No. 12-15

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

OFFICE OF PERSONNEL MANAGEMENT, ET AL., PETITIONERS

v.

NANCY GILL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
LEONDRA R. KRUGER
PRATIK A. SHAH
Assistants to the Solicitor General
MICHAEL JAY SINGER
AUGUST E. FLENTJE
BENJAMIN S. KINGSLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

PARTIES TO THE PROCEEDING

Petitioners are the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of Health and Human Services; the United States Department of Veterans Affairs; Eric K. Shinseki, Secretary of Veterans Affairs; the Office of Personnel Management; the United States Postal Service; Patrick R. Donahoe, Postmaster General of the United States of America; Michael J. Astrue, Commissioner of Social Security; Eric H. Holder, Jr., Attorney General; and the United States of America.

Respondents who were plaintiffs below are the Commonwealth of Massachusetts, Nancy Gill, Marcelle Letourneau, Martin Koski, James Fitzgerald, Dean Hara, Mary Ritchie, Kathleen Bush, Melba Abreu, Beatrice Hernandez, Marlin Nabors, Jonathan Knight, Mary Bowe-Shulman, Dorene Bowe-Shulman, Jo Ann Whitehead, Bette Jo Green, Randell Lewis-Kendell, and Herbert Burtis.

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened in the court of appeals to present arguments in defense of the constitutionality of Section 3 of DOMA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-15

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

OFFICE OF PERSONNEL MANAGEMENT, ET AL., PETITIONERS

v.

NANCY GILL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Health and Human Services et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is not yet reported but is available at 2012 WL 1948017. The opinion of the district court in *Gill* v. *Office of Personnel Management* (App., *infra*, 29a-72a) is reported at 699 F. Supp. 2d 374. The opinion of the district court in *Massachusetts* v. *United States Depart-*

ment of Health & Human Services (App., *infra*, 82a-120a) is reported at 698 F. Supp. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 125a.

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA or Act) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two principal provisions. The first, Section 2 of the Act, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only

> to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (*1996 House Report*). Although Hawaii ultimately did not permit same-sex marriage, other States, including respondent Massachusetts, have since recognized such marriages under their respective laws. See App., *infra*, 2a-3a nn.1-2; *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

Although Section 3 of DOMA does not purport to invalidate same-sex marriages in those States that recognize them, it excludes all such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/new.items/d04353r.pdf (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor). Section 3 of DOMA thus denies to legally married same-sex couples many substantial benefits otherwise available to legally married couples under federal employment, immigration, public health and welfare, tax, and other laws. See *id.* at 16-18; App., *infra*, 3a-4a, 13a-14a.

2. a. The individual respondents are seven same-sex couples married in Massachusetts and three surviving spouses of same-sex couples married in Massachusetts. They filed suit in the United States District Court for the District of Massachusetts, alleging that, as a result

of Section 3, they had been denied certain federal benefits otherwise available to married couples or surviving spouses, including federal health plan benefits for spouses of federal employees, see 5 U.S.C. 8901 *et seq.*; social security benefits for surviving spouses of insured individuals, see 42 U.S.C. 402(f) and (i), and benefits based on the earnings record of a spouse; and the ability to file federal income tax returns as married joint filers or to exclude the value of employer-provided health insurance coverage for a spouse from federally taxable income, see 26 U.S.C. 106 (2006 & Supp. IV 2010). Second Am. Compl. ¶¶ 67-413, *Gill* v. *Office of Pers. Mgmt.*, No. 1:09-cv-10309 (D. Mass. May 25, 2010); see App., *infra*, 4a, 10a. They contended that Section 3 violates the right of equal protection secured by the Fifth Amendment and sought to enjoin Section 3's enforcement, as well as other relief. *Ibid.*

Respondent Massachusetts filed a separate action challenging the constitutionality of Section 3 of DOMA. Massachusetts alleged that, as a result of Section 3, it would risk loss of federal funding if it treated legally married same-sex couples as married for purposes of determining eligibility for participation in the State's Medicaid program or for burial as a spouse of a veteran in a veterans' cemetery funded in part by federal grants. Compl. ¶¶ 46-79, *Massachusetts* v. *United States Dep't of Health & Human Servs.*, No. 1:09-cv-11156 (D. Mass. July 8, 2009); see App., *infra*, 4a-5a. Massachusetts contended that Section 3 violates the Tenth Amendment and principles of federalism and the Spending Clause as applied to the Medicaid and State Cemetery Grants Program. Massachusetts sought to enjoin enforcement of Section 3, as well as other relief. Compl. ¶¶ 80-100, *Massachusetts*, *supra*.

b. In separate opinions issued on the same day, the district court held Section 3 of DOMA unconstitutional

and entered judgment against petitioners. App., *infra*, 29a-72a, 75a-81a. Ruling in favor of the individual respondents in *Gill*, the court concluded that Section 3 violates the Fifth Amendment's equal protection guarantee. Without addressing respondents' argument that Section 3 should be subject to strict constitutional scrutiny, the district court concluded that Section 3 "fails to pass constitutional muster even under the highly deferential rational basis test," *id.* at 51a, because "'there exists no fairly conceivable set of facts that could ground a rational relationship'" between the classification employed in DOMA Section 3 "and a legitimate government objective," *ibid.* (quoting *Medeiros* v. *Vincent*, 431 F.3d 25, 29 (1st Cir. 2005), cert. denied, 548 U.S. 904 (2006)); see *id.* at 51a-71a.

In a separate opinion, the district court ruled in favor of Massachusetts on its action. App., *infra*, 82a-120a. The court concluded that Section 3 violates the Spending Clause because it impermissibly "induce[s] the States to engage in activities that would themselves be unconstitutional" by conditioning federal funds on the denial of marriage-based benefits to legally married same-sex couples without a rational basis for the differential treatment. *Id.* at 108a (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987)). The court further concluded that Section 3 violates the Tenth Amendment because it "plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens." *Id.* at 111a.

The district court enjoined petitioners from enforcing Section 3, but stayed its order pending appeal. App., *infra*, 5a.

3. The government appealed in both cases, and the cases were consolidated in the court of appeals. In its opening brief, the government explained that binding First Circuit precedent holds that classifications based

on sexual orientation are subject to rational basis review, rather than the more searching review applicable to constitutionally suspect or quasi-suspect classifications such as race, national origin, gender, or illegitimacy. Gov't Initial C.A. Br. 25-26 (citing *Cook* v. *Gates*, 528 F.3d 42, 60, 62 (1st Cir. 2008), cert. denied, 556 U.S. 1289 (2009)). Pointing to this Court's cases holding that a classification subject to rational basis review "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 27 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993)), the government argued that Section 3 satisfies that "highly deferential" standard, *id.* at 26, 29-55.

After the government filed its opening brief in this case, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. Letter from Eric H. Holder Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) (Attorney General Letter).[1] The letter explained that, while the Department of Justice had previously defended Section 3 in courts whose binding precedent required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a new examination of the issue after two lawsuits had been filed in a circuit that had yet to address the appropriate standard of review. *Id.* at 1-2. The Attorney General explained that, after examining several factors this Court has identified as relevant to the applicable level of scrutiny, including the history of discrimination against gay and lesbian individuals and the rele-

[1] Text available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

vance of sexual orientation to legitimate policy objectives, he and the President had concluded that Section 3 warrants application of heightened scrutiny rather than rational basis review. *Id.* at 2-4. The Attorney General further explained that both he and the President had concluded that Section 3 fails that standard of review and is therefore unconstitutional. *Id.* at 4-5.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Attorney General Letter 5. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to cease defense of Section 3. *Id.* at 5-6. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to participate" in litigation concerning the constitutionality of Section 3. *Id.* at 6.

After the Attorney General's letter, the government informed the First Circuit that it would no longer defend the constitutionality of Section 3 and sought to withdraw its opening brief. The court of appeals denied the government's motion but permitted the government to file a superseding brief. 6/16/11 Order 2. The government thereafter filed a superseding brief in the court of appeals in which it set forth its view that Section 3 is unconstitutional under heightened scrutiny. The government argued that the legislative purposes motivating

the enactment of Section 3, as articulated in the 1996 House Report, are insufficient to justify the exclusion of same-sex couples legally married in their States from federal benefits available to other married couples. See Gov't Superseding C.A. Br. 22-23.

Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene to present a defense of the constitutionality of Section 3.[2] The court of appeals granted the motion. 6/16/11 Order 2.

4. The individual respondents petitioned for initial hearing en banc. The court of appeals denied the petition, with three judges dissenting. A panel of the court of appeals then affirmed the judgment of the district court in part, holding DOMA Section 3 invalid under the equal protection component of the Fifth Amendment. App., *infra*, 1a-28a.

At the outset, the court of appeals distinguished the question at issue in this case from the question whether a State constitutionally may choose to limit marriage to persons of the opposite sex. App., *infra*, 7a-8a; see also *id.* at 23a-24a. The court thus rejected BLAG's threshold argument that "any equal protection challenge to DOMA is foreclosed" by this Court's summary dismissal of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, see *Baker* v. *Nelson*, 191 N.W.2d 185, 185-187 (1971). App., *infra*, 7a. The court of appeals reasoned that because *Baker* concerned a different question, the Court's summary dismissal cannot resolve this

---

[2] Two of the group's five members declined to support intervention. BLAG C.A. Mot. to Intervene 1 n.1 (May 20, 2011).

case. *Id.* at 8a. In the court's view, however, *Baker* "does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." *Ibid.*

To evaluate the constitutionality of Section 3, the court concluded that it was bound by its precedent to apply rational basis review. App., *infra*, 10a (citing *Cook*, *supra*). The court determined that Section 3's challengers could not prevail under what it termed "classic rational basis review," *id.* at 11a—*i.e.*, "rational basis review as conventionally applied in routine matters of commercial, tax and like regulation," *id.* at 9a—under which "[c]ourts accept as adequate any plausible factual basis" for a law that distinguishes between different groups of people, "without regard to Congress' actual motives" or to whether Congress's chosen means are "entirely consistent with" its legislative ends, *ibid.*

The court of appeals concluded, however, that Section 3 warrants more searching review than "the extreme deference accorded to ordinary economic legislation." App., *infra*, 14a. The court of appeals relied for that conclusion on cases in which this Court has "struck down state or local enactments without invoking any suspect classification" where "the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible." *Id.* at 11a-12a (citing *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973), *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), and *Romer* v. *Evans*, 517 U.S. 620 (1996)). The court of appeals noted that, in each of those cases, the Court "stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute" and "undert[ook] a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review," *id.* at 13a, focusing on "the case-specific

nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered," *id.* at 12a. The court of appeals concluded that Section 3 warrants similarly careful review because "gays and lesbians have long been the subject of discrimination," *id.* at 13a (citing *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003)), and because Section 3 imposes substantial burdens on married same-sex couples by precluding access to "medical care and other benefits available to opposite-sex partners in Massachusetts and everywhere else in the country," *id.* at 14a.

In the court of appeals' view, that analysis "is uniquely reinforced by federalism concerns." App., *infra*, 18a. The court concluded that, while "neither the Tenth Amendment nor the Spending Clause invalidates DOMA," *id.* at 14a, Section 3 represents a broad intrusion on the States' historic powers to regulate domestic relations, and, as such, warrants more searching examination of the purported bases for the legislation, *id.* at 14a-18a.

The court of appeals concluded that the rationales for Section 3, as reflected in the 1996 House Report and amplified in briefing, are insufficient to justify the statute's burden on same-sex married couples. App., *infra*, 18a-24a. The court reasoned that neither a desire to "preserv[e] scarce government resources" nor to express moral disapproval, without more, justifies differential treatment of "a historically disadvantaged group," *id.* at 19a-20a. It further reasoned that Section 3 lacks "any demonstrated connection" to a statutory purpose of "support[ing] child-rearing in the context of stable marriage" or of promoting heterosexual marriage, since Section 3 neither precludes same-sex couples in Massachusetts from raising children nor "affect[s] the gender choices of those seeking marriage" in that State. *Id.* at 20a-21a.

Finally, the court rejected the argument that, in the face of "a prospective change in state marriage laws, Congress was entitled to 'freeze' the situation and reflect," explaining that "[t]he House Report's own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure." App., *infra*, 22a. And while the House Report "did emphasize a related concern * * * that state judges would impose same-sex marriage on unwilling states," the court explained that States can "protect themselves against what their citizens may regard as overreaching," and that the concern in any event is addressed by Section 2 of DOMA, which is not at issue in this case. *Ibid.*

In evaluating Section 3's constitutionality, the court of appeals "d[id] not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality." App., *infra*, 23a. The court reasoned that "[t]he many legislators who supported DOMA acted from a variety of motives," including a desire to "preserve the heritage of marriage as traditionally defined." *Ibid.* But the court concluded that Section 3 is invalid because the "denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest." *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

Section 3 of DOMA denies to same-sex couples legally married under state law significant federal benefits that are otherwise available to persons lawfully married under state law. The court of appeals correctly concluded that none of the rationales for Section 3's passage justifies such disparate treatment of same-sex married couples. Section 3 therefore violates the guarantee of equal protection secured by the Fifth Amendment.

Although the Executive Branch agrees with the court of appeals' determination that Section 3 is unconstitutional, we respectfully seek this Court's review so that the question may be authoritatively decided by this Court. As explained above, to ensure that the Judiciary is the final arbiter of Section 3's constitutionality, the President has instructed Executive departments and agencies to continue to enforce Section 3 until there is a definitive judicial ruling that Section 3 is unconstitutional. Attorney General Letter 5; see p. 7, *supra*. As federal officials charged with Section 3's enforcement, and against whom judgment was entered below, petitioners are the proper parties to invoke this Court's power to review the court of appeals' judgment. See *INS* v. *Chadha*, 462 U.S. 919, 930-931 (1983) ("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," it may appeal that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional."); *United States* v. *Lovett*, 328 U.S. 303, 306-307 (1946) (reviewing constitutionality of a federal statute on the petition of the Solicitor General, even though the Solicitor General agreed with the lower court's holding that the statute was unconstitutional); see *United States* v. *Lovett*, 327 U.S. 773 (1946) (granting Solicitor General's petition for a writ of certiorari).[3]

---

[3] The fact that the government agrees with respondents that Section 3 is unconstitutional does not prevent this Court from resolving that issue. Cf., *e.g.*, *National Fed'n of Indep. Businesses* v. *Sebelius*, No. 11-393 (June 28, 2012), slip op. 11. Consistent with 28 U.S.C. 530D and prior practice in cases in which the Department has declined to defend the constitutionality of an Act of Congress, the Attorney General notified the Speaker of the House of Representatives, the President of the Senate, and other congressional leaders of the Department's position in this case. The Department did not oppose the subsequent interven-

This Court's review is warranted because the court of appeals invalidated an Act of Congress, and because the court of appeals' decision raises important questions concerning the proper standards for reviewing classifications based on sexual orientation that should be resolved by this Court. Authoritative resolution of the question presented is of great importance to the United States and to respondents and tens of thousands of others who are being denied the equal enjoyment of the benefits that federal law makes available to persons who are legally married under state law. The petition for a writ of certiorari should be granted.

A. This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Act Of Congress

Review by this Court is warranted because the court of appeals invalidated a provision of an Act of Congress as unconstitutional. Although no other court of appeals

---

tion by BLAG for the purpose of presenting arguments in support of the constitutionality of Section 3. Although the interest of Members of Congress in the constitutionality of a federal statute does not confer standing on them to invoke this Court's power to review a judgment entered against the Executive Branch petitioners to prevent them from implementing the statute, see, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811 (1997); *Diamond* v. *Charles*, 476 U.S. 54 (1986); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 482-483 (1982); *Newdow* v. *United States Congress*, 313 F.3d 495, 499-500 (9th Cir. 2002), with the case now before this Court on this petition filed by the Executive Branch petitioners, it is appropriate for BLAG to present arguments in defense of the validity of the measure. See, *e.g.*, *Lovett*, 328 U.S. at 306-307 (after this Court granted the petition for a writ of certiorari filed by the Solicitor General on behalf of the United States, counsel for Congress appeared to present argument in support of the constitutionality of the challenged legislation). Because the Executive Branch petitioners have properly invoked the jurisdiction of this Court, there is no need for the Court to address the question whether BLAG has independent standing to seek review of the court of appeals' decision.

has yet passed on the constitutionality of Section 3 of DOMA, this Court's ordinary practice is to grant review when a court of appeals holds a federal statute unconstitutional, even in the absence of a circuit conflict. See, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 130 S. Ct. 1577 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's recognition that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the courts. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Respect for a coequal branch of government counsels in favor of reviewing a lower court's exercise of "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

B. The Decision Below Raises Important Questions Of Federal Law That Should Be Settled By This Court

Review is also warranted because the court of appeals' invalidation of Section 3 raises important questions of federal law that have not been, but should be, settled by this Court. See Sup. Ct. R. 10(c).

1. The Constitution's equal protection guarantee, applicable to the federal government through the Due Process Clause of the Fifth Amendment, see *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), embodies a basic requirement that "all persons similarly situated should be treated alike," *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

Under this Court's precedents, general social and economic legislation is ordinarily presumed valid, even though it may draw distinctions between different classes of individuals. *Cleburne*, 473 U.S. at 440. The Court will thus generally uphold such legislation if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

This Court has held that this deferential framework of review does not, however, apply to legislation that classifies on the basis of certain characteristics, including race, national origin, illegitimacy, and gender, that are deemed "suspect" or "quasi-suspect." "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440-441. The law thus calls for more searching constitutional review of such classifications to determine whether they are adequately justified by legitimate state interests. Heightened scrutiny calls on courts to examine only the "actual [governmental] purposes" underlying such classifications rather than "rationalizations for actions in fact differently grounded," *United States* v. *Virginia*, 518 U.S. 515, 535-536 (1996), and to determine, at a minimum, whether the classification bears a substantial relationship to an important governmental objective, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

This Court's cases have identified a number of factors to guide the determination whether heightened scrutiny applies to legislation targeting certain classes of individuals for less favorable treatment. These factors include: (1) whether the group in question has suf-

fered a history of discrimination; (2) whether members of the group share obvious, immutable, or distinguishing characteristics; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (plurality opinion); see also *Bowen* v. *Gilliard*, 483 U.S. 587, 602-603 (1987); *Cleburne*, 473 U.S. at 435-441.

2. Section 3 of DOMA draws distinctions between couples who are legally married under their States' laws based on their sexual orientation. It excludes same-sex married couples—whether men or women—from the federal recognition and benefits available to opposite-sex married couples.

