Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

NANCY GILL, et al.,
Plaintiffs-Appellees,

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal from Final Orders of the U.S. District Court
for the District of Massachusetts

BRIEF FOR INTERVENOR-APPELLANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson

BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090

Counsel for Intervenor-Appellant

OF COUNSEL:

Kerry W. Kircher, General Counsel
Christine Davenport, Senior Assistant Counsel
Katherine E. McCarron, Assistant Counsel
William Pittard, Assistant Counsel
Kirsten W. Konar, Assistant Counsel

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515

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JURISDICTIONAL STATEMENT

These cases involve a constitutional challenge to a federal statute and a claim (by some Plaintiffs) for a refund of federal income tax. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final amended judgments were entered August 17, 2010 and this appeal was timely filed on October 12, 2010. *See* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUE PRESENTED

Intervenor-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives (the "House")[1] will address the following question:

Whether Congress's adoption of the traditional, historic, and time-tested definition of marriage for purposes of allocating federal benefits and burdens in Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, violates the Constitution's equal protection requirements.

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[1] The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and Democratic Whip decline to support the filing of this Brief.

STATEMENT OF THE CASE

These are three consolidated appeals from two district court judgments.

Decisions Below

The seventeen Plaintiffs-Appellees in *Gill v. OPM*, No. 10-2207, claim that DOMA has denied federal marriage-related benefits to them and/or persons of the same sex with whom they have obtained a marriage license, in violation of the Fifth Amendment's equal protection component.[2] In *Massachusetts v. Department of HHS*, No. 10-2204, the Commonwealth claims DOMA exceeds Congress's constitutional spending power by requiring Massachusetts to treat same-sex couples married under state law differently from opposite-sex married couples, allegedly in violation of the Equal Protection Clause of the Fourteenth Amendment.[3]

In *Gill*, the district court, while purporting to apply rational basis scrutiny to DOMA, considered Congress's stated purposes for the statute "only briefly"

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[2] One of the *Gill* plaintiffs, Dean Hara, has also filed a cross-appeal, No. 10-2214, that solely concerns a standing issue which will be addressed by the Department of Justice ("DOJ").

[3] The Commonwealth also claims that DOMA violates the Tenth Amendment. Because DOJ has abandoned DOMA's defense only with respect to its constitutionality under equal protection, this brief will not address the Tenth Amendment claim, which will be defended by DOJ.

because DOJ had "disavowed" those justifications. Addendum ("Add.") 29a. The court asserted that there is "a consensus . . . among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents," Add. 29a–30a, that "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," Add. 30a, and that "an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because . . . the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country," *id.*

The district court also rejected Congress's "interest in defending and nurturing heterosexual marriage," finding, without explanation, that DOMA "bears no reasonable relation to . . . making heterosexual marriages more secure." Add. 31a. The court further rejected the notion "that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges," Add. 34a, because, it concluded, "DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples," Add. 40a. Finally, the court asserted that DOMA does not reduce the administrative burden of distributing federal marital benefits, Add. 41a.

As a result, the district court granted summary judgment for Plaintiffs-Appellees and held DOMA unconstitutional as lacking a rational basis and violating equal protection.

In *Massachusetts*, the district court addressed the Commonwealth's equal protection claim by noting that the federal spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional," Add 73a. (quoting *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)), and found its equal-protection conclusions in *Gill* to be "equally applicable in this case." Add. 74a. Accordingly, the district court concluded "that the statute contravenes a well-established restriction on the exercise of Congress' spending power." Add. 74a.

Proceedings on Appeal

After DOJ filed its initial brief in this Court, but before Appellees filed theirs, DOJ informed this Court of its determination "that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation," that Section 3 of DOMA cannot survive heightened scrutiny, and "that the Department will cease its defense of Section 3." Letter from Tony West, Ass't Att'y Gen. (Feb. 24, 2011) (ECF No. 5528735). As a result of DOJ's abandonment of its responsibility for defending DOMA, the House intervened. *See* Order (June 16, 2011) (ECF No. 5558549). Subsequently, the Court denied

the *Gill* Plaintiffs' petition for initial *en banc* hearing. Order (Aug. 23, 2011) (ECF No. 5574496).

STATEMENT OF FACTS

The *Gill* Plaintiffs—each recognized by Massachusetts as a member or widower of a same-sex marriage—seek a variety of federal marital benefits for themselves and their state-law spouses, including "married filing jointly" tax status, health benefits for spouses of federal employees, and various social security spousal and survivors' benefits. *See generally* Add. 7a–15a. In *Massachusetts*, the Commonwealth seeks to treat state-law same-sex spouses as married for purposes of federally-funded programs without losing federal funding, Add. 56a–64a, and to avoid paying Medicare tax on health benefits it provides to same-sex state-law spouses of Commonwealth employees. Add. 64a–66a.

SUMMARY OF ARGUMENT

DOMA adopts the traditional definition of "marriage" for federal law purposes. For more than two centuries, every American jurisdiction shared this definition, which became the basis for hundreds of federal statutes. In 1996, a state court decision created the possibility that Hawaii, unlike the other forty-nine states, would alter that traditional definition. Congress could have decided to borrow state-law definitions (no matter what their content) for federal-law purposes or to reaffirm the traditional definition as the uniform rule for federal benefits and

burdens. Congress opted for the latter. Neither Congress's preference for a uniform federal rule nor its choice of the traditional and majority rule over a substantial redefinition was irrational. Yet Plaintiffs here assert—and the district court agreed—that the embrace of that traditional definition by an overwhelming majority of Congress was not only unwise, but so wholly lacking in any rational basis as to be forbidden by the Constitution.

Binding Supreme Court precedent dictates a contrary conclusion. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court affirmed that equal protection does not require recognition of same-sex marriages. *Baker* controls here, but the district court failed even to consider its application.

Binding Circuit precedent requires the same conclusion. This Court has made clear that classifications based on sexual orientation are subject only to rational basis review. *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), *petitions for reh'g en banc denied* (Aug. 8, 2008), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009). While the district court purported to apply rational basis review, it applied that level of review in name only. When DOMA's reaffirmation of the traditional definition of marriage is judged by the deferential standards of rational basis review, it clearly is constitutional, as even DOJ itself recognizes.

Numerous rational bases support Congress's judgment to reaffirm the traditional definition for federal law purposes. This case does not present the

question whether states must recognize same-sex marriages. Rather, the issue is whether, against a backdrop of varying state laws, mostly rejecting same-sex marriage (and none of which is challenged here), and extraordinary public controversy on the topic, Congress legitimately could reaffirm that for federal law purposes, marriage requires two persons of opposite sex.

The answer is an unqualified yes, as DOMA is justified by numerous government interests. In enacting DOMA, Congress rationally was concerned with employing proper caution when facing a possible redefinition of a fundamental social institution. Congress also had rational interests in protecting the public fisc, preserving previous legislative judgments and bargains, and in maintaining the uniformity of federal benefits. Congress further had a rational basis in avoiding the administrative difficulties created when same-sex couples move from one state to another or seek recognition of a marriage certificate obtained abroad. Additionally, Congress rationally could have concluded that the traditional definition satisfactorily subsidized and supported stable relationships for the conception and rearing of children and should not be altered. Likewise, Congress rationally could have sought to encourage the rearing of children by parents of both sexes.

The district court failed to apply rational basis review properly and either did not consider these interests or improperly discounted them. Its decision amounts to

a conclusion that the 427 members of Congress who voted for DOMA (including then-Senator Joseph Biden), and President Clinton who signed DOMA into law, were not just misguided but were patently irrational. That is not a judgment that can be sustained.

There is a better alternative to labeling hundreds of former and current elected officials bigoted and irrational, and forever thrusting the courts into these controversial issues. The debate over the proper definition of marriage is alive and well in the democratic process. That process allows people to change their minds over time and adopt nuanced solutions tailored to local conditions. Proponents of same-sex marriage have made remarkable strides, demonstrating that they are anything but politically powerless. The question in this case is not "unlikely to be soon [addressed] by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Rather, this is a quintessential legislative and democratic question that should be decided by the people. The role of the courts is narrow: to address simply whether any rational basis supported Congress's judgment. That standard is satisfied and the remainder of the debate can and should be resolved elsewhere.

ARGUMENT

Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This court "review[s] orders granting summary judgment *de novo*, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the nonmoving party." *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011) (citation omitted).

Background

Section 3 of DOMA defines "marriage" for purposes of federal law:

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

1 U.S.C. § 7. Congress did not, of course, invent the definitions of "marriage" and "spouse" in 1996. Rather, DOMA codified and confirmed what Congress always has meant by those words: an opposite-sex couple married under state law. *See, e.g.*, Revenue Act of 1921, § 223(3)(b), 42 Stat. 227 ("husband and wife living together" may file joint tax returns); 38 U.S.C. § 101(3) (1975) (defining surviving spouse as "a person of the opposite sex who was the spouse of a veteran"); Final

Rule, *Family Medical Leave Act*, 60 Fed. Reg. 2180, 2190-91 (1995) (rejecting, as inconsistent with congressional intent, inclusion of "same-sex relationships" in definition of "spouse"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress . . . did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (in 1901 District of Columbia marriage statute, Congress intended "that 'marriage' is limited to opposite-sex couples"). In DOMA, Congress used the definition of marriage universally accepted in American law until that time. *See infra* pp. 11-12; Black's Law Dictionary 756 (1st ed. 1891) ("the civil status of one man and one woman united in law for life"); Webster's Third New Int'l Dictionary 1384 (1976) ("the state of being united to a person of the opposite sex as husband or wife").

Congress intended DOMA to apply to all manner of federal programs. As of 2004, 1,138 provisions in the United States Code made marital status "a factor in determining or receiving benefits, rights, and privileges." U.S. Gen. Accounting Office, *Defense of Marriage Act*, GAO-04-353R, at 1 (Jan. 23, 2004). DOMA reaffirms the definition of marriage already reflected in those statutes: the traditional definition involving one man and one woman.

I. DOMA'S LEGISLATIVE HISTORY

Congress enacted DOMA in 1996 with overwhelming, bipartisan support by votes of 342-67 in the House and 85-14 in the Senate. 142 Cong. Rec. 17093-94 (1996) (House); 142 Cong. Rec. 22467 (1996) (Senate). President Clinton signed DOMA into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (1996).

DOMA was a response to the Hawaii Supreme Court's opinion in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), holding that the denial of marriage to same-sex couples required strict scrutiny under the Hawaii Constitution. *See* H.R. Rep. No. 104-664, at 4-5 (1996) ("House Rep."). Congress was concerned that if Hawaii's courts "require[d] that State to issue marriage licenses to same-sex couples," *id.* at 2, such a development, along with full faith and credit principles, could interfere with the ability of other states and the federal government to define marriage traditionally. Section 2 of DOMA addressed this concern with respect to other states. With Section 3, Congress ensured that, regardless of potential state redefinitions, the definition of marriage for purposes of federal benefits and burdens would remain the traditional one.

The legislative history confirms that, even before DOMA, Congress used "marriage" only in the traditional sense. *See* House Rep. 10 ("[N]one of the federal statutes or regulations that use the words 'marriage' or 'spouse' were

thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 30 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 32 (1996) ("House Hrg.") (Rep. Sensenbrenner) ("When all of these benefits were passed by Congress . . . it was assumed that the benefits would be to . . . traditional heterosexual marriages.").

During deliberations over DOMA, Congress repeatedly emphasized "[t]he enormous importance of marriage for civilized society." House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from *Murphy v. Ramsey*, referring to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." House Rep. 12 (quoting *Murphy*, 114 U.S. 15, 45 (1885)); *see also* 142 Cong. Rec. at 16970 (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id.* at 22442 (Sen. Gramm) ("[T]he traditional family has stood for 5,000 years. There is no moment in recorded history when the traditional family was not recognized and sanctioned by civilized society—it is the oldest institution that exists."); *id.* at 22454 (Sen.

