IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

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

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

NANCY GILL, et al.,
Plaintiffs-Appellees,

v.

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

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

COMBINED REPLY BRIEF AND RESPONSE BRIEF FOR THE FEDERAL DEFENDANTS

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STATEMENT OF JURISDICTION

The jurisdiction for federal defendants' appeal is set out in our superseding opening brief. Fed. Def. Br. 1–2. With respect to the cross-appeal, cross-appellant Dean Hara states in his cross-appellant's brief that the district court had jurisdiction

pursuant to 5 U.S.C. § 8912 and 28 U.S.C. § 1331. The federal defendants address the jurisdiction of the district court over Hara's claim in Part III, below. Following the district court's entry of a final judgment dismissing Hara's claim, he filed a timely cross-appeal on October 13, 2010. JA 1428. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues presented in federal defendants' appeal were discussed in our superseding opening brief, and are briefly addressed again below. The issue presented by plaintiff Hara's cross-appeal is: whether the district court could redress Hara's claim that he was entitled to benefits under the Federal Employees' Health Benefit Plan ("FEHBP"), when those benefits are only provided to a survivor-annuitant of a former federal employee, and the question of whether Hara is an eligible survivor-annuitant must be addressed and resolved by the United States Merit Systems Protection Board ("MSPB"), with review by the United States Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

With respect to the cross-appeal, Hara is one of several plaintiffs challenging the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA") in this case. Hara has two separate claims, and only one, for benefits under FEHBP, is at issue in this cross-appeal.

Under that claim, Hara seeks enrollment in the FEHBP program as the survivor

of his spouse, former United States Representative Gerry Studds. Hara had previously sought to enroll in FEHBP as a survivor annuitant. The Office of Personnel Management ("OPM") found Hara ineligible for a survivor annuity, and the MSPB affirmed OPM's denial. Hara appealed that decision to the Federal Circuit, which stayed that case pending the outcome of this action.

The district court dismissed for lack of standing Hara's FEHBP claim, holding that it could not redress Hara's inability to enroll in FEHBP because he had not been declared eligible for a survivor annuity in the exclusive process Congress has established to review that determination—at the MSPB, or on appeal to the Federal Circuit. Hara timely cross-appealed that holding.

STATEMENT OF THE FACTS

The statutory, factual, and procedural background of this case was set out in our superseding opening brief. Fed. Def. Br. 5–21. We outline here the procedural facts specifically relevant to Hara's cross-appeal.

I. Statutory Background

FEHBP is a comprehensive program of health insurance for federal civilian employees, annuitants, former spouses of employees and annuitants, and their family members. 5 U.S.C. § 8905. Premiums in FEHBP are paid by both the government and the enrollees. *Id.* § 8906. Generally, an enrollee in FEHBP chooses the carrier and plan in which to enroll, as well as whether to enroll for individual ("self only") coverage or

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

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

Survivor annuity claims and elections are submitted to OPM. 5 U.S.C. § 8347(b); 5 C.F.R. § 831.104(a). If OPM denies the claim or rejects the election, a claimant or retiree may seek reconsideration "within 30 calendar days from the date of the original decision." *Id.* § 831.109(d), (e). OPM's decision on reconsideration may be appealed to the MSPB within 30 days. 5 U.S.C. § 8347(d)(1); 5 C.F.R. §§ 831.110, 1201.22(b)(1). Judicial review of a decision by the MSPB lies exclusively in the Federal Circuit, and must be sought within 60 days after receipt of the MSPB decision. 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9).

II. Facts and Prior Proceedings

Plaintiff Dean Hara seeks enrollment in FEHBP as the survivor of his spouse, former United States Representative Gerry Studds. JA 711. As Hara acknowledges, "Hara's eligibility for FEHB[P] required Hara to also be eligible for a survivor annuity under federal retirement laws." *Gill* Pl. Br. 66.

Hara and the other *Gill* plaintiffs brought this suit in the district court, asking the district court to strike down DOMA as unconstitutional as applied to them. *See* JA 709–825. The government moved to dismiss the complaint, and the plaintiffs moved for summary judgment. JA 826, 828. Given the absence of disputed facts, the district court resolved both motions together and, on July 8, 2010, granted summary judgment to the plaintiffs, except as to the FEHBP claim brought by Hara. JA 1368.

Instead, the district court first dismissed for lack of standing Hara's FEHBP claim (but not his other claims). JA 1382–83. Hara had previously sought to enroll in FEHBP as a survivor annuitant based on his deceased spouse's federal employment. *Id.* OPM found Hara ineligible for a survivor annuity, both on initial review and on reconsideration, and the MSPB affirmed OPM's denial. JA 1383. Hara appealed that decision to the Federal Circuit,[1] which has stayed that case pending the outcome of this action. *Id.* The district court held that it could not redress Hara's inability to enroll in FEHBP because, unless and until he is declared eligible for a survivor annuity, he will

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

remain ineligible for FEHBP enrollment regardless of the DOMA provision challenged in this suit. *Id.*

As to the other *Gill* plaintiffs—and with respect to Hara's other claims—the court held that DOMA Section 3 violates the equal protection component of the Fifth Amendment Due Process Clause. That aspect of the district court's decision is the subject of the federal defendants' appeal.