This Court has never decided the appropriate equal protection framework for reviewing classifications based on sexual orientation. Cf. *Romer* v. *Evans*, 517 U.S. 620, 634-635 (1996) (invalidating a state constitutional amendment prohibiting any state or local action designed to protect gay and lesbian individuals as lacking a rational basis, without considering whether the classification warranted heightened scrutiny). The factors the Court has identified as relevant to the inquiry, however, counsel strongly in favor of treating sexual orientation classifications with suspicion.

As the court of appeals noted, "gays and lesbians have long been the subject of discrimination." App., *infra*, 13a (citing *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003)); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination."); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 465-466 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly

now in less degree."), cert. denied, 494 U.S. 1004 (1990). Gay and lesbian individuals also represent a "minority," App., *infra*, 22a, that has "historically been less able to protect itself through the political process," *id.* at 20a. That group is defined by a distinguishing characteristic—sexual orientation—that is not ordinarily "relevant to interests the State has the authority to implement," *Cleburne*, 473 U.S. at 441. Heightened scrutiny of legislative classifications based on sexual orientation is therefore warranted to ensure that they do not "invidiously relegat[e]" gay and lesbian individuals to "inferior legal status," *Frontiero*, 411 U.S. at 687 (plurality opinion), based simply on a view that gay and lesbian individuals as a class "are not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440.

Section 3 of DOMA fails under heightened scrutiny. The disparate treatment of gay and lesbian individuals who are legally married under state law does not substantially advance any important governmental purpose that motivated the enactment of Section 3.

To begin with, because Section 3 does not purport to forbid same-sex marriage, but instead simply denies federal benefits to same-sex couples who are *already* married, it does not meaningfully advance any cognizable federal interest in "defending and nurturing the institution of traditional, heterosexual marriage." *1996 House Report* 12. Nor does denying benefits to same-sex married couples substantially further an interest in "encouraging responsible procreation and child-rearing." *Id.* at 13.

This Court's cases, moreover, have made clear that neither moral disapproval nor the desire to preserve "scarce government resources," *1996 House Report* 12, adequately justifies legislation that targets suspect or quasi-suspect classes for adverse treatment, see *Law-*

rence, 539 U.S. at 577; *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971).

Finally, insofar as the House Committee Report cited the federal government's interest in "protecting state sovereignty and democratic self-governance," it cited that rationale in connection with Section 2, not Section 3. *1996 House Report* 16-18. Section 3 bears no substantial connection to that rationale in any event; it was not, for example, "framed as a temporary measure" to facilitate the States' own choices about whether to recognize same-sex marriage, App., *infra*, 22a, but instead was designed indefinitely to deny recognition to same-sex married couples for purposes of a wide array of federal statutes and programs, regardless of the content of state law.

The mismatch between Section 3's stated ends and means raises an inference that Section 3 classifies gay and lesbian individuals "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635; see *1996 House Report* 15 n.53 (suggesting that "[m]aintaining a preferred societal status of heterosexual marriage" will "promot[e] heterosexuality"); *id.* at 16 (citing "a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"). Section 3 accordingly violates the guarantee of equal protection secured by the Fifth Amendment.

3. The First Circuit, like every other court of appeals that has addressed the issue to date, concluded in a prior case that classifications based on sexual orientation are subject to rational basis review, rather than the heightened scrutiny applicable to suspect or quasi-suspect classifications. See *Cook* v. *Gates*, 528 F.3d 42, 61 (2008), cert. denied, 556 U.S. 1289 (2009)). Neither *Cook* nor any other case has, however, offered an explanation for that

conclusion that withstands scrutiny under this Court's precedents.[4]

The earliest court of appeals decisions addressing the issue simply assumed without explanation that gay and lesbian individuals are not a suspect or quasi-suspect class. See, *e.g.*, *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986), overruled on other grounds by *Lawrence*, *supra*; *National Gay Task Force* v. *Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985) (per curiam).

Following this Court's now-overruled decision upholding a state law criminalizing sodomy, *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, *supra*, some courts of appeals relied on that holding to conclude that discrimination against gay and lesbian individuals is presumptively constitutional. Those courts reasoned that they could not "constitute either a 'suspect class' or a 'quasi-suspect class'" if "the conduct which defined them as homosexuals was constitutionally proscribable."

---

[4] *Cook* and a number of cases in other circuits involved challenges to military policies on "homosexual conduct." See 528 F.3d at 45; see also *Richenberg* v. *Perry*, 97 F.3d 256, 258 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Thomasson* v. *Perry*, 80 F.3d 915, 919 (4th Cir.), cert. denied, 519 U.S. 948 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en banc); *High Tech Gays*, 895 F.2d at 565; *Ben- Shalom*, 881 F.2d at 456; *Woodward* v. *United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). As a number of those courts have noted, because Congress's authority to raise and support armies commands special judicial deference, classifications in the military context may present different questions from classifications in the civilian context. *Rostker*, 453 U.S. at 64-65, 70 (upholding male-only selective service registration against sex-discrimination challenge); see *Goldman* v. *Weinberger*, 475 U.S. 503, 507-509 (1986) (upholding military dress regulations barring the wearing of a yarmulke against First Amendment challenge); see also, *e.g.*, *Steffan*, 41 F.3d at 685 (citing the "special deference" owed "to the 'considered professional judgment' of 'appropriate military officials'") (quoting *Goldman*, 475 U.S. at 509).

Equality Found. of Greater Cincinnati, Inc. v. *City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); accord *Ben-Shalom*, 881 F.2d at 464; *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); see also *High Tech Gays,* 895 F.2d at 570-571 (relying in part on *Ben-Shalom*, *Woodward*, and *Padula* to conclude that gay and lesbian individuals are not a suspect or quasi-suspect class); cf. *Lawrence*, 539 U.S. at 575 (noting that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"). This Court's decision in *Lawrence* contradicts that basic premise.

Some courts of appeals also reasoned that gay and lesbian individuals differ from previously recognized suspect and quasi-suspect classes in that members of such classes, "e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." *Woodward*, 871 F.2d at 1076; accord *High Tech Gays*, 895 F.2d at 573. Subsequent decisions of this Court have undermined that reasoning. See *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that this Court's cases have "declined to distinguish between status and conduct in this context") (citing, *inter alia*, *Lawrence*, 539 U.S. at 575, and *id.* at 583 (O'Connor, J., concurring in the judgment)); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Some courts have further suggested that heightened constitutional protection against invidious discrimination is unnecessary because gay and lesbian individuals "have the ability to and do 'attract the attention of the lawmakers,'" as evidenced by the passage of anti-discrimination

legislation in some States. *High Tech Gays*, 895 F.2d at 574 (citing, *inter alia, Ben-Shalom*, 881 F.2d at 466). But this Court has not considered the passage of anti-discrimination laws in some States—or even by the federal government—to eliminate the need for searching judicial review of other laws that disadvantage a protected class. On the contrary, the plurality opinion in *Frontiero* cited the enactment of federal protections against sex discrimination as bolstering the conclusion that sex-based classifications are inherently invidious and thus deserving of heightened constitutional scrutiny. See 411 U.S. at 687-688.

Finally, the most recent decisions applying rational basis review, including the First Circuit's decision in *Cook*, have simply relied on other courts' decisions, see *Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing cases), cert. denied, 543 U.S. 1081 (2005), or on the fact that this Court "has never ruled that sexual orientation is a suspect classification for equal protection purposes," even though the Court has never squarely confronted that question, *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); accord *Cook*, 528 F.3d at 61. No court of appeals has offered an explanation for applying rational basis review that withstands scrutiny under this Court's precedents.

4. Although the court of appeals in this case acknowledged that there is "[s]ome similarity" between the factors underlying this Court's decision to extend heightened scrutiny to gender-based classifications and those applicable to sexual orientation classifications, it concluded that circuit precedent foreclosed extending heightened scrutiny to sexual orientation classifications. App., *infra*, 10a (citing *Cook*, *supra*). But while the court determined that Section 3 would survive "conventional rational basis review," *id.* at 9a, 13a, it concluded that

Section 3's effect on a minority group that has been politically unpopular and has suffered a long history of discrimination, reinforced by federalism concerns, warranted application of "closer than usual" review, *id.* at 7a, 14a-15a, 22a. Thus, rather than extend to Section 3 the "extreme deference accorded to ordinary economic legislation," *id.* at 14a, the court below examined the purposes underlying the enactment of Section 3 and found an insufficient connection to any legitimate governmental end to justify denying federal benefits to same-sex couples who are legally married under state law.

As the court of appeals itself acknowledged, the proper approach for reviewing the constitutionality of Section 3 is a matter that only this Court can resolve. See App., *infra*, 7a ("We have done our best to discern the direction of [Supreme Court precedent], but only the Supreme Court can finally decide this unique case."). This Court's review is warranted to consider the important questions raised by the decision below.

C. Authoritative Resolution Of The Question Presented Is Of Great Public Importance

1. Section 3 applies to more than 1000 federal statutes and programs whose administration depends in part on marital status. See GAO Report 1. The issues decided below therefore have a substantial impact on the conduct of a wide array of Executive functions. As a result of the President's instruction to continue enforcement of Section 3 pending final judicial resolution of its constitutionality, so as to ensure that the Judiciary is the final arbiter of the constitutional question, Executive departments and agencies will continue to deny federal benefits to scores of affected individuals until this Court reaches a definitive resolution. Other cases challenging the constitutionality of Section 3 of DOMA are currently pending in courts across the country. A timely and defin-

itive ruling on Section 3's constitutionality is accordingly of exceptional practical importance to the United States and to the tens of thousands of individuals affected by Section 3.

2. To help ensure that the Court will have an appropriate vehicle in which to resolve the issues presented in a timely and definitive fashion, the government is also filing today a petition for a writ of certiorari before judgment in *Golinski* v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), appeal pending, No. 12-15388 (9th Cir. filed Feb. 24, 2012) and No. 12-15409 (9th Cir. filed Feb. 28, 2012).

In *Golinski*, *supra*, the district court held that heightened scrutiny applies to classifications based on sexual orientation and that Section 3 fails that standard of review. In the alternative, the district court held that Section 3 is invalid under rational basis review. *Golinski* provides an appropriate vehicle for the Court to consider the constitutionality of Section 3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
LEONDRA R. KRUGER
PRATIK A. SHAH
Assistants to the Solicitor General
MICHAEL JAY SINGER
AUGUST E. FLENTJE
BENJAMIN S. KINGSLEY
Attorneys

JULY 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 10-2204

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF, APPELLEE

v.

UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES, ET AL., DEFENDANTS, APPELLANTS

Nos. 10-2207 & 10-2214

DEAN HARA, PLAINTIFF,
APPELLEE/CROSS-APPELLANT,

NANCY GILL, ET AL., PLAINTIFFS, APPELLEES,

KEITH TONEY, ET AL., PLAINTIFFS

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
DEFENDANTS, APPELLANTS/CROSS-APPELLEES,
HILARY RODHAM CLINTON, IN HER OFFICIAL
CAPACITY AS UNITED STATES SECRETARY OF STATE,
DEFENDANT

Filed: May 31, 2012

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before: LYNCH, *Chief Judge*, TORRUELLA and BOUDIN, *Circuit Judges*.

BOUDIN, *Circuit Judge*. These appeals present constitutional challenges to section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from couples thus married. Rather than challenging the right of states to define marriage as they see fit, the appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom.

In 1993, the Hawaii Supreme Court held that it might violate the Hawaii constitution to deny marriage licenses to same-sex couples. *Baehr v. Lewin*, 852 P.2d 44, 48, 68 (Haw. 1993). Although Hawaii then empowered its legislature to block such a ruling, Haw. Const. art. I, § 23—which it did, Act of June 22, 1994, 1994 Haw. Sess. Laws 526 (H.B. 2312) (codified at Haw. Rev. Stat. § 572-1)—the Hawaii decision was followed by legalization of same-sex marriage in a small minority of states, some by statute and a few by judicial decision;[1]

---

[1] *E.g.*, Marriage Equality Act, 2011 N.Y. Sess. Laws. ch. 95 (A. 8354) (McKinney) (codified at N.Y. Dom. Rel. Law § 10-a); Act of Feb. 13, 2012, 2012 Wash. Legis. Serv. ch. 3 (S.S.B. 6239) (West); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

many more states responded by banning same-sex marriage by statute or constitutional amendment.[2]

Congress reacted with the same alarm as many state legislatures. Within three years after the Hawaii decision, DOMA was enacted with strong majorities in both Houses and signed into law by President Clinton. The entire statute, reprinted in an addendum to this decision, must—having only two operative paragraphs—be one of the shortest major enactments in recent history. Section 3 of DOMA, 1 U.S.C. § 7, defines "marriage" for purposes of federal law:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Section 2, which is not at issue here, absolves states from recognizing same-sex marriages solemnized in other states.

DOMA does not formally invalidate same-sex marriages in states that permit them, but its adverse consequences for such a choice are considerable. Notably, it prevents same-sex married couples from filing joint federal tax returns, which can lessen tax burdens, *see* 26

---

[2] *E.g.*, Tex. Const. art. 1, § 32; Va Const. art. I, § 15-A; Act of May 24, 1996, 1996 Ill. Legis. Serv. P.A. 89-459 (S.B. 1140) (West) (codified at 750 Ill. Comp. Stat. 5/212(a)(5)); Act of May 13, 1997, 1997 Ind. Legis. Serv. P.L. 198-1997 (H.E.A. 1265) (West) (codified at Ind. Code § 31-11-1-1).

U.S.C. § 1(a)-(c), and prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits, *e.g.*, 42 U.S.C. § 402(f), (i). DOMA also leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses.

DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws. In most cases, the changes operate to the disadvantage of same-sex married couples in the half dozen or so states that permit same-sex marriage. The number of couples thus affected is estimated at more than 100,000.[3] Further, DOMA has potentially serious adverse consequences, hereafter described, for states that choose to legalize same-sex marriage.

In *Gill v. OPM*, No. 10-2207, seven same-sex couples married in Massachusetts and three surviving spouses of such marriages brought suit in federal district court to enjoin pertinent federal agencies and officials from enforcing DOMA to deprive the couples of federal benefits available to opposite-sex married couples in Massachusetts. The Commonwealth brought a companion case, *Massachusetts v. DHHS*, No. 10-2204, concerned that DOMA will revoke federal funding for programs tied to DOMA's opposite-sex marriage definition—such

---

[3] U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011),http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html; U.S. Census Bureau, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey*, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited May 22, 2012).

as Massachusetts' state Medicaid program and veterans' cemeteries.

By combining the income of individuals in same-sex marriages, Massachusetts' Medicaid program is noncompliant with DOMA, and the Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, has discretion to rescind Medicaid funding to noncomplying states. Burying a veteran with his or her same-sex spouse removes federal "veterans' cemetery" status and gives the Department of Veterans' Affairs discretion to recapture all federal funding for the cemetery.

The Department of Justice defended DOMA in the district court but, on July 8, 2010, that court found section 3 unconstitutional under the Equal Protection Clause. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010). In the companion case, the district court accepted the Commonwealth's argument that section 3 violated the Spending Clause and the Tenth Amendment. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 249, 253 (D. Mass. 2010).

The district court's judgment declared section 3 unconstitutional and enjoined the federal officials and agencies from enforcing section 3, but the court stayed injunctive relief pending appeals. The judgment included specific remedies ordered for the named plaintiffs in relation to tax, social security and like claims. With one qualification—discussed separately below—the federal defendants have throughout focused solely upon the district court's premise that DOMA is unconstitutional.

The Justice Department filed a brief in this court defending DOMA against all constitutional claims. Thereafter, altering its position, the Justice Department filed a revised brief arguing that the equal protection claim should be assessed under a "heightened scrutiny" standard and that DOMA failed under that standard. It opposed the separate Spending Clause and Tenth Amendment claims pressed by the Commonwealth. The *Gill* plaintiffs defend the district court judgment on all three grounds.

A delay in proceedings followed the Justice Department's about face while defense of the statute passed to a group of Republican leaders of the House of Representatives—the Bipartisan Legal Advisory Group ("the Legal Group")—who retained counsel and intervened in the appeal to support section 3. A large number of amicus briefs have been filed on both sides of the dispute, some on both sides proving very helpful to the court.

On appeal from a grant of summary judgment, our review is *de novo*, *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011), and the issues presented are themselves legal in character, even though informed by background information as to legislative purpose and "legislative facts" bearing upon the rationality or adequacy of distinctions drawn by statutes. *E.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-20 (1993). Such information is normally noticed by courts with the assistance of briefs, records and common knowledge. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999).

This case is difficult because it couples issues of equal protection and federalism with the need to assess

the rationale for a congressional statute passed with minimal hearings and lacking in formal findings. In addition, Supreme Court precedent offers some help to each side, but the rationale in several cases is open to interpretation. We have done our best to discern the direction of these precedents, but only the Supreme Court can finally decide this unique case.

Although our decision discusses equal protection and federalism concerns separately, it concludes that governing precedents under both heads combine—not to create some new category of "heightened scrutiny" for DOMA under a prescribed algorithm, but rather to require a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage. Our decision then tests the rationales offered for DOMA, taking account of Supreme Court precedent limiting which rationales can be counted and of the force of certain rationales.

Equal Protection. The Legal Group says that any equal protection challenge to DOMA is foreclosed at the outset by *Baker v. Nelson*, 409 U.S. 810 (1972). There, a central claim made was that a state's refusal to recognize same-sex marriage violated federal equal protection principles. Minnesota had, like DOMA, defined marriage as a union of persons of the opposite sex, and the state supreme court had upheld the statute. On appeal, the Supreme Court dismissed summarily for want of a substantial federal question. *Id.*

Baker is precedent binding on us unless repudiated by subsequent Supreme Court precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Following *Baker*,

"gay rights" claims prevailed in several well known decisions, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996),[4] but neither mandates that the Constitution requires states to permit same-sex marriages. A Supreme Court summary dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.

Central to this appeal is Supreme Court case law governing equal protection analysis. The *Gill* plaintiffs say that DOMA fails under the so-called rational basis test, traditionally used in cases not involving "suspect" classifications. The federal defendants said that DOMA would survive such rational basis scrutiny but now urge, instead, that DOMA fails under so-called intermediate scrutiny. In our view, these competing formulas are inadequate fully to describe governing precedent.

Certain suspect classifications—race, alienage and national origin—require what the Court calls strict scrutiny, which entails both a compelling governmental in-

---

[4] *Lawrence* struck down Texas' statute forbidding homosexual sodomy and *Romer* overturned a Colorado constitutional amendment that curtailed the right of communities to enact laws to prevent discrimination against gays and lesbians. Although *Lawrence* rested on substantive due process precedent and not equal protection, precedents under the two rubrics use somewhat related tests as to levels of scrutiny—applied to liberty interests under the former and discrimination claims under the latter. *Lawrence*, 539 U.S. at 575-76, 578; *Romer*, 517 U.S. at 632, 635.

terest and narrow tailoring. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.[5] Both are far more demanding than rational basis review as conventionally applied in routine matters of commercial, tax and like regulation.

Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the "last resort of constitutional argument," *Buck v. Bell*, 274 U.S. 200, 208 (1927), rarely succeed. Courts accept as adequate any plausible factual basis, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955), without regard to Congress' actual motives. *Beach Commc'ns*, 508 U.S. at 314. Means need not be narrowly drawn to meet—or even be entirely consistent with—the stated legislative ends. *Lee Optical*, 348 U.S. at 487-88.

Under such a rational basis standard, the *Gill* plaintiffs cannot prevail. Consider only one of the several justifications for DOMA offered by Congress itself, namely, that broadening the definition of marriage will reduce tax revenues and increase social security payments. This is the converse of the very advantages that the *Gill* plaintiffs are seeking, and Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government.

---

[5] *United States v. Virginia* (*VMI*), 518 U.S. 515, 532-33 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion).

The federal defendants conceded that rational basis review leaves DOMA intact but now urge this court to employ the so-called intermediate scrutiny test used by Supreme Court for gender discrimination. Some similarity exists between the two situations along with some differences, *compare Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion) (describing criteria for categorization). But extending intermediate scrutiny to sexual preference classifications is not a step open to us.

First, this court in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009), has already declined to create a major new category of "suspect classification" for statutes distinguishing based on sexual preference. *Cook* rejected an equal protection challenge to the now-superceded "Don't Ask, Don't Tell" policy adopted by Congress for the military, pointing out that *Romer* itself avoided the suspect classification label. *Cook*, 528 F.3d at 61-62. This binds the panel. *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010).

Second, to create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict. Nothing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche. That such a classification could overturn marriage laws in a huge majority of individual states underscores the implications.

However, that is not the end of the matter. Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. And (as we later explain), in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.

In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. It is these decisions—not classic rational basis review—that the *Gill* plaintiffs and the Justice Department most usefully invoke in their briefs (while seeking to absorb them into different and more rigid categorical rubrics).

The oldest of the decisions, *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973), invalidated Congress' decision to exclude from the food stamp program households containing unrelated individuals. Disregarding purported justifications that such households were more likely to under-report income and to evade detection, the Court closely scrutinized the legislation's fit—finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a "bare congressional desire to harm a politically unpopular group." *Id.* at 534, 537-38.

The second, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), overturned a local ordinance as ap-

plied to the denial of a special permit for operating a group home for the mentally disabled. The Court found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." *Id.* at 448.

Finally, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a provision in Colorado's constitution prohibiting regulation to protect homosexuals from discrimination. The Court, calling "unprecedented" the "disqualification of a class of persons from the right to seek specific protection from the law," deemed the provision a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* at 632-33, 635.

These three decisions did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered. Several Justices have remarked on this—both favorably, *City of Cleburne*, 473 U.S. at 451-55 (1985) (Stevens, J., concurring), and unfavorably, *United States v. Virginia* (*VMI*), 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

Circuit courts, citing these same cases, have similarly concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent

entirely on abstract categorizations.[6] As one distinguished judge observed:

> Judges and commentators have noted that the usually deferential "rational basis" test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination.

United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (citing *City of Cleburne* as an example). There is nothing remarkable about this: categories are often approximations and are themselves constructed by weighing of underlying elements.

All three of the cited cases—*Moreno*, *City of Cleburne* and *Romer*—stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. As with the women, the poor and the mentally impaired, gays and lesbians have long been the subject of discrimination. *Lawrence*, 539 U.S. at 571. The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.

As for burden, the combined effect of DOMA's restrictions on federal benefits will not prevent same-sex marriage where permitted under state law; but it will penalize those couples by limiting tax and social security benefits to opposite-sex couples in their own and all other states. For those married same-sex couples of which one partner is in federal service, the other cannot

---

[6] *E.g.*, *Ramos v. Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003); *Milner v. Apfel*, 148 F.3d 812, 816 (7th Cir.), *cert. denied*, 525 U.S. 1024 (1998); *Price v. Tanner*, 855 F.2d 820, 829 n.4 (11th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).

take advantage of medical care and other benefits available to opposite-sex partners in Massachusetts and everywhere else in the country.

These burdens are comparable to those the Court found substantial in *Moreno*, *City of Cleburne*, and *Romer*. *Moreno*, like this case, involved meaningful economic benefits; *City of Cleburne* involved the opportunity to secure housing; *Romer*, the chance to secure equal protection of the laws on the same terms as other groups. Loss of survivor's social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.

Accordingly, we conclude that the extreme deference accorded to ordinary economic legislation in cases like *Lee Optical* would not be extended to DOMA by the Supreme Court; and without insisting on "compelling" or "important" justifications or "narrow tailoring," the Court would scrutinize with care the purported bases for the legislation. Before providing such scrutiny, a separate element absent in *Moreno*, *City of Cleburne*, and *Romer*—federalism—must be considered.

Federalism. In assailing DOMA, the plaintiffs and especially the Commonwealth rely directly on limitations attributed to the Spending Clause of the Constitution and the Tenth Amendment; the Justice Department, along with the Legal Group, rejects those claims. In our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA; but Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual

scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily accorded.

It is true that DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation—domestic relations and the definition and incidents of lawful marriage—which is a leading instance of the states' exercise of their broad police-power authority over morality and culture. As the Supreme Court observed long ago,

> [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *see also Loving v. Virginia*, 388 U.S. 1, 7 (1967) (marriage).

Consonantly, Congress has never purported to lay down a general code defining marriage or purporting to bind to the states to such a regime. Rather, in individual situations—such as the anti-fraud criteria in immigration law, 8 U.S.C. § 1186a(b)(1)(A)(i)—Congress has provided its own definitions limited to the particular program or personnel involved. But no precedent exists for DOMA's sweeping general "federal" definition of marriage for all federal statutes and programs.

Nevertheless, Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has

traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so.

Supreme Court interpretations of the Tenth Amendment have varied over the years but those in force today have struck down statutes only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). Whatever its spin-off effects, section 3 governs only federal programs and funding, and does not share these two vices of commandeering or direct command.

Neither does DOMA run afoul of the "germaneness" requirement that conditions on federal funds must be related to federal purposes. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). The requirement is not implicated where, as here, Congress merely defines the terms of the federal benefit. In *Dole*, the Supreme Court upheld a condition by which federal funds for highway construction depended on a state's adoption of a minimum drinking age for all driving on state roadways. 483 U.S. at 205. DOMA merely limits the use of federal funds to prescribed purposes.

However, the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts to regulate the rules and incidents of marriage; notably, the Commonwealth stands both to assume new administrative burdens and to lose funding for Medicaid or veterans' cemeteries solely on account of its same-sex marriage laws. These consequences do not violate the Tenth Amendment or Spend-

ing Clause, but Congress' effort to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws does bear on how the justifications are assessed.

In *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court scrutinized with special care federal statutes intruding on matters customarily within state control. The lack of adequate and persuasive findings led the Court in both cases to invalidate the statutes under the Commerce Clause even though nothing more than rational basis review is normally afforded in such cases.

The Supreme Court has made somewhat similar statements about the need for scrutiny when examining federal statutes intruding on regulation of state election processes. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009);[7] *cf. City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (calling RFRA a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens").

---

[7] The majority, focusing on the related issue of fit, said that "a departure from the fundamental principle of equal sovereignty [between states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512. Justice Thomas went a step further, stating "because States still retain sovereign authority over their election systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination." *Id.* at 2520 (Thomas, J., concurring in part and dissenting in part).

True, these federalism cases examined the reach of federal power under the Commerce Clause and other sources of constitutional authority not invoked here; but a statute that violates equal protection is likewise beyond the power of Congress. *See Moreno*, 413 U.S. at 541 (Douglas, J., concurring). Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.

DOMA's Rationales. Despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA, Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1996) ("Hearing"), and none of the testimony concerned DOMA's effects on the numerous federal programs at issue. Some of the odder consequences of DOMA testify to the speed with which it was adopted.[8]

The statute, only a few paragraphs in length, is devoid of the express prefatory findings commonly made in major federal laws. *E.g.*, 15 U.S.C. § 80a-1; 16 U.S.C. § 1531; 20 U.S.C. § 1400; 21 U.S.C. § 801; 29 U.S.C.

[8] For example, DOMA's definition of marriage arguably undermines both federal ethics laws, 5 U.S.C. app. §§ 102(e)(1)(A)-(D), 501(c), and abuse reporting requirements in the military, 10 U.S.C. § 1787(a), insofar as it facially excludes same-sex married couples from their strictures. Other curiosities likely unintended are possible impacts on antinepotism provisions, 5 U.S.C. §§ 3110(a)(3), (b), 2302(b)(7); judicial recusals, 28 U.S.C. § 455(b)(4), restrictions on receipt of gifts, 2 U.S.C. § 31-2(a), and on travel reimbursement, 31 U.S.C. § 1353(a); and the crimes of bribery of federal officials, 18 U.S.C. § 208(a), and threats to family members of federal officials, *id.* § 115.

§ 151; *id.* § 1001; 42 U.S.C. § 7401. Accordingly, in discerning and assessing Congress' basis for DOMA our main resort is the House Committee report and, in lesser measure, to variations of its themes advanced in the briefs before us. The committee report stated:

> [T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

H.R. Rep. No. 104-664, at 12 (1996).

The penultimate reason listed above was not directed to section 3—indeed, is antithetical to it—but was concerned solely with section 2, which reserved a state's power not to recognize same-sex marriages performed in other states. Thus, we begin with the others, reserving for separate consideration the claim strongly pressed by the *Gill* plaintiffs that DOMA should be condemned because its unacknowledged but alleged central motive was hostility to homosexuality.

First, starting with the most concrete of the cited reasons—"preserving scarce government resources"—it is said that DOMA will save money for the federal government by limiting tax savings and avoiding social security and other payments to spouses. This may well be true, or at least might have been thought true; more

detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.[9]

But, where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction. *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Romer*, 517 U.S. at 635. The reason, derived from equal protection analysis, is that such a group has historically been less able to protect itself through the political process. *Plyler*, 457 U.S. at 218 n.14; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

A second rationale of a pragmatic character, advanced by the Legal Group's brief and several others, is to support child-rearing in the context of stable marriage.[10] The evidence as to child rearing by same-sex couples is the subject of controversy, but we need not enter the debate. Whether or not children raised by opposite-sex marriages are on average better served, DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners.

---

[9] Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

[10] The House Report refers obliquely to the importance of heterosexual marriage in "encouraging responsible procreation and child-rearing," H.R. Rep. No. 104-664, at 13, but the subcommittee chair at the House hearing began by saying that "heterosexual marriage provides the ideal structure within which to beget and raise children." Hearing, *supra*, at 1 (opening statement of Rep. Canady).

Although the House Report is filled with encomia to heterosexual marriage, DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage. This is not merely a matter of poor fit of remedy to perceived problem, *Lee Optical*, 348 U.S. at 487-88; *City of Cleburne*, 473 U.S. at 446-50, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.

A third reason, moral disapproval of homosexuality, is one of DOMA's stated justifications:

> Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both *moral disapproval of homosexuality*, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian)morality.

H.R. Rep. No. 104-664, at 15-16 (emphasis added); *see also, e.g.*, 142 Cong. Rec. 16,972 (1996) (statement of Rep. Coburn) (homosexuality "morally wrong").

For generations, moral disapproval has been taken as an adequate basis for legislation, although usually in choices made by state legislators to whom general police power is entrusted. But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis. 539 U.S. at 577-78. Moral judgments can hardly be avoided in legislation, but *Lawrence* and *Romer* have

undercut *this* basis. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Finally, it has been suggested by the Legal Group's brief that, faced with a prospective change in state marriage laws, Congress was entitled to "freeze" the situation and reflect. But the statute was not framed as a temporary time-out; and it has no expiration date, such as one that Congress included in the Voting Rights Act. *See Nw. Austin*, 129 S. Ct. at 2510 (describing original expiration date and later extensions); *City of Boerne*, 521 U.S. at 533. The House Report's own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure.

Congress did emphasize a related concern, based on the Hawaii Supreme Court's decision in *Baehr*, that state judges would impose same-sex marriage on unwilling states. H.R. Rep. No. 104-664, at 5-6, 12, 16-17. But almost all states have readily amended constitutions, as well as elected judges, and can protect themselves against what their citizens may regard as overreaching. The fear that Hawaii could impose same-sex marriage on sister states through the Full Faith and Credit Clause, *id.* at 7-9, relates solely to section 2 of DOMA, which is not before us.

We conclude, without resort to suspect classifications or any impairment of *Baker*, that the rationales offered do not provide adequate support for section 3 of DOMA. Several of the reasons given do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point. If we are right in thinking that disparate impact on minority interests and federalism concerns both require

somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.

Invalidating a federal statute is an unwelcome responsibility for federal judges; the elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion). But a lower federal court such as ours must follow its best understanding of governing precedent, knowing that in large matters the Supreme Court will correct mis-readings (and even if it approves the result will formulate its own explanation).

In reaching our judgment, we do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality. The many legislators who supported DOMA acted from a variety of motives, one central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of Western civilization. *See* H.R. Rep. No. 104-664, at 12, 16. Preserving this institution is not the same as "mere moral disapproval of an excluded group," *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring), and that is singularly so in this case given the range of bipartisan support for the statute.

The opponents of section 3 point to selected comments from a few individual legislators; but the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton. Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in

court. The desire to retain them is strong and can be honestly held.

For 150 years, this desire to maintain tradition would alone have been justification enough for almost any statute. This judicial deference has a distinguished lineage, including such figures as Justice Holmes, the second Justice Harlan, and Judges Learned Hand and Henry Friendly. But Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern.

To conclude, many Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.

Hara's Health Benefits Claim. A distinct, if much narrower, issue is raised by Dean Hara, one of the *Gill* plaintiffs. Although the district court ordered the relief Hara sought for Social Security lump-sum death benefits, the district court found that relief on his second claim for health coverage required a further determination on a precondition that is the subject of a proceeding earlier brought by Hara and now pending in the Federal Circuit. *Hara v. Office of Pers. Mgmt.*, No. 2009-3134 (Fed. Cir. docketed Mar. 17, 2009).

Hara was married under Massachusetts law to a now-deceased Congressman, and Hara has sought to be enrolled as a surviving spouse for health benefits under the Congressman's Federal Employees' Health Benefit Plan ("FEHBP"). For this, (1) Hara would have to be an eligible "annuitant" under the annuity statute, and (2) the Congressman had to have enrolled in the health benefit plan for "self and family," which he had not done. 5 U.S.C. § 8341; 5 C.F.R. §§ 890.303(c), 890.302(a)(1).

Acting on an application by Hara for a survivor annuity benefit, the Office of Personnel Management ("OPM") had previously ruled that Hara was ineligible to receive an annuity both because he was not a spouse under DOMA *and* because the Congressman had not elected such coverage. Such determinations as to annuities are reviewed exclusively by the Merit Systems Protection Board ("MSPB" or "Board") and then exclusively by the Federal Circuit. 5 U.S.C. §§ 8347, 8341, 7703(b)(1); 28 U.S.C. 1295(a)(9).

On review, the Board upheld the denial of coverage solely because of DOMA, finding the failure to elect coverage not to bar annuitant status. Hara sought further review in the Federal Circuit, and that case has been stayed pending resolution of the DOMA issue in this circuit. *Hara*, No. 2009-3134 (Oct. 15, 2010 order staying proceedings). Thus, now—as at the time the district court issued its judgment—a Board determination is in force that Hara lacks annuitant status.

OPM has separately denied Hara's claim for FEHBP health enrollment because of the Congressman's failure to elect "self and family" coverage. Although the district court found DOMA unconstitutional, it refused to

resolve Hara's health coverage claim now because it still depends on Hara establishing eligibility for annuitant status, which is at issue in his pending Federal Circuit appeal. Whether or not Hara lacked standing, the district court showed prudence in deferring on this issue to the Federal Circuit.

Hara says in substance that the Federal Circuit has to recognize his annuitant status because the Board has waived or forfeited any objection based on the failure to elect spousal survivor coverage; but the Department of Justice does not concede the point, which the Federal Circuit presumably will resolve. If Hara prevails there, district court injunctive relief to secure his health coverage is likely to be unnecessary, but our affirmance is without prejudice to such a future request by Hara.

The judgment of the district court is *affirmed* for the reasons and to the extent stated above. Anticipating that certiorari will be sought and that Supreme Court review of DOMA is highly likely, the mandate is *stayed*, maintaining the district court's stay of its injunctive judgment, pending further order of this court. The parties will bear their own costs on these appeals.

It is so ordered.

ADDENDUM

SECTION. 1. SHORT TITLE.

This Act may be cited as the "Defense of Marriage Act".

SEC. 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.—Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

"§ 1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738B the following new item:

"1738C. Certain acts, records, and proceedings and the effect thereof.".

SEC. 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

"§ 7. Definition of 'marriage' and 'spouse'

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'."

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 09-10309-JLT

NANCY GILL & MARCELLE LETOURNEAU, ET AL.,
PLAINTIFFS

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
DEFENDANTS

Filed: July 8, 2010

MEMORANDUM

TAURO, J.

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act[1] as applied to Plaintiffs, who are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts.[2] Specifically,

---

[1] 1 U.S.C. § 7.

[2] Defendants in this action are the Office of Personnel Management; the United States Postal Service; John E. Potter, in his official capacity as the Postmaster General of the United States of America; Michael J.

Plaintiffs contend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.[3] Because this court agrees, *Defendants' Motion to Dismiss* [#20] is DENIED and *Plaintiffs' Motion for Summary Judgment* [#25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

II. Background[4]

A. The Defense of Marriage Act

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA").[5] At issue in this case is Section 3 of DOMA,

---

Astrue, in his official capacity as the Commissioner of the Social Security Administration; Eric H. Holder, Jr., in his individual capacity as the United States Attorney General; and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

[3] Though the Fifth Amendment to the United States Constitution does not contain an Equal Protection Clause, as the Fourteenth Amendment does, the Fifth Amendment's Due Process Clause includes an Equal Protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[4] In the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010) (Tauro, J.) this court holds that the Defense of Marriage Act is additionally rendered unconstitutional by operation of the Tenth Amendment and the Spending Clause.

[5] Pub. L. No. 104-199, 110 Stat. 2419 (1996)

which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.[6]

In large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin*,[7] a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution.[8] That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses.[9]

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the *Baehr* decision as the beginning of an "orchestrated legal assault being

---

[6] 1 U.S.C. § 7.

[7] 852 P.2d 44 (Haw. 1993).