Burns) ("[M]arriage between one man and one woman is still the single most important social institution."); *cf.* 150 Cong. Rec. S7994 (2004) (Sen. Clinton) (traditional marriage is "one of the foundational institutions of history and humanity and civilization"); *id.* S7959 (2004) (Sen. Talent) ("[M]arriage may be the most important of all [social] institutions . . . ."); *id.* S7879 (Sen. Hatch) ("[T]raditional marriage has been a civilizational anchor for thousands of years.").

Congress also expressed concern that expanding marital benefits to same-sex couples would unduly strain the public fisc in a manner not foreseen by the Congresses that originally enacted those benefits. *See* House Rep. 18 ("legislative response" to same-sex marriage necessary to "preserve scarce government resources"). It desired to avoid a "huge expansion" in marital benefits, 142 Cong. Rec. H7484 (1996) (Rep. Sensenbrenner), which "ha[d] not been planned or budgeted for under current law," *id.* S10106 (Sen. Gramm), and that would be funded by "tak[ing] money out of the pockets of working families across America," *id.* H7493 (Rep. Weldon). Congress was concerned that same-sex marriage would "create . . . a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans," *id.* S10106 (Sen. Gramm); *see also id.* H7484 (Rep. Sensenbrenner) (listing some affected areas),

and that these additional costs had not even been calculated, let alone weighed, in the legislative debates on various benefits programs. Accordingly, Congress chose not to blindly burden the public fisc in this way, *id.* S10111 (Sen. Byrd) ("[T]hink of the potential cost involved. . . . I know I do not have any reliable estimates. . . . That is the point—nobody knows for sure. I do not think, though, that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions. . . .").

Congress also decided that eligibility for federal benefits should not vary with state marriage definitions. As Senator Ashcroft stated, a federal definition "is very important, because unless we have [one], a variety of States around the country could define marriage differently . . . , people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." *Id.* S10121; *see also id.* ("[Benefits] should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State.").

Congress also recognized society's "deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 12, 13. Many Members of Congress supported DOMA on the ground that traditional marriage was the time-proven and effective social structure for raising children. *See* 142 Cong. Rec. 22446 (1996) (Sen. Byrd); *id.* 22262 (Sen. Lieberman) ("[DOMA]

affirms another basic American mainstream value, . . . marriage as an institution between a man and a woman, the best institution to raise children in our society."); House Hrg. 1 (Rep. Canady) ("[H]eterosexual marriage provides the ideal structure within which to beget and raise children."); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) ("The [traditional] marriage relationship provides children with the best environment in which to grow and learn.").

Congress received and considered advice on DOMA's constitutionality from DOJ (among others) and determined that DOMA was constitutional. *E.g.*, House Rep. 32; Add. 86a–87a (House Rep. 33-34) (letters to House from Clinton DOJ endorsing DOMA's constitutionality); House Hrg. 86-117 (testimony of Professor Hadley Arkes); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 2 (1996) ("Senate Hrg.") (Sen. Hatch); Add. 88a (*id.* at 2) (DOJ letter to Senate advising DOMA is constitutional); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell); *see also* 150 Cong. Rec. S7879 (2004) (Sen. Hatch) ("obvious[] rational basis"); *id.* H7896 (letter from former Att'y Gen. Edwin Meese); *id.* S8008 (Sen. Sessions) ("perfectly legitimate for any government to provide laws that further [marriage]").

II. DOMA'S EXECUTIVE BRANCH HISTORY

President Clinton's DOJ three times advised Congress that DOMA was constitutional, stating that DOMA "would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. . . . [T]he Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis." Add. 87a (Letter from Ass't Att'y Gen. Andrew Fois to Hon. Charles T. Canady (May 29, 1996), *reprinted in* House Rep. 34); *see also* Add. 86a–87a, 88a (Letters from Ass't Att'y Gen. Andrew Fois to Hon. Henry J. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34, and to Hon. Orrin G. Hatch (July 9, 1996), *reprinted in* Senate Hrg. 2).

During the Bush Administration, DOJ successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment. *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part*, 447 F.3d 673 (9th Cir. 2006) (plaintiffs lacked standing to challenge Section 3), *cert. denied*, 549 U.S. 959 (2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting plaintiff's request for voluntary dismissal after defendants moved to dismiss); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

During the first two years of the Obama Administration, DOJ continued to defend DOMA, albeit without defending Congress's stated justifications. However, in February 2011, the Executive Branch abruptly reversed course. The Attorney General notified Congress that DOJ would "forgo the defense" of DOMA. *See* Feb. 23, 2011 Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, at 5 (filed Feb. 24, 2011) (ECF No. 5528735) ("Holder Letter"). Attorney General Holder stated that he and the President now take the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.* at 6. In so asserting, the Attorney General acknowledged that:

1) at least ten federal appellate courts (including this one) have held sexual orientation classifications are properly judged under the highly deferential rational basis test, not "heightened" scrutiny, *id.* at 3-4 nn.4-6 (citing, *inter alia*, *Cook*, 528 F.3d at 61);

2) in light of "the respect appropriately due to a coequal branch of government," DOJ "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id.* at 5; and

3) "a reasonable argument for Section 3's constitutionality *may be proffered* under that permissive [rational basis] standard," *id.* at 6 (emphasis added).

In subsequent cases, DOJ confirmed its view that there is a rational basis for DOMA. *E.g.*, Def.'s Opp'n to Mot. to Dismiss, at 24, *Lui v. Holder*, No. CV 11-

01267 SVW (JCGx) (C.D. Cal. Sept. 2, 2011) ("[A] reasonable argument for the constitutionality of DOMA Section 3 can be made under that permissive standard."); Def.'s Br. in Opp'n to Mots. to Dismiss, at 18 n.14, *Golinski v. OPM*, No. 10-cv-257-JSW (N.D. Cal. July 1, 2011) (same).

DOMA Fully Complies with the Constitutional Guarantee of Equal Protection[4]

I. AS AN ACT OF CONGRESS, DOMA IS ENTITLED TO A STRONG PRESUMPTION OF CONSTITUTIONALITY.

"[J]udging the constitutionality of an Act of Congress is the gravest and most delicate duty that th[e] Court[s] [are] called on to perform." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (citation and internal quotation marks omitted). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Id.* (citation omitted). Furthermore, "[a] ruling of unconstitutionality

[4] The District Court primarily held that DOMA violates the Fifth Amendment's equal protection component, *see generally* Add. 25a–45a, but in *Massachusetts* it also held that DOMA exceeds Congress's spending power by requiring the Commonwealth to violate the Fourteenth Amendment's Equal Protection Clause in its treatment of its own citizens, Add. 73a–75a. The Supreme "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995). Accordingly, the district court's Fourteenth-Amendment analysis was erroneous for all the same reasons, noted herein, that its conclusion under the Fifth Amendment was defective.

frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

Therefore, the Supreme "Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). This deference "is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981); *see supra* p. 15, and "must be afforded even though the claim is that a statute" violates the Fifth Amendment, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985). *See Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (according "great weight to the decisions of Congress even though the legislation . . . raises equal protection concerns") (quotation marks omitted), *receded from on other grounds*, *Adarand*, 515 U.S. at 236.

II. BINDING SUPREME COURT PRECEDENT FORECLOSES PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO DOMA.

This Court has no occasion to perform the "grave and delicate" task of invalidating an Act of Congress because binding Supreme Court precedent forecloses Plaintiffs' challenge. No matter how this Court might view DOMA as a policy or a constitutional matter, the Supreme Court already squarely has held that

defining marriage as between one man and one woman comports with equal protection. The only Court that can reconsider that determination is the Supreme Court itself.

In *Baker v. Nelson*, the Supreme Court held that two men had no constitutional right to marry. 409 U.S. 810. Their application for a Minnesota marriage license was declined, based on state law, "on the sole ground that [they] were of the same sex." *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 185 (1971). The Minnesota Supreme Court rejected their federal constitutional challenge to the state statute defining marriage as a "union between persons of the opposite sex," *id.* at 186. It rejected their arguments "that the right to marry without regard to the sex of the parties is a fundamental right . . . and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Id.*

The two men appealed to the U.S. Supreme Court under former 28 U.S.C. § 1257(2) (repealed in 1988), presenting the question: "Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." Add. 89a (Jurisdictional Statement at 3, *Baker v. Nelson*, No. 71-1027 (1972)). The *Baker* plaintiffs extensively argued their equal-protection claim. *See* Add. 96a–100a. The Supreme Court summarily and

unanimously affirmed: "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810.

Such a disposition by the Supreme Court is a decision on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*Hicks* "held that lower courts are bound by summary actions on the merits by this Court"). It means that "the Court found that the decision below was correct and that no substantial question on the merits was raised." Eugene Gressman et al., Supreme Court Practice 365 (9th ed. 2007). Such a dismissal is no mere denial of certiorari. The Court's certiorari jurisdiction is discretionary, whereas its appellate jurisdiction under 28 U.S.C. § 1257(2) was mandatory. Thus "the Supreme Court had no discretion to refuse to adjudicate [*Baker*] on its merits." *Wilson*, 354 F. Supp. 2d at 1304. The Jurisdictional Statement in *Baker* expressly argued that Minnesota's nonrecognition of same-sex marriages violated equal protection, and "dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." *Mandel*, 432 U.S. at 176.

Referring to *Baker*, the Eighth and Ninth Circuits have explained that "the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication on the merits which is binding on the lower federal

courts." *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976);[5] *accord Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982). *See also Adams*, 486 F. Supp. at 1124; *Andersen v. King Cnty.*, 158 Wash. 2d 1, 138 P.3d 963, 999 & n.19 (2006); *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005); *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1993).

Baker holds that a state may define marriage as the union of one man and one woman without violating equal protection. Since "[the Supreme] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment," *Adarand*, 515 U.S. at 217, Congress therefore may use the same definition in federal law. For this reason, the *Wilson* court recognized *Baker* as "binding precedent" with "dispositive effect" in an equal protection challenge to DOMA. 354 F. Supp. 2d at 1305. The Commonwealth's choice to recognize same-sex marriages does not in any way dilute the force of *Baker*'s equal protection holding.[6]

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[5] Although the *Baker* plaintiffs later obtained a marriage license and "were 'married' by a minister," *id.* at 55, the Eighth Circuit rejected their claims for federal veteran's spousal benefits, *id.* at 55-56, and for a federal tax refund, *McConnell v. United States*, 188 F. App'x 540 (8th Cir. 2006).

[6] The House anticipates that DOJ will explain in greater detail why states do not have the constitutional power to dictate to Congress the meaning of terms in (*continued*)

This Court is obligated to follow *Baker*, even if it believes later Supreme Court cases have undermined *Baker* or a majority of the current Justices might decide *Baker* differently. "[T]he lower courts are bound by summary decisions by [the Supreme] Court until such time as the [Supreme] Court informs them they are not." *Hicks*, 422 U.S. at 344-45 (quotation marks omitted); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls. . . ."); *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts should not "conclude our more recent cases have, by implication, overruled an earlier precedent"); *see also Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005) (court would follow directly-on-point Supreme Court precedent even if later Supreme Court decision was "inconsistent

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federal statutes—including "marriage" and "spouse"—thus further establishing that *Baker* cannot be distinguished on this basis. Needless to say, no serious argument can be made that the federal government must adopt a state-law definition for purposes of defining and allocating federal benefits and burdens. Nor can the Commonwealth's recognition of same-sex marriages under its own law make any difference under the Fourteenth Amendment. The question there, of course, is not whether a state has chosen (or not) to declare persons or relationships equal under its own law, but rather whether the federal Constitution *mandates* that it do so. If not, Congress manifestly has the power to require differential treatment as a condition of participation in federally-funded programs, and under the Supremacy Clause no state-law classification can eliminate that power.

with" that precedent); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 67 (1st Cir. 2003) (even if Supreme Court precedent is "not entirely consistent" with later cases, "[w]e must follow it until the Supreme Court decides otherwise").