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

SUMMARY OF ARGUMENT

As discussed in the federal defendants' superseding opening brief, Section 3 of DOMA unconstitutionally discriminates by treating same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples. Under the well-established factors set forth by the Supreme Court, discrimination based on sexual orientation merits heightened scrutiny, and, under that standard of review, Section 3 violates equal protection principles and is unconstitutional. Moreover, because

it violates equal protection principles, Section 3 exceeds the authority of the Spending Clause. However, Section 3 presents no further Spending Clause concerns independent of its violation of equal protection, and it does not violate the Tenth Amendment.

1. The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") has not addressed the substance of our argument that, under Supreme Court precedent, laws that classify on the basis of sexual orientation should be subject to heightened scrutiny. Instead, BLAG primarily contends that Section 3 is subject to rational basis review under circuit precedent, and passes that level of review. As we have previously submitted, such precedent should be revisited. Moreover, BLAG's other arguments—that *Baker v. Nelson*, 409 U.S. 810 (1972), controls and that marriage definitions should be left to the democratic process—are inapt. *Baker* did not address the constitutionality of a federal law that distinguishes among couples who are already legally married and that was motivated by animus toward gay and lesbian people. Nor did it consider whether classifications on the basis of sexual orientation are subject to heightened scrutiny. Assuming it were preferable for Congress to repeal DOMA through a democratic process, that does not alter this Court's responsibility to invalidate an unconstitutional law.

2. If this Court concludes that Section 3 violates equal protection, it must also conclude that Section 3 is not authorized by the Spending Clause. In that event, this Court need not reach Massachusetts's alternative claims. However, if this Court does

reach these claims, it should reject them. Section 3 of DOMA presents no further concerns under the Spending Clause. Section 3 is, by definition, "germane" to the purposes of the federal programs it modifies. And, as argued in our superseding opening brief, if this Court holds that Section 3 does not violate principles of equal protection and is therefore authorized by the Spending Clause, Section 3 does not violate the Tenth Amendment. *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997) (noting that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power"). Massachusetts nowhere refutes that fundamental principle, and its arguments are therefore all without merit.

3. Finally, Dean Hara cross-appeals the district court's dismissal of his FEHBP claim for lack of standing. To be entitled to enrollment in FEHBP, Hara must be determined eligible for a survivor annuity. OPM's denial of Hara's survivor annuity is on appeal in the Federal Circuit, which has exclusive jurisdiction over such an appeal. That court, and not the district court here, therefore has the exclusive ability to grant Hara a survivor annuity, which is a prerequisite to Hara being eligible for enrollment in FEHBP. Hara therefore is unable to receive the relief he requests from the district court, so his injury is not redressable in this action. The district court properly dismissed his FEHBP claim for lack of standing.

STANDARD OF REVIEW

With respect to the cross-appeal, this Court reviews *de novo* a dismissal of a claim for lack of standing. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011).

ARGUMENT

In our superseding opening brief, the federal defendants explained why DOMA Section 3 violates principles of equal protection, and also explained that Section 3 does not, independent of its violation of equal protection, separately violate the Spending Clause or Tenth Amendment. Below, we address plaintiffs' equal protection challenges, Massachusetts's Spending Clause and Tenth Amendment challenges, and then finally, Hara's cross-appeal, in turn.

I. Section 3 of DOMA Violates Principles of Equal Protection.

As explained in our superseding opening brief, Fed. Def. Br. 24–53, Section 3 of DOMA unconstitutionally violates principles of equal protection. Under the established set of factors relevant to whether heightened scrutiny applies to a specific group, laws such as Section 3 that classify on the basis of sexual orientation should be subject to heightened scrutiny, and Section 3 fails such heightened scrutiny.[2]

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[2] Because DOMA violates the equal protection component of the Due Process Clause, this Court need not reach plaintiffs' alternative due process arguments that Section 3 should be subject to heightened scrutiny because it burdens their "constitutionally protected interest in the integrity of their families," *Gill* Pl. Br. 55–58, or that Section 3 should be closely scrutinized because it represents an intrusion on state family law, *Gill* Pl. Br. 58–59.

The law is clear that the government is not required to subsidize the exercise of even a fundamental right. *See, e.g.*, *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S.

BLAG has not refuted the substance of the government's arguments as to why Section 3 should be subject to heightened scrutiny and why it fails that standard of review. Instead, in response to plaintiffs' equal protection claims, BLAG argues principally that Section 3 of DOMA is subject to rational basis review, and not heightened scrutiny, under circuit precedent, and that Section 3 survives this more deferential form of review. BLAG Br. 24–58. The federal defendants have previously submitted that this precedent does not adequately consider the relevant factors and should be reconsidered. Fed. Def. Br. 25–45.

