
Nos. 10-2204, 10-2207, 10-2214 (Consolidated)

United States Court of Appeals for the First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

vs.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee / Cross-Appellant,

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

vs.

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

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
CIVIL CASE NOS. 1:09-10309-JLT, 1:09-11156-JLT
HON. JOSEPH L. TAURO

**AMICUS CURIAE BRIEF OF EAGLE FORUM
EDUCATION & LEGAL DEFENSE FUND
IN SUPPORT OF APPELLANTS
IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund (“Eagle Form”) makes the following corporate disclosure statement: No publicly held company owns 10% or more of Eagle Forum’s stock, and Eagle Forum has no parent company.

Dated: January 26, 2011

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) is a nonprofit Illinois corporation founded in 1981. Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Accordingly, Eagle Forum has a direct and vital interest in the issues before this Court. Eagle Forum files this *amicus* brief with the consent of all parties.¹

STATEMENT OF THE CASE AND FACTS

In 1996, Congress enacted the Defense of Marriage Act (“DOMA”) *inter alia* to adopt a uniform federal definition of marriage and to foster husband-wife marriage to encourage responsible procreation and childrearing. H.R. REP. NO. 104-664 at 5, 12-13, 18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910, 2916, 2922. Various private individuals and Massachusetts (collectively, “Plaintiffs”) prevailed in an as-applied

¹ Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

constitutional challenge to 1 U.S.C. §7 against various federal officers and agencies (collectively, “Federal Appellants”). *Commonwealth v. HHS*, 698 F.Supp.2d 234, 235-36 (D. Mass. 2010); *Gill v. OPM*, 699 F.Supp.2d 374, 386 n.82 (D. Mass. 2010). The only relevant facts are legislative facts that support the plausibility of the link between husband-wife marriage and responsible procreation and childrearing.

SUMMARY OF ARGUMENT

Plaintiffs lack standing over Massachusetts’ voluntary decisions to fund same-sex beneficiaries, DOMA’s application to statutes that do not affect Plaintiffs, and speculative, non-imminent future enforcement (Section I.A). Because Plaintiffs’ damage claims fall outside any waivers of sovereign immunity, the District Court lacked jurisdiction to award damages and to hear Plaintiffs’ non-exhausted claims for taxes, Social Security, and Medicare (Sections I.B-I.E). On the merits, marriage’s rationales of responsible procreation and childrearing easily satisfy the rational-basis test (Section II.B), and same-sex marriage is not a fundamental right (Section II.A). Because it fits within the Spending, Commerce, and Taxing Powers, without offending Equal Protection, DOMA does not violate the Tenth Amendment (Section III).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER MOST, IF NOT ALL, OF PLAINTIFFS' CLAIMS

To adjudicate claims in federal court, the parties must present a case or controversy under Article III's constitutional requirement for subject-matter jurisdiction. U.S. CONST. art. III, §2. In addition, the lower federal courts have defined statutory subject-matter jurisdiction, *see, e.g.*, 28 U.S.C. §1331, which they lack authority to exceed. Eagle Forum respectfully submits that the District Court and this Court lack jurisdiction for most, if not all, of Plaintiffs' claims.

A. Plaintiffs Lack Standing

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The plaintiff's injury must involve "a legally protected interest" and its "invasion [must be] concrete and particularized" and "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560-61 & n.1.

Standing is a "bedrock requirement," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982), "founded in concern about the proper – and

properly limited – role of the courts in a democratic society.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (interior quotations and citations omitted). Standing is “fundamental to the judiciary’s proper role in our system of government,” *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976), and “[n]o principle is more fundamental” to that role “than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Id.*

Standing is “*crucial* in maintaining the tripartite allocation of power set forth in the Constitution.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added). If their jurisdiction extended beyond cases and controversies, judges could impose personal policy choices by fiat, without public recourse.²

Federal Appellants purport to have declined to appeal the District Court’s jurisdictional rulings, Fed’l Opening Br. at 21 n.13, but parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

² The Supreme Court recently emphasized that judges exceed their constitutional role when they substitute their policy views and bend constitutional texts to do what those texts were not designed to do. *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008).

Quite the contrary, appellate courts must assure themselves of jurisdiction, even if the parties concede it:

[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, *but also that of the lower courts in a cause under review*, even though the parties are prepared to concede it.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (interior quotations omitted, emphasis added). “In a long and venerable line of cases, [the U.S. Supreme] Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998). With that background, *amicus* Eagle Forum now applies the standing analysis to various aspects of the cases before this Court.

