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-cv-11156-JLT

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT AND IN SUPPORT OF COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"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." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Throughout our history, marital status has been determined solely and exclusively by State law—not simply for purposes of State legislation, but also wherever Congress has chosen to make federal law turn on marital status. Even in times of significant controversy on the subject within and among the States—such as the debate over interracial marriage—and notwithstanding significant divergence between different States' definitions of marriage (a divergence that persists today), States have the exclusive sovereign prerogative to define and regulate marriage.

Pursuant to this sovereign prerogative and the Massachusetts Declaration of Rights, the Commonwealth of Massachusetts has issued marriage licenses to same-sex couples since 2004. Over that six-year span, more than 15,000 same-sex couples have wed in the Commonwealth. Although Massachusetts law does not distinguish marriage between same-sex and different-sex couples, marriages between same-sex couples—and *only* those marriages—are deemed invalid for purposes of federal law pursuant to Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (*codified at* 1 U.S.C. § 7) ("DOMA").[1]

DOMA's unprecedented federal definition of marriage violates the allocation of powers between the federal government and the Commonwealth in two independent ways:

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[1] Section 2 of the Defense of Marriage Act authorizes States to disregard marriages of same-sex couples performed and recognized by other States. 28 U.S.C. § 1738C. The Commonwealth does not challenge Section 2, and references to "DOMA" throughout refer only to Section 3.

First, DOMA violates the Tenth Amendment to the U.S. Constitution, which prohibits Congress from intruding on areas of exclusive State authority, of which the definition and regulation of marriage is perhaps the clearest example. Contrary to Defendants' arguments, the States' authority to define marriage is not limited to application under State law. Rather, the Commonwealth—like all States—has the authority to issue marriage licenses that determine *marital status* for all purposes, State and federal. States that do not recognize marriages between same-sex couples still retain that authority in full. DOMA, however, creates *two* distinct and unequal marital statuses in Massachusetts: married for different-sex spouses and married but "federally single" for same-sex spouses. That division is an unprecedented and unconstitutional interference with the Commonwealth's authority to define marital status. Congress is not required to make marital status relevant to federal law. Having chosen to do so, however, it must take marital status as the States define it; it cannot declare that some marriages valid under State law are federally valid whereas others are not.

Second, DOMA—which Defendants admit is "discriminatory"—violates 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. Massachusetts cannot receive or retain federal funds if it gives same-sex and different-sex spouses equal treatment, namely by authorizing the burial of a same-sex spouse in a federally-funded veterans' cemetery and by recognizing the marriages of same-sex spouses in assessing eligibility for Medicaid health benefits. Were the Commonwealth to disregard the lawful marriages of same-sex couples when administering these programs, it would violate the Equal Protection Clause, as DOMA fails even the most lenient standard of rational basis

scrutiny. Defendants disavow the supposed "interests" Congress originally put forward as justifications for DOMA, and the current justifications fare no better. The federal government has no legitimate interest in "preserving the status quo" where the status quo is invidious discrimination. Moreover, the status quo—as shown by the incontrovertible facts of record—is federal *recognition* of State marriages, not wholesale disregard of certain State marriages due to federal disagreement with how some States have exercised their sovereign authority over marital status. Nor is Defendants' invocation of "uniformity" in marriage law persuasive. States have never been uniform in their definitions of marriage, but rather have differed (and continue to differ today) in significant ways. The only uniformity has been the federal government's acceptance of State definitions. Defendants' invocation of "incrementalism" is similarly off-point: while the federal government may pursue a *legitimate interest* incrementally, DOMA does not further any legitimate interest at all. On the contrary, the legislative record confirms that DOMA is rooted in animus against gay and lesbian people, a fact that further demonstrates its irrationality.

Moreover, although DOMA lacks even a rational basis, it should be analyzed under a heightened standard. The evidence of record shows that gay and lesbian people are a minority that has historically suffered serious discrimination on account of obvious, immutable, or distinguishing characteristics that define it as a discrete and disadvantaged group. Contrary to Defendants' arguments, the First Circuit has not ruled on this issue. *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), decided only that the Supreme Court had not *previously mandated* that gays and lesbians are a suspect class. The plaintiffs in *Cook* did not present any affirmative argument, much less evidence, of traditional invidious discrimination justifying application of heightened

scrutiny. Accordingly, *Cook* does not forbid this Court from doing so based on the factual record the Commonwealth submits here.

DOMA also violates the Spending Clause because it imposes a requirement—disregard of marriages between same-sex couples—that is not related to either of the joint federal-state programs. The state cemeteries program provides convenient burial sites for veterans and their spouses. Excluding same-sex spouses from burial undermines that purpose. Similarly, DOMA does not relate to Medicaid's purpose in providing health care coverage to needy individuals.

Defendants' objections to the Commonwealth's standing are meritless. Standing requirements are liberally construed in challenges by States, and Defendants do not dispute that Massachusetts has suffered injury through the loss of federal Medicaid funds. DOMA additionally injures Massachusetts by requiring it to pay additional Medicare tax based on health benefits provided to same-sex spouses of Commonwealth employees and by exposing it to the imminent risk that Defendants will seek to recapture federal funds previously received for veterans' cemeteries and deny payments for Medicaid health benefits. That Defendants have not *yet* chosen to do so does not defeat standing. Finally, DOMA's severe incursion on the Commonwealth's power to define and regulate marriage causes sufficient constitutional injury to confer standing on the Commonwealth.

The evidence of record compels summary judgment in the Commonwealth's favor and a ruling that DOMA is unconstitutional. At the very least, Defendants' arguments do not justify dismissal at this stage because the Commonwealth's allegations, if ultimately proven, state a cognizable claim for relief.

STATEMENT OF FACTS

The following facts are taken from the Commonwealth's complaint, the allegations of which are taken as true for purposes of Defendants' motion to dismiss. In light of the Commonwealth's summary judgment motion, citations to its Statement of Undisputed Material Facts under Local Rule 56.1 ("Rule 56.1 Stmt.") are also provided. The Rule 56.1 Statement contains references to admissible evidence of record.

A. Marriage Laws in the United States

Since the Founding, States have issued civil marriage licenses and established the terms for entry to and exit from marriage. Rule 56.1 Stmt. ¶ 10. State marriage rules have varied substantially over time in response to local and regional preferences. Rule 56.1 Stmt. ¶ 12. Examples of this variation arose in the context of recognition of common law marriage, age of consent to marry, hygienic and eugenic restrictions on who can marry, interracial marriage, and grounds for the termination of marriage. Rule 56.1 Stmt. ¶ 13. Divisions over these rules have been politically and socially contentious. Rule 56.1 Stmt. ¶ 14. Starting in the 1880s and culminating around the time of World War II, some called for the establishment of uniformity at the federal level through legislation or constitutional amendment. Rule 56.1 Stmt. ¶ 15. Prior to 1996, however, none of these efforts had been successful due to the repeated recognition of exclusive state authority over the institution of marriage. Rule 56.1 Stmt. ¶ 15.

Congress has chosen to make eligibility for numerous rights and protections turn on marital status. Rule 56.1 Stmt. ¶ 16. For such purposes, a person traditionally has been considered married under federal law if he or she is considered married under the applicable state law. Rule 56.1 Stmt. ¶ 17. Indeed, Defendants have conceded that historically, "the marital

status of individuals under federal law—and thus the operation and effect of those statutes—generally depended on marital status under state law." Reply in Supp. of Defs.' Mot. to Dismiss & Opp. to Pls.' Mot. for Summ. J. at 12, *Gill v. Office of Pers. Mgmt.*, No. 09 Civ. 10309 (Dkt. No. 54) (D. Mass. Jan. 29, 2010) ("U.S. *Gill* Reply"). Despite substantial variation among the States regarding eligibility requirements, Congress never created a blanket federal definition of marriage before enacting DOMA. Rule 56.1 Stmt. ¶ 18.

B. Marriage for Same-Sex Couples in Massachusetts

In 2003, the Supreme Judicial Court of Massachusetts recognized that marriage is among the most basic liberty interests and due process rights and that denying same-sex couples access to marriage violated the equality and liberty provisions of the Massachusetts Constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957, 959-61, 968 (Mass. 2003). 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." Compl. ¶ 17. The Massachusetts legislature rejected both citizen-initiated and legislatively-proposed constitutional amendments to overturn *Goodridge*. Compl. ¶¶ 18-19. Since May 17, 2004, the Commonwealth has issued approximately 15,214 marriage licenses to same-sex couples. Rule 56.1 Stmt. ¶ 9.

