

MEDICAID IN THE WAKE OF *WINDSOR*

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TABLE OF CONTENTS

SECTION	PAGE NUMBER
Action-Forcing event	1
Statement of problem	1
History	2
Background	7
Policy Proposal	16
Policy Analysis	18
Political Analysis	24
Recommendation	33
Curriculum Vita	34

LIST OF INSERTS

INSERT	PAGE NUMBER
Federal and State Share of Medicaid Spending	8
Same Sex Marriage Map, State Laws List	10

To: Administrator of the Centers for Medicare and Medicaid Services (CMS)
From: Adam Goldstein
RE: Medicaid in the Wake of *Windsor*

Action Forcing Event:

On June 26, 2013 the Supreme Court rendered a decision in the case *United States vs. Windsor*. In this decision the Supreme Court, in a 5-4 decision, ruled that the Defense of Marriage Act's (DOMA) Section 3, which defines marriage for the purpose of federal law, was unconstitutional.

As a result of the court's decision, the Executive Branch must take action to provide guidance on how federal law will now recognize same-sex marriage for the discrete programs DOMA formerly governed. In particular, The Centers for Medicaid and CHIP Services (CMCS) must provide guidance to states on how CMCS will recognize same-sex marriage.

Statement of the Problem:

Federal laws must be adjusted or clarified to respond to the June 2013 Supreme Court decision striking down Section 3 of the Defense of Marriage Act. Whereas the federal government can make certain decisions, such as the recognition of same sex marriage in the case of federal income taxes, autonomously, others are more complicated.

CMCS statute is currently not in line with the *Windsor* decision and as such states are without the needed guidance to implement *Windsor*. As Medicaid eligibility is largely based on the income of the individual or family that is applying, the impact of CMCS guidance will be meaningful as there is much at stake for same-sex couples potentially

eligible for Medicaid. Whether or not a couple has a recognized marriage will determine if their income is counted together as a family, or separately as individuals. In particular, the definition and protections of assets will be significantly altered if individuals in a same sex marriage are recognized as spouses. First, asset-based Medicaid eligibility would change for a family if a marriage was recognized by the state and federal government. Additionally, certain protections of assets for healthy spouses with a spouse in long term care would apply to same-sex marriages if recognized. There are other implications as well.

Further complicating the matter is disparate views of same sex marriages in each state. The aforementioned unique relationship between CMCS and states dictates that any *Windsor* guidance must allow states to operate their Medicaid programs with the authority given to them in Medicaid statute.

History

For the purposes of understanding how CMCS has arrived at this point it is necessary to understand the interplay between DOMA and federal legislation, as well as the policy and judicial history involved.

The struggle for recognition of same sex marriage in the public sphere goes as far back as the 1970s.¹ However, the lead-up to DOMA can be traced to a state level action in Hawaii in 1993. There, a court determined that a state level statute denying same sex

¹ Michael D. Pelts; *A Look Back at the Defense of Marriage Act: Why Same-Sex Marriage Is Still Relevant for Social Work*, Affilia May 2014 29: 237-247, first published on January 27, 2014

marriage was in conflict with the state constitution's equal protection clause.² Those events, though confined to one state, stirred action on a national level among the right wing to "protect marriage". Those in the United States who opposed same sex marriage saw a coming tide of state and local legal actions such as what had just transpired in Hawaii. It was clear to those opponents that a judiciary-based strategy was in the works from supporters of same sex marriage and that they would be following in the steps of similar discrimination battles such as the fight against Jim Crow separate but equal laws held in the American South in the 19th and 20th centuries. The introduction and passage of the Defense of Marriage Act of 1996 was a response to that coming legal action. DOMA was passed amongst a legislative atmosphere that was allowing for discrimination against both gay couples and individuals. Prior to the passage of DOMA, Congress had defined "spouse" as a husband or wife for the purposes of the Family and Medical Leave Act. The United States military had adopted the "Don't Ask, Don't Tell" policy around the same time which, although a minor step forward, continued the practice of prohibiting gays from serving openly in the military. In fact, on the very same day that the Senate considered and approved DOMA, it rejected the Employee Non-Discrimination Act which sought to prohibit discrimination in the work place on the basis of sexuality.³

DOMA was passed through Congress by wide margins and signed by then President Clinton in 1996. DOMA took a two pronged approach to prohibiting recognition of same sex marriage.⁴ The first was to allow Congress to work around the "Full Faith and Credit" clause of the United States constitution. This clause, which essentially holds that the

² Ibid

³ Harvard Law Review. Jun2004, Vol. 117 Issue 8, p2684-2707. 24p.