1. A Plaintiff Can Challenge DOMA’s Application Only to Statutes that Impact that Plaintiff

Although the Government Accountability Office (“GAO”) has identified over 1,000 federal laws to which DOMA applies, GAO, *Defense of Marriage Act*, at 1 (GAO-04-353R 2004), Plaintiffs here challenge DOMA’s application to only a handful of those laws. Specifically, Massachusetts challenges DOMA’s application to the State

Cemetery Grants Program, Medicaid and its implementation in Massachusetts as “MassHealth,” and the Medicare tax, *Commonwealth*, 698 F.Supp.2d at 239-44, and the private plaintiffs challenge DOMA’s application to federal-employee health-benefit programs, Social Security retirement and survivor benefits, and tax filing-status issues. *Gill*, 699 F.Supp.2d at 379-83. In sum, Plaintiffs challenge several Spending-Clause issues and two Taxing-Power issues.

Indeed, most of DOMA’s applications fall under the Spending Clause as conditions that Congress attached to the receipt of federal funds, although Massachusetts noted below that DOMA “impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act [“FMLA”], and testimonial privileges.” *Commonwealth*, 698 F.Supp.2d at 247 & n.133; *see also Gill*, 699 F.Supp.2d at 396 (discussing DOMA’s impact on immigration issues). Of the issues outside the Spending Clause, however, only the foregoing tax issues are contested.

To prevail, plaintiffs must establish standing on the merits, *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1150 (2009), which requires that each challenged DOMA application injure a plaintiff

concretely: “standing is not dispensed in gross,” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Accordingly, the District Court’s mention of immigration, testimonial privileges, and copyright protections is *dicta*.³

Although it represents a separate sovereign in our federal system, Massachusetts cannot represent its citizens as *parens patriae* when suing the federal government: “A State does not have standing as *parens patriae* to bring an action against the Federal Government.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); accord *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (Supreme Court’s precedent “prohibits” “allowing a State to protect her citizens from the operation of federal statutes”) (internal quotations omitted). Accordingly, Massachusetts must assert her own injuries.

³ Should they prevail here, Plaintiffs could assert collateral estoppel against the government in future litigation between the same parties over DOMA’s other impacts, *Montana v. U.S.*, 440 U.S. 147, 153 (1979), but new plaintiffs could not. *U.S. v. Mendoza*, 464 U.S. 154, 162-63 (1984) (“nonmutual offensive collateral estoppel simply does not apply against the government”). Given the weak defense put on by the federal government, subsequent litigation presumably will attack the application of *stare decisis* and estoppel. Cf. *Horne v. Flores*, 129 S.Ct. 2579, 2596 (2009) (suggesting lack of “true challenge” where plaintiffs and defendants appear to have sought same result).

2. Massachusetts' Self-Inflicted Injuries from *Its Own Laws Cannot Support Standing*

Because its Supreme Judicial Court has decreed that same-sex couples may marry under state law, *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), and Massachusetts decided to cover same-sex marriages in its implementation of Medicare, MASS. GEN. LAWS Ch. 118E, §61 (“MassHealth Equity Act”), Massachusetts now pays higher benefits to same-sex couples excluded from the federal definition of marriage. *Commonwealth*, 698 F.Supp.2d at 241-43. Incredibly, Massachusetts claims injury from these higher payments, notwithstanding that it remains entirely free to void its Supreme Judicial Court’s decision and the MassHealth Equity Act.

Consistent with founding principles, both the Massachusetts and federal constitutions recognize the separation-of-powers doctrine. MASS. CONST. Pt. 1, art. XXX; *Loving v. U.S.*, 517 U.S. 748, 756 (1996). “Even before the birth of this country, separation of powers was known to be a defense against tyranny.” *Loving v. U.S.*, 517 U.S. at 756. Although both the Massachusetts and federal constitutions recognize the doctrine, Massachusetts’ state-law version does not aid Massachusetts in federal court. To the contrary, if plaintiffs’ self-inflicted injuries could

manufacture standing, Article III's limits would have no meaning.

Accordingly, Massachusetts' decision to allow same-sex marriage cannot support Massachusetts' standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (no standing to redress "self-inflicted" injuries); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injury does not support standing if it is "so completely due to the [complainant's] own fault as to break the causal chain") (*quoting* 13 WRIGHT, MILLER & COOPER, FED. PRAC. & PROC.: JURISDICTION 2d §3531.5 (2d ed. 1984)). The Constitution shields Massachusetts' decision to allow same-sex marriage *within its borders*, but Massachusetts cannot turn that shield into a sword to attack federal law.

Significantly, the "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. U.S.*, 445 U.S. 684, 689 (1980); *Tarrant v. Ponte*, 751 F.2d 459, 464 (1st Cir. 1985). Because "States are free to allocate the lawmaking function to whatever branch of state government they may choose," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.6 (1981), Massachusetts may override the Supreme Judicial Court by constitutional amendment or even abolish the Supreme Judicial Court. Massachusetts' voluntary

acquiescence to that court's decision cannot manufacture a controversy with the United States. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to Medicare.