[8] *See id.* at 59-67.

[9] Notably, the *Baehr* decision did not carry the day in Hawaii. Rather, Hawaii ultimately amended its constitution to allow the state legislature to limit marriage to opposite-sex couples. *See* HAW. CONST. art. I, § 23. However, five other states and the District of Columbia now extend full marriage rights to same-sex couples. These five states are Iowa, New Hampshire, Connecticut, Vermont, and Massachusetts, where Plaintiffs reside.

waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences . . . on federal law."[10] Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."[11]

And so, in response to the Hawaii Supreme Court's decision, Congress sought a means to both "preserve[] each State's ability to decide" what should constitute a marriage under its own laws and to "lay[] down clear rules" regarding what constitutes a marriage for purposes of federal law.[12]

In enacting Section 2 of DOMA,[13] Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its "express grant of authority," under the second sentence of the Constitution's Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States."[14] With regard to Section 3 of DOMA, the House Report explained that the statute codifies the

---

[10] Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.") [hereinafter "House Report"].

[11] *Id.* at 10.

[12] *Id.* at 2.

[13] Section 2 of DOMA provides that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."

[14] *Id.* at 25.

definition of marriage set forth in "the standard law dictionary," for purposes of federal law.[15]

The House Report acknowledged that federalism constrained Congress' power, and that "[t]he determination of who may marry in the United States is uniquely a function of state law."[16] Nonetheless, it asserted that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,'"[17] and, therefore, embraced DOMA as a step toward furthering Congress's interests in "defend[ing] the institution of traditional heterosexual marriage."[18]

The House Report further justified the enactment of DOMA as a means to "encourag[e] responsible procreation and child-rearing," conserve scarce resources,[19] and reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[20] In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that "[m]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law."[21]

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion"

---

[15] *Id.* at 29. (citing BLACK'S LAW DICTIONARY 972 (6th ed. 1990)).

[16] *Id.* at 3.

[17] *Id.* at 12.

[18] *Id.*

[19] *Id.* at 13, 18.

[20] *Id.* at 16 (footnote omitted).

[21] 142 CONG. REC. H7480 (daily ed. July 12, 1996).

and "an attack upon God's principles."[22] They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage[23] and might indeed be "the final blow to the American family."[24]

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined,

---

[22] 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *Id.* at H7494 (statement of Rep. Smith).

[23] *Id.* at H7494 (statement of Rep. Smith); *see also* 142 CONG. REC. S10, 110 (daily ed. Sept. 10, 1996) (statement of Sen. Helms) ("[Those opposed to DOMA] are demanding that homosexuality be considered as just another lifestyle—these are the people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle . . . Homosexuals and lesbians boast that they are close to realizing their goal—legitimizing their behavior . . . . At the heart of this debate is the moral and spiritual survival of this Nation."); 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by the homosexual extremists all across this country").

[24] *Id.* at H7276 (statement of Rep. Largent); *see also* 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.").

prior to DOMA, only by reference to each state's marital status determinations.[25]

In January 1997, the General Accounting Office issued a report clarifying the scope of DOMA's effect. It concluded that DOMA implicated at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health benefits and taxation, which are at issue in this action.[26] A follow-up study conducted in 2004 found that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status.[27]

B. The Federal Programs Implicated in This Action

Prior to filing this action, each Plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower with respect to particular federal benefits available to married individuals. But each request was denied. In denying Plaintiffs access to these benefits, the government agencies responsible for administering the relevant programs all invoked DOMA's mandate that the federal government recognize only those marriages between one man and one woman.

1. Health Benefits Based on Federal Employment

Plaintiffs' allegations in this case encompass three federal health benefits programs: the Federal Employ-

---

[25] House Report at 10-11.

[26] Aff. of Gary D. Buseck, Ex. A, Report of the U.S. General Accounting Office, Office of General Counsel, January 31, 1997 (GAO/OGC-97-16).

[27] U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

ees Health Benefits Program (the "FEHB"), the Federal Employees Dental and Vision Insurance Program (the "FEDVIP"), and the federal Flexible Spending Arrangement program.

Plaintiff Nancy Gill, an employee of the United States Postal Service, seeks to add her spouse, Marcelle Letourneau, as a beneficiary under Ms. Gill's existing self and family enrollment in the FEHB, to add Ms. Letourneau to FEDVIP, and to use her flexible spending account for Ms. Letourneau's medical expenses.

Plaintiff Martin Koski, a former employee of the Social Security Administration, seeks to change his "self only" enrollment in the FEHB to "self and family" enrollment in order to provide coverage for his spouse, James Fitzgerald. And Plaintiff Dean Hara seeks enrollment in the FEHB as the survivor of his spouse, former Representative Gerry Studds.

A. Federal Employees Health Benefits Program

The FEHB is a comprehensive program of health insurance for federal civilian employees,[28] annuitants, former spouses of employees and annuitants, and their family members.[29] The program was created by the Federal Employees Health Benefits Act, which established (1) the eligibility requirements for enrollment, (2) the types of plans and benefits to be provided, and (3) the qualifications that private insurance carriers

[28] "Employee" is defined as including a Member of Congress. 5 U.S.C. § 8901(1)(B).

[29] 5 U.S.C. § 8905.

must meet in order to offer coverage under the program.[30]

The Office of Personnel Management ("OPM") administers the FEHB and is empowered to negotiate contracts with potential carriers, as well as to set the premiums for each plan.[31] OPM also prescribes regulations necessary to carry out the program, including those setting forth "the time at which and the manner and conditions under which an employee is eligible to enroll,"[32] as well as "the beginning and ending dates of coverage of employees, annuitants, members of their families, and former spouses."[33] Both the government and the enrollees contribute to the payment of insurance premiums associated with FEHB coverage.[34]

An enrollee in the FEHB chooses the carrier and plan in which to enroll, and decides whether to enroll for individual, i.e. "self only," coverage or for "self and family" coverage.[35] Under OPM's regulations, "[a]n enrollment for self and family includes all family members who are eligible to be covered by the enrollment."[36] For the purposes of the FEHB statute, a "member of family" is defined as either "the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age . . . ."[37] An employee enrolled in the FEHB for

---

[30] *Id.* §§ 8901-8914.

[31] *Id.* §§ 8902, 8903, 8906.

[32] *Id.* § 8913.

[33] *Id.*

[34] *Id.* § 8906.

[35] *Id.* §§ 8905, 8906.

[36] 5 C.F.R. § 890.302(a)(1).

[37] *Id.* § 8901(5).

"self only" coverage may change to "self and family" coverage by submitting documentation to the employing office during an annual "open season," or within sixty days after a change in family status, "including a change in marital status."[38]

An "annuitant" eligible for coverage under the FEHB is, generally speaking, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee . . . or of a retired employee . . . ."[39] To be covered under the FEHB, anyone who is not a current federal employee, or the family member of a current employee, must be eligible for a federal annuity, either as a former employee or as the survivor of an employee or former employee. When a federal employee or annuitant dies under "self and family" enrollment in FEHB, the enrollment is "transferred automatically to his or her eligible survivor annuitants."[40]

B. Federal Employees Dental and Vision Insurance Program ("FEDVIP")

The Federal Employees Dental and Vision Insurance Program provides enhanced dental and vision coverage to federal civilian employees, annuitants, and their family members, in order to supplement health insurance coverage provided by the FEHB.[41] The program was created by the Federal Employee Dental and Vision Benefits Enhancement Act of 2004,[42] and, as with the

---

[38] *See* 5 U.S.C. § 8905(f); 5 C.F.R. § 890.301(f), (g).

[39] *See* 5 U.S.C. § 8901(3)(B).

[40] 5 C.F.R. § 890.303(c).

[41] 5 U.S.C. §§ 8951, 8952, 8981, 8982.

[42] *Id.* §§ 8951, 8954, 8981, 8984.

FEHB generally, FEDVIP is administered by OPM, which contracts with qualified companies and sets the premiums associated with coverage.[43] OPM is also authorized to "prescribe regulations to carry out" this program.[44]

Persons enrolled in FEDVIP pay the full amount of the premiums,[45] choose the plan in which to enroll, and decide whether to enroll for "self only," "self plus one," or "self and family" coverage.[46] Under the associated regulations, an enrollment for "self and family" "covers the enrolled employee or annuitant and all eligible family members."[47] An employee enrolled in FEDVIP for "self only" coverage may change to "self and family" coverage during an annual "open season" or within 60 days after a "qualifying life event," including marriage or "acquiring an eligible child."[48] The terms "annuitant" and "member of family" are defined in the same manner for the purposes of the FEDVIP as they are for the FEHB more generally.[49]

---

[43] *Id.* §§ 8952(a), 8953, 8982(a), 8983.

[44] *Id.* §§ 8962(a), 8992(a).

[45] *Id.* §§ 8958(a), 8988(a).

[46] *Id.* §§ 8956(a), 8986(a); *see* 5 C.F.R. § 894.201(b).

[47] *Id.* § 894.201(c).

[48] *Id.* 894.509(a), (b).

[49] *See* 5 U.S.C. §§ 8951(2), 8991(2).

C. Flexible Spending Arrangement Program[50]

A Flexible Spending Arrangement ("FSA") allows federal employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses. The money withheld in an FSA is not subject to income taxes.[51] OPM established the federal Flexible Spending Arrangement program in 2003.[52] This program does not apply, however, to "[c]ertain executive branch agencies with independent compensation authority," such as the United States Postal Service, which established its own flexible benefits plan prior to the creation of the FSA.[53]

2. Social Security Benefits

The Social Security Act ("Act") provides, among other things, Retirement and Survivors' Benefits to eligible persons. The Act is administered by the Social Security Administration, which is headed by the Commissioner of Social Security.[54] The Commissioner has the authority to "make rules and regulations and to establish procedures, not inconsistent with the [pertinent]

---

[50] Plaintiffs' *First Amended and Supplemental Complaint* refers to the "Federal Flexible Spending Account Program." Compl. ¶ 401. Although OPM and the Internal Revenue Service have occasionally used that term, the term now used by both agencies is "Flexible Spending Arrangement." The term "HCFSA" used by the plaintiffs means "health care flexible spending arrangement." *Id.* ¶¶ 401, 410-12.

[51] 26 U.S.C. § 125.

[52] *See* 71 Fed. Reg. 66,827 (Nov. 17, 2006).

[53] *Id.*; *see* 68 Fed. Reg. 56,525 (Oct. 1, 2003). Because Plaintiff Gill works for the United State Postal Service, her claim with regard to her FSA is asserted only against the Postal Service and not against OPM.

[54] 42 U.S.C. §§ 901, 902.

provisions of [the Social Security Act], which are necessary or appropriate to carry out such provisions."[55]

A number of the plaintiffs in this action seek certain Social Security Benefits under the Act, based on marriage to a same-sex spouse. Specifically, Jo Ann Whitehead seeks Retirement Insurance Benefits based on the earnings record of her spouse, Bette Jo Green. Three of the Plaintiffs, Dean Hara, Randell Lewis-Kendell, and Herbert Burtis, seek Lump-Sum Death Benefits based on their marriages to same-sex spouses who are now deceased. And Plaintiff Herbert Burtis seeks Widower's Insurance Benefits.

A. Retirement Benefits

The amount of Social Security Retirement Benefits to which a person is entitled depends on an individual's lifetime earnings in employment or self-employment.[56] In addition to seeking Social Security Retirement Benefits based on one's own earnings, an individual may claim benefits based on the earnings of a spouse, if the claimant "is not entitled to old-age . . . insurance benefits [on his or her own account], or is entitled to old-age . . . insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of [his or her spouse]."[57]

B. Social Security Survivor Benefits

The Act also provides certain benefits to the surviving spouse of a deceased wage earner. This action implicates two such types of Survivor Benefits, the Lump-

---

[55] *Id.* § 405(a); *see id.*§ 902(a)(5).

[56] *Id.* §§ 402, 413(a), 414, 415.

[57] *Id.* § 402(b), (c).

Sum Death Benefit and the Widower's Insurance Benefit.[58]

i. Lump-Sum Death Benefit

The Lump-Sum Death Benefit is available to the surviving widow or widower of an individual who had adequate lifetime earnings from employment or self-employment.[59] The amount of the benefit is the lesser of $255 or an amount determined based on a formula involving the individual's lifetime earnings.[60]

ii. Widower's Insurance Benefit

The Widower's Insurance Benefit is available to the surviving husband of an individual who had adequate lifetime earnings from employment or self-employment.[61] The claimant, with a few limited exceptions, must not have "married" since the death of the individual, must have attained the age set forth in the statute, and must be either (1) ineligible for old-age insurance benefits on his own account or (2) entitled to old-age insurance benefits "each of which is less than the primary insurance amount" of his deceased spouse.[62]

---

[58] The Social Security Act also provides for a Widow's Insurance Benefit, *see* 42 U.S.C. § 402(e), but only the Widower's Insurance Benefit is implicated here because the only plaintiff who seeks such benefits herein is Herbert Burtis, a male.

[59] *Id.* §§ 402(I), 413(a), 414(a), (b).

[60] *Id.* §§ 402(I), 415(a).

[61] *Id.* §§ 402(f), 413(a), 414(a), (b).

[62] *Id.* § 402(f)(1); *see id.*§ 402(f)(3).

3. Filing Status Under the Internal Revenue Code

Lastly, a number of Plaintiffs in this case seek the ability to file federal income taxes jointly with their spouses. The amount of income tax imposed on an individual under the Internal Revenue Code depends in part on the taxpayer's "filing status." In accordance with the income tax scheme utilized by the federal government, a "married individual . . . who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household."[63] "[I]f an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse," the couple may file a joint return within three years after the filing of the original returns.[64] Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference.[65]

III. Discussion

A. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[66] In

---

[63] 26 U.S.C. § 1(a), (b), (c); *see id.* § 6013(a) ("A husband and wife may make a single return jointly of income taxes . . . even though one of the spouses has neither gross income nor deductions [subject to certain exceptions].").

[64] *Id.* § 6013(b)(1), (2).

[65] *Id.* § 6511(a); *see* 26 C.F.R. § 301.6402-2(a)(1).

[66] *Prescott v. Higgins*, 538 F.3d 32, 40 (1st Cir. 2008).

granting a summary judgment motion, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof."[67] Because the Parties do not dispute the material facts relevant to the questions raised by this action, it is appropriate for this court to dispose of the issues as a matter of law.[68]

B. Plaintiff Dean Hara's Standing to Pursue his Claim for Health Benefits

As a preliminary matter, this court addresses the government's assertion that Plaintiff Dean Hara lacks standing to pursue his claim for enrollment in the FEHB, as a survivor annuitant, in this court.

"The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proven) an injury in fact. . . . Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury."[69] Where the plaintiff lacks standing to pursue his claim, the

---

[67] *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir. 2005).

[68] This court notes that *Defendants' Motion to Dismiss* [#20] is also currently pending. Because there are no material facts in dispute and *Defendants' Motion to Dismiss* turns on the same purely legal question as the pending *Motion for Summary Judgment*, this court finds it appropriate, as a matter of judicial economy, to address the two motions simultaneously.

[69] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (internal citations omitted).

court, in turn, lacks subject matter jurisdiction over the dispute.[70] At issue here is the question of redressability.

A surviving spouse can enroll in the FEHB program only if he or she is declared eligible to receive a survivor annuity under federal retirement laws.[71] Such eligibility is a matter determined initially by OPM,[72] subject to review by the Merit Systems Review Board, and finally subject to the *exclusive* judicial review of the United States Court of Appeals for the Federal Circuit.[73]

Prior to this action, Mr. Hara sought to enroll in the FEHB as a survivor annuitant based on his deceased spouse's federal employment. OPM found Mr. Hara ineligible for a survivor annuity both on initial review and on reconsideration. Mr. Hara appealed that decision to the Merit Systems Review Board, which affirmed OPM's denial. And currently, Mr. Hara's appeal of the Merit Systems Review Board's decision is pending before the Federal Circuit.[74] Accordingly, the government asserts that a ruling in this court cannot redress Mr. Hara's inability to enroll in the FEHB as an annuitant, because the Federal Circuit has yet to resolve his appeal of the Merit Systems Review Board's decision, which affirmed OPM's finding adverse to Mr. Hara. And so the government maintains that, if Mr. Hara has not been declared eligible for a survivor annuity, he will remain

---

[70] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

[71] 5 U.S.C. § 8905(b).

[72] 5 U.S.C. § 8347(b).

[73] *See* 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); *see also Lindahl v. OPM*, 470 U.S. 768, 775, 791-99 (1985).

[74] The appeal, however, has been stayed pending the outcome of this action.

ineligible for FEHB enrollment, regardless of the outcome of this proceeding. This court agrees.

Plaintiffs arguments to the contrary are unavailing. First, Plaintiffs argue that, in basing its decision on reconsideration explicitly on the finding that Mr. Hara's spouse failed to elect self and family FEHB coverage prior to his death, OPM effectively conceded Mr. Hara's status as an annuitant for purposes of appeal to the Federal Circuit. But, regardless of the grounds upon which OPM rested its decision, the fact remains that Mr. Hara applied for an annuity, and the agency which has authority over such matters denied his claim.

Because the Federal Circuit has not held differently, this court must accept OPM's determination, affirmed by the Merit Systems Review Board, that Mr. Hara is ineligible to receive a survivor annuity pursuant to the FEHB statute. And if he is ineligible to receive a survivor annuity, then he cannot enroll in the FEHB program, notwithstanding this court's finding that Section 3 of DOMA as applied to Plaintiffs violates principles of equal protection.

Second, Plaintiffs argue that, because OPM did not file a cross-appeal to the Federal Circuit, it is estopped from raising the issue of whether Mr. Hara is an "annuitant" on appeal and, therefore, Mr. Hara's eligibility for a survivor annuity turns solely on the constitutionality of DOMA. This argument stems from the fact that, unlike OPM, the Merit Systems Review Board deemed Mr. Hara's spouse to have made the requisite "self and family" benefits election prior to his death, based on unrebutted evidence of his intent.

The Merit Systems Review Board affirmed OPM's decision that Mr. Hara is ineligible for a survivor annu-

ity only because DOMA precluded federal recognition of Mr. Hara's same-sex marriage. Plaintiffs therefore contend that, as a matter of judicial economy, it makes sense for this court to render a decision on Mr. Hara's claim, because the pending appeal in the Federal Circuit ultimately turns on the precise legal question at issue here, the constitutionality of DOMA.