⁴ Ibid

judicial proceedings of one state are to be honored in another⁵, looked to be a mechanism by which a state that did not recognize same sex marriage might be compelled to do so by being forced to recognize a same sex marriage that was celebrated in another state. In Section 2 of DOMA, Congress made it clear that recognition of a same sex marriage was an exception.⁶ The second part of DOMA, Section 3, effectively prohibited the federal government from recognizing same sex marriage for the purposes of nearly 2,000 laws that pertain to the marriage relationship. *Windsor* struck section 3, which is what has caused the need for CMCS action.

Federal Legislative History

Since the passage of DOMA there have been efforts from both supporters and opponents of the law to use legislation to strengthen DOMA, chip away at DOMA provisions, or repeal DOMA outright. There are a few examples of legislation that are relevant.

In 2004, opponents of same sex marriage introduced the Marriage Protection Act which denied federal courts the ability to hear cases which sought to challenge Section 2 of DOMA – the section which gives states the option to not recognize same sex marriages held in other states. The bill even went as far as to deny any appellate jurisdiction involving same sex marriage to the United States Supreme Court. This bill passed the House but never made it through the Senate.⁷

2004 also saw an even more extreme effort on the part of same sex marriage opponents. Wayne Allard, a senator from Colorado, introduced the Federal Marriage

⁵ U.S. Const. art. IV, § 1

⁶ Scott Ruskay-Kidd, “The Defense of Marriage Act and the Overextension of Congressional Authority”, *Columbia Law Review*, Vol. 97, No. 5 (Jun., 1997), 1450

⁷ H.R. 3313, 108th Cong. (2004)

Amendment. The Federal Marriage Amendment was the first step in a federal constitutional ban on same sex marriage.⁸ Although this proposed constitutional amendment never received any real interest, it did show some of the potential splits among the right wing in how they felt about same sex marriage. The Cato Institute published a report in 2006, when the Federal Marriage Amendment was once again introduced, stating their total opposition on the grounds that the federal government had no place taking authority on this issue away from the states.⁹

On the other side of the spectrum, there have been similarly moderate and extreme reactions to fight against DOMA. The Military Spouses Equal Treatment Act sought to take some of the teeth out of Section 3 of DOMA by giving military spousal benefits to same sex couples.¹⁰ The passage of such a law would have certainly opened the door for striking down parts of DOMA legislatively.

The Respect for Marriage Act goes even further. Introduced for the first time in 2011, this bill would have the effect of a full repeal of DOMA, both Section 2 and Section 3.¹¹ The effect of the bill would require all states, regardless of their state-level laws on same sex marriage, to recognize same sex marriages from other states.

It is worth noting that while the highly partisan environment in the United States Congress has stymied efforts to impact DOMA for both supporters and opponents of the law, there has been more state level action. State legislatures around the country have

⁸ S.J. Res. 40, 108th Cong. (2004)

⁹ Dale Carpenter The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic Cato POLICY ANALYSIS NO. 570 June 1, 2006

¹⁰ H.R. 683, 113th Cong.(2013)

¹¹ H.R. 2523, 113th Cong. (2013)

taken more decisive action on same sex marriage, in both directions. More detail will be provided in the background section of this paper.

Judicial History

Throughout the debate on DOMA the action in the judicial branch has been the main tool for opponents of the law. Just as with civil rights battles of the past, the courts have provided a more insulated and neutral venue for cases involving same sex marriage, even in states where overwhelming opinion is in opposition to same sex marriage.