3. Massachusetts' Cemetery-Related Injuries Are Purely Speculative and Non-Imminent

From 2004 to 2008 (*i.e.*, in the prior Administration), the executive branch advised Massachusetts that burying veterans' same-sex spouses in veterans' cemeteries *could* require reimbursing funds the federal government provided under the State Cemetery Grants Program, 38 U.S.C. §2408 ("SCGP"). *Commonwealth*, 698 F.Supp.2d at 240-41. The current Administration favors repealing DOMA, Fed'l Opening Br. at 23 n.14, and repealed the "Don't Ask, Don't Tell" law ("DADT"). PUB. L. NO. 111-321, 124 Stat. 3515 (2010). It is inconceivable that the current Administration would exercise *discretion* to demand reimbursement for military cemeteries. 38 U.S.C. §2408(b)(3) (entitling – without requiring – recovery of SCGP grants); 38 C.F.R. §39.10(c) (same). To have standing to avoid *future* enforcement, Plaintiffs must face a "credible threat" of enforcement. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). That threat is entirely lacking under the current Administration and thus insufficiently imminent for

standing. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to SCGP.

B. Anti-Injunction Act Denies Jurisdiction for All Tax-Related Relief

To the extent that Plaintiffs seek relief from DOMA's impact on tax legislation, the District Court and this Court lack jurisdiction for injunctive or declaratory relief. Under the Anti-Injunction Act ("AIA"), with exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). Similarly, the Declaratory Judgment Act provides jurisdiction to the district courts for declaratory relief "except with respect to Federal taxes." 28 U.S.C. §2201(a). With equitable relief thus denied, Plaintiffs cannot bring tax-related claim.

Applying the AIA preserves the government's ability to collect tax assessments expeditiously, with "a minimum of preenforcement judicial interference," "require[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (internal quotation omitted). The parallel provision in the Declaratory Judgment Act further demonstrates the "congressional

antipathy for premature interference with the assessment or collection of any federal tax.” *Bob Jones Univ.*, 416 U.S. at 732 n.7.

Apart from their power to consider validly filed refund claims, district courts lack jurisdiction to order the abatement of tax liability. *McMillen v. U.S. Dept. of Treasury*, 960 F.2d 187, 188-89 (1st Cir. 1991). Indeed, courts lack jurisdiction not only for employers’ pre-enforcement challenges to employment taxes, *Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842, 844-45 (D.C. Cir. 1987), but even for pre-enforcement constitutional challenges. *U.S. v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 10 (2008) (“unmistakably clear that the constitutional nature of a taxpayer’s claim ... is of no consequence”) (alteration in original, interior quotations omitted).⁴ Under the circumstances, this Court must dismiss Plaintiffs’ challenges to DOMA as applied to taxes.

C. Sovereign Immunity Bars Claims for Money Damages

Plaintiffs lack jurisdiction to sue the federal government without a

⁴ District courts’ jurisdiction for tax claims, 28 U.S.C. §1346(a)(1), carries jurisdictional predicates not met here: pre-enforcement claims for refunds, 26 U.S.C. §7422(a); *McMillen*, 960 F.2d at 188-89, and strict timelines to file claims. 26 U.S.C. §6511(a) (later of 3 years from return or 2 years from paying). Like failure to present claims administratively, untimeliness is jurisdictional. *U.S. v. Dalm*, 494 U.S. 596, 602 (1990).

waiver of sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Officer suits for *prospective* injunctive relief against ongoing violations of federal law are an exception to sovereign immunity, *Ex parte Young*, 209 U.S. 123 (1908), but that exception does not allow money damages or even “retroactive payment of benefits ... wrongfully withheld.” *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Similarly, 5 U.S.C. §702 “eliminates the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer,” *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. REP. NO. 94-996, 8 (1976)), but its express terms omit “money damages.” 5 U.S.C. §702. To recover money damages, Plaintiffs must proceed under a waiver of sovereign immunity for such damages.⁵

For damage claims *not sounding in tort*, the “Little Tucker Act” provides district-court jurisdiction for nontax claims up to \$10,000, and

⁵ A “*Bivens*” action covers *some* equal-protection violations, *Davis v. Passman*, 442 U.S. 228, 247-49 (1979), but only for individual-capacity defendants, *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir. 2009) (“*Bivens* doctrine does not override bedrock principles of sovereign immunity ... to permit suits against the United States, its agencies, or federal officers sued in their official capacities”) (interior quotation omitted), and probably would fail, in any event, where Plaintiffs have adequate alternate remedies. *Bush v. Lucas*, 462 U.S. 367, 388 (1983).