In short, "[t]he Supreme Court has not explicitly or implicitly overturned its holding in *Baker*," and this Court "is bound to follow the Supreme Court's decision." *Wilson*, 354 F. Supp. 2d at 1305. That proposition is sufficient for this Court to resolve this case and allow the Supreme Court the opportunity to reconsider *Baker* if it is so inclined.

III. CIRCUIT PRECEDENT MAKES CLEAR THAT RATIONAL BASIS REVIEW, NOT ANY FORM OF HEIGHTENED SCRUTINY, GOVERNS PLAINTIFFS' CHALLENGE TO DOMA.

A. *Cook v. Gates* Holds that Rational Basis Review Applies to Sexual-Orientation Classifications.

In *Cook v. Gates*, this Court upheld the "Don't Ask, Don't Tell" Act, 10 U.S.C. § 654, against due process and equal protection challenges. 528 F.3d at 61. This Court expressly rejected the *Cook* plaintiffs' contentions "that the district court erred by applying rational basis review because the Supreme Court's decisions in *Romer v. Evans* and *Lawrence* mandate a more demanding standard." *Id.* (citation omitted). Instead, this Court held that "neither *Romer* nor *Lawrence* mandate heightened scrutiny of the Act because of its classification of homosexuals," and that "the district court was correct to analyze the plaintiffs'

equal protection claim under the rational basis standard." *Id.* This Court therefore joined its "sister circuits in declining to read *Romer* as recognizing homosexuals as a suspect class for equal protection purposes. . . . *Lawrence* does not alter this conclusion." *Id.* (citations omitted). The list of "sister circuits" is long: all ten of the other Courts of Appeals that have addressed the question have reached the same conclusion. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (collecting cases); *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296-97 (6th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 684-85 (D.C. Cir. 1994); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *overruled on other grounds*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984).

"[I]t is axiomatic that new panels are bound by prior panel decisions in the absence of supervening authority." *United States v. Holloway*, 499 F.3d 114, 118 (1st Cir. 2007). That conclusion applies with particular force here in light of the

Court's decision after considerable deliberation to not review this case en banc as an initial matter. *See* Order (Aug. 23, 2011) (ECF No. 5574496). Thus, as DOJ correctly noted: "[U]nder this Court's binding precedent, DOMA is subject to rational basis review under the equal protection component of the Due Process Clause. Under such review the statute is fully supported by several interrelated rational bases." Corr. Brief for U.S. Dep't of HHS, et al. at 25 (Jan. 20, 2011) (ECF No. 5520069).[7]

B. DOMA Does Not Classify Based on Sex.

DOMA is not a sex-based classification, as every court to have considered the question as a matter of federal law has agreed. *See Wilson*, 354 F. Supp. 2d at 1307-08 ("DOMA . . . treats women and men equally."); *accord Smelt*, 374 F. Supp. 2d at 877; *Kandu*, 315 B.R. at 143.[8] Indeed, the House is unaware of *any*

[7] Even if this Court were writing on a clean slate, it would be clear that classifications based on sexual orientation do not satisfy the Supreme Court's test for suspect classifications for a number of reasons, perhaps most obviously that gays are far from politically powerless, as the recent repeal of "Don't Ask, Don't Tell" amply demonstrates. The House has briefed this question elsewhere—*see, e.g.*, Mem. of Law in Supp. of Intervenor-Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 7-21, *Windsor v. United States*, No. 10-cv-8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011) (ECF No. 50); Mem. of Law in Opp'n to Pls.' Mot. for Summ. J. at 8-25, *Pedersen v. OPM*, No. 10-cv-01750-VLB (D. Conn. Aug. 15, 2011) (ECF No. 82)—but has not done so here in light of *Cook*.

[8] With one exception, state courts have reached the same conclusion with respect to state marriage definitions. *E.g.*, *Conaway v. Deane*, 401 Md. 219, 932 A.2d (*continued*)

traditional-marriage provision that has been found to be a sex-based classification under the federal Constitution. Accordingly, DOMA does not classify based upon a suspect or quasi-suspect class, as three federal courts already specifically have held. *See Wilson*, 354 F. Supp. 2d at 1307-08; *Smelt*, 374 F. Supp. 2d at 874-75; *Kandu*, 315 B.R. at 144.

C. DOMA Does Not Infringe the Fundamental Right to Marriage.

Fundamental rights are those "objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). Same-sex marriage does not meet this definition. And, even if it did, DOMA does not prohibit same-sex marriage; it merely uses a different definition for purposes of federal burdens and benefits.

571, 598 (2007); *Andersen*, 158 Wash. 2d at 9-10, 138 P.3d at 969; *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384, 401 (2009); *Shields v. Madigan*, 5 Misc. 3d 901, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Baker v. State*, 170 Vt. 194, 744 A.2d 864, 890 (1999). Only *Baehr v. Lewin* differs, and the court there expressly noted that "[t]he equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another," 74 Haw. at 562, 852 P.2d at 59, and Hawaii's equal protection clause "is more elaborate" than the federal one, *id.*, 852 P.2d at 60. Moreover, *Baehr* has been superseded by an amendment to Hawaii's constitution.

1. Same-Sex Marriage Is Not a Fundamental Right.

The right to marry someone of one's own sex is, of course, not deeply-rooted in American law and history—indeed, it has scarcely any roots at all. When Congress enacted DOMA, "the uniform and unbroken rule ha[d] been that only opposite-sex couples can marry. No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage." House Rep. 2. In 1996, only the Hawaii Supreme Court, by a 3-2 vote, had suggested that such a right *might* exist under *its* state constitution. *Baehr*, 74 Haw. 530, 852 P.2d 44; *but see id.* at 597-98, 852 P.2d at 74 (Heen, J., dissenting) ("This court should not manufacture a civil right which is unsupported by any precedent. . . .").

Beginning in 2004, some jurisdictions began recognizing same-sex marriage, often by judicial decision, *see, e.g.*, *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). But these recent, limited developments are not enough to establish a "deeply-rooted" tradition. Even today, forty-one states define marriage as the union of one man and one woman. Add. 113a (List of State Statutes). As far as same-sex marriage has come in a short time, it has not become "deeply rooted" only seven years after first being permitted anywhere in this country.

Before DOMA, every court to address the issue held that there was no statutory, common law, or constitutional right to same-sex marriage. *See Baker*,

291 Minn. at 312-13, 191 N.W.2d at 186-87; *see also Storrs v. Holcomb*, 168 Misc. 2d 898, 899, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996) (rejection of same-sex marriage does not "destroy[] a fundamental right"); *Dean v. District of Columbia*, 653 A.2d 307, 361-62 (D.C. 1995) (Terry, J., concurring) (rejecting Fifth Amendment equal protection challenge to congressionally enacted District of Columbia marriage statute); *id.* at 362-63 (Steadman, J., concurring) (same); *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (following *Baker*); *DeSanto v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1192-93 (Wash. Ct. App. 1974) (rejecting federal equal protection claim); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971).

And every federal and state court to consider the question has held that same-sex marriage is not a fundamental federal right. *See Smelt*, 374 F. Supp. 2d at 879; *Wilson*, 354 F. Supp. 2d at 1306-07; *Kandu*, 315 B.R. at 140; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675 (Tex. App. 2010) ("[p]lainly, [same-sex marriage] is not" deeply-rooted); *Conaway v. Deane*, 401 Md. at 307, 932 A.2d at 624; *Standhardt v. Superior Ct. of Ariz.*, 206 Ariz. 276, 285, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) (history and "recent, explicit affirmations" of traditional marriage "lead invariably to the conclusion" that same-sex marriage is

not a fundamental liberty); *see also Shahar v. Bowers*, 114 F.3d 1097, 1099 & n.2 (11th Cir. 1997) (en banc) ("culture and traditions of the Nation" create "considerable doubt" that same-sex marriage is a constitutional right; "no federal appellate court or state supreme court" has found it so).

As New York's highest court aptly observed: "Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex[es]." *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 855 N.E.2d 1, 5 (N.Y. 2006). Thus the notion that same-sex marriage is a fundamental right would be "an astonishing conclusion, given the lack of any authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result." *Andersen*, 158 Wash. 2d at 30, 138 P.3d at 979.

In cases involving traditional, opposite-sex couples, the Supreme Court, of course, has recognized a fundamental right to marry. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942). However, it never has suggested, let alone held, that same-sex marriage is a fundamental right. If anything, the Court has suggested the contrary. *See, e.g.*, *Zablocki*, 434 U.S. at 386 (referring to the "decision to marry and raise the child in a traditional family setting"); *Skinner*, 316 U.S. at 541

("Marriage and procreation are fundamental to the very existence and survival of the [human] race.").

2. DOMA Implicates Federal Benefits, Not the Underlying Right to Same-Sex Marriage.

Regardless of whether same-sex marriage is a fundamental right, DOMA does not "directly and substantially interfere" with the ability to marry, because it "does not . . . prevent any" same sex couple from marrying. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). It does not operate "by banning, or criminally prosecuting nonconforming marriages." *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977). It places no obstacle whatsoever in the path of same-sex individuals who wish to obtain a marriage certificate authorized by state law—DOMA does not punish them for obtaining such a certificate; it treats them exactly the same both before and afterwards.

DOMA defines marriage only for purposes of federal benefits and burdens.[9] As Senator Nickles, sponsor of the Senate version of DOMA, stated: "These definitions apply only to Federal law. We are not overriding any State law. We

[9] *See, e.g.*, *Druker v. Comm'r Internal Revenue*, 697 F.2d 46 (2d Cir. 1982) (upholding "marriage penalty" in federal tax code); 42 U.S.C. § 1396a(a)(17)(D) (non-spouse's income not counted against individual's Medicaid eligibility); 20 U.S.C. §§ 1087nn(b)(1) & 1087oo(f)(3) (spouse's or stepparent's income counted against student loan eligibility); 31 U.S.C. § 1353(a) (limiting non-federal reimbursement of executive branch spouses' travel expenses).

are not banning gay marriages." Senate Hrg. 5; *see* House Rep. 32 ("Whether and to what extent benefits available to married couples available under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question."). Congress thus "did not penalize" same sex couples; it simply "decided not to offer them a special inducement." *Cf. Alexander v. Fioto*, 430 U.S. 634, 640 (1977) (denying retirement pay to National Guardsman who did not also serve in wartime).

This dramatically distinguishes DOMA from laws the Supreme Court has found to infringe upon the right to marry. Those laws did not merely decline to offer benefits to some married couples, but affirmatively prohibited some marriages and (in two of three cases) attached severe penalties to their celebration. *Loving*, 388 U.S. at 4 (interracial marriages voided; punishable by imprisonment); *Zablocki*, 434 U.S at 375 & n.1, 387 (certain marriages prohibited without court order, on pain of criminal sanctions); *Turner*, 482 U.S. at 82 (prisoner marriages prohibited except with permission of superintendent for "compelling reasons"). DOMA does neither.

Thus, even if the fundamental right to marriage included same-sex marriage, which it does not, to conclude that DOMA restricts that right, the Court would have to expand the current rule—subjecting *prohibitions* on marriage to strict scrutiny—to a rule that offering lesser *benefits* to any potential marriage is subject

to strict scrutiny. But "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 U.S. at 386. And DOMA plainly does not "interfere" with the decisions of same-sex couples to enter a marital relationship.

