IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

NANCY GILL, et al.,
Plaintiffs-Appellees,
v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SUPERSEDING BRIEF FOR THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Following the district court's entry of final judgment in each case, the United States filed timely notices of appeal in both cases on October 12, 2010. Joint Appendix ("JA") 677, 1426; *see* Fed.

R. App. P. 4(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Section 3 of the Defense of Marriage Act is consistent with the equal protection component of the Fifth Amendment Due Process Clause.

2. Whether Section 3 of the Defense of Marriage Act exceeds federal authority under the Spending Clause.

3. Whether Section 3 of the Defense of Marriage Act violates state sovereignty under the Tenth Amendment.

STATUTES AND REGULATIONS

The relevant statutory provisions are included in the addendum.

STATEMENT OF THE CASE

This case involves the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA") as applied to the plaintiffs in these two cases. Plaintiffs in *Gill v. Office of Personnel Management* are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts. Plaintiff in *Massachusetts v. HHS* is the Commonwealth of Massachusetts.

The plaintiffs in *Gill* allege that they have been denied the benefits of certain federal statutes because of DOMA. They contend that this denial violates the equal protection component of the Due Process Clause. Massachusetts alleges that it may be required to repay or will be denied the benefit of certain federal funding programs

because of DOMA and that it is negatively impacted as an employer by federal tax code provisions that are affected by DOMA. Massachusetts contends that these effects violate the Spending Clause, Art. I, § 8, cl. 1, by imposing an unconstitutionally discriminatory condition on its receipt of federal funds and by not being sufficiently germane to the spending programs at issue, and the Tenth Amendment, by intruding on core areas of state sovereignty.

The district court held DOMA unconstitutional on three grounds: that DOMA (1) violated the equal protection component of the Due Process Clause because it lacked a rational basis; (2) exceeded Congress's authority under the Spending Clause because it was unconstitutional under the Due Process Clause; and (3) violated the Tenth Amendment because it imposed on an area of regulation historically left to the states. These appeals followed.

On January 20, 2011, federal defendants filed a consolidated opening brief as appellants in these cases, defending Section 3 of DOMA against plaintiffs' equal protection challenges under the rational basis standard of review as well as defending against Massachusetts's germaneness and Tenth Amendment challenges to the statute. On February 23, 2011, the President and Attorney General notified Congress of their determination that Section 3 of DOMA is unconstitutional as applied to legally married same-sex couples, and the Attorney General instructed Department of Justice attorneys "to advise courts in [] pending DOMA litigation of the President's and my conclusions

that a heightened standard should apply, [and] that Section 3 is unconstitutional under that standard[.]" Letter from Attorney General Eric H. Holder, Jr. (Feb. 23, 2011), at 6. Based on this decision, the President and the Attorney General determined that "the Department will cease defense of Section 3." *Id.*

On May 20, 2011, the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") moved to intervene in these cases. On June 2, 2011, the Department moved to withdraw its opening brief, and on July 16, 2011, this Court granted the BLAG's intervention motion, denied the Department's motion to withdraw its brief but allowed the Department to file a superseding brief, and set a briefing schedule for these cases. On August 23, 2011, this Court denied plaintiffs' petition for initial rehearing en banc and reset the briefing schedule.

STATEMENT OF THE FACTS

I. Statutory Background

The Defense of Marriage Act ("DOMA") was enacted by Congress in 1996. DOMA has two main provisions. Section 2 of DOMA provides that no state is required to give effect to any public act, record, or judicial proceeding of another state that treats a relationship between two persons of the same sex as a marriage under its laws. 28 U.S.C. § 1738C. Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United

> States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. Section 3 thereby excludes same-sex relationships from the definition of marriage or spouse for purposes of federal law, even if that relationship is fully recognized under state law. Only Section 3 is at issue in these two cases.

II. Facts and Prior Proceedings

A. *Gill v. Office of Personnel Management*

1. Factual Background

The plaintiffs in *Gill* are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses to whom they were married in Massachusetts. They contend that DOMA Section 3 violates the equal protection component of the Fifth Amendment Due Process Clause. The plaintiffs claim that, as a result of Section 3, they have been denied certain federal benefits that turn on marital status and that are available to married opposite-sex couples or survivors of opposite-sex spouses.[1] Different *Gill* plaintiffs claim they are harmed by decisions relating to different federal programs.

i. First, several plaintiffs seek benefits under three health benefits programs for federal employees and their family members and/or programs for workers' retirement and survivors' benefits. These three programs are the Federal Employees Health

[1] Plaintiffs alternatively claimed before the district court that the Federal Employees Health Benefits Program statute confers on the Office of Personnel Management the discretion to extend health benefits to same-sex spouses. The district court denied this claim and plaintiffs have not appealed, so that issue is not before this Court.

Benefits Program ("FEHBP"), the Federal Employees Dental and Vision Insurance Program ("FEDVIP"), and the United States Postal Service's flexible spending account program ("FSA").[2] The first two programs are administered by the Office of Personnel Management ("OPM").

Plaintiff Nancy Gill, an employee of the United States Postal Service, seeks (1) to add her spouse, Marcelle Letourneau, as a beneficiary under Ms. Gill's existing self-and-family enrollment in the FEHBP; (2) to add Ms. Letourneau to FEDVIP; and (3) to use her flexible spending account for Ms. Letourneau's medical expenses. JA 711 (*Gill* Compl. ¶ 6). Plaintiff Martin Koski, a former employee of the Social Security Administration, seeks to change his "self only" enrollment in the FEHBP to a "self and family" enrollment to include his spouse, James Fitzgerald. *Id.* And plaintiff Dean Hara seeks enrollment in the FEHBP as the survivor of his spouse, former United States Representative Gerry Studds. *Id.*

a. The FEHBP is a comprehensive program of health insurance for federal civilian employees, annuitants, former spouses of employees and annuitants, and their family members. 5 U.S.C. § 8905. Premiums in the FEHBP are paid by both the government and the enrollees. *Id.* § 8906. Generally, an enrollee in the FEHBP chooses the carrier

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[2] The plaintiffs initially challenged the federal Flexible Spending Account program administered by the Office of Personnel Management ("OPM"), but that claim was later amended to refer to the Postal Service's program. The OPM program does not apply to "[c]ertain executive branch agencies with independent compensation authority," including the Postal Service, which had already "established their own flexible benefits plans." 71 Fed. Reg. 66,827, 66,827 (Nov. 17, 2006); 68 Fed. Reg. 56,525 (Oct. 1, 2003).

and plan in which to enroll, as well as whether to enroll for individual ("self only") coverage or for "self and family" coverage. An enrollee can change this choice during federal "open season" or following a change in family status, "including a change in marital status." *Id.* §§ 8905, 8906; 5 C.F.R. § 890.301(f), (g).

An "annuitant" eligible for coverage under FEHBP is, generally, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee . . . or of a retired employee . . . ." 5 U.S.C. § 8901(3)(B). When a federal employee or annuitant under "self and family" enrollment in FEHBP dies, the enrollment is "transferred automatically to his or her eligible survivor annuitants." 5 C.F.R. § 890.303.

Thus, to be covered under FEHBP, anyone who is not a current federal employee or the family member of a current employee must be eligible for a federal annuity, either as a former employee or as the survivor of an employee or former employee. A "member of family," for the purposes of eligibility for coverage as an annuitant or for coverage under "self and family" enrollment, is defined as either "the spouse of an employee or annuitant [or] an unmarried dependent child . . . ." 5 U.S.C. § 8901(5). DOMA Section 3 prevents persons who, under state law, are same-sex spouses, or surviving same-sex spouses, of federal employees from receiving FEHBP coverage that they would be entitled to if they were or had been a member of an opposite-sex marriage with a federal employee.

b. FEDVIP provides enhanced dental and/or vision coverage for federal civilian employees, annuitants, and their family members to supplement health insurance coverage under FEHBP. 5 U.S.C. §§ 8951, 8952, 8981, 8982. Persons enrolled in FEDVIP pay 100% of the premiums. *Id.* §§ 8958(a), 8988(a).

As with FEHBP, an enrollee in FEDVIP chooses the carrier and plan in which to enroll, as well as whether to enroll for "self only," "self plus one," or "self and family" coverage, and the enrollee can change this choice during federal "open season" or within 60 days after a "qualifying life event," including marriage or "acquiring an eligible child." *Id.* §§ 8956(a), 8986(a); *see* 5 C.F.R. §§ 894.201(b), 894.509(a), (b). "Annuitant" and "member of family" have the same meanings in FEDVIP as they do in FEHBP. 5 U.S.C. §§ 8951(2), 8981(2). Thus, DOMA Section 3 prevents same-sex spouses or survivors of same-sex spouses under state law from receiving FEDVIP coverage they would be entitled to if they were or had been a member of an opposite-sex marriage with a federal employee.

c. The Postal Service's FSA allows employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses for themselves and their family members, including spouses. The money withheld for flexible spending accounts is not subject to income taxes. 26 U.S.C. § 125. DOMA Section 3 prevents same-sex spouses or survivors of same-sex spouses from receiving the FSA tax benefits they would be able to receive if they were or had been a member of an opposite-sex marriage.

ii. Second, some of the *Gill* plaintiffs seek benefits under the Social Security Act ("the Act"). The Act provides for, among other things, Retirement Benefits and Survivors' Benefits for eligible persons. The Act is administered by the Social Security Administration, headed by the defendant Commissioner of Social Security. 42 U.S.C. §§ 901, 902.

A number of the plaintiffs in this action seek certain benefits under the Act, based on marriage to a same-sex spouse. Plaintiff Jo Ann Whitehead seeks Retirement Insurance Benefits based on the earnings record of her spouse, Bette Jo Green. JA 712–13 (*Gill* Compl. ¶ 8). Three of the plaintiffs—Dean Hara, Randell Lewis-Kendell, and Herbert Burtis—seek Lump-Sum Death Benefits based on their marriages to same-sex spouses who are now deceased. *Id.* Plaintiff Herbert Burtis also seeks Widower's Insurance Benefits. *Id.*

a. The availability and amount of Social Security Retirement Benefits depend on an individual's lifetime earnings in employment or self-employment. 42 U.S.C. §§ 402, 413(a), 414, 415. An individual can also seek retirement benefits based on the earnings of a husband or wife, called Husband's or Wife's Insurance Benefits, if the individual claiming the benefits "is not entitled to old-age . . . insurance benefits [on his or her own account], or is entitled to old-age . . . insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of [her husband or his wife]." *Id.* § 402(b), (c). DOMA Section 3 does not allow same-sex spouses to claim

such Husband's or Wife's Insurance Benefits.

b. The Act also provides some benefits to the surviving spouse of a wage earner. First, the Lump-Sum Death Benefit is available to the surviving widow or widower of an individual who has an adequate level of earnings from employment or self-employment. *Id.* §§ 402(i), 413(a), 414(a), (b). The amount of the benefit is $255 or an amount based on the individual's earnings, whichever is smaller. *Id.* §§ 402(i), 415(a). Second, the Widower's Insurance Benefit[3] is available to the surviving husband of an individual who has an adequate level of earnings from employment or self-employment. *Id.* §§ 402(f), 413(a), 414(a), (b). The claimant, among other requirements, must not have "married" since the death of the individual (with some exceptions), must have attained the age set forth in the statute, and must be either "not entitled to old-age insurance benefits [on his own account], or . . . entitled to old-age insurance benefits each of which is less than the primary insurance amount . . . of such deceased individual . . . ." *Id.* § 402(f)(1); *see id.* § 402(f)(3). DOMA Section 3 does not allow survivors of same-sex spouses to claim the Lump-Sum Death Benefit or the Widower's (or Widow's) Insurance Benefit.

iii. Third, some of the *Gill* plaintiffs seek to file their federal income tax returns under a certain filing status. JA 711–12 (*Gill* Compl. ¶ 7). Under the Internal Revenue

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[3] The Social Security Act also provides for a Widow's Insurance Benefit, *see* 42 U.S.C.§ 402(e), but only the Widower's Insurance Benefit is implicated here because the only plaintiff who seeks such benefits in *Gill* is male (Herbert Burtis). Although not relevant to this litigation, that provision is similarly affected by DOMA.

Code, the income tax imposed on an individual depends partly on the taxpayer's "filing status." A "married individual . . . who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household." 26 U.S.C. § 1(a), (b), (c); *see id.* § 6013(a) ("A husband and wife may make a single return jointly of income taxes . . . even though one of the spouses has neither gross income nor deductions [subject to certain exceptions]."). DOMA Section 3 prevents same-sex married couples from filing joint tax returns.

2. Prior Proceedings

The *Gill* plaintiffs brought this suit in the district court, asking the district court to strike down DOMA as unconstitutional as applied to them or hold that it provided OPM with discretion to enroll them in the various plans at issue, and requesting various forms of equitable relief against the government. JA 709–825 (*Gill* Compl.). The government moved to dismiss the complaint, and the plaintiffs moved for summary judgment. JA 826, 828 (*Gill* Def. MTD; *Gill* Pl. MSJ). Given the absence of disputed facts, the district court resolved both motions together and, on July 8, 2010, granted summary judgment to all but one of the plaintiffs, Dean Hara. JA 1368 (*Gill* Op.).

