and twentieth centuries, as well as by antidiscrimination laws in no fewer than forty-eight of the states." *Kerrigan*, 957 A.2d at 443 & n.35 (internal quotation marks, brackets, and citation omitted). Moreover, the limited support gays and lesbians have received from the federal government does not show that gays and lesbians are able to get the government to do something it would not otherwise do. *See* Dahl, *The Concept of Power*, *supra*, at 202-03. "Don't Ask, Don't Tell" was repealed only after years of majority public support for repeal. Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. Times (Dec. 18, 2010); Lymari Morales, *In U.S., 67% Support Repealing "Don't Ask, Don't Tell"*, Gallup, Dec. 9, 2010, *available at* http:// tinyurl.com/2abb22l. Congress only expanded the definition of hate crimes to include sexual orientation when the provision was tacked onto a $681 billion military policy bill. Carl Hulse, *House Votes to Expand Hate Crimes Definition*, N.Y. Times, (Oct. 8, 2009). Although the Attorney General has instructed the Department of Justice not to defend DOMA or, in certain instances, 38 U.S.C. § 101(31) from equal protection challenges, the statutes are still being enforced, *see* Holder Title 38 Letter at 2; Holder DOMA Letter at 5, and powerful federal actors have rushed in to defend their constitutionality. *See, e.g.*, Mot. to Intervene of the Bipartisan Legal Advisory Group of the U.S. House of Rep., *Gill*, Nos. 10-2204, 10-2207, 10-2214.

the Employment Non-Discrimination Act has been introduced in all but one Congress since 1994 but has never become law). The Supreme Court has acknowledged that gays and lesbians are a "politically unpopular group," *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (internal quotation marks and citation omitted), and a U.S. district court recognized that "gays and lesbians possess less power than groups [that have already received] judicial protection." *Perry*, 704 F. Supp. 2d at 943. Ms. Cardona is a member of a minority group with little political power – she is a member of a suspect class.

Fourth, gays and lesbians exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group. Though deeming a class immutable is not necessary to find it suspect, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), gays and lesbians meet this criterion. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more *enduring*." *Lawrence*, 539 U.S. at 567 (emphasis added). Lower courts have agreed, holding that sexual orientation is immutable, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), and a "fundamental aspect of . . . human identity." *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

These legal decisions are supported by medical and social science research. A recent study found that 88% of gay men and 68% of lesbians surveyed said they had no choice at all as to their sexual orientation. Gregory Herek, *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176, 188 (2010); *see also* Gregory

Herek et al., *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. Gay and Lesbian Med. Ass'n 17 (1998) (majority of gays and lesbians in community-based sample reported they had "no choice at all" about their sexual orientation); Ritch Savin-Williams, *Gay and Lesbian Youth: Expressions of Identity* 77, 79 (1990) (majority of gay and lesbian young adults and teens perceive their sexual orientation to be beyond their control). In fact, "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." *Perry*, 704 F. Supp. 2d at 966; *see also* Richard A. Posner, *Sex and Reason* 101 (1992). Because 38 U.S.C. § 101(31) and DOMA impermissibly require Ms. Cardona to relinquish an "integral part of [her] human freedom," *Lawrence*, 539 U.S. at 577, they are subject to strict scrutiny.

The Federal Circuit has on one prior occasion considered the appropriate level of equal protection scrutiny for anti-gay discrimination, but that case is no longer good law. In *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), the Court held that the Navy's decision to discharge an officer because he was gay was subject to only rational basis review. But the analysis in *Woodward* derived entirely from *Bowers v. Hardwick*, 478 U.S. 186 (1986) (state sodomy law not unconstitutional), which the Supreme Court overturned in 2003. *See Lawrence*, 539 U.S. at 578 ("*Bowers v. Hardwick* should be and now is overruled"). Moreover, *Woodward* concerned a military discharge, not eligibility for VA benefits pursuant to 38 U.S.C. § 101(31) and DOMA, and therefore would not be controlling here even if it were still good law – which it is not. *Plaut v. Spendthrift Farm*,

Inc., 514 U.S. 211, 232 n. 6 (1995); *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue"); *Tobler v. Derwinski*, 2 Vet. App. 8, 11 (1991). Finally, the Supreme Court has repeatedly cautioned that special judicial deference is due to decisions of the armed forces, such as that at issue in *Woodward*. *See, e.g.*, *United States v. Stanley*, 483 U.S. 669, 681-84 (1987); *Feres v. United States*, 340 U.S. 135, 146 (1950). This case, by contrast, involves a veteran, not a service-member. No such special deference is due, and in fact, the converse principle applies: a well-established rule of lenity requires that all legal ambiguities be resolved in favor of the veteran. *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994) ("interpretive doubt is to be resolved in the veteran's favor"); *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21 n.9 (1991) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

In conclusion, it is undisputed that gays and lesbians have faced a long history of discrimination based on an immutable characteristic unrelated to their ability to contribute to society, that they are a numeric minority, and that they lack significant political power. Under settled Supreme Court and Federal Circuit precedent, they are a suspect class. Section 101(31) of 38 U.S.C. and DOMA discriminate against this suspect class and are therefore subject to strict scrutiny.