the Tucker Act provides jurisdiction for all amounts. 28 U.S.C. §§1346(a)(2), 1491(a)(1).⁶ If Plaintiffs had non-tort claims under the Little Tucker Act, Federal Appellants would have appealed to the wrong court: the Federal Circuit has exclusive appellate jurisdiction “over every appeal from a Tucker Act or nontax Little Tucker Act claim,” *U.S. v. Hohri*, 482 U.S. 64, 73 (1987) (emphasis in original), including “mixed cases” with nontax Little Tucker Act claims coupled with claims typically resolved in regional courts of appeals. *Hohri*, 482 U.S. at 78; 28 U.S.C. §1295(a)(2). But discrimination claims sound in tort, *Wilson v. Garcia*, 471 U.S. 261, 277 (1985), abrogated on other grounds by 28 U.S.C. §1658, for which the Tucker and Little Tucker Acts provide no jurisdiction. *Tempel v. U.S.*, 248 U.S. 121, 129 (1918); *Roman v. Velarde*, 428 F.2d 129, 131-32 (1st Cir. 1970).

Similarly, the Federal Tort Claims Act (“FTCA”) waives sovereign immunity for tort-related damages, but that waiver excludes “claim[s] based upon an act or omission of an employee of the Government,

⁶ Unless withdrawn or duplicated by another statute, §1491(a)(1)’s jurisdiction is exclusive. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 519-20 (1998); cf. *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988).

exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.” 28 U.S.C. §2680(a). Falling outside FTCA’s waiver of sovereign immunity, Plaintiffs cannot recover tort damages. *Molzof v. U.S.*, 502 U.S. 301, 304-05 (1992) (before FTCA, “sovereign immunity ... prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits”).

To the extent that *any* of Plaintiffs’ claims *do not sound in tort*, this Court lacks jurisdiction and should transfer the entire appeal to the Court of Appeals for the Federal Circuit. 28 U.S.C. §1631. Because Plaintiffs’ claims sound in tort, albeit outside FTCA’s waiver of immunity, this Court must dismiss Plaintiffs’ damage claims.

D. Sovereign Immunity Bars Claims where Plaintiffs Have Adequate Alternate Remedies in Court

As indicated in the prior section, the doctrine of sovereign immunity allows suits for equitable and declaratory relief, which may proceed under either the officer-suit fiction of *Ex parte Young*, 209 U.S. 123 (1908), or 5 U.S.C. §702’s waiver of sovereign immunity. Although both *Ex parte Young* and §702 provide resort to equitable relief, they also both are conditioned upon exhausting alternate legal remedies. Like equitable relief’s requiring inadequate legal remedies, *Beacon*

Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959), §702’s waiver of sovereign immunity is conditioned upon 5 U.S.C. §704’s limitation, in pertinent part, to actions “for which there is no other adequate remedy in a court.” Several of Plaintiffs’ claims have or even *require* alternate remedies, so sovereign immunity bars suit. Under the circumstances, this Court must dismiss Plaintiffs’ challenges to DOMA as applied to Medicare, Social Security, and tax claims with alternate remedies.

E. Medicare and Social Security Statutes Require Exhausting those Statutes’ Administrative Process

Where they seek relief from Social Security or Medicare, Plaintiffs first must present their claims administratively under those statutes’ administrative-channeling mechanisms. 42 U.S.C. §§405(g)-(h), 1395ii. Under the circumstances presented here, “Section 405(g) contains the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court,” *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 15 (2000), which withdraws district courts’ jurisdiction under 28 U.S.C. §§1331, 1346 for claims outside that channeling process. 42 U.S.C. §§405(g)-(h), 1395ii. Under the circumstances, this Court must dismiss Plaintiffs’ challenges to DOMA as applied to Medicare and Social Security.

II. DOMA SATISFIES DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AMENDMENT

The District Court found DOMA to deny Equal Protection,⁷ based on one-sided legislative facts. To negate federal interests in marriage, Plaintiffs' historian airbrushed federal opposition to bigamy out of existence, *compare Commonwealth*, 698 F.Supp.2d at 236-39 *with Reynolds v. U.S.*, 98 U.S. 145 (1879), and Federal Appellants threw marriage's traditional justifications of responsible procreation and childrearing under the polemical bus of left-leaning policy statements. *Gill*, 699 F.Supp.2d at 388 n.106. Because review of legislative facts and legal conclusions is *de novo*, *U.S. v. Volungus*, 595 F.3d 1, 4 (1st Cir. 2010), the District Court's facts are neither relevant nor controlling, and DOMA easily satisfies the Fifth Amendment.

