UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

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

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 the United States District Court
for the District of Massachusetts

BRIEF FOR PLAINTIFF-APPELLEE COMMONWEALTH OF MASSACHUSETTS

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PRELIMINARY STATEMENT

The Commonwealth of Massachusetts, pursuant to its sovereign prerogative and the Massachusetts Declaration of Rights, has issued marriage licenses to same-sex couples since 2004. These marriages are singled out and rendered invalid for purposes of federal law under the Defense of Marriage Act (DOMA), through its unprecedented federal definition of marriage. DOMA violates the allocation of powers between the federal government and States in two independent ways.

First, DOMA violates the Tenth Amendment. Throughout our history, marital status has been determined 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, such as the debate over interracial marriage, and notwithstanding divergence between different States' definitions of marriage, States have retained the exclusive authority to define and regulate marriage for purposes of State and federal law. DOMA encroaches on this realm "reserved to the States" contrary to the Tenth Amendment.

Second, DOMA violates the Spending Clause, because it forces the Commonwealth to engage in invidious discrimination in violation of the Fourteenth Amendment's guarantee of equal protection, as the United States now agrees. The legislative record lays bare that DOMA is rooted in animus towards

gays and lesbians, and it cannot survive even the most lenient standard of review, much less the heightened scrutiny triggered by its targeting of a minority that has historically endured, and continues to endure, serious discrimination. By forcing the Commonwealth to choose between discriminating against its own citizens or risking its eligibility for federal funds in connection with jointly administered federal-state programs, DOMA imposes an unconstitutional condition on the Commonwealth's receipt of federal funds, contrary to the Spending Clause.

STATEMENT OF ISSUES

1. Whether Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7), violates the Tenth Amendment, U.S. Const. amend. X.

2. Whether Section 3 of DOMA violates the Spending Clause, U.S. Const. art. I, § 8, cl. 1.

STATEMENT OF THE CASE

The Commonwealth, by and through its Attorney General, filed this declaratory judgment action challenging the application of DOMA in the Commonwealth. JA34-35. The United States moved to dismiss. The Commonwealth cross-moved for summary judgment, adducing detailed evidence demonstrating, *inter alia*, that State determinations of marital status have traditionally governed not only under State law, but also under federal law. JA65-

77. The United States did not contest the Commonwealth's evidence, nor did it offer any evidence of its own. JA631. The United States also did not, and still does not, defend the actual motivations that Congress articulated in enacting DOMA or deny that DOMA was motivated by discriminatory animus against gay and lesbian citizens.

The district court denied the United States' motion to dismiss and granted summary judgment to the Commonwealth. In concluding that DOMA violates the Spending Clause, the district court incorporated its holding in *Gill v. Office of Personnel Management*, 699 F. Supp. 2d. 374 (D. Mass. 2010) (JA1368-1406), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 12, 2010) (*Gill*), that DOMA violates the equal protection principles embodied in the Due Process Clause, finding that the justifications for the statute—both those originally considered by Congress and those that the United States fashioned *post hoc* in this litigation—did not provide a rational basis for treating married same-sex couples differently from married different-sex couples. JA660, JA1386-1406. The court concluded that DOMA was motivated by prejudice towards gays and lesbians, which is not a legitimate government interest. JA1405. The court further held that DOMA imposes "an unconstitutional condition on the receipt of federal funding" by requiring the Commonwealth to discriminate between similarly-situated married individuals in violation of equal protection. JA660. The court noted that its

Spending Clause analysis did not reach all of DOMA's applications because "DOMA's reach is not limited to provisions relating to federal spending." JA657.[1]

The court also granted the Commonwealth's motion for summary judgment on its Tenth Amendment claim. The court found abundant historical evidence demonstrating that marital status determinations are "the exclusive province of state government," including for purposes of federal law. JA664. The court ruled that, because DOMA denies federal recognition of State marital status determinations, it encroaches upon the States' sovereign authority to define marital status. JA666-669. At the United States' request, the court stayed the injunctive portions of its judgment pending appeal. JA676.

After filing its opening brief in this Court, the United States determined that DOMA was subject to, and failed, heightened scrutiny and informed this Court that it would cease its defense of DOMA in this case. The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) sought and was allowed to intervene. The Court permitted the United States to file a superseding opening brief and denied initial hearing *en banc*.

[1] The court did not address the Commonwealth's alternative argument that DOMA violates the Spending Clause because it is not sufficiently related to the purposes of the federal spending programs it affects. JA660-661.

STATEMENT OF FACTS

This statement is drawn from the summary judgment record, which was uncontested below and is accordingly deemed admitted. *See Stonkus v. City of Brockton Sch. Dep't*, 322 F.3d 97, 102 (1st Cir. 2003).

A. Marriage Laws In The United States

Since the Founding, States have issued civil marriage licenses and established the terms for entry into and exit from marriage. JA422-424. State marriage rules have varied substantially, including "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." JA425; *see also* JA67-68. Several variations were the subject of serious controversy, including restrictions regarding consanguinity, hygiene, age, and most notably race. JA67-68, JA427-437. Despite significant variations among the States at any given time and substantial change over time, the federal government has consistently given effect under federal law to State marriage determinations. JA432, JA434-435.

B. The Federal Defense Of Marriage Act

Congress enacted DOMA in 1996 out of concern that, following *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), Hawaii would recognize marriages between same-sex couples. JA18-19. 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 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908. The Committee stated that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage'" and asserted that DOMA would further Congress's interests in "defend[ing] the institution of traditional heterosexual marriage" and "encouraging responsible procreation and child-rearing," 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 2916-2922. Members of Congress repeatedly condemned homosexuality, calling it "immoral," "based on perversion," 142 Cong. Rec. H7441, H7444 (daily ed. July 11, 1996) (Rep. Coburn), "unnatural," *id.* at H7480, H7494 (daily ed. July 12, 1996) (Rep. Smith), "depraved," and "an attack upon God's principles," *id.* at H7486 (Rep. Buyer); *see also* U.S. Br. 46-48 ("The legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians and their intimate and family relationships.").

Section 3 of DOMA provides that, for purposes of federal law, "marriage" and "spouse" are defined to exclude same-sex couples:

> 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.

The terms "marriage" and "spouse" appear 1,138 times in the United States Code. JA22, JA38-43, JA583-601. 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." JA22; *see also* JA583-601. Congress did not investigate, let alone hear testimony about, DOMA's effect on the myriad federal programs and laws at issue. Despite asserting financial savings as a purported rationale, the House rejected a proposed amendment that would have required budgetary analysis by the General Accounting Office. *See* 142 Cong. Rec. H7503-7505 (daily ed. July 12, 1996).

C. Marriage In The Commonwealth

In 2003, the Supreme Judicial Court of Massachusetts ruled that denying same-sex couples access to marriage violated the equality and liberty provisions of the Massachusetts Declaration of Rights. *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). Citizen-initiated and legislatively-proposed constitutional amendments to overturn *Goodridge* failed. The Commonwealth accordingly recognizes "a single marital status that is open and available to every qualified couple, whether same-sex or different-sex." JA17-18. As of the filing of this suit, the Commonwealth had issued 15,214 marriage licenses to same-sex couples. JA107.

D. DOMA's Effect On The Commonwealth's Veterans' Cemeteries

The Commonwealth receives funding through the federal government's State Cemetery Grants Program for two veterans' cemeteries in Agawam and Winchendon, Massachusetts. JA29, JA80. These cemeteries, located on Commonwealth-owned land, are dedicated to the burial of military veterans and their spouses. JA68. Under this program, Defendant United States Department of Veterans Affairs (the 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 over $19 million in federal funds for these cemeteries and receives federal reimbursement for costs associated with burying veterans there. JA31, JA68-69.

Federal funding for veterans' cemeteries is conditioned on compliance with regulations promulgated by Defendant Secretary of the VA. JA30, JA69. One such condition is that the cemeteries "must be operated solely for the interment of veterans, their spouses, surviving spouses, and [certain of their] children." JA69; *see also* JA30. The VA may recapture funds provided for a cemetery that is not so operated. JA30-31, JA69.