Beginning with the aforementioned 1993 Hawaii case, lower level state and federal courts have struck down various prohibitions on same sex marriages and unions (though it is worth noting that the Hawaii decision was later reversed through the legislature and dismissed).¹² Of course this action culminated with the *Windsor* decision that has prompted action from CMCS, however it is worth briefly noting the other cases that have come before *Windsor* as precedent for why it is unlikely we will see any judicial reverse in the *Windsor* decision going forward.

It is fair to point to the 1999 Vermont Supreme Court decision in *Baker vs State of Vermont* which mandated equal treatment of same sex and opposite sex marriage at the Vermont state level.¹³ Although Vermont has what research has shown to be one the most liberal populations in the United States¹⁴, the precedents set there have trickled into

¹² Pelts; *A Look Back at the Defense of Marriage Act: Why Same-Sex Marriage Is Still Relevant for Social Work*, Affilia May 2014 29: 237-247, first published on January 27, 2014

¹³ Freedom to Marry.org "History and Timeline of the Freedom to Marry in the United States." <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage>. Accessed June 22, 2014

¹⁴ Frank Newport, "Alabama, North Dakota, Wyoming Most Conservative States," *Gallup Politics*, 2013 1-February, <http://www.gallup.com/poll/160196/alabama-north-dakota-wyoming-conservative-states.aspx> (accessed 2014 21-June)

action throughout the country into states with more moderate or conservative leanings. Though Vermont would later accept full marriage, at the time, the state legislature chose to only acknowledge civil unions at the time, a distinction which brings couples many, but not all, of the same protections as marriage. This is an action and series of events that we have seen in other states including New Jersey.¹⁵

In 2003, the Massachusetts Supreme Court went a step further. In the decision over *Goodridge vs Department of Public Health* the court decided that not only did same sex couples have the right to marry, but that only marriage, and not civil unions or domestic partnerships, afforded couples the proper protections under the law.¹⁶

As time has gone on, many state and federal level courts have found in favor of same sex marriage in one way or another. These actions set the stage for *Windsor* to come before the Supreme Court. The specifics of *Windsor* will be discussed in more detail in the background section.

Background

As discussed above, the Supreme Court June 2013 decision in *United States v. Windsor* struck down Section 3 of the Defense of Marriage Act. As such, there is no longer a law prohibiting the federal government from recognizing same sex marriage. Any CMS guidance will constitute new policy as DOMA had made same sex marriage a moot issue for federal programs like Medicaid and CHIP. Prior to the *Windsor* decision same sex marriage was not a consideration in Medicaid eligibility.

¹⁵ Freedom to Marry.org “History and Timeline of the Freedom to Marry in the United States.”<http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage>. Accessed June 22, 2014

¹⁶ Ibid

The Medicaid and CHIP programs are run as a state-federal partnership with each side paying for the cost of the program. CMCS pays, on average, 57% of the cost of Medicaid in states with the states picking up the remaining cost.¹⁷ This is an average as the federal share ranges from state to state based on the state's ability to pay. There is a wide disparity with states like West Virginia paying only 27% of costs while states like New York or Colorado pay a full 50% of the costs.¹⁸ It is worth noting this information as context for why Medicaid remains a unique federal program. Medicaid sets a baseline of rules for how states can run their program, however states have a great deal of flexibility in what populations they cover, what kind of services they provide, and what factors influence eligibility and at what level.

Location	Federal	State	Location	Federal	State
United States	57%	43%			
Alabama	69%	31%	Montana	68%	32%
Alaska	58%	42%	Nebraska	57%	43%
Arizona	69%	31%	Nevada	57%	43%
Arkansas	71%	29%	New Hampshire	50%	50%
California	51%	49%	New Jersey	50%	50%
Colorado	50%	50%	New Mexico	70%	30%
Connecticut	50%	50%	New York	50%	50%
Delaware	54%	46%	North Carolina	65%	35%
District of Columbia	70%	30%	North Dakota	56%	44%
Florida	56%	44%	Ohio	64%	36%
Georgia	66%	34%	Oklahoma	65%	35%
Hawaii	50%	50%	Oregon	63%	37%
Idaho	70%	30%	Pennsylvania	55%	45%
Illinois	50%	50%	Rhode Island	52%	48%

¹⁷ Center on Budget and Policy Priorities. "Policy Basics: Introduction to Medicaid." <http://www.cbpp.org/cms/index.cfm?fa=view&id=2223>. Accessed June 27, 2014.