2. The statutes fail strict scrutiny.

To survive strict scrutiny, a statute "must serve a compelling governmental

interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1035 (Fed. Cir. 2008); *Berkley v. United States*, 287 F.3d 1076, 1082 (Fed. Cir. 2002). Neither 38 U.S.C. § 101(31) nor DOMA serve any government interest, let alone a compelling one, and they are not narrowly tailored to any valid interest. *See also infra* Part I(C).

B. In the alternative, the statutes fail intermediate scrutiny.

1. Gays and lesbians are a quasi-suspect class.

If this Court finds that gays and lesbians do not constitute a suspect class, it should find that they form a quasi-suspect class. Statutes that discriminate against a quasi-suspect class are subject to heightened, or "intermediate" scrutiny. *Cleburne*, 473 U.S. at 440-43; *see also United States v. Virginia*, 518 U.S. 515, 531-34 (1996) (stating that parties seeking to uphold a gender-based classification must demonstrate an "exceedingly persuasive justification"); *Berkley*, 287 F.3d at 1082 n.1 (same).

A classification is quasi-suspect when "[e]very law that places [the group] in a special class is not presumptively irrational," but "through ignorance and prejudice," the group has "'been subjected to a history of unfair and often grotesque mistreatment.'" *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring) (citation omitted); *see also Virginia*, 518 U.S. at 531-32 (justifying heightened scrutiny of sex-based classifications on ground that, though such classifications can be valid, United States has a "long and unfortunate history of sex discrimination"); *Reed v. Campbell*, 476 U.S. 852, 854-56 (1986) (applying

intermediate scrutiny because, although some distinctions on basis of illegitimacy may be permissible, "unjustified discrimination against children born out of wedlock" is not).

On these grounds, the Supreme Court has held that gender, *Virginia*, 518 U.S. at 531; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); and illegitimacy, *Reed*, 476 U.S. 852, 854-55 & n.5; *Lalli v. Lalli*, 439 U.S. 259, 265 (1978), are quasi-suspect classifications subject to intermediate scrutiny. Such classifications can have valid purposes, but because the individuals that fit within them have historically been subject to discrimination, the Court has deemed the classifications "quasi-suspect." If this Court concludes strict scrutiny is not appropriate, it should recognize that gays and lesbians have been subject to an undeniable history of discrimination, *see supra* Part I(A), and hence are a quasi-suspect class, like those targeted for official classifications based on gender or illegitimacy.

2. The statutes discriminate on the basis of sex.

The Supreme Court has recognized our nation's "long and unfortunate history of sex discrimination," *Frontiero*, 411 U.S. at 684 (1973), and repeatedly rejected such discrimination as impermissible. *See, e.g.*, *Virginia*, 518 U.S. 560 (exclusion of women from state military college unconstitutional); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender-based exclusion of jurors unconstitutional); *Miss. Univ. for Women*, 458 U.S. 718 (exclusion of men from state nursing school violates equal protection). Sex discrimination nevertheless persists. Section 101(31) of 38 U.S.C. and DOMA establish gender-based classifications that unlawfully discriminate against service members on the

basis of sex. Ms. Cardona, a veteran married to a person of the same sex, suffers from this sex discrimination.

Statutory classifications that distinguish between males and females are subject to intermediate scrutiny. *Craig*, 429 U.S. at 197; *see also Berkley*, 287 F.3d at 1082 n.1. Section 101(31) of 38 U.S.C. and DOMA create gender-based classifications based on the sex of the person the veteran has married. Under these statutes, a female veteran cannot legally be recognized as the spouse of another woman, simply because she is a woman. A male veteran cannot legally be recognized as the spouse of another man, because he is a man. The statutes discriminate on the basis of sex, by denying a female veteran dependency benefits because she is married to a woman. Thus, both statutes are discriminatory and violate the constitutional command of equal protection by precluding recognition of Ms. Cardona's marriage to a woman.

3. The statutes fail intermediate scrutiny.

To survive intermediate scrutiny, a classification must have an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 531; *see Berkley*, 287 F.3d at 1082 n.1. The classification "must serve important government objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. The justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation" and "must not rely on overbroad generalizations about the different talents, capacities, or preferences" of the classified group. *Virginia*, 518 U.S. at 533. Section 101(31) of 38 U.S.C. and DOMA do not have an exceedingly persuasive justification. *See infra* Part

I.C. They serve no valid government objective, much less an important one. *Id.* Nor are they substantially related to achievement of an important purpose. *Id.* Accordingly, they fail intermediate scrutiny.

