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

RESPONSE OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND TO THE PETITION FOR HEARING *EN BANC*

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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: July 6, 2011

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation founded in 1981, consistently defends traditional American values, including marriage defined as the union of husband and wife. As the accompanying motion shows, Eagle Forum has a direct and vital interest in the issues before this Court. 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. *Cf.* FED. R. APP. P. 29(c)(5).

INTRODUCTION

The Gill plaintiffs-appellees base their petition for hearing *en banc* on the premise that "[t]his Court *must* adjudicate a fundamental constitutional issue of first impression" "[a]ffecting *more than 1,100 federal statutes*." Pet. at 1, 2 (emphasis added). To the contrary, as made clear in *amicus* Eagle Forum's brief in support of reversal, this litigation lacks jurisdictional predicates. Before considering the equal-protection merits, this Court first must assure itself – in the absence of an adequate effort by the Executive defendants and the lower court – of the jurisdiction to consider those merits issues under even a *single*

federal statute. *Amicus* Eagle Forum respectfully submits that that winnowing is the task for a three-judge panel, not the Court *en banc,* and certainly not an *initial* hearing before the Court *en banc.*

I. 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.

The Executive 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). 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.

A. 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 the Defense of Marriage Act ("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 v. HHS,* 698 F.Supp.2d 234, 239-44 (D. Mass. 2010), 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 v. OPM,* 699 F.Supp.2d 374, 379-83 (D. Mass. 2010). 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.*

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.

B. 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.

C. 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, not 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 lacking and thus insufficiently imminent for standing. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to SCGP.

II. 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 claims.

Applying the AIA preserves the government's ability to collect tax assessments expeditiously, with "a minimum of preenforcement judicial interference," "requir[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). The Plaintiffs have not met the jurisdictional predicates for district courts' jurisdiction over tax claims: 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

administrative exhaustion, timeliness is jurisdictional. *U.S. v. Dalm,* 494 U.S. 596, 602 (1990). Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to taxes.

III. SOVEREIGN IMMUNITY BARS CLAIMS FOR DAMAGES

Plaintiffs lack jurisdiction to sue the federal government without a 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 can be 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.

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). In any event, *Bivens* actions typically fail when plaintiffs have adequate alternate remedies. *Bush v. Lucas,* 462 U.S. 367, 388 (1983); *see* Section IV, *infra.*

For damage claims *not sounding in tort,* the "Little Tucker Act" provides district-court jurisdiction for nontax claims up to $10,000, and the Tucker Act provides jurisdiction for all amounts. 28 U.S.C. §§1346(a)(2), 1491(a)(1). 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). If Plaintiffs had non-tort claims under the Little Tucker Act, the Executive 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, 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.

IV. SOVEREIGN IMMUNITY BARS CLAIMS TO PLAINTIFFS WITH ADEQUATE ALTERNATE REMEDIES IN COURT

As indicated in the prior section, the doctrine of sovereign immunity allows certain 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 predicate of 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.

V. MEDICARE AND SOCIAL SECURITY REQUIRE ADMINISTRATIVE EXHAUSTION

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.

CONCLUSION

The Gill plaintiffs-appellees' equal-protection issues will arise here only if this Court and the lower court have jurisdiction over Plaintiffs' claims. If those claims survive the jurisdictional threshold, the non-prevailing parties may seek rehearing *en banc* on the merits.

This Court should deny the petition for initial hearing *en banc.*

Dated: July 6, 2011

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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 "Response of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund to the Petition for Hearing *En Banc*" complies with 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 is proportionately spaced in 14-point Century Schoolbook typeface.

Dated: July 6, 2011

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