C. The Federal Defense of Marriage Act

Section 3 of DOMA defines "marriage" and "spouse," across all federal law, to exclude same-sex couples lawfully married under State law. 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.

1 U.S.C. § 7.

DOMA was a reaction to Congressional fears that Hawaii would begin to recognize marriages between same-sex couples following *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See* H.R. Rep. No. 104-664, at 2, 4-6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906; Compl. ¶ 22. The House Judiciary Committee viewed *Baehr* as part of a "legal assault against traditional heterosexual marriage laws." H.R. Rep. No. 104-664, at 4, *reprinted in* 1996 U.S.C.C.A.N. at 2908. The Committee explicitly stated that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,'" and that DOMA would further Congress's interests in, *inter alia*, "defend[ing] the institution of traditional heterosexual marriage," "encouraging responsible procreation and child-rearing," and "preserving scarce government resources," all while reflecting "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* at 12-18, *reprinted in* 1996 U.S.C.C.A.N. at 2916-22. Members of Congress repeatedly condemned homosexuality in the floor debates surrounding DOMA's passage, calling it "immoral," "based on perversion," 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn), "unnatural," *id.* at H7494 (daily ed. July 12, 1996) (statement of Rep. Smith), "depraved," and "an attack upon God's principles," *id.* at H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer).

Notably absent from the legislative record is any concern about DOMA's sweeping effect. The terms "marriage" and "spouse" appear over 1,100 times in the United States Code. *See generally* Compl. ¶ 34, Addendum of Fed. Law Regulating Marriage; Rule 56.1 Stmt. ¶ 4 (citing U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior*

Report (2004)). Those provisions create "rights, obligations, and protections pertaining to a wide range of areas, including the workplace, healthcare, taxes, Social Security, retirement, intellectual property, and court proceedings." Compl. ¶ 35; *see also* Rule 56.1 Stmt. ¶ 5. Congress did not investigate, let alone hear testimony from experts or analysts about, DOMA's likely effect on the myriad federal programs at issue. In fact, the House rejected a proposed amendment that would have required budgetary analysis by the General Accounting Office. *See* 142 Cong. Rec. H7503-05 (daily ed. July 12, 1996).

D. Veterans' Cemeteries

Massachusetts has received federal funding through the federal government's State Cemetery Grants Program for Commonwealth-operated veterans' cemeteries in Agawam and Winchendon, Massachusetts. Rule 56.1 Stmt. ¶¶ 20-23; Compl. ¶¶ 63-64. Under that program, Defendant United States Department of Veterans Affairs ("VA") provides federal funding for the establishment, expansion, and improvement of veterans' cemeteries owned and operated by a state. 38 U.S.C. § 2408; 38 C.F.R. § 39. The Commonwealth received three grants totaling over $19 million for its two cemeteries and is also reimbursed by the federal government for the costs associated with burying veterans in those cemeteries. Rule 56.1 Stmt. ¶¶ 22-23; Compl. ¶ 71.

Federal funding for veterans' cemeteries in the State Cemetery Grants Program is conditioned on compliance with regulations promulgated by Defendant Secretary of the VA. Rule 56.1 Stmt. ¶ 24; Compl. ¶ 68. One such condition is that the cemeteries "must be operated solely for the interment of veterans, their spouses, [and] surviving spouses[.]" Rule 56.1 Stmt. ¶ 25; Compl. ¶ 69. The VA may recapture funds provided for a cemetery if it is no longer

operated as a veterans' cemetery, Rule 56.1 Stmt. ¶ 26; Compl. ¶ 70; also, under such circumstances, the VA can no longer reimburse the cost of burying veterans. 38 U.S.C. § 2303.

In 2004, in response to an inquiry from the General Counsel of the Massachusetts Department of Veterans' Services ("DVS"), the VA informed the Commonwealth that "a state cemetery would not be operated solely for the interment of veterans and their spouses and children if [Massachusetts] allowed the interment of a person solely on the basis that the person is recognized under state law as being the same-sex spouse of a veteran." Rule 56.1 Stmt. ¶ 27; Compl. ¶ 73 & Ex. 3 at 2. The VA emphasized that "[t]he United States Government would have discretion to invoke the recapture provisions of 38 U.S.C. 2408(b)(3) should DVS decide to authorize the interment of same-sex spouses at the Agawam or Winchendon cemetery." Rule 56.1 Stmt. ¶ 28; Compl. ¶ 72 & Ex. 3 at 2. The VA has reiterated this position in a published directive and public statements. Rule 56.1 Stmt. ¶ 29; Compl. ¶ 74 & Ex. 4.

On August 22, 2007, the Commonwealth authorized the burial of the same-sex spouse of a veteran. Rule 56.1 Stmt. ¶ 30; Compl. ¶ 77. The veteran is a 65-year-old decorated U.S. Army service member who retired after over twenty years of service. Rule 56.1 Stmt. ¶ 31. His spouse is 58 years old and not otherwise eligible for burial in a veterans' cemetery. Rule 56.1 Stmt. ¶ 32. The men are lawfully married under Massachusetts law, Rule 56.1 Stmt. ¶ 30, and the Commonwealth intends to honor their wish to be buried together in a veterans' cemetery, Rule 56.1 Stmt. ¶ 33. According to the VA, because the Commonwealth has "decide[d] to authorize" their burial, the VA has "discretion to invoke the recapture provisions of 38 U.S.C. 2408(b)(3)." Rule 56.1 Stmt. ¶¶ 28, 34; Compl. ¶ 78 & Ex. 3 at 2.

E. MassHealth

The federal Medicaid program, enacted in 1965 as Title XIX of the Social Security Act, is a federal-state partnership designed to offer subsidized medical services to certain qualifying low-income individuals. Rule 56.1 Stmt. ¶ 36; Compl. ¶ 46. The program provides "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons," *Harris v. McRae*, 448 U.S. 297, 301 (1980), as long as the State complies with the Medicaid statute and regulations promulgated by Defendant U.S. Department of Health and Human Services, which oversees Medicaid programs through its Centers for Medicare and Medicaid Services ("CMS"). Rule 56.1 Stmt. ¶ 38; Compl. ¶¶ 46-47. The Commonwealth's Medicaid program is known as MassHealth. *See generally* Mass. Gen. Laws ch. 118E, § 9. Federal payments to States under Medicaid are referred to as federal financial participation ("FFP"). CMS reimburses MassHealth for roughly half of the qualifying benefits it pays out. Rule 56.1 Stmt. ¶ 39; Compl. ¶ 48.

An individual's marital status is often relevant to that individual's eligibility for federal medical assistance under MassHealth. Rule 56.1 Stmt. ¶ 41; Compl. ¶ 49. As required by federal law, spouses' incomes and assets are usually combined for purposes of determining whether an applicant falls above or below an eligibility threshold. Rule 56.1 Stmt. ¶ 41; Compl. ¶ 50. Depending on circumstances, a person who would be individually *eligible* for benefits if considered as single might be *ineligible* when assessed as married, and vice versa. Rule 56.1 Stmt. ¶ 41. For example:

(1) Recognition of a marriage can sometimes render a spouse ineligible for benefits. Assume that a household consists of a married couple both under the age of 65. If one spouse

earns $65,000 and the other earns $13,000, their combined income ($78,000) is too high for either spouse to be eligible for coverage. However, if the spouse earning $13,000 were treated as unmarried, he would be eligible for coverage. Affidavit of Robin Callahan (hereinafter, "Callahan Aff.") ¶ 11.

(2) Recognition of a marriage can also render an otherwise-ineligible spouse eligible for benefits. As a second example, consider a household consisting of a married couple both under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year. Only the spouse earning $7,000 would be eligible if the spouses were treated as single. However, treating the two as married, both would qualify for coverage. Callahan Aff. ¶ 12.

(3) Similarly, when a spouse in a nursing home applies for coverage, asset sharing allowances for married couples can render someone eligible as married who would not qualify as single. As a third example, consider a married couple both over the age of 65. One spouse is institutionalized and each has $50,000 in assets. If the institutionalized spouse were treated as unmarried, her assets would make her ineligible for coverage. But if she were treated as married, she would be able to transfer her assets (up to $109,560) to her spouse and therefore qualify for coverage. Callahan Aff. ¶ 13.

In 2004, CMS informed the Commonwealth that federal Medicaid law required MassHealth to provide coverage to same-sex spouses who qualify when assessed as single, even if they would not qualify when considered as married. Rule 56.1 Stmt. ¶ 43; Compl. ¶ 55 & Exs. 1 & 2. CMS also stated that "DOMA does not give [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid." Rule 56.1 Stmt. ¶ 44; Compl. Ex. 1 at 1.