BLAG raises two other separate arguments, both of which are flawed. First, BLAG contends that this case is governed by *Baker v. Nelson*, 409 U.S. 810 (1972). BLAG Br. 19–24. In *Baker*, the Supreme Court dismissed an appeal as of right from a Minnesota Supreme Court decision denying marriage status to a same-sex couple. *Id.* at 810. As a per curiam order dismissing an appeal for lack of a substantial federal question, *Baker* only "prevent[s] lower courts from coming to opposite conclusions on

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189, 196 (1989) (holding that the Due Process Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Lyng v. Automobile Workers*, 485 U.S. 360, 368 (1988) (holding that a decision "not to subsidize the exercise of a fundamental right does not infringe the right"). But the government may not single out a disfavored group of people (particularly one that is a suspect or quasi-suspect class) and refuse to fund them when they exercise a fundamental right if the government funds others exercising the same right. And, for the reasons explained in our superseding opening brief as well as further below, DOMA is unconstitutional because it singles out a suspect or quasi-suspect class of people for disfavored treatment, not because it interferes with state sovereignty or state family law.

the precise issues presented and necessarily decided" by the dismissal of the appeal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). The constitutionality of a federal statute, like DOMA Section 3, that distinguishes among couples who are already legally married in their own states was not presented and therefore not decided—necessarily or otherwise—in *Baker*. Nor did *Baker* address a statute, like DOMA Section 3, that was undeniably motivated in part by animus toward gay and lesbian people.

BLAG's argument to the contrary is based on its assumption that *Baker* stands for the proposition "that a state may define marriage as the union of one man and one woman without violating equal protection," BLAG Br. 22, and that, because the same standards apply under the equal protection component of the Fifth Amendment as under the Fourteenth Amendment, *Baker* resolves all equal protection challenges to any statutes, state or federal, that discriminate against same-sex couples in defining marriage, BLAG Br. 22. This argument involves both an overreading of *Baker* as well as a misunderstanding of equal protection review. It overreads *Baker* to reason that it addressed, resolved, or even considered a law, like DOMA, that distinguishes marriages that states do in fact recognize in a way that expressly targets marriages involving gays and lesbians for disparate and inferior treatment. *See, e.g.*, *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 874 (C.D. Cal. 2005) (noting that the "issue of allocating benefits is different from the issue of sanctifying a relationship presented in *Baker*'s jurisdictional statement"). Further, the application of heightened scrutiny is necessarily context

specific, and dependent on the actual motivation and tailoring of the challenged policy before the court. Under any level of scrutiny, the constitutionality of a 1970s Minnesota state marriage policy must be considered differently from that of a federal statute, like DOMA, that was enacted in 1996 with a legislative history replete with evidence of animus towards gays and lesbians. For that reason, *Baker* has no precedential effect on the constitutionality of Section 3.

Moreover, *Baker* does not involve the standard of review for classifications, such as DOMA Section 3, based on sexual orientation. Neither the Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs' jurisdictional statement raised whether classifications based on sexual orientation are subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup. Ct.), at 2; *see also id.* at 13 (describing equal protection challenge as based on the "arbitrary" nature of the state law). As the *Gill* plaintiffs note, *Gill* Pl. Br. 61–63, it is not even apparent that plaintiffs' equal protection claims in *Baker* were claims of sexual orientation, as opposed to sex, discrimination. *Baker*, 191 N.W.2d at 186 ("These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."). Given that the plaintiffs in *Baker* did not claim that the state law at issue classified on the basis of a suspect classification, the Supreme Court's resolution

of *Baker* cannot be taken to resolve plaintiffs' claims that Section 3 is subject to heightened scrutiny and is unconstitutional under this standard of review.

BLAG also argues that "any redefinition of marriage should be left to the democratic process." BLAG Br. 58–60. This argument ignores the fact that plaintiffs in this case are already married under state law, and Section 3 of DOMA serves not to define marriage but rather to unconstitutionally discriminate against plaintiffs' state-recognized marriages. But most importantly, BLAG's argument is a non-sequitur to plaintiffs' equal protection claims. Even assuming that it would be preferable for Congress to repeal an unconstitutionally discriminatory law, that does not mean that courts may abdicate their responsibility to apply equal protection principles, to closely scrutinize laws that discriminate against suspect classes, and to declare such laws unconstitutional if they fail heightened scrutiny.

II. If DOMA Section 3 Does Not Violate Principles of Equal Protection, It Is Authorized by the Spending Clause and Does Not Violate the Tenth Amendment.