IV. DOMA EASILY SATISFIES RATIONAL BASIS REVIEW.

The district court correctly recognized rational basis review as the applicable level of equal protection scrutiny. *See* Add. 27a. However, it seriously misunderstood the nature of that review and erroneously concluded that DOMA does not satisfy it.

Rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). "This standard of review is a paradigm of judicial restraint," affording a classification "a strong presumption of validity." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993); *see also City of Cleburne*, 473 U.S. at 440. So strong is the presumption of validity under rational basis review that only once (to our knowledge) has the Supreme Court applied it to strike down a federal statute as an equal protection violation. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[10]

[10] And that lone exception is readily distinguishable. The statute in *Moreno* was irrational because it could not further the interests identified by the government (*continued*)

That striking fact is a direct product of the deferential nature of rational basis review and the extraordinary nature of a federal court's declaration that the actions of the coordinate branches in enacting and signing a law were not just unwise, but wholly irrational. The government "has no obligation to produce evidence to sustain the rationality of a statutory classification," and "the burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it, whether or not that basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (quotation marks, brackets, and citations omitted) (emphasis added); *see also Beach Commc'ns*, 508 U.S. at 315 (citation omitted); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (plaintiff must show "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker"); *see also City of Dallas*, 490 U.S. at 26-27; *City of Cleburne*, 473 U.S. at 440. Thus, "[the] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"—indeed, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508

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given that it was so easy for the vast majority of individuals excluded by the statutory qualification provision to become eligible, and the people who could not alter their circumstances to become eligible were the most needy. *Id.* at 538. There is no analogous difficulty with DOMA's definition.

U.S. at 315 (citation omitted). Courts are "compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 321 ("A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality.") (citation and quotation marks omitted), and may not "substitute [their] personal notions of good public policy for those of Congress," *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

That deferential standard is at its zenith when it comes to statutory definitions and other line-drawing exercises (like DOMA). The Supreme Court has recognized a broad category of regulations in which "Congress had to draw the line somewhere," *Beach Commc'ns*, 508 U.S. at 316, and which "inevitably require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line. . . ." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see also Schweiker*, 450 U.S. at 238 (definitional statutes "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle") (citing *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)). In such cases, Congress's decision where to draw the line is "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316. "The only remaining question" is whether the line is "patently arbitrary or irrational." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980).

A. The District Court Fundamentally Misconceived the Nature of Rational Basis Review.

Although the district court purported to apply rational basis scrutiny, it wholly failed to apply the kind of deferential review demanded by Supreme Court precedent. Instead, it seemed to believe that Congress could only exclude same-sex couples from the federal definition of marriage if doing so affirmatively benefitted the opposite-sex couples included within the definition. Thus, the district court struck down DOMA based on its conclusion that excluding same-sex marriage in itself "does nothing to promote stability in heterosexual parenting" and that "denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to . . . making heterosexual marriages more secure." Add. 31a.

This is not rational basis review. Indeed, it is exactly the flawed approach that the Supreme Court repeatedly has rejected. Rational basis review allows any rational justification to justify a particular exercise in government line-drawing. A benefit to those within the line is one—but only one—conceivable rational basis for congressional action. Cost savings, ease of administration, uniformity, a desire for further empirical data, and various other policy judgments rationally can support drawing a line, even if the act of exclusion is of no particular benefit to those included.

The district court's fundamentally erroneous conception of rational basis review is particularly misplaced in the context of statutes such as DOMA that

define eligibility for federal benefits. Whenever Congress creates rights or benefits it must determine who is and who is not eligible for them. Deference to Congress's judgment in this respect is particularly appropriate because limiting benefits always furthers the legitimate purpose of protecting the public fisc. For example, in *Schweiker*, the Supreme Court considered an equal-protection challenge to Congress's decision to extend Supplemental Security Income benefits to elderly, blind, or disabled citizens residing in hospitals or nursing homes receiving Medicaid funds, but to deny the same benefits to such persons residing in non-Medicaid facilities. 450 U.S. at 226. Applying rational basis review, the Court did *not* ask the question that would have been analogous to the district court's inquiry here—whether denying benefits somehow would aid other benefit recipients. Instead, the Court simply noted that Congress rationally could have concluded that maintenance of persons in non-Medicaid institutions was primarily a state and not a federal responsibility and upheld the statute. *Id.* at 238-39; *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 315-17 (1976) (upholding mandatory retirement age of 50 for police not because it improved performance or compensation of under-50 police, but because Congress rationally could have concluded that persons over 50 as a whole could be deemed less qualified); *Vance*, 440 U.S. at 106-08 (Congress could require foreign service officers, but not civil service officers, to retire at 60, not because the forced retirement of the former

would help the latter, but because Congress rationally could have concluded that foreign service is more rigorous); *Califano v. Boles*, 443 U.S. 282, 291-93 (1979) (Congress could deny social security benefits to mothers who never married the deceased fathers of their children but provide them to mothers divorced from deceased fathers, not because the denial would aid the divorcees, but because Congress rationally could have concluded that the divorcees were more financially-dependent on their ex-husbands).

Because the district court fundamentally misapprehended the nature of rational basis review, it subjected DOMA to what can most accurately be described as heightened scrutiny masquerading as rational basis review. Many, perhaps most, federal statutes limiting benefits or duties would fail under the district court's test. Under the correct test, DOMA clearly survives rational basis review.

B. Myriad Rational Bases Support DOMA.

A number of rational bases support Congress's decision to limit federal marital rights and benefits to traditional marital relationships.

1. Congress Rationally Acted Cautiously in Facing the Unknown Consequences of a Novel Redefinition of a Foundational Social Institution.

In light of the foundational and fundamental nature of the institution of marriage, Congress was justified in proceeding with caution in considering whether to eliminate a criterion—opposite-sex partners—that has been historically regarded as an essential element of marriage. Under any level of scrutiny, this amply justifies DOMA against equal protection attack.

In the district court, DOJ offered only a watered-down version of this argument, contending that Congress rationally could have desired "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." Add. 33a. And the district court—suggesting that DOJ's position was that "[t]he only 'problem' . . . DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits," Add. 39a—failed to give any weight to the fact that the "status quo" preserved by DOMA is a defining element of the most foundational institution of our society, which element has existed for all of history. Nor did the district court even acknowledge that one of Congress's aims in enacting DOMA was to ensure that the undeniable social benefits derived from this foundational institution were not lost by substantially redefining the institution. *See Lawrence*,

539 U.S. at 585 (O'Connor, J., concurring) ("preserving the traditional institution of marriage" is a rational basis).

The rationality of Congress's judgment is underscored by the situation Congress confronted in 1996. In light of the impending possibility that the Hawaii Supreme Court would cause Hawaii to alter its traditional definition of marriage in a substantial way, Congress had essentially three options: (1) immediately substantially redefine the institution of marriage for federal law purposes; (2) leave the issue to the states and adopt the state definitions for federal purposes, no matter what definitions the states adopted; or (3) maintain the traditional definition for federal law purposes. Faced with that choice, it was entirely rational for Congress both to adopt a uniform federal definition (i.e., reject option two) and to prefer the traditional definition over an immediate federal adoption of a substantial redefinition of so fundamental an institution (i.e., prefer option three over option one). The latter choice may have been a "conservative" rather than a "progressive" course, but those are the kind of political decisions that the Constitution leaves to the political branches.

The district court, however, opined that "[s]ince the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." Add. 29a–30a. There are

manifold problems with this observation. First and foremost, rational basis review is premised on the notion that the elected branches are better situated than the judiciary to assess whether there is an emerging consensus on a divisive social issue. But even assuming for a moment that there really is such a "consensus"—a highly dubious proposition on this divisive issue—the very fact that it emerged only in the years since DOMA's enactment underscores the rationality of Congress's concern. The Congress that enacted DOMA could not be found irrational for failing to predict the emergence of this supposed consensus. And a current Congress rationally could conclude that any such "consensus" is far too recent to justify a major change in an age-old institution.

The "evidence," such as it is, about the welfare of children raised by same-sex couples is contained in studies that relied on very small samples and are very recent. Empirically, the long-term social consequences of recognizing same-sex marriages remain completely unknown. Congress was amply justified in waiting for evidence spanning a longer term before changing this foundational institution. *Cf.* 150 Cong. Rec. S2836 (2004) (Sen. Cornyn) ("[M]arriage is just too important to leave to chance. . . . The burden of proof is on those who seek to experiment . . . ."); *id.* S7880 (Sen. Hatch) ("The jury is out on what the effects on children and society will be and only legislatures are institutionally-equipped to make these decisions. If nothing else, given the uncertainty of a radical change in a

fundamental institution like marriage, popular representatives should be given deference on this issue."); *id.* S7887 (Sen. Frist) (same-sex marriage "a vast untested social experiment for which children will bear the ultimate consequences"); *id.* S7888 (Sen. Sessions) ("I think anybody ought to be reluctant to up and change [the definition of marriage by saying] everybody has been doing this for 2000 years but we think we ought to try something different."); *id.* S8089 (Sen. Smith) (same-sex marriage would be "tinkering with the foundations of our culture, our civilization, our Nation, and our future"); 152 Cong. Rec. S5473 (2006) (Sen. Talent) ("[T]he evidence is not even close to showing that we can feel comfortable making a fundamental change in how we define marriage . . . .").

2. Congress Rationally Protected the Public Fisc and Preserved the Balances Struck by Earlier Congresses Allocating Federal Burdens and Benefits.

Wholly apart from the broader debate about the definition of marriage, Congress had ample rational bases for preserving the traditional definition in allocating federal burdens and benefits: DOMA preserves both the public fisc and the legislative judgments of earlier Congresses that used terms like "marriage" and "spouse" to refer to traditional marriages alone.

DOMA is thus justified by an independent federal interest without an analog in debates about state-law definitions of marriage—protecting the public fisc. In statutes apportioning benefits, saving money by declining to expand pre-existing

eligibility requirements is itself a rational basis. *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."); *Hassan v. Wright*, 45 F.3d 1063, 1069 (7th Cir. 1995) ("[P]rotecting the fisc provides a rational basis for Congress' line drawing in this instance."); *Ass'n of Residential Res. in Minn. v. Gomez*, 51 F.3d 137, 141 (8th Cir. 1995).[11]

Congress expressly relied on this rationale in enacting DOMA. *See supra* pp. 13-14. Congress was not required to produce evidence that DOMA definitely preserved the public fisc; it is enough that Congress's expressed belief was reasonable. It certainly was reasonable for Congress to conclude that maintaining the traditional definition of marriage would save taxpayers' money, especially because, at least at first, same-sex couples who stood to benefit from marital status would be far more likely to self-identify as married on federal forms than same-sex

[11] Limitations on benefits thus can violate equal protection only if they employ "invidious discrimination." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). In light of this Court's holding in *Cook* that sexual orientation is not a suspect classification, *see supra* pp. 24-25, it is not possible for this Court to find that DOMA invidiously discriminates. In any event, DOMA merely maintained the substantive eligibility criteria for marriage that always had been used in this country, and no one has suggested that those criteria were created with any invidious intent.

couples who stood to lose federal benefits.[12] That savings to the federal government in maintaining the traditional definition is certainly evident with respect to the *Gill* Plaintiffs, who seek many thousands of dollars from the government based on DOMA's alleged unconstitutionality.