C. In the alternative, the statutes fail rational basis review.

There is no rational basis for 38 U.S.C. § 101(31) or DOMA. To survive rational basis review, a statute must be rationally related to a legitimate state interest. *Cleburne,* 473 U.S. at 440. DOMA functions to classify "homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer,* 517 U.S. at 635 (discussing amendment to Colorado constitution). Congress enacted 38 U.S.C. § 101(31) to remove "unnecessary gender references" from the statute, but as applied the provision has the same effect as DOMA. S. Rep. No. 94-568, at 19-22 (1975) (explaining substitution of gender-neutral terms such as "person of the opposite sex" for previously gendered terms "wife" and "widow"). The categorical exclusion of spouses of the same sex is not rationally related, however, to the compelling goal of gender equality, and is in fact "so attenuated [to that goal] as to render the distinction arbitrary . . . ." *Cleburne*, 473 U.S. at 446; *see also Romer*, 517 U.S. at 632-33 (statute will fail rational basis unless it is "narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served"). Both 38 U.S.C. § 101(31) and DOMA fail to meet this standard.

VA has not defended 38 U.S.C. § 101(31) or DOMA in this litigation. In other challenges to DOMA, the government and the Bipartisan Legal Advisory Group (BLAG)

have offered several rationalizations, including conserving resources, moral disapproval, maintaining the status quo or proceeding with caution, respecting state sovereignty, promoting responsible heterosexual procreation, and defending heterosexual marriage. Courts have rejected all of these, *see, e.g.*, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 390 (D. Mass. 2010), *appeal filed* October 12, 2010; *Perry*, 671 F.3d at 1086-95, but Ms. Cardona will briefly address each in turn. *See Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992) (on rational basis review, party challenging statute should "negative every conceivable basis which might support it") (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).[5] Even if this Court, unlike others, were to deem one of these reasons valid, DOMA is nevertheless unconstitutional because it was motivated by animus and harms Ms. Cardona in an "immediate, continuing, and real" fashion that

[5] The rational bases for discharging a service member on the basis of his homosexuality identified in *Woodward*, 871 F.2d 1068 included "maintenance of 'discipline, good order and morale[,] . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, ... recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security.'" *Id.* at 1076-77. The Federal Circuit also emphasized deference to the military. *Id.* These justifications have no bearing on the legality of the statutes at issue in this case, which are implemented by the VA rather than the military and affect veterans rather than service members. In any case, Congress has determined that such rationales do not warrant exclusion of homosexuals from service. Pub. L. 111-321 (2010) (repealing "Don't Ask, Don't Tell"). Indeed, since the repeal of "Don't Ask, Don't Tell," the military has moved aggressively to recruit gays and lesbians. *See Marines Hit the Ground Running in Seeking Recruits at Gay Center*, N.Y. Times (Sept. 20, 2011). Far from advancing the interests of the military, DOMA and 38 U.S.C. § 101(31) actually hamper recruiting and retention of gay and lesbian soldiers by preventing them from receiving the same benefits as their heterosexual counterparts.

belies any justification offered. *Romer*, 517 U.S. at 635.[6]

Conservation of resources. 38 U.S.C. § 101(31) and DOMA are not rationally related to a goal of conserving resources because "the distinctions that are drawn" do not have any "relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). A classification does not satisfy rational basis review merely because its purpose is to conserve resources. *Id.* at 309-10 (holding that statute distinguishing between convicted defendants sentenced to prison and all other convicted defendant failed rational basis review even assuming purpose was to "replenish the county treasury"); *see Plyler v. Doe*, 457 U.S. 202, 228-30 (1982) (resource conservation alone cannot justify denial of primary or secondary education to undocumented children); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (statute preferring men over women failed rational basis review and was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" even assuming purpose was to conserve resources). Instead, the state must show that the trait defining the group targeted by the statute is rationally related to a

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[6] Laws motivated primarily by animus violate equal protection. *Romer*, 517 U.S. at 633 (invalidating state constitutional amendment where the motivation was to harm gays and lesbians); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating food-stamp regulation motivated by a desire to harm "hippies"); Part I(C), *infra*. The animus DOMA represents is clear from the congressional record, the lack of a legitimate government purpose advanced by the statute, and the irrational *post hoc* justifications put forth to defend the statute against multiple challenges. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. The harm inflicted upon Ms. Cardona is precisely what DOMA intended, and for this reason the law is invalid.