As explained in federal defendants' superseding opening brief, Fed. Def. Br. 53–55, Section 3 of DOMA exceeds federal authority under the Spending Clause because it violates equal protection principles. Massachusetts, however, claims two alternate bases for the invalidity of Section 3: (1) that it is not sufficiently "germane" under the Spending Clause and (2) that it independently violates the Tenth Amendment. Both of these alternative claims fail.

A. DOMA Section 3 Does Not Present a "Germaneness" Problem under the Spending Clause.

Statutes that impose conditions on the receipt of federal funds or on the collection of federal taxes generally raise no constitutional concerns under the Spending Clause. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987). The Supreme Court in *Dole* identified narrow limitations on Congress's spending power, including, as pertinent to Massachusetts's argument here, "that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207 (internal quotation marks omitted).

Under this precedent, Massachusetts claims that even if Section 3 does not violate principles of equal protection, it exceeds Congressional authority under the Spending Clause because the effects of Section 3 are not sufficiently related to the purposes of the many federal programs it impacts, including the Medicaid and State Cemetery Grants programs at issue in this case. The district court did not reach this issue below, and, because Section 3 violates equal protection and therefore imposes an unconstitutional condition on Massachusetts, this Court need not reach it either.

If this Court does reach this issue, Massachsuetts's argument is wholly without merit. To the extent Congress's authority under the Spending Clause is limited to setting conditions for federal funds that are "germane" to the spending programs at issue, this limitation has no relevance to terms that merely define the scope of the very program Congress chooses to fund. In *Dole*, for example, Congress authorized the use of federal

funds for highway construction and maintenance, then conditioned a state's right to receive full federal funding on enactment of a minimum drinking age. 483 U.S. at 205. It was the requirement that states pass a minimum drinking age law as a condition for receiving federal funds—and not the requirement that federal highway funds be used for highways—that was the subject of the third constraint articulated in *Dole*. Accordingly, no court has ever suggested that there is a "germaneness" limit on Congress's ability to determine the use of the precise federal funds Congress has chosen to distribute through the states. Similarly, here, DOMA only sets terms for Massachusetts's use of federal funds. It does not separately require that Massachusetts take any action—such as recognizing or not recognizing some form of marriage—that extends beyond the use of the federally appropriated funds in accordance with federal law.

Massachusetts's precise claims about the purposes of each program (Medicaid and the State Cemetery Grants program) at issue here, and how Section 3 is allegedly unrelated to these purposes, illustrate this point. For example, Massachusetts characterizes Medicaid as "designed to provide subsidized medical care to needy individuals" and describes the Cemetery Grants program as "a program that exists to bury veterans with their loved ones." Mass. Br. 58–59. However, the purposes and terms of each of these programs are defined by Congress, not by Massachusetts, and Congress is free to modify the purposes of a federal program as it sees fit (consistent with equal protection principles, of course). *See, e.g.*, *Pennhurst State Sch. & Hosp. v.*

Halderman, 451 U.S. 1, 17 (1981) ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). Section 3 changes the definition of "spouse" that is used in the Medicaid statute to determine eligibility for Medicaid benefits and in the regulations that provide that federal grants are available for state cemeteries that are "operated solely for the interment of veterans, their spouses, [and] surviving spouses," 38 C.F.R. § 39.10(a), and thereby reflects a Congressional determination on the purposes and terms of these statutes. It is nonsensical to suggest, as Massachusetts does, that the terms of a program set by Congress are unconstitutional because they are at odds with Congress's purposes in enacting that very program.

B. DOMA Section 3 Does Not Independently Violate the Tenth Amendment.

Despite overwhelming precedent to the contrary, Massachusetts continues to argue that Section 3 violates the Tenth Amendment even if its operation as applied to this case is authorized under the Spending Clause. Again, this Court need not reach this claim if it determines that Section 3 violates equal protection principles.

1. In the event this Court reaches this claim, however, Massachusetts's argument fails. The Supreme Court and this Court have repeatedly made clear that, absent a commandeering claim, *see New York v. United States*, 505 U.S. 144, 161 (1992); *Printz v. United States*, 521 U.S. 898 907–08 (1997), the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power," *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *see*

also United States v. Lewko, 269 F.3d 64, 66–70 (1st Cir. 2001); *United States v. Meade*, 175 F.3d 215, 224 (1st Cir. 1999). As the Supreme Court has explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. This rule refutes Massachusetts's Tenth Amendment argument, given that, if this Court holds that Section 3 does not violate equal protection principles, Section 3 applies in areas where Congress is acting in accordance with its constitutionally delegated powers.

2. Massachusetts's own counter arguments underscore this point. Its core argument is that Section 3 operates to define "marital status" and that the definition of "marital status" is constitutionally left to the states. But, as explained above with respect to Massachusetts's "germaneness" argument, Section 3 of DOMA defines "marriage" and "spouse" only as they are used in various federal programs. It does not impose on Massachusetts any definition of marriage for Massachusetts law, and in fact allows Massachusetts to recognize same-sex marriages within its own borders. Massachusetts, in administering federal funds that it has chosen to receive, must of course follow the terms and conditions of the program that Congress has established, and, presumably, this is what Massachusetts means when it claims that "DOMA thus impermissibly requires the Commonwealth to recognize two marital statuses among its citizens." Mass.