Moreover, Congress did not need to be certain that the effect on the fisc would be a net negative. To the contrary, it is sufficient that Congress recognized that the effect on the treasury of a substantial change in the definition would be

[12] In 2004, the Congressional Budget Office opined that treating same-sex couples as married under federal law would result in so many of them becoming ineligible for federal means-tested benefits (after the incomes of their same-sex partners were included) that it actually would result in a net benefit to the Treasury, even after a decrease in tax revenues. *See* Douglas Holtz-Eakin, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf. This report assumes that same-sex couples who would suffer a net reduction in federal benefits nonetheless would marry and self-identify to the federal government at the same rate as ones receiving a net benefit from marriage. That is a critical but highly dubious assumption. If same-sex couples who stand to benefit get married and self-identify to the federal government as married more frequently than those who stand to lose federal benefits by virtue of being married, then Congress's concern about the impact on the federal fisc would be fully justified. In the absence of any hard data in 1996 (or 2004) about this dynamic, Congress rationally could have concluded that the net effect would be negative. More broadly, the CBO report is little more than nine pages in length, lacks detailed analysis, and its estimate—and that is all it is—that being married would constitute a net financial *detriment* to same-sex couples as a class is implausible enough that Congress rationally could have rejected it even had it existed in 1996, which of course it did not.

unpredictable and potentially large. *See supra* pp. 13-14. It is perfectly rational for Congress to have avoided that uncertainty by maintaining the traditional definition.

Additionally, preserving the traditional definition served a similar, yet distinct rational basis in the context of DOMA: It preserved the legislative judgments of countless earlier Congresses. Congress recognized that the host of pre-existing federal statutes allocating marital benefits and burdens all were premised on the traditional definition of marriage because, at the time of enactment, there was no other definition. *See supra* p. 11-12. Each such statute involved its own unique legislative debate, balancing the importance of the benefit against fiscal restraint and other countervailing considerations. With respect to the estate tax, for example, impact on tax revenues would loom large; in the immigration context, immigration levels and asylum requests might have been relevant. But each of these countless balancing acts was predicated on the traditional definition of marriage. The other alternatives available to Congress when it considered DOMA—incorporating state definitions or adopting a uniform federal definition that included same-sex marriages—risked upsetting all those prior judgments. Congress's decision to instead proceed slowly and preserve those prior judgments was surely rational.

3. Congress Rationally Maintained Uniformity in Eligibility for Federal Marital Benefits.

Another rational basis for DOMA rooted in its federal character, with no precise analog in state marriage definitions, is the federal interest in uniform eligibility for federal benefits. *See* 142 Cong. Rec. S4870 (1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal benefits"); *id.* S10121 (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits"); 150 Cong. Rec. S7966 (2004) (Sen. Inhofe) (same-sex marriage "should be handled on a Federal level [because] people constantly travel and relocate across State lines throughout the Nation"). Congress could have preserved such uniformity by adopting a federal definition that included same-sex marriage. But Congress also could rationally have chosen—as it did—to maintain the traditional definition. And Congress certainly rationally could choose a uniform federal rule over a rule of deferring to whatever definitions states might adopt, at a time when state definitions were (and are) in flux.

Opposite-sex couples can, of course, marry in every American jurisdiction while same-sex couples can marry only in some. If Congress simply incorporated state-law definitions, same-sex couples would be treated as married for federal-law purposes if they lived in states recognizing such marriages, but not if they lived in states retaining the traditional definition. More confusion would arise regarding

same-sex couples who marry in a state or foreign country where such marriages are permitted but reside in a state that does not recognize foreign same-sex marriages. *See* 152 Cong. Rec. S5481 (2006) (Sen. Carper) (if a Delaware same-sex couple "go to another country or another place where same-sex marriages are allowed . . . they are not married in my State"). *Compare, e.g*, Marriage—Whether Out-of-State Same-Sex Marriage that Is Valid in the State of Celebration May Be Recognized in Maryland, 95 Md. Op. Att'y Gen. 3, 2010 WL 886002 (Feb. 23, 2010) (predicting Maryland would recognize foreign same-sex marriages despite prohibiting in-state celebrations), *with* Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, Op. No. 3-2007, N.J. Op. Att'y Gen., 2007 WL 749807 (Feb. 16, 2007) (foreign same-sex marriages recognized as civil unions) *and with, e.g.*, Fla. Const. art. I, § 27 (declining recognition) *and* 750 Ill. Comp. Stat. Ann. § 5/216 (same).[13] In enacting DOMA, Congress rationally decided to avoid creating such a confusing patchwork in favor of a simple uniform national rule relying on the traditional definition.

[13] Congress's interest in a uniform definition of marriage for purposes of federal benefits also is revealed by Section 2 of DOMA, 28 U.S.C. § 1738C, which ensures that states not permitting same-sex marriage need not recognize foreign same-sex marriages.

The district court did not seriously consider this rationale, instead dismissing it by assuming that Congress may not pursue uniformity by denying benefits to couples deemed married by the relevant state. Add. 34a. This is wrong on its own terms—Congress has a long history of overriding state definitions of marriage for purposes of federal statutes. *E.g.*, 26 U.S.C. § 7703(b) (excluding some couples "living apart" from marriage for tax purposes regardless of state-law status); 42 U.S.C. § 416 (detailed definitions of "spouse," "wife," "husband," "widow," "widower," and "divorce" for social-security purposes, inevitably varying from state definitions); 5 U.S.C. §§ 8101(6)-(11), 8341(a)(1)(A)-(a)(2)(A) (employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria in immigration law). The district court pointed to nothing, and the House is aware of nothing, suggesting the invalidity of these venerable statutes.

The district court also opined that "DOMA does not provide for nationwide consistency in the distribution of federal benefits" because it instead "denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy." Add. 40a. But it offered no explanation (and none exists) why it was irrational—not just arguably a slightly inferior approach, but downright irrational—for Congress to prefer national uniformity in the *substantive* definition of federal marriage to a mere choice-of-law provision incorporating the rules of fifty-plus jurisdictions.

In short, the district court struck down DOMA because it achieves one kind of uniformity (among same-sex couples) while the district court prefers another (between same-sex and opposite-sex couples within a state). This is exactly the kind of judicial second-guessing of Congress that is forbidden under rational basis review.

4. DOMA Furthers the Government's Interest in Encouraging Responsible Procreation.

In addition to uniquely federal rationales like furthering uniformity and protecting the public fisc and prior legislative judgments, DOMA also is supported by the rational bases that justified states in adopting the traditional definition of marriage in the first place.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. In DOMA, Congress rationally decided to base eligibility for marital benefits on basic biological *differences* between opposite-sex sexual relationships and other relationships: "Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not." *Hernandez*, 7 N.Y.3d at 359, 855 N.E.2d at 7. It is a biological fact that opposite-sex relationships result in children much more often than same-sex relationships. In particular, opposite-sex couples have a unique capacity to produce unintended and unplanned offspring. To the extent that marriage was designed to provide an incentive for opposite-sex couples facing an

unplanned pregnancy to raise the child in a stable two-parent environment, it is rational not to extend the institution to couples without the same ability to produce unplanned offspring. The definitional difference simply reflects a biological difference. As New York's highest court stated in rejecting an effort to impose same-sex marriage by judicial decision, the legislature could "rationally decide that, for the welfare of children, it is more important to promote stability and to avoid instability, in opposite-sex [rather] than in same-sex relationships." *Id.*, 855 N.E.2d at 7.

Congress noted its "deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 13. To the extent that Congress reasonably believed that the traditional definition advanced this goal, employing the traditional definition as the federal one was a rational choice open to Congress. Congress invoked this basis for supporting the traditional definition both during the debates over DOMA, *see id.*, and in subsequent legislative proceedings, *see*, *e.g.*, 150 Cong. Rec. S7994 (2004) (Sen. Clinton) (marriage's "primary, principal role during th[e] millennia has been the raising and socializing of children for the society"); *id.* S7886 (Sen. Frist) ("Marriage is the union between a man and a woman for the purpose of procreation, and has been, until this point, one of the great settled questions of human history and culture."); *id.* S7889 (Sen. Sessions) (the "State has an interest in preserving marriage, traditional marriage . . . because

children are produced in that arrangement"); *id.* S7913 (Sen. Bunning) ("Only a man and a woman have the ability to create children.").

While some same-sex couples have children, the overwhelming number of children remain in opposite-sex households (or are the product of opposite-sex couples but in single-parent settings), and Congress rationally could focus its efforts on the latter by providing incentives for opposite-sex couples to wed. As of 2005, only 0.37% of children in the United States lived in households headed by same-sex couples—meaning that more than 99.6% of children in the United States were either being raised by an opposite-sex couple or were conceived in an opposite-sex relationship that Congress rationally desired to stabilize by offering marital benefits to the parents.[14]

Thus, Congress rationally could find that "it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman . . . and find that this will continue to be true." *Hernandez*, 7 N.Y.3d at

[14] Adam P. Romero et al., *Census Snapshot* at 2 (Williams Institute, Dec. 2007), http://services.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf (total number of children living in households headed by same-sex couples); *Living Arrangements of Children Under 18 Years Old: 1960 to Present*, U.S. Census Bureau (Nov. 2010), *available at* www.census.gov/population/www/socdemo/hh-fam.html (scroll down to "Table CH-1") (total number of children in United States). No reliable data exist on the number of children born to single women through in vitro fertilization, artificial insemination, or surrogacy, but this seems unlikely materially to impact these statistics.

359, 855 N.E.2d at 7. It therefore "could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other," could "find that this rationale for marriage does not apply with comparable force to same-sex couples," and thus further could find that "unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples." *Id.*, 855 N.E.2d at 7.

This conclusion is only reinforced by the fact that, for the small percentage of same-sex couples who do conceive or adopt children, biological differences render the circumstances surrounding these decisions quite different from those of most opposite-sex couples. These same-sex couples must go through a lengthy process of adoption, in vitro fertilization, or surrogacy arrangements, requiring a high degree of stability, cooperation, and financial security in their relationship. By contrast, opposite-sex couples can and often do conceive children with little or no expense or planning. The traditional definition rationally reflects society's concern with the latter phenomenon, and it was equally rational for Congress to retain that definition and not extend it to a group that does not present the same dynamic.

5. Congress Rationally Desired to Preserve the Social Link Between Marriage and Children.

For the same reasons, Congress reasonably could have concluded that altering the traditional definition of marriage would weaken society's understanding of the importance of marriage for children. The number of children born outside of marriage has increased in recent decades,[15] and Congress reasonably concluded that changing the definition of what marriage is would accelerate that alarming trend.

Specifically, Congress was concerned that extending the definition of marriage to a group that generally did not have children would undermine the message that children are a central reason for marriage and could lead to an increase in the number of children raised outside marriage. *Cf.* 150 Cong. Rec. S7922 (2004) (Sen. Cornyn) ("[C]ountless statistics and research attest to the fact that when marriage becomes less important because it is expanded beyond its traditional definition to include other arrangements, that untoward consequences such as greater out-of-wedlock births occur.").

[15] *See* Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, Ctrs. for Disease Control & Prevention (May 2009), http://www.cdc.gov/nchs/data/databriefs/db18.htm (births to unmarried women in 2007 were "2.5 times the number reported in 1980 and 19 times the estimate for 1940").

In 2004, Congress heard testimony vividly illustrating the impact on communities of racial minorities of the corrosion of the link between children and marriage.[16] *See Judicial Activism v. Democracy: What are the Nat'l Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 108th Cong. 11 (Mar. 3, 2004) (testimony of Rev. Richard Richardson, Black Ministerial Alliance of Greater Boston) ("The dilution of the ideal—of procreation and child-rearing within the marriage of one man and one woman—has already had a devastating effect on [the African-American] community."); *id.* 13 (testimony of Pastor Daniel de Leon, Alianza de Ministerios Evangelicos Nacionacles) (similar, regarding Hispanic community).