cost-cutting objective. *See Rinaldi*, 384 U.S. at 309-10; *Plyler*, 457 U.S. at 229 ("[T]he State must support its selection of *this* group as the appropriate target for exclusion."). The basis on which 38 U.S.C. § 101(31) and DOMA distinguishes between veterans—sexual orientation and the sex of a partner—are "trait[s] unrelated to the [alleged] fiscal objective of the statute[s]," and thus must fail rational basis review. *See Rinaldi*, 384 U.S. at 309-10; *see also Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011) ("[P]reservation of resources does not justify [DOMA] barring some arbitrarily chosen group of individuals from a government program."). Moreover, the Congressional Budget Office has found that federal recognition of marriages between same-sex couples nationwide would "improve the [federal] budget's bottom line . . . by [almost] $1 billion" annually. Cong. Budget Office, U.S. Cong., *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (June 21, 2004).

Moral disapproval. DOMA was motivated by moral disapproval of same-sex relationships. *See, e.g.*, H.R. Rep. No. 104-664, at 15-16 (1996) (DOMA passed to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."); 142 Cong. Rec. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk) (urging passage of DOMA because "we need to protect our social and moral foundations"); 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith) (arguing that DOMA is a "moral necessity" because marriages of same-sex couples "demean[s] the fundamental institution of marriage" by "legitimiz[ing] unnatural and immoral

behavior"); 142 Cong. Rec. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("We are here because the issue of gay marriages is a moral one."); 142 Cong. Rec. H7277 (daily ed. July 11, 1996) (statement of Rep. Hoke) (arguing that because we have "laws about murder . . . about theft and burglary, larceny, rape, and other bodily attacks," we should have DOMA as well); 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (arguing that DOMA will "safeguard the sacred institutions of marriage and the family from those who are . . . willing to tear apart America's moral fabric").

However, the Supreme Court has held that moral disapproval of homosexuality is not a valid rationalization that justifies discrimination under rational basis review. *Romer*, 517 U.S. at 634-36; *Gill*, 699 F. Supp. 2d at 389; *In re Levenson*, 587 F.3d 925, 932 (9th Cir. 2009); *Kerrigan*, 957 A.2d at 479; *see also Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534. Even vehement moral disapproval is no excuse for denying equal protection of the law.

Maintenance of the status quo. Neither 38 U.S.C. § 101(31) nor DOMA maintain the status quo.[7] "Marriage traditionally has been a *state*-sanctioned and *state*-recognized status to which the Federal Government attaches consequences." *Burden v. Shinseki*, 25 Vet. App. 178, 182 (2012) (emphasis added), *appeal filed* Mar. 30, 2012. VA and this

[7] Judge Tauro questioned whether maintenance of the status quo alone is a legitimate government interest. *See Gill*, 699 F. Supp. 2d at 393-94 ("Staying the course is not an end in and of itself, but rather a means to an end.").

Court have long respected and incorporated state law definitions of marriage when determining a veteran's marital status. *See* 38 U.S.C. § 103(c) ("In determining whether . . . a person is or was the spouse of a veteran, their marriage shall be proven as valid . . . 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."); *Hopkins v. Nicholson*, 19 Vet. App. 165, 169 (2005) ("The validity of a marriage is determined according to the lex loci, the law of the state that solemnized the marriage.").

The statutes in question do not preserve the status quo; they undermine it by departing from the federal government's long-standing tradition of "accept[ing] state definitions of civil marriage." *Dragovich*, 764 F. Supp. 2d at 1189; *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 250 (D. Mass. 2010) ("[T]his court is convinced that there is a historically entrenched tradition of federal reliance on state marital status determinations."), *appeal filed* Oct. 12, 2010; *Gill*, 699 F. Supp. 2d at 393 ("[T]he status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision [DOMA] denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo . . . ."); *In re Levenson*, 587 F.3d at 933 ("Because state law governs marriage recognition, the only consistent definition that could be employed at the federal level is [one that] recognize[s] as valid [any marriage recognized by] the couple's state of domicile."). Section 101(31) of 38 U.S.C. and DOMA, by disrupting the status quo, make

administration of federal marriage benefits inconsistent and discriminatory.

Federalism. Section 101(31) of 38 U.S.C. and DOMA undermine state sovereignty and violate the Tenth Amendment, which reserves to Connecticut the right to "define the marital status of its citizens." *Massachusetts*, 698 F. Supp. 2d at 249; *see also Burden*, 25 Vet. App. at 182 (noting that determination of marital status has traditionally been within province of states and not federal government). There can be no serious contention that these statutes advance federalism or respect state sovereignty.