Br. 21. However unfortunate it may be that this creates an administrative burden for the state, this is an aspect of every federal spending program that sets out terms and conditions that a state does not wish to incorporate broadly into its own law.

Massachusetts also appears to make the extraordinary argument that, under the Tenth Amendment, Congress is constitutionally required to accept state marital definitions wholesale into federal law. Mass. Br. 19–20, 30–31. This argument is completely without support and would turn the Supremacy Clause on its head, as, again, a federal statute's meaning and terms are defined by Congress. *See, e.g.*, *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 223–24 (1st Cir. 2003); *United States v. Ahlers*, 305 F.3d 54, 57–58 (1st Cir. 2002).

Along these lines, Massachusetts further contends that, "prior to DOMA, Congress had *never* refused to recognize a State determination of marital status." Mass. Br. 20 (emphasis in original). This claim is demonstrably false. As explained in our superseding opening brief, Congress has previously adopted definitions of marriage for many federal programs inconsistent with state definitions of marriage, often in a manner that results in federal law not recognizing an otherwise valid state marriage. Some examples are found in the immigration context, 8 U.S.C. § 1186a(b)(1)(A)(i); 8 C.F.R. § 216.3; the tax code, 26 U.S.C. § 7703(b); the Social Security Act, 42 U.S.C. § 416(a)–(g); veterans' benefits laws, 38 U.S.C. § 101(3); and federal employee benefit programs, 5 U.S.C. § 8341(a)(1)(A), (a)(2)(A). The existence of many such provisions belies

Massachusetts's argument that the Tenth Amendment provides the states, and not Congress, the ability to define the meaning of "marriage" and "spouse" for the purposes of federal law.

And, though Massachusetts contends that Congress has never rejected an entire category of state marriages across a range of state laws, Mass. Br. 23–30, Massachusetts offers no reason why that fact is relevant to whether Congress has the authority to define the terms and conditions of federal programs. In fact, Massachusetts uses the lack of prior examples only as evidence of Congress's discriminatory intent in enacting DOMA, Mass. Br. 28–29, thereby improperly conflating (as it does elsewhere, and as the district court did as well) a frivolous Tenth Amendment claim with its meritorious equal protection argument.

3. Further, Massachusetts contends that the district court applied the correct test in evaluating Section 3 of DOMA in asking whether "the regulation of marital status is at the 'core of state sovereignty'" or "'a domain of activity set apart by the Constitution as the province of the states.'" Mass. Br. 31–32 (quoting *New York*, 505 U.S. at 177 and *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 338 (1935)). Again, under controlling Tenth Amendment law, if Section 3 is authorized by the Spending Clause, it does not violate the Tenth Amendment with respect to Massachusetts. And, in any event, Section 3 does not define marital status for purposes of state law; states are still left with the ability to determine who is or who is not married under state law, and that

"core" of state sovereignty is unaffected by DOMA.

4. Finally, Massachusetts also contends that its Tenth Amendment claim is, in fact, a facial challenge to Section 3 of DOMA, and not a challenge to Section 3 as applied to the specific programs at stake in this case, and contends that federal defendants' analysis of its Tenth Amendment claims is improper because it assumes that Massachusetts has raised an "as applied" challenge. Mass. Br. 22–23. This case has consistently been litigated over the application of Section 3 to certain Massachusetts programs, and the district court's decision discusses Section 3 only in that context. JA 661–69. Accordingly, this Court should reject Massachusetts's attempts to transform this case into a facial challenge at this late stage of the litigation. Moreover, if Massachusetts truly intends to bring a facial challenge to Section 3 under the Tenth Amendment, it has not come close to meeting its very heavy burden in prevailing on such a challenge.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Massachusetts has not even argued, as it must to prevail in a facial Tenth Amendment challenge, that Section 3 violates the Tenth Amendment in any situations beyond the Medicaid and State Cemetery Grants programs at issue in this case. This is particularly problematic given the nature of Section 3. Section 3 is a dictionary definition that has

operative effect only through other federal statutes. Massachusetts's Tenth Amendment claim, at bottom, turns on whether there is federal authority for Section 3. But Section 3, as a definition that covers many federal laws, was not enacted pursuant to any one source of Congressional authority. Instead, it is authorized by whichever Article I authority supports the substantive law to which its definition applies. In this case, Massachusetts's claims and arguments all involve programs authorized by the Spending Clause, but a facial Tenth Amendment claim against Section 3 of DOMA could not prevail unless Massachusetts were to demonstrate that Congress lacked authority for each and every federal statute to which DOMA applies. The state has not even attempted to make such a showing.