In 2004, 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 the Commonwealth 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." JA53; *see also* JA31, JA69. 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 the Commonwealth decide to authorize the interment of same-sex spouses at the Agawam or Winchendon cemetery." JA53; *see also* JA31. The VA reiterated this position in a published directive and public statements. JA31-32, JA56, JA69.

On August 22, 2007, the Commonwealth approved an application for burial in the Winchendon veterans' cemetery submitted by a decorated Army veteran with over twenty years of service and his same-sex spouse, who is not otherwise eligible for burial in a veterans' cemetery. JA32, JA70. The Commonwealth intends to honor their wish to be buried together in a veterans' cemetery. JA70. 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)." JA53-54; *see also* JA32, JA69-70. The United States concedes that the Commonwealth is subject to the VA's threat of enforcement. U.S. Br. 20 n.8.

E. DOMA's Effect On Medicaid Services In The Commonwealth

The federal Medicaid program is a federal-state partnership designed to offer subsidized medical services to certain qualifying low-income individuals. JA25, JA70. 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). JA25, JA71. The Commonwealth's Medicaid program is known as MassHealth. *See generally* Mass. Gen. Laws ch. 118E, § 9. CMS reimburses MassHealth for roughly half of the qualifying benefits it pays out through payments known as federal financial participation (FFP). JA26, JA71. MassHealth received $5.8 billion of FFP for fiscal year 2008 alone. JA71.

An individual's marital status is frequently relevant to eligibility for Medicaid benefits. JA26, JA71. Spouses' incomes and assets are usually combined when determining whether an applicant falls above or below an eligibility threshold. JA26, JA71. Depending on circumstances, a person who would be eligible for benefits if considered as single might be ineligible when assessed as married, and vice versa. JA71 ¶41. Application of DOMA to MassHealth would force the Commonwealth to incur costs for Medicaid coverage that it would not otherwise incur, and in other instances would force the Commonwealth to deny coverage to gay and lesbian residents that it extends to similarly-situated heterosexual residents.

For example, for a different-sex married couple with one spouse earning $65,000 and the other $13,000, the spouses' incomes are combined, and the combined income ($78,000) is too high for either spouse to be eligible for Medicaid coverage. However, if the spouses are of the same sex and the marriage is disregarded under DOMA, the spouse earning $13,000 is eligible for coverage, because his or her income falls below the $32,496 eligibility threshold for single persons. JA618-619.

In 2004, CMS informed the Commonwealth that federal law required MassHealth to provide coverage to same-sex spouses who would qualify for Medicaid assistance when assessed as single, even if they would not qualify when assessed as married. JA27, JA72, JA44-50. CMS also stated that "DOMA does not give [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid." JA72, JA45.

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* JA27, JA72. Soon afterwards, CMS reasserted its position that DOMA "limits the availability of

FFP by precluding recognition of same sex couples as 'spouses' in the Federal program." JA50; *see also* JA28, JA72. CMS further warned that the Commonwealth "must pay the full cost, including the cost of administration, of a program that does not comply with Federal law." JA50; *see also* JA28, JA72.

Because MassHealth follows the Commonwealth's definition of marriage rather than DOMA's, the Commonwealth is subject to enforcement by CMS and stands to lose Medicaid funding. JA73. The United States concedes that the Commonwealth is subject to CMS's threat of enforcement. U.S. Br. 20 n.8.

SUMMARY OF ARGUMENT

For over 200 years, even during periods of deep social discord and diverging State-law rules concerning interracial marriage and other marital eligibility requirements, State marriage determinations have governed for purposes of federal as well as State law. By enacting DOMA, Congress made an unprecedented and expansive federal incursion into this area of exclusive State authority. Separately, through its application to programs like Medicaid and the State Cemetery Grants Program, DOMA forces the Commonwealth to engage in unconstitutional discrimination against its own citizens. The district court correctly ruled that DOMA exceeds Congress's constitutional authority, and its judgment should be affirmed.

DOMA violates the Tenth Amendment because it usurps the Commonwealth's exclusive authority to determine the marital status of its citizens for both federal- and State-law purposes. The United States admits that, prior to DOMA, marriages lawfully licensed under State law were recognized under federal law, even in times of significant inter-State disagreement over eligibility criteria. While Congress may have imposed *additional* criteria other than a State-licensed marriage as a condition of various federal programs—such as requirements of good faith or minimum duration—all couples able to contract a valid marriage under State law have been at least *potentially* able to satisfy those added criteria as well. DOMA marks the first time that Congress has sought to disqualify, irretrievably and for all purposes, an entire category of State-licensed marriages. DOMA essentially requires the Commonwealth to recognize *two* types of marriage: married for all purposes, and married under State law but "federally single." DOMA uniquely disqualifies the Commonwealth (and other States that recognize marriage between same-sex couples) from exercising its sovereign power in this area of unparalleled State authority. *See infra* Part I.

DOMA also violates the Spending Clause by requiring the Commonwealth to discriminate against its own married citizens on the basis of sexual orientation. Contrary to BLAG's assertion, *Baker v. Nelson*, 409 U.S. 810 (1972), has no bearing on this case, as neither the Supreme Court nor the lower court in that case

decided the question presented here. *See infra* Part II.A. BLAG's *post hoc* justifications for DOMA are similarly unavailing and do not justify DOMA's discrimination under even the most lenient level of scrutiny. BLAG's contention that DOMA represents cautious action is legally irrelevant, because caution is not itself a legitimate government interest, and factually incorrect, because DOMA is in fact a marked *reversal* of prior practice. BLAG's other proffered justifications similarly fail because they are not *legitimate* federal interests, nor does DOMA in fact advance those supposed interests. Indeed, the legislative record makes plain that DOMA was motivated by animus towards gay and lesbian citizens, which provides an independent basis for affirmance. *See infra* Part II.B.

DOMA can also properly be invalidated through the application of heightened scrutiny, an avenue that remains open to this Court and is warranted by the uncontested record evidence. *See infra* Part II.C. The Court may also affirm because the conditions DOMA imposes on the Commonwealth's receipt of federal funds are unrelated to the purposes of the funded programs. *See infra* Part II.D.

ARGUMENT

I. DOMA VIOLATES THE TENTH AMENDMENT

DOMA's unprecedented nature is undisputed. The United States conceded below, and does not contest now, that DOMA represents the first time in American

history that Congress enacted a "federal definition of marriage,"[2] affirmatively overriding State determinations as to marital status. BLAG also acknowledges that DOMA represents an "adoption" of a federal "definition of marriage" (BLAG Br. 1) and refers to "state law spouses" (*id.* 5)—even though, before DOMA, our Nation did not recognize any other kind of spouse.

By enacting a federal definition of marriage, Congress usurped the States' sovereign authority to determine marital status. The result is that, although Massachusetts law recognizes only one marital status, DOMA forces it to have two: married for all purposes for different-sex spouses, and married but "federally single" for same-sex spouses. DOMA violates the Tenth Amendment's limitation on Congress's authority to enact legislation in this area reserved to the States.

A. DOMA Is A Federal Incursion Into A "Domain Of Activity Set Apart By The Constitution As The Province Of The States"

The Tenth Amendment expressly limits Congress's authority to enact legislation in areas 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."). As the Supreme Court recently reaffirmed, "[i]mpermissible interference with state sovereignty is

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[2] Mem. of Law in Supp. of Defs.' Mot. to Dismiss 13, *Gill v. Office of Personnel Mgmt.*, No. 09-cv-10309 (Dkt. No. 21) (D. Mass. Sept. 18, 2009); *see also* Reply in Supp. of Defs.' Mot. to Dismiss & Opp. to Pls.' Mot. for Summ. J. at 12, *Gill* (Dkt. No. 54) (D. Mass. Jan. 29, 2010); JA68; JA631.

not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (citations omitted). Any federal "expropriation" of the States' sovereign right to make policy decisions that are "presumed to be those of the States alone" must occur "in a manner that is faithful to the limitations on Federal power that inhere in the Tenth Amendment and in the principles of federalism that undergird our entire democratic system of governance." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 571 (4th Cir. 1997); *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 Supreme Court has long recognized that the Tenth Amendment protects States from federal encroachment in traditional areas of exclusive State concern. For example, the Court invalidated a federal statute that permitted State-chartered savings institutions to convert themselves into federally-chartered entities without State permission because the act was "an unconstitutional encroachment upon the reserved powers of the states." *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335 (1935) (Cardozo, J.). The Court found "an illegitimate encroachment by the government of the Nation upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338-339.