Though this court is empathetic to Plaintiffs' argument, identity of issues does not confer standing. The question of standing is one of jurisdiction, not one of efficiency.[75] So if this court cannot redress Mr. Hara's injury, it is without *power* to hear his claim. Based on this court's reading of the Merit Systems Review Board's decision, Plaintiffs are correct that Mr. Hara will be rendered eligible for a survivor annuity if the question of DOMA's constitutionality is resolved in his favor. But that question, as it pertains to Mr. Hara, must be answered by the Federal Circuit. Accordingly, a decision by this court cannot redress Mr. Hara's injury and, therefore, this court is without power to hear his claim.

C. The FEHB Statute

In the alternative to the constitutional claims analyzed below, Plaintiffs assert that, notwithstanding DOMA, the FEHB statute confers on OPM the discretion to extend health benefits to same-sex spouses. In support of this argument, Plaintiffs contend that the terms "family members" and "members of family" as used in the FEHB statute set a floor, but not a ceiling, to coverage eligibility. Plaintiffs assert, therefore, that

---

[75] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (internal citations omitted).

OPM may, in its discretion, consider same-sex spouses to be eligible "family members" for purposes of distributing health benefits. To arrive at this interpretation of the FEHB statute, Plaintiffs rely on associated regulations which state that an "enrollment for self and family *includes* all family members who are eligible to be covered by the enrollment."[76]

A basic tenet of statutory construction teaches that "where the plain language of a statute is clear, it governs."[77] Under the circumstances presented here, this basic tenet readily resolves the issue of interpretation before this court. The FEHB statute unambiguously proclaims that "'member of family' *means* the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age."[78] And "[w]here, as here, Congress defines what a particular term 'means,' that definition controls to the exclusion of any meaning that is not explicitly stated in the definition."[79]

In other words, through the plain language of the FEHB statute, Congress has clearly limited coverage of family members to spouses and unmarried dependent children under 22 years of age. And DOMA, with similar clarity, defines the word "spouse," for purposes of determining the meaning of *any* Act of Congress, as "a person of the opposite sex who is a husband or wife."[80] In the face of such strikingly unambiguous statutory language to the contrary, this court cannot plausibly

---

[76] 5 C.F.R. § 890.302(a)(1) (emphasis added).

[77] *One Nat'l Bank v. Antonellis*, 80 F.3d 606, 615 (1st Cir. 1996).

[78] 5 U.S.C. § 8901(5) (emphasis added).

[79] *United States v. Roberson*, 459 F.3d 39, 53 (1st Cir. 2006).

[80] 1 U.S.C. § 7.

interpret the FEHB statute to confer on OPM the discretion to provide health benefits to same-sex couples, notwithstanding DOMA.[81]

Having reached this conclusion, the analysis turns to the central question raised by Plaintiffs' Complaint, namely whether Section 3 of DOMA as applied to Plaintiffs[82] violates constitutional principles of equal protection.

D. Equal Protection of the Laws

"[T]he Constitution 'neither knows nor tolerates classes among citizens.'"[83] It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.'"[84] And it is because of this "commitment to the law's neutrality

---

[81] *Accord In re Brad Levenson*, 560 F.3d 1145, 1150 (9th Cir. 2009) (Reinhardt, J.); *but see*, *In re Karen Golinski*, 587 F.3d 956, 963 (9th cir. 2009) (Kozinski, C.J.). This court also takes note of Plaintiffs' argument that the FEHB statute should not be read to exclude same-sex couples as a matter of constitutional avoidance. The doctrine of constitutional avoidance counsels that "between two plausible constructions of a statute, an inquiring court should avoid a constitutionally suspect one in favor of a constitutionally uncontroversial alternative." *United States v. Dwinells,* 508 F.3d 63, 70 (1st Cir. 2007). Because this court has concluded that there is but one plausible construction of the FEHB statute, the doctrine of constitutional avoidance has no place in the analysis.

[82] In the remainder of this Memorandum, this court uses the term "DOMA" as a shorthand for "Section 3 of DOMA as applied to Plaintiffs."

[83] *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)).

[84] *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, ___, 128 S. Ct. 2146, 2152 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

where the rights of persons are at stake"[85] that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.[86]

To say that all citizens are entitled to equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike."[87] But courts remain cognizant of the fact that "the promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[88] And so, in an attempt to reconcile the promise of equal protection with the reality of lawmaking, courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class.[89] A law that does neither will be upheld if it merely survives the rational basis inquiry—if it bears a rational relationship to a legitimate government interest.[90]

---

[85] *Romer*, 517 U.S. at 623.

[86] *Id.*

[87] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

[88] *Romer*, 517 U.S. at 631 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

[89] *Id.*

[90] *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)). This constitutional standard of review is alternately referred to as the rational relationship test or the rational basis inquiry.

Plaintiffs present three arguments as to why this court should apply strict scrutiny in its review of DOMA, namely that:

- DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations;
- DOMA burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships, and;
- The law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class.

This court need not address these arguments, however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that "there exists no fairly conceivable set of facts that could ground a rational relationship"[91] between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.

1. The Rational Basis Inquiry

This analysis must begin with recognition of the fact that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[92] A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded

---

[91] *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005) (internal citation omitted).

[92] *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (internal citations omitted).

a strong presumption of validity . . . [and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."[93] Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision.[94]

Nonetheless, "the standard by which legislation such as [DOMA] must be judged is not a toothless one."[95] "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained."[96] In other words, a challenged law can only survive this constitutional inquiry if it is "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]."[97] Courts thereby "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[98] Importantly, the objective served by the law must be not only a proper arena

---

[93] *Id.* (internal citations omitted).

[94] *Shaw v. Oregon Public Employees' Retirement Bd.*, 887 F.2d 947, 948-49 (9th Cir. 1989) (internal quotation omitted).

[95] *Matthews v. de Castro*, 429 U.S. 181, 185 (1976) (internal quotation omitted).

[96] *Romer*, 517 U.S. at 633.

[97] *Id.*

[98] *Id.* (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

for government action, but also properly cognizable by the governmental body responsible for the law in question.[99] And the classification created in furtherance of this objective "must find some footing in the realities of the subject addressed by the legislation."[100] That is to say, the constitution will not tolerate government reliance "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[101] As such, a law must fail rational basis review where the "purported justifications . . . [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects."[102]

2. Congress' Asserted Objectives

The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.[103] For purposes of this litigation, the government has disavowed Congress's stated justifications for the statute and, therefore, they are addressed below only briefly.

But the fact that the government has distanced itself from Congress' previously asserted reasons for DOMA

---

[99] *Bd. Of Trs. Of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quoting *City of Cleburne*, 473 U.S. at 441).

[100] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[101] *City of Cleburne*, 473 U.S. at 447.

[102] *Garrett*, 531 U.S. at 366 n.4 (citing *City of Cleburne*, 473 U.S. at 447-450).

[103] House Report at 12-18.

does not render them utterly irrelevant to the equal protection analysis. As this court noted above, even in the context of a deferential rational basis inquiry, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[104]

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA.[105] Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.[106] But even if Congress believed at the

---

[104] *City of Cleburne,* 473 U.S. at 446.

[105] *See* Def.'s Mem. Supp. Mot. Dismiss, 19 n.10.

[106] Def.'s Mem. Supp. Mot. Dismiss, 19 n.10 (citing American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or second-parent adoption by same-sex parents*, 109 PEDIATRICS 339 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics; American Psychological Association, *Policy Statement on Lesbian and Gay Parents*, http://www.apa.org/about/governance/council/policy/parenting.aspx; American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, *AMA Policy Regarding Sexual Orientation*, http://www.ama-assn.org/ ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm).

time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure,"[107] when afforded equal recognition under federal law.

Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to *Lawrence v. Texas*, the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country.[108] Indeed, "the sterile and the elderly" have never been denied the right to marry by any of the fifty states.[109] And the federal government has never considered denying recognition to marriage based on an ability or inability to procreate.

Similarly, Congress' asserted interest in defending and nurturing heterosexual marriage is not "grounded in sufficient factual context [for this court] to ascertain some relation" between it and the classification DOMA

---

[107] *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 335 (2003).

[108] *See Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

[109] *Id.*

effects.[110] To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same sex. But more generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.[111] And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.

What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it "*only* by punishing same-sex couples who exercise their rights under state law."[112] And this the Constitution does not permit. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean"[113] that the Constitution will not abide such "a bare congressional desire to harm a politically unpopular group."[114]

---

[110] *Romer*, 517 U.S. at 632-33.

[111] *Accord In re Brad Levenson*, 560 F.3d 1145, 1150 (9th Cir. Jud. Council 2009) (Reinhardt, J.).

[112] *Id.*

[113] *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

[114] *Moreno*, 413 U.S. at 534 (1973); *see also*, *Lawrence* 539 U.S. at 571, 578 (suggesting that the government cannot justify discrimination against same-sex couples based on traditional notions of morality alone).

Neither does the Constitution allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality. As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans*, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law. . . . "[115]

And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest,[116] "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[117] This court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And "mere negative attitudes, or fear, unsubstantiated by factors which are properly cog-

---

[115] *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[116] This court notes that, though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact prior to passage. *See* 142 CONG. REC. H7503-05 (daily ed. July 12, 1996). Furthermore, the Congressional Budget Office concluded in 2004 that federal recognition of same-sex marriages by all fifty states would actually result in a net *increase* in federal revenue. *See* Buseck Aff., Ex. C at 1, Cong. Budget Office, The Potential Budgetary Impact of Recognizing Same-Sex Marriages.

[117] *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (quoting *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971)).

nizable [by the government]" are decidedly impermissible bases upon which to ground a legislative classification.[118]

3. Objectives Now Proffered for Purposes of Litigation

Because the rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA's operation, this court next turns to the potential justifications for DOMA that the government now proffers for the purposes of this litigation.

In essence, the government argues that the Constitution permitted Congress to enact DOMA as a means to preserve the "status quo," pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage. Had Congress not done so, the argument continues, the definitions of "marriage" and "spouse" under federal law would have changed along with each alteration in the status of same-sex marriage in any given state because, prior to DOMA, federal law simply incorporated each state's marital status determinations. And, therefore, Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

In addition, the government asserts that DOMA exhibits the type of incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.

---

[118] *City of Cleburne*, 473 U.S. at 448.

For the reasons set forth below, this court finds that, as with Congress' prior asserted rationales, the government's current justifications for DOMA fail to ground a rational relationship between the classification employed and a legitimate governmental objective.

To begin, the government claims that the Constitution permitted Congress to wait for the heated debate over same-sex marriage in the states to come to some resolution before formulating an enduring policy at the national level. But this assertion merely begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance.

There can be no dispute that the subject of domestic relations is the exclusive province of the states.[119] And the powers to establish eligibility requirements for marriage, as well as to issue determinations of martial status, lie at the very core of such domestic relations law.[120] The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges.

---

[119] *See, e.g., Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)); *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010) (Tauro, J.).

[120] *See Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

There is no such interest.[121] "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations."[122]

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations.[123] Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise,"[124] individual states have changed their marital eligibility requirements in myriad ways over time.[125] And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as

---

[121] *See, generally*, *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010) (Tauro, J.).

[122] *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (internal citation omitted).

[123] This court addresses the federal government's historical treatment of state marital status determinations at length in the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010) (Tauro, J.).

[124] *United States v. Lopez*, 514 U.S. 549, 580-83 (1995) (Kennedy, J., concurring).

[125] *See, e.g.*, Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 Amer. J. of Legal Hist. 197, 197-200 (1982).

valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law.[126]

By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process.[127] Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

---

[126] *See, e.g., Dunn v. Comm'r of Internal Revenue,* 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse" for purposes of federal employee benefits by reference to State law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for purposes of Social Security survivor and death benefits as "the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such an applicant and such insured individual were validly married"); 20 C.F.R. § 404.345 (Social Security) ("If you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met."); 38 U.S.C. § 103(c) (Veterans' benefits); 20 C.F.R. § 10.415 (Workers' Compensation); 45 C.F.R. § 237.50(b)(3) (Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans' Pension and Compensation). Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to *any* state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans' cemeteries, enacted in 1975. *See* 38 U.S.C. § 101(31).

[127] *See Loving v. Virginia*, 388 U.S. 1, 6 n.5, 12 (1967).

The government suggests that the issue of same-sex marriage is qualitatively different than any historical state-by-state debate as to who should be allowed to marry because, though other such issues have indeed arisen in the past, "none had become a topic of great debate in numerous states with such fluidity."[128] This court, however, cannot lend credence to the government's unsupported assertion in this regard, particularly in light of the lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago.[129]

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage—or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry.[130]

---

[128] Def.'s Reply Mem., 14.

[129] *See* NANCY COTT, PUBLIC VOWS 163 (2000).

[130] Congress has contemplated regulating the marital relationship a number of times in the past, but always by way of proposed constitutional amendments, rather than legislation. And none of these proposed constitutional amendments have ever succeeded in garnering enough support to come to a vote in either the House or the Senate. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 614-15 (2004). It is worthy of note that Congress' resort to constitutional amendment when it has previously considered wading into the area of domestic relations appears to be a tacit acknowledgment that, indeed, regulation of familial relationships lies beyond the bounds of its legislative powers. *See id.* at 620 (internal citations omitted) ("Advocates for nationwide changes to marriage laws typically consider amending the Constitution in part because of the widely-accepted view

Though not dispositive of a statute's constitutionality in and of itself, "a longstanding history of related federal action . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests."[131] And the *absence* of precedent for the legislative classification at issue here is equally instructive, for "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution[]. . . . '"[132]

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest

---

that, in the United States, for the most part, family law is state law. . . . Although the process of passing a law is much easier than amending the Constitution, a law may still be found unconstitutional. Advocates of federal marriage laws are worried that such laws would be in tension with the thesis that family law is state law and for this reason would be found unconstitutional. Reaching marriage laws by amending the Constitution sidesteps this tension.").

[131] *United States v. Comstock*, 176 L. Ed. 2d 878, 892 (2010) (internal citations omitted).

[132] *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

in disregarding those family status determinations properly made by the states.[133]

Moreover, in order to give any meaning to the government's notion of preserving the status quo, one must first identify, with some precision, the relevant status quo to be preserved. The government has claimed that Congress could have had an interest in adhering to federal policy regarding the recognition of marriages as it existed in 1996. And this may very well be true. But even assuming that Congress could have had such an interest, the government's assertion that pursuit of this interest provides a justification for DOMA relies on a conspicuous misconception of what the status quo was *at the federal level* in 1996.

The states alone are empowered to determine who is eligible to marry and, as of 1996, no state had extended such eligibility to same-sex couples. In 1996, therefore, it was indeed the status quo *at the state level* to restrict the definition of marriage to the union of one man and one woman. But, the 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 denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level.

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo

---

[133] *See, generally, Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT (D. Mass. July 8, 2010).

might help to achieve. Staying the course is not an end in and of itself, but rather a means to an end. Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it. This court does not doubt that Congress occasionally encounters social problems best dealt with by preserving the status quo or adjusting national policy incrementally.[134] But to assume that such a congressional response is appropriate requires a predicate assumption that there indeed exists a "problem" with which Congress must grapple.[135]

---

[134] The government asserts, without explaining, that DOMA exhibits legislative incrementalism. As Plaintiffs aptly point out, it is unclear how this is so. DOMA, by its language, permanently and sweepingly excludes same-sex married couples from recognition for all federal purposes.

[135] Indeed, the cases cited by the government support this court's interpretation of the incrementalist approach as a means by which to achieve a legitimate government objective and not an objective in and of itself. *See*, *e.g.*, *Medeiros v. Vincent*, 431 F.3d 25, 31-32 (1st Cir. 2005) (upholding regulation of lobster fishing method, notwithstanding differential treatment of other fishing methods, to ameliorate problem of overfishing); *Butler v. Apfel*, 144 F.3d 622, 625 (9th Cir. 1998) (upholding denial of Social Security benefits to incarcerated felons to conserve welfare resources, notwithstanding different treatment of other institutionalized groups because these groups are different in relevant respects); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (noting that a massive problem, such as global change, is not generally resolved at once but rather with "reform" moving one step at a time, addressing what seems "most acute to the legislative mind"); *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (addressing need for regulatory flexibility to address "specialized problems which arise"); *Nat'l Parks Conserv. Ass'n. v. Norton*, 324 F.3d 1229, 1245 (11th Cir. 2003) (preserving status quo by allowing leaseholders of stilted structures on

The only "problem" that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

And even within the narrower class of heterosexual married couples, this court cannot apprehend any rational relationship between DOMA and the goal of nationwide consistency. As noted above, eligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license. For example, a thirteen year-old female and a fourteen year-old male, who have the consent of their parents, can obtain a valid marriage license in the state of New Hampshire.[136] Though this court knows of no other state in the country that would sanction such a marriage, the

---

national park land to continue to live in structures to extend their leases for a limited period of time served legitimate interest in ensuring that structures were maintained pending development of planning process); *Teigen v. Renfrow*, 511 F.3d 1072, 1084-85 (10th Cir. 2007) (preserving status quo by not promoting employees involved in active litigation against government employer served government's legitimate interest in avoiding courses of action that might negatively impact its prospects of success in the litigation).

[136] RSA 457:4-5.

federal government recognizes it as valid simply because New Hampshire has declared it to be so.

More importantly, however, the pursuit of consistency in the distribution of federal marriage-based benefits can only constitute a legitimate government objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not.[137] And, notably, there is a readily discernible and eminently relevant characteristic on which to base such a distinction: *marital status*. Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny.[138]

Similarly unavailing is the government's related assertion that "Congress could reasonably have concluded that federal agencies should not have to deal immediately with [the administrative burden presented by] a changing patchwork of state approaches to same-sex

---

[137] *City of Cleburne*, 473 U.S. at 439 (explaining that equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike") (internal citation omitted).

[138] *See Garrett*, 531 U.S. at 366 n.4 (finding that a law failed rational basis review where the "purported justifications . . . made no sense in light of how the [government] treated other groups similarly situated").

marriage"[139] in distributing federal marriage-based benefits. Federal agencies are not burdened with the administrative task of implementing changing state marriage laws—that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex. Nor does it become more complex simply because some of the couples applying for marriage-based benefits were previously ineligible to marry. Every heterosexual couple that obtains a marriage license was at some point ineligible to marry due to the varied age restrictions placed on marriage by each state. Yet the federal administrative system finds itself adequately equipped to accommodate their changed status.

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal

---

[139] Def.'s Mem. Opp. Summ. Judg., 16.

that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.[140]

The federal definitions of "marriage" and "spouse," as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits.[141] For example, persons who are considered married for purposes of federal law enjoy the right to sponsor their non-citizen spouses for naturalization,[142] as well as to obtain conditional permanent residency for those spouses pending naturalization.[143] Similarly, the Family and Medical Leave Act ("FMLA") entitles federal employees, who are considered married for federal purposes, to twelve weeks of unpaid leave in order to care for a spouse who has a serious health condition or because of any qualifying exigency arising out of the fact that a spouse is on active military duty.[144] But because DOMA dictates that the word "spouse", as used in the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

---

[140] *See Romer*, 517 U.S. at 635 (rejecting proffered rationale for state constitutional amendment because "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.").