Encouraging responsible procreation and child-rearing. Section 101(31) of 38 U.S.C. and DOMA are not rationally related to procreation or child-rearing. The ability or desire to procreate or rear children are not preconditions of civil marriage in any state. *Gill*, 699 F. Supp. 2d at 389. Furthermore, nothing in either statute prevents same-sex couples, married or not, from procreating and rearing children, or encourages "responsible" procreation among heterosexual couples within or outside of marriage.

Many gays and lesbians have children, Ms. Cardona included. R. at 150 (149-152). Gays and lesbians are just as likely to make responsible and nurturing parents as their straight counterparts. *Gill*, 699 F. Supp. 2d at 388; *see also Perry*, 671 F.3d at 1086-89 (state exclusion of same-sex couples from marriage not rationally related to encouraging responsible procreation or child-rearing); *Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10-00257 JSW, 2012 WL 569685, at *22-23 (N.D. Cal. Feb. 22, 2012), *appeal filed* Feb. 24, 2012 (finding no rational relationship between DOMA and encouragement of responsible procreation or child-rearing). Furthermore, there is no

evidence in the record that either statute advances responsible procreation or child-rearing.

The Department of Justice "has already disavowed in litigation the argument that DOMA serves a governmental interest in 'responsible procreation and child-rearing.'" H.R. Rep. No. 104-664, at 13 (1996). As the Department has explained in numerous filings, "leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents." Holder DOMA Letter at 3 n.5.

Preservation of traditional marriage. The two statutes at issue bear no constitutionally cognizable relationship to the preservation of traditional marriage. Because discriminatory classifications must serve some "independent and legitimate legislative end," *Romer*, 517 U.S. at 633, continuing the exclusion of same-sex couples from marriage simply because they have traditionally been excluded is not a constitutionally permissible government interest. *Williams v. Illinois*, 399 U.S. 235, 245 (1970); *Golinski*, 2012 WL 569685, at *18 ("Tradition alone . . . cannot form an adequate justification for a law.").

Moreover, excluding same-sex couples from marriage does not affect whether heterosexuals marry. Other courts have rejected as unpersuasive the contention that marriages of same-sex couples will "affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability

of opposite-sex marriages." *Perry*, 704 F. Supp. 2d at 972. Finally, the statutes do not encourage gays and lesbians—and particularly not Ms. Cardona, who is already married to a woman—to enter into heterosexual marriages. *In re Levenson*, 587 F.3d at 932.

Section 101(31) of 38 U.S.C. and DOMA are subject to heightened scrutiny, *see supra* Part I(A), but they are unconstitutional even if tested against the lower rational basis standard. Defendant has set forth no valid justification for the statutes, nor is there any evidence in the RBA demonstrating the laws serve a legitimate purpose. The statutes violate Ms. Cardona's right to equal protection under law.

II. 38 U.S.C. § 101(31) and DOMA violate the Tenth Amendment.

Marriage is an "area[] of traditional state regulation," *United States v. Morrison*, 529 U.S. 598, 615 (2000), which under the Tenth Amendment "belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs*, 520 U.S. 833, 848 (1997). By excluding married couples from spousal benefits, 38 U.S.C. § 101(31) and DOMA violate Connecticut's right to define and regulate marriage. Ms. Cardona has Article III standing because the statutes have caused her discrete, justiciable injury that can be redressed by a favorable decision.

A. The statutes violate Connecticut's right to regulate marriage.

Since the founding of the United States, the Tenth Amendment has reserved to the States "full power over the subject of marriage." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942). With the enactment of 38 U.S.C. § 101(31) and DOMA, Congress impermissibly invaded

the States' longstanding sovereign authority to define and regulate marriage, in violation of the Tenth Amendment and in excess of its Article I authority.

1. The power to define and regulate marriage is reserved to the States.

The Tenth Amendment 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. The Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty…." *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed., 1961)); *see also id.* at 156 ("'The States unquestionably do retai[n] a significant measure of sovereign authority . . . [T]he Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'") (citation omitted). An "Act of Congress [that] invades the province of state sovereignty reserved by the Tenth Amendment" is invalid. *New York*, 505 U.S. at 155.

Marriage regulation is an area of state sovereignty shielded from federal invasion. *See Morrison*, 529 U.S. at 615-16; *see also id.* at 660 (Breyer, J., dissenting) (federal regulation of "marriage . . . [would] obliterat[e] the Constitution's distinction between national and local authority" (citations and internal quotation marks omitted)); *Boggs*, 520 U.S. at 848; *Zablocki v. Redhail*, 434 U.S. 374, 398-99 (1978) (Powell, J., concurring) ("As early as [1878], this Court noted that a State 'has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.'") (citations omitted); *Haddock*,

201 U.S. at 575 ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce."); *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) ("The first, or 'core,' category [of domestic relations over which the federal government has no jurisdiction] involves . . . marriage.").