Congress also expressed concern about evidence that recognition of same-sex relationships had precisely this effect in Scandinavia and the Netherlands. After Massachusetts recognized same-sex marriages, Congress noted a July 2004 open letter by Dutch scholars cautioning that, while "definitive scientific evidence" does not yet exist, "there are good reasons to believe the decline in Dutch marriage

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[16] This testimony was not before Congress in 1996, but "[t]he absence of legislative facts explaining the distinction on the record has no significance in rational basis analysis," because "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315 (citation, quotation marks, and brackets omitted).

may be connected to the successful public campaign for the opening of marriage to same-sex couples," and reporting that:

> Until the late 1980s, marriage was a flourishing institution in The Netherlands. . . . It seems, however, that legal and social experiments in the 1990s have had an adverse effect on the reputation of man's most important institution. . . . [T]he number of marriages has declined substantially, both in absolute and relative terms. . . . This same period also witnessed a spectacular rise in the number of illegitimate births—in 1989 one in ten children were born out of wedlock (11 percent), by 2003 that number had risen to almost one in three (31 percent). . . . It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their offspring.

150 Cong. Rec. S7927-28 (2004); *see also id.* S7921 (Sen. Cornyn) (echoing these sentiments); *id.* H5951 (Rep. Osborne) (similar); *id.* S7880 (Sen. Hatch); *id.* S8003-07 (reprinting Stanley Kurtz, *The End of Marriage in Scandinavia*, Weekly Standard (Feb. 2, 2004)); *id.* H7912 (Rep. Pence). While some have disputed this evidence, such disputes hardly render Congress's conclusion irrational.

6. Congress Rationally Desired to Encourage Childrearing by Parents of Both Sexes.

Finally, the traditional definition of marriage reflects the belief that the optimal unit for child-rearing is both a mother and father, i.e., role models of both sexes. *See, e.g.*, *Lofton*, 358 F.3d at 820 ("Although social theorists . . . have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure . . . ."); *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987)

(Brennan, J., dissenting) ("[C]onsiderable scholarly research . . . indicates that '[t]he optimal situation for the child is to have both an involved mother and an involved father.'") (quoting H. Biller, Paternal Deprivation 10 (1974)). While that belief is under attack in some quarters, Congress rationally could conclude that retaining the traditional federal definition rationally would promote child-rearing in this manner.

DOJ refused to advance this argument below, and the district court rejected it summarily, relying on an supposed "consensus" that same-sex and traditional parenting are indistinguishable. Add. 29a–30a. This was error for several reasons. First, as discussed *supra* at Part V.B.1, the elected branches are far better positioned to assess the existence of such a "consensus" than the courts. Indeed, the distinguishing feature of rational basis review is deference to legislative judgments about such matters, and the absence of fact-finding efforts to assess the legislature's judgment. Moreover, even if a consensus has emerged, Congress reasonably could conclude that it is too recent and based on too incomplete a data set to justify abandonment of an age-old definition. Experts in the field—including those referenced by Plaintiffs' experts here—have observed that the relevant studies "have almost exclusively focused on families headed by lesbian mothers

rather than gay fathers,"[17] that "relatively few" have covered "adolescent offspring of lesbian and gay parents,"[18] that "most studies have used convenience samples of mostly white and well-educated partners" so that "the extent to which findings generalize to the larger population of gay and lesbian couples is unknown,"[19] and that "[m]ost studies . . . have used self-report surveys," creating as-yet unaddressed "biases associated with self-report data."[20] The Eleventh Circuit has recognized these limitations:

> Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and conflicting results. Thus, it is hardly surprising that the question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree.

Lofton, 358 F.3d at 826.

Under these circumstances, Congress could and did conclude that retaining the traditional definition rationally advanced an interest in creating an institution

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[17] Susan Golombok & Fiona Tasker, *Gay Fathers*, *in* The Role of the Father in Child Development 327 (M.E. Lamb, ed., 5th ed., 2010).

[18] Jennifer L. Wainwright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents with Female Same-Sex Parents*, 20 J. Fam. Psychol. No. 3, at 526 (2006).

[19] Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?*, 14 Current Directions in Psychol. Sci. No. 5, at 254 (2005).

[20] *Id.*

that gives children role models of both sexes. 150 Cong. Rec. S1507 (2004) (Sen. Cornyn); *id.* S7690 (Sen. Talent); *id.* H5951 (Rep. Osborne); *id.* H7892 (Rep. Akin); *id.* H7913 (Rep. Jo Ann Davis) (mothers and fathers play important but different roles); *see* James Q. Wilson, The Marriage Problem 169 (2002); Maggie Gallagher, *What is Marriage For?*, 62 La. L. Rev. 773 (2002).

Numerous federal courts have upheld DOMA on this basis, *see Wilson*, 354 F. Supp. 2d at 1308-09; *Smelt*, 374 F. Supp. 2d at 880; *Kandu*, 315 B.R. at 146-47, and many state courts have found it sufficient to uphold state traditional-marriage provisions, *e.g.*, *Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway*, 401 Md. at 317-22, 932 A.2d at 630-33; *Andersen*, 158 Wash. 2d at 36-42, 138 P.3d at 982-85; *Hernandez*, 7 N.Y.3d at 359-60, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 22-27; *Standhardt*, 206 Ariz. at 287-89, 77 P.3d at 462-64.

V. ANY REDEFINITION OF MARRIAGE SHOULD BE LEFT TO THE DEMOCRATIC PROCESS.

There is no denying that the issue of same-sex marriage is divisive. Indeed, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt*, 447 F.3d at 681. And there is an alternative: same-sex marriage and broader issues concerning the appropriateness of sexual-orientation classifications are under active consideration and reconsideration in the legislative process. Congress's recent decision to repeal "Don't Ask, Don't Tell" is only the

most prominent example. In short, the federal rights of same-sex couples "remain[] a fit topic for [Congress] rather than the courts," *id.* at 684 n.34, and the legislative process is the far superior mechanism to resolve this issue. *Kandu*, 315 B.R. at 145 ("[C]reation of new and unique rights is more properly reserved for the people through the legislative process."); *Hernandez*, 7 N.Y.3d at 361, 855 N.E.2d at 9 ("[A]ny expansion of the traditional definition of marriage should come from the Legislature.").

The marriage debate continues in towns and cities across the country, in the press and the academy, and at every level of government.[21] These fora permit discussion of considered arguments on all sides of the issue. Importantly, same-sex marriage supporters have ample and increasing clout in Congress and the executive branch. Indeed, in the debate regarding the repeal of "Don't Ask, Don't Tell," one Senator remarked that "in many ways, when it comes to issues regarding gays and lesbians, America has already changed." 156 Cong. Rec. S8399 (Sen. Snyder). By contrast, the courts can intervene in this debate only to cut it off, and only by labeling the positions of the hundreds of Members of Congress who voted for DOMA, many still in office, and the President who signed it, as not just

[21] *E.g.*, Michael Cole-Schwartz, *Sen. Leahy Announces Upcoming Hearing on DOMA Repeal*, HRC Back Story (July 7, 2011), http://www.hrcbackstory.org/2011/07/hrc-statement-on-announcement-of-senate-doma-hearing/#.Tna3o9SG6uI.

mistaken, or antiquated, but as wholly "irrational." Neither Congress's decision to adopt a federal definition of marriage for purposes of federal law nor its decision to choose the traditional definition over a substantial redefinition lack a rational basis, and, accordingly, this Court should not shut down the debate by striking down DOMA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

/s/Paul D. Clement
Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson

BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090

Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives

Of Counsel
Kerry W. Kircher, General Counsel
Christine Davenport, Sr. Assistant Counsel
Katherine E. McCarron, Assistant Counsel
William Pittard, Assistant Counsel
Kirsten W. Konar, Assistant Counsel

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

September 22, 2011

ADDENDUM

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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:

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

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[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

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[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

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[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
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

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

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[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

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[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.

1 U.S.C. § 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.

28 U.S.C. § 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.

criminalizing homosexual sodomy. *Bowers* would seem to be particularly relevant to the issues raised in *Romer,* for in the earlier case, the Court expressly held that the anti-sodomy law served the rational purpose of expressing "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[91] If (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals preferred status as a protected class under antidiscrimination laws.

The Committee belabors these aspects of *Romer* to highlight the difficulty of analyzing any law in light of the Court's decision in that case. But of this much, the Committee is certain: nothing in the Court's recent decision suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing.

By extension, the Defense of Marriage Act is also plainly constitutional under *Romer*. The Committee briefly described above at least four legitimate government interests that are advanced by this legislation—namely, defending the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self-governance; and preserving government resources. The Committee is satisfied that these interests amply justify the enactment of this bill.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 14, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Attorney General has referred your letter of May 9, 1996 to this office for response. We appreciate your inviting the Department to send a representative to appear and testify on Wednesday, May 22 at a hearing before the Subcommittee on the Constitution concerning H.R. 3396, the Defense of Marriage Act. We understand that the date of the Hearing has now been moved forward to May 15.

H.R. 3396 contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would essentially provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one

[91] *Id.* at 196.

woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that H.R. 3396 would be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department.

Sincerely,

ANDREW FOIS, *Assistant Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 29, 1996.

Hon. CHARLES T. CANADY,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of May 28 requesting updated information regarding the Administration's analysis of the constitutionality of H.R. 3396, the Defense of Marriage Act.

The Administration continues to believe that H.R. 3396 would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer* v. *Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable), and the President "would sign the bill if it was presented to him as currently written."

Please feel free to contact this office if you have further questions.

Sincerely,

ANN M. HARKINS
(For Andrew Fois, Assistant Attorney General).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART V—PROCEDURE

* * * * * * *

Thus, it would not be surprising that persons who want to invoke the legitimacy of "marriage" for same-sex unions will travel to Hawaii to become "married." Then they will return to their home States where it would be expected that the State recognize as valid a Hawaii marriage certificate.

The second question before us today is whether the act will solve the problem before us; namely, whether three members of the Hawaii Supreme Court can force other States to accept the Hawaii Supreme Court decision, to alter radically the concept of marriage. The answer again is yes. The Defense of Marriage Act ensures that each State can define for itself the concept of marriage and not be bound by decisions made by other States. The Defense of Marriage Act also makes clear that no Federal law should be read to treat a same-sex union as a "marriage."

The last question is whether this act is a legitimate exercise of Congress' power. To me, the answer again is yes. But that is not just my view. The Clinton administration also believes that the Defense of Marriage Act is legitimate and lawful.

In that regard, I would like to place in the record a letter from Andrew Fois, Assistant Attorney General for the Office of Legislative Affairs. The letter states that the Clinton administration views this legislation as constitutional. The letter also addresses the House's identical version of this law, and the letter makes clear that the administration continues to believe that both H.R. 3396 and S. 1740 would be sustained as constitutional if challenged in court.

[The letter follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 9, 1996.

The Honorable ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of June 5, 1996, inviting a representative from the Department to testify at a hearing before the Committee on S. 1740, the Defense of Marriage Act. Should a representative be unavailable to testify at the hearing, you asked that we submit a written analysis of the Department's views regarding the constitutionality of S. 1740 for the hearing record.

S. 1740 is identical to H.R. 3396 which was recently reported out of the House Subcommittee on the Constitution. It contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that the Defense of Marriage Act would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that would make an appearance by a representative of the Department helpful to the Committee. As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer* v. *Evans* does not affect the Department's analysis (that the Defense of Marriage Act is constitutionally sustainable), and the President "would sign the bill if it was presented to him as currently written."

I respectfully request that this letter be submitted for the hearing record in lieu of oral testimony. Please feel free to contact this office if you have further questions.