Even under Massachusetts's flawed theory of the Tenth Amendment, if Massachusetts were correct that Congress had violated state sovereignty in the federal programs at issue here, Section 3 would not necessarily violate the Tenth Amendment in each of its over 1,000 additional applications. Rather, the question of whether Congress violated state sovereignty with respect to each of these additional federal programs would necessitate highly context-specific inquiries, as these programs impact state interests in different ways. For example, there are many applications of Section 3 of DOMA, such as in the immigration context, that have no direct impact on state programs at all. Massachusetts has not explained how Section 3 violates state sovereignty in any of these other contexts.

III. Dean Hara's Injury Relating to his FEHBP Claim Cannot Be Redressed by the District Court; He Must First Obtain Relief in the Federal Circuit.

Dean Hara currently lacks standing to pursue his FEHBP claim because the district court cannot redress his injury. As the district court concluded, the district court "is without *power* to hear his claim" because the question of whether Hara was "eligible for a survivor annuity"—as he must be, in order to be eligible for FEHBP—is one that "must [first] be answered by the Federal Circuit" as a preliminary matter before he can seek benefits under the FEHBP program. JA 1384. Indeed, Hara has a claim pending in the Federal Circuit to obtain that survivor annuity, and it is that court, not the district court, that must first resolve that preliminary claim on which he must prevail before qualifying for the FEHBP program.

A. The power of federal courts extends only to "Cases" and "Controversies," U.S. Const. art. III, § 2, and a litigant's standing to sue is "an essential and unchanging part of the case-or-controversy requirement." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy this requirement, a plaintiff must demonstrate, as the "irreducible constitutional minimum" of standing to sue, an "injury in fact," a "fairly traceable" causal connection between the injury and defendant's conduct, and redressability. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03 (1998); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("The plaintiff must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress."). As to redressability, the plaintiff must show "a likelihood that the requested

relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103; *accord Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (stating that relief must be "likely" to redress injury). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. Standing will not be found, therefore, if it is "speculative whether the desired exercise of the court's remedial powers . . . would result" in the relief sought by plaintiffs. *Simon*, 426 U.S. at 43.

Here, Dean Hara lacks standing to challenge the application of DOMA to enrollment in FEHBP because he has not fulfilled a critical statutory requirement the program, which is obtaining eligibility as a survivor annuitant. Accordingly, he does not qualify for FEHBP irrespective of Section 3 of DOMA, and a ruling that strikes down Section 3 does not redress his inability to enroll in the program.

B.1. An "annuitant" eligible for enrollment in FEHBP is, generally speaking, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee . . . or of a retired employee." 5 U.S.C. § 8901(3)(B). Contingent upon meeting the applicable requirements regarding age and length of service, a former federal employee or Member of Congress may qualify for an annuity under the Civil Service Retirement System ("CSRS"), and, under certain circumstances, the surviving "spouse" of a federal annuitant who dies may receive a survivor annuity after the death of the employee or Member of Congress. *Id.* §§ 8333, 8341; *see id.* § 8331(2) (defining "Member" of Congress).

If the employee and surviving spouse were married after the employee's retirement from federal service, one requirement for a survivor annuity is that the employee must have elected a reduced annuity for himself or herself, "in a signed writing received [by OPM] within 2 years after such employee or Member marries." 5 U.S.C. § 8339(k)(2)(A). That is, in order to provide a survivor annuity for a spouse acquired after retirement, the former employee must elect to reduce his or her own annuity. *Id.* § 8339(k); *see* 5 C.F.R. § 831.631(b).

Review then flows through OPM, the MSPB, and the Federal Circuit. As the D.C. Circuit has explained,

> CSRA specifies the benefits to which federal employees and their survivors are entitled, and provides a reticulated remedial regime for beneficiaries to secure review—including judicial review—of benefits determinations. That regime provides for adjudication of all claims by OPM, 5 U.S.C. § 8347(b), appeal of adverse decisions by OPM to the MSPB, *id.* § 8347(d)(1), and subsequent review of MSPB decisions in the Federal Circuit, *id.* § 7703(b)(1); 28 U.S.C. § 1295(a)(9). A series of opinions from the Supreme Court and this court make clear that these remedial provisions are exclusive, and may not be supplemented by the recognition of additional rights to judicial review having their sources outside the CSRA.

Fornano v. James, 416 F.3d 63, 66 (D.C. Cir. 2005).