Before the adoption of DOMA, state sovereignty over the definition and regulation of marriage was respected by the federal government. This was so even where the states themselves adopted varying marriage standards, such as those concerning age restrictions, interracial unions, consanguineous marriages, and eugenic restrictions. Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 Am. J. Legal Hist. 197, 205-17, 221-23 (1982) (discussing varying marriage restrictions). Congress incorporated the diverse state definitions of marriages into federal statutes and did not create a federal definition of marriage prior to DOMA.[8]

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[8] Congress previously enacted a small number of provisions regarding marriage, but these were done either to address sham marriages or to include those who had undertaken a marriage ceremony in good faith. *See, e.g.*, 8 U.S.C. § 1186a(b)(1)(A)(i) (marriage invalid for immigration purposes if "entered into for the purpose of procuring an alien's admission as an immigrant"); 26 U.S.C. § 7703(b) (marriage invalid for tax purposes if couple has lived apart for majority of taxable year, and if certain other conditions apply); *Delong v. Dep't of Health & Human Servs*., 264 F.3d 1334, 1343 (Fed. Cir. 2001) (Social Security duration-of-relationship requirement "was intended to prevent the use of sham marriages to secure Social Security payments") (citations and internal quotation marks omitted).

Applying these principles, Judge Tauro concluded that "DOMA plainly intrudes on a core area of state sovereignty – the ability to define the marital status of its citizens." *Massachusetts*, 698 F. Supp. 2d at 249; *see also id.* at 251-53 (DOMA represents impermissible interference of federal government into state sovereignty). Accordingly, "the statute violates the Tenth Amendment." *Id.* at 249. By wresting the power to regulate marriage from Connecticut, 38 U.S.C. § 101(31) and DOMA intrude upon this long-established area of exclusive state authority.

2. Congress lacks the power to define or regulate marriage.

Whether a law violates the Tenth Amendment is analogous to the question of whether Congress has the power under Article I of the Constitution to make a law. *New York*, 505 U.S. at 156 ("[T]he two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is . . . reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."). Because 38 U.S.C. § 101(31) and DOMA violate state sovereignty, Congress by definition lacks authority under Article I to define or regulate marriage.

Confirming this proposition, there is no enumerated power in Article I of the Constitution that allows Congress to define or regulate marriage. Congressional power to provide veterans' benefits arises primarily from the powers "[t]o raise and support armies," "[t]o provide and maintain a navy," and "[t]o make rules for the government and regulation of the land and naval forces." U.S. Const. art. I, § 8, cls. 12-14; *see United*

States v. Oregon, 366 U.S. 643, 648 (1961) ("Congress undoubtedly has the power–under its constitutional powers to raise armies and navies and to conduct wars–to pay pensions, and to build hospitals and homes for veterans."); *Johnson v. Robison*, 415 U.S. 361, 376 (1974); *Reeves v. West*, 11 Vet. App. 255, 260 (1998). Section 101(31) of 38 U.S.C. and DOMA are not supported by Congress' powers to raise and support armies and navies or conduct wars because these statutes intrude upon lawful private relationships without aims tied to the discharge of military duties. Moreover, the denial of benefits to spouses of a certain class of veterans threatens to frustrate recruitment of members of that class, erode morale among all servicemembers, and weaken the fair treatment and unit cohesion essential to an effective national defense.

Congressional authority to regulate veterans' benefits also arises under the Spending Clause. U.S. Const. art. I, § 8, cl. 1 (power to "provide for the common defense and general welfare of the United States"). However, 38 U.S.C. § 101(31) and DOMA are not valid exercises of Congress' Spending Clause power because that power cannot be used to enact statutes that violate the Constitution or are unrelated "to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

B. Ms. Cardona has suffered a discrete, justiciable injury.

Individuals may privately enforce their rights under the Tenth Amendment. *Bond v. United States*, 131 S. Ct. 2355, 2363-64 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism

defines. Her rights in this regard do not belong to a State."); *see also New York*, 505 U.S. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

A plaintiff bringing a Tenth Amendment claim must meet Article III requirements for standing. *Bond*, 131 S.Ct. at 2366. Courts have confirmed the standing requirement of *Bond*. *See LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) (plaintiff qualified to bring Tenth Amendment claim against federal government where he suffered concrete, particularized, redressable injury); *Purpura v. Sebelius*, 446 F. App'x 496 (3d Cir. 2011) (Tenth Amendment claim dismissed for lack of concrete injury).

Ms. Cardona has standing to bring a Tenth Amendment claim because she meets the Article III requirements. She is asserting a direct and personal injury-in-fact that is traceable to government action and likely to be redressed by a repeal of the intrusive statutes causing the harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). She has suffered a redressable injury in fact as a direct result of 38 U.S.C. § 101(31) and DOMA, which prevent her from receiving dependency benefits for which she would be eligible had she married a man.