A. Same-Sex Marriage Is Not a Fundamental Right under the Due Process Clause

Under substantive Due Process, the Supreme Court recognizes "heightened protection against government interference with certain

⁷ The Due Process Clause includes an equal-protection component that parallels the Equal Protection Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

fundamental rights and liberty interests,” which courts are “reluctant to expand ... because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,” reflecting only the “policy preferences” of the presiding judge. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). To cabin any possible impulse to impose policy preferences by judicial fiat, the Supreme Court limits fundamental rights to “those fundamental rights and liberties which are, *objectively*, deeply rooted in this Nation’s history and tradition.” *Glucksberg*, 521 U.S. at 720-21 (emphasis added, interior quotations omitted).

Although *husband-wife marriage* unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“the decision to marry is a fundamental right”); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“[m]arriage and procreation are fundamental”), the federal Constitution has never recognized the unrestricted right to marry *anyone*. Instead, the fundamental right recognized by the Supreme Court applies only to marriages between one man and one woman: “Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Unlike opposite-sex

marriage, same-sex marriage is not fundamental to the existence and survival of the human race. Indeed, the Supreme Court held that same-sex couples have no right to marry, much less a fundamental right do so. *Baker v. Nelson*, 409 U.S. 810 (1972). *Baker* ends this matter.⁸

It is also significant that ten of the thirteen states that originally ratified the Fifth Amendment⁹ – and all but two of the thirty-seven

⁸ Because the Supreme Court resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court must review the “jurisdictional statement filed in the Supreme Court ... and any other relevant aid to construction in order to ascertain what issues were ‘presented and necessarily decided’ by the Court’s summary dismissal.” *Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)); cf. *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110, 122 n.5 (1st Cir. 1983) (“summary affirmance ... can be taken only to affirm the precise issues decided by the court below”), *aff’d*, 470 U.S. 274 (1985). The *Baker* jurisdictional statement plainly presented (and *Baker* thus plainly decided) the question whether denying same-sex marriage violates Equal Protection. Add. 23a-34a. Taking the Supreme Court at its word, nothing has undermined *Baker* with respect to same-sex marriage. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (*Lawrence* “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

⁹ GA. CONST. art. I, §IV, ¶I; S.C. CONST. art. XVII, §15; VA. CONST. art. I, §15-A; DEL. CODE ANN. tit. 13, §101; MD. CODE ANN., FAM. LAW §2-201; N.C. GEN. STAT. §51-1.2; PA. CONS. STAT. §1704; R.I. GEN. LAWS §§15-1-1 to -5; *Chambers v. Ormiston*, 935 A.2d 956, 962 (R.I. 2007); *Hernandez*, 7 N.Y.3d at 366, 855 N.E.2d at 12; cf. *Quarto v. Adams*, 395 N.J. Super. 502, 511, 929 A.2d 1111, 1116 (N.J. Super.A.D. 2007).

states that subsequently joined the Union¹⁰ – have, in much more homosexual-friendly times, defined marriage as a union between husband and wife. While “not conclusive in a decision as to whether that practice accords with due process,” the “fact that a practice is followed by a large number of states is ... plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971). In ratifying twenty-nine constitutional marriage amendments, States acted with the same solemnity with which they ratified the Fifth and Fourteenth Amendments. Whatever the founding colonies had in mind

¹⁰ See ALA. CONST. art. I, §36.03; ALASKA CONST. art. 1, §25; ARIZ. CONST. art. XXX, §1; ARK. CONST. amend. 83, §§1-3; CAL. CONST. art. I, §7.5; COLO. CONST. art. II, §31; FLA. CONST. art. I §27; IDAHO CONST. art. III, §28; KAN. CONST. art. XV, §16; KY. CONST. §233a; LA. CONST. art. XII, §15; MICH. CONST. art. I, §25; MISS. CONST. art. XIV, §263a; MO. CONST. art. I, §33; MONT. CONST. art. XIII, §7; NEB. CONST. art. I, §29; NEV. CONST. art. I, §21; N.D. CONST. art. XI, §28; OHIO CONST. art. XV, §11; OKLA. CONST. art. II, §35; OR. CONST. art. XV, §5a; S.D. CONST. art. XXI, §9; TENN. CONST. art. XI, §18; TEX. CONST. art. I, §32; UTAH CONST. art. I, §29; WIS. CONST. art. XIII, §13; HAW. REV. STAT. §572-1, -3; 750 ILL. COMP. STAT. 5/212; IND. CODE §31-11-1-1; 19-A ME. REV. STAT. §701.5; MINN. STAT. §517.01; WASH. REV. CODE §26.04.010-20; W. VA. CODE §48-2-603; WYO. STAT. ANN. §20-1-101; N.M. Stat. §§40-1-1 to -7.

in 1787, the idea of same-sex marriage is not “deeply rooted” *today*.

B. Denying Benefits to Same-Sex Marriage Does Not Violate Equal Protection under the Fifth Amendment

DOMA does not trigger heightened equal-protection scrutiny because same-sex couples are not a suspect class. The United States has an unquestionable interest in supporting responsible and stable procreation and childrearing through husband-wife marriage, which easily satisfies the rational-basis test.