Consistent with this general holding, all annuity claims and elections under the CSRS, like Hara's survivor annuity claim, are submitted to OPM. 5 U.S.C. § 8347(b); 5 C.F.R. § 831.104(a). If OPM denies the claim or rejects the election, a claimant or retiree may seek reconsideration "within 30 calendar days from the date of the original decision." *Id.* § 831.109(d), (e). OPM's decision on reconsideration may be appealed to

the MSPB within 30 days. 5 U.S.C. § 8347(d)(1); 5 C.F.R. §§ 831.110, 1201.22(b)(1). Judicial review of a decision by the MSPB lies exclusively in the Federal Circuit, and must be sought within 60 days after receipt of the MSPB decision. 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9). The Supreme Court has held that this review process for annuity decisions—whereby an appeal is brought in the Federal Circuit—is exclusive. *See Lindahl v. OPM*, 470 U.S. 768, 775, 791–99 (1985) (holding that review of federal disability retirement claims lies exclusively in Federal Circuit).

2. Here, Hara alleges that former Congressman Studds "was a participant in the Civil Service Retirement System." JA 740. Thus, he was eligible for and subject to the various benefit and review provisions outlined above. Hara alleges that former Congressman Studds "elected an unreduced annuity" upon his retirement in 1996 because "no state had yet recognized his and Dean's right to marry." JA 738. Hara further alleges that when he and Studds married in 2004, DOMA "prevented Congressman Studds from electing a retirement annuity that provided a spousal annuity for Dean." JA 740–41. He alleges that OPM denied his claim for a monthly survivor annuity because "your spouse did not notify our office of your marriage and no election was made to provide a survivor annuity for you." JA 741. OPM also denied the claim based on DOMA. JA 742–43. Hara alleges that he appealed this determination to the MSPB, JA 743, and that the MSPB denied his appeal based solely on DOMA in a decision that became final on January 21, 2009, JA 743. In March 2009, Hara appealed

that denial to the Federal Circuit. *See Hara v. OPM*, No. 09-3134 (Fed. Cir.). As noted, proceedings in the Federal Circuit have been stayed.

Hara has pled a viable action challenging Section 3 of DOMA as the basis for the denial of the survivor annuity that is a prerequisite to obtaining benefits under FEHBP. The MSPB, after all, denied his request solely on the basis of Section 3, and as we pointed out in our superseding opening brief, Section 3 is unconstitutional. However, that challenge lies in the Federal Circuit because, as we have explained, review of a decision of the MSPB lies exclusively in the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); *Lindahl*, 470 U.S. at 775, 791–99. Accordingly, the action challenging the annuity decision, as Hara's Federal Circuit filing acknowledges, must proceed in the Federal Circuit.[3] Until he prevails in that action, he cannot establish that he is an "annuitant" under 5 U.S.C. § 8901(3)(B), and the district court therefore could not redress Hara's ineligibility to enroll in FEHBP. This is because until that court determines that Hara is an "annuitant," he cannot be eligible for enrollment in FEHBP. *See* 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9). Thus, consistent with this remedial

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[3] At Hara's request and with OPM's consent, the Federal Circuit stayed proceedings in that appeal pending resolution of this action (Doc. 18 ¶¶ 171–79). *See* 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9). Were Hara to seek to proceed to judgment in that case, the government would not object. Moreover, while we do not think preclusion principles would apply given that the annuity issue cannot be litigated in this forum, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties . . . from relitigating issues that *were or could have been raised in that action*." (emphasis added)), the stay does save the parties the burden of litigating in two forums at once.

scheme, only the Federal Circuit has jurisdiction to determine whether the survivor of a federal employee qualifies as a federal annuitant.

3. Hara argues that there is jurisdiction because the MSPB determined his "*factual* eligibility for a survivor annuity." *Gill* Pl. Br. 68 (emphasis in original). As an initial matter, this factual determination is irrelevant to the jurisdictional question here, which asks only whether the district court can provide Hara the relief that he seeks. In this case, the district court cannot, because before granting Hara the FEHBP enrollment he seeks, Hara must first be found *both* factually and legally eligible for an annuity by the MSPB process that is subject to review in the Federal Circuit.

Further, Hara's claim that his factual eligibility has been finally resolved is not correct. The MSPB concluded that former Congressman Studds would have elected that Hara receive an annuity in the absence of DOMA. *See* JA 900–01; *see also* JA 1384 ("[T]he [MSPB] deemed Mr. Hara's spouse to have made the requisite 'self and family' benefits election prior to his death, based on unrebutted evidence of his intent."). But the MSPB decision remains on appeal to the Federal Circuit, and OPM can argue on appeal that the MSPB erred in concluding that Hara was entitled to an annuity because Congressman Studds would have made the election in the absence of DOMA. Given that OPM prevailed before the MSPB, Hara is wrong to suggest that OPM was required to "appeal this issue to the Federal Circuit." *Gill* Pl. Br. 68.[4] Instead, it is well

[4] Hara is also incorrect in suggesting (*Gill* Pl. Br. 68 n.38) that OPM abandoned this argument earlier during administrative proceedings. In fact, at all administrative stages

established that OPM could raise that issue in proceedings in the Federal Circuit. *See Horner v. Acosta*, 803 F.2d 687, 691 n.6 (Fed. Cir. 1986) ("In order to sustain the Board's decision, respondents, without appealing, can urge a position they took before the Board even though it was rejected.").

Moreover, a decision that Hara qualified as a survivor annuitant would also likely carry with it the issue of whether he was subject to liability given that Congressman Studds received a higher annuity as a sole annuitant. Those issues would need to be resolved in the MSPB process. For these reasons, Hara is also wrong in asserting that a final decision striking down DOMA Section 3 in this litigation "would . . . carry with it a resolution of Hara's survivor annuity claim." *Gill* Pl. Br. 69. Instead, the preliminary annuity claim would still need to be litigated in the Federal Circuit to determine that Hara was entitled to the annuity, and if so whether he has to pay an additional amount.

In any event, the question of whether Hara's factual eligibility is finally resolved does not make his claim for FEHBP benefits redressable by the district court here. As the district court explained, even assuming that Hara is "correct that [under the MSPB decision] Mr. Hara will be rendered eligible for a survivor annuity if the question of DOMA's constitutionality is resolved in his favor," "that question, as it pertains to Mr. Hara, must be answered by the Federal Circuit." JA 1384; *see Elgin v. U.S. Dep't of*

"OPM asserted that appellant is not entitled to the annuity . . . because . . . Congressman Studds failed to make an election." JA 887; *see* JA 884 (OPM ruled based on *both* Studds's "fail[ure] to elect . . . an annuity" and then "added a second basis for its denial: DOMA.").

Treasury, 641 F.3d 6, 11–12 (1st Cir. 2011), *cert. granted*, 2011 WL 3052250 (Oct. 17, 2011) ("Constitutional claims are common in administrative proceedings" and "[o]ften such claims are made along with factual claims"; "Congress' desire to consolidate [claims] . . . in a single forum [the MSPB followed by review by the Federal Circuit]" did not rest on "the precise arguments made in contesting [the administrative] action").

Hara cites *Fornano v. James*, 416 F.3d 63, 68–69 (D.C. Cir. 2005), in support of his argument that "procedural and constitutional questions . . . would not be precluded in the district court." *Gill* Pl. Br. 69. This general principle is contrary to this Court's holding in *Elgin*, which held that constitutional claims must proceed through the administrative process. 641 F.3d at 11–12. More importantly, *Fornano* does not hold that constitutional claims may forgo the MSPB process, and in fact underscores the government's argument that review of Hara's claim must first come in the Federal Circuit. 416 F. 3d at 66 (explaining that the "Supreme Court and this court make clear that these remedial provisions are exclusive, and may not be supplemented by the recognition of additional rights to judicial review having their sources outside the CSRA").

To be sure, the *Fornano* court acknowledged that a court outside the review scheme could, under *McNary v. Hatian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), hear a case "challenging agency practices and policies" so long as the "district court action would not 'have the practical effect of also deciding their claims for benefits on the merits.'"

Fornano, 416 F.3d at 68 (quoting *McNary*, 498 U.S. at 495); *see id.* (discussing *Bowen v. New York*, 476 U.S. 467 (1986), where plaintiff "challeng[ed] the legality of a 'systemwide . . . policy'"). But here, Hara's challenge to DOMA is not the type of general policy discussed in those cases; rather, it is a challenge to Hara's specific benefit denial that must be reviewed and resolved by the Federal Circuit, and resolving his FEHBP claim would plainly have the "practical effect of also deciding" that annuity claim on the merits. *Id.* at 68. In short, there "is a far closer connection between the relief sought in the judicial action and that available in" the MSPB process, and hearing the claim would "erode 'the primacy of the MSPB for administrative resolution of disputes . . . and the primacy of the Federal Circuit for judicial review.'" *Id.* at 68–69 (quoting *United States v. Fausto*, 484 U.S. 439, 449 (1988)); *cf. Elgin*, 641 F.3d at 11 (holding that the MSPB process must be used for general constitutional challenge to federal law barring federal service by those who did not register for the draft).

Importantly, Hara does not claim that review of his entitlement to be enrolled in FEHBP would be precluded. Instead, a determination in his favor on his eligibility for FEHBP must simply await the outcome of his litigation over entitlement to the annuity. As the Supreme Court has recognized in addressing another statute that channeled review through a specifically designated process, there is an important "distinction that this Court has often drawn between a total preclusion of review and postponement of review." *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 19 (2000).

In sum, as the district court explained, "regardless of the grounds upon which OPM rested its decision, the fact remains that Mr. Hara applied for an annuity, . . . the agency which has authority over such matters denied his claim," and the "Federal Circuit has not held differently." JA 1383.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed on the ground that Section 3 of DOMA is subject to and fails heightened scrutiny and on the ground that plaintiff Hara does not possess standing to bring his FEHBP claim in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportionally-spaced font typeface using Corel WordPerfect X4 in 14-point Garamond font. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 7,899 words, as counted by Corel WordPerfect X4.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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