Since then, the Supreme Court has repeatedly reaffirmed that the Tenth Amendment protects "domain[s] of activity set apart by the Constitution as the province of the states." *See, e.g.*, *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-129 (1937) (state has exclusive authority over corporate status, for both state and federal purposes); *United States v. Darby*, 312 U.S. 100, 124 (1941) (purpose of Tenth Amendment was "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers"); *see also New York v. United States*, 505 U.S. 144, 155-156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) ("States remain sovereign as to all powers not vested in Congress or denied them by the Constitution[.]").

The undisputed record establishes that the Constitution sets the determination of marital status apart as the province of the States. *See, e.g.*, JA424 ¶10 ("The Constitution's silence on marriage rules conceded states' sovereignty over the area. States had exclusive power over marriage rules as a central part of the individual states' 'police power[.]'"). The Supreme Court has reaffirmed the

point repeatedly: "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 th[at] subject." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942); *see also McCarty v. McCarty*, 453 U.S. 210, 220 (1981) ("This Court repeatedly has recognized that '[t]he whole subject of the domestic relations of husband and wife … belongs to the laws of the States and not to the laws of the United States.'" (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979))); *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1877) ("The State … has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created[.]").

Even Congress's enumerated power to regulate interstate commerce does not extend to marital status. *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting the federal government's reasoning, under which "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"); *see also* Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787,

1789 (1995) (*Lopez* united the Supreme Court "around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority").[3]

Notably, the States' exclusive authority over marital status has never been limited to defining its contours for purposes of *State* law. Rather, State marital determinations have controlled for purposes of *federal* law as well. *See, e.g.*, *Slessinger v. Secretary of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (rejecting application of federal common law rule to eligibility determination under Social Security Act and instead deferring to State rule: "This conclusion is strongly reinforced by the settled principle that matters of divorce and marital status are uniquely of state, not federal concern. It would do violence to this principle for a court to apply federal law under the Act to give effect to a foreign divorce decree that would not be honored in the state of domicile." (citations omitted)); *In re Tidewater Marine Towing, Inc.*, 785 F.2d 1317, 1318, 1320 (5th Cir. 1986) (rejecting application of federal common law rule in eligibility determination under federal maritime law: "We are aware of few instances in which state interests are accorded more deference by federal courts

[3] Nor does the Necessary and Proper Clause provide authority for federal regulation in this area, as the valid exercise of Congress's power under that clause depends on a history of congressional regulation in the area. *See United States v. Comstock*, 130 S. Ct. 1949, 1958 (2010). There is no such history here.

than in defining familial status."); *Bell v. Tug Shrike*, 332 F.2d 330, 334-336 (4th Cir. 1964) (same).[4]

Indeed, prior to DOMA, Congress had *never* refused to recognize a State determination of marital status. *See* Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996). As the uncontroverted evidence establishes, State marital determinations have controlled regardless of differences among the States regarding marriage eligibility, even when those differences were highly controversial. *E.g.*, JA425 ¶13 ("Marriage rules have varied from state to state, and legislators and judges in every state have changed those rules and interpretations significantly over time. Despite these many changes to the terms of marriage, the federal government accepted the states' definitions of marriage for purposes of federal law."). For example, despite deep local and regional disagreement in the late nineteenth and early twentieth centuries about the validity of common-law marriages, the proper age at marriage, hygienic restrictions, interracial marriage, and grounds for divorce, Congress never before enacted legislation to disregard unpopular or controversial marriages for purposes of federal law. JA427-437. Accordingly, the United States

[4] *See also United States v. Yazell*, 382 U.S. 341, 352-353 (1966) (State law determined whether a wife was liable on a federal Small Business Administration loan taken out by her husband).

acknowledged "Congress's settled, uninterrupted history of respecting state definitions of marriage."[5]

Although most States' determinations of marital status continue to be given full effect under federal law, those of the Commonwealth are not. The Commonwealth is also required to *disregard* certain marriages when, for example, calculating federal withholding for its own employees or determining the eligibility of veterans' spouses for burial in Massachusetts veterans' cemeteries. *See, e.g.*, JA69, JA73. DOMA thus impermissibly requires the Commonwealth to recognize *two* marital statuses among its citizens, contrary to the Massachusetts Declaration of Rights, which recognizes only one. This forced recognition of two different types of marriage "plainly encroaches upon the firmly entrenched province of the state." JA669.[6]

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[5] Reply in Supp. of Defs.' Mot. to Dismiss & Opp. to Pls.' Mot. for Summ. J. 4, *Commonwealth v. Dep't of Health & Hum. Servs.*, No. 09-cv-11156 (Dkt. No. 47) (D. Mass. Sept. 18, 2009) ("U.S. *Massachusetts* Reply").

[6] 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) (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.'"); *id.* at H7449 (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.").

B. The United States' Contrary Arguments Lack Merit

1. DOMA Cannot Be Sustained Under The Spending Clause

The United States' primary response (U.S. Br. 56-57) is that DOMA cannot violate the Tenth Amendment because it was enacted pursuant to Congress's power under the Spending Clause. But as the United States elsewhere concedes, DOMA *violates* the Spending Clause by conditioning federal funding on invidious State discrimination against its own citizens. U.S. Br. 53-55; *cf. Riley*, 106 F.3d at 570 ("if the Court meant what it said in *Dole*, then … a Tenth Amendment claim of the highest order lies where" Congress violates the Spending Clause). Moreover, DOMA affects myriad federal laws that have no connection to spending, such as the right to take leave from work to care for an ailing spouse, 29 U.S.C. § 2612(a)(1)(C), the right to have privileged marital communications, *Trammel v. United States*, 445 U.S. 40, 44 (1980), bankruptcy protection, 11 U.S.C. §§ 302, 507, copyright protection, 17 U.S.C. §§ 203(a)(2)(A), 304(a)(1)(C)(2), and protection under the Employee Retirement Income Security Act, *see, e.g.*, 26 U.S.C. § 401(a).

The United States' focus on the Spending Clause stems from its mischaracterization of the Commonwealth's claim as an "as applied" challenge to DOMA's application "to various federal funding programs." U.S. Br. 14. The Commonwealth's Tenth Amendment claim, however, concerns all applications of

DOMA under federal law. Accordingly, the issue to be decided under the Tenth Amendment is whether, having chosen to make various federal laws turn on *marital status*, Congress may then disregard the Commonwealth's determination of who is married. The answer is plainly no. *In re Burrus*, 136 U.S. 586, 593-594 (1890) ("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."); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) ("'Domestic Relations' actions are loosely classifiable into four categories. The first, or 'core' category involves *declarations of status*, *e.g.*, marriage, annulment, divorce, custody, and paternity." (emphasis added)). And even if DOMA were a valid exercise of spending authority as applied to certain programs (which, as the United States concedes, it is not), that conclusion would not establish that DOMA—which sweeps far beyond any congressional spending program—represents a valid exercise of the federal authority.

2. DOMA Differs From Other Federal Laws By Disregarding A Category Of Marriages For *All* Purposes

The United States and its *amici* cite a handful of statutes in which Congress made particular treatment turn not just on marital status, but on additional requirements. *See* U.S. Br. 59-61, Nat'l Org. for Marriage (NOM) Br. 4-11. Those statutes are fundamentally different, however, because they impose supplementary, program-specific requirements *in addition* to marriage to advance

federal interests unrelated to regulating marriage. Every couple that is eligible to marry could potentially satisfy those additional federal requirements. DOMA, by contrast, imposes a federal policy of blanket and irremediable non-recognition of a category of marriages, thereby altering the character of marital status.