1. Plaintiffs’ Claimed Discrimination Does Not Trigger Heightened Scrutiny

For constitutional equal-protection claims without a suspect class, courts evaluate differential treatment under the rational-basis test. *Cf. Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (evaluating sexual-orientation discrimination under rational-basis test).¹¹ Significantly, intermediate scrutiny cannot apply because DOMA’s differential

¹¹ Homosexuals cannot trigger strict scrutiny as a class “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Indeed, the homosexual lobby recently succeeded in legislatively repealing DADT. PUB. L. NO. 111-321, 124 Stat. 3515 (2010).

treatment of same-sex and opposite-sex couples is not *because of sex*.¹²

For intermediate scrutiny even potentially to apply, the defendant must have acted *because of* the plaintiff's sex, not merely in spite of it. *Feeney*, 442 U.S. at 279; *cf. Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (“[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions ... to which members of the other sex are not exposed”). DOMA is facially neutral with respect to sex, applying equally to same-sex female couples and same-sex male couples, as the individual Plaintiffs demonstrate. Because something other than sex drives any differential treatment, DOMA does not constitute differential treatment *because of sex*.¹³

¹² Strictly speaking, treating same-sex couples differently is not the same as treating homosexuals differently, notwithstanding a disparate impact on homosexuals. Disparate impacts alone cannot support an equal-protection claim. *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹³ *Loving* properly rejected Virginia's claim that its miscegenation statute neutrally treated whites and blacks equally. *Loving*, 388 U.S. at 8-9. There, the statute *did not* apply equally to whites and non-whites, had a race-based purpose, and was “designed to maintain White Supremacy.” *Loving*, 388 U.S. at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting). Here, DOMA has no *sex-based* purpose whatsoever. Even

(Footnote cont'd on next page)

2. DOMA Satisfies the Rational-Basis Test

Under rational-basis review, Equal Protection does not require that the decisionmaker's reasoning is objectively correct. Instead, it suffices if "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Moreover, courts give economic and social legislation a presumption of rationality, and "Equal Protection ... is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988) (interior quotations omitted). DOMA easily meets this test.

Under the rational-basis test, equal-protection plaintiffs "must convince the court that the *legislative* facts on which the classification is

(Footnote cont'd from previous page.)

the District Court tied DOMA to *anti-homosexual* animus, not anti-female or anti-male animus. *Gill*, 699 F.Supp.2d at 396.

apparently based could not reasonably be conceived to be true by the governmental decisionmaker,” a burden that “the plaintiff can carry ... by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact.” *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988) (interior quotations omitted, emphasis added). As explained below, the standard is not what *is true*, but what the decisionmaker *could reasonably believe to be true*. “[T]his burden is ... a considerable one,” *id.*; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (those attacking the rationality of legislative classifications have the burden “to negative every conceivable basis which might support it”) (internal quotations omitted), but it is the only way that Plaintiffs can prevail.

“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (same). Because a merely arguable basis will support government action, even the one-sided evidentiary presentation here cannot bear the weight that the District Court placed on it.

For example, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981), the plaintiff marshaled “impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers” would be counterproductive. That evidence served no purpose because it attacked the “*empirical* connection between” the ban and the legislative purpose, without “challeng[ing] the *theoretical* connection” between the two. *Id.* (emphasis in original). As explained below, the data that Plaintiffs need to negative the procreation and childrearing rationale for traditional husband-wife marriage simply do not exist, and yet those data are Plaintiffs’ burden to produce.

The most widely recognized social purpose of marriage is to provide for responsible procreation and childrearing. *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage is “an institution regulated and controlled ... for the benefit of the community,” in which “the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress”); *Skinner*, 316 U.S. at 541 (“Marriage and procreation are fundamental to the very existence and survival of the race”); *Citizens for Equal Prot. v.*

Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (*quoted infra*); *Loving*, 388 U.S. at 12 (*quoted supra*); note 14, *infra* (collecting cases). Children born within husband-wife marriages have the uniquely valuable opportunity to know their own biological mother and father. Common understanding easily establishes DOMA's goals as worthy and well-served by husband-wife marriage. By contrast, same-sex marriage obviously neither produces biological offspring nor serves these goals.

As indicated above, the rational-basis test does not *require* that research support husband-wife marriage's benefits for childrearing. It is enough that Congress *plausibly* could find that link, based on merely *arguable* legislative facts. *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979). And it is *Plaintiffs' burden* to negative that link's plausibility. "Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton v. Sec'y of Dept. of Children & Family Services*, 358 F.3d 804, 820 (11th Cir. 2004). Without that definitive proof that "millennia of human experience" are objectively wrong and that Congress could not *plausibly* link biological

parenting to childrearing, Plaintiffs cannot use the courts to coerce the United States into their brave new world.