Sincerely,

(Signed) Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1027

RICHARD JOHN BAKER, *et al.*,
Appellants,

—v.—

GERALD R. NELSON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

R. MICHAEL WETHERBEE
Minnesota Civil Liberties Union
2323 East Hennepin Avenue
Minneapolis, Minnesota 55413

LYNN S. CASTNER
1625 Park Avenue
Minneapolis, Minnesota 55404

Attorneys for Appellants

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra,* pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra,* pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson,* petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently percipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra,* pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra,* p. 12a), and to the Supreme Court of Minnesota (App. *infra,* p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

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to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices Among Male College Students,* 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.,* at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra,* at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.,* at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallihan,* W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Meyer* v. *Nebraska,* 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut, supra.*

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia, supra; Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia,* 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia,* 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra,* p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.[5]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut,* 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[5] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed, supra; Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra.*

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut, supra; Loving* v. *Virginia,* 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut, supra.*

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

R. Michael Wetherbee
Minnesota Civil Liberties Union
2323 East Hennepin Avenue
Minneapolis, Minnesota 55413

Lynn S. Castner
1625 Park Avenue
Minneapolis, Minnesota 55404

Attorneys for Appellants

APPENDIX

Statutes Involved

CHAPTER 517

[Minnesota Statutes]

517.01 MARRIAGE A CIVIL CONTRACT. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

517.02 PERSONS CAPABLE OF CONTRACTING. Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent. A male person of the full age of 18 years may, with the consent of his parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry. A female person of the full age of 16 years may, with the consent of her parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, her application for a license is approved by the judge of the juvenile court of the county in which she resides. If the judge of juvenile court of the county in which she resides is absent from the county and has not by order assigned another probate judge or a retired probate judge to act in his stead, then the court commissioner or any judge of

district court of the county may approve her application for a license.

517.03 MARRIAGES PROHIBITED. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; or between parties who are nearer than second cousins; whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age of 16 years; provided, however, that mentally deficient persons committed to the guardianship of the commissioner of public welfare may marry on receipt of written consent of the commissioner. The commissioner may grant such consent if it appears from his investigation that such marriage is for the best interest of the ward and the public. The clerk of the district court in the county where the application for a license is made by such ward shall not issue the license unless and until he has received a signed copy of the consent of the commissioner of public welfare.

517.04 SOLEMNIZATION. Marriages may be solemnized by any justice of the peace in the county in which he is elected, and throughout the state by any judge of a court of record, the superintendent of the department for the deaf and dumb, in the state school for the deaf and blind,

or any licensed or ordained minister of the gospel in regular communion with a religious society.

517.05 CREDENTIALS OF MINISTER. Ministers of the gospel, before they are authorized to perform the marriage rite, shall file a copy of their credentials of license or ordination with the clerk of the district court of some county in this state, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be endorsed upon and recorded with each certificate of marriage granted by a minister.

517.06 PARTIES EXAMINED. Every person authorized by law to perform the marriage ceremony, before solemnizing any marriage, may examine the parties on oath, which oath he is authorized to administer, as to the legality of such intended marriage, and no such person shall solemnize a marriage unless he is satisfied that there is no legal impediment thereto.

517.07 LICENSE. Before any persons shall be joined in marriage, a license shall be obtained from the clerk of the district court of the county in which the woman resides, or, if not a resident of this state, then from the clerk of the district court of any county and the marriage need not take place in the county where the license is obtained.

517.08 APPLICATION FOR LICENSE. Subdivision 1. Application for a marriage license shall be made at least five days before a license shall be issued. Such application shall be made upon a form provided for the purpose and shall contain the full names of the parties, their post office addresses and county and state of residence, and their full

ages. The clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage and, if at the expiration of this five-day period, he is satisfied that there is no legal impediment thereto, he shall issue such license, containing the full names of the parties and county and state of residence, with the district court seal attached, and make a record of the date of issuance thereof, which license shall be valid for a period of six months. In case of emergency or extraordinary circumstances, the judge of the probate court, the court commissioner, or any judge of the district court, of the county in which the application is made, may authorize the license to be issued at any time before the expiration of the five days. If a male person intending to marry shall be under the age of 21 and shall not have had a former wife, such license shall not be issued unless the consent of the parents or guardians or the parent having the actual care, custody and control of said party shall be given under the hand of such parent or guardian and duly verified by an officer duly authorized to take oaths and duly attested by a seal, where such officer has a seal. Provided, that if there be no parent or guardian having the actual care, custody and control of said party, then the judge of the juvenile court, the court commissioner, or any judge of the district court in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party. The clerk shall collect from the applicant a fee of $10 for administering the oath, issuing, recording, and filing all papers required, and preparing and transmitting to the state registrar of vital statistics the reports of marriage required by this section. If the license should not be used within the period of six months

due to illness or other extenuating circumstances, it may be surrendered to the clerk for cancellation, and in such case a new license shall issue upon request of the parties of the original license without fee therefor. Any clerk who shall knowingly issue or sign a marriage license in any other manner than in this section provided shall forfeit and pay for the use of the parties aggrieved not to exceed $1,000.

Subd. 2. On or before the 11th day of each calendar month, the clerk of the district court shall prepare and transmit to the state registrar of vital statistics, on a form prescribed and furnished by the state registrar of vital statistics, a certified summary of the identifying information and statistical data concerning persons for whom certificates of marriage were filed in the office of the clerk of the district court during the previous month. The state registrar of vital statistics shall prepare and maintain a state-wide index of such identifying information and compile therefrom data for statistical purposes.

Subd. 3. The personal information necessary to complete the report of marriage shall be furnished by the applicant prior to the issuance of the license. The report shall contain only the following information:

(a) Personal information on bride and groom.

1. Name.
2. Residence.
3. Date and place of birth.
4. Race.
5. If previously married, how terminated.
6. Signature of applicant and date signed.

(b) Information concerning the marriage.

1. Date of marriage.
2. Place of marriage.
3. Civil or religious ceremony.

(c) Signature of clerk of court and date signed.

517.09 SOLEMNIZATION. In the solemnization of marriage no particular form shall be required, except that the parties shall declare in the presence of a person authorized by section 517.04 to solemnize marriages, and the attending witnesses that they take each other as husband and wife. In each case at least two witnesses shall be present besides the person performing the ceremony.

517.10 CERTIFICATE; WITNESSES. The person solemnizing a marriage shall prepare under his hand three certificates thereof. Each certificate shall contain the full names and county and state of residences of the parties and the date and place of the marriage. Each certificate shall also contain the signatures of at least two of the witnesses present at the marriage who shall be at least 16 years of age. The person solemnizing the marriage shall give each of the parties one such certificate, and shall immediately make a record of such marriage, and file one such certificate with the clerk of the district court of the county in which the license was issued within five days after the ceremony. The clerk shall record such certificate in a book kept for that purpose.

517.11, 517.12 [Repealed, 1951 c 700 s 5]

517.13 PENALTY FOR FAILURE TO DELIVER AND FILE CERTIFICATE. Every person solemnizing a marriage who shall neglect to make and deliver to the clerk a certificate thereof within the time above specified shall forfeit a sum not exceeding $100, and every clerk who neglects to record such certificate shall forfeit a like sum.

517.14 ILLEGAL MARRIAGE; FALSE CERTIFICATE; PENALTY. If any person authorized by law to join persons in marriage shall knowingly solemnize any marriage contrary to the provisions of this chapter, or wilfully make any false certificate of any marriage, or pretended marriage, he shall forfeit for every such offense a sum not exceeding $500, or may be imprisoned not exceeding one year.

517.15 UNAUTHORIZED PERSON PERFORMING CEREMONY. If any person undertakes to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be guilty of a gross misdemeanor; and, upon conviction thereof, punished by imprisonment of not more than one year, or by a fine of not more than $500, or by both such fine and imprisonment.

517.16 IMMATERIAL IRREGULARITY OF OFFICIATING PERSON NOT TO VOID. No marriage solemnized before any person professing to be a judge, justice of the peace, or minister of the gospel shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed officer or person; provided, the marriage is consummated with the full belief on the part of the persons

so married, or either of them, that they have been lawfully joined in marriage.

517.17 SOLEMNIZING UNLAWFUL MARRIAGES. Every minister or magistrate who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which, within his knowledge, a legal impediment exists, shall be guilty of a gross misdemeanor.

517.18 MARRIAGE AMONG QUAKERS; BAHA'IS; HINDUS; MUSLIMS. All marriages solemnized among the people called Friends or Quakers, in the form heretofore practiced and in use in their meetings, shall be valid and not affected by any of the foregoing provisions; and the clerk of the meeting in which such marriage is solemnized, within one month after any such marriage, shall deliver a certificate of the same to the clerk of the district court of the county where the marriage took place, under penalty of not more than $100, and such certificate shall be filed and recorded by the clerk under a like penalty; and, if such marrage does not take place in such meeting, such certificate shall be signed by the parties and at least six witnesses present, and filed and recorded as above provided under a like penalty, and marriages may be solemnized among members of the Baha'i faith by the Chairman of an incorporated local Spiritual Assembly of the Baha'is, according to the form and usage of such society, and marriages may be solemnized among Hindus or Muslims by the person chosen by a local Hindu or Muslim association, according to the form and usage of their respective religions, but in the presence of at least two witnesses be-

sides the person performing the ceremony, and who shall issue and record a certificate thereof as provided by Minnesota Statutes 1945, Section 517.10.

517.19 ILLEGITIMATE CHILDREN. Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other, and the issue of marriages declared null in law shall nevertheless be legitimate.

Alternative Writ of Mandamus

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Petitioners Richard John Baker and James Michael McConnell show to the Court as follows:

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota statutes, section 517.08.

2. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

3. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, section 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

4. That on the above date, pursuant to Minnesota Statutes, section 517.08, subdivision (3), petitioners were not questioned as to which physical sex classification they belonged.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license which petitioners had duly and truthfully completed.

6. That the refusal of Clerk Gerald R. Nelson to issue the marriage to petitioners violated Minnesota Statutes, sections 517.02 and 517.08, subdivision (3), and was therefore an unlawful act.

7. That in the alternative, the refusal of Clerk Gerald R. Nelson to issue the marriage license to petitioners violated the First Amendment, the Eighth Amendment, the Ninth Amendment and the Fourteenth Amendment of the United States Constitution.

WHEREFORE: Gerald R. Nelson, Clerk of District Court of Hennepin County, is hereby commanded to issue to Richard John Baker or James Michael McConnell on or before the 22 day of December, 1970 a marriage license or show cause before Special Term Judge Donald T. Barbeau, on the 22 day of December, 1970 at 9:30 a.m./p.m. at the Hennepin County Courthouse why he has not done so, and that he then and there make his return to this writ, with his certificate thereon of having done as commanded.

Signed: /s/ .....
Donald T. Barbeau
District Court Judge

Dated this 10 day
of December, 1970

Order Quashing the Writ

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL MCCONNELL,

Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on January 8, 1971, on the motion of plaintiffs for the issuance of an alternative writ of mandamus to require defendant, Clerk of District Court of Hennepin County, to issue a marriage license to plaintiffs.

R. Michael Wetherbee, Esq., appeared for and on behalf of plaintiffs and in support of said motion. George M. Scott, County Attorney of Hennepin County, by David E. Mikkelson, Esq., Assistant County Attorney, appeared for and on behalf of defendant, and in opposition thereto.

The Court having heard the evidence adduced and the arguments of counsel, and on all the files, records and

proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the alternative writ of mandamus be and the same hereby is quashed.