For example, the Immigration and Nationality Act (INA) provides that conditional permanent resident status based on marriage may be terminated if the Attorney General determines that the marriage was "entered into for the purpose of procuring an alien's admission as an immigrant." 8 U.S.C. § 1186a(b)(1)(A)(i). That requirement does not disqualify an entire category of marriages from *ever* giving rise to permanent resident status; it simply adds a requirement of good faith that any couple eligible to marry may satisfy. The additional requirement of good faith exists not because Congress sought to disapprove of a particular category of marriages, but because Congress—in the exercise of its authority over immigration—meant to prevent the receipt of immigration benefits through "fake marriages in which neither of the parties ever intended to enter into the marital relationship." *Lutwak v. United States*, 344 U.S. 604, 611 (1953). DOMA, by contrast, is not supported by any such targeted federal interest.

The same is true of each of the statutes that the United States cites as examples of federal programs "that do not accept wholesale a state definition of

marriage." U.S. Br. 59-61. None of the programs identified categorically excludes any couple married under State law:

- ERISA preempts inconsistent State law that would require a plan administrator "[to] pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). Accordingly, where State law governing the disposition of community property conflicts with plan provisions, the plan provisions control. But nothing in ERISA (other than its incorporation of DOMA) requires a plan administrator to disregard a *marriage*.
- The Railroad Retirement Act similarly preempts State community property law to the extent it would effectively assign, by operation of law, a portion of a recipient's retirement benefits to a spouse. *Hisquierdo*, 439 U.S. at 581-583. Like ERISA, the Railroad Retirement Act says nothing about disregarding marriages; it only preempts State property laws.
- The Supplemental Nutrition Assistance Program defines the term "household" broadly, without reference to spousal or other family relationships. 7 U.S.C. § 2012(n)(1). The statute thereby *expands* the

availability of nutrition assistance independent of marital status; it certainly does not disregard marriages licensed under State law.

- Under the Internal Revenue Code, "[c]ertain married individuals living apart" are allowed to be considered unmarried for purposes of filing status. 26 U.S.C. § 7703(b). This provision allows a married individual to elect to file as unmarried if that individual meets certain other requirements, thus providing an additional, more advantageous filing option for individuals who meet the relevant criteria and wish to file an individual return, but in no way disregarding marriages as DOMA does.
- The United States argues (U.S. Br. 60) that eligibility requirements for programs like Social Security, veterans' benefits, and federal employee benefits modify underlying State marital definitions. But each example *respects* State determinations of "marriage" or "spouse" and imposes a requirement in *addition* to marriage to determine eligibility for these benefits. For example, the Social Security Act defines a "wife" under the Social Security Act as "the wife of an individual" (under State law), and adds the requirement that the "wife" (1) be the mother of the individual's child, (2) have been married to the individual for at least one year prior to claiming benefits, or (3) satisfy certain age-related

requirements. 42 U.S.C. § 416(a)(2)(b). This requirement—which any marriage-eligible couple can potentially satisfy—serves a legitimate federal purpose of preventing death-bed marriages from conferring benefits. *See also, e.g.*, 38 U.S.C. § 101(3) (placing additional eligibility requirements on an eligible veteran's spouse, *i.e.*, that the spouse be married to the veteran at the time of death, have lived with the veteran continuously from the date of marriage to the date of the veteran's death, and have not remarried).[7]

The imposition of additional, program-specific eligibility requirements in these statutes is categorically different from DOMA's absolute non-recognition of an entire category of marriages.

Amicus NOM invokes federal bankruptcy law (Br. 9), but it cites no provision touching on marital status, much less any provision that purports to disregard an entire category of otherwise valid marriages. NOM also makes the overbroad assertion that "marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes." *Id*. Of course, the INA does not address "valid[ity] for federal purposes," but only

[7] BLAG cites the 1975 definition of a surviving spouse as "a person of the opposite sex who was the spouse of a veteran" (BLAG Br. 9 (citing 38 U.S.C. § 101(3) (1975)), but that definition was enacted to conform to the constitutional mandate for gender equality, rather than to exclude certain married couples categorically. *See* S. Rep. No. 94-568, at 19 (1975).

specific consequences in limited immigration-related contexts. Indeed, the two provisions NOM cites do not question the "validity" of marriages at all, but are directed only to their good faith—a requirement that does not categorically disqualify any couple married under State law.[8]

In marked contrast, DOMA is a broad, definitional provision that consigns an entire category of State-authorized marriages to invalidity under federal law. As the United States concedes (U.S. Br. 46-48), Congress's intent was precisely *not* to impose a neutral requirement that any marriageable couple may potentially

[8] The first involves a situation in which an immigrant who obtained permanent resident status based on a "prior marriage" to a U.S. citizen subsequently petitions for residency for a *second* spouse; that second petition may be approved only if the petitioning immigrant has been a permanent resident for five years or proves by clear and convincing evidence that the *prior* marriage (to the U.S. citizen) "was not entered into for the purpose of evading any provision of the immigration laws." 8 U.S.C. § 1154(a)(2)(A)(ii). The second provision states that an alien may not obtain permanent residence based on a marriage entered into while the alien is in removal proceedings, unless the alien proves that the marriage "was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given." *Id.* § 1255(e)(3). As with the other immigration provisions discussed, that specific fraud-preventing provision can be satisfied by any couple otherwise eligible for marriage under State law. Indeed, the federal reference to "the laws of the place where the marriage took place" indicates a careful desire *not* to create the broad-ranging "federal definition of marriage" that DOMA contains.

satisfy, but to delegitimize, on animus-based grounds, marriages validly licensed under State law. *See also infra* Part II.B.3.[9]

The United States also cites *United States v. Lewko*, 269 F.3d 64 (1st Cir. 2001), and *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999), but both decisions support the Commonwealth's position. *Lewko* upheld the federal Child Support Recovery Act and the Deadbeat Parents Punishment Act against a Commerce Clause challenge, but in doing so noted that those acts did not have "the purpose or effect of establishing a national, uniform 'family law.'" 269 F.3d at 66-70. In *Meade*, the defendant was convicted under a federal statute that prohibited firearm possession by an individual who had committed a domestic violence misdemeanor. The Court rejected Meade's Tenth Amendment challenge to the federal firearms statute, ruling that it did not "intrude upon … the authority of a state or its agents to administer their domestic relations laws in the manner they see fit." 175 F.3d at 225. Both cases accordingly reinforce the federal recognition of

[9] Before the district court, the United States relied on a handful of immigration cases to argue that Congress may define marriage for purposes of federal law. U.S. *Massachusetts* Reply 5-6. The United States does not cite those cases now, and for good reason: none involved federal disapproval of a state-sanctioned marriage. *See Lockhart v. Napolitano*, 573 F.3d 251, 258-261 (6th Cir. 2009); *Taing v. Napolitano*, 567 F.3d 19, 25-27 (1st Cir. 2009). BLAG relies on *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982), for the same argument. In *Adams*, the court refused to give effect under the immigration law to a marriage license for a same-sex couple, which was likely invalid under State law. *Adams* nowhere mentioned the Tenth Amendment and is in any event not binding on this Court.

State prerogatives in determining marital status. They in no way support DOMA's abrogation of those prerogatives through a "federal definition of marriage."

3. State Sovereignty Over Marital Status Is Not Limited To State Law

The United States also contends that DOMA "leaves entirely unaffected Massachusetts's interest in defining family relations *under its own law*" and that the Commonwealth may treat same-sex and different-sex spouses identically "under state law." U.S. Br. 58; *see also Amici* States Br. 14 (arguing, without citation, that DOMA "does not purport to modify or interfere with state law in any way, so it implicates no attributes of state sovereignty"). The United States cites no authority suggesting that the States' determination of marital status can be confined to State law. If that were the case, marital status would be no different from any other area of regulation in which federal law may trump conflicting State law, so long as Congress's pronouncement is clear. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). On the contrary, the Supreme Court has held that State, not federal, law governs marital status. *See, e.g.*, *Rose v. Rose*, 481 U.S. 619, 625 (1987) ("Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests." (internal quotation marks omitted)); *see supra* p. 18 (citing cases). The United States' contention that

marriage could generally be defined one way for purposes of federal law and another way for purposes of State law is itself an unprecedented proposition inconsistent with the States' constitutional preeminence in matters of marital status.[10]

4. The District Court Applied The Correct Tenth Amendment Test

Finally, the United States focuses at length on a supposed error in the district court's application of *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), which the United States believes is "inconsistent with Supreme Court precedent." U.S. Br. 57. Though *Bongiorno* rested in part on *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was overruled by the Supreme Court in *Garcia*, the district court explicitly recognized that "more recent authority" had undermined *Bongiorno*. JA667. The court accordingly deemed it "most appropriate [to] determin[e] whether DOMA 'infring[es] upon the core of state sovereignty.'" JA667 (quoting *New York*, 505 U.S. at 177). Accordingly, the court's conclusion did not ultimately rest on the analysis discarded in *Garcia*.[11] Instead, it rested on the fact that the regulation of marital status is at the "core of

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[10] *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220 (1st Cir. 2003), and *United States v. Ahlers*, 305 F.3d 54 (1st Cir. 2002) (cited at U.S. Br. 58), set forth generic canons of statutory interpretation. Those cases are irrelevant here, as there is no dispute as to DOMA's interpretation.

[11] The United States notably does not challenge the district court's application of the first two prongs of *Bongiorno*, effectively conceding that DOMA regulates Massachusetts as a State and that the statute concerns attributes of State sovereignty. *Bongiorno*, 106 F.3d at 1033.

state sovereignty" (*New York*, 505 U.S. at 177) or, as Justice Cardozo put it, "a domain of activity set apart by the Constitution as the province of the states." *Hopkins*, 296 U.S. at 338-339. The articulation in *New York* and *Hopkins* remains good law and compels affirmance.[12]

* * *

The Supreme Court's consistent recognition of the States' power to regulate marriage, coupled with the federal government's uninterrupted reliance on State definitions of marriage for purposes of federal law, shows that the States' authority to regulate domestic relations governs marital status as relevant to *federal* law as well. A State marriage license has always entailed—and, but for DOMA still does entail—a promise of federal recognition. By overturning this allocation of sovereignty, DOMA violates the Tenth Amendment.

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[12] *New York* was, on its facts, concerned with federal commandeering of State government processes. But the Supreme Court has never suggested that the Tenth Amendment's protection of State sovereignty is limited to a prohibition on "commandeering," and *New York* stated precisely the opposite. 505 U.S. at 188 (immunity from commandeering is not necessarily "the outer limit[] of [State] sovereignty"); *see also McConnell v. FEC*, 540 U.S. 93, 187 (2003) ("[I]n 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. FEC*, 130 S. Ct. 876 (2010).

II. DOMA VIOLATES THE SPENDING CLAUSE

As the United States now acknowledges, DOMA is a product of "the kind of animus and stereotype-based thinking that the Equal Protection Clause is designed to guard against." U.S. Br. 48. None of BLAG's defenses can cure that fatal defect.

A. *Baker v. Nelson* Is Inapposite

BLAG argues (BLAG Br. 19-20) that the Supreme Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972), holds that "defining marriage as between one man and one woman comports with equal protection." *Baker* makes no such statement, and the summary disposition did not address—much less resolve—the equal protection question presented here.

The precedential effect of *Baker*'s summary affirmance "can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). Thus, in considering the effect of that case, this Court must first determine *Baker*'s "reach and content." *Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993). In *Baker*, the Supreme Court of Minnesota had held, *inter alia*, that Minnesota's refusal to issue a marriage license to two men did not violate the Fourteenth Amendment prohibition on discrimination based on gender. *Baker v. Nelson*, 291 Minn. 310, 312-315, 191 N.W.2d 185, 186-187 (1971).

BLAG characterizes *Baker*'s narrow holding as follows: "*a state* may define marriage as the union of one man and one woman without violating equal protection." BLAG Br. 22 (emphasis added). Yet BLAG then asserts—without argument or citation—that *Baker* somehow sanctions the "use [of] the same definition in federal law." *Id.* This Court should reject such sleight of hand. *Baker* decided nothing about the constitutionality of a *federal* law that denies legal recognition for all federal purposes to couples who are already married under State law. *See Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872-874 (C.D. Cal. 2005) (*Baker* not binding because federal discrimination against married same-sex couples is legally distinct from State limitations on marital eligibility), *aff'd in part and vacated in part on other grounds*, 477 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 136-138 (Bankr. W.D. Wash. 2004) (*Baker* not dispositive of equal protection challenge to DOMA); *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 671 (Tex. Ct. App. 2010) (whether Texas law proscribing adjudication of divorce proceedings between same-sex couple violated the Equal Protection Clause was "distinguishable from the precise issues presented … in *Baker*").[13]

[13] *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), is inapposite, because the court never analyzed whether the *Wilson* plaintiffs' various constitutional challenges to DOMA involved "the precise issues presented and necessarily decided" by *Baker*. *Mandel*, 432 U.S. at 176.

Furthermore, the equal protection theory in *Baker* was primarily one of *gender* discrimination. Jurisdictional Statement at 16, *Baker v. Nelson*, No. 71-1027 (1972) (BLAG Br. Add. 99a) ("The discrimination in this case is one of gender."). Thus, *Baker* had no occasion to consider the claim asserted here, which rests on discrimination on the basis of *sexual orientation*. BLAG's attempt to invoke *Baker* as binding in this case is therefore unavailing, because the "Supreme Court's summary disposition will not control later lower court cases involving significantly dissimilar facts." *Carpenter*, 8 F.3d at 894.

Finally, even if *Baker*'s "reach and content" did somehow implicate the equal protection issue presented in this case, it must be considered in light of intervening "doctrinal developments." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted); *see also Carpenter*, 8 F.3d at 894 ("The Supreme Court's summary disposition of an appeal to it is an adjudication on the merits that must be followed by lower courts, subject, of course, to any later developments that alter or erode its authority."). That is, even if the issue in *Baker* were identical to the issue presented in this case, subsequent doctrinal developments—specifically, the last four decades of Supreme Court precedent in the law of gender and sexual orientation discrimination—have rendered *Baker* obsolete: "Supreme Court cases decided since *Baker* show the Supreme Court does not consider unsubstantial a constitutional challenge brought

by homosexual individuals on equal protection grounds … or on due process grounds." *Smelt*, 374 F. Supp. 2d at 873; *see also Kandu*, 315 B.R. at 138 ("The Supreme Court's approach to the constitutional analysis of same-sex conduct, however, at least arguably appears to have shifted [since *Baker*].").

B. DOMA Fails Rational-Basis Review

Neither BLAG nor the United States (when it defended DOMA on rational basis grounds) has been able to identify a legitimate federal interest that DOMA rationally advances. Rather, as the district court correctly concluded, the only goal that DOMA can fairly be said to advance is inflicting harm on individuals married to someone of the same sex, which is not a legitimate interest at all. Moreover, DOMA was transparently motivated by a discriminatory animus towards gay and lesbian citizens, which provides an independent basis for invalidating it.

1. The District Court Properly Articulated And Applied The Rational Basis Framework

BLAG accuses the district court of having "seriously misunderstood" rational basis review. BLAG Br. 33. That claim rests primarily on the assertion that the court "seemed to believe" that DOMA failed rational-basis review unless it "affirmatively benefitted" different-sex married couples. *Id.* at 36. BLAG misstates the court's reasoning. The court correctly rejected the argument that DOMA could be justified by "Congress' asserted interest in defending and nurturing heterosexual marriage" (JA1392), but it nowhere suggested that the

analysis ended there. On the contrary, the court carefully considered the remaining asserted contentions and rejected them as well. JA1390-1405.

Even the cases on which BLAG relies confirm that the district court correctly framed and applied rational basis review by examining whether the asserted justifications for DOMA furthered any legitimate federal interest—and correctly concluded that they do not. In *Vance v. Bradley*, 440 U.S. 93 (1979), the Supreme Court upheld a statute mandating retirement at age 60 for members of the U.S. Foreign Service only after finding that it furthered the legitimate government interest in "stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available[.]" *Id.* at 101; *see also Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-315 (1976) (mandatory retirement age furthered the Commonwealth's interest in "protect[ing] the public by assuring physical preparedness of its uniformed police"); *Califano v. Boles*, 443 U.S. 282, 288-289 (1979) (Social Security Act restriction rationally related to government's desire to provide aid to particular dependents of deceased wage-earner); *Schweiker v. Wilson*, 450 U.S. 221, 236-237 (1981) (Medicaid restriction rationally related to government's interest in avoiding expenditure of federal funds for individuals whose care was being provided by state and local governments).

BLAG also argues that DOMA draws lines in eligibility for federal benefits and is thus "virtually unreviewable." Br. 35. That is incorrect; DOMA affects many laws unrelated to federal benefits. *See supra* p. 22-23. Moreover, though it may be true that "laws such as economic or tax legislation … normally pass constitutional muster," DOMA is not such a law, and the presumption of constitutionality in any event does not apply where, as here, a law targets "a politically unpopular group" or "inhibits personal relationships." *Lawrence v. Texas*, 539 U.S. 558, 579-580 (2003) (O'Connor, J., concurring). Anomalous and unprecedented legislation like DOMA in fact receives less deference, as "'[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional [equal protection] provision.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)) (alteration in original).

2. None Of BLAG's Proffered Rationales Is A Legitimate Federal Interest

Rational basis review requires that the interest asserted be "properly cognizable" by the governmental body asserting it, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), and "relevant to interests" the classifying body "has the authority to implement," *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quoting *Cleburne*, 473 U.S. at 441). *See also Plyler v. Doe*, 457 U.S. 202, 225 (1982) (overturning State law discriminating

against aliens, noting that although it is a "routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status … only rarely are such matters relevant to legislation by a State" (internal quotation marks and citations omitted)). Accordingly, DOMA can be sustained only by a legitimate federal interest that Congress has the power to advance. *See also Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-115 (1976) (Civil Service Commission rule barring employment of aliens violates equal protection because asserted interests were "not matters which are properly the business of the Commission"). None of the rationales offered by BLAG is legitimate.

a. *"Proceeding with caution" and protecting the "status quo" do not justify discrimination*

BLAG argues (BLAG Br. 39) that Congress had an interest in "proceeding with caution" and preserving the "status quo" rather than "redefining" marriage. As the district court noted, such an argument "does nothing more than describe what DOMA does. It does not provide a justification for doing it." JA1400. The federal government has no *independent* interest in proceeding cautiously; caution is simply a means of carrying out a further governmental end that the lawmaking entity must otherwise have authority to pursue.[14]

[14] The United States made a similar argument in its original, now-superseded opening brief, but none of the cases cited established incrementalism as an end in itself. Rather, they simply held that Congress may choose to proceed incrementally in pursuing *other* legitimate goals. *See, e.g.*, *Massachusetts v. EPA*,

In any event, there is nothing "cautious" about DOMA: it represents a stark reversal of prior federal policy. Before 1996, if federal law turned on marital status, it was "controlled by a person's status under state law." *Kahn v. INS*, 36 F.3d 1412, 1415 (9th Cir. 1994) (per curiam); *see also, e.g.*, *Bell*, 332 F.2d at 334-337 (applying State law to determine marital status of surviving spouse in maritime wrongful death action); *Gersten v. Commissioner of Internal Revenue*, 267 F.2d 195, 199-200 (9th Cir. 1959) (applying California law to invalidate divorce obtained in Mexico and to refuse to recognize subsequent marriage for joint filing). DOMA, by contrast, 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 2916-2922 (Congress is not "indifferent to" same-sex marriage); *see also In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009) ("DOMA … disrupted the long-standing practice of the federal government

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549 U.S. 497, 524 (2007) (administrative agencies may proceed incrementally in pursuit of proper regulatory ends, like reducing emissions of greenhouse gases); *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (where an administrative agency has substantive rule-making power, it may exercise that power through general rules or individual orders); *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 goal of reducing overfishing); *National Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1245 (11th Cir. 2003) (upholding status quo pending ongoing "planning process"); *Teigen v. Renfrow*, 511 F.3d 1072, 1084-1086 (10th Cir. 2007) (state agencies may freeze promotions for employees while their appeals in prior personnel actions remained pending).

deferring to each state's decisions as to the requirements for a valid marriage."); *Dragovich v. Department of Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) ("DOMA … alters the status quo because it impairs the states' authority to define marriage[.]"). Indeed, federal fidelity to State definitions remains the status quo in all *other* respects, notwithstanding significant divergence in marriage eligibility requirements. JA429-431 (detailing current differences among state marital eligibility laws with regard to common law marriage, age at marriage, and consanguinity).

BLAG also ventures (BLAG Br. 39) that DOMA embodies a cautious approach in light of "the unknown consequences of … the redefinition of a foundational social institution." BLAG identifies no case suggesting that an interest in avoiding speculative and unidentified "consequences" could be legitimate; indeed, the Supreme Court has held just the opposite. *See Cleburne*, 473 U.S. at 448 ("[T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))); *see also Watson v. City of Memphis*, 373 U.S. 526, 535-536 (1963) (rejecting as a defense of discrimination a purported interest in proceeding with caution to prevent "community confusion and turmoil"). In any event, "to assume that [a cautious]

congressional response is appropriate requires a predicate assumption that there indeed exists a 'problem' with which Congress must grapple." JA1400.

b. *DOMA does not preserve the public fisc*

BLAG next contends that, by refusing to recognize a lone category of State-authorized marriages, Congress rationally advanced an interest in preserving the federal fisc. This argument is also without merit. First, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227*; see also Graham v. Richardson*, 403 U.S. 365, 374-375 (1971) (rejecting similar argument offered in support of denying welfare benefits to noncitizens).

In addition, the undisputed record demonstrates that recognition of marriages between same-sex spouses would result in a net *savings* to the federal government. JA602-614 (Congressional Budget Office 2004 Report). Where "the asserted grounds for the legislative classification lack any reasonable support in fact," there is no rational basis for the classification. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988); *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."). BLAG's suggestion that married same-sex couples "who stood to lose federal benefits" would violate the law by misrepresenting their marital status

on federal forms (BLAG Br. 43-44 & n.12) is utterly unsupported and patently offensive.

BLAG's fiscal argument also runs aground on the fact that many of the federal programs affected by DOMA have no connection to federal spending. *See supra* p. 22-23. BLAG's argument that DOMA advanced an interest in preserving the legislative judgments of prior Congresses regarding program costs (BLAG Br. 45) fails for similar reasons.

c. *Uniformity in eligibility for federal benefits is not a legitimate interest in and of itself, and DOMA does not in fact promote uniformity, nor alleviate any administrative burden*

Like "caution" or preservation of a "status quo" (*supra* Part II.B.2.a), the bare invocation of "uniformity" (BLAG Br. 46) is not a legitimate government end in itself. While Congress may have an interest in promoting uniformity in certain designated areas, such as bankruptcy, immigration, or tax, the interest is inexorably linked to the broader regulatory goals of these systems. *See, e.g.*, *In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002) ("[T]he application of the federal interest rate to all claims is rationally related to the legitimate interests in efficiency, fairness, predictability, and *uniformity within the bankruptcy system.*" (emphasis added)). BLAG offers no legitimate purpose served by the supposed uniformity achieved by DOMA.

Notably, Congress has never pursued true federal "uniformity" in the sense that all persons treated as "married" under federal law would be considered "married" in all fifty States. *See supra* Part I; *cf. Capitano v. Sec'y of Health & Human Servs.*, 732 F.2d 1066, 1068-1069 (2d Cir. 1984) (because "widow" under the Social Security Act is determined by "the marital law of the state of the covered worker's domicile at the time of his death," the law does not promote "uniformity" in the administration of benefits nation-wide). Rather, Congress has pursued uniformity only by uniformly *accepting* State marital status determinations—as it continues to do to this day in all respects other than sexual orientation, notwithstanding many differences in State marriage-eligibility rules regarding age, consanguinity, and other factors. JA427-437. "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." *Levenson*, 587 F.3d at 933.

BLAG suggests (BLAG Br. 46-47) that Congress could have passed DOMA to alleviate confusion due to the vagaries of state law. But as the undisputed record demonstrates, DOMA makes program administration *more* difficult, because it requires an inquiry beyond whether a couple is married under State law. JA73-74 ¶¶51-55 (describing costs and difficulty of imputing fair market value of spousal health benefits as income under DOMA); JA1402 ("DOMA seems to

inject complexity into an otherwise straightforward administrative task."); *see Medora v. Colautti*, 602 F.2d 1149, 1153-1154 (3d Cir. 1979) (administrative regime that requires application of divergent federal and state definitions of "need" is "irrational").

The federal government was well-equipped to handle any lack of uniformity among State marriage laws without DOMA. Many federal statutes and regulations provide clear choice-of-law rules for determining eligibility for benefits or protections based on marriage. *See, e.g.*, 17 U.S.C. § 101 ("The author's 'widow' or 'widower' is the author's surviving spouse under the law of the author's domicile at the time of his or her death[.]"); 42 C.F.R. § 130.2(e)(1) (former lawful spouse determined by "laws of the place where the person resided"). Where there is no statutory definition, courts often apply the forum State's conflict of law rules, *e.g.*, *De George v. American Airlines, Inc.*, 338 F. App'x 15, 16-17 (2d Cir. 2009), or general conflict of law principles, *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006). Extensive case law fills in other gaps. *See, e.g.*, *Metropolitan Life Ins. Co. v. Manning*, 568 F.2d 922, 926 (2d Cir. 1977) (applying the law of the state of the insured's domicile at time of death); *Barrons v. United States*, 191 F.2d 92, 95-99 (9th Cir. 1951) (applying California and Texas conflict of law rules and holding proxy marriage not void under the law of Nevada, the place of celebration). In all these instances, federal law has always

followed *some* State law. Congress has never fashioned an across-the-board federal definition of marriage for itself.

d. *The preservation of heterosexual marriage and childrearing are not legitimate congressional goals, and DOMA does not advance those goals*

BLAG's remaining proffered justifications for DOMA all relate to Congress's stated goals of protecting what it calls "traditional marriage" and promoting childrearing within heterosexual marriages. BLAG Br. 49-58. Neither goal withstands analysis.

BLAG argues (BLAG Br. 49-52) that federal recognition of marriages between same-sex couples would lead to fewer different-sex marriages, thus increasing the number of children born out of wedlock. This argument is nothing more than a poorly-disguised version of the argument that federal recognition of same-sex marriages will result in the crumbling of the institution of "traditional" marriage, which in turn is based only on sheer animus towards gay and lesbian citizens. *See* 142 Cong. Rec. H7482, 7487 (daily ed. July 12, 1996) ("[t]he very foundations of our society are in danger of being burned," "[h]omosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies"). There is in any event no evidence in the record to support the implausible argument that recognizing State-licensed

marriages between same-sex couples would somehow discourage heterosexual couples from marrying and having children.[15]

As the district court recognized, "the Constitution will not abide such 'a bare Congressional desire to harm a politically unpopular group.'" JA1393 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Every historically discriminatory law maintains a "tradition" of discrimination, but that has never been a rational basis for discrimination. *Romer*, 517 U.S. at 633 (discriminatory classification must serve an "independent and legitimate legislative end"); *see also Levenson*, 587 F.3d at 932 ("*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."). Moreover, DOMA's classification does nothing to protect the "traditional" institution of marriage for heterosexual couples because it has no effect on them whatsoever. All it does is impose burdens on same-sex couples. *See Levenson*, 587 F.3d at 932 ("[D]enying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of … 'defending and nurturing the institution of traditional, heterosexual marriage.'").

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[15] Similar arguments were advanced and rejected in connection with the equal protection challenge to laws barring interracial marriage. *See* Brief for Appellee *47-48, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931 (defending anti-miscegenation law by referencing "the higher rate of divorce among the intermarried" and a concern for the well-being of children "who become the victims of their intermarried parents" (internal quotation marks omitted)); *see also* JA431-435 (noting that proponents of anti-miscegenation laws argued that the institution of marriage would suffer as a result of interracial marriage).

BLAG's argument that the discrimination codified in DOMA may be justified by the fact that only different-sex couples can "produce unintended and unplanned offspring" (BLAG Br. 49) suggests a constitutional linkage between marriage and procreation that does not exist. The ability or desire to procreate has never been a prerequisite for marriage. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (recognizing purposes of marriage that have no connection to procreation, including the "expression[] of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and even "the receipt of government benefits"). BLAG's purported constitutional link between marriage and childrearing (BLAG Br. 55) is likewise fabricated. Even parents who are "irresponsible" about their obligations to their children and their procreative activities have the right to marry, further underscoring the separation of marriage and parenting in the eyes of the law. *See Zablocki v. Redhail*, 434 U.S. 374, 389-391 (1978) (invalidating a Wisconsin law that prohibited marriage of noncustodial parents who were in arrears on their child support payments).

Even if encouraging marriage between couples who may accidentally procreate were a valid federal interest, the line DOMA draws bears no relationship to this interest. Many different-sex couples who either cannot procreate (*e.g.*, the old, the infertile, and the incarcerated) or choose not to are as unlikely to procreate

"accidentally" as same-sex couples, yet DOMA is concerned with none of them. DOMA does not represent a law that has merely an "imperfect fit between means and end." *Heller*, 509 U.S. at 321. Instead, DOMA pursues the supposed objective of "responsible procreation" in a manner that is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 633 (invalidating discriminatory law because it is "at once too narrow and too broad").

BLAG's argument is further refuted by the record, which contains a large body of evidence conclusively documenting that children raised by gay and lesbian citizens are just as likely to be well-adjusted as children raised by different-sex couples. JA74-75 ¶¶56-60;[16] *see also, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted."). In addition, DOMA does not further any purported federal interest in childrearing by heterosexual parents. Many of the federal provisions affected have

[16] Assuming *arguendo* that no such evidence existed at the time of DOMA's passage, the district court properly considered the undisputed record highlighting the contemporary scientific consensus. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *see also G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 409 (1982) (considering whether a tolling statute "no longer is rationally related to a legitimate state objective" in light of a subsequent enactment).

no connection to childrearing and apply to all married couples whether they have children or not. DOMA's only impact is to inflict harm on married same-sex couples and the children they raise. As the district court ruled, DOMA "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,' when afforded equal recognition under federal law." JA1391 (quoting *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 964).

3. DOMA Was Motivated By The Illegitimate Purpose Of Expressing Moral Disapproval Of Gays And Lesbians

Once BLAG's purported justifications are stripped away, the only remaining "interest" that DOMA can be said to advance is disapproval of homosexuality. *Dragovich*, 746 F. Supp. 2d at 1190 ("[A]nimus toward, and moral rejection of, homosexuality and same-sex relationships are apparent in the Congressional record."). By "imposing a broad and undifferentiated disability on a single named group," DOMA "defies" the conventional rational basis inquiry, raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and is an "invalid form of legislation." *Romer*, 517 U.S. at 632, 634. This illegitimate purpose provides an independent basis for ruling that DOMA violates equal protection. *See Cleburne*, 473 U.S. at 450 (though zoning ordinance might have served legitimate interest in avoiding population congestion,

it "appear[ed] … to rest on an irrational prejudice against the mentally retarded" and was therefore unconstitutional).[17]

DOMA imposes precisely the type of "broad and undifferentiated disability" on gay and lesbian married couples that constitutes "a denial of equal protection of the laws in the most literal sense" and raises a strong inference that animus was the driving force behind the legislation. *Romer*, 517 U.S. at 632-634. Indeed, the legislative history provides undisputed corroborating evidence of that animus:

- "[I]t is time to say that homosexuality should not be sanctioned on an equal level with heterosexuality[.]… [N]o society [ ] has lived through the transition to homosexuality and the perversion which it lives and what it brought forth." 142 Cong. Rec. H7444 (Rep. Coburn).
- "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. H7482 (Rep. Barr).

[17] *See also Inmates of Suffolk Cnty. Jail v. Rouse*, 129 F.3d 649, 660-661 (1st Cir. 1997) (noting the "intriguing question of whether the *Romer* Court meant to add a new 'animus test' to the armamentarium of rationality review").

- "Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies." *Id.* at H7487 (Rep. Funderburk).
- "Same-sex 'marriages' … legitimize unnatural and immoral behavior." *Id.* at H7494 (Rep. Smith).
- "[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." 142 Cong. Rec. S10067, S10068 (daily ed. Sept. 9, 1996) (Sen. Helms).
- "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664, at 11, *reprinted in* 1996 U.S.C.C.A.N. at 2919-2920.

This record, which BLAG does not challenge, speaks for itself. Legislation enacted out of animus towards a burdened group fails rational basis review, even if arguable *post hoc* justifications are offered in its support. *Romer*, 517 U.S. at 632, 635; *Cleburne*, 473 U.S. at 448 ("[m]ere negative attitudes, or fear … are not permissible bases" upon which to discriminate); *Moreno*, 413 U.S. at 534

(legislative history showed that purpose of classification was to prevent "hippies" from qualifying for benefits); *see also* JA1390-1394; *accord Levenson*, 587 F.3d at 932-933; *Dragovich*, 764 F. Supp. 2d at 1189-1190, 1192. As the district court correctly concluded: "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." JA1405.[18]

C. DOMA Is Subject To, And Fails, Heightened Scrutiny

Because DOMA fails even rational basis scrutiny, this Court need not consider whether heightened scrutiny is appropriate. However, should the Court determine that DOMA's validity turns on the level of scrutiny applied, then it should analyze the legislation under heightened scrutiny, which DOMA clearly fails.

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[18] BLAG's suggestion that the district court's conclusion "label[s] hundreds of former and current elected officials bigoted and irrational" (BLAG Br. 7-8, 59-60), is incorrect. A finding that DOMA was motivated by animus does not imply that the individuals who voted for the legislation were bigoted. *See, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 320 n.15 (1993) (Stevens, J., dissenting) ("The Justices who subscribed to [the views expressed in *Bradwell v. State*] were certainly not misogynists, but their basic attitude—or animus—toward women is appropriately characterized as "invidiously discriminatory."); *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring) ("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.").

Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), is not to the contrary. *Cook* determined only that the Supreme Court's decisions in *Romer* and *Lawrence* did not "mandate" heightened scrutiny. *Id.* at 61; *accord* BLAG Br. 26. *Cook* did not consider—because it was not presented with—record evidence or arguments about the factors relevant to heightened scrutiny, and therefore it did not ultimately analyze any of those factors in its opinion. *See Cook*, 528 F.3d at 61-62; Brief of Plaintiffs-Appellants at 31-35, *Cook*, 528 F.3d 42 (Nos. 06-2313, 06-2381), 2006 WL 4035217 (containing no argument or evidentiary citation regarding the factors that determine whether heightened scrutiny is appropriate).

"[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." *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993). *Cook* therefore does not require this Court to ignore the undisputed record evidence in *this* case that compels application of heightened scrutiny. *See United States v. DiPina*, 178 F.3d 68, 73 (1st Cir. 1999) ("Where, in a prior decision, we have not considered an issue directly and assessed the arguments of parties with an interest in its resolution, that decision does not bind us in a subsequent case where the issue is adequately presented and squarely before us[.]").

Nearly all of the cases cited by BLAG (BLAG Br. 25), including all of the "sister circuit" cases cited in *Cook* (528 F.3d at 61), fail to examine the heightened

scrutiny factors in determining that rational-basis review would apply. Many merely assume that gays and lesbians are not a suspect class, *see, e.g.*, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004), or hold, like *Cook*, that *Romer* does not mandate heightened scrutiny of classifications based on sexual orientation. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-868 (8th Cir. 2006).[19] Here, where the Commonwealth has adduced undisputed record evidence on the factors relevant to heightened scrutiny, the Court may and should decide that heightened scrutiny is warranted. The Commonwealth adopts the submissions of the United States and the *Gill* Appellees demonstrating that the factors relevant to heightened scrutiny compel application of heightened scrutiny to discrimination based on sexual orientation and that DOMA fails heightened scrutiny. *See* U.S. Br. Part I; Br. of Plaintiffs-Appellees Nancy Gill, *et al.*, Part II.A.2.[20]

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[19] The only cases to discuss the heightened scrutiny factors do so perfunctorily and unpersuasively, and are not binding on this Court. The Ninth Circuit in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990), found that, although homosexuals had suffered a history of discrimination, they lacked other characteristics that warranted heightened scrutiny. *Woodward v. United States*, 871 F.2d 1068, 1075-1076 (Fed. Cir. 1989), contained only a cursory analysis based on the discredited logic of *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[20] BLAG argues (BLAG Br. 26-33) that DOMA is not subject to heightened scrutiny because it does not discriminate on the basis of gender and does not implicate a fundamental right. These are non sequiturs; neither the parties nor the district court relied on such theories. Moreover, BLAG has waived any argument

* * *

The Spending Clause allows Congress to attach conditions to funding it provides to the States, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), but it forbids conditions that are "barred by other constitutional provisions." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) (quoting *Dole*, 483 U.S. at 207-208). Because DOMA requires the Commonwealth to discriminate against its citizens in violation of the Fourteenth Amendment's equal protection guarantee, DOMA violates the Spending Clause. The United States concedes this expressly (U.S. Br. 55), and BLAG does not argue that DOMA could violate equal protection without also violating the Spending Clause, thereby waiving any such argument. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Accordingly, DOMA violates the Spending Clause by forcing the Commonwealth to engage in unlawful discrimination against gay and lesbian citizens as a condition of federal funding.

D. DOMA Separately Violates The Spending Clause Because It Bears No Relation To The Federal Spending Programs At Issue

The district court did not address the Spending Clause's separate requirement that a condition on federal funding be related "'to the federal interest in particular

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concerning the other heightened scrutiny factors, as it makes no argument in this respect in its brief, instead referring only in a footnote to pleadings in unrelated cases. BLAG Br. 26 n.7. "Issues 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Cortes-Rivera v. Department of Corr. & Rehab. of Com. of P.R.*, 626 F.3d 21, 26 (1st Cir. 2010) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

national projects or programs' funded under the challenged legislation." *Nieves-Marquez*, 353 F.3d at 128 (quoting *Dole*, 483 U.S. at 207-208). DOMA's failure to satisfy that requirement provides a further basis for affirmance. As shown in Part I above, DOMA enacts an unprecedented blanket policy of non-recognition of an entire category of State-licensed marriages. DOMA is not—indeed, cannot possibly be—related to the federal spending programs at issue.

At the time of DOMA's passage, Congress did not consider whether its discriminatory definition of marriage was related to any of the interests embodied in the laws that DOMA affects. The House Judiciary Committee recommended DOMA's enactment even though it had "not undertaken an exhaustive examination" of the "array of material and other benefits to married couples" under federal law. H.R. Rep. No. 104-664, at 18, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2922. Nor did Congress consider whether DOMA's definition of marriage was "reasonably related" to the affected programs. *See Dole*, 483 U.S. at 208-209 (noting that the challenged condition was "directly related to one of the main purposes for which highway funds are expended" and that the condition was "reasonably calculated to address [a] particular impediment to a purpose for which the funds are expended").

BLAG fails to offer any defense of DOMA on these grounds, once again waiving any argument related to this issue. The United States makes only the

perfunctory argument—offered in this Court in a single footnote—that because "[t]he purposes and terms" of federal programs are defined by Congress, "Congress is free to modify a program as it sees fit." U.S. Br. 54 n.23. Even if the Court decides to consider this cursory argument, such a view of congressional power would render the *Dole* relatedness limitation meaningless, since any funding condition can be characterized as a modification of a program's purposes and terms; the "purpose" of any federal program would simply be the sum of its eligibility criteria and any attached conditions. Surely the Supreme Court had something more in mind when it reaffirmed *Dole*'s "relatedness" limitation in *New York*. 505 U.S. at 167 ("[C]onditions 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." (citation omitted)).

At the very least, limiting marriage to heterosexual couples for federal purposes must advance the purposes of the affected federal programs. *See New York*, 505 U.S. at 172. But DOMA is unrelated to—and actually frustrates—the purposes of the affected federal programs. Medicaid is designed to provide subsidized medical care to needy individuals (JA70), yet DOMA compels the Commonwealth to provide and pay for coverage of individuals in high-income families. And the United States has never explained how DOMA's prohibition on

burying a decorated veteran with his husband is “related” to a program that exists to bury veterans with their loved ones.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

/s/ Maura T. Healey

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2011, I caused the foregoing Brief for Plaintiff-Appellee Commonwealth of Massachusetts to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Maura T. Healey
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October 27, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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