On July 31, 2008, the Commonwealth enacted the MassHealth Equality Act, 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." Mass. Gen. Laws ch. 118E, § 61; *see also* Rule 56.1 Stmt. ¶ 45; Compl. ¶ 56. Soon afterwards, by letter dated August 21, 2008, CMS reasserted its position that DOMA "limits the availability of FFP by precluding recognition of same sex couples as 'spouses' in the Federal program." Rule 56.1 Stmt. ¶ 46; Compl. ¶ 57 & Ex. 2 at 2. CMS further warned that the Commonwealth "must pay the full cost of administration of a program that does not comply with Federal law." Rule 56.1 Stmt. ¶ 46; Compl. ¶ 58 & Ex. 2 at 2.

The Commonwealth assesses all married individuals as married for purposes of MassHealth eligibility, regardless of whether their spouses are of the same or opposite sex. Rule 56.1 Stmt. ¶ 42; Compl. ¶ 59. MassHealth has accordingly denied coverage to individuals in a position similar to example (1) above, *i.e.* persons who do not qualify when assessed as married, even though they would qualify if assessed as single. Rule 56.1 Stmt. ¶ 47. Likewise, MassHealth provides benefits to individuals in a position similar to example (2) above, *i.e.* persons who qualify when assessed as married, even if they would not be eligible if assessed as single. Rule 56.1 Stmt. ¶ 49; Compl. ¶ 59. Because it applies Massachusetts law's definition of marriage, rather than DOMA's, the Commonwealth is accordingly subject to enforcement by CMS and stands to lose Medicaid funding. Rule 56.1 Stmt. ¶ 48.

F. The Commonwealth's Injury

The Commonwealth has suffered and will suffer cognizable injury as a result of DOMA.

First, DOMA has harmed the Commonwealth's sovereign authority by disregarding marriages recognized by the Commonwealth and forcing the Commonwealth to treat same-sex couples, to whom it has issued lawful marriage licenses, unequally. *See generally* Rule 56.1 Stmt. ¶¶ 19-55; Compl. ¶¶ 43-79. This injury has already occurred and continues to occur on each day that the Commonwealth is unable to give its marriage licenses equal effect.

Second, the VA views the Commonwealth's decision to authorize the burial of a same-sex spouse in one of its veterans' cemeteries—and, at the appropriate time, to permit the burial to go forward—as giving it "discretion to invoke the recapture provisions of 38 U.S.C. 2408(b)(3)," Rule 56.1 Stmt. ¶ 28; Compl. ¶¶ 72-73, potentially leading to the recapture of millions of dollars in federal grants to the Commonwealth, Rule 56.1 Stmt. ¶ 34.

Third, the Commonwealth's recognition of marriages between same-sex couples for purposes of Medicaid eligibility means that it does not provide benefits to same-sex spouses who do *not* qualify when considered as married, but would qualify when assessed as single. Providing benefits to those individuals would cost the Commonwealth tens of thousands of dollars annually and would risk costly lawsuits from different-sex couples not afforded the same treatment. Rule 56.1 Stmt. ¶ 47. CMS has taken the position that the Commonwealth's denial of benefits in such situations gives CMS the right to demand that MassHealth "pay the full cost of administration of a program that does not comply with Federal law." Rule 56.1 Stmt. ¶ 46;

Compl. Ex. 2 at 2. Loss of all federal Medicaid support would be a significant financial hardship for the Commonwealth. Rule 56.1 Stmt. ¶ 40; Compl. ¶ 48.[2]

Finally, DOMA imposes out-of-pocket costs on the Commonwealth by increasing the amount of Medicare tax it must pay. The Commonwealth must pay Medicare tax in the amount of 1.45% of the income of each employee subject to Medicare tax. Rule 56.1 Stmt. ¶ 52; 26 U.S.C. §§ 3121(u), 3111(b). An employee's taxable income under the Internal Revenue Code does not include the value of employer-provided health benefits for an employee's different-sex spouse. Rule 56.1 Stmt. ¶ 51. However, because of DOMA, a same-sex spouse is not treated as a spouse; therefore, the fair market value of employer-provided health benefits provided to that spouse is imputed to the employee as taxable "income." Rule 56.1 Stmt. ¶ 51. Because, as noted above, the Commonwealth must pay Medicare tax of 1.45% of its employees' taxable income, it has to pay 1.45% of the amount of that extra taxable income in additional Medicare tax. Rule 56.1 Stmt. ¶ 52. This effect of DOMA costs the Commonwealth approximately $25,000 per year. Rule 56.1 Stmt. ¶ 53. It has also required the Commonwealth to institute and pay for new monitoring systems to implement DOMA's federal definition of marriage as it pertains to benefits provided to the same-sex spouses of Commonwealth employees. Rule 56.1 Stmt. ¶¶ 54-55.

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[2] MassHealth currently pays for health care coverage of married individuals of the same sex who qualify for MassHealth benefits as married, as required by Massachusetts law. Rule 56.1 Stmt. ¶¶ 45, 49. CMS refuses to provide FFP for those expenditures, due solely to DOMA's federal definition of marriage. Rule 56.1 Stmt. ¶¶ 43-44, 46. MassHealth estimates that, for the period from October 31, 2008 to the present, it will lose at least $640,661 and as much as $2,224,018 in FFP due to DOMA. Rule 56.1 Stmt. ¶ 50. Defendants do not dispute that the Commonwealth has standing in this regard. Mem. of Law in Supp. of Defs.' Mot. to Dismiss (Dkt. No. 17) ("Defs.' Br.") 34.

LEGAL STANDARD

A motion to dismiss must be denied if, taking all factual allegations in the complaint as true and making all reasonable inferences in the plaintiff's favor, the complaint states a plausible claim for legal relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Summary judgment is warranted if, viewing the facts in the light most favorable to the non-movant, there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Cunningham v. Nat'l City Bank*, 588 F.3d 49, 52 n.4 (1st Cir. 2009).

ARGUMENT

I. DOMA EXCEEDS THE SCOPE OF CONGRESSIONAL POWER

A. The Definition and Regulation of Marital Status Is a Sovereign Power Reserved to the States and Protected from Federal Interference

The Tenth Amendment expressly limits Congress's authority to enact legislation in areas traditionally reserved to the States. U.S. Const. amend. X ("The 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."). Accordingly, "[t]he States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *New York v. United States*, 505 U.S. 144, 156 (1992) (internal quotation marks and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (states "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"). The Tenth Amendment thus operates to confine Congress to its constitutionally-conferred powers. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 704 (7th Cir. 1999) ("Whether Congress has invaded the province reserved to the States by the Tenth Amendment

is . . . a question that must be answered by inquiring whether Congress has exceeded the limits of authority bestowed upon it by Article I of the Constitution."); *United States v. Meade*, 175 F.3d 215, 224 (1st Cir. 1999).

The Supreme Court has recognized for more than one hundred years that domestic relations are the paradigmatic area of State, not federal, concern, and that marital status lies at the core of domestic relations law. *E.g.*, *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."), *overruled on other grounds, Williams v. North Carolina*, 317 U.S. 287 (1942).[3]

[3] *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("The whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States.") (citing *Burrus*, 136 U.S. at 593-94); *accord Boggs v. Boggs*, 520 U.S. 833, 848 (1997); *Rose v. Rose*, 481 U.S. 619, 625 (1987); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)); *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) (recognizing "domestic relations as 'an area that has long been regarded as a virtually exclusive province of the States'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Burrus*, 136 U.S. at 593-94; *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 (Blackmun, J., concurring) ("declarations of status, *e.g.* marriage, annulment, divorce, custody and paternity" lie at the "core" of domestic relations law reserved to the states); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (State has "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"), *overruled on other grounds by Shaffer v.*

The States' exclusive authority to define marriage is confirmed by the fact that, prior to DOMA, the federal government used State determinations of marital status for purposes of *federal* law. Rule 56.1 Stmt. ¶ 17.[4] The federal government respected State definitions of marriage even where those definitions were divergent and reflected deep-seated cultural disagreement. Rule 56.1 Stmt. ¶¶ 14, 17. For example, at least twenty-six States banned interracial marriage at the end of the nineteenth century. Michael Grossberg, *Guarding the Altar: Physiological Restrictions on Marriage and the Rise of State Intervention in Matrimony*, 26 Am. J. Legal Hist. 197, 205 (1982); *see also* Affidavit of Nancy Cott (hereinafter, "Cott Aff.") ¶¶ 35-36. Thirty States imposed similar restrictions by 1930. Cott Aff. ¶ 41. The other States permitted interracial marriage. Despite this stark variation, the federal government respected all interracial marriages for the purpose of federal law. Cott Aff. ¶ 45. Earlier still, States divided sharply over age restrictions for marriage, Grossberg, *supra*, at 206-211; Cott Aff.