IT IS FURTHER ORDERED That the defendant, Gerald R. Nelson, Clerk of District Court in and for the County of Hennepin, Minnesota, is specifically ordered not to issue a marriage license to the petitioners Richard John Baker and James Michael McConnell.

BY THE COURT,

/s/ TOM BERGIN
Judge

Dated: January 8, 1971

Amended Order, Findings and Conclusions

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL McCONNELL,

Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on Friday, January 29, 1971, on the motion of Plaintiffs requesting that Findings of Fact be specifically set forth, together with Conclusions of Law, and that the same be incorporated into the Order of the Court issued in the above entitled matter on January 8, 1971, which Order quashed the Alternative Writ of Mandamus and directed the Defendant, Gerald R. Nelson, specifically to not issue a marriage license sought by the Petitioners.

R. Michael Wetherbee, Esquire, appeared for and on behalf of the Plaintiffs and in support of said motion. George M. Scott, County Attorney for Hennepin County

by David E. Mikkelson, Assistant County Attorney, appeared for and on behalf of the Defendant.

The Court having heard the evidence, arguments of counsel, and on all the files, records and proceedings herein, the Court hereby grants the motion of the Plaintiffs and directs that the following Findings of Fact and Conclusions of Law be incorporated into and made a part of the earlier Order of this Court in this matter dated January 8, 1971:

FINDINGS OF FACT

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota Statutes, Section 517.08.

2. That the petitioners-plaintiffs, Richard John Baker and James Michael McConnell, were both of the male sex and that they presented themselves to the Clerk of District Court as such in making their application for marriage license.

3. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

4. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, Sec-

tion 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license, however, the said defendant, Gerald R. Nelson, subsequently refused to issue such marriage license on the grounds that there was a legal impediment to such contemplated marriage in that both parties were of the same sex. Such denial to issue the marriage license was based in part on an opinion of the County Attorney of Hennepin County which had been requested by said defendant, Gerald R. Nelson.

Based upon the foregoing Findings of Fact, the Court does hereby make the following

CONCLUSIONS OF LAW

1. That the refusal of the Defendant, Gerald R. Nelson, Clerk of Hennepin County District Court, to issue the marriage license to the Plaintiffs Richard John Baker and James Michael McConnell was not a violation of Minnesota Statutes, Chapter 517.

2. That such refusal to issue the marriage license applied for by the Plaintiffs was not in violation of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

IT IS THEREFORE ORDERED That the foregoing Findings of Fact and Conclusions of Law be incorporated into and made a part of the Order of this Court heretofore made in the above entitled matter and dated January 8, 1971.

BY THE COURT,

/S/ TOM BERGIN
Tom Bergin
Judge of District Court

Dated: January 29, 1971

Opinion of the Minnesota Supreme Court, Hennepin County

No. 201 HENNEPIN COUNTY PETERSON, *J.*

RICHARD JOHN BAKER, *et al.*,

Appellants,

43009 vs.

GERALD NELSON, Clerk of Hennepin County District Court,

Respondent.

Endorsed
Filed October 15, 1971
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Minn. St. c. 517, which prohibits the marriage of persons of the same sex, does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

Heard and considered en banc.

OPINION

PETERSON, *Justice.*

The questions for decision are whether a marriage of two persons of the same sex is authorized by state statutes

and, if not, whether state authorization is constitutionally compelled.

Petitioners, Richard John Baker and James Michael McConnell, both adult male persons, made application to respondent, Gerald R. Nelson, clerk of Hennepin County District Court, for a marriage license pursuant to Minn. St. 517.08. Respondent declined to issue the license on the sole ground that petitioners were of the same sex, it being undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioner.

The trial court, quashing an alternative writ of mandamus, ruled that respondent was not required to issue a marriage license to petitioners and specifically directed that a marriage license not be issued to them. This appeal is from those orders. We affirm.

1. Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages. We think, however, that a sensible reading of the statute discloses a contrary intent.

Minn. St. c. 517, which governs "marriage," employs that term as one of common usage, meaning the state of union between persons of the opposite sex.[1] It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would

[1] Webster's Third New International Dictionary (1966) p. 1384 gives this primary meaning to marriage: "1 a: the state of being united to a person of the opposite sex as husband or wife."

Black, Law Dictionary (4 ed.) p. 1123 states this definition: "Marriage * * * is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."

have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as "husband and wife" and "bride and groom" (the latter words inserted by L. 1969, c. 1145, § 3, subd. 3).

We hold, therefore, that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.

2. Petitioners contend, second, that Minn. St. c. 517, so interpreted, is unconstitutional. There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.[2]

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of

[2] We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.

children within a family, is as old as the book of Genesis. Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965), upon which petitioners rely, does not support a contrary conclusion. A Connecticut criminal statute prohibiting the use of contraceptives by married couples was held invalid, as violating the due process clause of the Fourteenth Amendment. The basic premise of that decision, however, was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship. Mr. Justice Douglas, author of the majority opinion, wrote that this criminal statute "operates directly on an intimate relation of husband and wife," 381 U. S. 482, 85 S. Ct. 1680, 14 L. ed. 2d 513, and that the very idea of its enforcement by police search of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives * * * is repulsive to the notions of privacy surrounding the marriage relationship," 381 U. S. 485, 85 S. Ct. 1682, 14 L. ed. 2d 516. In a separate opinion for three justices, Mr. Justice Goldberg similarly abhorred this state disruption of "the traditional relation of the family—a

relation as old and as fundamental as our entire civilization." 381 U. S. 496, 85 S. Ct. 1688, 14 L. ed. 2d 522.[3]

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.[4]

Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. ed. 2d 1010 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's anti-miscegenation statute, prohibiting interracial marriages,

[3] The difference between the majority opinion of Mr. Justice Douglas and the concurring opinion of Mr. Justice Goldberg was that the latter wrote extensively concerning this right of marital privacy as one preserved to the individual by the Ninth Amendment. He stopped short, however, of an implication that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment.

[4] See, Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 S. Ct. 281, 282, 58 L. ed. 539, 543 (1914). As stated in Tigner v. Texas, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. ed. 1124, 1128, 130 A. L. R. 1321, 1324 (1940), and reiterated in Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 540, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1659, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

was invalidated solely on the grounds of its patent racial discrimination. As Mr. Chief Justice Warren wrote for the court (388 U. S. 12, 87 S. Ct. 1824, 18 L. ed. 2d 1018):

> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U. S. 535, 541 (1942). See also Maynard v. Hill, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these 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. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." [5]

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

[5] See, also, McLaughlin v. Florida, 379 U. S. 184, 85 S. Ct. 283, 13 L. ed. 2d 222 (1964), in which the United States Supreme Court, for precisely the same reason of classification based only upon race, struck down a Florida criminal statute which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.

Forty-one states have promulgated constitutional amendments or enacted statutes limiting marriage to opposite-sex couples:

1. Alabama. *See* Ala. Const. art. I, § 36.03; Ala. Code § 30-1-19 (2011).

2. Alaska. *See* Alaska Const. art. I, § 25; Alaska Stat. Ann. § 25.05.013 (West 2011).

3. Arizona. *See* Ariz. Const. art. XXX § 1; Ariz. Rev. Stat. Ann. §§ 25-101 & 25-112 (2011).

4. Arkansas. *See* Ark. Const. amend. 83, § 1; Ark. Code Ann. §§ 9-11-109, 9-11-107, 9-11-208 (West 2011).

5. California. *See* Cal. Const. art. I, § 7.5.

6. Colorado. *See* Colo. Const. art. II, § 31; Colo. Rev. Stat. Ann. § 14-2-104 (West 2011).

7. Delaware. *See* 13 Del. Code Ann. § 101 (West 2011).

8. Florida. *See* Fla. Const. art. I § 27; Fla. Stat. Ann. § 741.212 (West 2011).

9. Georgia. *See* Ga. Const. art. I, § 4, para. I; Ga. Code Ann. § 19-3-3.1 (West 2011).

10. Hawaii. *See* Haw. Const. art. I, § 23; Haw. Rev. Stat. § 572-1 (2011).

11. Idaho. *See* Idaho Const. art. III, § 28; Idaho Code Ann. §§ 32-201 & 32-209 (West 2011).

12. Illinois. *See* 750 Ill. Comp. Stat. 5/212 (West 2011).

13. Indiana. *See* Ind. Code Ann. § 31-11-1-1 (West 2011).

14. Kansas. *See* Kan. Const. art. XV, § 16; 2011 Kan. Legis. Serv. 26 (West), Kan. Stat. Ann. § 23-115 (West 2011).

15. Kentucky. *See* Ky. Const § 233A; Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (West 2011).

16. Louisiana. *See* La. Const. art. XII, § 15; La. Civ. Code Ann. art. 86, 89 (2011).

17. Maine. *See* Me. Rev. Stat. Ann. tit. 19-A, § 701(5) (2011).

18. Maryland. *See* Md. Code Ann., Fam. Law § 2-201 (West 2011).

19. Michigan. *See* Mich. Const. art. I, § 25; Mich. Comp. Laws Ann. § 551.1 (West 2011).

20. Minnesota. *See* Minn. Stat. § 517.03(4) (West 2011).

21. Mississippi. *See* Miss. Const. art. XIV, § 263A; Miss. Code Ann. § 93-1-1(2) (West 2011).

22. Missouri. *See* Mo. Const. art. I, § 33; Mo. Rev. Stat. § 451.022 (West 2011).

23. Montana. *See* Mont. Const. art. XIII, § 7; Mont. Code Ann. § 40-1-401 (2011).

24. Nebraska. *See* Neb. Const. art. I, § 29.

25. Nevada. *See* Nev. Const. art. I, § 21.

26. North Carolina. *See* N.C. Gen. Stat. § 51-1.2 (West 2011).

27. North Dakota. *See* N.D. Const. art. XI, § 28; N.D. Cent. Code §§ 14-03-01 & 14-03-08 (West 2011).

28. Ohio. *See* Ohio Const. art. XV, § 11; Ohio Rev. Code Ann. § 3101.01(C) (West 2011).

29. Oklahoma. *See* Okla. Const. art. II, § 35; Okla. Stat. Ann. tit. 43, § 3.1 (2011).

30. Oregon. *See* Or. Const. art. XV, § 5a.

31. Pennsylvania. *See* 23 Pa. Cons. Stat. Ann. §§ 1102, 1704 (West 2011).

32. South Carolina. *See* S.C. Const. art. XVII, § 15; S.C. Code Ann. § 20-1-15 (2011).

33. South Dakota. *See* S.D. Const. art. XXI, § 9; S.D. Codified Laws § 25-1-1 (2011).

34. Tennessee. *See* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113 (West 2011).

35. Texas. *See* Tex. Const. art. I, § 32; Tex. Fam. Code Ann. §§ 2.001(b) & 6.204 (West 2011).

36. Utah. *See* Utah Const. art. I, § 29; Utah Code Ann. §§ 30-1-2(5) & 30-1-4.1 (West 2011).

37. Virginia. *See* Va. Const. art. I, § 15-A; Va. Code Ann. §§ 20-45.2 & 20-45.3 (West 2011).

38. Washington. *See* Wash. Rev. Code § 26.04.010(1) (West 2011).

39. West Virginia. *See* W. Va. Code § 48-2-603 (West 2011).

40. Wisconsin. *See* Wis. Const. art. XIII, § 13; Wis. Stat. §§ 765.001(2) & 765.04 (West 2011).

41. Wyoming. *See* Wyo. Stat. Ann. § 20-1-101 (West 2011).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

/s/Paul D. Clement
Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson

BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090

Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives

September 22, 2011

CERTIFICATE OF SERVICE

On September 22, 2011, I filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit, using the appellate CM/ECF system, the foregoing Brief for Intervenor-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/Paul D. Clement
Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson

BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090

Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives