

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

Civil Action No. _____

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.

COMPLAINT

INTRODUCTION

In 2004, the Commonwealth of Massachusetts became the first state to end the exclusion of same-sex couples from marriage. Since that time, more than 16,000 qualified and committed same-sex couples have married in Massachusetts and the security and stability of families has been strengthened in important ways throughout the state. Despite these developments, same-sex couples in Massachusetts are still denied essential rights and protections because the federal Defense of Marriage Act (“DOMA”) interferes with the Commonwealth’s sovereign authority to define and regulate marriage. As applied to the Commonwealth and its residents, DOMA constitutes an overreaching and discriminatory federal law.

In this case, the Commonwealth challenges the constitutionality of Section 3 of DOMA, codified at 1 U.S.C. § 7. Section 3 of DOMA creates an unprecedented federal definition of

marriage limited to a union between one man and one woman. Congress's decision to enact a federal definition of marriage rejected the long-standing practice of deferring to each state's definition of marriage and contravened the constitutional designation of exclusive authority to the states. From its founding until DOMA was enacted in 1996, the federal government recognized that defining marital status was the exclusive prerogative of the states and an essential aspect of each state's sovereignty, and consistently deferred to state definitions when the marital status of an individual was used as a marker of eligibility for rights or protections under federal law.

Now, because of Section 3 of DOMA, married individuals in same-sex relationships are both denied access to critically important rights and benefits and not held to the same obligations and responsibilities arising out of marriage or based on marital status. DOMA precludes same-sex spouses from a wide range of important protections that directly affect them and their families, including federal income tax credits, employment and retirement benefits, health insurance coverage, and Social Security payments. In enacting DOMA, Congress overstepped its authority, undermined states' efforts to recognize marriages between same-sex couples, and codified an animus towards gay and lesbian people.

Section 3 of DOMA applies to all federal laws retrospectively and prospectively. In so doing, it affects the Commonwealth in significant ways. First, DOMA interferes with the Commonwealth's exclusive authority to determine and regulate the marital status of its citizens. Although the Commonwealth views all married persons identically, Section 3 of DOMA creates two distinct classes of married persons in Massachusetts by denying hundreds of rights and protections to married individuals in same-sex relationships. Second, Section 3 of DOMA imposes conditions on the Commonwealth's participation in certain federally funded programs

that require the Commonwealth to disregard marriages validly solemnized under Massachusetts law. DOMA's sweeping scope exceeds the powers granted to Congress and violates the United States Constitution.

The Commonwealth seeks declaratory and injunctive relief for the narrow but critical purpose of enabling it to define marriage within its own boundaries. This action does not address the application of DOMA in states that do not recognize marriages between same-sex couples. It does, however, seek to remedy the fundamental unfairness that DOMA causes to Massachusetts and its residents by denying those residents equal treatment under the law.

NATURE OF THE ACTION

1. The Commonwealth, by and through its Attorney General Martha Coakley, brings this action seeking a declaratory judgment that Section 3 of DOMA, codified at 1 U.S.C. § 7, is unconstitutional as well as injunctive relief prohibiting the enforcement of Section 3 against Massachusetts.¹

2. Section 3 of DOMA exceeds congressional authority and interferes with the Commonwealth's sovereign authority to define marriage, in violation of the Tenth Amendment to the United States Constitution, Congress's Article I powers, and the Constitution's principles of federalism. Due to the extensive scope of federal rights, obligations, and protections linked to marital status, Section 3 of DOMA creates two separate and unequal categories of married couples in the Commonwealth. Despite the Commonwealth's recognition of only one category

¹ The Commonwealth's lawsuit does not challenge Section 2 of DOMA, codified at 28 U.S.C. § 1738C, which provides that states shall not be required to recognize marriages between individuals of the same sex that are validly solemnized in other states. This lawsuit is, instead, limited to the impact of Section 3 of DOMA within the borders of the Commonwealth. Accordingly, the Commonwealth does not assert any claims regarding the decision of other states to define marriage as a union between one man and one woman.

of married persons, Section 3 of DOMA changes the meaning of marriage in Massachusetts and commandeers state employees into implementing federal policy that contradicts Massachusetts law and violates the United States Constitution. This usurps the Commonwealth's authority and contravenes constitutionally mandated principles of federalism.

3. In addition, Section 3 of DOMA, through its application to programs administered by the Commonwealth and funded by the federal government, requires the Commonwealth to treat married individuals in same-sex relationships differently from married individuals in different-sex relationships. When the Commonwealth receives federal funding for various programs, federal law requires the Commonwealth to implement DOMA's disregard of valid marriages between same-sex couples. Section 3 of DOMA requires the Commonwealth to treat married individuals in same-sex relationships as single, imposing an impermissible condition on the Commonwealth in violation of the Spending Clause of Article I of the United States Constitution.

4. This case is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rule of Civil Procedure 57.

PARTIES

5. The Commonwealth brings this action in its own capacity as a sovereign state. The Commonwealth has a significant interest in treating its residents equally as required by its constitution and laws and as further required by the United States Constitution. The Commonwealth also has an interest in maintaining its sovereign authority to define the marital status of its citizens, as well as an interest in not being conscripted as an agent implementing federal policy that conflicts with Massachusetts law and violates the United States Constitution.

The Commonwealth further has an interest in not being subject to unconstitutional conditions in connection with its receipt of federal funds.

6. Defendant the United States Department of Health and Human Services is responsible for the administration of the Centers for Medicare and Medicaid Services.

7. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services. She is named as a defendant in her official capacity only.

8. Defendant the United States Department of Veterans Affairs is responsible for the National Cemetery Administration and the State Cemetery Grants Service.

9. Defendant Eric K. Shinseki is the Secretary of the United States Department of Veterans Affairs. He is named as a defendant in his official capacity only.

10. The United States of America is named as a defendant because this action challenges the constitutionality of an Act of Congress. 28 U.S.C. § 2403(a).

JURISDICTION

11. The Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346(a)(2) because it arises under the Constitution and laws of the United States.

12. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(3), because no real property is involved in this action, the Commonwealth is situated in this judicial district, and the defendants are officers of the United States, agencies of the United States, and the United States.

MARRIAGE EQUALITY IN MASSACHUSETTS

13. In *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts recognized that, without access to marriage, same-sex couples were “excluded from the full range of human experience and denied full protection of the [Massachusetts] laws.” *Id.* at 957.

14. The Supreme Judicial Court concluded that marriage is among the most basic of liberty interests and due process rights and that excluding same-sex couples from marriage violated the equality and liberty provisions of the Massachusetts Constitution. 798 N.E.2d at 959-961, 968.

15. The Supreme Judicial Court stayed entry of its ruling for 180 days in order to give the Massachusetts General Court (the state legislature) an opportunity to remedy the constitutional infirmity. 798 N.E.2d at 970.

16. On February 3, 2004, the Supreme Judicial Court rendered an advisory opinion to the Massachusetts General Court concluding that a bill prohibiting same-sex couples from entering into marriage, but allowing them to form civil unions, would not comply with the *Goodridge* decision and would violate the Massachusetts Constitution. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

17. Since May 17, 2004 – 180 days after the *Goodridge* decision – the Commonwealth has recognized a single marital status that is open and available to every qualifying couple, whether same-sex or different-sex.

18. In September 2005, a Joint Session of the Commonwealth’s Legislature (commonly referred to as a state “constitutional convention”) overwhelmingly defeated a

legislatively proposed constitutional amendment to prohibit marriages between same-sex couples.

19. In June 2007, during another Joint Session of the Legislature, state legislators considered a citizen-initiated proposed constitutional amendment to prohibit marriages between individuals of the same sex. That proposed constitutional amendment failed to obtain the twenty-five percent of votes needed to send it to the electorate in the state elections of November 2008.

20. On July 31, 2008, the Massachusetts General Court repealed a 1913 law (MASS. GEN. LAWS ch. 207, §§ 11-12) that barred couples from marrying in Massachusetts if that marriage was prohibited in their home state. The repeal had the effect of permitting same-sex couples who resided in other states to obtain marriage licenses in Massachusetts.

FEDERAL DEFENSE OF MARRIAGE ACT

21. Prior to 1996, the federal government of the United States recognized that the authority to create and regulate marital status was the exclusive prerogative of the states and consistently deferred to each state's definition of marriage, including when the marital status of an individual was used as a marker of eligibility for a right, responsibility, or protection under federal law.

22. DOMA was enacted in anticipation of the possibility that Hawai'i might permit marriages between same-sex couples. In 1993, the Supreme Court of Hawai'i ruled in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), that refusing to grant marriage licenses to same-sex couples was sex-based discrimination. However, the court remanded the case for further proceedings and did not order the state to begin issuing marriage licenses to same-sex couples. As a result, at

the time that DOMA was enacted, no state recognized marriages between individuals of the same sex.

23. DOMA, when it was enacted, eviscerated more than 200 years of federal government deference to the states with respect to defining marriage.

24. DOMA prospectively invalidated marriages between same-sex couples for purposes of all federal laws, whether enacted before or after DOMA. It 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.

1 U.S.C. § 7.

25. DOMA applies to all facets of the federal government. It also applies to the states when the states implement federal programs or are subject to federal law, including federal tax requirements applicable when the a state acts as an employer.

26. But for DOMA, married individuals in same-sex relationships in the Commonwealth would receive the same status, obligations, responsibilities, rights, and protections as married individuals in different-sex relationships under local, state, and federal laws.

27. DOMA was enacted for the purported purpose of defending “the institution of traditional heterosexual marriage,” H.R. REP. NO. 104-664, at 2, 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906, notwithstanding the fact that the determination of marital status is a power reserved exclusively to the states. At the time of DOMA’s enactment, several members of Congress expressed doubts about DOMA’s constitutionality because Congress had never previously defined marriage. *See, e.g.*, 142 CONG. REC. H7446 (daily ed. July 11, 1996)

(DOMA “defines marriage in Federal law for the first time and says to any State, ‘No matter what you do, whether you do it by referendum or by public decision or by legislative action, the Federal Government won’t recognize a marriage contracted in your state if we don’t like the definition. We are going to trample the States’ rights’”) (statement of Rep. Jerrold Nadler); *id.* at H7449 (“[DOMA] is an unnecessary intrusion into the State domain of family law. It tears at the fabric of our Constitution. Historically, States have the primary authority to regulate marriage based upon the Tenth amendment of the Constitution. . . . If there is any area of law to which States can lay a claim to exclusive authority, it is the field of family relations.”) (statement of Rep. Neil Abercrombie); 142 CONG. REC. S10120 (daily ed. Sept. 10, 1996) (“[I]t is not clear that this is even an appropriate area for Federal legislation. Historically, family law matters, including marriage, divorce, and child custody laws, have always been within the jurisdiction of State governments, not the Federal Government.”) (statement of Sen. Russell Feingold).

28. Although DOMA was enacted for the purported purpose of preserving state sovereignty, H.R. REP. NO. 104-664, at 2, Section 3 of DOMA actually interferes with each state’s authority to define marriage. Congress intended that marriages between same-sex couples not be given the same “imprimatur of legal sanction” as marriages between different-sex couples. 142 CONG. REC. H7446 (daily ed. July 11, 1996) (statement of Rep. Jim Talent); *see also* 142 CONG. REC. S10101 (daily ed. Sept. 10, 1996) (“Inaction on the part of Congress would be equivalent to approval of what the Hawaiian courts may do. We can’t afford such action.”) (statement of Sen. Trent Lott).

29. DOMA was enacted to codify animus against gay and lesbian people. H.R. REP. NO. 104-664, at 15-16; 142 CONG. REC. H7444 (daily ed. July 11, 1996) (“[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it

brought forth.”) (statement of Rep. Tom Coburn); 142 CONG. REC. H7482 (daily ed. July 12, 1996) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society....”) (statement of Rep. Bob Barr); 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) (DOMA “will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America’s moral fabric in the process.”) (statement of Sen. Jesse Helms).

30. DOMA was enacted to deny federal rights and protections to same-sex couples who are validly married under state law. H.R. REP. NO. 104-664, at 18. For example, DOMA was enacted so that the federal government would not have to provide survivorship benefits to the surviving same-sex spouse of a veteran of the Armed Services. *Id.* (without DOMA, “these marital [survivorship] benefits would ... have to be made available to homosexual couples and surviving spouses of homosexual ‘marriages’ on the same terms as they are now available to opposite-sex married couples and spouses.”).

31. DOMA was also enacted for the purported purpose of preserving federal resources by denying benefits and entitlements to married individuals in same-sex relationships who would qualify for such benefits if they were in a different-sex relationship. H.R. REP. NO. 104-664, at 18. The Congressional Budget Office, however, has estimated that, if marriages between same-sex couples were recognized in all fifty states and by the federal government, the federal budget would benefit by \$500 million to \$900 million annually. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004) at 1, available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>. This

net benefit is due to estimated increased revenues through income and estate taxes and decreased outlays for Supplemental Security Income, Medicaid, and Medicare. *Id.* at 2, 5.

FEDERAL REGULATION OF MARRIAGE

32. Section 3 of DOMA trespasses on a core area of state sovereignty by creating two distinct and unequal categories of married persons in states, such as Massachusetts, in which the legal status of marriage extends to both same-sex and different-sex couples.

33. Since the founding of the United States, the determination of who can marry and who is recognized as being married has been made by state law. Prior to DOMA's enactment, federal law referring to marital status incorporated state definitions of marriage. In contravention of this longstanding respect for states' prerogative to define the institution of marriage, Section 3 of DOMA creates a federal definition of marriage and regulates the meaning of marriage within the sovereign states.

34. The federal General Accounting Office identified 1,138 statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights, and privileges. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO/OGC-04-353R (January 23, 2004), *updating* General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (January 31, 1997), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

35. These federal laws create rights, obligations, and protections pertaining to a wide range of areas, including the workplace, healthcare, taxes, Social Security, retirement, intellectual property, and court proceedings. They significantly affect the lives of every married person throughout the United States. By disregarding Massachusetts's definition of marriage,

DOMA prevents legally married same-sex couples in the Commonwealth from having access to hundreds of rights and protections provided to married different-sex couples.

36. For example, Social Security benefits are affected by marital status in a variety of ways. Spouses qualify for up to fifty percent of a disabled worker's benefit, spouses are entitled to a higher benefit upon the retirement or death of their spouse, and surviving spouses are given a one-time lump-sum death benefit.

37. Eligibility for Medicare benefits is likewise affected by marital status. Being married allows an otherwise ineligible individual to qualify for free hospital insurance (Medicare Part A) based on his or her spouse's work record. Once a person qualifies for Medicare Part A, he or she can enroll in Part B (medical insurance) and, in turn, becomes eligible for Medicare Parts C (Medicare Advantage Plans) and D (prescription drug coverage).

38. In the workplace, spouses enjoy rights relating to retirement and benefits plans, medical leave, and healthcare coverage. Under most private employee benefit plans, which are federally regulated, spouses are guaranteed annuities, spousal approval is required to secure loans with pension benefits, and spouses are the automatic beneficiaries of many plans. When a spouse is ailing, an employee is ensured at least twelve weeks of unpaid leave to care for his or her spouse. In addition, spouses are entitled to enroll in an employer's healthcare plan outside of the open enrollment period and are allowed to maintain healthcare coverage through the employer even after employment is terminated. A flexible spending account, which is exempt from federal income taxes, can be used to pay for medical expenses incurred by a spouse.

39. Marital status also has a significant impact on federal income tax liability. Spouses are permitted to file a joint income tax return and pool deductions. The value of healthcare coverage provided by an employer to a spouse is not considered taxable income.

Money and property transferred between spouses is not taxable, and spouses are permitted to contribute portions of their income to Individual Retirement Accounts of their spouses.

40. Spouses of public safety officers (police officers, firefighters, etc.), railroad workers, military veterans, and federal employees are afforded certain rights, including payments for tuition fees, annuities, and healthcare coverage.

41. Other examples of the severe impact of DOMA's discrimination against Massachusetts citizens who are legally married to a spouse of the same sex are set forth in the Addendum to this Complaint, incorporated here by reference. Under DOMA, all of the rights and protections listed above and in the Addendum are denied to married same-sex couples and their families.

42. Additionally, the severe impact of DOMA is amplified by the fact that the Commonwealth is conscripted as an agent to implement this discriminatory federal scheme.

43. When the Commonwealth acts as an employer, DOMA's regulation of marriage requires the Commonwealth to disregard the lawful marriages of its own employees. For example, the Commonwealth's employees have the option of including their spouses as a recipient of health benefits. The Commonwealth, like other employers, is not required to treat the health benefits they provide to different-sex spouses as taxable income. However, because DOMA restricts the meaning of spouse under the Internal Revenue Code, the Commonwealth is required to treat health benefits provided to a same-sex spouse as taxable income for the purpose of federal income and Medicare tax withholding.

44. Approximately 550 employees of the Commonwealth include their same-sex spouses on their health insurance plans. DOMA requires the Commonwealth to collect both federal income and Medicare taxes based on the fair market value of health benefits provided to

the same-sex spouses of these employees. In order to accommodate DOMA's requirements, the Commonwealth must undertake a multi-step process involving several different offices and agencies. These additional steps impose a burden on the Commonwealth's resources.

45. In implementing any federally funded program that is subject to Section 3 of DOMA, the Commonwealth is required to choose between applying the state definition of marriage and applying DOMA's federal definition. In making that choice, the Commonwealth is faced with an unconstitutional dilemma: maintain federal funding by disregarding marriages that are valid under state law and discriminating against same-sex couples or risk losing federal funding by honoring marriages valid under state law and treating all married couples equally.

FEDERALLY FUNDED PROGRAMS

46. The Massachusetts Executive Office of Health and Human Services provides healthcare coverage to eligible low- and moderate-income individuals and families in Massachusetts through the Commonwealth's Medicaid program, known as MassHealth. *See, e.g.*, MASS. GEN. LAWS ch. 118E, § 9; 130 MASS. CODE REGS. ("CMR") § 501.002. Originally enacted in 1965, Medicaid offers assistance to those who have insufficient incomes and resources to meet the costs of necessary medical services.

47. MassHealth is jointly funded by the federal government and the Commonwealth. It is administered exclusively by Massachusetts, and it is overseen by the Defendant United States Department of Health and Human Services through its Centers for Medicare and Medicaid Services ("CMS"). *See, e.g.*, 42 U.S.C. § 1396a (state plans complying with federal mandates receive funds); MASS. GEN. LAWS ch. 118E, § 9 (establishing MassHealth "pursuant to and in conformity with the provisions of" the federal Medicaid statute, 42 U.S.C. §§ 1396 *et seq.*).

48. In general, the federal government reimburses half of the qualifying health benefits paid out by MassHealth. Each year, MassHealth receives billions of dollars in federal funding. For the fiscal year ending on June 30, 2008, MassHealth received approximately \$5.3 billion in funding from the United States Department of Health and Human Services for the medical assistance program. Commonwealth of Massachusetts, OMB Circular A-133 Report (June 30, 2008) at 9, *available at* http://www.mass.gov/Aosc/docs/reports_audits/SA/2008/2008_single_audit.pdf.

49. The marital status of an individual seeking or receiving coverage affects MassHealth's determinations in several ways.

50. MassHealth coverage is provided based on financial eligibility, which is determined based on the applicant's available income and assets. In assessing eligibility of a married individual, the individual's income and assets are combined with those of his or her spouse, subject to certain exceptions.

51. Because marital status is a key marker in the eligibility process, the conflict between Section 3 of DOMA and the Commonwealth's definition of marriage creates two constitutional problems in the implementation of MassHealth. First, federal law requires MassHealth to assess married individuals in same-sex relationships as though they were "single," whereas married individuals in different-sex relationships must be assessed as married. As a result, in order to comply with federal law, MassHealth must treat married individuals differently depending only on whether they are married to a person of the same sex. Second, MassHealth cannot obtain federal financial participation ("FFP") for coverage provided to individuals in same-sex marriages who qualify when their marriages are honored in the eligibility analysis.

52. In 2004, soon after the *Goodridge* decision, MassHealth sought clarification from CMS as to how to comply with federal law in light of the Commonwealth's recognition of marriages between individuals of the same sex.

53. CMS informed MassHealth that it must apply the federal definition of marriage, as provided in DOMA, when assessing eligibility for Medicaid benefits. 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), attached as Exhibit 1.

54. CMS specifically asserted that MassHealth cannot treat an individual in a same-sex marriage as eligible for Medicaid benefits on the basis of combined income or assets with a same-sex spouse, if the individual would be ineligible for benefits when considered as "single." CMS explicitly stated that FFP would not be available for the Commonwealth's expenditures for such an individual: "DOMA does not give [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid." Ex. 1 at 1.

55. CMS also asserted that federal Medicaid law requires MassHealth to provide coverage to married individuals in same-sex relationships who qualify when assessed as "single."

56. On July 31, 2008, the Commonwealth enacted the MassHealth Equality Act, codified at MASS. GEN. LAWS ch. 118E, § 61. The law 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 non-recognition of spouses of the same sex." *Id.*

57. In response to enactment of that law, in 2008, CMS again informed the Commonwealth that DOMA “limits the availability of FFP by precluding recognition of same sex couples as ‘spouses’ in the Federal program.” CMS further 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.” 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), attached as Exhibit 2.

58. CMS further asserted that the Commonwealth “must pay the full cost of administration of a program that does not comply with Federal law.” Ex. 2 at 2.

59. MassHealth makes eligibility determinations for married couples without regard to whether the marriage is between persons of the same sex or different sexes, as is required by the United States Constitution. As a result, married individuals in same-sex relationships who would qualify under federal law for Medicaid benefits but for the application of DOMA, are nevertheless covered by MassHealth. Because FFP is not available for expenditures relating to such individuals, under the MassHealth Equality Act, described above, the Commonwealth pays for the entire cost of MassHealth coverage provided to those individuals.

60. The Commonwealth has estimated that the annual amount of FFP that is unavailable due to DOMA is \$2.37 million.

61. Additionally, because the United States Constitution compels MassHealth to treat similarly all individuals validly married under Massachusetts law, Massachusetts’s compliance with the Equal Protection Clause requires MassHealth to treat certain married individuals in

same-sex relationships as ineligible for MassHealth coverage even though they would be eligible for Medicaid benefits if the federal definition of marriage were applied (and their marriages ignored).

62. Section 3 of DOMA creates an unconstitutional dilemma for the Commonwealth by requiring MassHealth to choose between, on the one hand, violating the Equal Protection Clause of the Fourteenth Amendment by applying DOMA's federal definition of marriage in order to receive federal funding from CMS and, on the other hand, losing FFP for otherwise eligible individuals and risking enforcement for non-compliance by CMS if MassHealth continues to treat all married individuals equally in assessing MassHealth eligibility.

63. Marital status is also relevant to the operations of veterans' cemeteries at Agawam and Winchendon, Massachusetts, by the Massachusetts Department of Veterans Services ("DVS"). These cemeteries are maintained for the burial of Massachusetts veterans, their spouses, and their children. The cemeteries are operated solely by the Commonwealth and are located on land owned by the Commonwealth.

64. These cemeteries were constructed, expanded, and improved through the expenditure of federal funding provided by the Defendant United States Department of Veterans Affairs ("VA"). 38 U.S.C. § 2408(b); 38 C.F.R. § 39.5. This federal funding is provided by a grant program administered by the VA's State Cemetery Grants Service, which is a part of the VA's National Cemetery Administration.

65. The State Cemetery Grants Program was created in 1978 to complement the service provided by the VA's system of veterans' cemeteries operated by the National Cemetery Administration. Through the combination of federal- and state-operated burial sites, the VA seeks to make a veterans' cemetery available within seventy-five miles of the homes of 90% of

the veterans across the country. United States Department of Veterans Affairs, State Cemetery Grants Program, <http://www.cem.va.gov/scg/scgkit.asp> (last visited June 19, 2009).

66. To be eligible for burial as a veteran in a Massachusetts veterans' cemetery, an individual must satisfy federal requirements pertaining to military service and a state requirement of a sufficient connection to Massachusetts, such as having a home of record in Massachusetts or being a Massachusetts resident. United States Department of Veterans Affairs, Federal Benefits for Veterans, Dependents & Survivors at 59 (2009), *available at* <http://www1.va.gov/opa/vadocs/fedben.pdf>; Massachusetts Veterans' Memorial Cemeteries, Interment Registration Instructions and Requirements for Agawam and Winchendon (Feb. 2002) at 2-3, *available at* <http://www.ci.woburn.ma.us/documents/Veterans%20Office/MA%20cemetery%20pre%20registration.pdf>.

67. To be eligible for burial as the spouse of a veteran in a Massachusetts veterans' cemetery, federal regulations require that an individual produce a marriage certificate and demonstrate that the veteran spouse is eligible for burial. Federal Benefits for Veterans, Dependents & Survivors at 59; Interment Registration Instructions and Requirements for Agawam and Winchendon at 2-3.

68. In operating and maintaining these cemeteries, the Commonwealth is required to comply with regulations promulgated by the Secretary of the VA. 38 U.S.C. § 2408(c).

69. The regulations contain the requirement that these cemeteries "must be operated solely for the interment of veterans, their spouses, [and] surviving spouses." 38 C.F.R. § 39.5(a).

70. The VA can recapture from the Commonwealth any funds provided by the VA for the construction, expansion, or improvement of the cemeteries at Agawam and Winchendon if

either is deemed to be no longer operated solely as a veterans' cemetery. 38 U.S.C. § 2408(b)(3); 38 C.F.R. § 39.18(a).

71. The Commonwealth has received three federal grants for the Agawam and Winchendon cemeteries. In 1999, \$6,818,011 in federal funds was provided for the construction of the Agawam cemetery. In 2003, \$4,780,375 in federal funds was provided for the expansion of the Agawam cemetery. In 2003, \$7,422,013 in federal funds was provided for the construction of the Winchendon cemetery.

72. Soon after Massachusetts recognized the right to marry for individuals of the same sex, DVS sought clarification from the VA as to how to comply with federal law. In response to this inquiry, the VA informed the Commonwealth that 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." 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 at 1 (June 18, 2004), attached as Exhibit 3.

73. The VA further stated that, in light of DOMA, the cemeteries at Agawam and Winchendon "would not be operated solely for the interment of veterans and their spouses and children if [Massachusetts] allowed the interment of a person solely on the basis that the person is recognized under [Massachusetts] law as being the same-sex spouse of a veteran." Ex. 3 at 2.

74. On June 4, 2008, the National Cemetery Administration published NCA Directive 3210/1, which states 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.” NCA Directive 3210/1 (June 4, 2008), attached as Exhibit 4.

75. Massachusetts veterans and their family members regularly apply for burial in either the Agawam or Winchendon cemetery far in advance of their deaths. DVS either pre-approves or denies these applications by determining whether the applicants are eligible for burial in either of these cemeteries, based on the federally mandated and state-specific criteria described herein.

76. DVS treats identically the applications of married veterans in same-sex and different-sex relationships.

77. DVS has pre-approved an application for burial submitted by a Massachusetts veteran and his same-sex spouse. This same-sex spouse is not otherwise eligible for burial in a Massachusetts veterans’ cemetery.

78. The VA has taken the position that it has the authority to withhold federal funding from the Commonwealth due to the Commonwealth’s equal and identical treatment of married individuals in assessing eligibility for interment.

79. Section 3 of DOMA creates an unconstitutional dilemma for the Commonwealth by requiring DVS to choose between, on the one hand, violating the Equal Protection Clause of the Fourteenth Amendment by refusing burial of the same-sex spouses of Massachusetts veterans in a Massachusetts veterans’ cemetery and, on the other hand, risking enforcement for non-compliance by the VA if DVS continues to apply the state definition of marriage in assessing eligibility for burial in a veterans’ cemetery.

CAUSES OF ACTION

**COUNT ONE – VIOLATION OF THE TENTH AMENDMENT
AND CONSTITUTIONAL PRINCIPLES OF FEDERALISM
(U.S. CONST. amend. X)**

80. The allegations contained in paragraphs 1 through 79 are re-alleged and incorporated into this count as though fully set forth herein.

81. The Tenth Amendment to the United States Constitution expressly reserves to the states all powers except those limited powers granted to the federal government.

82. The Tenth Amendment ensures the division of powers between the states and federal government that is necessary for the dual sovereignty of the federal system.

83. The Tenth Amendment preserves for the states the authority to regulate and define marriage for their citizens.

84. Congress lacks the authority under Article I of the United States Constitution to regulate the field of domestic relations, including marriage.

85. Section 3 of DOMA violates the Tenth Amendment, exceeds Congress's Article I powers, and runs afoul of the Constitution's principles of federalism by creating an extensive federal regulatory scheme that interferes with and undermines the Commonwealth's sovereign authority to define marriage and to regulate the marital status of its citizens.

86. Enforcement of Section 3 of DOMA unconstitutionally commandeers the Commonwealth and its employees as agents of the federal government's regulatory scheme and requires the Commonwealth to facilitate the implementation of a discriminatory federal policy.

COUNT TWO – VIOLATION OF THE SPENDING CLAUSE
(U.S. CONST. art. I, § 8)

87. The allegations contained in paragraphs 1 through 86 are re-alleged and incorporated into this count as though fully set forth herein.

88. Article I, § 8 of the United States Constitution limits the power of Congress to attach conditions to the receipt of federal funds. One such limitation is that Congress may not exercise its spending power in a manner that induces a state to violate the constitutional rights of its citizens.

89. The Fourteenth Amendment to the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

90. Massachusetts recognizes a unitary status of married persons, irrespective of whether they are part of a same-sex or a different-sex couple. Section 3 of DOMA, as applied to the Medicaid statute, 42 U.S.C. §§ 1396 *et seq.*, requires the Commonwealth to violate the Equal Protection Clause by treating married individuals in same-sex relationships and married individuals in different-sex relationships differently for purposes of determining eligibility for Medicaid benefits.

91. Section 3 of DOMA, as applied to the State Cemetery Grants Program, 38 U.S.C. § 2408, likewise requires the Commonwealth to violate the Equal Protection Clause by treating married individuals in same-sex relationships and married individuals in different-sex relationships differently for the purposes of determining eligibility for burial in a Massachusetts veterans’ cemetery.

92. None of the interests purportedly furthered by DOMA, as it applies to these programs, justifies discrimination against married individuals in same-sex relationships. Because all of these individuals are married under Massachusetts law, there is no basis for DOMA's required differential treatment of same-sex and different-sex couples. As a result, DOMA, as applied to these programs, violates the Spending Clause.

93. Another limitation on Congress's authority pursuant to the Spending Clause is that Congress may not attach conditions to the receipt of federal funds that lack a sufficient nexus to the purpose(s) advanced by the program's implementation.

94. Medicaid funding is given to MassHealth for the purpose of providing healthcare coverage to low- and moderate-income residents of the Commonwealth.

95. CMS has mandated that MassHealth must disregard the valid marriages of same-sex couples in order to continue to receive federal funds.

96. Veterans' cemetery funding is given to DVS for the purpose of constructing and improving cemeteries that provide a convenient burial site for military veterans and their families.

97. The VA has mandated that DVS must disregard the valid marriages of veterans and their same-sex spouses in order to continue to receive federal funds.

98. Because there is no nexus between discriminating against individuals in same-sex marriages and the purposes advanced by these programs, Section 3 of DOMA, as applied to these programs, violates the Spending Clause.

COUNT THREE – DECLARATORY JUDGMENT
(28 U.S.C. § 2201)

99. As demonstrated by the allegations set forth in paragraphs 1 through 98, which are incorporated into this count as though fully set forth herein, there is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Commonwealth and the proper legal relations between the Commonwealth and the Defendants to warrant relief under 28 U.S.C. § 2201.

100. The harm to the Commonwealth as a direct result of DOMA is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties.

PRAYER FOR RELIEF

The Commonwealth of Massachusetts respectfully requests that the Court:

- A. Enter an order declaring that 1 U.S.C. § 7 is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples;
- B. Enter an order declaring that 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;
- C. Enter an order declaring that 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;

- D. Enjoin Defendants and any other agency or official acting on behalf of Defendant the United States of America from enforcing 1 U.S.C. § 7 against Massachusetts and any of its agencies or officials;
- E. Award attorneys' fees and costs; and
- F. Grant any other relief that the Court considers proper.

Dated: July 8, 2009
Boston, Massachusetts

Respectfully submitted:

COMMONWEALTH OF MASSACHUSETTS
MARTHA COAKLEY
ATTORNEY GENERAL

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ADDENDUM OF FEDERAL LAW REGULATING MARRIAGE

Topic	Citation	Effect on Marriage
Federal Employee Benefits	5 U.S.C. §§ 6382-6383	Most federal employees may use up to a total of twelve administrative work weeks of sick leave each year to care for a spouse with a serious health condition.
	5 U.S.C. § 8133	If a federal employee's death resulted from an injury sustained in the performance of duty, the employee's surviving spouse is eligible for compensation equal to a percentage of the employee's monthly pay. The compensation for a surviving spouse is paid for life, unless he or she re-marries before the age of fifty-five.
	5 U.S.C. §§ 8331, 8401; 5 U.S.C. §§ 8331(10), 8401(23)	Federal employees with permanent appointment are eligible for retirement and disability benefits under either the Civil Service Retirement System ("CSRS") or the Federal Employees Retirement System ("FERS"). Both CSRS and FERS provide survivor benefits for the spouse of a deceased federal employee or retiree.
	5 U.S.C. §§ 8341(b)(1), 8442(a)(1)	Married federal employees who retire under either CSRS or FERS receive a joint and survivor annuity.
	5 U.S.C. § 8341(b)(1)	Under CSRS, the surviving spouse of a federal employee is eligible for an annuity equal to 55% of the retirement benefit that the deceased employee had accrued at the time of death.
	5 U.S.C. § 8442(a)(1)	Under FERS, the surviving spouse is eligible for a lump-sum survivor benefit equal to one-half of the employee's annual basic pay plus a lump-sum payment.
	5 U.S.C. § 8901(5)	Spouses of federal employees can obtain health insurance through the Federal Employees Health Benefits Program ("FEHB") as a member of the employee's family.
	5 U.S.C. §§ 8905, 8905a U.S. Office of Personnel Management, <i>Death Benefits</i> , http://www.opm.gov/retire/faq/post/faq4.asp#family (last visited July 7, 2009)	Spouses who survive a deceased federal employee who was enrolled in the FEHB may continue to participate in that program at the same cost as a federal employee if, prior to the employee's death, the spouse was covered as a family member under the plan.
	5 U.S.C. §§ 8981-8992	Spouses of federal employees can obtain dental insurance and vision benefits as a member of the employee's family.
	Federal Retirement Thrift Investment Board, <i>TSP Features for Civilians</i> , http://www.tsp.gov/features/chapter15.html (last visited July 7, 2009)	Under FERS, federal employees participate in a Thrift Savings Plan. The employee's spouse has the right to consent before money is borrowed from the account as well as to approve withdrawal.
	FSAFeds Program, <i>Summary of Benefits with Frequently Asked Questions</i> , https://www.fsafeds.com/fsafeds/SummaryofBenefits.asp#HCFSA (last visited July 7, 2009)	Spouses of federal employees can participate in the employee's Health Care Flexible Savings Account.

Topic	Citation	Effect on Marriage
Federal Employee Benefits	U.S. Department of Labor, <i>Employment Standards Administration, Division of Federal Employees' Compensation, CA-11</i> , http://www.dol.gov/esa/regs/compliance/owcp/ca-11.htm (last visited July 7, 2009)	If a federal employee becomes disabled from a work-related injury, the employee is paid one-third of his or her salary if he or she has no dependents, but three-quarters of his or her salary if he or she has dependents. A spouse can be considered a dependent.
Bankruptcy	11 U.S.C. § 302	Spouses are permitted to file jointly for bankruptcy protection.
	Administrative Office of the United States Courts, <i>Bankruptcy Basics</i> (April 2006), http://www.uscourts.gov/bankruptcycourts/bankbasics0908.pdf	The ability to file jointly allows creditors to file only one claim and the married couple to pay only one filing fee.
	11 U.S.C. §§ 507, 1328	A former spouse of a debtor making a claim for payments required as part of a divorce or separation agreement is given a higher priority than some other creditors.
National Housing Act	12 U.S.C. § 1701j-3(d)(6)	Banks sometimes utilize a due-on-sale clause in mortgage agreements that permit them to declare a loan payable in full if the borrower sells the property without the bank's consent. Use of a due-on-sale clause is prohibited in cases of transfers of residential property from one spouse to another.
Consumer Credit Protection Act	15 U.S.C. §§ 1673(a), (b)(2)	Up to 25% of a person's disposable weekly earning can be subject to garnishment, but if the purpose of the garnishment is to enforce an order for the support of any person, including a spouse or former spouse, the maximum that can be garnished is 60%.
Copyright	17 U.S.C. § 203(a)(2)(A)	When an author is dead, his or her right to terminate the licensing of a copyright may be exercised by the author's surviving spouse.
	17 U.S.C. § 304(a)(1)(C)(2)	A surviving spouse is entitled to the renewal and extension of a copyright for a further term of sixty-seven years.
Education Loans	20 U.S.C. § 1087e(e)(2)	Various federal student loans are eligible for income contingent repayment. If the borrower is married, the repayment schedule is based upon the adjusted gross income of the borrower and his or her spouse.
	20 U.S.C. §§ 1087nn(a), (b)(1), (b)(4), (b)(7); 20 U.S.C. § 1087vv(d)(5)	Eligibility for federal financial assistance for education is determined based on information provided in the Free Application for Federal Student Aid ("FAFSA"), which requires identification of a student's marital status as well as information about the available income, assets, and additional expenses of the student's spouse. A student is considered an independent applicant if he or she is married.
	20 U.S.C. § 1087oo(a); 20 U.S.C. § 1087oo(f)(1)	The expected family contribution of any dependent student includes consideration of both parents' income and assets if the parents are married. If a student's parents are not married or are divorced, parental contribution includes only the income and assets of one of the parents.
Tax	26 U.S.C. § 1	Spouses are permitted to file a joint federal tax return.
	26 U.S.C. § 105	A healthcare flexible spending account, which is exempt from income tax, can be used to pay for medical expenses of an employee or a spouse.
	26 U.S.C. § 106	When a married employee receives employer-provided health benefits, the value of the health insurance for the employee's spouse is not considered taxable compensation to the employee.

Topic	Citation	Effect on Marriage
Tax	26 U.S.C. § 163(h)(3)	Taxpayers are limited to \$1,000,000 in mortgage interest deductions for acquisition indebtedness and \$100,000 for home equity indebtedness on either a joint return or a single return; married taxpayers filing individually are limited to \$500,000 for acquisition indebtedness and \$50,000 for home equity indebtedness.
	26 U.S.C. § 213	Married couples filing jointly may pool deductions, such as the deduction for certain uncompensated medical expenses.
	26 U.S.C. § 215(a)	Alimony payments are excluded from the taxable income of the spouse making alimony payments.
	26 U.S.C. § 219	An employed spouse is permitted to make an Individual Retirement Account contribution on behalf of a non-working spouse or a spouse who has little income.
	26 U.S.C. § 401	Spouses receive preferential treatment in retirement savings and use of retirement funds.
	26 U.S.C. § 1041	The transfer of property (including retirement funds) to a spouse, or to a former spouse incident to a divorce, is not a taxable transfer.
	26 U.S.C. § 1211(b)(1)	Taxpayers are limited to a \$3,000 net capital loss deduction on a joint or single return; married taxpayers filing individually are limited to a \$1,500 net capital loss deduction.
	26 U.S.C. § 2056(a)	The value of the taxable estate is determined by deducting the value of any interest in property that passes or has passed from the decedent to a surviving spouse.
	26 U.S.C. § 2603; 26 U.S.C. § 1041; Internal Revenue Service, <i>Frequently Asked Questions on Gift Taxes</i> , http://www.irs.gov/businesses/sm/all/article/0,,id=108139,00.html (last visited July 7, 2009)	An individual can give another individual who is not a spouse no more than \$13,000 in a calendar year without having to file a gift tax return. There is no limit on the amount one spouse can give another.
	26 U.S.C. § 6013(d)(3)	Spouses have joint and several liability for the income tax on a joint return unless innocent spouse relief applies.
Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)	29 U.S.C. § 1166(a); U.S. Department of Labor, <i>Continuation of Health Coverage</i> , http://www.dol.gov/dol/topic/health-plans/cobra.htm (last visited July 7, 2009)	If an employer chooses to provide an employee and his or her spouse with healthcare coverage, COBRA requires the employer upon termination of employment to offer the employee's spouse the opportunity to continue their healthcare coverage for a prescribed period, provided that the spouse pays the applicable premium.
Employee Retirement Income Security Act (ERISA)	26 U.S.C. §§ 401(a)(11); 401(a)(17)	Pension plans are required to provide spouses with certain protections, including a Qualified Preretirement Survivor Annuity while the employee is working and a Qualified Joint and Survivor Annuity at retirement.
	26 U.S.C. § 401(a)(11)(B)(iii)	Under a profit-sharing plan, a spouse is the automatic beneficiary of the employee's benefit, unless waived by the spouse.
	26 U.S.C. § 417(a)(2)	An employee must obtain his or her spouse's approval to waive a Qualified Joint and Survivor Annuity or a Qualified Pre-retirement Survivor Annuity.
	26 U.S.C. § 417(a)(4)	An employee must obtain his or her spouse's approval to use his or her accrued pension benefit as a security for a loan.

Topic	Citation	Effect on Marriage
ERISA	29 U.S.C. § 1055	Defined contribution plans, such as 401(k) plans, pay the account balance to the designated beneficiary if the participant dies. The employee's spouse is the automatic beneficiary upon the employee's death, unless the employee has specifically designated someone else.
	29 U.S.C. § 1056(d)(3); 26 U.S.C. § 401(a)(13)(B)	Benefits from a retirement plan subject to ERISA may not be pledged, attached, levied upon or awarded by a court to another private party. One major exception is divorce proceedings, where the retirement assets may be viewed as marital property. Federal law permits benefits to be awarded to a former spouse through a Qualified Domestic Relations Order.
Family and Medical Leave Act	29 U.S.C. § 2612(a)(1)(C)	Requires covered employers to offer employees up to twelve weeks of unpaid leave to care for a spouse.
Veterans Benefits	38 U.S.C. § 1115	Veterans who have at least a 30% disability are entitled to additional disability compensation if they have dependents. For this purpose, a spouse is considered a dependent.
	38 U.S.C. §§ 1121, 1141	A surviving spouse of a veteran is entitled to receive a monthly pension if the veteran's death was service connected.
	38 U.S.C. §§ 1158	A veteran's spouse may receive compensation if a veteran disappears.
	38 U.S.C. §§ 1311, 1317	A surviving spouse of a veteran is entitled to receive monthly dependency or indemnity compensation payments if the veteran's death was service connected.
	38 U.S.C. §§ 1701, 1781	The spouses of certain veterans are entitled to medical care provided by the government.
	38 U.S.C. § 1722	In determining, based on income and assets, whether a veteran has the ability to defray necessary home care and medical expenses, the property of the spouse of the veteran is included as an asset of the veteran.
	38 U.S.C. § 1901	Spouses of veterans may be beneficiaries of National Service Life Insurance.
	38 U.S.C. § 2402	Spouses of veterans are eligible for interment in national cemeteries if the veteran is eligible.
	38 U.S.C. §§ 3500, 3501, 3511, 3512, 3534	The surviving spouse of a veteran who died of a service-connected disability is entitled to educational assistance for up to 45 months and to job counseling, training, and placement services.
	38 U.S.C. § 3701(b)(2)	The loan guarantee benefit extends to surviving spouses of veterans who died on active duty or as a result of a service-connected disability.
	38 U.S.C. § 3704(c)(2); U.S. Department of Veterans Affairs, <i>Pre-Loan Frequently Asked Questions</i> , http://www.homeloans.va.gov/faq/preln.htm (last visited July 7, 2009).	Loans guaranteed by the U.S. Department of Veterans Affairs assist eligible veterans in the purchase of a home by protecting private lenders against loss if the veteran fails to repay the mortgage. The guarantee requires that the veteran certify an intent to occupy the property, but if the veteran is in active duty status and unable to occupy, the veteran's spouse can fulfill the occupancy requirement.
	38 U.S.C. § 4215; 5 U.S.C. § 2108	Surviving spouses and certain spouses enjoy certain preferences in federal employment and job training.
	38 C.F.R. § 39.5(a)	Spouses of veterans are entitled to interment in state-operated veterans' cemeteries if the veteran is eligible for burial.

Topic	Citation	Effect on Marriage
Medicare	42 U.S.C. § 1395i-2	Marriage allows an ineligible individual who has never worked or who has not worked long enough to qualify for free hospital insurance based on his or her spouse's work record.
	Centers for Medicare & Medicaid Services, <i>Medicare and You 2009</i> , CMS Publication No. 10050 (Sept. 2008), http://www.medicare.gov/Publications/Pubs/pdf/10050.pdf	Once a person qualifies for Medicare Part A (hospital insurance) – including by qualifying on the basis of his or her spouse's eligibility for Medicare Part A even though he or she would not independently qualify – he or she can enroll in Part B (medical insurance) by paying a monthly premium. Anyone enrolled in both Medicare Part A and Part B may enroll in Part C, which provides additional benefits. When a person receives coverage under Medicare Part A, Part B, or Part C, he or she is eligible to receive prescription drug coverage under Part D by paying a monthly premium.
Medicaid	42 U.S.C. § 1396r-5(b)(1)	The income of a spouse is not deemed available to a married Medicaid applicant receiving institutionalized care.
	42 U.S.C. § 1396r-5(d)	After an institutionalized spouse is determined to be eligible for medical assistance, in determining the amount of the institutionalized spouse's income that is to be applied monthly to payment for the costs of care in the institution, a community spouse allowance is to be deducted from the institutionalized spouse's countable income.
	20 C.F.R. §§ 416.1160, 416.1202	The income and assets of a spouse are deemed available to a married Medicaid applicant.
	42 C.F.R. § 433.36(g)(3)(i)	A state cannot place a lien on an institutionalized Medicaid recipient's property if the member's spouse is living in the home.
	42 C.F.R. § 433.36(h)(2)(i)	A state can recover payments from the estates of deceased members. This recovery must be deferred when there is a surviving spouse.
Social Security	42 U.S.C. § 402(b), (c)	If a worker is eligible for federal disability benefits, a spouse and/or a divorced spouse may qualify for up to 50% of the disabled worker's benefit amount.
	42 U.S.C. § 402(b), (c)	When both members of a married couple are retired and collecting Social Security benefits, the lower-earning spouse can increase his or her benefit by up to one half of the higher-earning spouse's payment.
	42 U.S.C. § 402(e), (f)	After a worker's death, a surviving spouse and/or ex-spouse may receive the worker's higher benefit, instead of his or her own benefit, as long as the spouse is at least sixty years old, was married to the worker for at least nine months, and is not currently married to someone else.
	42 U.S.C. § 402(i); 20 C.F.R. §§ 404.390 – 404.391 and § 404.347	A surviving spouse is entitled to a one-time lump-sum death benefit of \$255 if the surviving spouse was "living in the same household with the deceased at the time of death," if the surviving spouse applies for the benefit "prior to the expiration of two years after the date of death ...," and if the deceased spouse was "fully or currently insured" at the time of death.
	42 U.S.C. § 1382	When two eligible individuals are spouses who live together, only one is eligible for Supplemental Security Income benefits in a given month.
	42 U.S.C. §§ 1382a, 1382b; Social Security Administration, <i>Understanding Supplemental Security Income</i> , http://socialsecurity.gov/ssi/text-income-ussi.htm (last visited July 7, 2009)	For purposes of determining eligibility for Supplemental Security Income benefits, the resources of a spouse are deemed to be those of the applicant as well, with certain limited exclusions.

Topic	Citation	Effect on Marriage
Public Safety Officers Benefit Program	42 U.S.C. § 3796; Bureau of Justice Assistance, <i>Public Safety Officers' Benefits Program</i> , http://www.ojp.usdoj.gov/BJA/grant/psob/psob_main.html (last visited July 7, 2009)	If a public safety officer dies in the line of duty, his or her spouse is entitled to death benefits. As of October 1, 2008, the benefit amount is a one-time payment of \$315,746.
	42 U.S.C. § 3796d-1; 38 U.S.C. § 3532; Bureau of Justice Assistance, <i>Public Safety Officers' Benefits Program: Education Assistance Benefits</i> , http://www.ojp.usdoj.gov/BJA/grant/psob/psob_education.html (last visited July 7, 2009)	If a public safety officer dies or is permanently disabled in the line of duty, his or her spouse is entitled to payment for education expenses, including tuition and fees, room and board, books, supplies, and other education-related costs. As of October 1, 2008, the maximum award for a full-time student is \$915.00 per month of class attendance.
Child Support Enforcement	42 U.S.C. §§ 659, 660	The federal government assists in enforcing the support obligations of parents to their children and the spouse with whom the children are living. Federal courts have jurisdiction to hear enforcement matters, and the federal government withholds payment due to an individual if that individual owes child support.
Older Americans Act	42 U.S.C. § 3030g-21	Nutrition services, including congregate and home delivery meals, are provided to older individuals (age sixty and over) and their spouses, irrespective of the spouse's age.
Railroad Retirement Act	45 U.S.C. § 59	45 U.S.C. § 51 creates liability for injuries to employees due to railroad negligence. Any right of action given to a person suffering injury survives to his or her personal representative, for the benefit of the surviving spouse.
	45 U.S.C. § 231a(c)	Spouses of railroad workers are entitled to retirement and disability annuities to which railroad workers are entitled.
	45 U.S.C. § 231a(c)(2)	An annuity may also be payable to the divorced wife or husband of a retired employee if their marriage lasted for at least ten consecutive years, both have attained age sixty-two for a full month, and the divorced spouse is not currently married.
Federal Court Privileges	<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	In federal courts, under the testimonial privilege, an individual cannot be compelled to testify against his or her spouse.
	<i>Blau v. United States</i> , 340 U.S. 332 (1951)	In federal courts, confidential communications between spouses are privileged. The privilege can be asserted by either spouse.
Health Insurance Portability and Accountability Act (HIPAA)	U.S. Department of Labor, <i>Portability of Health Coverage</i> , http://www.dol.gov/dol/topic/health-plans/portability.htm (last visited July 7, 2009)	Special enrollment rights allow spouses of a covered employee to enroll outside of a group plan's open enrollment period.

Exhibit 1

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2325
Boston, Massachusetts 02203
617-565-1188



CENTERS FOR MEDICARE & MEDICAID SERVICES

Office of the Regional Administrator / Region I

May 28, 2004

Kristen Reasoner Apgar
General Counsel
The Commonwealth of Massachusetts
Executive Office of Health and Human Services
1 Ashburton Place, Room 4409
Boston, Massachusetts 02408

Re: Implementation of Goodridge decision

Dear Ms. Apgar:

This is in response to your letter of March 22, 2004 to Brian Cresta regarding issues arising from the Goodridge decision and particularly how that decision interacts with the Federal Medicaid statute. In general, the Department of Health and Human Services does not provide legal opinions. However, we certainly want to help the Commonwealth avoid potential conflicts with Federal law, which could result in loss of Federal matching funds.

You are undoubtedly aware that under the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 1 U.S.C. § 7,

In determining the meaning of any Act of Congress . . . 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.

In large part, DOMA dictates the response to your seven questions which we will answer below. In short, the DOMA does not give the Centers for Medicare & Medicaid Services (CMS) the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid.

1. If the state determines that the applicant spouse in a same-sex marriage is *not* eligible for Medicaid, but the applicant would be eligible if not married, would the state's denial of Medicaid benefits violate Federal Medicaid law?

Yes. If the applicant is eligible for medical assistance under the state plan approved under title XIX, the state must provide medical assistance to the applicant or be in violation of Federal Medicaid law. If, for example, under state law the applicant is ineligible because his same sex spouse has income or resources which are deemed to him thereby making him ineligible, this deeming would not be permitted under the Federal Medicaid statute. Deeming of income and resources is only permitted between spouses, as defined by DOMA, or from a parent to a minor

or disabled child. Because a same sex couple are not spouses under Federal law, the deemed income or resources which would result in the applicant's ineligibility cannot be recognized under Federal law.

2. Conversely, if the state determines that the applicant spouse in a same-sex marriage is eligible for Medicaid, but the applicant would *not* be eligible, if not married (for example, where the spouse's medical expenses are counted to meet applicant's deductible or spenddown), would FFP be available on the state's expenditures for the applicant spouse?

No. If the reason that the applicant is eligible under the state's determination is the state's treatment of the same sex partner as a spouse, FFP would not be available in the state's expenditures for the individual. The individual may be eligible for a state only medical assistance benefit.

3. Similarly, if the state treats the same-sex spouse of an institutionalized applicant as the "community spouse" under the "spousal impoverishment" rules, and determines that the institutionalized applicant is eligible for Medicaid when the applicant would not be eligible if not married, would FFP be available on the state's expenditures for the institutionalized individual?

If the applicant would be ineligible if he or she were treated as being unmarried, no FFP would be available in the state's expenditures for that individual. The spousal impoverishment protections only apply to an institutionalized individual with a community spouse. Under DOMA a same sex couple would not qualify as an individual with a spouse.

4. Under Federal Medicaid law, a trust established by the spouse of an institutionalized Medicaid applicant is considered to be established by the applicant. If the same-sex spouse of an institutionalized Medicaid applicant establishes a trust, may the state, in determining Medicaid eligibility, consider the trust to be established by the institutionalized applicant?

Not in their capacity as a spouse; however, the rule under which a trust will be considered to be established by an institutionalized individual also applies when an individual other than a spouse establishes the trust. The institutionalized individual will be considered to have established the trust if his or her assets were used to form all or part of the corpus of the trust and another individual who has the legal authority to act in place of or on behalf of the individual establishes the trust. Whether a particular individual has the legal authority to act in this capacity for the institutionalized individual is a matter of state law.

5. Under federal Medicaid law, if an institutionalized Medicaid applicant transfers assets for less than fair market value to the applicant's spouse (or for the spouse's benefit), the transfer does not result in a penalty. If an institutionalized Medicaid applicant transfers assets for less than fair market value to his same-sex spouse, may the state treat the transfer as a permissible transfer that results in no penalty?

No. The provision governing asset transfers would not apply in the context of a same sex spouse since under DOMA that individual is not a spouse.

6. Where all federal Medicaid requirements for placing a real estate lien otherwise are present, may the state opt not to place a lien, so long as the same-sex spouse is lawfully residing in the home?

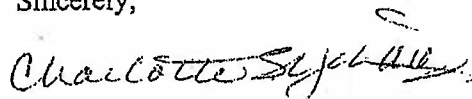
Each state follows its own laws or regulations on imposition of liens and on estate recoveries within Federal guidelines. Federal language which restricts imposition of liens or adjustment or recovery in the case of a lien until after the death of the surviving spouse would not apply to the surviving member of a same sex couple. However, while imposition of a lien on real property is optional, estate recovery from real property subject to a lien is mandatory.

7. Where the state otherwise has a claim under federal Medicaid law against a deceased recipient's estate, may the state opt not to require repayment until after the death of the surviving same-sex spouse? If repayment would otherwise be required under federal Medicaid law, may the state amend its undue hardship criteria, so as to waive repayment until after the death of the surviving same-sex spouse?

Again, each state follows its own laws and regulations on estate recovery, consistent with Federal guidelines. DOMA, of course, effectively prohibits the recognition of same sex spouses.

I hope this information is helpful as Massachusetts considers its response to the *Goodridge* decision.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charlotte S. Yeh", with a small flourish at the end.

Charlotte S. Yeh, MD, FACEP
Regional Administrator

Exhibit 2

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2275
Boston, Massachusetts 02203



Division of Medicaid and Children's Health Operations / Boston Regional Office

August 21, 2008

JudyAnn Bigby, M.D., Secretary
Executive Office of Health
and Human Services
One Ashburton Place
Boston, Massachusetts 02108

RECEIVED
AUG 27 2008
E.O. 12812

Dear Dr. Bigby:

We understand that recently the legislature passed and the Governor signed an Act Relative to Equality in the MassHealth Program. This Act (Chapter 217 of the Acts of 2008) amended Chapter 118E of the General Laws by adding §61. This section provides that notwithstanding the unavailability of Federal financial participation (FFP), 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 1 U.S.C. § 7 or any other Federal non-recognition of spouses of the same sex.

We are enclosing a copy of a letter we wrote to Kristen Reasoner Apgar on May 28, 2004, concerning the implementation of the *Goodridge* decision and the Defense of Marriage Act (DOMA), Public Law No. 104-199, 1 U.S.C. § 7.¹ We thought you would be attempting to implement the *Goodridge* decision in MassHealth in accordance with the guidance we provided you in that letter. Apparently, the limitation on FFP prevented you from doing so without legislative approval. Your current law seems to address this.

As our May 28, 2004 letter indicated, and as your new State law appears to recognize, DOMA applies to all Federally funded programs including Medicaid. DOMA limits the availability of FFP by precluding recognition of same sex couples as "spouses" in the Federal program. DOMA also precludes the State from narrowing Federal Medicaid entitlements by considering individuals as spouses who would not be spouses under Federal law.

¹DOMA 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 a wife.

Page 2 - JudyAnn Bigby, M.D., Secretary

All Federal funds, including Title XIX (and Title XXI) funds, used to reimburse the State for benefits or administrative costs, are covered under DOMA. You must pay the full cost, including the cost of administration, of a program that does not comply with Federal law. To assure there is no conflict and for MassHealth to remain in compliance with all applicable Federal laws, you can elect to set up a separate State financed and administered program in which no Federal funds are used if the State believes that long-term care or any other Medicaid benefits in the form of spousal protections might be provided as a result of a same sex marriage under State law. Or, you can elect to apply your same sex marriage law in the context of MassHealth, as long as you separately identify any service and administrative expenditures that result from the difference between your definition of spouse and the DOMA definition and do not submit any claims for FFP for those expenditures.

In addition, you cannot use State law to deprive anyone of Federal entitlements in those programs by considering individuals who would not be spouses under Federal law to be spouses in MassHealth pursuant to State law. For example, under the Medicaid statute, deeming of income and resources is only permitted between spouses as defined by DOMA. Therefore, 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.

We would like to meet with you and your staff within the next several weeks to discuss implementation of the *Goodridge* decision and your planned implementation of the new §61 of Chapter 118E of the General Laws. Allen Bryan will be contacting appropriate staff to set up a date and time for a meeting. Besides Mr. Bryan, Nancy Nemon, Irvin Rich, and I will attend.

Please contact Allen Bryan if you have any additional questions before the meeting. He can be reached at (617) 565-1246.

Sincerely,



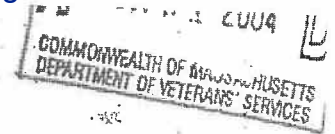
Richard R. McGreal
Associate Regional Administrator

Enclosure

Exhibit 3



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420



JUN 11 2004

In Reply Refer To:

022

Ms. Joan E. O'Connor
General Counsel
Massachusetts Department of Veterans' Services
600 Washington Street, Suite 1100
Boston, Massachusetts 02111

Dear Ms. O'Connor:

I am responding to your March 30, 2004, letter to Department of Veterans Affairs (VA) Regional Counsel Edward J. Lukey concerning implementation of the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Welfare*, 440 Mass. 309 (2003), which generally held that the Massachusetts Constitution protects same-sex marriages. Specifically, your letter asks whether the Massachusetts Department of Veterans' Services (DVS) may bury the same-sex spouse of a veteran in its Agawam or Winchendon state veterans cemetery without losing Federal funding provided under VA's state cemetery grants program. As I explain in greater detail below, we believe VA would be entitled to recapture Federal grant funds provided to DVS for either of those cemeteries should DVS decide to bury the same-sex spouse of a veteran in the cemetery, unless that individual is independently eligible for burial on some basis other than being the spouse of the veteran.

Section 2408(b)(3) of title 38, United States Code, provides that the United States shall be entitled to recover state cemetery grant funds if a state "ceases to operate [a VA-funded] cemetery as a veterans' cemetery." Congress did not define "veterans' cemetery" in section 2408, but expressly authorized the Secretary of Veterans Affairs to establish regulations governing the conditions for state cemetery grant awards. See 38 U.S.C. § 2408(c). Pursuant to this statutory authority, the Secretary promulgated regulations that condition grant eligibility upon operating a cemetery "solely for the interment of veterans, their wives, husbands, surviving spouses, minor children, and unmarried adult children who were physically or mentally disabled and incapable of self-support." See 38 C.F.R. § 39.2(a) (2003). VA recently modified its regulations to provide, among other things, that "a State veterans' cemetery must be operated solely for the interment of veterans, their spouses, surviving spouses," and certain children to be eligible for funding under the state cemetery grants program. See 38 C.F.R. § 39.5 (2004). Although Part 39 of title 38, Code of Federal Regulations, has never included a definition of the words "wife," "husband," and "spouse," it is clear from their common meaning that those words describe a person who is "married" to a veteran.

Ms. Joan E. O'Connor

Under Federal law, "marriage" does not include being the wife, husband, or spouse of a person of the same sex. Section 7 of title 1, United States Code, 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.

This Federal law governs the Secretary's determination of whether a state cemetery is being operated in accordance with VA regulations. Under former section 39.2(a) and current section 39.5, a state cemetery would not be operated solely for the interment of veterans and their spouses and children if it allowed the interment of a person solely on the basis that the person is recognized under state law as being the same-sex spouse of a veteran. The United States Government would have discretion to invoke the recapture provisions of 38 U.S.C. § 2408(b)(3) should DVS decide to authorize the interment of same-sex spouses at the Agawam or Winchendon cemetery.

While we believe section 2408 would entitle the United States to recapture cemetery grant funds if a grantee permitted the burial of veterans' same-sex spouses, whether the Government would assert such claims would depend upon the policies of the Executive branch officials in office at the time.

Your letter states that DVS receives VA grants only under the state cemetery grants program. Nonetheless, you ask whether the same-sex spouse of a veteran would be entitled to receive the benefit of any other grants that VA may provide to DVS in the future for the assistance of veterans and their spouses. You should be aware that the *Goodridge* decision might have implications for the Holyoke and Chelsea Soldiers' Homes. VA provides grants to states to assist in the acquisition, construction, and renovation of State veterans' homes. States must verify that not more than 25 percent of a home's residents will be non-veterans to qualify for Federal grant funds. See 38 U.S.C. § 8135(a)(4). VA has long interpreted this law as requiring that non-veteran residents of state veterans' homes be either veterans' spouses or parents of certain deceased veterans. Admission of same-sex spouses of veterans would probably not trigger the recapture provision for these grants in 38 U.S.C. § 8136, which authorizes recapture if a home ceases to be operated principally for furnishing care to veterans. However, VA's interpretation of section 8135 would render the Holyoke and Chelsea Soldiers' Homes ineligible for future grants if those homes admitted the same-sex spouses of veterans.

As you know, VA also provides per diem payments to Massachusetts to help defray the cost of hospital, nursing home, and domiciliary care provided to veterans in the Holyoke and Chelsea Soldiers' Homes. State homes must meet the standards prescribed by VA to receive per diem payments. 38 U.S.C. § 1742(a). These

3.

Ms. Joan E. O'Connor

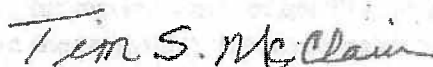
standards require that all non-veteran nursing home residents receiving care in state veterans' homes be either veterans' spouses or parents of certain deceased veterans. See 38 C.F.R. § 51.210(d). VA manual provisions impose the same requirement upon state veterans' home facilities for per diem payments for provision of hospital and domiciliary care. For the reasons described above in our discussion of 1 U.S.C. § 7, the Massachusetts Soldiers' Homes would not satisfy this requirement if they admitted the same-sex spouses of veterans. VA would be required by law to withdraw recognition of the homes and cease paying per diem for the care of veterans in those homes should such admissions occur.

You also ask for our opinion concerning the impact of *Goodridge* on annuities provided to surviving spouses by DVS, which we understand are contingent on a VA finding of service-connected death. Section 2307 of title 38, United States Code, authorizes VA to pay burial and funeral expenses incurred as a result of a veteran's service-connected death "upon the request of the survivors of such veteran." VA has interpreted this statute as authorizing the filing of service-connected burial claims by funeral directors, individuals who used personal funds to pay burial expenses, and executors or administrators of veterans' estates. See 38 C.F.R. § 3.1601(a)(1). Thus, VA's consideration of a claim for service-connected burial benefits is not conditioned upon marriage, and such benefits may be claimed by a person recognized under state law as being the same-sex spouse of a veteran as long as that person used personal funds to pay the veteran's burial expenses or is the executor or administrator of the veteran's estate. Accordingly, VA would make a finding as to whether a veteran's death was service connected in a claim under 38 U.S.C. § 2307 by a same-sex spouse who had paid funeral or burial expenses of a deceased veteran.

In a separate communication with Mr. Lukey, you asked whether the plot allowance that VA pays to states that provide for the interment of certain veterans also applies to the interment of veterans' spouses. Section 2303(b) of title 38, United States Code, authorizes VA to pay a \$300 plot or interment allowance to a state that buries a "veteran" without charge for the cost of a plot or interment. VA does not have authority under section 2303(b) to pay the allowance to states for burial of veterans' spouses.

I hope this information is helpful to you.

Sincerely yours,



Tim S. McClain
General Counsel

Exhibit 4

June 4, 2008

NCA DIRECTIVE 3210/1

<u>PERSONS INELIGIBLE</u>	<u>INELIGIBILITY CRITERIA</u>	<u>AUTHORITY</u>
(6) Vietnam Civilian POWs/Internees	Service not considered active military service in the Armed Forces of the U.S. for all laws administered by VA.	PLaw 95-202, §401, Determination date January 28, 1982, as published in 47 FR 6916
(7) Same-sex spouses or partners of veterans	While some States recognize same-sex civil unions or marriages for State benefit purposes, 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. 38 U.S.C. 101(3) and (31) expressly provide that the terms "spouse" and "surviving spouse" respectively refer to a person of the opposite sex.	U.S.C. 101(3) & (31) 38 CFR 3.50(a) & (b)

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Commonwealth of Massachusetts

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Maura T. Healey, Jonathan B. Miller, Office of the Attorney General,
One Ashburton Place, Boston, MA 02108, 617-727-2200

DEFENDANTS

U.S. Dept. of Health and Human Services; Kathleen Sebelius;
U.S. Dept. of Veterans Affairs; Eric K. Shinseki; and United **+**

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act (Excl. Veterans) ☐ 152 Recovery of Defaulted Student Loans ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	PERSONAL INJURY ☐ 362 Personal Injury - Med. Malpractice ☐ 365 Personal Injury - Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs. ☐ 660 Occupational Safety/Health ☐ 690 Other	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Motions to Vacate Sentence Habeas Corpus: ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition	LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609
			IMMIGRATION ☐ 462 Naturalization Application ☐ 463 Habeas Corpus - Alien Detainee ☐ 465 Other Immigration Actions	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☒ 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):
Tenth Amendment to the U.S. Constitution; Spending Clause of the U.S. Constitution; 28 U.S.C. 2201

Brief description of cause:
Constitutional challenge of 1 U.S.C. 7

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Tauro

DOCKET NUMBER 1:09-cv-10309-JLT

DATE

07/08/2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- ☐ I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
- ☒ II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. *Also complete AO 120 or AO 121 for patent, trademark or copyright cases
- ☐ III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- ☐ IV. 220, 422, 423, 430, 460, 462, 463, 465, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- ☐ V. 150, 152, 153.
3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.
Gill, et al. v. Office of Personnel Management, et al., 1:09-cv-10309-JLT
4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
YES ☐ NO ☒
5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
YES ☒ NO ☐
If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
YES ☒ NO ☐
6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
YES ☐ NO ☒
7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
YES ☐ NO ☐
- A. If yes, in which division do all of the non-governmental parties reside?
Eastern Division ☐ Central Division ☐ Western Division ☐
- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
Eastern Division ☐ Central Division ☐ Western Division ☐
8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
YES ☐ NO ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Maura T. Healey, Jonathan B. Miller, Assistant Attorneys GeneralADDRESS Office of the Attorney General, One Ashburton Place, Boston, MA 02108TELEPHONE NO. 617-727-2200

(CategoryForm-08.wpd -2/8/08)