Heitner, 433 U.S. 186 (1977). Even in recent federalism cases where the Court has divided sharply over the limit of Congress's authority, all members have agreed that Congress lacks power to directly regulate family law. *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting a broad reading of the Commerce Clause, noting it could lead to federal regulation of "family law (including marriage, divorce and child custody)"); *id.* at 585 (Thomas, J., concurring); *id.* at 624 (Breyer, J., dissenting); *see also United States v. Morrison*, 529 U.S. 598, 615 (2000) (allowing Congress to regulate gender-motivated violence (which the Court refused to do) would also permit it to regulate "family law and other areas of traditional state regulation.").

[4] *See also United States v. Yazell*, 382 U.S. 341, 352-53 (1966) (state domestic relations law determined whether a wife was liable on a Federal Small Business Administration Loan taken out by her husband); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (ruling that state law should determine whether an illegitimate child falls within the definition of "child" for purposes of federal copyright statute); Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996) (before DOMA, "[C]ongress has given nearly exclusive control over access to the tax benefits of marriage to the states, through their regulation of marriage. . . . [A]t no time before 1996 has Congress ever refused to recognize a state-law determination of marital status.").

¶¶ 28; Congress again recognized lawful state marriages for purposes of federal law, despite the variations in age of consent. Cott Aff. ¶ 30. And the early twentieth century saw many States adopt eugenic restrictions on marriage—including restrictions based on epilepsy, venereal disease, "feeblemindedness," and "idiocy"—yet Congress declined to disregard any State marriages for purposes of federal law. Cott Aff. ¶ 31; Grossberg, *supra*, at 221-23. Marriage restrictions based on kinship have similarly varied historically and continue to vary today. Cott Aff. ¶ 32.

Congress's settled, uninterrupted history of respecting state definitions of marriage reinforces the Supreme Court's recognition that the regulation and definition of marriage "belongs to the laws of the States and not to the laws of the United States." *McCarty*, 453 U.S. at 220 (quotation marks omitted).

B. DOMA is an Improper Federal Interference with the Commonwealth's Sovereign Authority to Define and Regulate Marital Status

As discussed above, the States' sovereign authority to define and regulate marriage has traditionally meant that, if married under a State's law, spouses were treated as married for federal purposes as well. The States' authority over marriage has never been limited to applications under state law. Rather, the States have always determined marital status to the exclusion of the federal government; historically, marriages recognized under state law have been recognized under federal law.[5]

[5] Members of Congress objected to the enactment of DOMA on precisely this ground. *See, e.g.*, 142 Cong. Rec. H7446 (daily ed. July 11, 1996) (statement of Rep. Nadler) (DOMA "defines marriage in Federal law for the first time and says to any State, 'No matter what you do, whether you do it by referendum or by public decision or by legislative action, the Federal Government won't recognize a marriage contracted in your state if we don't like the definition.

DOMA violated this allocation of powers by, as Defendants admit, enacting a "federal definition of marriage." Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 13, *Gill*, No. 09-cv-10309 (Dkt. No. 21) (D. Mass. Sept. 18, 2009) ("U.S. *Gill* Br."). This sweeping federal definition was both unprecedented and broad-ranging: DOMA affects approximately 1,138 federal rights, protections, and benefits linked to marriage, including the right to collect death benefits for a public safety officer who is killed in the line of duty, 42 U.S.C. § 3796, and the right to pool deductions for income tax purposes, 26 U.S.C. § 213. *See also* Compl. Addendum (listing examples); Rule 56.1 Stmt. ¶¶ 4-5. These rights and protections, some of them individually but particularly in the aggregate, have a significant impact upon the marriages of same-sex couples.

DOMA violates the Tenth Amendment by interfering with the Commonwealth's power to issue marriage licenses that qualify the recipients as "married" under both Massachusetts and federal law. DOMA nullifies the Commonwealth's power to define one marital status and requires it to have two: one for different-sex couples who are married, and one for same-sex couples who are married but "federally single." That burden is not visited on States that do *not* recognize marriages between individuals of the same sex; all persons married in those States are

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We are going to trample the States' rights' . . . ."); *id.* at H7449 (statement of Rep. Abercrombie) ("Historically, States have the primary authority to regulate marriage based upon the 10th amendment of the Constitution. . . . If there is any area of law to which States can lay a claim to exclusive authority, it is the field of family relations."); *id.* at H7489 (statement of Rep. Moran) ("As you know, the 10th amendment was designed to prevent us from preempting States' right[s]. Yet for this purpose, we are willing to federalize the one area of law that has been under State control for the last 200 years."); *id.* at S10120 (daily ed. Sept. 10, 1996) (statement of Sen. Feingold) ("[I]t is not clear that this is even an appropriate area for Federal legislation. Historically, family law matters, including marriage, divorce, and child custody laws, have always been within the jurisdiction of State governments, not the Federal Government.")

federally married as well. Only Massachusetts (and other States that have chosen to recognize marriages between individuals of the same sex) have been deprived of the ability to have all of their marriage licenses recognized under federal law. That DOMA deprives the Commonwealth of this ability is not surprising, as that was precisely Congress's objective: to override, for the first time ever, the States' longstanding authority to define marital status for purposes of federal law. And this is no small matter: DOMA works a major change in marital status for same-sex couples by denying the existence of their marriages and depriving them of hundreds of rights and benefits.

Defendants' contention that DOMA is constitutional because it does not nullify marriages for purposes of "rights under Massachusetts law" (Defs.' Br. 11) is accordingly off-point. Because "the Constitution delegated no authority to the Government of the United States" on the subject of marriage, *Haddock*, 201 U.S. at 575, the Commonwealth's sovereign right to define marriage is not limited to programs arising under Massachusetts law, but rather extends to the effect that Massachusetts marriage licenses receive under federal law as well. Defendants' view would render the State's absolute authority over marital status meaningless, as it would merely duplicate the State's powers in other areas.

Defendants' effort to limit the Commonwealth's Tenth Amendment claim to "federal funding" programs (Defs.' Br. 12) is similarly misplaced. DOMA affects several non-monetary consequences of marriage, such as the right to take leave from work to care for an ailing spouse, 29 U.S.C. § 2612(a)(1)(C), and the right to have privileged marital communications, *Trammel v. United States*, 445 U.S. 40, 44 (1980). Moreover, the point is not whether Congress can attach conditions to the receipt of federal funds—though such conditions must separately comply with

the Spending Clause, *see infra* Part II—but rather whether, having chosen to base eligibility for federal rights and protections on *marital status*, Congress may then create its own marital status, rather than respecting the States' determination of who is "married." The Supreme Court's consistent recognition that the Constitution assigns control of marital status to the States and centuries of practice confirming that understanding show that Congress overstepped its authority.

Defendants' primary response is not that DOMA does not seek to define marriage—they admit it does, Defs.' Br. 2; U.S. *Gill* Br. 13—but that the Tenth Amendment permits DOMA's federal incursion onto State sovereignty because it does not "commandeer" the States' legislative process or executive officers. Defs.' Br. 10-12. But the Supreme Court has never suggested that the Tenth Amendment's protection of State sovereignty is limited to a prohibition on "commandeering"; if anything, it suggested the opposite. *New York*, 505 U.S. at 188 (immunity from "commandeering" is not necessarily "the outer limit[] of [State] sovereignty"); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 187 (2003) ("Of course, in maintaining the federal system envisioned by the Founders, this Court has done more than just prevent Congress from commandeering the States. We have also policed the absolute boundaries of congressional

power under Article I."), *overruled in part on other grounds*, *Citizens United v. Fed. Election Comm'n*, __ S. Ct. __, No. 08-205, 2010 WL 183856 (U.S. Jan. 21, 2010).[6]

Although this is not a commandeering case, this sweeping federal incursion into an area that, the unequivocal record shows, has for centuries been the exclusive province of State regulation, Rule 56.1 Stmt. ¶ 17, violates the Tenth Amendment. The Tenth Amendment "reserve[s]" the regulation of marriage to "the States respectively," and DOMA's attempt to federalize marriage exceeds the limited powers that our federalism confers on the central government.[7]

II. DOMA VIOLATES THE SPENDING CLAUSE

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.

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[6] Defendants' cases are inapposite. *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000), addressed a coercion claim relating to a specific spending program; Kansas did not argue that the regulations interfered with an exclusive State power, nor that the regulations were *ultra vires*. Both *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981), and *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996), were also spending cases concerning the appropriateness of program conditions, not *ultra vires* challenges. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), is even less relevant. There, the First Circuit struck down the Massachusetts Burma law, which precluded state vendors from doing business with Burma, because it encroached on the *federal government's exclusive power* over foreign relations.