[141] *See* U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[142] 8 U.S.C. § 1430.

[143] 8 U.S.C. § 1186b(2)(A).

[144] *See* 5 U.S.C. § 6382.

It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits. For though the government is correct that the rational basis inquiry leaves room for a less than perfect fit between the means Congress employs and the ends Congress seeks to achieve,[145] this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves.

In sum, this court is soundly convinced, based on the foregoing analysis, that the government's proffered rationales, past and current, are without "footing in the realities of the subject addressed by [DOMA]."[146] And "when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest,"[147] this court finds that DOMA lacks a rational basis to support it.

This court simply "cannot say that [DOMA] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which [this court] could discern

---

[145] *See Heller*, 509 U.S. at 319-20 (internal citations omitted).

[146] *Id*. at 321.

[147] *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *Romer v. Evans*).

a relationship to legitimate [government] interests."[148] Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, "there is no reason to believe that the disadvantaged class is different, in *relevant* respects" from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification.[149] As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.

---

[148] *Romer*, 517 U.S. at 635.

[149] *Lofton*, 377 F.3d at 1280 (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *City of Cleburne v. Cleburne Living Center*) (emphasis added).

IV. Conclusion

For the foregoing reasons, *Defendants' Motion to Dismiss* [#20] is DENIED and *Plaintiffs' Motion for Summary Judgment* [#25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

AN ORDER HAS ISSUED.

/s/ JOSEPH L. TAURO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 09-10309-JLT

NANCY GILL & MARCELLE LETOURNEAU, ET AL.,
PLAINTIFFS

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
DEFENDANTS

Filed: July 8, 2010

ORDER

TAURO, J.

For the reasons set forth in the accompanying Memorandum, this court hereby orders that:

1. *Defendants' Motion to Dismiss* [#20] is ALLOWED IN PART and DENIED IN PART. Specifically, *Defendant's Motion to Dismiss* [#20] is DENIED as to all claims, except Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan.
2. *Plaintiffs' Motion for Summary Judgment* [#25] is ALLOWED.

IT IS SO ORDERED.

/s/ [ILLEGIBLE]
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:09-cv-10309 JLT

NANCY GILL & MARCELLE LETOURNEAU, ET AL.,
PLAINTIFFS

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
DEFENDANTS

Filed: Aug. 17, 2010

AMENDED JUDGMENT

This action came on for a hearing before the Court on the Defendants' Motion to Dismiss [#20] and Plaintiffs' Motion for Summary Judgment [#25], and the issues having been duly heard and a Memorandum having been issued on July 8, 2010,

It is ORDERED AND ADJUDGED:

The Plaintiffs' Motion for Summary Judgment is ALLOWED and:

(1) The rights of the Plaintiffs are declared as follows:

(a) Section 3 of the Defense of Marriage Act, 1 U.S.C. §7 ("DOMA"), is unconstitutional as applied to the Plaintiffs by the Defendants in the administration and application of (1) the Federal Employees Health Benefits Program ("FEHB"), (2) the Federal Employees Dental and Vision Insurance Program ("FEDVIP"), (3) the United States Postal Service Health Care Flexible Spending Account program ("Postal Service Health Care FSA"), (4) certain retirement and survivor benefit provisions of the Social Security Act, as set forth below, and (5) the Internal Revenue Code.

(b) The Plaintiff Nancy Gill is entitled to review of her applications for enrollment of her spouse, Marcelle Letourneau, in the FEHB and the FEDVIP without regard to Section 3 of DOMA.

(c) The Plaintiff Nancy Gill is entitled to obtain reimbursement under the Postal Service Health Care FSA for eligible medical expenses incurred by her spouse, Marcelle Letourneau, subject to the other relevant requirements of the program.

(d) The Plaintiff Martin Koski is entitled to review of his application for enrollment of his spouse, James Fitzgerald, in the FEHB without regard to Section 3 of DOMA.

(e) The Plaintiff Dean Hara is entitled to review of his application for the Social Security Lump-Sum Death Benefit without regard to Section 3 of DOMA.

(f) The Plaintiff Jo Ann Whitehead is entitled to review of her application for Retirement Insurance Benefits based on the earning record of her spouse,

Bette Jo Green, without regard to Section 3 of DOMA.

(g) The Plaintiff Randell Lewis-Kendell is entitled to review of his application for the Social Security Lump-Sum Death Benefit without regard to Section 3 of DOMA.

(h) The Plaintiff Herb Burtis is entitled to review of his applications for the Social Security Lump-Sum Death Benefit and for the Widower's Insurance Benefit without regard to Section 3 of DOMA.

(2) The Defendant United States Postal Service and Defendant John E. Potter, in his official capacity as the Postmaster General of the United States, are permanently enjoined, ordered, and directed:

(a) to permit Plaintiff Nancy Gill to designate Plaintiff Marcelle Letourneau as her spouse in accordance with the requirements of the FEHB but without regard to Section 3 of DOMA; and

(b) to permit reimbursement to Plaintiff Nancy Gill under the Postal Service Health Care FSA for eligible medical expenses incurred by her spouse, Marcelle Letourneau.

(3) The Defendant Office of Personnel Management ("OPM") is permanently enjoined, ordered, and directed:

(a) to review and process, without regard to Section 3 of DOMA, the request of Plaintiff Martin Koski dated October 5, 2007, to change his enrollment in the FEHB from "self only" to "self and family" so as to provide coverage for his spouse, Plaintiff James Fitzgerald;

(b) to refrain from interfering with or from declining to permit enrollment, on the basis of DOMA, of Marcelle Letourneau in the FEHB as the spouse of Plaintiff Nancy Gill; and

(c) to permit Plaintiff Nancy Gill to designate Plaintiff Marcelle Letourneau as an eligible family member in accordance with the requirements of the FEDVIP but without regard to Section 3 of DOMA.

(4) The Defendant Michael J. Astrue, in his official capacity as the Commissioner of the Social Security Administration, is permanently enjoined, ordered, and directed:

(a) to review the Plaintiff Dean Hara's application for the Social Security Lump-Sum Death Benefit without regard to Section 3 of DOMA;

(b) to review the Plaintiff Jo Ann Whitehead's application for the Retirement Insurance Benefits based on the earning record of her spouse, Plaintiff Bette Jo Green, without regard to Section 3 of DOMA;

(c) to review the Plaintiff Randell Lewis-Kendell's application for the Social Security Lump-Sum Death Benefit without regard to Section 3 of DOMA; and

(d) to review the Plaintiff Herb Burtis's application for the Social Security Lump-Sum Death Benefit and for the Widower's Insurance Benefit without regard to Section 3 of DOMA.

(5) On Counts IV, V, VI, VII, and VIII of the Second Amended and Supplemental Complaint, the following amounts, plus statutory interest thereon at the rate pro-

vided by Section 6621 of the Internal Revenue Code (26 U.S.C.) to a date preceding issuance of the refund check by not more than 30 days, are awarded to the Plaintiffs Mary Ritchie and Kathleen Bush as against the United States of America:

(a) For the taxable year ending December 31, 2004: $1,054.

(b) For the taxable year ending December 31, 2005: $2,703.

(c) For the taxable year ending December 31, 2006: $4,390.

(d) For the taxable year ending December 31, 2007: $6,371.

(e) For the taxable year ending December 31, 2008: $4,548.

(6) On Counts IX, X, XI, XII, and XIII of the Second Amended and Supplemental Complaint, the following amounts, plus statutory interest thereon at the rate provided by Section 6621 of the Internal Revenue Code (26 U.S.C.) to a date preceding issuance of the refund check by not more than 30 days, are awarded to the Plaintiffs Melba Abreu and Beatrice Hernandez as against the United States of America:

(a) For the taxable year ending December 31, 2004: $4,687.

(b) For the taxable year ending December 31, 2005: $3,785.

(c) For the taxable year ending December 31, 2006: $5,546.

(d) For the taxable year ending December 31, 2007: $5,697.

(e) For the taxable year ending December 31, 2008: $5,644.

(7) On Counts XIV, XV, and XVI of the Second Amended and Supplemental Complaint, the following amounts, plus statutory interest thereon at the rate provided by Section 6621 of the Internal Revenue Code (26 U.S.C.) to a date preceding issuance of the refund check by not more than 30 days, are awarded to the Plaintiffs Marlin Nabors and Jonathan Knight as against the United States of America:

(a) For the taxable year ending December 31, 2006: $1,286.

(b) For the taxable year ending December 31, 2007: $1,234.

(c) For the taxable year ending December 31, 2008: $374.

(8) On Count XVII of the Second Amended and Supplemental Complaint, the amount of $3,332 for the taxable year ending December 31, 2006, plus statutory interest thereon at the rate provided by Section 6621 of the Internal Revenue Code (26 U.S.C.) to a date preceding issuance of the refund check by not more than 30 days, is awarded to the Plaintiffs Mary Bowe-Shulman and Dorene Bowe-Shulman as against the United States of America.

(9) Plaintiffs are awarded their costs.

The Defendants' Motion to Dismiss is ALLOWED IN PART and DENIED IN PART, being allowed solely

on the Plaintiff Dean Hara's claim for enrollment in the FEHB Program as a matter of standing.

JUDGMENT FOR PLAINTIFFS AS TO COUNTS I-II, III (AS TO DEFENDANT ASTRUE ONLY WITH RESPECT TO THE SOCIAL SECURITY LUMP-SUM DEATH BENEFIT) AND IV-XX.

COUNT III (AS TO DEFENDANT OPM ONLY AND WITH RESPECT TO FEHB HEALTH INSURANCE) IS DISMISSED FOR LACK OF JURISDICTION.

The parties' concurrence in the form of this Amended Judgment is without prejudice to any appeal from the Amended Judgment or from any earlier rulings that gave rise to and/or produced the Amended Judgment, such as the Order and Memorandum of July 8, 2010 [#69, #70] and the original Judgment of August 12, 2010 [#71].

/s/ JOSEPH L. TAURO
JOSEPH L. TAURO
United States District Judge

ENTERED:

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 1:09-11156-JLT

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; AND THE UNITED STATES OF AMERICA, DEFENDANTS

Filed: July 8, 2010

MEMORANDUM

TAURO, J.:

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act[1] as applied to Plaintiff, the Commonwealth of Massachusetts (the "Commonwealth").[2] Specifically, the Commonwealth contends that DOMA violates the Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs. Because this court agrees, *Defendants' Motion to Dismiss* [#16] is DENIED and *Plaintiff's Motion for Summary Judgment* [#26] is ALLOWED.[3]

---

[1] 1 U.S.C. § 7.

[2] Defendants in this action are the United States Department of Health and Human Services, Kathleen Sebelius, in her official capacity as the Secretary of the Department of Health and Human Services, the United States Department of Veterans Affairs, Eric K. Shinseki, in his official capacity as the Secretary of the Department of Veterans Affairs, and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

[3] In the companion case of *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

II. Background[4]

A. The Defense of Marriage Act

Congress enacted the Defense of Marriage Act ("DOMA") in 1996, and President Clinton signed it into law.[5] The Commonwealth, by this lawsuit, challenges Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In pertinent part, Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[6]

As of December 31, 2003, there were at least "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges," according to estimates from the General Ac-

---

[4] Defendants, with limited exception, concede the accuracy of Plaintiff's Statement of Material Facts [#27]. Resp. to Pl.'s Stmt. Mat'l Facts, ¶¶ 1, 2. For that reason, for the purposes of this motion, this court accepts the factual representations propounded by Plaintiff, unless otherwise noted.

[5] Pub. L. No. 104-199, 110 Stat. 2419 (1996). Please refer to the background section of the companion case, *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), for a more thorough review of the legislative history of this statute.

[6] 1 U.S.C. § 7.

counting Office.[7] These statutory provisions pertain to a variety of subjects, including, but not limited to Social Security, taxes, immigration, and healthcare.[8]

B. The History of Marital Status Determinations in the United States

State control over marital status determinations predates the Constitution. Prior to the American Revolution, colonial legislatures, rather than Parliament, established the rules and regulations regarding marriage in the colonies.[9] And, when the United States first declared its independence from England, the founding legislation of each state included regulations regarding marital status determinations.[10]

In 1787, during the framing of the Constitution, the issue of marriage was not raised when defining the powers of the federal government.[11] At that time, "[s]tates had exclusive power over marriage rules as a central part of the individual states' 'police power'—meaning their responsibility (subject to the requirements and

---

[7] Aff. of Jonathan Miller, Ex. 3, p. 1, Report of the U.S. General Accounting Office, Office of General Counsel, January 23, 2004 (GAO-04-353R).

[8] *Id.* at 1.

[9] Aff. of Nancy Cott (hereinafter, "Cott Aff."), ¶ 9. Nancy F. Cott, Ph.D., the Jonathan Trumbull Professor of American History at Harvard University, submitted an affidavit on the history of the regulation of marriage in the United States, on which this court heavily relies.

[10] *Id.*

[11] *Id.*, ¶ 10.

protections of the federal Constitution) for the health, safety and welfare of their populations."[12]

In large part, rules and regulations regarding marriage corresponded with local circumstances and preferences.[13] Changes in regulations regarding marriage also responded to changes in political, economic, religious, and ethnic compositions in the states.[14] Because, to a great extent, rules and regulations regarding marriage respond to local preferences, such regulations have varied significantly from state to state throughout American history.[15] Indeed, since the founding of the United States "there have been many nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce."[16]

In response to controversies stemming from this "patchwork quilt of marriage rules in the United States," there have been many attempts to adopt a national definition of marriage.[17] In the mid-1880s, for instance, a constitutional amendment to establish uniform regulations on marriage and divorce was proposed for the first time.[18] Following the failure of that proposal, there were several other unsuccessful efforts to create a uniform definition of marriage by way of consti-

---

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*, ¶ 14.

[16] *Id.*

[17] *Id.*, ¶¶ 15, 18-19.

[18] *Id.*, ¶ 19.

tutional amendment.[19] Similarly, "[l]egislative and constitutional proposals to nationalize the definition of marriage were put before Congress again and again, from the 1880s to 1950s, with a particular burst of activity during and after World War II, because of the war's perceived damage to the stability of marriage and because of a steep upswing in divorce."[20] None of these proposals succeeded, however, because "few members of Congress were willing to supersede their own states' power over marriage and divorce."[21] And, despite a substantial increase in federal power during the twentieth century, members of Congress jealously guarded their states' sovereign control over marriage.[22]

Several issues relevant to the formation and dissolution of marriages have served historically as the subject of controversy, including common law marriage, divorce, and restrictions regarding race, "hygiene," and age at marriage.[23] Despite contentious debate on all of these subjects, however, the federal government consistently deferred to state marital status determinations.[24]

For example, throughout much of American history a great deal of tension surrounded the issue of interracial marriage. But, despite differences in restrictions on interracial marriage from state to state, the federal government consistently accepted all state marital status

---

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See id.*, ¶¶ 20-52.

[24] *Id.*

determinations for the purposes of federal law.[25] For that reason, a review of the history of the regulation of interracial marriage is helpful in assessing the federal government's response to the "contentious social issue"[26] now before this court, same-sex marriage.

Rules and regulations regarding interracial marriage varied widely from state to state throughout American history, until 1967, when the Supreme Court declared such restrictions unconstitutional.[27] And, indeed, a review of the history of the subject suggests that the strength of state restrictions on interracial marriage largely tracked changes in the social and political climate.

Following the abolition of slavery, many state legislatures imposed additional restrictions on interracial marriage.[28] "As many as 41 states and territories of the U.S banned, nullified, or criminalized marriages across the color line for some period of their history, often using 'racial' classifications that are no longer recognized."[29] Of those states, many imposed severe punishment on relationships that ran afoul of their restrictions.[30] Alabama, for instance, "penalized marriage, adultery, or fornication between a white and 'any negro, or the descendant of any negro to the third generation,' with hard labor of up to seven years."[31]

---

[25] *Id.*, ¶ 45.

[26] Defs.' Mem. Mot. Dismiss, 27.

[27] *See* Cott Aff., ¶¶ 36, 44.

[28] *Id.*, ¶ 35.

[29] *Id.*

[30] *Id.*, ¶ 37.

[31] *Id.*

In contrast, some states, like Vermont, did not bar interracial marriage.[32] Similarly, Massachusetts, a hub of antislavery activism, repealed its prohibition on interracial marriage in the 1840s.[33]

The issue of interracial marriage again came to the legislative fore in the early twentieth century.[34] The controversy was rekindled at that time by the decline of stringent Victorian era sexual standards and the migration of many African-Americans to the northern states.[35] Legislators in fourteen states introduced bills to institute or strengthen prohibitions on interracial marriage in response to the marriage of the African-American boxer Jack Johnson to a young white woman.[36] These bills were universally defeated in northern states, however, as a result of organized pressure from African-American voters.[37]

In the decades after World War II, in response to the civil rights movement, many states began to eliminate laws restricting interracial marriage.[38] And, ultimately, such restrictions were completely voided by the courts.[39]

---

[32] *Id.*, ¶ 36.

[33] *Id.*

[34] *Id.*, ¶ 38.

[35] *Id.*

[36] *Id.*

[37] *Id.*, ¶ 38.

[38] *Id.*, ¶ 43.

[39] In 1948, the Supreme Court of California became the first state high court to hold that marital restrictions based on race were unconstitutional. *Id.*, ¶ 43. In 1948, the Supreme Court finally eviscerated existing state prohibitions on interracial marriage, finding that "deny[ing] this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so

Throughout this entire period, however, the federal government consistently relied on state determinations with regard to marriage, when they were relevant to federal law.[40]

C. Same-Sex Marriage in Massachusetts

In 2003, the Supreme Judicial Court of Massachusetts held that excluding same-sex couples from marriage violated the equality and liberty provisions of the Massachusetts Constitution.[41] In accordance with this decision, on May 17, 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples.[42] And, since then, the Commonwealth has recognized "a single marital status that is open and available to every qualifying couple, whether same-sex or different-sex."[43] The Massachusetts legislature rejected both citizen-initiated and legislatively-proposed constitutional amendments to bar the recognition of same-sex marriages.[44]

As of February 12, 2010, the Commonwealth had issued marriage licenses to at least 15,214 same-sex couples.[45] But, as Section 3 of DOMA bars federal recogni-

---

directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[40] Cott Aff., ¶ 45.

[41] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959-61, 968 (Mass. 2003).

[42] Aff. of Stanley E. Nyberg (hereinafter, "Nyberg Aff."), ¶ 5.

[43] Compl. ¶ 17.

[44] *Id.*, ¶¶ 18-19.

[45] Nyberg Aff., ¶¶ 6-7.

tion of these marriages, the Commonwealth contends that the statute has a significant negative impact on the operation of certain state programs, discussed in further detail below.

D. Relevant Programs

1. The State Cemetery Grants Program

There are two cemeteries in the Commonwealth that are used for the burial of eligible military veterans, their spouses, and their children.[46] These cemeteries, which are located in Agawam and Winchendon, Massachusetts, are owned and operated solely by the Commonwealth.[47] As of February 17, 2010, there were 5,379 veterans and their family members buried at Agawam and 1,075 veterans and their family members buried at Winchendon.[48]

The Massachusetts Department of Veterans' Services ("DVS") received federal funding from the United States Department of Veterans Affairs ("VA") for the construction of the cemeteries at Agawam and Winchendon, pursuant to the State Cemetery Grants Program.[49] The federal government created the State Cemetery Grants Program in 1978 to complement the VA's network of national veterans' cemeteries.[50] This program aims to make veterans' cemeteries available within seventy-five miles of 90% of the veterans across the country.[51]

---

[46] Aff. of William Walls (hereinafter, "Walls Aff."), ¶¶ 5, 7.

[47] *Id.*

[48] *Id.*, ¶ 4.

[49] *Id.*, ¶ 4.

[50] Walls Aff., ¶ 8 (citations omitted).

[51] *Id.*

DVS received $6,818,011 from the VA for the initial construction of the Agawam cemetery, as well as $4,780,375 for its later expansion, pursuant to the State Cemetery Grants Program.[52] DVS also received $7,422,013 from the VA for the construction of the Winchendon cemetery.[53]

In addition to providing funding for the construction and expansion of state veterans' cemeteries, the VA also reimburses DVS $300 for the costs associated with the burial of each veteran at Agawam and Winchendon.[54] In total, the VA has provided $1,497,300 to DVS for such "plot allowances."[55]

By statute, federal funding for the state veterans' cemeteries in Agawam and Winchendon is conditioned on the Commonwealth's compliance with regulations promulgated by the Secretary of the VA.[56] If either cemetery ceases to be operated as a veterans' cemetery, the VA can recapture from the Commonwealth any funds provided for the construction, expansion, or improvement of the cemeteries.[57]

---

[52] *Id.*, ¶ 5.

[53] *Id.*, ¶ 5.

[54] *Id.*, ¶ 6 (citing 38 U.S.C. § 2303(b) ("When a veteran dies in a facility described in paragraph (2), the Secretary shall...pay the actual cost (not to exceed $300) of the burial and funeral or, within such limits, may make contracts for such services without regard to the laws requiring advertisement for proposals for supplies and services for the Department . . .")).

[55] *Id.*, ¶ 6.

[56] 38 U.S.C. § 2408(c).

[57] Walls Aff., ¶ 10.

The VA regulations require that veterans' cemeteries "be operated solely for the interment of veterans, their spouses, surviving spouses, [and certain of their] children. . . ."[58] Since DOMA provides that a same-sex spouse is not a "spouse" under federal law, DVS sought clarification from the VA regarding whether DVS could "bury the same-sex spouse of a veteran in its Agawam or Winchendon state veterans cemetery without losing federal funding provided under [the] VA's state cemeteries program," after the Commonwealth began recognizing same-sex marriage in 2004.[59] In response, the VA informed DVS by letter that "we believe [the] VA would be entitled to recapture Federal grant funds provided to DVS for either [the Agawam or Winchendon] cemeteries should [Massachusetts] decide to bury the same-sex spouse of a veteran in the cemetery, unless that individual is independently eligible for burial."[60]

More recently, the National Cemetery Administration ("NCA"), an arm of the VA, published a directive in June 2008 stating that "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran."[61] In addition, at a 2008 NCA conference, "a representative from the VA gave a presentation making it clear that the VA would

---

[58] 38 C.F.R. § 39.5(a).

[59] Walls Aff., ¶ 17, Ex. 1., Letter from Tim S. McClain, General Counsel to the Department of Veteran Affairs, to Joan E. O'Connor, General Counsel, Massachusetts Department of Veterans' Services (June 18, 2004).

[60] *Id.*

[61] Walls Aff., Ex. 2, NCA Directive 3210/1 (June 4, 2008).

not permit the burial of any same-sex spouses in VA supported veterans' cemeteries."[62]

On July 17, 2007, Darrel Hopkins and Thomas Hopkins submitted an application for burial in the Winchendon cemetery.[63] The couple were married in Massachusetts on September 18, 2004.[64] Darrel Hopkins retired from the United States Army in 1982, after more than 20 years of active military service.[65] During his time in the Army, Darrel Hopkins served thirteen months in the Vietnam conflict, three years in South Korea, seven years in Germany (including three years in occupied Berlin), and three years at the School of U.S. Army Intelligence at Fort Devens, Massachusetts.[66] He is a decorated soldier, having earned two Bronze Stars, two Meritorious Service Medals, a Meritorious Unit Commendation, an Army Commendation Medal, four Good Conduct Medals, and Vietnam Service Medals (1-3), and having achieved the rank of Chief Warrant Officer, Second Class.[67]

Because of his long service to the United States Army, as well as his Massachusetts residency, Darrel Hopkins is eligible for burial in Winchendon cemetery.[68] By virtue of his marriage to Darrel Hopkins, Thomas Hopkins is also eligible for burial in the Winchendon cemetery in the eyes of the Commonwealth, which rec-

---

[62] Walls Aff., ¶ 20.

[63] Walls Aff., Ex. 3, Copy of Approved Application.

[64] Walls Aff., ¶ 22, Ex. 4, Marriage License.

[65] Walls Aff., ¶ 23.

[66] *Id.*

[67] *Id.*, ¶ 24.

[68] *Id.*, ¶ 25.

ognizes their marriage.[69] But because the Hopkins' marriage is not valid for federal purposes, in the eyes of the federal government, Thomas Hopkins is ineligible for burial in Winchendon.[70]

Seeking to honor the Hopkins' wishes, DVS approved their application for burial in the Winchendon cemetery and intends to bury the couple together.[71]

2. MassHealth

Medicaid is a public assistance program dedicated to providing medical services to needy individuals,[72] by providing federal funding (also known as "federal financial participation" or "FFP") to states that pay for medical services on behalf of those individuals.[73] Massachusetts' Executive Office of Health and Human Services administers the Commonwealth's Medicaid program, known as MassHealth.[74]

MassHealth provides comprehensive health insurance or assistance in paying for private health insurance to approximately one million residents of Massachusetts.[75] The Department of Health and Human Services ("HHS") reimburses MassHealth for approximately one-half of its Medicaid expenditures[76] and administration

---

[69] *Id.*, ¶ 26.

[70] *Id.*, ¶ 26.

[71] *Id.*, ¶¶ 21, 27.

[72] Aff. of Robin Callahan (hereinafter, "Callahan Aff."), ¶ 4.

[73] *Id.*

[74] *Id.*, ¶¶ 2, 5.

[75] *Id.*, ¶ 5.

[76] *Id.*, ¶ 7.

costs.[77] HHS provides MassHealth with billions of dollars in federal funding every year.[78] For the fiscal year ending on June 30, 2008, for example, HHS provided MassHealth with approximately $5.3 billion in federal funding.[79]

To qualify for federal funding, the Secretary of HHS must approve a "State plan" describing the nature and scope of the MassHealth program.[80] Qualifying plans must meet several statutory requirements.[81] For example, qualifying plans must ensure that state-assisted healthcare is not provided to individuals whose income or resources exceed certain limits.[82]

Marital status is a relevant factor in determining whether an individual is eligible for coverage by MassHealth.[83] The Commonwealth asserts that, because of DOMA, federal law requires MassHealth to assess eligibility for same-sex spouses as though each were single, a mandate which has significant financial consequences for the state.[84] In addition, the Commonwealth cannot obtain federal funding for expenditures made for coverage provided to same-sex spouses who do not qualify for

---

[77] *Id.*, ¶ 7.

[78] *Id.*, ¶ 6.

[79] *Id.*, ¶ 6 (Commonwealth of Massachusetts, OMB Circular A-133 Report (June 30, 2008) at 9, http://www.mass.gov/Aosc/docs/reports_audits/SA/2008/2008_single_audit.pdf (last visited Feb. 17, 2010)).

[80] *Id.*, ¶ 8.

[81] *Id.*, ¶ 9 (citing 42 U.S.C. §§ 1396a(a)(1)-(65)).

[82] *Id.*, ¶ 9.

[83] *Id.*, ¶ 11.

[84] *Id.*, ¶ 14.

Medicaid when assessed as single, even though they would qualify if assessed as married.[85]

The Commonwealth contends that, under certain circumstances, the recognition of same-sex marriage leads to the denial of health benefits, resulting in cost savings for the state. By way of example, in a household of same-sex spouses under the age of 65, where one spouse earns $65,000 and the other is disabled and receives $13,000 per year in Social Security benefits,[86] neither spouse would be eligible for benefits under MassHealth's current practice, since the total household income, $78,000, substantially exceeds the federal poverty level, $14,412.[87] Since federal law does not recognize same-sex marriage, however, the disabled spouse, who would be assessed as single according to federal practice, would be eligible for coverage since his income alone, $13,000, falls below the federal poverty level.[88]

The recognition of same-sex marriages also renders certain individuals eligible for benefits for which they would otherwise be ineligible.[89] For instance, in a household consisting of two same-sex spouses under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year,[90] both spouses are eligible for healthcare under MassHealth because, as a married couple, their combined income—$40,000—falls below the

---

[85] *Id.*

[86] *Id.*, ¶ 11.

[87] *Id.*, ¶ 11.

[88] *Id.*, ¶ 11.

[89] *Id.*, ¶ 12.

[90] *Id.*, ¶ 12.

$43,716 minimum threshold established for spouses.[91] In the eyes of the federal government, however, only the spouse earning $7,000 per year is eligible for Medicaid coverage.[92]

After the Commonwealth began recognizing same-sex marriages in 2004, MassHealth sought clarification, by letter, from HHS's Centers for Medicare & Medicaid Services ("CMS") as to how to implement its recognition of same-sex marriages with respect to Medicaid benefits.[93] In response, CMS informed MassHealth that "[i]n large part, DOMA dictates the response" to the Commonwealth's questions, because "DOMA does not give the [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid."[94]

The Commonwealth enacted the MassHealth Equality Act in July 2008, which provides that "[n]otwithstanding the unavailability of federal financial participation, no person who is recognized as a spouse under the laws of the commonwealth shall be denied benefits that are otherwise available under this chapter due to the provisions of [DOMA] or any other federal nonrecognition of spouses of the same sex."[95]

Following the passage of the MassHealth Equality Act, CMS reaffirmed that DOMA "limits the availability

---

[91] *Id.*, ¶ 12.

[92] *Id.*, ¶ 12.

[93] *Id.*, ¶ 15.

[94] *Id.*, ¶¶ 15-17, Ex. 1, Letter from Charlotte S. Yeh, Regional Administrator, Centers for Medicare & Medicaid Services, to Kristen Reasoner Apgar, General Counsel, Commonwealth of Massachusetts, Executive Office of Health and Human Services (May 28, 2004).

[95] Callahan Aff., ¶ 18, MASS. GEN. LAWS ch. 118E, § 61.

of FFP by precluding recognition of same- sex couples as 'spouses' in the Federal program."[96] In addition, CMS stated that "because same sex couples are not spouses under Federal law, the income and resources of one may not be attributed to the other without actual contribution, i.e. you must not deem income or resources from one to the other."[97] Finally, CMS informed the Commonwealth that it "must pay the full cost of administration of a program that does not comply with Federal law."[98]

Currently, MassHealth denies coverage to married individuals who would be eligible for medical assistance if assessed as single pursuant to DOMA, a course of action which saves MassHealth tens of thousands of dollars annually in additional healthcare costs.[99] Correspondingly, MassHealth provides coverage to married individuals in same-sex relationships who would not be eligible if assessed as single, as required by DOMA. To date, the Commonwealth estimates that CMS' refusal to provide federal funding to individuals in same-sex couples has resulted in $640,661 in additional costs and as much as much as $2,224,018 in lost federal funding.[100]

---

[96] Callahan Aff., Ex. 2, Letter from Richard R. McGreal, Associate Regional Administrator, Centers for Medicare & Medicaid Services, to JudyAnn Bigby, M.D., Secretary, Commonwealth of Massachusetts, Executive Office of Health and Human Services (August 21, 2008).

[97] *Id.*

[98] *Id.*

[99] Callahan Aff., ¶ 22.

[100] *Id.*, ¶ 23.

3. Medicare Tax

Under federal law, health care benefits for a different-sex spouse are excluded from an employee's taxable income.[101] The value of health care benefits provided to an employee's same-sex spouse, however, is considered taxable and must be imputed as extra income to the employee for federal tax withholding purposes.[102]

The Commonwealth is required to pay Medicare tax for each employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable income.[103] Because health benefits for same-sex spouses of Commonwealth employees are considered to be taxable income for federal purposes, the Commonwealth must pay an additional Medicare tax for the value of the health benefits provided to the same-sex spouses.[104]

As of December 2009, 398 employees of the Commonwealth provided health benefits to their same-sex spouses.[105] For those employees, the amount of monthly imputed income for healthcare benefits extended to their spouses ranges between $400 and $1000 per month.[106] For that reason, the Commonwealth has paid approximately $122,607.69 in additional Medicare tax between 2004, when the state began recognizing same-sex marriages, and December 2009.[107]

---

[101] Aff. of Kevin McHugh (hereinafter, "McHugh Aff."), ¶ 4 (citing 26 U.S.C. § 106; 26 C.F.R. § 1.106-1).

[102] McHugh Aff., ¶ 4.

[103] *Id.*, ¶ 5 (citing 26 U.S.C. §§ 3121(u), 3111(b)).

[104] *Id.*

[105] *Id.*

[106] *Id.*, ¶ 7.

[107] *Id.*, ¶ 8.

Furthermore, in order to comply with DOMA, the Commonwealth's Group Insurance Commission has been forced to create and implement systems to identify insurance enrollees who provide healthcare coverage to their same-sex spouses, as well as to calculate the amount of imputed income for each such enrollee.[108] Developing such a system cost approximately $47,000, and the Group Insurance Commission continues to incur costs on a monthly basis to comply with DOMA.[109]

III. Discussion

A. Summary Judgment

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[110] In reviewing a motion for summary judgment, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof."[111] As the Parties do not dispute the material facts relevant to the constitutional questions raised by this action, it is appropriate to dispose of the issues as a matter of law.[112]

---

[108] Aff. of Dolores Mitchell (hereinafter, "Mitchell Aff."), ¶¶ 2, 4-9.

[109] *Id.*, ¶ 10.

[110] *Prescott v. Higgins*, 538 F.3d 32, 40 (1st Cir. 2008).

[111] *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir. 2005).

[112] This court notes that *Defendants' Motion to Dismiss* [#16] is also currently pending. Because there are no material facts in dispute and *Defendants' Motion to Dismiss* turns on the same purely legal question as the pending *Motion for Summary Judgment*, this court finds it appropriate, as a matter of judicial economy, to address the two motions simultaneously.

B. Standing

This court first addresses the government's contention that the Commonwealth lacks standing to bring certain claims against the VA and HHS.[113]

"The irreducible constitutional minimum of standing" hinges on a claimant's ability to establish the following requirements: "[f]irst and foremost, there must be alleged (and ultimately proven) an injury in fact.... Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury."[114]

The government claims that the Commonwealth has failed to sufficiently establish an injury in fact because "its claims are based on the 'risk' of speculative future injury."[115] Specifically, the government contends that (1) allegations that the VA intends to recoup federal grants for state veterans' cemeteries grants lacks the "imminency" required to establish Article III standing, and (2) allegations regarding the HHS' provision of federal Medicaid matching funds constitute nothing more than a hypothetical risk of future enforcement. The government's arguments are without merit.

The evidentiary record is replete with allegations of past and ongoing injuries to the Commonwealth as a

---

[113] The government does not dispute that the Commonwealth has standing to challenge restrictions on the provision of federal Medicaid matching funds that have already been applied. Defs.' Mem. Mot. Dismiss, 34.

[114] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998).

[115] Defs.' Mem. Mot. Dismiss, 32.

result of the government's adherence to the strictures of DOMA. Standing is not contingent, as the government suggests, on Thomas Hopkins—or another similarly-situated individual—being lowered into his grave at Winchendon, or on the Commonwealth's receipt of an invoice for millions in federal state veterans cemetery grant funds. Indeed, a plaintiff is not required "to expose himself to liability before bringing suit to challenge the basis for the threat," particularly where, as here, it is the government that threatens to impose certain obligations.[116]

By letter, the VA already informed the Massachusetts Department of Veterans' Services that the federal government is entitled to recapture millions of dollars in federal grants if the Commonwealth decides to entomb an otherwise ineligible same-sex spouse of a veteran at Agawam or Winchendon. And, given that the Hopkins' application to be buried together has already received the Commonwealth's stamp of approval, the matter is ripe for adjudication.

Moreover, in light of the undisputed record evidence, the argument that the Commonwealth lacks standing to challenge restrictions on the provision of federal Medicaid matching funds to MassHealth cannot withstand scrutiny. The Commonwealth has amassed approximately $640,661 in additional tax liability and forsaken at least $2,224,018 in federal funding because DOMA bars HHS's Centers for Medicare & Medicaid Services from using federal funds to insure same-sex married couples. Given that the HHS has given no indication

---

[116] *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007).

that it plans to change course, it is disingenuous to now argue that the risk of future funding denials is "merely . . . speculative."[117] The evidence before this court clearly demonstrates that the Commonwealth has suffered, and will continue to suffer, economic harm sufficient to satisfy the injury in fact requirement for Article III standing.

C. Challenges to DOMA Under the Tenth Amendment and the Spending Clause of the Constitution

This case requires a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself. This Court has merged the analyses of the Commonwealth challenges to DOMA under the Spending Clause and Tenth Amendment because, in a case such as this, "involving the division of authority between federal and state governments," these inquiries are two sides of the same coin.[118]

It is a fundamental principle underlying our federalist system of government that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[119] And, correspondingly, 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."[120] The division

---

[117] Def.'s Mem. Mot. Dismiss, 34.

[118] *New York v. United States*, 505 U.S. 144, 156 (1992).

[119] *United States v. Morrison*, 529 U.S. 598, 607 (2000).