The district court first dismissed for lack of standing the FEHBP claim of plaintiff Hara (but not his other claims). JA 1382–83 (*Gill* Op. 15–16). Hara had previously sought to enroll in the FEHBP as a survivor annuitant based on his deceased spouse's federal employment. *Id.* OPM found Hara ineligible for a survivor annuity both on

initial review and on reconsideration, and the Merit Systems Review Board affirmed OPM's denial. JA 1383 (*Gill* Op. 16). Hara appealed that decision to the Federal Circuit,[4] which has stayed that case pending the outcome of this action. *Id.* The district court held that it could not redress Hara's inability to enroll in the FEHBP as an annuitant because, unless and until he is declared eligible for a survivor annuity, he will remain ineligible for FEHBP enrollment regardless of the DOMA provision challenged in this suit. *Id.*

The district court also rejected the plaintiffs' alternative argument that the FEHBP statute conferred discretion on OPM to extend health benefits to same-sex spouses, holding that the text of FEHBP is unambiguous on this issue.[5] JA 1384–86 (*Gill* Op. 17–19).

The district court then held that DOMA Section 3 violates the equal protection component of the Fifth Amendment Due Process Clause. Because the district court found that Section 3 could not even satisfy rational basis scrutiny, the court did not need to reach plaintiffs' claim that heightened scrutiny should apply. In reaching the conclusion that Section 3 fails rational basis, the district court first rejected four governmental interests it identified as purported support for DOMA, which the

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[4] *See Hara v. OPM*, No. 09-3134 (Fed. Cir.).

[5] The plaintiffs have not appealed this issue, so it is not before this Court.

government has not advanced in this litigation.[6] The court then rejected other interests articulated by the government in this litigation, holding that neither preserving the status quo pending the resolution of a contentious societal debate on whether same-sex couples should enjoy equal access to the protections and benefits of marriage nor preserving the uniform application of federal programs across states is a legitimate interest supporting the statute. The court reasoned that "the subject of domestic relations is the exclusive province of the states," and therefore that Congress has no interest in defining "marriage for purposes of determining federal rights, benefits, and privileges" because, in the district court's view, the ability to define the terms "marriage" and "spouse" for the purposes of federal law is, constitutionally, the exclusive province of the states. JA 1395–98 (*Gill* Op. 28–31).

The court further held that, even if they represent valid congressional interests, the status quo and uniformity rationales are not sufficiently connected to DOMA Section 3 to support its constitutionality. With respect to the status quo rationale, the court found that the legal status quo prior to DOMA's enactment was incorporation of state marriage law and that, regardless, simply preserving the status quo—without a reason for doing so—is not a rational basis for legislating. JA 1399–1400 (*Gill* Op. 32–33). With respect to the uniformity rationale, the court noted that DOMA does not impose

[6] The district court described those interests as "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources." JA 1390 (*Gill* Op. 23).

uniformity on every aspect of state marriage law and that therefore uniformity cannot be a rationale for upholding the statute. JA 1400–01 (*Gill* Op. 33–34). Finally, the court held that, even if there were a legitimate interest in uniformity and a rational relationship between the statute and that interest, the fit would not be sufficiently close to survive scrutiny because the minor uniformity created by the statute is outweighed by the significant "disadvantage [to] a group of which [Congress] disapproves." JA 1405 (*Gill* Op. 38).

On August 12, 2010, the district court entered final judgment for plaintiffs, enjoining application of DOMA Section 3 to the plaintiffs. JA 1407 (*Gill* Judgment). On August 17, 2010, following a joint motion for a stay, the district court entered an amended final judgment and a stay pending appeal. JA 1419–24 (*Gill* Amended Judgment). On October 12, 2010, the government timely appealed. JA 1426 (*Gill* Notice of Appeal). On October 13, 2010, plaintiff Hara timely cross-appealed the district court's dismissal of his FEHB claim for lack of standing. JA 1428 (*Gill* Notice of Cross-Appeal).

B. *Massachusetts v. HHS*

1. Factual Background

Plaintiff, the Commonwealth of Massachusetts, contends that Section 3 of DOMA, as applied to various federal funding programs in which that state participates, violates two constitutional provisions: (1) the Spending Clause, by forcing the state to

discriminate or lose federal funding and by not being sufficiently related to federal funding programs; and (2) the Tenth Amendment, by intruding in an area reserved exclusively to state authority. Specifically, the state alleges that it is at risk of losing some federal funding under Medicaid and for veterans' cemeteries, and that it is required to pay extra Medicare taxes for health benefits that it provides to same-sex spouses of state employees.

In detail, the three federal programs at issue are as follows:

i. Medicaid is a cooperative federal-state public assistance program that provides federal financial participation to states that elect to pay for medical services on behalf of certain needy individuals. 42 U.S.C. §§ 1396 *et seq.*; 42 C.F.R. §§ 430.0 *et seq.* Participation is voluntary, but once a state elects to participate, it must comply with the requirements of the Medicaid statute and regulations promulgated by the Secretary of Health and Human Services. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). To qualify for federal financial participation, a participating state must submit to the Secretary, and have approved, a state "plan for medical assistance" that describes the nature and scope of the state program. 42 U.S.C. § 1396a(a). If the state plan is approved by the Secretary, the state is thereafter eligible to receive matching payments from the federal government of the amounts "expended . . . as medical assistance under the State plan." 42 U.S.C. §§ 1396b(a)(1), 1396d(b).

Congress has established a number of requirements that must be met for a state

Medicaid plan to be approved and receive federal funds. 42 U.S.C. §§ 1396a(a)(1) *et seq.* Federal matching payments are not available to states with respect to individuals who do not meet the applicable Medicaid eligibility requirements, either by reason of their income levels or for other reasons, so if states make services available to these individuals, the services are not federally reimbursed. 42 U.S.C. §§ 1396b(a)(1), 1396d(b). An individual's status as a "spouse," as defined under federal law, may be relevant to that individual's eligibility for Medicaid. For example, in determining income, a

> [s]tate plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 . . . .

42 U.S.C. § 1396a(a)(17).

MassHealth is Massachusetts's Medicaid program. JA 25 (*Mass.* Compl. ¶¶ 46–47). Under state law, "[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 [MassHealth] . . . due to the provisions of 1 U.S.C. § 7 or any other federal non-recognition of spouses of the same sex." Mass. Gen. Laws ch. 118E, § 61. For this reason, despite the effects of DOMA, Massachusetts considers individuals in same-sex marriages to be married for purposes of its Medicaid scheme. JA 27–28 (*Mass.* Compl. ¶¶ 56–59).

The state's statute has two different and opposing financial effects. In some

circumstances, the recognition of marriages between same-sex couples can lead to the denial of health benefits for one or both partners because the incomes of both spouses are combined to determine household income for purposes of Medicaid eligibility. JA 28–29 (*Mass.* Compl. ¶ 61). Because federal law does not recognize marriages of same-sex couples, Massachusetts saves money by not following DOMA in these instances. In other circumstances, however, the recognition of a same-sex couple's marriage can render one or both partners eligible for benefits they would not otherwise receive. That occurs because the income ceiling for Medicaid eligibility is higher for a married couple than for a single individual.

Currently, MassHealth denies coverage to married individuals who would be eligible for medical assistance if assessed as single individuals pursuant to DOMA. JA 28–29 (*Mass.* Compl. ¶ 61). Correspondingly, MassHealth provides coverage to partners in same-sex marriages who would not be eligible if treated as single individuals, as required by DOMA. JA 28 (*Mass.* Compl. ¶ 59). Massachusetts claims that it has not sought federal matching payments with respect to these individuals because it fears federal enforcement of DOMA and the loss of federal funds if the Department of Health and Human Services ("HHS") determines that MassHealth is not in compliance with federal law. JA 28–29 (*Mass.* Compl. ¶¶ 59–62).

ii. Under the State Cemetery Grants Program, the Department of Veterans Affairs ("VA") provides federal funding for the establishment, expansion, and improvement, or

operation and maintenance, of veterans' cemeteries owned and operated by a state. 38 U.S.C. § 2408; 38 C.F.R. § 39. Massachusetts has received three grants totaling over $19 million for its two cemeteries. JA 31 (*Mass.* Compl. ¶ 71).

Federal funding for veterans' cemeteries is conditioned on compliance with VA regulations, 38 U.S.C. § 2408(c), which include the condition that cemeteries "must be operated solely for the interment of veterans, their spouses, [and] surviving spouses[.]" 38 C.F.R. § 39.10(a). Because, under DOMA Section 3, same-sex spouses are not considered "spouses," VA would be "entitled," but not required, to recover any grant funds paid to a state for a veterans' cemetery under the State Cemetery Grants Program if the state "ceases to operate such cemetery as a veterans' cemetery" by burying the same-sex spouse of a veteran at such cemetery. *See* 38 U.S.C. § 2408(b)(3); *see also* 38 C.F.R. § 39.10(c). The National Cemetery Administration, which is part of the VA, published a directive in June 2008 stating that "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran." National Cemetery Administration Directive 3210/1 (June 4, 2008).[7] Nonetheless, the Commonwealth authorized the burial of the same-sex spouse of a veteran. JA 32 (*Mass.* Compl. ¶ 77). The spouse, who is still living, is not otherwise eligible for burial in a veterans' cemetery. *Mass.* Compl. ¶ 77. Massachusetts alleges that,

[7] *Available at* http://www.dva.wa.gov/PDF%20files/3210-1_Directive.pdf.

if either of its two cemeteries ceases to be operated as a veterans' cemetery, VA can recapture from the state any funds provided for its construction, expansion, or improvement. JA 32 (*Mass.* Compl. ¶ 79).

iii. Under federal law, health care benefits provided by an employer to an employee's spouse are generally excluded from that employee's taxable income. 26 U.S.C. § 106; 26 C.F.R. § 1.106-1. Because, under DOMA Section 3, same-sex spouses are not considered "spouses," health care benefits provided to them by an employer are not excluded from an employee's taxable income and must be imputed as extra income to the employee for federal tax withholding purposes.

As an employer, Massachusetts is required to pay Medicare tax for each employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable income. 26 U.S.C. §§ 3121(u), 3111(b). Massachusetts provides health care benefits to the same-sex spouses of its employees, and, because these benefits are not exempted from taxes, the state must pay this Medicare tax for the value of the health benefits provided to the same-sex spouses that it does not need to pay for the value of health benefits provided to the opposite-sex spouses of its employees. JA 24–25 (*Mass.* Compl. ¶ 42–44). The state has also had to create and implement systems to identify insurance enrollees who provide health care coverage to their same-sex spouses, as well as to calculate the value of such coverage, so the state can keep track of this tax. JA 24–25 (*Mass.* Compl. ¶ 44).

2. Prior Proceedings

Massachusetts brought this suit in the district court, asking the court to strike down DOMA as unconstitutional as applied to Massachusetts. JA 12–37 (*Mass.* Compl.). The federal government moved to dismiss, and Massachusetts moved for summary judgment. JA 59, 62. Given the absence of disputed facts, the district court resolved both motions together and, on July 8, 2010, granted summary judgment to Massachusetts. JA 634–69 (*Mass.* Op.).

The district court held that DOMA exceeds federal authority under the Spending Clause and violates the Tenth Amendment.[8] The district court first held that "DOMA plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples," which the district court had held in *Gill* violated the equal protection component of the Due Process Clause. JA 660 (*Mass.* Op. 27). As a result, the court held that, "as DOMA imposes an unconstitutional condition on the receipt of federal funding, . . . the statute contravenes a well-established restriction on the exercise of Congress' spending power." *Id.* The district court did not reach Massachusetts's

[8] The district court also rejected the government's argument that Massachusetts lacked standing because the government had never acted to recoup funds from Massachusetts under the State Cemetery Grants Program or Medicaid. The district court found the record "replete" with evidence that VA and HHS had asserted a right to recapture these funds, and that, as to Medicaid, the state had already given up significant federal funding to follow its state marriage law. JA 652–54 (*Mass.* Op. 19–21). The government is not appealing this ruling.

assertion that DOMA also violates the Spending Clause because it is not sufficiently related to federal funding programs. JA 660–61 (*Mass.* Op. 27–28).

The district court then alternatively held that DOMA violates the Tenth Amendment because it (1) "regulate[s] the States as States"; (2) "concern[s] attributes of state sovereignty"; and (3) is of "such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions," JA 661 (*Mass.* Op. 28), applying the test from *National League of Cities v. Usery*, 426 U.S. 833 (1976). In so holding, the district court observed that there was a "historically entrenched tradition of federal reliance on state marital status determinations." JA 662–65 (*Mass.* Op. 29–32).

On August 12, 2010, the district court entered final judgment for Massachusetts, enjoining application of DOMA to Massachusetts. JA 670 (*Mass.* Judgment). On August 24, 2010, following a joint motion for a stay, the district court entered a stay pending appeal. JA 676 (*Mass.* Stay Order). On October 12, 2010, the government timely appealed. JA 677 (*Mass.* Notice of Appeal).

SUMMARY OF ARGUMENT

Section 3 of DOMA unconstitutionally discriminates. Section 3 treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under the well-established factors set

forth by the Supreme Court to guide the determination whether heightened scrutiny applies to a classification that singles out a particular group, discrimination based on sexual orientation merits heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.

The Supreme Court has yet to determine the appropriate level of scrutiny for classifications based on sexual orientation, but it has established a set of factors to guide whether heightened scrutiny applies to a specific group: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985). Careful consideration of these factors demonstrates that sexual orientation classifications should be subject to heightened scrutiny.

The Department has acknowledged in its superseded opening brief on file with this Court, as well as in its response to the petition for initial hearing en banc, that binding authority of this circuit holds that rational basis review applies to classifications based on sexual orientation, *see Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008). We respectfully submit that *Cook* does not withstand scrutiny, as we explain *infra*. The *Cook*

decision fails to account for the factors identified by the Supreme Court as relevant to the inquiry, and the Supreme Court has yet to rule on the appropriate level of scrutiny. While recognizing existing circuit precedent, the Department submits this superseding brief to provide a full explanation of its view of how these consolidated cases should ultimately be decided.

Accordingly, heightened scrutiny should be applied to Section 3 of DOMA, and the statute is unconstitutional under that level of review. Congress's announced rationales in enacting Section 3 fall short of meeting heightened scrutiny, and the legislative record contains numerous expressions of the type of stereotype-based thinking and animus that the Constitution's equal protection guarantee is designed to guard against.

In sum, this Court's precedent applying rational basis review to classifications based on sexual orientation should be reconsidered, and the district court's judgments should be affirmed on the ground that Section 3 of DOMA is subject to heightened scrutiny and, under that standard, is unconstitutional as applied to same-sex couples married under state law. If this Court concludes that Section 3 violates equal protection, it must also conclude that Section 3 is not authorized by the Spending Clause. In that event, this Court need not reach the other issues presented by these cases.

However, if this Court holds that Section 3 does not violate equal protection, it should reverse the district court's ruling on the Tenth Amendment challenge presented

by Massachusetts. The Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power," *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997). In the event that this Court holds that Section 3 does not violate equal protection and therefore represents a valid exercise of Congress's Spending Clause authority, it plainly does not violate the Tenth Amendment.

STANDARD OF REVIEW

This Court reviews de novo challenges to the constitutionality of a federal statute. *United States v. Volungus*, 595 F.3d 1, 4 (1st Cir. 2010).

ARGUMENT

I. DOMA Violates Equal Protection.

The Constitution's guarantee of equal protection of the laws, applicable to the federal government through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008), embodies a fundamental requirement that "all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). DOMA Section 3 is inconsistent with that principle of equality, as it denies legally married same-sex couples federal benefits that are available to similarly situated opposite-sex couples.

For the reasons set forth below, heightened scrutiny, rather than rational basis review, is the appropriate standard of review for classifications based on sexual

orientation. Under that more rigorous standard, Section 3 of DOMA cannot pass constitutional muster.

A. Plaintiffs' Equal Protection Challenge to DOMA Is Subject to Heightened Scrutiny under Supreme Court Precedent.

As a general rule, legislation challenged under equal protection principles is presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441–42. Where, however, legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment," such as race or gender, the law demands more searching review and imposes a greater burden on the government to justify the classification. *Id.* at 440–41.

Such suspect or quasi-suspect classifications are reviewed under a standard of heightened scrutiny, under which the government must show, at a minimum, that a law is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This more searching review enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and serves to prevent implementation of classifications that are the product of impermissible prejudice or stereotypes. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)

(plurality opinion); *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 533 (1996).

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation.[9] It has, however, established and repeatedly confirmed a set of factors that guide the determination of whether heightened scrutiny applies to a classification that singles out a particular group. These include: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen*

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[9] In neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In both cases, the Court invalidated sexual orientation classifications under a more permissive standard of review without having to decide whether heightened scrutiny applied (*Romer* found that the legislation failed rational basis review, 517 U.S. at 634–35; *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574–75).

Nor did the Court decide the question in its one line per curiam order in *Baker v. Nelson*, 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple, *id.* at 810. *Baker* did not concern the constitutionality of a federal law, like DOMA Section 3, that distinguishes among couples who are already legally married in their own states, and was motivated by animus toward gay and lesbian people. *See infra* Part I.B. Moreover, neither the Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs' jurisdictional statement raised whether classifications based on sexual orientation are subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup. Ct.), at 2; *see also id.* at 13 (repeatedly describing equal protection challenge as based on the "arbitrary" nature of the state law). There is no indication in the Court's order that the Court nevertheless considered, much less resolved, that question.

v. Gilliard, 483 U.S. 587, 602–03 (1987); *see also Cleburne*, 473 U.S. at 441–42.

Although there is substantial circuit court authority, including binding authority of this circuit, holding that rational basis review generally applies to sexual orientation classifications, *see, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008), most of these decisions fail to give adequate consideration to these factors. Indeed, the reasoning of this line of case law traces back to circuit court decisions from the late 1980s and early 1990s, a time when *Bowers v. Hardwick*, 478 U.S. 186 (1986), was still the law. The Supreme Court subsequently overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the reasoning of these circuit decisions no longer withstands scrutiny.

In *Cook*, for example, this Court considered an equal protection challenge to 10 U.S.C. § 654, which established the policy concerning homosexuality in the armed forces. 528 F.3d at 45. Plaintiffs contended that, because it classified on the basis of sexual orientation, § 654 should be subject to heightened scrutiny under equal protection principles. *Id.* at 60. Without invoking the deference due to military judgments, *cf. Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), this Court concluded that, in the context of equal protection challenges, classifications based on sexual orientation are only subject to rational basis review.[10] In so holding, this Court concluded that, because "*Romer*

[10] *Cook* and a number of cases in other circuits involved challenges to military policy on homosexual conduct. *See Cook*, 528 F.3d at 45; *see also Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 565 (9th Cir. 1990); *Woodard v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 456 (7th Cir. 1989). Classifications

nowhere suggested that the Court recognized a new suspect class," it would apply rational basis "[a]bsent additional guidance from the Supreme Court." *Id.* at 61. As noted above, *Romer* did not address the question of what standard of scrutiny applies to sexual orientation classifications. It therefore cannot serve as a basis for the decision not to apply heightened scrutiny to classifications based on sexual orientation.[11] Careful consideration of the factors the Supreme Court has identified as relevant to the inquiry demonstrates that classifications based on sexual orientation should be subject to heightened scrutiny.

1. Gays and Lesbians Are a Suspect or Quasi-Suspect Class under the Relevant Factors Identified by the Supreme Court.

i. Gays and Lesbians Have Been Subject to a History of Discrimination.

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in the military context, however, present different questions from classifications in the civilian context, *see, e.g.*, *Rostker*, 453 U.S. at 70, and the military is not involved here.

[11] As noted above, other courts of appeals have held that classifications on the basis of sexual orientation are not subject to heightened scrutiny, but the reasoning of these courts is similarly flawed. One of those courts relied, like this Court in *Cook*, on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect or quasi-suspect class. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004). Many other courts relied in part or in whole on *Bowers*. *See Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266–67 & n.2 (6th Cir. 1995); *Steffan*, 41 F.3d at 685 n.3; *High Tech Gays*, 895 F.2d at 571; *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *see also Richenberg*, 97 F.3d at 260 (citing to reasoning of prior appellate decisions that were based on *Bowers*); *Thomasson*, 80 F.3d at 928 (same). Finally, the remaining courts to address the issue offered no pertinent reasoning in so doing. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984).

First, courts have recognized that gay and lesbian individuals have suffered a long and significant history of purposeful discrimination. *See High Tech Gays*, 895 F.2d at 574 ("[W]e do agree that homosexuals have suffered a history of discrimination . . . ."); *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (noting that "[h]omosexuals have suffered a history of discrimination and still do, though possibly now in less degree"). So far as we are aware, no court to consider this question has ever ruled otherwise.

Discrimination against gay and lesbian individuals has a long history in this country, *Bowers*, 478 U.S. at 192, from colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind," *see, e.g.*, Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294–95 & n.1 (enacted Dec. 1, 1642; revised 1750), to state laws that, until very recently, have "demean[ed] the[] existence" of gay and lesbian people "by making their private sexual conduct a crime," *Lawrence*, 539 U.S. at 578. In addition to the discrimination reflected in DOMA itself, as explained below, the federal government, state and local governments, and private parties all have contributed to this long history of discrimination.[12]

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[12] We do not understand the Supreme Court to have called into question this well-documented history when it said in *Lawrence* that "it was not until the 1970's that any State singled out same-sex relations for criminal prosecution," 539 U.S. at 570, and that only nine States had done so by the time of *Lawrence*. The question before the Court in *Lawrence* was whether, as *Bowers* had asserted, same-sex sodomy prohibitions were so deeply rooted in history that they could not be understood to contravene the Due Process Clause. That the Court rejected that argument and invalidated Texas's sodomy

a. Discrimination by the Federal Government

The federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals.

For years, the federal government deemed gays and lesbians unfit for employment, barring them from federal jobs on the basis of their sexual orientation. *See Employment of Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Congress), December 15, 1950, ("Interim Report"), at 9. In 1950, Senate Resolution 280 directed a Senate subcommittee "to make an investigation in the employment by the Government of homosexuals and other sexual perverts." Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 , 1565–66 (1993). The Committee found that from 1947 to 1950, "approximately 1,700 applicants for federal positions were denied employment because they had a record of homosexuality or other sex perversion." Interim Report at 9.

In April 1953, in the wake of the Senate investigation, President Eisenhower issued Executive Order 10450, which officially added "sexual perversion" as a ground for investigation and possible dismissal from federal service. Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953); *see also* 18 Fed. Reg. 2489 (Apr. 29, 1953). The Order expanded the investigations of civilian employees for "sexual perversion" to include every agency

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law on due process grounds casts no doubt on the duration and scope of discrimination against gay and lesbian people writ large.

and department of the federal government, and thus had the effect of requiring the termination of all gay people from federal employment. *See* General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process*, at 2 (Mar. 1995).

The federal government enforced Executive Order 10450 zealously, engaging various agencies in intrusive investigatory techniques to purge gays and lesbians from the federal civilian workforce. The State Department, for example, charged "skilled investigators" with "interrogating every potential male applicant to discover if they had any effeminate tendencies or mannerisms," used polygraphs on individuals accused of homosexuality who denied it, and sent inspectors "to every embassy, consulate, and mission" to uncover homosexuality. Edward L. Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602 (2006). In order to identify gays and lesbians in the civil service, the FBI "sought out state and local police officers to supply arrest records on morals charges, regardless of whether there were convictions; data on gay bars; lists of other places frequented by homosexuals; and press articles on the largely subterranean gay world." Williams Institute, "Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment," ch. 5 at 7, *available at* http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html ("Williams Report"). In the 1950s and early 1960s, the Post Office Department (the predecessor to the Postal Service), for its part, aided the FBI by "establish[ing] a

watch on the recipients of physique magazines, [those who] subscribed to pen pal clubs, and [those who] initiated correspondence with men whom they believed might be homosexual." *Id.* If "their suspicions were confirmed, they then placed tracers on victims' mail in order to locate other homosexuals." *Id.*

The end result was thousands of men and women forced from their federal jobs based on the suspicion that they were gay or lesbian. It was not until 1975 that the Civil Service Commission prohibited discrimination on the basis of sexual orientation in federal civilian hiring. *See* General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process* (1995) (describing the federal government's restrictions on the employment of gay and lesbian individuals).[13]

The history of the federal government's discrimination against gays and lesbians extends beyond the employment context. For decades, gay and lesbian noncitizens were categorically barred from entering the United States, on grounds that they were "persons of constitutional psychopathic inferiority," "mentally defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571–72 (N.D. Cal. 1982) (quoting Ch. 29, § 3, 39 Stat. 874 (1917)), *aff'd Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). As the Supreme Court held in *Boutilier v. INS*, 387 U.S. 118 (1967), "[t]he legislative

[13] Open military service by gays and lesbians was prohibited, first by regulation and then by statute, 10 U.S.C. § 654 (2007), until the "Don't Ask, Don't Tell" Repeal Act, enacted last year, 111 P.L. 321, 124 Stat. 3515 (2010). Pursuant to the Repeal Act, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certified the repeal on July 22, 2011, and repeal was effective 60 days from that date, on September 20, 2011.

history of [the Immigration and Nationality Act of 1952] indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals." *Id.* at 120. This exclusion remained in effect until Congress repealed it in 1990. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

b. Discrimination by State and Local Governments

Like the federal government, state and local governments have long discriminated against gays and lesbians in public employment. By the 1950s, many state and local governments had banned gay and lesbian employees, as well as gay and lesbian "employees of state funded schools and colleges, and private individuals in professions requiring state licenses." Williams Report, ch. 5 at 18. Many states and localities began aggressive campaigns to purge gay and lesbian employees from government services as early as the 1940s. *Id.* at 18–34.

This employment discrimination was interrelated with longstanding state law prohibitions on sodomy; the discrimination was frequently justified by the assumption that gays and lesbians had engaged in criminalized and immoral sexual conduct. *See, e.g.*, *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 138, 147–48 (N.D. Tex. 1981) (holding that police could refuse to hire gays), *aff'd without opinion*, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1342, 1347 (Wash. 1977) (upholding the dismissal of an openly gay school teacher who was fired based on a local school board policy that allowed removal for "immorality"); *Burton v. Cascade Sch. Dist. Union*

High Sch., No.5, 512 F.2d 850, 851 (9th Cir. 1975) (upholding the dismissal of a lesbian teacher in Oregon, after adopting a resolution stating that she was being terminated "because of her immorality of being a practicing homosexual"); *Bd. of Educ. v. Calderon*, 110 Cal. Rptr. 916, 919 (1973) (holding that state sodomy statute was a valid ground for discrimination against gays as teachers); *see also Baker v. Wade*, 553 F. Supp. 1121, 1128 n.9 (N.D. Tex. 1982) ("A school board member testified that [the defendant] would have been fired [from his teaching position] if there had even been a suspicion that he had violated [the Texas sodomy statute]."), *rev'd,* 769 F.2d 289 (5th Cir. 1985) (holding that challenged Texas homosexual sodomy law was constitutional). Some of these discriminatory employment policies continued into the 1990s. *See Shahar v. Bowers*, 114 F.3d 1097, 1105 & n.17, 1107–10 (11th Cir. 1997) (en banc) (upholding Georgia Attorney General's Office's rescission of a job offer to plaintiff after she mentioned to co-workers her upcoming wedding to her same-sex partner); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding unconstitutional Dallas Police Department policy denying gays and lesbians employment).

Based on similar assumptions regarding the criminal sexual conduct of gays and lesbians, states and localities also denied child custody and visitation rights to gay and lesbian parents. *See, e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "[h]omosexual conduct is . . . abhorrent, immoral, detestable, a crime against nature, and

a violation of the laws of nature and of nature's God . . . [and] an inherent evil against which children must be protected."); *Pulliam v. Smith*, 501 S.E.2d 898, 903–04 (N.C. 1998) (upholding denial of custody to a gay man who had a same-sex partner; emphasizing that father engaged in sexual acts while unmarried and refused to "counsel the children against such conduct"); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that a trial court did not err in granting a father custody of his son on the basis that people in town had rumored that the son's mother was involved in a lesbian relationship); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that, although the Court had previously held "that a lesbian mother is not per se an unfit parent," the "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth" and therefore "that conduct is another important consideration in determining custody"); *Roe v. Roe*, 324 S.E.2d 691, 692, 694 (Va. 1985) (holding that father, who was in a same-sex relationship, was "an unfit and improper custodian as a matter of law" because of his "continuous exposure of the child to his immoral and illicit relationship").

State and local law also has been used to prevent gay and lesbian people from associating freely. Liquor licensing laws, both on their face and through discriminatory enforcement, were long used to harass and shut down establishments patronized by gays and lesbians. *See* William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, 1946–1961, 24 Fla. St. U. L. Rev. 703, 762–66 (1997) (describing such efforts in New

York, New Jersey, Michigan, California, and Florida); *see also Irvis v. Scott*, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970) (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass gays and lesbians, often when gay and lesbian people congregated in public. *See, e.g.*, *Pryor v. Mun. Court*, 599 P.2d 636, 644 (Cal. 1979) ("Three studies of law enforcement in Los Angeles County indicate[d] that the overwhelming majority of arrests for violation of [the 'lewd or dissolute' conduct statute] involved male homosexuals."); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City*, 1960–1980, 12 Colum. Hum. Rts. L. Rev. 159, 162–64 (1982); Florida State Legislative Investigation Committee (Johns Committee), *Report: Homosexuality and Citizenship in Florida*, at 14 (1964) ("Many homosexuals are picked up and prosecuted on vagrancy or similar non-specific charges, fined a moderate amount, and then released."). Similar practices persist to this day. *See, e.g.*, *Calhoun v. Pennington*, No. 09-3286 (N.D. Ga.) (involving September 2009 raid on Atlanta gay bar and police harassment of patrons); *Settlement in gay bar raid*, N.Y. Times (Mar. 23, 2011) (involving injuries sustained by gay bar patron during raid by Fort Worth police officers and the Texas Alcoholic Beverage Commission).

Efforts to combat discrimination against gays and lesbians also have led to significant political backlash, as evidenced by the long history of successful state and local initiatives repealing laws that protected gays and lesbians from discrimination. *See also infra* Part I.A.1.iii. A rash of such initiatives succeeded in the late 1970s. *See, e.g.*,

Christopher R. Leslie, *The Evolution of Academic Discourse on Sexual Orientation and the Law*, 84 Chi. Kent L. Rev. 345, 359 (2009) (Boulder, Colorado in 1974); Rebecca Mae Salokar, Note, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 Fla. Int'l. U. L. Rev. 473, 477 (2009) (Dade County, Florida in 1977); *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (St. Paul, Minnesota in 1978); *Gay rights referendum in Oregon*, Washington Post (May 11, 1978), at A14 (Wichita, Kansas in 1978); *Why tide is turning against homosexuals*, U.S. News & World Report (June 5, 1978), at 29 (Eugene, Oregon in 1978). The laws at issue in *Romer* and in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) are just two of a number of more recent examples from the 1990s. In fact, in May 2011, the Tennessee legislature enacted a law stripping counties and municipalities of their ability to pass local non-discrimination ordinances that would prohibit discrimination on the basis of sexual orientation, and repealing the ordinances that had recently been passed by Nashville and other localities.[14] Similar responses have followed states' decisions to recognize same-sex marriages. *See infra* Part I.A.1.iii.

c. Discrimination by Private Parties

Finally, private discrimination against gays and lesbians in employment and other

[14] *See* State of Tennessee, Public Chapter No. 278, *available at* http://state.tn.us/sos/acts/107/pub/pc0278.pdf.

areas has been pervasive and continues to this day.[15] *See, e.g.*, Williams Report, ch. 5 at 8–9 (explaining that private companies and organizations independently adopted discriminatory employment policies modeled after the federal government's, and as federal employers shared police and military records on gay and lesbian individuals with private employers, these same persons who were barred from federal employment on the basis of their sexual orientation were simultaneously blacklisted from employment by many private companies). The pervasiveness of private animus against gays and lesbians is underscored by statistics showing that gays and lesbians continue to be among the most frequent victims of all reported hate crimes. *See* H.R. Rep. 111-86, at 9–10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's sexual orientation—gay, lesbian, or bisexual—constituted the third highest category reported—1,265 incidents, or one-sixth of all reported hate crimes."); Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1464 (1992).

In sum, gays and lesbians have suffered a long history of discrimination based on prejudice and stereotypes. That history counsels strongly in favor of heightened scrutiny, giving courts ample reason to question whether sexual orientation classifications are the product of hostility rather than a legitimate government purpose.

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[15] Private discrimination, as well as official discrimination, is relevant to whether a group has suffered a history of discrimination for purposes of the heightened scrutiny inquiry. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]omen still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.").

ii. Gays and Lesbians Exhibit Immutable Characteristics that Distinguish Them as a Group.

Over ten years ago, in considering whether gays and lesbians constituted a "particular social group" for asylum purposes, the Ninth Circuit recognized that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (quotation omitted). *But see High Tech Gays*, 895 F.2d at 573 (stating that sexual orientation is not immutable because "it is behavioral"). Sexual orientation, the Ninth Circuit explained, is "fundamental to one's identity," and gay and lesbian individuals "should not be required to abandon" it to gain access to fundamental rights guaranteed to all people. *Hernandez-Montiel*, 225 F.3d at 1093.

That conclusion is consistent with the overwhelming consensus in the scientific community that sexual orientation is an immutable characteristic. *See e.g.*, G.M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults*, 7, 176–200 (2010), *available at* http://www.springerlink.com/content/k186244647272924/fulltext.pdf (noting that in a national survey conducted with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95 percent of the gay men and 83 percent of lesbian women reported that they experienced "no choice at all" or "small amount of choice" about their sexual orientation). There is also a consensus among the established

medical community that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being.[16] *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); *see also* Richard A. Posner, Sex and Reason 101 n.35 (1992) (describing "failure of treatment strategies . . . to alter homosexual orientation"); Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

Furthermore, sexual orientation need not be a "visible badge" that distinguishes gays and lesbians as a discrete group for the classification to warrant heightened scrutiny. As the Supreme Court has made clear, a classification may be "constitutionally suspect" even if it rests on a characteristic that is not readily visible, such as illegitimacy. *Mathews v. Lucas*, 427 U.S. 495, 504 (1976); *see id.* at 506 (noting that "illegitimacy does not carry an obvious badge, as race or sex do," but nonetheless applying heightened scrutiny). Whether or not gays and lesbians could hide their identities in order to avoid

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[16] In fact, every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gays and lesbians. These policy statements are reproduced in a 2008 publication of the American Psychological Association, available at http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

discrimination, they are not required to do so. As the Court has recognized, sexual orientation is a core aspect of identity, and its expression is an "integral part of human freedom," *Lawrence*, 539 U.S. at 562, 576–77.

iii. Gays and Lesbians Are Minorities with Limited Political Power.

Third, gays and lesbians are a minority group,[17] *Able v. United States*, 968 F. Supp. 850, 863 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998), that has historically lacked political power. To be sure, many of the forms of historical discrimination described above have subsided or been repealed. But efforts to combat discrimination have frequently led to successful initiatives to scale back protections afforded to gay and lesbian individuals. *See also supra* Part I.A.1.i.b. As described above, the adoption of ballot initiatives specifically repealing laws protecting gays and lesbians from discrimination (including the laws at issue in *Romer* and *Equality Foundation v. City of Cincinnati*) are examples of such responses. In fact, "[f]rom 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive

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[17] It is difficult to offer a definitive estimate for the size of the gay and lesbian community in the United States. According to an analysis of various data sources published in April 2011 by the Williams Institute, there appear to be 9 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population. *See* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*(April 2011), *available at* http://www3.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf. Ascertaining the precise percentage of gays and lesbians in the population, however, is not relevant to the analysis, as it is clear that whatever the data reveal, there is no dispute that gays and lesbians constitute a minority in the country.

order prohibiting sexual orientation discrimination should be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order." Robert Wintemute, Sexual Orientation and Human Rights 56 (1995).

The strong backlash in the 1970s, 1980s, and 1990s to these civil rights ordinances has been followed in the 2000s with similar political backlashes against same-sex marriage. In 1996, at the time DOMA was enacted, only three states had statutes restricting marriage to opposite-sex couples. National Conference of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, *available at* http://www.ncsl.org/default.aspx?tabid=16430 (last updated July 2011). Today, thirty-seven states have such statutes, and thirty states have constitutional amendments explicitly restricting marriage to opposite-sex couples. *Id.*

California and Iowa are recent examples of such backlash. In May 2008, the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage. *In re Marriage Cases*, 183 P.3d 384, 419–20 (Cal. 2008). In November 2008, California's voters passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex couples. *See Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009). In November 2010, when three Iowa state supreme court justices who had been part of a unanimous decision legalizing same-sex marriage were up for reelection, Iowa voters recalled all of them. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times (Nov. 3, 2010).

Beyond these state ballot initiatives, the relatively recent passages of anti-sodomy laws singling out same-sex conduct, such as the Texas law the Supreme Court ultimately invalidated in *Lawrence*, indicate that gays and lesbians lack the consistent "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445.

This is not to say that the political process is closed entirely to gay and lesbian people. But complete foreclosure from meaningful political participation is not the standard by which the Supreme Court has judged "political powerlessness." When the Court ruled in 1973 that gender-based classifications were subject to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677 (1973), women already had won major political victories, including a constitutional amendment granting the right to vote and protection against employment discrimination under Title VII. As *Frontiero* makes clear, the "political power" factor does not require a complete absence of political protection, and its application is not intended to change with every political success.[18]

iv. Sexual Orientation Bears No Relation to Legitimate Policy Objectives or Ability to Perform or Contribute to Society.

Even where other factors might point toward heightened scrutiny, the Court has declined to treat as suspect those classifications that generally bear on "ability to perform

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[18] In determining that gender classifications warranted heightened scrutiny, the plurality in *Frontiero* noted that "in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." 411 U.S. at 686 n.17 (plurality opinion).

or contribute to society." *See Cleburne*, 473 U.S. at 441 (holding that mental disability is not a suspect classification) (quotation omitted); *see also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–15 (1976) (holding that age is not a suspect classification).

Sexual orientation is not such a classification. As the history described above makes clear, prior discrimination against gay and lesbian people has been rested not on their ability to contribute to society, but on the basis of invidious and long-discredited views that gays and lesbians are, for example, sexual deviants or mentally ill. *See also supra* Part I.A.1.i. As the American Psychiatric Association stated more than 35 years ago, "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the Am. Psychiatric Ass'n (Dec. 15, 1973); *see also Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975) (reflecting a similar American Psychological Association statement).

Just as a person's gender, race, or religion does not bear an inherent relation to a person's ability or capacity to contribute to society, a person's sexual orientation bears no inherent relation to ability to perform or contribute. President Obama elaborated on this principle in the context of the military when he signed the Don't Ask, Don't Tell Repeal Act of 2010:

> [V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed. . . . There will never be a full accounting of the heroism demonstrated by gay Americans in service to this country; their service has been obscured in history. It's been lost to

> prejudices that have waned in our own lifetimes. But at every turn, every crossroads in our past, we know gay Americans fought just as hard, gave just as much to protect this nation and the ideals for which it stands.

White House, Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

The Supreme Court has also recognized that opposition to homosexuality, though it may reflect deeply held personal religious and moral views, is not a legitimate policy objective. *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quotation omitted); *Romer*, 517 U.S. at 635 (noting that a law cannot broadly disfavor gays and lesbians because of "personal or religious objections to homosexuality"). Whether premised on pernicious stereotypes or simple moral disapproval, laws classifying on the basis of sexual orientation rest on a "factor [that] generally provides no sensible ground for differential treatment," *see Cleburne*, 473 U.S. at 440, and thus such laws merit heightened scrutiny.

B. DOMA Fails Heightened Scrutiny.

For the reasons described above, heightened scrutiny is the appropriate standard by which to review classifications based on sexual orientation, including DOMA Section

3.[19] In reviewing a legislative classification under heightened scrutiny, the government must establish, at a minimum, that the classification is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. Moreover, under any form of heightened scrutiny, a statute must be defended by reference to the "actual [governmental] purposes" behind it, not different "rationalizations." *VMI*, 518 U.S. at 535–36.

Section 3 fails this analysis.[20] The legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians and their intimate and family relationships.[21] Among the interests expressly identified by Congress in enacting DOMA was "the government's interest in defending traditional notions of morality." H.R. Rep. No. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905

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[19] The government takes no position on whether sexual orientation classifications should be considered suspect, as opposed to quasi-suspect, and therefore whether DOMA should be subject to intermediate or strict scrutiny.

[20] Though the government believes that heightened scrutiny is the appropriate standard of review for Section 3 of DOMA, if this Court holds that rational basis is the appropriate standard, as the government has previously stated, a reasonable argument for the constitutionality of DOMA Section 3 can be made under that permissive standard.

[21] We note that some members of the majority in Congress that enacted DOMA have changed their views on the law, and the legitimacy of its rationales, since 1996. *See, e.g.*, Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), *available at* http://www.latimes.com/news/politics/newsletter/la-oe-barr5-2009jan05,0,2810156.story?track=newslettertext. In reviewing the statute under heightened scrutiny, however, what is relevant are the views of Congress at the time of enactment, as evidenced by the legislative record.

("H.R. Rep."). The House Report repeatedly claims that DOMA upholds "traditional notions of morality" by condemning homosexuality, and by expressing disapproval of gays and lesbians and their committed relationships. *See, e.g.*, H.R. Rep. at 15–16 ("[J]udgment [opposing same-sex marriage] entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."); *id.* at 16 (stating that same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral" (quotation omitted)); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality."); *id.* at 33 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable" (quotation omitted)).

The House Report also explicitly stated an interest in extending legal preferences to heterosexual couples in various ways to "promote heterosexuality" and discourage homosexuality. H.R. Rep. at 15 n.53 ("Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality. . . . Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . . ."). Thus, one of the goals of DOMA was to provide gays and lesbians with an incentive to abandon or at least to hide from view a core aspect of

their identities, which legislators regarded as immoral and inferior.

This record evidences the kind of animus and stereotype-based thinking that the Equal Protection Clause is designed to guard against. *Cf. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("[The Supreme Court] ha[s] consistently held . . . that some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests." (quotation and alteration omitted)). And even if Congress's opposition to gay and lesbian relationships could be understood as reflecting moral or religious objections, that would remain an impermissible basis for sexual-orientation discrimination. *See supra* Part I.A.1.iv; *see also Romer*, 517 U.S. at 635 (noting that law cannot broadly disfavor gays and lesbians because of "personal or religious objections to homosexuality"). Discouraging homosexuality, in other words, is not a governmental interest that justifies sexual orientation discrimination.

Nor is there some other important governmental interest identified by Congress and substantially advanced by Section 3 of DOMA, as required under heightened scrutiny. In addition to expressing bare hostility to gay and lesbian people and their relationships, the House Report articulated an interest in "defending and nurturing the institution of traditional, heterosexual marriage." H.R. Rep. at 12. That interest does not

support Section 3. As an initial matter, reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. *VMI*, 518 U.S. at 535 (invalidating longstanding tradition of single-sex education at Virginia Military Institute). But even if it were possible to identify a substantive and animus-free interest in protecting "traditional" marriage on this record, there would remain a gap between means and end that would invalidate Section 3 under heightened scrutiny. Section 3 of DOMA has no effect on recognition of the same-sex marriages Congress viewed as threatening to "traditional" marriage; it does not purport to defend "traditional, heterosexual marriage" by preventing same-sex marriage or by denying legal recognition to such marriages. Instead, Section 3 denies benefits to couples who are already legally married in their own states, on the basis of their sexual orientation and not their marital status. Thus, there is not the "substantial relationship" required under heightened scrutiny between an end of defending "traditional" marriage and the means employed by Section 3.

The same is true of Congress's interest in promoting "responsible procreation and child-rearing," which the House Report identified not as a separate rationale for DOMA Section 3, but as the basis for its larger interest in defending "the institution of traditional, heterosexual marriage." *See, e.g.*, H.R. Rep. at 12–13 ("At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and

child-rearing."); *id.* at 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, *society would have no particular interest* in encouraging citizens to come together in a committed relationship.") (emphasis added). Again, even assuming that Congress legislated on the basis of an independent and animus-free interest in promoting responsible procreation and child-rearing, that interest is not materially advanced by Section 3 of DOMA and so cannot justify that provision under heightened scrutiny.

First, there is no sound basis for concluding that same-sex couples who have committed to marriages recognized by state law are anything other than fully capable of responsible parenting and child-rearing. To the contrary, many leading medical, psychological, and social welfare organizations have issued policies opposing restrictions on lesbian and gay parenting based on their conclusions, supported by numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. *See, e.g.*, American Academy of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; American Psychological Association, Sexual Orientation, Parents, & Children (July 2004), *available at* http://www.apa.org/about/governance/council/policy/parenting.aspx; American Academy of Child and Adolescent Psychiatry, Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement (2009), *available at* http://www.aacap.org/cs/root/

policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, AMA Policy Regarding Sexual Orientation, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, *available at* http://www.cwla.org/programs/culture/glbtqposition.htm. For this reason alone, no penalty or prohibition on same-sex marriage can be "substantially" related to an interest in promoting responsible child-rearing.

Second, there is no evidence in the legislative record that denying federal benefits to same-sex couples legally married under state law operates in any way to encourage responsible child-rearing, whether by opposite-sex or same-sex couples, and it is hard to imagine what such evidence would look like. In enacting DOMA, Congress expressed the view that marriage plays an "irreplaceable role" in child-rearing. H.R. Rep. at 14. But Section 3 does nothing to affect the stability of heterosexual marriages or the child-rearing practices of heterosexual married couples. Instead, it denies the children of same-sex couples what Congress sees as the benefits of the stable home life produced by legally recognized marriage, and therefore, on Congress's own account, undermines rather than advances an interest in promoting child welfare.

Finally, as to "responsible procreation," even assuming an important

governmental interest in providing benefits only to couples who procreate, Section 3 is not sufficiently tailored to that interest to survive heightened scrutiny. Many state-recognized same-sex marriages involve families with children; many opposite-sex marriages do not. And ability to procreate has never been a requirement of marriage or of eligibility for federal marriage benefits; opposite-sex couples who cannot procreate for reasons related to age or other physical characteristics are permitted to marry and to receive federal marriage benefits. *Cf.* H.R. Rep. at 14 (noting "that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children" but describing this objection to DOMA as "not a serious argument").[22]

In sum, the official legislative record makes plain that DOMA Section 3 was motivated in substantial part by animus toward gay and lesbian individuals and their intimate relationships, and Congress identified no other interest that is materially advanced by Section 3. Section 3 of DOMA is therefore unconstitutional. The

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[22] The House Report also identifies preservation of scarce government resources as an interest underlying Section 3's denial of government benefits to same-sex couples married under state law. *See* H.R. Rep. at 18. In fact, many of the rights and obligations affected by Section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds, and in other cases, exclusion of state-recognized same-sex marriages costs the government money by preserving eligibility for certain federal benefits. But regardless of whether an interest in preserving resources could justify Section 3 under rational basis review, it is clear that it will not suffice under heightened scrutiny; the government may not single out a suspect class for exclusion from a benefits program solely in the interest of saving money. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (holding that state may not advance its "valid interest in preserving the fiscal integrity of its programs" through alienage-based exclusions).

judgment of the district court in *Gill* should therefore be affirmed.

II. DOMA Violates the Spending Clause by Imposing an Unconstitutional Condition on the Receipt of Federal Funds.

The Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. It is well-settled that "Congress may attach conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), and "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

The spending power is "'not limited by the direct grants of legislative power found in the Constitution,'" but can be used to achieve broad policy objectives beyond Article I's "'enumerated legislative fields.'" *Dole*, 483 U.S. at 207 (citations omitted); *see also Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (contrasting an impermissible command with the imposition of a condition on acceptance of federal funds). Accordingly, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

Although statutes that impose conditions on the receipt of federal funds or on the collection of federal taxes generally raise no constitutional concerns under the Spending

Clause, the Court in *Dole* identified four limitations on Congress's spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "'the general welfare.'" *Dole*, 483 U.S. at 207 (quoting Art. I, § 8, cl. 1). Second, if Congress places conditions on the states' receipt of federal funds, it "'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (internal citation omitted). And fourth, the obligations imposed by Congress may not violate any independent constitutional provision. *Id.* at 208. As the Court in *Dole* explained, this limitation reflects "the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Id.* at 210.

DOMA prescribes the terms and conditions of federally funded programs and federal tax schemes, so it is within the Spending Clause's general grant of authority to Congress. The district court's holding in *Massachusetts* that DOMA exceeds Congress's authority under the Spending Clause turned entirely on the fourth *Dole* limitation.[23]

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[23] Massachusetts also claimed that DOMA is not germane to the purposes of the Medicaid and State Cemetery grant programs. JA 34–35 (*Mass.* Compl. ¶¶ 87–98). The district court did not decide this issue, and Massachusetts's claim is, in any event, wholly without merit. The purposes and terms of each of these programs are defined by

Because the court had already concluded in *Gill* that DOMA violates equal protection, it similarly held that Congress could not force Massachusetts to violate equal protection, applicable to Massachusetts through the Fourteenth Amendment, as a condition of the receipt of federal funds. JA 659–60 (*Mass.* Op. 26–27).

As demonstrated above, DOMA Section 3 violates equal protection. Therefore, it violates the Spending Clause by imposing an unconstitutional condition on Massachusetts, and the judgment of the district court in *Massachsusetts* should be affirmed on this ground.

III. DOMA Does Not Violate the Tenth Amendment by Interfering with State Sovereignty.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Under Supreme Court precedent, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505

Congress, not by Massachusetts, and Congress is free to modify a program as it sees fit. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). In the event this Court determines that DOMA Section 3 does not violate equal protection, it should also hold that Section 3 represents a valid exercise of Congressional authority under the Spending Clause.

U.S. 144, 156 (1992). "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)). This Court has similarly held that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power." *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *see also United States v. Lewko*, 269 F.3d 64, 66–70 (1st Cir. 2001); *United States v. Meade*, 175 F.3d 215, 224 (1st Cir. 1999). Because, as shown above, DOMA Section 3 is inconsistent with the Equal Protection Clause and, as a result, is also not authorized by the Spending Clause, this Court need not reach the Tenth Amendment argument.

However, in the event this Court determines that DOMA Section 3 does not violate equal protection and therefore represents a valid exercise of Congressional authority under the Spending Clause, it should also hold that DOMA does not violate the Tenth Amendment. Massachusetts has not raised a commandeering claim,[24] *see New York*, 505 U.S. at 161; *Printz v. United States*, 521 U.S. 898, 907–08 (1997), and if DOMA is supported by the Spending Clause, it plainly does not violate the Tenth Amendment.

Despite clear precedent holding to the contrary, Massachusetts claims that, even if DOMA is authorized by the Spending Clause, Section 3 of DOMA violates the Tenth

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[24] Massachusetts's complaint alleged that DOMA unconstitutionally commandeered state regulatory authority under *New York v. United States*, 505 U.S. 144 (1992), JA 33 (*Mass.* Compl. ¶ 86), but the state abandoned that claim in its motion for summary judgment before the district court, *Mass.* Mem. in Supp. of Mot. for Summary Judgment at 22.

Amendment because it "creat[es] 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." JA 33 (*Mass.* Compl. ¶ 85). The district court agreed with Massachusetts, applying the three part Tenth Amendment test from *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was explicitly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985).

The district court did not cite *National League of Cities* in applying that test; instead, it cited this Court's decision in *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997), which post-dated *Garcia* and cited, in dicta, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287–88 (1981), for this three part test. The part of *Hodel* to which *Bongiorno* referred, however, relied entirely on *National League of Cities* and therefore was plainly overruled by *Garcia* as well. This dicta in *Bongiorno*, even if it has not been overturned by this Court, is inconsistent with Supreme Court precedent. Regardless, as noted above, when there is no commandeering issue, *Bongiorno* itself holds that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power." *Bongiorno*, 106 F.3d at 1033. Accordingly, the district court's Tenth Amendment holding plainly conflicts with Supreme Court case law.

Nonetheless, even if the existence of congressional authority under the Spending Clause would not defeat Massachusetts's claim—which, of course, it would if this Court

determines that DOMA does not violate equal protection—the premises of the claim are flawed. It may be true that domestic relations have traditionally been regulated by the states—states traditionally decide who may marry, the dissolution of marriage, division of marital property, child custody, and the payment and amount of alimony or child support. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (describing limited statutory domestic relations exception to federal court jurisdiction). However, Section 3 of DOMA in no way displaces any state laws in these areas, and leaves entirely unaffected Massachusetts's interest in defining family relations under its own law within its own borders. Massachusetts can still issue marriage licenses on whatever terms it decides are appropriate and can grant same-sex couples all of the same benefits under state law it grants to opposite-sex couples.

Therefore, the essence of Massachusetts's claim is a contention that DOMA violates the Tenth Amendment by interfering with an asserted sovereign power of a state to define the meaning of the words "marriage" and "spouse" under *federal* law. Massachusetts thus asserts for the states the sovereign authority to define provisions of federal law. While the Constitution reserves various powers to the states, defining the meaning and scope of federal statutes is certainly not among them. As discussed above with respect to the Spending Clause, a federal statute's meaning and terms are defined by Congress. *See, e.g.*, *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 223–24 (1st Cir. 2003); *United States v. Ahlers*, 305 F.3d 54, 57–58 (1st Cir. 2002).

Furthermore, it does not matter whether Congress has legislated on an issue previously. Congressional inaction does not remove an area from Congress's authority. Moreover, it is not true, as the district court held, that DOMA represents the first time that Congress has departed from state definitions of family law for purposes of federal law. JA 662–65 (*Mass.* Op. 29–32). Independent of DOMA, there are a multitude of different federal programs that do not accept wholesale a state definition of marriage or its attributes. Many of them, like DOMA, do not adhere to definitions of family law terms as set forth under state law. Immigration law, where the federal government will look behind the existence of a state marriage for evidence of fraud, is one example. 8 U.S.C. § 1186a(b)(1)(A)(i); 8 C.F.R. § 216.3. Similarly, under ERISA, Congress has provided that the terms of an ERISA plan supersede state community property law—a matter typically regarded as being of fundamental importance in the regulation of marriage by those states that have such regimes. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 151–52 (2001) (discussing *Boggs v. Boggs*, 520 U.S. 833 (1997)); *see also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581–83 (1979) (holding that federal provisions for payment of benefits under Railroad Retirement Act preempt state community property law; discussing other cases in which state family law was found to be preempted). Other examples include the Food Stamps program, 7 U.S.C. § 2012(n)(1)(B) (defining the term "household" as, *inter alia*, "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption"); the tax code, 26

U.S.C. § 7703(b) (departing from state definition of "married" to exclude "certain married individuals living apart"); the Social Security Act, 42 U.S.C. § 416(a)–(g) (defining the terms "spouse," "wife," "widow," "divorce," "child," "husband," and "widower" for the purposes of federal law in ways that depart from underlying state definitions); veterans' benefits, 38 U.S.C. § 101(3) (defining "surviving spouse" as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death . . . and who has not remarried"); and many laws relating to the benefits offered to federal employees, *see, e.g.*, 5 U.S.C. § 8101(6)–(11) (defining the terms "widow," "parent," "brother," "sister," "child," "grandchild," and "widower"); 5 U.S.C. § 8341(a)(1)(A)–(a)(2)(A) (defining "widow" as "the surviving wife of an employee or Member" who "was married to him for at least 9 months immediately before his death" or "the mother of issue by that marriage," and providing a similar definition for "widower").

This list, which is hardly exhaustive, demonstrates that, for the purposes of the Tenth Amendment question, the district court was incorrect in finding that the federal government has previously simply incorporated state law definitions of marriage for purposes of eligibility under federal programs. Indeed, this Court has repeatedly upheld federal statutes that affect domestic relations law in various ways. *See, e.g.*, *Lewko*, 269 F.3d at 66–70 (upholding the Child Support Recovery Act of 1992, 18 U.S.C. § 228(a)(1),

and the Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228(a)(3)); *Meade*, 175 F.3d at 224 (upholding 18 U.S.C. § 922(g)(8), which criminalizes the possession of firearms by individuals who have been subject to a judicial anti-harassment or anti-stalking order).

Therefore, we respectfully submit that DOMA does not impermissibly interfere with state sovereignty. In the event this Court determines that Section 3 does not violate equal protection and therefore is authorized by the Spending Clause, it should hold that DOMA does not violate the Tenth Amendment.

CONCLUSION

For the foregoing reasons, this Court's precedents applying rational basis review to sexual orientation classifications should be reconsidered, and the judgments of the district court should be affirmed on the ground that Section 3 of DOMA is subject to heightened scrutiny and, under that standard, is unconstitutional as applied to same-sex couples married under state law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportionally spaced font typeface using Corel WordPerfect X4 in 14-point Garamond font. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 15,714 words, as counted by Corel WordPerfect X4, which is within the word limit of 21,000 words set by this Court's Order of November 24, 2010, for the principal brief of Appellants/Cross-Appellees.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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ADDENDUM

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v.
United States Department of Health and Human Services, et al.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, in his official capacity as the Secretary of the United States Department of Veterans Affairs; and the UNITED STATES OF AMERICA, Defendants.	*	Civil Action No. 1:09-11156-JLT

ORDER

July 8, 2010

TAURO, J.

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

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, in his official capacity as the Secretary of the United States Department of Veterans Affairs; and the UNITED STATES OF AMERICA, Defendants.	*	Civil Action No. 1:09-11156-JLT

MEMORANDUM

July 8, 2010

TAURO, J.

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act[1] as applied to Plaintiff, the Commonwealth of Massachusetts (the "Commonwealth").[2] Specifically, the Commonwealth contends that DOMA violates the Tenth

[1]1 U.S.C. § 7.

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

Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs. Because this court agrees, Defendants' Motion to Dismiss [#16] is DENIED and Plaintiff's Motion for Summary Judgment [#26] is ALLOWED.[3]

II. Background[4]

A. The Defense of Marriage Act

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

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

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

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

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

[6]1 U.S.C. § 7.

As of December 31, 2003, there were at least "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges," according to estimates from the General Accounting Office.[7] These statutory provisions pertain to a variety of subjects, including, but not limited to Social Security, taxes, immigration, and healthcare.[8]

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

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

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

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

[8]Id. at 1.

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

[10]Id.

[11]Id., ¶ 10.

health, safety and welfare of their populations."[12]

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

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

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[12] Id.

[13] Id.

[14] Id.

[15] Id., ¶ 14.

[16] Id.

[17] Id., ¶¶ 15, 18-19.

[18] Id., ¶ 19.

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

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

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

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[19] Id.

[20] Id.

[21] Id.

[22] Id.

[23] See id., ¶¶ 20-52.

[24] Id.

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

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

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

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[25] Id., ¶ 45.

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

[27] See Cott Aff., ¶¶ 36, 44.

[28] Id., ¶ 35.

[29] Id.

[30] Id., ¶ 37.

[31] Id.

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

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

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

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[32]Id., ¶ 36.

[33]Id.

[34]Id., ¶ 38.

[35]Id.

[36]Id.

[37]Id., ¶ 38.

[38]Id., ¶ 43.

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

government consistently relied on state determinations with regard to marriage, when they were relevant to federal law.[40]

C. Same-Sex Marriage in Massachusetts

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

As of February 12, 2010, the Commonwealth had issued marriage licenses to at least 15,214 same-sex couples.[45] But, as Section 3 of DOMA bars federal recognition of these marriages, the Commonwealth contends that the statute has a significant negative impact on the

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

[40]Cott Aff., ¶ 45.

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

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

[43]Compl. ¶ 17.

[44]Id., ¶¶ 18-19.

[45]Nyberg Aff., ¶¶ 6-7.

operation of certain state programs, discussed in further detail below.

D. Relevant Programs

1. The State Cemetery Grants Program

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

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

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

[47]Id.

[48]Id., ¶ 4.

[49]Id., ¶ 4.

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

[51]Id.

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

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

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

The VA regulations require that veterans' cemeteries "be operated solely for the interment

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[52]Id., ¶ 5.

[53]Id., ¶ 5.

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

[55]Id., ¶ 6.

[56]38 U.S.C. § 2408(c).

[57]Walls Aff., ¶ 10.

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

More recently, the National Cemetery Administration ("NCA"), an arm of the VA, published a directive in June 2008 stating that "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran."[61] In addition, at a 2008 NCA conference, "a representative from the VA gave a presentation making it clear that the VA would not permit the burial of any same-sex spouses in VA supported veterans' cemeteries."[62]

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[58]38 C.F.R. § 39.5(a).

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

[60]Id.

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

[62]Walls Aff., ¶ 20.

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

Because of his long service to the United States Army, as well as his Massachusetts residency, Darrel Hopkins is eligible for burial in Winchendon cemetery.[68] By virtue of his marriage to Darrel Hopkins, Thomas Hopkins is also eligible for burial in the Winchendon cemetery in the eyes of the Commonwealth, which recognizes their marriage.[69] But because the Hopkins' marriage is not valid for federal purposes, in the eyes of the federal government,

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

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

[65]Walls Aff., ¶ 23.

[66]Id.

[67]Id., ¶ 24.

[68]Id., ¶ 25.

[69]Id., ¶ 26.

Thomas Hopkins is ineligible for burial in Winchendon.[70]

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

2. MassHealth

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

MassHealth provides comprehensive health insurance or assistance in paying for private health insurance to approximately one million residents of Massachusetts.[75] The Department of Health and Human Services ("HHS") reimburses MassHealth for approximately one-half of its Medicaid expenditures[76] and administration costs.[77] HHS provides MassHealth with billions of

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[70] Id., ¶ 26.

[71] Id., ¶¶ 21, 27.

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

[73] Id.

[74] Id., ¶¶ 2, 5.

[75] Id., ¶ 5.

[76] Id., ¶ 7.

[77] Id., ¶ 7.

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

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

Marital status is a relevant factor in determining whether an individual is eligible for coverage by MassHealth.[83] The Commonwealth asserts that, because of DOMA, federal law requires MassHealth to assess eligibility for same-sex spouses as though each were single, a mandate which has significant financial consequences for the state.[84] In addition, the Commonwealth cannot obtain federal funding for expenditures made for coverage provided to same-sex spouses who do not qualify for Medicaid when assessed as single, even though they would qualify if assessed as married.[85]

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[78] Id., ¶ 6.

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

[80] Id., ¶ 8.

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

[82] Id., ¶ 9.

[83] Id., ¶ 11.

[84] Id., ¶ 14.

[85] Id.

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

The recognition of same-sex marriages also renders certain individuals eligible for benefits for which they would otherwise be ineligible. [89] For instance, in a household consisting of two same-sex spouses under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year,[90] both spouses are eligible for healthcare under MassHealth because, as a married couple, their combined income—$40,000—falls below the $43,716 minimum threshold established for spouses.[91] In the eyes of the federal government, however, only the spouse

[86] Id., ¶ 11.

[87] Id., ¶ 11.

[88] Id., ¶ 11.

[89] Id., ¶ 12.

[90] Id., ¶ 12.

[91] Id., ¶ 12.

earning $7,000 per year is eligible for Medicaid coverage.[92]

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

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

Following the passage of the MassHealth Equality Act, CMS reaffirmed that DOMA "limits the availability of FFP by precluding recognition of same- sex couples as 'spouses' in the Federal program."[96] In addition, CMS stated that "because same sex couples are not spouses

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[92]Id., ¶ 12.

[93]Id., ¶ 15.

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

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

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

under Federal law, the income and resources of one may not be attributed to the other without actual contribution, i.e. you must not deem income or resources from one to the other."[97] Finally, CMS informed the Commonwealth that it "must pay the full cost of administration of a program that does not comply with Federal law."[98]

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

3. Medicare Tax

Under federal law, health care benefits for a different-sex spouse are excluded from an employee's taxable income.[101] The value of health care benefits provided to an employee's

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2008).

[97] Id.

[98] Id.

[99] Callahan Aff., ¶ 22.

[100] Id., ¶ 23.

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

same-sex spouse, however, is considered taxable and must be imputed as extra income to the employee for federal tax withholding purposes.[102]

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

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

Furthermore, in order to comply with DOMA, the Commonwealth's Group Insurance Commission has been forced to create and implement systems to identify insurance enrollees who provide healthcare coverage to their same-sex spouses, as well as to calculate the amount of

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[102]McHugh Aff., ¶ 4.

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

[104]Id.

[105]Id.

[106]Id., ¶ 7.

[107]Id., ¶ 8.

imputed income for each such enrollee.[108] Developing such a system cost approximately $47,000, and the Group Insurance Commission continues to incur costs on a monthly basis to comply with DOMA.[109]

III. Discussion

A. Summary Judgment

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

B. Standing

This court first addresses the government's contention that the Commonwealth lacks

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

[109]Id., ¶ 10.

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

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

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

standing to bring certain claims against the VA and HHS.[113]

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

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

The evidentiary record is replete with allegations of past and ongoing injuries to the Commonwealth as a result of the government's adherence to the strictures of DOMA. Standing is not contingent, as the government suggests, on Thomas Hopkins—or another similarly-situated individual—being lowered into his grave at Winchendon, or on the Commonwealth's receipt of an invoice for millions in federal state veterans cemetery grant funds. Indeed, a plaintiff is not

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

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

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

required "to expose himself to liability before bringing suit to challenge the basis for the threat," particularly where, as here, it is the government that threatens to impose certain obligations.[116]

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

Moreover, in light of the undisputed record evidence, the argument that the Commonwealth lacks standing to challenge restrictions on the provision of federal Medicaid matching funds to MassHealth cannot withstand scrutiny. The Commonwealth has amassed approximately $640,661 in additional tax liability and forsaken at least $2,224,018 in federal funding because DOMA bars HHS's Centers for Medicare & Medicaid Services from using federal funds to insure same-sex married couples. Given that the HHS has given no indication that it plans to change course, it is disingenuous to now argue that the risk of future funding denials is "merely...speculative."[117] The evidence before this court clearly demonstrates that the Commonwealth has suffered, and will continue to suffer, economic harm sufficient to satisfy the injury in fact requirement for Article III standing.

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

This case requires a complex constitutional inquiry into whether the power to establish

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

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

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

It is a fundamental principle underlying our federalist system of government that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[119] And, correspondingly, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[120] The division between state and federal powers delineated by the Constitution is not merely "formalistic."[121] Rather, the Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty."[122] This reflects a founding principle of governance in this country, that "[s]tates are not mere political subdivision of the United States," but rather sovereigns unto themselves.[123]

The Supreme Court has handled questions concerning the boundaries of state and federal power in either of two ways: "In some cases the Court has inquired whether an Act of Congress is

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

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

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

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

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

[123]Id.

authorized by one of the powers delegated to Congress in Article I of the Constitution.... In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment."[124]

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

1. DOMA Exceeds the Scope of Federal Power

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

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

[125]Id. at 156.

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

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

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

The First Circuit has upheld federal regulation of family law only where firmly rooted in an enumerated federal power.[129] In many cases involving charges that Congress exceeded the scope of its authority, e.g. Morrison[130] and Lopez,[131] courts considered whether the challenged federal statutes contain "express jurisdictional elements" tying the enactment to one of the federal government's enumerated powers. DOMA, however, does not contain an explicit jurisdictional element. For that reason, this court must weigh the government's contention that DOMA is grounded in the Spending Clause of the Constitution. The Spending Clause provides, in pertinent part:

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

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

It is first worth noting that DOMA's reach is not limited to provisions relating to federal spending. The broad sweep of DOMA, potentially affecting the application of 1,138 federal

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

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

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

[132]U.S. CONST. art. I, § 8.

statutory provisions in the United States Code in which marital status is a factor, impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act, and testimonial privileges.[133]

It is true, as the government contends, that "Congress has broad power to set the terms on which it disburses federal money to the States" pursuant to its spending power.[134] But that power is not unlimited. Rather, Congress' license to act pursuant to the spending power is subject to certain general restrictions.[135]

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

The Commonwealth charges that DOMA runs afoul of several of the above-listed restrictions. First, the Commonwealth argues that DOMA departs from the fourth Dole

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

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

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

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

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

requirement, regarding the constitutionality of Congress' exercise of its spending power, because the statute is independently barred by the Equal Protection Clause. Second, the Commonwealth claims that DOMA does not satisfy the third Dole requirement, the "germaneness" requirement, because the statute's treatment of same-sex couples is unrelated to the purposes of Medicaid or the State Veterans Cemetery Grants Program.

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

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

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

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

[140]Id. (internal citation omitted).

In the companion case, Gill et al. v. Office of Pers. Mgmt. et al., No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. There, this court found that DOMA failed to pass constitutional muster under rational basis scrutiny, the most highly deferential standard of review.[141] That analysis, which this court will not reiterate here, is equally applicable in this case. DOMA plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples. By way of example, the Department of Veterans Affairs informed the Commonwealth in clear terms that the federal government is entitled to "recapture" millions in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries, a threat which, in essence, would penalize the Commonwealth for affording same-sex married couples the same benefits as similarly-situated heterosexual couples that meet the criteria for burial in Agawam or Winchendon. Accordingly, this court finds that DOMA induces the Commonwealth to violate the equal protection rights of its citizens.

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

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

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

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

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

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

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

A. DOMA Regulates the Commonwealth "as a State"

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

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

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

B. Marital Status Determinations Are an Attribute of State Sovereignty

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

"The Constitution requires a distinction between what is truly national and what is truly local."[144] And, significantly, family law, including "declarations of status, e.g. marriage, annulment, divorce, custody and paternity,"[145] is often held out as the archetypal area of local concern.[146]

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

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

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

[146]See, e.g., Boggs v. Boggs, 520 U.S. 833, 848 (1997) ("As a general matter, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'") (citation omitted); Haddock v. Haddock, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the

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

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

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Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."), overruled on other grounds, Williams v. North Carolina, 317 U.S. 287 (1942); see also Morrison, 529 U.S. at 616.

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

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

their states' areas of sovereign concern.

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

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

That the Supreme Court, over the past century, has repeatedly offered family law as an example of a quintessential area of state concern, also persuades this court that marital status determinations are an attribute of state sovereignty.[149] For instance, in Morrison, the Supreme Court noted that an overly expansive view of the Commerce Clause could lead to federal legislation of "family law and other areas of traditional state regulation since the aggregate effect

[149]See, e.g., Lopez, 514 U.S. 549, 564 (1995) (noting with disfavor that a broad reading of the Commerce Clause could lead to federal regulation of "family law (including marriage, divorce and child custody)"); Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); Haddock, 201 U.S. at 575 ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."); see also, United States v. Molak, 276 F.3d 45, 50 (1st Cir. 2002) ("[d]omestic relations and family matters are, in the first instance, matters of state concern").

of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[150] Similarly, in Elk Grove Unified Sch. Dist. v. Newdow, the Supreme Court observed "that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'"[151]

The government has offered little to disprove the persuasive precedential and historical arguments set forth by the Commonwealth to establish that marital status determinations are an attribute of state sovereignty.[152] The primary thrust of the government's rebuttal is, in essence, that DOMA stands firmly rooted in Congress' spending power, and, for that reason, "the fact that Congress had not chosen to codify a definition of marriage for purposes of federal law prior to 1996 does not mean that it was without power to do so or that it renders the 1996 enactment invalid."[153] Having determined that DOMA is not rooted in the Spending Clause, however, this court stands convinced that the authority to regulate marital status is a sovereign attribute of

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

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

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

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

statehood.

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

Having determined that marital status determinations are an attribute of state sovereignty, this court must now determine whether compliance with DOMA would impair the Commonwealth's ability to structure integral operations in areas of traditional governmental functions.[154]

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

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

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

separate and independent existence."[155] And, in view of more recent authority, it seems most appropriate for this court to approach this question with a mind towards determining whether DOMA "infring[es] upon the core of state sovereignty."[156]

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

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

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[155]United Transp. Union v. Long Island R. R. Co., 455 U.S. 678, 686-687 (1982) (internal citations and quotation marks omitted). This court notes that the concept of "traditional governmental functions" has been the subject of disfavor, see, e.g., Morrison, 529 U.S. 598, 645-52 (2000) (describing this part of the test as "incoherent" because there is "no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other") (Souter, J., dissenting), but was revived by the court in Morrison.

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

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

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

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

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

That the government views same-sex marriage as a contentious social issue cannot justify its intrusion on the "core of sovereignty retained by the States,"[157] because "the Constitution ... divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of

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

the day."[158] This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.

IV. Conclusion

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

AN ORDER HAS ISSUED.

/s/ Joseph L. Tauro
United States District Judge

[158] Id. at 187.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, in his official capacity as the Secretary of the United States Department of Veterans Affairs; and the UNITED STATES OF AMERICA, Defendants.	*	Civil Action No. 09-11156-JLT

JUDGMENT

August 12, 2010

TAURO, J.

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

1. 1 U.S.C. § 7 is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples.

2. 1 U.S.C. § 7 as applied to 42 U.S.C. §§ 1396 et seq. and 42 C.F.R. pts. 430 et seq. is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples.

3. 1 U.S.C. § 7 as applied to 38 U.S.C. § 2408 and 38 C.F.R. pt. 39 is unconstitutional as applied in Massachusetts, where state law recognizes marriages

between same-sex couples.

4. Defendants and any other agency or official acting on behalf of Defendant the United States of America is hereby enjoined from enforcing 1 U.S.C. § 7 against Massachusetts and any of its agencies or officials.

5. This case is hereby CLOSED.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

Hara and Gill, et al.,
v.
Office of Personnel Management, et al.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY GILL & MARCELLE LETOURNEAU, et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 09-10309-JLT
OFFICE OF PERSONNEL MANAGEMENT, et al.,	*	
Defendants.	*	

ORDER

July 8, 2010

TAURO, J.

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

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

2. Plaintiffs' Motion for Summary Judgment [#25] is ALLOWED.

IT IS SO ORDERED.

/s/ J. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY GILL & MARCELLE LETOURNEAU, et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 09-10309-JLT
OFFICE OF PERSONNEL MANAGEMENT, et al.,	*	
Defendants.	*	

MEMORANDUM

July 8, 2010

TAURO, J.

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act[1] as applied to Plaintiffs, who are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts.[2] Specifically, Plaintiffs contend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-based benefits that are available to similarly-situated heterosexual

[1]1 U.S.C. § 7.

[2]Defendants in this action are the Office of Personnel Management; the United States Postal Service; John E. Potter, in his official capacity as the Postmaster General of the United States of America; Michael J. Astrue, in his official capacity as the Commissioner of the Social Security Administration; Eric H. Holder, Jr., in his individual capacity as the United States Attorney General; and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.[3] Because this court agrees, Defendants' Motion to Dismiss [#20] is DENIED and Plaintiffs' Motion for Summary Judgment [#25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

II. Background[4]

A. The Defense of Marriage Act

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA").[5] At issue in this case is Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides that:

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

In large part, the enactment of DOMA can be understood as a direct legislative response

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

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

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

[6]1 U.S.C. § 7.

to Baehr v. Lewin,[7] a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution.[8] That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses.[9]

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the Baehr decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences . . . on federal law."[10] Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."[11]

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

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

[8]See id. at 59-67.

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

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

[11]Id. at 10.

[12]Id. at 2.

In enacting Section 2 of DOMA,[13] Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its "express grant of authority," under the second sentence of the Constitution's Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States."[14] With regard to Section 3 of DOMA, the House Report explained that the statute codifies the definition of marriage set forth in "the standard law dictionary," for purposes of federal law.[15]

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

The House Report further justified the enactment of DOMA as a means to "encourag[e] responsible procreation and child-rearing," conserve scarce resources,[19] and reflect Congress'

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

[14]Id. at 25.

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

[16]Id. at 3.

[17]Id. at 12.

[18]Id.

[19]Id. at 13, 18.

"moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[20] In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that "[m]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law."[21]

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles."[22] They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage[23] and might indeed be "the final blow to the American family."[24]

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did

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

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

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

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

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

not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state's marital status determinations.[25]

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

B. The Federal Programs Implicated in This Action

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

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[25]House Report at 10-11.

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

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

1. Health Benefits Based on Federal Employment

Plaintiffs' allegations in this case encompass three federal health benefits programs: the Federal Employees Health Benefits Program (the "FEHB"), the Federal Employees Dental and Vision Insurance Program (the "FEDVIP"), and the federal Flexible Spending Arrangement program.

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

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

A. Federal Employees Health Benefits Program

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

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

[29]5 U.S.C. § 8905.

the program.[30]

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

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

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[30] Id. §§ 8901-8914.

[31] Id. §§ 8902, 8903, 8906.

[32] Id. § 8913.

[33] Id.

[34] Id. § 8906.

[35] Id. §§ 8905, 8906.

[36] 5 C.F.R. § 890.302(a)(1).

[37] Id. § 8901(5).

employing office during an annual "open season," or within sixty days after a change in family status, "including a change in marital status."[38]

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

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

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

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

[39] See 5 U.S.C. § 8901(3)(B).

[40] 5 C.F.R. § 890.303(c).

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

[42] Id. §§ 8951, 8954, 8981, 8984.

sets the premiums associated with coverage.[43] OPM is also authorized to "prescribe regulations to carry out" this program.[44]

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

C. Flexible Spending Arrangement Program[50]

A Flexible Spending Arrangement ("FSA") allows federal employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses. The money withheld in

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

[44] Id. §§ 8962(a), 8992(a).

[45] Id. §§ 8958(a), 8988(a).

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

[47] Id. § 894.201(c).

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

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

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

an FSA is not subject to income taxes.[51] OPM established the federal Flexible Spending Arrangement program in 2003.[52] This program does not apply, however, to "[c]ertain executive branch agencies with independent compensation authority," such as the United States Postal Service, which established its own flexible benefits plan prior to the creation of the FSA.[53]

2. Social Security Benefits

The Social Security Act ("Act") provides, among other things, Retirement and Survivors' Benefits to eligible persons. The Act is administered by the Social Security Administration, which is headed by the Commissioner of Social Security.[54] The Commissioner has the authority to "make rules and regulations and to establish procedures, not inconsistent with the [pertinent] provisions of [the Social Security Act], which are necessary or appropriate to carry out such provisions."[55]

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

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[51] 26 U.S.C. § 125.

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

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

[54] 42 U.S.C. §§ 901, 902.

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

Burtis seeks Widower's Insurance Benefits.

A. Retirement Benefits

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

B. Social Security Survivor Benefits

The Act also provides certain benefits to the surviving spouse of a deceased wage earner. This action implicates two such types of Survivor Benefits, the Lump-Sum Death Benefit and the Widower's Insurance Benefit.[58]

i. Lump-Sum Death Benefit

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

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[56]Id. §§ 402, 413(a), 414, 415.

[57]Id. § 402(b), (c).

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

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

the individual's lifetime earnings.[60]

ii. Widower's Insurance Benefit

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

3. Filing Status Under the Internal Revenue Code

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

[60] Id. §§ 402(I), 415(a).

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

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

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

within three years after the filing of the original returns.[64] Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference.[65]

III. Discussion

A. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[66] In granting a summary judgment motion, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof."[67] Because the Parties do not dispute the material facts relevant to the questions raised by this action, it is appropriate for this court to dispose of the issues as a matter of law.[68]

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

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

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[64]Id. § 6013(b)(1), (2).

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

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

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

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

"The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proven) an injury in fact.... Second, there must be causation–a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability–a likelihood that the requested relief will redress the alleged injury."[69] Where the plaintiff lacks standing to pursue his claim, the court, in turn, lacks subject matter jurisdiction over the dispute.[70] At issue here is the question of redressability.

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

Prior to this action, Mr. Hara sought to enroll in the FEHB as a survivor annuitant based on his deceased spouse's federal employment. OPM found Mr. Hara ineligible for a survivor annuity both on initial review and on reconsideration. Mr. Hara appealed that decision to the Merit Systems Review Board, which affirmed OPM's denial. And currently, Mr. Hara's appeal of

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

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

[71]5 U.S.C. § 8905(b).

[72]5 U.S.C. § 8347(b).

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

the Merit Systems Review Board's decision is pending before the Federal Circuit.[74] Accordingly, the government asserts that a ruling in this court cannot redress Mr. Hara's inability to enroll in the FEHB as an annuitant, because the Federal Circuit has yet to resolve his appeal of the Merit Systems Review Board's decision, which affirmed OPM's finding adverse to Mr. Hara. And so the government maintains that, if Mr. Hara has not been declared eligible for a survivor annuity, he will remain ineligible for FEHB enrollment, regardless of the outcome of this proceeding. This court agrees.

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

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

Second, Plaintiffs argue that, because OPM did not file a cross-appeal to the Federal Circuit, it is estopped from raising the issue of whether Mr. Hara is an "annuitant" on appeal and, therefore, Mr. Hara's eligibility for a survivor annuity turns solely on the constitutionality of

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

DOMA. This argument stems from the fact that, unlike OPM, the Merit Systems Review Board deemed Mr. Hara's spouse to have made the requisite "self and family" benefits election prior to his death, based on unrebutted evidence of his intent.

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

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

C. The FEHB Statute

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

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

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

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

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

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

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

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

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

[80]1 U.S.C. § 7.

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

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

D. Equal Protection of the Laws

"[T]he Constitution 'neither knows nor tolerates classes among citizens.'"[83] It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.'"[84] And it is because of this "commitment to the law's neutrality where the rights of persons are at stake"[85] that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional

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

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

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

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

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

scrutiny.[86]

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

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

- DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations;

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[86]Id.

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

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

[89]Id.

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

- DOMA burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships, and;
- The law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class.

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

1. The Rational Basis Inquiry

This analysis must begin with recognition of the fact that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[92] A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity...[and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."[93] Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision.[94]

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

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

[93] Id. (internal citations omitted).

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

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

Importantly, the objective served by the law must be not only a proper arena for government action, but also properly cognizable by the governmental body responsible for the law in question.[99] And the classification created in furtherance of this objective "must find some footing in the realities of the subject addressed by the legislation."[100] That is to say, the constitution will not tolerate government reliance "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[101] As such, a law

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

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

[97]Id.

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

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

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

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

must fail rational basis review where the "purported justifications...[make] no sense in light of how the [government] treated other groups similarly situated in relevant respects."[102]

2. Congress' Asserted Objectives

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

But the fact that the government has distanced itself from Congress' previously asserted reasons for DOMA does not render them utterly irrelevant to the equal protection analysis. As this court noted above, even in the context of a deferential rational basis inquiry, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[104]

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA.[105] Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare

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

[103]House Report at 12-18.

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

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

communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.[106] But even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure,"[107] when afforded equal recognition under federal law.

Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to Lawrence v. Texas, the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country.[108] Indeed, "the sterile

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

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

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

and the elderly" have never been denied the right to marry by any of the fifty states.[109] And the federal government has never considered denying recognition to marriage based on an ability or inability to procreate.

Similarly, Congress' asserted interest in defending and nurturing heterosexual marriage is not "grounded in sufficient factual context [for this court] to ascertain some relation" between it and the classification DOMA effects.[110] To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same sex. But more generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.[111] And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.

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

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[109] Id.

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

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

[112] Id.

the very least mean"[113] that the Constitution will not abide such "a bare congressional desire to harm a politically unpopular group."[114]

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

And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest,[116] "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[117] This court can discern no principled reason to cut government expenditures at the particular expense of

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

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

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

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

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

Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]" are decidedly impermissible bases upon which to ground a legislative classification.[118]

3. Objectives Now Proffered for Purposes of Litigation

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

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

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

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

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

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

There can be no dispute that the subject of domestic relations is the exclusive province of the states.[119] And the powers to establish eligibility requirements for marriage, as well as to issue determinations of martial status, lie at the very core of such domestic relations law.[120] The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest.[121] "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be

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

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

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

determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations."[122]

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations.[123] Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise,"[124] individual states have changed their marital eligibility requirements in myriad ways over time.[125] And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law.[126]

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

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

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

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

[126]See, e.g., Dunn v.Comm'r of Internal Revenue, 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse" for purposes of federal employee benefits by reference to State law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for purposes of Social Security survivor and death benefits as "the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such an applicant and such insured individual were validly married"); 20 C.F.R. § 404.345 (Social Security) ("If you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met."); 38 U.S.C. § 103(c) (Veterans' benefits); 20 C.F.R. § 10.415 (Workers' Compensation); 45 C.F.R. § 237.50(b)(3)

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

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

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage–or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other

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(Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans' Pension and Compensation). Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to *any* state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans' cemeteries, enacted in 1975. See 38 U.S.C. § 101(31).

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

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

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

similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry.[130]

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

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law

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

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

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

reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.[133]

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

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

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo might help to achieve. Staying the course is not an end in and of

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

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

The only "problem" that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in

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

[135]Indeed, the cases cited by the government support this court's interpretation of the incrementalist approach as a means by which to achieve a legitimate government objective and not an objective in and of itself. See, e.g., Medeiros v. Vincent, 431 F.3d 25, 31-32 (1st Cir. 2005) (upholding regulation of lobster fishing method, notwithstanding differential treatment of other fishing methods, to ameliorate problem of overfishing); Butler v. Apfel, 144 F.3d 622, 625 (9th Cir. 1998) (upholding denial of Social Security benefits to incarcerated felons to conserve welfare resources, notwithstanding different treatment of other institutionalized groups because these groups are different in relevant respects); Massachusetts v. EPA, 549 U.S. 497, 524 (2007) (noting that a massive problem, such as global change, is not generally resolved at once but rather with "reform" moving one step at a time, addressing what seems "most acute to the legislative mind"); SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (addressing need for regulatory flexibility to address "specialized problems which arise"); Nat'l Parks Conserv. Ass'n. v. Norton, 324 F.3d 1229, 1245 (11th Cir. 2003) (preserving status quo by allowing leaseholders of stilted structures on national park land to continue to live in structures to extend their leases for a limited period of time served legitimate interest in ensuring that structures were maintained pending development of planning process); Teigen v. Renfrow, 511 F.3d 1072, 1084-85 (10th Cir. 2007) (preserving status quo by not promoting employees involved in active litigation against government employer served government's legitimate interest in avoiding courses of action that might negatively impact its prospects of success in the litigation).

consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

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

More importantly, however, the pursuit of consistency in the distribution of federal marriage-based benefits can only constitute a legitimate government objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not.[137] And, notably, there is a readily discernible and eminently relevant characteristic on which to base such a distinction: *marital status*. Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects

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[136]RSA 457:4-5.

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

from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny.[138]

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

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the

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

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

suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.[140]

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

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

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

[142]8 U.S.C. § 1430.

[143]8 U.S.C.§ 1186b(2)(A).

[144]See 5 U.S.C. § 6382.

dictates that the word "spouse", as used in the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

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

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

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

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

[146]Id. at 321.

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

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

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

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss [#20] is DENIED and Plaintiffs' Motion for Summary Judgment [#25] is ALLOWED, except with regard to Plaintiff

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

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

Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

AN ORDER HAS ISSUED.

/s/ Joseph L. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NANCY GILL & MARCELLE LETOURNEAU, et al. Plaintiffs, v. OFFICE OF PERSONNEL MANAGEMENT, et al. Defendants.	)	No. 1:09-cv-10309 JLT

~~PROPOSED~~ AMENDED JUDGMENT

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

It is ORDERED AND ADJUDGED:

The Plaintiffs' Motion for Summary Judgment is ALLOWED and:

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

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

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

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

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

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

(f) The Plaintiff Jo Ann Whitehead is entitled to review of her application for Retirement Insurance Benefits based on the earning record of her spouse, Bette Jo Green, without regard to Section 3 of DOMA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) On Counts IV, V, VI, VII, and VIII of the Second Amended and Supplemental Complaint, the following amounts, plus statutory interest thereon at the rate provided by Section 6621 of the Internal Revenue Code (26 U.S.C.) to a date preceding issuance of the refund check by not more than 30 days, are awarded to the Plaintiffs Mary Ritchie and Kathleen Bush as against the United States of America:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) Plaintiffs are awarded their costs.

The Defendants' Motion to Dismiss is ALLOWED IN PART and DENIED IN PART, being allowed solely on the Plaintiff Dean Hara's claim for enrollment in the FEHB Program as a matter of standing.

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

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

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

/s/ J Tauro

Joseph L. Tauro
United States District Judge

ENTERED:

STATUTORY ADDENDUM

Pub. L. No. 104-199, 110 Stat 2419 (1996):

SECTION 1. SHORT TITLE.

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

SEC. 2. POWERS RESERVED TO THE STATES.
<< 28 USCA § 1738C >>

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

> "§ 1738C. Certain acts, records, and proceedings and the effect thereof
>
> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

* * * *

SEC. 3. DEFINITION OF MARRIAGE.
<< 1 USCA § 7 >>

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

> "§ 7. Definition of 'marriage' and 'spouse'
>
> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

* * * *