[7] Defendants contend (Defs.' Br. 2) that DOMA is entitled to a presumption of constitutionality. But any such presumption may be overcome "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *see also Morrison*, 529 U.S. at 607 (presumption is overcome "upon a plain showing that Congress has exceeded its constitutional bounds"). Moreover, where a law is subject to strict scrutiny (as DOMA is, *see infra* Part II.A.4), there is a "presumption *against* constitutionality." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (emphasis added).

U.S. Const., art. I, § 8. Congress's power under the Spending Clause is broad, but it is bounded. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The Supreme Court has identified five basic limitations on the spending power, of which two are relevant here: (1) conditions on spending may not be independently barred by another constitutional provision; and (2) conditions must be related "to the federal interest in particular national projects or programs." *Id.* (citations and internal quotation marks omitted). DOMA violates both of these limitations.

A. DOMA's Requirement that the Commonwealth Discriminate Against Individuals Married to Someone of the Same Sex Is Independently Barred by the Equal Protection Clause

Congress cannot impose spending conditions that induce the Commonwealth to discriminate against its citizens in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Dole*, 483 U.S. at 210-11. Congress has violated that prohibition, because the discrimination DOMA requires is plainly based on animus toward gay and lesbian people, and the justifications Defendants offer fail any level of scrutiny.

1. The Commonwealth Must Disregard the Marriages of Same-Sex Couples to Maintain Federal Funding

The Commonwealth cannot respect marriages between same-sex couples and remain in compliance with federal law. In the case of veterans' cemeteries, the VA has taken the position that DVS *cannot* authorize the burial of the same-sex spouse of a veteran in a federally-funded cemetery without giving the VA the "discretion" to "recapture" the federal funds DVS received. Rule 56.1 Stmt. ¶¶ 28, 34; Compl. ¶ 72 & Ex. 3 at 2. Accordingly, if DVS wishes to receive or retain federal funding for veterans' cemeteries, DVS must discriminate against veterans and their same-sex spouses by denying them authorization for burial. Indeed, the *only* way the Commonwealth could maintain federal funding and honor the wishes of Massachusetts veterans

and their same-sex spouses to be buried together would be to establish a "separate but equal" cemetery for them through the exclusive use of Commonwealth funds. As explained in Part II.A.2-3, *infra*, this unequal treatment violates the Constitution's equal protection guarantee as there is no government interest advanced by it. DOMA accordingly puts the Commonwealth in the position of choosing between invidious discrimination and forfeiting federal funds—the very inequity the Spending Clause forbids. *See Dole*, 483 U.S. at 210-11.[8]

Similarly, in order to receive federal contributions (FFP) to the provision of medical assistance to needy residents of Massachusetts, MassHealth is required to engage in unlawful discrimination. In particular, DOMA requires the Commonwealth to *provide* benefits to married same-sex couples who are eligible for benefits when considered as single even if ineligible when considered as married. Rule 56.1 Stmt. ¶ 43; Compl. ¶ 55 & Exs. 1 & 2. Accordingly, DOMA requires the Commonwealth to provide benefits to same-sex couples in circumstances in which it does not provide (and could not receive FFP for) benefits to *different-sex* couples.

Defendants suggest (Defs.' Br. 16) that, because the Commonwealth has so far refused to bow to DOMA's requirement that the Commonwealth violate equal protection guarantees—namely by passing the MassHealth Equality Act, which ensures that all married couples are treated equally, and by authorizing the burial of a veteran's same-sex spouse—there is in fact no requirement of unconstitutional discrimination at all. That is incorrect. In order to avoid violating its citizens' equal protection rights, the Commonwealth has taken actions that

[8] Defendants observe that another statutory provision defines the term "spouse" for purposes of veterans' benefits "in a manner that would not include a same-sex married partner." Defs'. Br. 9 n.6 (citing 38 U.S.C. § 101(31)). Of course, DOMA cannot be deemed constitutional merely by operation of another federal statute. To the extent 38 U.S.C. §101(31) applies to veterans' cemetery programs, it would also violate the Spending Clause.

Defendants assert grant the VA and CMS the "discretion" to claim millions in cemetery grants and to deny Medicaid FFP, respectively. Rule 56.1 Stmt. ¶¶ 22, 28, 34, 40, 48. It is hard to see how this is anything other than a "requirement" that Massachusetts engage in discrimination—a requirement enforceable by withholding significant federal funds already paid and denial of further funds. The fact that the Commonwealth has chosen to sacrifice federal funding by violating the terms of federal programs, rather than violate the Constitution, *reinforces* the fact that DOMA conditions federal spending on a constitutional violation.

Defendants' suggestion that the Commonwealth has no "constitutional right" to that funding (Defs.' Br. 16) is likewise misplaced. If a State's claim under the Spending Clause depended on showing a constitutional "right" to federal funds, the unconstitutional conditions doctrine would be a nullity. Rather, the Spending Clause places certain limits on federal spending, including that it not condition the States' receipt of federal funds on unconstitutional action. The States *do* have the right to insist that Congress respect that limitation, even if they have no underlying right to demand that Congress fund the program at all. *Dole*, 483 U.S. at 210-11; *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 n.2 (2003).[9]

2. Defendants' Proffered Justifications for DOMA Cannot Satisfy Rational Basis Review

The distinction DOMA requires the Commonwealth to draw between married couples is inconsistent with the Equal Protection Clause. Defendants have explicitly disavowed reliance

[9] Defendants' reliance on *Lyng v. International Union*, 485 U.S. 360 (1988) (cited at Defs.' Br. 16) is misplaced. This is not a case in which Congress has simply failed to fund the *exercise* of a fundamental right. Rather, it has made significant federal funding for health care and veterans' cemeteries contingent on the Commonwealth's *violation* of the right to equal protection. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms").

"on certain purported interests set forth in the legislative history of DOMA." Defs.' Br. 30 n.16; *see also* U.S. *Gill* Reply 17 (same). And they forthrightly acknowledge that the statute is "discriminatory." Defs.' Br. 1; U.S. *Gill* Reply 1. Instead, Defendants rely on other justifications: maintaining the status quo, responding to social phenomena one step at a time and adjusting national policy incrementally, and creating uniformity in federal law. Defs.' Br. 24, 29-31. DOMA cannot satisfy rational basis review, because none of these justifications are legitimate interests that the federal government "has the authority to implement," *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), nor does DOMA actually advance any of them, *Romer v. Evans*, 517 U.S. 620, 632-633 (1996).

a) Continuing to Discriminate Against Married Same-Sex Couples Is Not a Legitimate Interest

Defendants now claim that Congress was "entitled to maintain the status quo pending further evolution in the States," because "same-sex marriage is a contentious social issue." Defs.' Br. 29. But every historically discriminatory law maintains the status quo; that has never been a rational basis for rejecting an equal protection challenge. *Romer*, 517 U.S. at 633 (discriminatory classification must serve an "independent and legitimate legislative end"); *In re Levenson*, 587 F.3d 925, 932 (9th Cir. 2009) ("*Romer* makes clear that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions."). As the Supreme Court of Vermont put it, "[p]erpetuating a classification, in and of itself, is not a valid [reason] for the classification." *Baker v. State*, 744 A.2d 864, 910 (Vt. 1999); *see also Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983); *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1099-1100 (3d Cir. 1981).

Furthermore, even if preservation of the status quo were a defensible interest, DOMA does not advance it. The status quo prior to DOMA was federal incorporation of state marital status determinations, notwithstanding the multitude of differences in state law regarding eligibility for marriage and grounds for divorce. Additionally, there was no federal policy against recognition of marriages between same-sex couples because, when DOMA was passed in 1996, there were no such marriages to recognize. There was therefore no policy of non-recognition for the federal government to *continue*. Rule 56.1 Stmt. ¶¶ 3, 17-18. Instead, Congress invented a federal definition of marriage out of whole cloth. *See also Levenson*, 587 F.3d at 933 ("DOMA did not preserve the status quo vis-à-vis the relationship between federal and state definitions of marriage; to the contrary, it disrupted the long-standing practice of the federal government of deferring to each state's decisions as to the requirements for a valid marriage."). Thus, DOMA upsets, rather than perpetuates, the status quo.

DOMA is not an instance in which Congress has chosen to take a neutral position with regard to a contentious social issue. The federal government's prior position—acceptance of state determinations of marriage—was neutral, as it reflected indifference to states' variations. Instead, Congress chose to force Massachusetts (and other States) to violate the equal protection rights of its citizens or risk federal funding. That is not neutrality; rather, it significantly burdens the ability of States to adopt any definition of marriage that does not match the federal one—a non-neutral position that the legislative record expressly acknowledges. H.R. Rep. No. 104-664, at 12-18, *reprinted in* 1996 U.S.C.C.A.N. at 2916-22 (stating that Congress was not "indifferent to" same-sex marriage and that DOMA reflected "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-

Christian) morality"). This is constitutionally intolerable, particularly given the States' exclusive historic sovereignty in the area of domestic relations. *See supra* Part I.

b) DOMA Is Not Incremental, nor Is Incrementalism a Legitimate Interest

DOMA is not an incremental statute: it permanently denies same-sex married couples every federal marriage-based right and benefit. Although the President supports its repeal, his support does not change what the law actually does, which is flatly deny same-sex couples marriage recognition "no matter what legal status" the State affords their relationship. *Levenson*, 587 F.3d at 933.

Even were DOMA incremental, the federal government has no *independent* interest in incrementalism; incrementalism is simply a *means* of carrying out a further governmental *end*, which must itself be valid. *See, e.g.*, *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 981-82 & n.10 (1st Cir. 1989) (Sunday closing law was acceptable despite containing exemptions, because it served the legitimate interest of creating a day of rest); *Medeiros v. Vincent*, 431 F.3d 25, 31-32 (1st Cir. 2005) (regulation treating different lobstering methods differently was constitutional, because it served the legitimate interest of reducing overfishing). Defendants have identified no legitimate *end* served (incrementally or otherwise) by DOMA.

c) DOMA Destroys, Rather than Creates, Uniformity in Distribution of Marriage-Based Benefits, and Uniformity Does Not Justify the Classification

DOMA does not serve Defendants' purported interest in "preserving relative consistency in the nationwide distribution of marriage-based federal benefits" and preventing "federal rights [from] vary[ing] dramatically from state to state." Defs.' Br. 30. States define marriage eligibility; therefore, the only consistent definition at the federal level is to adopt state

determinations. *See Levenson*, 587 F.3d at 933 ("DOMA replaced that consistency with a marked *in*consistency: under DOMA, a couple can be legally married in their state of domicile but not 'married' for purposes of receiving federal benefits.").

Moreover, the mere fact that a classification creates "uniformity" is insufficient. Any classification will create uniformity along some dimension, but that dimension must itself be constitutional, *i.e.* rationally related to a legitimate government end. Here, Defendants have shown no legitimate reason for treating married same-sex couples "uniformly" differently from married different-sex couples. To the extent Defendants' argument for uniformity amounts to an argument for administrative convenience, that interest also fails because DOMA makes it *more* difficult to administer the relevant federal programs.[10]

3. Congress's Contemporaneous Justifications for DOMA Confirm that DOMA Is Animus-Based, Which Further Shows Its Lack of a Rational Basis

As noted above, Defendants have wisely disavowed the indefensible interests Congress articulated in support of DOMA: that it "encourag[ed] responsible procreation and child-rearing," "defend[ed] and nurtur[ed] the institution of traditional heterosexual marriage," "protect[ed] state sovereignty," "preserv[ed] scarce government resources," and "reflect[ed] and

[10] *See, e.g.*, *Weber v. Aetna Cas. & Sur. Co*, 406 U.S. 164, 175 (1972) (administrative convenience does not justify classifications that bear "no significant relationship to those recognized purposes" of the administrative regime). DOMA requires an inquiry beyond whether the couple is married under state law: the official administering the federal program must also determine whether the spouses are of the same gender. *Cf. id.* (interest in administrative convenience not advanced when it is necessary to undertake virtually the same analysis in any event); *see also Medora v. Colautti*, 602 F.2d 1149, 1153-54 (3d Cir. 1979) (deeming "irrational" an administrative regime that requires application of divergent federal and state definitions of "need"); Rule 56.1 Stmt. ¶¶ 51-55 (describing costs and difficulty of imputing fair market value of spousal health benefits as income under DOMA).

honor[ed] a collective moral judgment about human sexuality." H.R. Rep. No. 104-664, at 12-13, *reprinted in* 1996 U.S.C.C.A.N. at 2916-17. *See generally* U.S. *Gill* Reply 17.[11]

Nonetheless, Congress's contemporaneous articulation of its reasons for enacting DOMA confirm an additional basis for invalidating it: DOMA was enacted out of animus toward a burdened group. This fact invalidates a legislative classification under rational basis scrutiny, even if legitimate *post hoc* justifications are offered in its support. *Romer*, 517 U.S. at 632, 635 ("Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."). The legislative record overwhelmingly confirms that DOMA's purpose was to codify animus toward gay and lesbian people. H.R. Rep. No. 104-664, at 15-16; 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn) ("[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth."); 142 Cong. Rec. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society . . . ."); 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (DOMA "will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.").

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[11] To the extent there remains any doubt, the facts of record demonstrate that non-recognition of marriages between individuals of the same sex in no way furthers an interest in "responsible procreation and child-rearing" or any of the other interests asserted in the legislative history. *See* Rule 56.1 Stmt. ¶¶ 6, 14, 56-60. *See generally* Cott Aff.

A law enacted out of an obvious desire to harm a politically unpopular group violates equal protection. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (legislative history showed that purpose of classification was to prevent "hippies" from qualifying for benefits); *see also Romer*, 517 U.S. at 633 (holding law invalid where the only explanation for its purpose was a desire to disadvantage homosexuals); *Cleburne*, 473 U.S. at 448 ("[m]ere negative attitudes, or fear . . . are not permissible bases" upon which to discriminate).[12]

The animus underlying DOMA is confirmed by the act's breadth—it mandates complete non-recognition of marriages lawfully contracted under state law—and its lack of any relationship to the underlying goals of any of the programs it affects. It is unprecedented, breaking from the longstanding tradition of deference to state definitions of marriage. Finally, the weakness of the justifications offered to support it, both by Congress initially and by Defendants now, suggests that the best explanation is dislike of and desire to burden gay and lesbian people as a group. Accordingly, even if the justifications in Defendants' brief could pass rational basis scrutiny—and they cannot—they would not redeem DOMA, which was plainly enacted primarily, if not exclusively, out of animus.

4. The Court Should Apply Heightened Scrutiny to Classifications Based on Sexual Orientation

Although DOMA fails to satisfy even rational basis review, the Court should also evaluate DOMA under heightened scrutiny because it discriminates on the basis of sexual orientation. Contrary to Defendants' contention, this issue was not resolved by *Cook v. Gates*,

[12] *See also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

528 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). Although the First Circuit applied rational basis scrutiny to the exclusion of gay and lesbian people from military service, and noted in its opinion that "homosexuals are not a suspect class," *id.* at 62, the court was not presented with any record evidence or argument on the factors relevant to heightened scrutiny, nor did it analyze those factors in its opinion. *See* Brief of Plaintiffs-Appellants at 31-35, *Cook*, 528 F.3d 42 (Nos. 06-2313 & 06-2381) (containing no argument or evidentiary citation regarding the factors that determine whether heightened scrutiny is appropriate). Rather, *Cook* only considered whether *Romer* and *Lawrence* "mandate[d]" heightened scrutiny. *Cook*, 528 F.3d at 61.

The *Cook* court's statement that the Supreme Court had not *mandated* heightened scrutiny may be tenable, but it does not *preclude* application of heightened scrutiny in a case such as this one, where record evidence supports that outcome. This Court is not bound by *Cook*'s limited language based on a limited record and limited argument by the parties. *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("[A] decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record."); *see also Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 103 (1937) ("[G]eneral expressions [in a judicial opinion] are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be

respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.").[13]

In general, courts decide whether to apply heightened scrutiny by considering the following factors: whether the burdened group (1) has "been subjected to discrimination"; (2) exhibits "obvious, immutable, or distinguishing characteristics that define [it] as a discrete group"; and (3) is "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see also Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 354-55 (1st Cir. 2004). Though not all criteria must be met for heightened scrutiny to be applied, the evidence of record demonstrates that gay and lesbian people meet all of them.

a) Gay and Lesbian People Have Suffered from a Long History of Discrimination Unrelated to Their Ability to Contribute to Society

The most important criteria in the heightened scrutiny analysis are whether the group has suffered from a history of discrimination and whether the characteristic at issue relates to group members' ability to contribute to society. *Varnum*, 763 N.W.2d at 889; *Kerrigan*, 957 A.2d at 426-27. If both of these criteria are met, as they are here, courts will assume that classification on that basis is the result of prejudice and antipathy, as opposed to legitimate distinctions between groups. *Cleburne*, 473 U.S. at 441 (citations omitted) (heightened scrutiny applies when laws single out a class that has "experienced a history of purposeful unequal treatment or

[13] To the extent *Cook* were dispositive here (and it is not), the fact that the high courts of California, Connecticut, and Iowa—every state to address this issue since *Cook*—applied heightened scrutiny would be grounds for revisiting it. *See United States v. Chhien*, 266 F.3d 1, 11 (1st Cir. 2001) (First Circuit panel decisions may be reconsidered "where non-controlling but persuasive case law suggests such a course"); *see also In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 430-454 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885-896 (Iowa 2009).

been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities").

As is more fully set out in the Commonwealth's Rule 56.1 Statement as well as in the supporting affidavits of Michael Lamb, Gregory Herek, George Chauncey, and Gary Segura, sexual orientation bears no relationship to the ability of gay and lesbian people to contribute to society. Rule 56.1 Stmt. ¶¶ 61-62. *Compare Cleburne*, 473 U.S. at 442-45 (developmental disability is sometimes a relevant basis for classification because it relates to ability to contribute to society); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 315 (1976) (per curiam).

Despite their ability to contribute to society, gay and lesbian people have been singled out for unfavorable treatment throughout history. Rule 56.1 Stmt. ¶¶ 63-69. The Supreme Court recognized in *Lawrence* that "state-sponsored condemnation" of homosexuality has led to "discrimination both in the public and in the private spheres," 539 U.S. at 575-76, and other courts have acknowledged this long history. *See, e.g.*, *Varnum*, 763 N.W.2d at 889-90 & n. 17; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 432-33. Gay and lesbian people have been targeted by State authorities and faced discrimination in employment by both federal and State governments, which have throughout history sought to purge gay civil servants. Rule 56.1 Stmt. ¶ 66, 69. The military continues to exclude gay people today. Rule 56.1 Stmt. ¶ 63.

Private individuals have also targeted and continue to target gay and lesbian people, who have been forced to hide their sexual orientation from employers for fear of losing jobs. Rule 56.1 Stmt. ¶ 69. They are the victims of more hate crimes per capita than any other group. Rule 56.1 Stmt. ¶ 80. The public has expressed condemnation of gay and lesbian people through ballot initiatives, including measures that invalidated civil rights ordinances protecting gay and

lesbian people and prevented gay and lesbian people from adopting children. Rule 56.1 Stmt. ¶ 77. Recent campaigns to deny same-sex couples rights through ballot initiatives continue to rely on enduring anti-gay stereotypes in order to sway public opinion. Rule 56.1 Stmt. ¶ 67.

b) Sexual Orientation Is Immutable and Is an Integral Part of Identity

The evidence of record demonstrates that sexual orientation is an immutable characteristic that defines gays and lesbians as a discrete group. An overwhelming majority of gay and lesbian people do not experience their sexual orientation as a "choice," and most people experience attractions to only one gender throughout their lives. Rule 56.1 Stmt. ¶ 70. Similarly, heterosexuals likely do not experience their sexual orientation as a choice. Rule 56.1 Stmt. ¶ 70. Sexual orientation is also a trait that is so essential to identity that it would be distasteful for the government to encourage people to change it. Rule 56.1 Stmt. ¶ 73.[14]

c) Gay and Lesbian People Are a Minority Group and Lack Political Power Compared to Other Groups that Receive Heightened Scrutiny

Gays and lesbians are a minority group. Rule 56.1 Stmt. ¶ 74. It is accordingly unnecessary to consider whether they also lack political power. *See Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982); *Lyng*, 477 U.S. at 638 (final factor of the test for heightened scrutiny is satisfied by minority status *or* political powerlessness); *cf. Palmore v. Sidoti*, 466 U.S. 429, 432-34 (1984) (not discussing political power in context of strict scrutiny for racial classifications).

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[14] *See also Kerrigan*, 957 A.2d at 432, 438 ("Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so."); *In re Marriage Cases*, 183 P.3d at 442; *Varnum*, 763 N.W.2d at 893. Indeed, people who are open about their sexual orientation are happier and healthier than those who choose to hide it. Rule 56.1 Stmt. ¶ 72.

Notwithstanding isolated legislative victories in some states, gay and lesbian people continue to face discrimination in the political process. Rule 56.1 Stmt. ¶¶ 75-79. Indeed, women and African Americans continue to be (properly) considered suspect classes, despite significant advances toward gender equality and racial equality that exceed any such progress for gay and lesbian people. Rule 56.1 Stmt. ¶ 81. Gay and lesbian people continue to face outspoken condemnation from elected officials "that would be unthinkable if directed toward most other groups." Rule 56.1 Stmt. ¶ 82; *see also Varnum*, 763 N.W.2d at 893-95 (fact that group has made some political strides does not prevent it from being a suspect class).

* * *

Post hoc justifications cannot survive heightened scrutiny under the Equal Protection Clause. Interests advanced to satisfy heightened scrutiny must be genuine and "not hypothesized or invented . . . in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendants rely exclusively on justifications invented in response to this litigation. If the Court applies heightened scrutiny, these justifications are inadequate as a matter of law. And, because the discrimination DOMA requires cannot survive any level of equal protection scrutiny, DOMA's application to Medicaid and the veterans' cemeteries contravenes the independent constitutional bar's limitation on congressional spending power.

B. DOMA's Treatment of Same-Sex Couples Is Unrelated to the Purposes of Medicaid or the State Cemetery Grants Program

In addition to impermissibly inducing the Commonwealth to violate the Equal Protection Clause, DOMA violates the Spending Clause's germaneness limitation. DOMA's requirement that married same-sex couples receive disparate treatment is insufficiently related to the specific purposes of Medicaid or the State Cemetery Grants Program. *See Dole*, 483 U.S. at 207-08; *see*

also New York, 505 U.S. at 167 (recognizing that conditions attached to federal funds "must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority") (internal citation omitted); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003).

DOMA, in fact, undermines the purposes of these programs. Medicaid subsidizes medical coverage for low-income individuals, Rule 56.1 Stmt. ¶ 36, while DOMA's requirement that MassHealth treat married individuals in same-sex couples as single would require coverage of individuals in high-income families. Similarly, the State Cemetery Grants Program supplements the VA's national cemeteries in providing convenient burial sites for veterans and their *spouses*, Rule 56.1 Stmt. ¶ 19, yet DOMA precludes DVS from burying same-sex spouses in its cemeteries. Defendants claim that these requirements are germane to the programs because "DOMA defines the scope of all federal programs that refer to marital status, rendering different-sex marital status germane to all such programs" and that "the 'purposes' of the Medicaid and veterans cemetery funds are established by the criteria that govern eligibility for those funds." Defs.' Br. 19-20. Under Defendants' theory, the purpose of a program would be the sum of its eligibility criteria, even if those eligibility criteria have nothing to do with the actual purpose Congress gave for creating the program, as is the case here. Defendants' argument would render the germaneness requirement a nullity.

Defendants also attempt to create a distinction between "conditions . . . that bind the funds recipient outside the federal program" and program requirements defining the scope of the program itself. Defs.' Br. 18. This distinction is both unworkable and unconvincing, and case law does not support it. Courts have routinely analyzed program requirements, including

provisions that require *no* action, as "conditions" that must satisfy the germaneness standard. *See, e.g., Benning v. Georgia*, 391 F.3d 1299, 1309 (11th Cir. 2004) (analyzing federal prohibition on "governmental interference" with free exercise as a condition for Spending Clause purposes); *Cutter v. Wilkinson*, 423 F.3d 579, 586-87 (6th Cir. 2005) (same). More generally, courts refer to program guidelines—both in Spending Clause cases and elsewhere—as "conditions" on the receipt of funds. *See, e.g., Suter v. Artist M.*, 503 U.S. 347, 356 (1992) (referring to program requirement as a "condition"); *Bell v. New Jersey*, 461 U.S. 773, 790 (1983) (referring to requirements for the use of funds as "conditions"); *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981).[15]

Finally, Defendants' attempt to analogize DOMA's blanket discrimination to "cross-cutting" *anti*-discrimination provisions (Defs.' Br. 1) is fundamentally misplaced. It would be strange indeed to read the proposition that Congress may "require[] that public funds, to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in . . . discrimination," *Lau v. Nichols*, 414 U.S. 563, 569 n.4 (1974) (internal citation omitted) (internal quotation mark omitted), as supporting a statute that allocates public funds in a discriminatory manner unrelated to the purpose of the underlying program. A cross-cutting condition requires a cross-cutting interest. *See, e.g., Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (interest in better public service served by Hatch Act's blanket prohibition on partisan political activity by those administering funds for national needs).

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[15] The only case that Defendants cite in support of their proposed distinction addressed a First Amendment challenge to state anti-smoking advertising, not germaneness under the Spending Clause. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 919 (9th Cir. 2005).

As discussed above, there is no legitimate interest in discriminating against gay and lesbian couples, let alone a cross-cutting one.

III. THE COMMONWEALTH HAS STANDING TO PURSUE ITS CLAIMS

The Commonwealth has standing to raise its claims because it has suffered injury-in-fact caused by Defendants' actions and its injuries will be redressed by a ruling that DOMA is unconstitutional. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 179 (2000). The standing analysis is particularly permissive given the "special solicitude" afforded to States. *Massachusetts v. EPA*, 549 U.S. 497, 508 (2007). Defendants do not dispute the Commonwealth's standing insofar as the harm is denial of FFP to cover married individuals in same-sex couples. Defs.' Br. 34. That alone confers standing sufficient to permit the Court to address the Commonwealth's constitutional arguments on the merits. *See, e.g.*, *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 261 (6th Cir. 2009) (en banc) (opinion of Cole, J.) (plaintiffs had standing based on "allegation that they must spend state and local funds to pay for [No Child Left Behind] compliance" and the court "need not address whether the . . . [p]laintiffs' other alleged injuries are sufficient to establish standing").[16]

The Commonwealth is also directly injured by the requirement that it pay 1.45% more in Medicare tax for state employees whose same-sex spouses receive health benefits. Rule 56.1 Stmt. ¶ 52. This effect of DOMA costs the Commonwealth an expected $25,000 per year in out-of-pocket costs. Rule 56.1 Stmt. ¶ 53. Defendants do not deny that the Commonwealth's

[16] In *Pontiac*, the Sixth Circuit sitting en banc divided equally over whether to affirm the judgment below, but a majority of the court agreed that plaintiffs had standing. *See id.* at 278 (Sutton, J., concurring in the order) (agreeing plaintiffs had standing but disagreeing as to the merits).

increased tax burden provides it with *standing* to challenge DOMA's constitutionality. *See, e.g.*, *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51 n.17 (1986) ("State had standing because it alleged a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference in its employment relations with its public employees." (internal quotation marks omitted)); *see also Nat'l League of Cities v. Usery*, 426 U.S. 833, 836 & n.7 (1976) (finding that States had standing to bring Tenth Amendment challenge to Fair Labor Standards Act's regulation of "employers"), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Moreover, the significant risk that the Defendants will exercise their avowed "discretion" to recapture and/or deny funding for veterans' cemeteries and medical benefits, Rule 56.1 Stmt. ¶¶ 22, 28, 34, 40, 48, more than satisfies Article III's requirements. The Supreme Court has noted that, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007). A party need not be in violation of a law to challenge it. *Id.* at 129 (a party need not "bet the farm" by violating the statute to challenge it (citing *Terrace v. Thompson*, 263 U.S. 197 (1923))); *Steffel v. Thompson*, 415 U.S. 452, 458-459 (1974) (not requiring plaintiff to violate a state handbill prohibition to challenge its constitutionality); *id.* at

480 (Rehnquist, J., concurring) ("[T]he declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.").[17]

Defendants strangely contend that Massachusetts must wait until a veteran's same-sex spouse is "about to be" buried in a Massachusetts veterans' cemetery before bringing suit. Defs.' Br. 33. The time between death and burial is measured in days, not the months needed to address the constitutional issues in this case. Rule 56.1 Stmt. ¶ 35 (decedent is typically buried in a veterans' cemetery within 3-5 days of death). The Commonwealth is entitled to know whether it may bury its citizens on land owned and maintained by the Commonwealth as a veterans' cemetery; it need not wait until the sensitive and unpredictable moments after a death, when there is no time for uncertainty about where a burial may take place. Additionally, the VA has taken the position that Defendants' right to recapture federal funds is triggered by the Commonwealth's mere "authorization" of the burial of a veteran's same-sex spouse in a veterans' cemetery—which has already happened. Rule 56.1 Stmt. ¶¶ 28, 34.

The fact that the VA has not yet stated that it will seek to recapture funds, Defs. Br. 33, is likewise irrelevant. The Commonwealth is not required to endure the Sword of Damocles over

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[17] *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 152-53 (1967) (finding standing and ripeness to challenge change in labeling requirements where company put to the choice between violating law and risking enforcement proceeding or complying with the law and facing costly relabeling of products); *ANR Pipeline Co. v. Corp. Comm'n of Okla.*, 860 F.2d 1571, 1578-79 (10th Cir. 1988); *Building & Const. Trades Dep't v. Allbaugh*, 172 F. Supp. 2d 138, 157 (D.D.C. 2001) ("The potential loss of millions of dollars in federal funding is sufficient injury to support standing to challenge a federal program."), *rev'd on other grounds*, 295 F.3d 28 (D.C. Cir. 2002); *Hodges v. Shalala*, 121 F. Supp. 2d 854, 865 (D.S.C. 2000) ("[T]he State has identified a claimed financial harm (i.e., the probable loss of millions of dollars in federal funding during the next session of Congress if its arguments do not prevail here) that is sufficiently imminent to sharpen its interest in the litigation."), *aff'd*, 311 F.3d 316 (4th Cir. 2002).

its head. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991). The same is true with respect to MassHealth: the Commonwealth currently denies Medicaid coverage to individuals married to a person of the same sex whose marriage renders them ineligible, even if they would qualify when assessed as "single." Rule 56.1 Stmt. ¶ 47. CMS has already advised MassHealth that it views such denials as impermissible under DOMA—a view that could require the Commonwealth to "pay the full cost of administration" of programs that are out of compliance with federal law. Rule 56.1 Stmt. ¶ 46. DOMA therefore injures Massachusetts by threatening financial sanctions for not paying those additional benefits.[18]

Defendants' suggestion that the significant "risk" of adverse measures fails to create sufficient injury-in-fact is simply incorrect. Even if the Commonwealth later contests their actions, Defendants are in a position to withdraw or recapture funding from Massachusetts *now*. The remote possibility that the law could someday change, Defs.' Br. 34, or that federal officials might decide not to enforce the law, *id.* 34, does not defeat standing. Massachusetts is entitled to resolution of its constitutional claims. *Cf. Abbott Labs.*, 387 U.S. at 154 (risk of imposition of strong sanctions sufficiently immediate to create justiciable controversy).[19]

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[18] This is not a situation in which a deliberative back-and-forth between the State and agency might resolve the conflict. DOMA's applications are clear and mandatory. *Cf. New York v. U.S. Dep't of Health & Human Servs.*, No. 07 Civ. 8621, 2008 WL 5211000 (S.D.N.Y. Dec. 15, 2008); *New Jersey v. U.S. Dep't of Health & Human Servs.*, No. 07-4698, 2008 WL 4936933 (D.N.J. Nov. 17, 2008); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

[19] The regulation at issue in *Abbott Laboratories* also provided for some discretion, 387 U.S. at 151, and the government had agreed not to enforce it to the full extent. *Id.* at 154. But such guarantees did not suffice to defeat jurisdiction over the claims.

Finally, the Commonwealth has standing to challenge DOMA's incursion on its sovereign authority to define and regulate marriage without federal interference. *See Bowen*, 477 U.S. at 51 n.17 (affirming finding of State standing based on alleged diminution of its sovereignty); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986) (states have a "legitimate interest in the continued enforceability of [their] statutes"). That power would be meaningless if states had no standing to challenge overreaching federal laws. *See Wyoming v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) ("Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong."); *Hodges*, 121 F. Supp. 2d at 865 ("[I]f Congress' enactment of the legislation at issue has exceeded its constitutional powers . . . then the State's reserved rights under the Tenth Amendment have already been violated."); *Printz v. United States*, 854 F. Supp. 1503, 1508 (D. Mont. 1994) (finding standing for Tenth Amendment challenge where plaintiff state officer was forced to choose between violating state law and federal law), *aff'd in part and rev'd in part by Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *rev'd by Printz v. United States*, 521 U.S. 898 (1997).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that Defendants' Motion to Dismiss be denied, that the Commonwealth's Motion for Summary Judgment be granted, and that this Court declare 1 U.S.C. § 7 unconstitutional and enjoin its enforcement against the Commonwealth and its agencies.

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Boston, Massachusetts

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan B. Miller, hereby certify that this document filed through the ECF system shall be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies shall be sent by first-class mail postage prepaid to:

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