The two decisions below represent one district judge's conclusions, but other judges have reached opposite conclusions:

[T]he many laws defining marriage as the union of one man and one woman ... are rationally related to the government interest in steering procreation into marriage.

Bruning, 455 F.3d at 867 (interior quotations omitted).¹⁴ That alone establishes that DOMA satisfies the equal-protection inquiry. *Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986) (“[t]he difficulty with applying [the clearly-erroneous] standard to ‘legislative’ facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies ... has reached a [contrary] conclusion”). Marriage remains plausibly linked to procreation and childrearing.

¹⁴ See, e.g., *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 388-89, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting); *Standhardt v. Superior Court of Ariz.*, 206 Ariz. 276, 288-89, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 336-37 (D.C. 1995); *Hernandez v. Robles*, 7 N.Y.3d 338, 359-61, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Conaway v. Deane*, 401 Md. 219, 317-23, 932 A.2d 571, 630-34 (Md. Ct. App. 2007); *Andersen v. King County*, 158 Wash. 2d 1, 35-42, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005).

Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, Plaintiffs here face an *impossible* burden. While Eagle Forum submits that Plaintiffs *never* will negative the value of traditional husband-wife families for childrearing, Plaintiffs clearly cannot prevail when the data *required by their theory of the case* do not – indeed cannot – yet exist. Plaintiffs therefore lack the very data that could negate DOMA’s linkage to a legitimate legislative end. Unlike legislators, Plaintiffs cannot ask that we take their word for it.

3. The Federal Litigants’ Concessions Cannot Undermine DOMA’s Congressional Bases

Relying on left-leaning professional-academic associations, Federal Appellants choose not to rely on childrearing. *Gill*, 699 F.Supp.2d at 388 n.106; Fed’l Opening Br. at 30 n.16. The cited authorities (Add. 1a-17a) are mere policy statements, reflecting faculty-lounge groupthink:

Given the widespread support for same-sex marriage among social and behavioral scientists, it is becoming politically incorrect in academic circles even to suggest that arguments being used in support of same-sex marriage might be wrong. There already seems to be some reluctance on the part of researchers and scholars to address issues

concerning fatherlessness and the relative merits of same-sex and opposite-sex parenting.

Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 SOC'Y 25, 27 (2004) (Add. 21a). Even if these purported authorities were “studies” instead of political statements, they could not displace the basis on which Congress – a coequal branch of government – enacted DOMA.

As explained in Section II.B.2, *supra*, the underlying data are too thin to support the definitive findings that Plaintiffs would need to prevail (namely, that Congress could not plausibly believe that husband-wife marriage contributes to responsible procreation and childrearing). Moreover, the existing studies are simply inapposite, focusing on “children raised by gay and lesbian parents,” most of whom also have a parent of the sex opposite the now-homosexual parent. *At most*, that could show that children of broken homes with one now-homosexual parent fare as badly as other children of broken homes. Nothing in the rational-basis test compels Congress to aim that low.

Because the District Court reached it, Congress relied on it, and *amici* brief it, this Court can reach DOMA’s responsible-childrearing rationale. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Cleland v. Nat’l Coll. of Business*, 435 U.S. 213, 220 (1978); *Aroostook Band of*

Micmacs v. Ryan, 484 F.3d 41, 73 n.11 (1st Cir. 2007). Alternatively, if this Court disqualifies the statutory rationale, any decision should be unpublished. 1ST CIR. RULE 36.0(b)(1) (unpublished “opinion[s] do[] not ... serve ... as a significant guide to future litigants”).

4. The District Court’s Fact-Finding Is Neither Relevant Nor Controlling

The District Court attempted to determine the facts, but “it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.” *Clover Leaf Creamery*, 449 U.S. at 470, Accordingly, the District Court’s purported facts – even if they were true – could not negative a rational basis for DOMA. *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995) (“district court ... should not have conducted a trial, and we disregard its conclusions”). The rational-basis test does not allow courts to substitute their own views for the permissible views of Congress.

Although the *Lawrence* majority held that that case had nothing to do with same-sex marriage, *Lawrence*, 539 U.S. at 578, the District Court cites Justice Scalia’s *dissent* to argue that DOMA cannot concern procreation and childrearing because it allows opposite-sex couples to marry even if infertile or not wanting children. *Gill*, 699 F.Supp.2d at

389 (*citing Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting)). At the outset, it turns *stare decisis* on its head to attempt to silence a majority with a dissent. Even with that aside, the argument is a *non sequitur*.