Second, there is a direct causal connection between Ms. Cardona's injury and the statutes. The BVA denied her benefits because of the definitions set forth in 38 U.S.C. § 101(31) and DOMA. Each month, she goes without $120 of federal benefits that would enable her to provide for her family. This sum is not insignificant in Ms. Cardona's

household. She also suffers humiliation and disrespect from a government that refuses to recognize the legitimacy of "the most important relation in [her] life," *Zablocki*, 434 U.S. at 384 (citation omitted).

Ms. Cardona meets the final standing requirement because her injury will be redressed by a favorable decision in this case. In short, she has Article III standing.

III. 38 U.S.C. § 101(31) and DOMA are unconstitutional bills of attainder.

The Constitution prohibits Congress from passing bills of attainder. U.S. Const. art. I, § 9, cl. 3. A statute is a bill of attainder if it (1) targets a named individual or an easily ascertainable group and (2) inflicts punishment (3) without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Nagac v. Derwinski*, 933 F.2d 990, 990 (Fed. Cir. 1991); *Latham v. Brown*, 4 Vet. App. 265, 268 (1993). The two statutes at issue, 38 U.S.C. § 101(31) and DOMA, satisfy all three requirements.

First, the statutes target an easily ascertainable group: male and female veterans validly married to spouses of the same sex under the laws of their state. To satisfy this element of the bill of attainder analysis, the statute need not name specific people. *See, e.g.*, *United States v. Brown*, 381 U.S. 437, 461-62 (1965) (invalidating statute applicable to members of Communist Party); *Ex parte Garland*, 71 U.S. 333 (1866) (invalidating statute directed at attorneys); *Cummings v. State of Missouri*, 71 U.S. 277 (1866) (invalidating statute applicable to persons who rebelled against the union). Moreover, that the statutes apply to an open, growing class does not defeat the claim, as bills of attainder need not apply to a "fixed class." *See, e.g.*, *Brown*, 381 U.S. at 461 (Communist Party

members are an easily ascertainable group, even though membership is not "fixed"). Section 101(31) of 38 U.S.C. and DOMA target an ascertainable group, veterans validly married to spouses of the same sex under the laws of their states. This targeted exclusion satisfies the first requirement.

Second, the statutes inflict punishment on their targets. Punishment includes anything that "affect[s] the life of an individual," *Fletcher v. Peck*, 10 U.S. 87, 138 (1810). Three factors determine whether a statute is punitive for bill of attainder purposes: where (1) it falls within the historical meaning of legislative punishment; (2) the legislative record shows a congressional intent to punish; and (3) the statute cannot be said to further nonpunitive legislative purposes. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *Planned Parenthood v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999); *Nagac*, 933 F.2d at 990. It is not necessary to satisfy all three factors; each is merely "evidence that is weighed together in resolving a bill of attainder claim." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473-78 (1977); *Con. Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002).

DOMA and 38 U.S.C. § 101(31) punish Ms. Cardona and other veterans legally married to same-sex spouses by denying benefits they are entitled to as a result of their honorable military service and state-recognized marriages. The elimination of non-contractual government benefits does not constitute traditional legislative punishment, *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960); *Hall v. West*, 217 F.3d 860, 860 (Fed. Cir. 1999), but this factor alone is not determinative. This Court must not give the Bill of

Attainder Clause a "narrow historical reading," *Brown*, 381 U.S. at 447, but must interpret it "in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity." *Id.*; *see also Nixon*, 433 U.S. at 475 (court should not "preclude[] the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee."). That denial of dependency benefits is not traditional punishment merely increases the burden on Ms. Cardona to show that the statutes in question evince a legislative intent to punish, *see Nestor*, 363 U.S. at 617; *Butler v. Apfel*, 144 F.3d 622, 626 (9th Cir.1998), a burden she is able to shoulder.[9]

DOMA's legislative history establishes that Congress sought to punish gays and lesbians. Congress defined marriage to exclude state-recognized marriages between people of the same sex as retribution for a characteristic that members of Congress considered "wrong," to deter unmarried gays and lesbians from marrying, and to discourage children from identifying as gay or lesbian. *See* H.R. Rep. No. 104-664, at 15-16 (1996) (arguing that DOMA is necessary to defend "traditional notions of morality"); 142 Cong. Rec. H7487 (daily ed. July 12, 1996) (statement of Rep. Delay) ("As a father and an observer of this culture, I look ahead to the future of my daughter and wonder what building a family will be like for her. . . . Children do best in a family with a mom

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[9] *Hall* mischaracterized *Nestor* as holding that the denial of a non-contractual government benefit can *never* be a bill of attainder. *Hall*, 217 F.3d at 860. *Nestor* did not create such an absolute bar; it merely increased plaintiff's burden of showing that the statute in question demonstrates punitive legislative intent, *see Nestor*, 363 U.S. at 617; *Butler*, 144 F.3d at 626.

and a dad."); *see also supra* Part I(C) (analyzing legislative history of DOMA). This "formal legislative announcement of moral blameworthiness" is probative of punitive intent. *Nixon*, 433 U.S. at 480.