[120] U.S. CONST. Amend. X.

between state and federal powers delineated by the Constitution is not merely "formalistic."[121] Rather, the Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty."[122] This reflects a founding principle of governance in this country, that "[s]tates are not mere political subdivision of the United States," but rather sovereigns unto themselves.[123]

The Supreme Court has handled questions concerning the boundaries of state and federal power in either of two ways: "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution.... In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment."[124]

Since, in essence, "the two inquiries are mirror images of each other,"[125] the Commonwealth challenges Congress' authority under Article I to promulgate a national definition of marriage, and, correspondingly, complains that, in doing so, Congress has intruded on the exclusive province of the state to regulate marriage.

1. DOMA Exceeds the Scope of Federal Power

Congress' powers are "defined and limited," and, for that reason, every federal law "must be based on one or

---

[121] *New York v. United States*, 505 U.S. 144, 187 (1992).

[122] *Id.* at 188 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)).

[123] *Id*.

[124] *New York*, 505 U.S. at 155.

[125] *Id.* at 156.

more of its powers enumerated in the Constitution."[126] As long as Congress acts pursuant to one of its enumerated powers, "its work product does not offend the Tenth Amendment."[127] Moreover, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[128] Accordingly, it is for this court to determine whether DOMA represents a valid exercise of congressional authority under the Constitution, and therefore must stand, or indeed has no such footing.

The First Circuit has upheld federal regulation of family law only where firmly rooted in an enumerated federal power.[129] In many cases involving charges that Congress exceeded the scope of its authority, e.g. *Morrison*[130] and *Lopez*,[131] courts considered whether the challenged federal statutes contain "express jurisdic-

---

[126] *United States v. Morrison*, 529 U.S. 598, 607 (2000) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

[127] *United States v. Meade*, 175 F.3d 215, 224 (1st Cir. 1999) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

[128] *Morrison*, 529 U.S. at 607.

[129] *See United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997) (the Child Support Recovery Act is a valid exercise of congressional authority pursuant to the Commerce Clause).

[130] 529 U.S. at 612 (noting that Section 13981 of the Violence Against Women Act of 1994 "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

[131] *United States v. Lopez*, 514 U.S. 549, 561-62 (1995) ("§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

tional elements" tying the enactment to one of the federal government's enumerated powers. DOMA, however, does not contain an explicit jurisdictional element. For that reason, this court must weigh the government's contention that DOMA is grounded in the Spending Clause of the Constitution. The Spending Clause provides, in pertinent part:

> The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.[132]

The government claims that Section 3 of DOMA is plainly within Congress' authority under the Spending Clause to determine how money is best spent to promote the "general welfare" of the public.

It is first worth noting that DOMA's reach is not limited to provisions relating to federal spending. The broad sweep of DOMA, potentially affecting the application of 1,138 federal statutory provisions in the United States Code in which marital status is a factor, impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act, and testimonial privileges.[133]

It is true, as the government contends, that "Congress has broad power to set the terms on which it disburses federal money to the States" pursuant to its

---

[132] U.S. CONST. art. I, § 8.

[133] Pl.'s Reply Mem., 3.

spending power.[134] But that power is not unlimited. Rather, Congress' license to act pursuant to the spending power is subject to certain general restrictions.[135]

In *South Dakota v. Dole,*[136] the Supreme Court held that "Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the 'general welfare,' (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be 'unrelated to the federal interest in particular national projects or programs' funded under the challenged legislation, (4) the legislation must not be barred by other constitutional provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion."[137]

The Commonwealth charges that DOMA runs afoul of several of the above-listed restrictions. First, the Commonwealth argues that DOMA departs from the fourth *Dole* requirement, regarding the constitutionality of Congress' exercise of its spending power, because the statute is independently barred by the Equal Protection Clause. Second, the Commonwealth claims that DOMA does not satisfy the third *Dole* requirement, the "germaneness" requirement, because the statute's treatment of same-sex couples is unrelated to the purposes of

---

[134] *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

[135] *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

[136] 483 U.S. 203 (1987).

[137] *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) (citing *Dole*, 483 U.S. at 207-08, 211).

Medicaid or the State Veterans Cemetery Grants Program.

This court will first address the Commonwealth's argument that DOMA imposes an unconstitutional condition on the receipt of federal funds. This fourth *Dole* requirement "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[138]

The Commonwealth argues that DOMA impermissibly conditions the receipt of federal funding on the state's violation of the Equal Protection Clause of the Fourteenth Amendment by requiring that the state deny certain marriage-based benefits to same-sex married couples. "The Fourteenth Amendment 'requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'"[139] And where, as here, "those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions."[140]

In the companion case, *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process

---

[138] *Dole*, 483 U.S. at 210.

[139] *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)).

[140] *Id.* (internal citation omitted).

Clause of the Fifth Amendment. There, this court found that DOMA failed to pass constitutional muster under rational basis scrutiny, the most highly deferential standard of review.[141] That analysis, which this court will not reiterate here, is equally applicable in this case. DOMA plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples. By way of example, the Department of Veterans Affairs informed the Commonwealth in clear terms that the federal government is entitled to "recapture" millions in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries, a threat which, in essence, would penalize the Commonwealth for affording same-sex married couples the same benefits as similarly-situated heterosexual couples that meet the criteria for burial in Agawam or Winchendon. Accordingly, this court finds that DOMA induces the Commonwealth to violate the equal protection rights of its citizens.

And so, as DOMA imposes an unconstitutional condition on the receipt of federal funding, this court finds that the statute contravenes a well-established restriction on the exercise of Congress' spending power. Because the government insists that DOMA is founded in this federal power and no other, this court finds that Congress has exceeded the scope of its authority.

Having found that DOMA imposes an unconstitutional condition on the receipt of federal funding, this

---

[141] *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.).

court need not reach the question of whether DOMA is sufficiently related to the specific purposes of Medicaid or the State Cemetery Grants Program, as required by the third limitation announced in *Dole*.

2. DOMA Impermissibly Interferes with the Commonwealth's Domestic Relations Law

That DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens—also convinces this court that the statute violates the Tenth Amendment.

In *United States v. Bongiorno*, the First Circuit held that "a Tenth Amendment attack on a federal statute cannot succeed without three ingredients: (1) the statute must regulate the States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions."[142]

A. DOMA Regulates the Commonwealth "as a State"

With respect to the first prong of this test, the Commonwealth has set forth a substantial amount of evidence regarding the impact of DOMA on the state's bottom line. For instance, the government has announced that it is entitled to recapture millions of dollars in federal grants for state veterans' cemeteries at Agawam

---

[142] 106 F.3d 1027, 1033 (1st Cir. 1997) (citations and internal quotation marks omitted) (quoting *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981)); *Z.B. v. Ammonoosuc Cmty. Health Servs.*, 2004 U.S. Dist. LEXIS 13058, at *15 (D. Me. July 13, 2004).

and Winchendon should the same-sex spouse of a veteran be buried there. And, as a result of DOMA's refusal to recognize same-sex marriages, DOMA directly imposes significant additional healthcare costs on the Commonwealth, and increases the state's tax burden for healthcare provided to the same-sex spouses of state employees.[143] In light of this evidence, the Commonwealth easily satisfies the first requirement of a successful Tenth Amendment challenge.

B. Marital Status Determinations Are an Attribute of State Sovereignty

Having determined that DOMA regulates the Commonwealth "as a state," this court must now determine whether DOMA touches upon an attribute of state sovereignty, the regulation of marital status.

"The Constitution requires a distinction between what is truly national and what is truly local."[144] And, significantly, family law, including "declarations of status, e.g. marriage, annulment, divorce, custody and pa-

---

[143] The government contends that additional federal income and Medicare tax withholding requirements do not offend the Tenth Amendment because they regulate the Commonwealth not as a state but as an employer. It is clear that the Commonwealth has standing to challenge DOMA's interference in its employment relations with its public employees, *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51 n.17 (1986), and this court does not read the first prong of the *Bongiorno* test so broadly as to preclude the Commonwealth from challenging this application of the statute.

[144] *Morrison*, 529 U.S. at 618 (citing *Lopez*, 514 U.S. at 568).

ternity,"[145] is often held out as *the* archetypal area of local concern.[146]

The Commonwealth provided this court with an extensive affidavit on the history of marital regulation in the United States, and, importantly, the government does not dispute the accuracy of this evidence. After weighing this evidence, this court is convinced that there is a historically entrenched tradition of federal reliance on state marital status determinations. And, even though the government objects to an over-reliance on the historical record in this case,[147] "a longstanding history of related federal action . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests."[148]

---

[145] *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

[146] *See, e.g., Boggs v. Boggs*, 520 U.S. 833, 848 (1997) ("As a general matter, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'") (citation omitted); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("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 [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."), overruled on other grounds, *Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Morrison*, 529 U.S. at 616.

[147] Defs.' Reply Mem., 4-5 ("a history of respecting state definitions of marriage does not itself mandate that terms like 'marriage' and 'spouse,' when used in *federal* statutes, yield to definitions of these same terms in *state* law.") (emphasis in original).

[148] *United States v. Comstock*, 176 L. Ed. 2d 878, 892 (2010) (internal citations omitted).

State control over marital status determinations is a convention rooted in the early history of the United States, predating even the American Revolution. Indeed, the field of domestic relations was regarded as such an essential element of state power that the subject of marriage was not even broached at the time of the framing of the Constitution. And, as a consequence of continuous local control over marital status determinations, what developed was a checkerboard of rules and restrictions on the subject that varied widely from state to state, evolving throughout American history. Despite the complexity of this approach, prior to DOMA, every effort to establish a national definition of marriage met failure, largely because politicians fought to guard their states' areas of sovereign concern.

The history of the regulation of marital status determinations therefore suggests that this area of concern is an attribute of state sovereignty, which is "truly local" in character.

That same-sex marriage is a contentious social issue, as the government argues, does not alter this court's conclusion. It is clear from the record evidence that rules and regulations regarding marital status determinations have been the subject of controversy throughout American history. Interracial marriage, for example, was at least as contentious a subject. But even as the debate concerning interracial marriage waxed and waned throughout history, the federal government consistently yielded to marital status determinations established by the states. That says something. And this court is convinced that the federal government's long history of acquiescence in this arena indicates that, indeed, the federal government traditionally regarded

marital status determinations as the exclusive province of state government.

That the Supreme Court, over the past century, has repeatedly offered family law as an example of a quintessential area of state concern, also persuades this court that marital status determinations are an attribute of state sovereignty.[149] For instance, in *Morrison*, the Supreme Court noted that an overly expansive view of the Commerce Clause could lead to federal legislation of "family law and other areas of *traditional state regulation* since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[150] Similarly, in *Elk Grove Unified Sch. Dist. v. Newdow*, the Supreme Court observed "that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'"[151]

The government has offered little to disprove the persuasive precedential and historical arguments set forth by the Commonwealth to establish that marital status determinations are an attribute of state sover-

---

[149] *See, e.g., Lopez*, 514 U.S. 549, 564 (1995) (noting with disfavor that a broad reading of the Commerce Clause could lead to federal regulation of "family law (including marriage, divorce and child custody)"); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *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 [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."); *see also*, *United States v. Molak*, 276 F.3d 45, 50 (1st Cir. 2002) ("[d]omestic relations and family matters are, in the first instance, matters of state concern").

[150] 529 U.S. at 615 (emphasis added).

[151] 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)) (other citations omitted).

eignty.[152] The primary thrust of the government's rebuttal is, in essence, that DOMA stands firmly rooted in Congress' spending power, and, for that reason, "the fact that Congress had not chosen to codify a definition of marriage for purposes of federal law prior to 1996 does not mean that it was without power to do so or that it renders the 1996 enactment invalid."[153] Having determined that DOMA is not rooted in the Spending Clause, however, this court stands convinced that the authority to regulate marital status is a sovereign attribute of statehood.

C. Compliance with DOMA Impairs the Commonwealth's Ability to Structure Integral Operations in Areas of Traditional Governmental Functions

Having determined that marital status determinations are an attribute of state sovereignty, this court must now determine whether compliance with DOMA

---

[152] Certain immigration cases cited by the government do not establish, as it contends, that "courts have long recognized that federal law controls the definition of 'marriage' and related terms." Defs.' Reply Mem., 5. None of these cases involved the displacement of a state marital status determination by a federal one. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), for instance, involved a challenge by a same-sex spouse to the denial of an immigration status adjustment. Because this case was decided before any state openly and officially recognized marriages between individuals of the same sex, as the Commonwealth does here, *Adams* carries little weight. And, in *Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009), and *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009), the courts merely determined that it would be unjust to deny the adjustment of immigration status to surviving spouses of state-sanctioned marriages solely attributable to delays in the federal immigration process.

[153] Defs.' Reply Mem., 5.

would impair the Commonwealth's ability to structure integral operations in areas of traditional governmental functions.[154]

This third requirement, viewed as the "key prong" of the Tenth Amendment analysis, addresses "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence."[155] And, in

---

[154] *United Transp. Union v. Long Island R. R. Co.*, 455 U.S. 678, 684 (1982) (citations and quotation marks omitted). It is worth noting up front that this "traditional government functions" analysis has been the subject of much derision. Indeed, this rubric was once explicitly disavowed by the Supreme Court in the governmental immunity context in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), in which the Court stated that the standard is not only "unworkable but is also inconsistent with established principles of federalism." *Id.* at 531, *see also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 368-369 (2007) (noting that legal standards hinging on "judicial appraisal[s] of whether a particular governmental function is 'integral' or 'traditional'" were "abandon[ed] . . . as analytically unsound") (Alito, J., dissenting).

Still, it is this court's understanding that such an analysis is nonetheless appropriate in light of more recent Supreme Court cases, *see, e.g.*, *New York*, 505 U.S. at 159 (noting that the Tenth Amendment challenges "discern[] the core of sovereignty retained by the States"), and *Morrison*, 529 U.S. at 615-16, which revive the concept of using the Tenth Amendment to police intrusions on the core of sovereignty retained by the state. Moreover, this analysis is necessary, in light of First Circuit precedent, which post-dates the Supreme Court's disavowal of the traditional governmental functions analysis in *Garcia*. *Bongiorno*, 106 F.3d at 1033.

[155] *United Transp. Union v. Long Island R. R. Co.*, 455 U.S. 678, 686-687 (1982) (internal citations and quotation marks omitted). This court notes that the concept of "traditional governmental functions" has been the subject of disfavor, *see, e.g.*, *Morrison*, 529 U.S. 598, 645-52

view of more recent authority, it seems most appropriate for this court to approach this question with a mind towards determining whether DOMA "infring[es] upon the core of state sovereignty."[156]

Tenth Amendment caselaw does not provide much guidance on this prong of the analysis. It is not necessary to delve too deeply into the nuances of this standard, however, because the undisputed record evidence in this case demonstrates that this is not a close call. DOMA set the Commonwealth on a collision course with the federal government in the field of domestic relations. The government, for its part, considers this to be a case about statutory interpretation, and little more. But this case certainly implicates more than tidy questions of statutory interpretation, as the record includes several concrete examples of the impediments DOMA places on the Commonwealth's basic ability to govern itself.

First, as a result of DOMA, the VA has directly informed the Commonwealth that if it opts to bury same-sex spouses of veterans in the state veterans' cemeteries at Agawam and Winchendon, the VA is entitled to recapture almost $19 million in federal grants for the construction and maintenance of those properties. The Commonwealth, however, recently approved an applica-

---

(2000) (describing this part of the test as "incoherent" because there is "no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other") (Souter, J., dissenting), but was revived by the court in *Morrison*.

[156] *New York*, 505 U.S. at 177. It is also important to note that in recent history, Tenth Amendment challenges have largely policed the federal government's efforts to "commandeer" the processes of state government. Here, however, the Commonwealth acknowledges that "this is not a commandeering case." Pl.'s Mem. Supp. Summ. Judg., 22.

tion for the burial of Thomas Hopkins, the same-sex partner of Darrel Hopkins, in the Winchendon cemetery, because the state constitution requires that the Commonwealth honor their union. The Commonwealth therefore finds itself in a Catch-22: it can afford the Hopkins' the same privileges as other similarly-situated married couples, as the state constitution requires, and surrender millions in federal grants, or deny the Hopkins' request, and retain the federal funds, but run afoul of its own constitution.

Second, it is clear that DOMA effectively penalizes the state in the context of Medicaid and Medicare.

Since the passage of the MassHealth Equality Act, for instance, the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses. The HHS Centers for Medicare & Medicaid Services, however, has informed the Commonwealth that the federal government will not provide federal funding participation for same-sex spouses because DOMA precludes the recognition of same-sex couples. As a result, the Commonwealth has incurred at least $640,661 in additional costs and as much as $2,224,018 in lost federal funding.

In the same vein, the Commonwealth has incurred a significant additional tax liability since it began to recognize same-sex marriage in 2004 because, as a consequence of DOMA, health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income.

That the government views same-sex marriage as a contentious social issue cannot justify its intrusion on

the "core of sovereignty retained by the States,"[157] because "the Constitution . . . divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[158] This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.

IV. Conclusion

For the foregoing reasons, Defendants' *Motion to Dismiss* is DENIED and Plaintiff's *Motion for Summary Judgment* is ALLOWED.

AN ORDER HAS ISSUED.

/s/ JOSEPH L. TAURO
United States District Judge

---

[157] *New York*, 505 U.S. at 159.

[158] *Id.* at 187.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 1:09-11156-JLT

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; AND THE UNITED STATES OF AMERICA,
DEFENDANTS

Filed: July 8, 2010

ORDER

TAURO, J.

For the reasons set forth in the accompanying Memorandum, this court hereby orders that *Defendants' Motion to Dismiss* [#16] is DENIED and *Plaintiff's Motion for Summary Judgment* [#26] is ALLOWED.

IT IS SO ORDERED.

/s/ JOSEPH L. TAURO
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 09-11156-JLT

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; AND THE UNITED STATES OF AMERICA, DEFENDANTS

Filed: Aug. 12, 2010

JUDGMENT

TAURO, J.

Having allowed *Plaintiffs Motion for Summary Judgment* [#26], this court hereby enters the following judgment in this action:

1. 1 U.S.C. § 7 is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples.
2. 1 U.S.C. § 7 as applied to 42 U.S.C. §§ 1396 et seq. and 42 C.F.R. pts. 430 et seq. is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples.
3. 1 U.S.C. § 7 as applied to 38 U.S.C. § 2408 and 38 C.F.R. pt. 39 is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples.
4. Defendants and any other agency or official acting on behalf of Defendant the United States of America is hereby enjoined from enforcing 1 U.S.C. § 7 against Massachusetts and any of its agencies or officials.
5. This case is hereby CLOSED.

IT IS SO ORDERED.

/s/ JOSEPH L. TAURO
United States District Judge

APPENDIX H

1. U.S. Const., Amend. V provides, in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. 1 U.S.C. 7 provides:

Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.