Unlike strict scrutiny, the rational-basis test does not require narrow tailoring. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-317 (1976). Moreover, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Finally, by reinforcing the family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

III. DOMA SATISFIES THE TENTH AMENDMENT

Under the Tenth Amendment, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. “Every law enacted by Congress must be based on one or more of” its “enumerated powers,” *U.S. v. Morrison*, 529 U.S. 598, 607 (2000). This Section shows that DOMA falls within those enumerated

powers, making the Tenth Amendment inapposite by its terms.¹⁵

Action under an enumerated power cannot lawfully coerce States “to engage in activities that would themselves be unconstitutional.” *U.S. v. Am. Library Ass’n*, 539 U.S. 194, 194 (2003). As *amicus* Eagle Forum reads it, *Commonwealth* found DOMA to violate the Tenth Amendment because DOMA discriminates (and compels Massachusetts to discriminate) against same-sex couples. Compare *Commonwealth*, 698 F.Supp.2d at 248-49 with *Gill*, 699 F.Supp.2d at 386-97. As Section II, *supra*, explains, however, DOMA does not violate equal-protection principles, thereby negating the perceived Tenth-Amendment violation.

Under the Full-Faith-and-Credit Clause, “Congress may by general laws prescribe the manner in which [State acts] shall be proved, and the effect thereof.” U.S. CONST. art. IV, §1. Under Article I, “Congress shall have power to lay and collect taxes ... [to] provide for

¹⁵ Federal Appellants address Massachusetts’ perceived alternate argument that the Tenth Amendment prohibits DOMA, *even if DOMA falls within an enumerated power*. Fed’l Opening Br. at 59-61. If Massachusetts indeed makes that alternate argument here, Federal Appellants adequately address that argument. *Id.* Although federal action under an enumerated power can violate the Tenth Amendment by “commandeering” the States, DOMA does not do commandeer Massachusetts. *Commonwealth*, 698 F.Supp.2d at 252 n.156.

the ... general welfare of the United States,” *id.* art. I, §8, cl. 1, and “[t]o regulate commerce ... among the several states.” *Id.* art. I, §8, cl. 3. The Sixteenth Amendment exempts income taxes from the Constitution’s other limitations on direct taxes. *Id.* amend XVI. Finally, under the Necessary-and-Proper Clause, Congress may “make all laws which shall be necessary and proper for carrying into execution the [Article I, §8] powers, and all other powers vested by this Constitution in the [federal] government.” *Id.* art. I, §8, cl. 18. These broad powers provide sufficient authority for all DOMA applications challenged here.

At the outset, it would be anomalous for the Constitution to provide Congress authority to legislate the effect of State acts in sister States without providing authority to legislate their effects in federal matters. Indeed, courts have “consistently held that federal law governs questions involving the rights of the [U.S.] arising under nationwide federal programs.” *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Of course, absent controlling federal statutes or a “need for a nationally uniform body of law,” courts often adopt “state law ... as the federal rule of decision.” *Id.* 728; *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006) (“prudent course ... is often to adopt the ready-

made body of state law as the federal rule of decision until Congress strikes a different accommodation”) (internal quotation omitted). But now that Congress has enacted a federal rule, that rule must control.

With respect to the Taxing Power and Spending Clause, Congress may use its broad power for purposes that would exceed its other enumerated powers. *U.S. v. Sanchez*, 340 U.S. 42, 44 (1950), and determining how to “provide for the ... general Welfare” is for the representative branches, not for the courts. *Helvering v. Davis*, 301 U.S. 619, 640, 645 & n.10 (1937); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Similarly, courts “will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution” where (as here) taxes are “productive of some revenue.” *Sonzinsky v. U.S.*, 300 U.S. 506, 514 (1937). Finally, with respect to non-tax, non-spending statutes like FMLA, Congress plainly has Commerce-Clause authority to regulate employment. *See, e.g., U.S. v. Darby*, 312 U.S. 100, 118 (1941) (Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 (1937) (National Labor Relations Act). Plaintiffs cannot seriously contend otherwise.

CONCLUSION

This Court should reverse the District Court's judgment.

Dated: January 26, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the foregoing “*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in Support of Appellants in Support of Reversal” complies with FED. R. APP. P. 32(a)(7)(B)’s type-volume limitation, FED. R. APP. P. 32(a)(5)’s typeface requirements, and FED. R. APP. P. 32(a)(6)’s type-style requirements because the brief contains 6,927 words, excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts, and is proportionately spaced in 14-point Century Schoolbook typeface. I have relied on Microsoft Word 2007’s word-count feature for the calculation.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I electronically filed the foregoing “*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in Support of Appellants in Support of Reversal” and its accompanying Addendum with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel of record for all participants in the case are registered CM/ECF users and that service on all participants will be accomplished by the Appellate CM/ECF System.

/s/ Lawrence J. Joseph

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