Where "legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Id.* at 476. Neither 38 U.S.C. § 101(31) nor DOMA serve any legitimate purpose, *see supra* Part I(C), and they do not serve one in the least burdensome manner, as required in the bill of attainder analysis. *Nixon*, 433 U.S. at 482.[10]

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006), is not dispositive. In *Bruning*, the Eighth Circuit held that a Nebraska constitutional amendment

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[10] *Minn. Public Interest Group*, 468 U.S. 841, is not to the contrary. There, the Court rejected a bill of attainder challenge to a statute denying federal financial aid to male students who failed to register with Selective Service. The Court reasoned that the law did not punish because it left "open perpetually the possibility of qualifying for aid," as students merely had to register late. *Id.* at 853; *see also Dempsey*, 167 F.3d 458 (rejecting bill of attainder challenge to statute that would allow Planned Parenthood to qualify for family-planning funds upon establishing independent affiliate to perform abortion services). Unlike the statutes at issue in *Minn. Public Interest Group* and *Dempsey*, DOMA and 38 U.S.C. § 101(31) do not leave "open" any possibility for Ms. Cardona; there is no way for her to qualify for federal disability aid for her wife. These statutes "operate[] as . . . legislative decree[s] of perpetual exclusion," *Ex parte Garland*, 71 U.S. at 377. *Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6 (1st Cir. 2011) is also inapposite. In *Elgin*, plaintiffs challenged a statute that excluded men who did not register with the Selective Service from federal executive branch employment. The First Circuit found the bill of attainder claim "unpromising" because plaintiff could have avoided the punishment through timely registration. This reasoning does not apply here, as there was no way for Ms. Cardona to "avoid" the punishment inflicted by 38 U.S.C. § 101(31) and DOMA.

defining marriage as between a man and a woman was not a bill of attainder because it served the nonpunitive purpose of "steering heterosexual procreation into marriage" in such a way that "encourage[s] heterosexual couples to bear and raise children in committed marriage relationships." *Id.* at 868-69. Similar reasoning has been rejected by the Ninth Circuit, *see Perry*, 671 F.3d at 1089, and cannot be squared with Congress' subsequent repeal of "Don't Ask, Don't Tell." Moreover, *Bruning's* reasoning as applied to this case fails on its own terms. *Bruning* involved a state ban on marriage; this case involves federal statutes that apply to a disabled veteran's marriage that is *already recognized* by her state of domicile. Thus, the statutes at issue in this case, as applied to Ms. Cardona, cannot possibly be said validly to "steer" her towards heterosexual procreation in marriage to a man. Finally, the court in *Bruning* analyzed the bill of attainder issue with the qualification that "the institution of marriage has always been, in our federal system, the predominant concern of state government." *Bruning*, 455 F.3d at 867. The same deference to state decisions on marriage shifts the bill of attainder analysis in favor of Ms. Cardona in this case.

Third, 38 U.S.C. § 101(31) and DOMA inflict punishment on Ms. Cardona without allowing her a judicial trial. As statutory law, they apply to her automatically. *Citizens for Equal Protection v. Bruning*, 368 F. Supp. 2d 980, 1006 (D. Neb. 2005) (state constitutional amendment defining marriage as between man and woman operates without judicial trial), *rev'd on other grounds*, 455 F.3d 859 (8th Cir. 2006). The Bill of Attainder Clause safeguards against trial by legislature and maintains separation of

powers. *Brown*, 381 U.S. at 442; *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir. 2002); *Korte v. Office of Pers. Mgmt.*, 797 F.2d 967, 972 (Fed. Cir. 1986); *Latham*, 4 Vet. App. at 268. Section 101(31) of 38 U.S.C. and DOMA are invalid bills of attainder, punishing Ms. Cardona without a proper hearing because of the ascertainable class to which she belongs.

CONCLUSION

For the foregoing reasons, Ms. Cardona respectfully requests that this Court hold that 38 U.S.C. § 101(31) and Section 3 of DOMA, as applied to Ms. Cardona, violate the Fifth Amendment, Tenth Amendment, and Bill of Attainder Clause, and reverse the denial of Ms. Cardona's application for additional disability benefits for her dependent spouse.

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New Haven, CT

Respectfully submitted,

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