¹⁸ Kaiser Family Foundation: Kaiser State Facts "Federal and State Share of Medicaid Spending," <http://kff.org/medicaid/state-indicator/federalstate-share-of-spending/>. Accessed June 27, 2014.

Indiana	67%	33%	South Carolina	70%	30%
Iowa	61%	39%	South Dakota	63%	37%
Kansas	57%	43%	Tennessee	67%	33%
Kentucky	71%	29%	Texas	58%	42%
Louisiana	69%	31%	Utah	71%	29%
Maine	63%	37%	Vermont	57%	43%
Maryland	50%	50%	Virginia	50%	50%
Massachusetts	50%	50%	Washington	50%	50%
Michigan	66%	34%	West Virginia	73%	27%
Minnesota	50%	50%	Wisconsin	61%	39%
Mississippi	74%	26%	Wyoming	51%	49%
Missouri	64%	36%			

Part 1: Background Facts and Context

Thus, the decision of how Medicaid and CHIP should recognize same sex marriage is further complicated by the diverse stances of the 50 states on this topic. 23 states and the District of Columbia recognize some form of same sex marriage or civil and domestic union. 30 states have in place legal or statutory prohibitions on same sex marriage (however, three of those states, Nevada, Wisconsin, and Colorado allow for civil unions or domestic partnerships).¹⁹ In states where only civil union or domestic partnerships are recognized there can be a discrepancy between the right afforded same sex couples in this sub-marriage relationships and opposite sex marriages that the state recognizes.²⁰ This lack of consistency must be considered with regard to implementation of eventual CMCS policy. As will be discussed later in the document, finding a policy that fits the needs and views of each state will be a challenge for CMCS to overcome.

¹⁹Governing Data. "Same Sex Marriage Map, State Laws List."
<http://www.governing.com/gov-data/same-sex-marriage-civil-unions-doma-laws-by-state.html>. Accessed June 26, 2014

²⁰ Ibid

that act, the Republican leadership of the House of Representatives used funds to retain lawyers to take the opposition side in *Windsor*.

The Administration, through Solicitor General Donald Verrilli requested that the court take up *Windsor* as opposed to other cases on DOMA making their way through the court system. There were challenges from opponents of same sex marriage to *Windsor* making it before the Supreme Court on various standing. There was some debate over the purpose of the case moving forward as the plaintiff had won in lower court. There was even debate over whether the plaintiff in *Windsor* was legally married.²² Ultimately the federal government argued, and the Supreme Court agreed, that *Windsor* was an appropriate vehicle for challenging DOMA. It had been through the federal appeals level and had been reviewed under the “heightened scrutiny” standard, a more stringent review than other similar cases. Another benefit for the federal government was that Justice Kagan would not have to recuse herself from consideration of *Windsor* as it was rumored she might have to do in other cases she worked on in her role as U.S. Solicitor General.²³

Ultimately the facts of the case were clear. Edith Schlain Windsor legally married Dr. Thea Spyer in May 2007 following a relationship that had spanned more than 40 years. They wed at an advanced age so that they did not miss the opportunity as Spyer had become ill. When Spyer died in 2009, she left Windsor a sizeable inheritance. Windsor was forced to pay more than \$360,000 in estate taxes on the inheritance left to her by Spyer. Had Windsor and Spyer been in an opposite sex marriage, Windsor would have been eligible for protection from the federal estate tax, a protection in the form of a

²²Lyle Denniston, “U.S. picks a DOMA case”, *SCOTUS Blog*, 2012 26-October, <http://www.scotusblog.com/2012/10/u-s-picks-a-doma-case/> (accessed 2014 25-June)

²³ Ibid

tax deduction given to opposite sex spouses.²⁴ To gain that protection and relief, and, more importantly to challenge DOMA, Windsor petitioned the court for those rights. The case was also a platform for challenging the entirety of DOMA in the hope of same sex couple gaining all federal rights granted to married couples.²⁵

The court ruled in a 5-4 decision that Section 3 of DOMA was in fact unconstitutional. In the decision Justice Anthony Kennedy joined Justice Ruth Ginsburg, Justice Stephen Breyer, Justice Sonia Sotomayor, and Justice Elena Kagan in holding the finding of the lower court that Ms. Windsor's rights had been infringed upon when the estate tax was levied on her inheritance. First, the court held that the case had standing to be considered. Then, the majority found that while Congress can pass laws that impact marriage, and while states are ultimately the entities that define marriage, Congress had overstepped its authority in passing DOMA.²⁶ The court found that the scope of DOMA surpassed Congress's ability to govern marriage both in how wide ranging the law's impact was (over 1000 federal laws) and in how the law stopped the federal government from recognizing the role of states in defining marriage.²⁷

Part 2: Key Actors and Constituencies

²⁴ Lyle Denniston, "DOMA: Describing a life in the shadows", *SCOTUS Blog*, 2013 26-February, <http://www.scotusblog.com/2013/02/doma-describing-a-life-in-the-shadows/> (accessed 2014 25-June)

²⁵ Ibid

²⁶ Amy Howe, "A home run but not a grand slam for gay-marriage advocates: In Plain English" *SCOTUS Blog*, 2013 26-June, <http://www.scotusblog.com/2013/06/a-home-run-but-not-a-grand-slam-for-gay-marriage-advocates-in-plain-english/> (accessed 2014 25-June)

²⁷ Ibid

State Medicaid Programs: As mentioned above, although the federal government sets out the baseline rules of Medicaid, state programs have the responsibility of administering the program. On a national level, state Medicaid programs are represented by the National Association of Medicaid Directors (NAMD). NAMD describes themselves as a “bipartisan, professional, nonprofit organization of representatives of state Medicaid agencies (including the District of Columbia and the territories).”²⁸ Among the groups stated purpose is the ability to represent the states view to the federal government but also help states understand the impact of federal action on their programs.²⁹ Coordination with NAMD will be a key piece of the guidance decision CMCS makes on *Windsor*. NAMD lists themselves as a bipartisan organization, but a more accurate description might be to call them nonpartisan. NAMD traditionally speaks up for the most flexibility possible for state Medicaid programs, regardless of ideology. It is likely that whatever policy CMCS espouses, NAMD will want to maintain that flexibility and self-determination for states. Further, there are operational considerations for states as the ability to recognize same sex marriage for the purposes of Medicaid will require some changes to eligibility and enrollment systems. CMCS guidance will need to allow states the time and technical assistance necessary to carry out those changes.

Obama Administration: It is not hyperbole to say that this White House has gone further in support of gay marriage than any administration, Democratic or Republican, ever has. Chronologically, that support began with the Department of Justice’s (DoJ)

²⁸ National Association of Medicaid Directors, “About Us”, <http://medicaiddirectors.org/about>, (accessed June 25, 2014)

²⁹ Ibid

announcement that our administration would no longer defend DOMA in court as DoJ had done since the law's passage. DoJ made this announcement in February 2011.³⁰ The next milestone was the potentially unplanned announcement in support of gay marriage by Vice President Joe Biden in late May 2012. In an interview, Biden stated his personal endorsement for same sex marriage, though made clear it was not the stance of the White House.³¹ Several days later, on May 9, 2012 President Obama became the first president to publically support same sex marriage. The President said simply, ““I think same-sex couples should be able to get married.””³² As mentioned above, our administration also joined the *Windsor* case on the side of Ms. Windsor despite being normally named in opposition. CMCS policy on *Windsor* will be made in close coordination with colleagues at DoJ, the White House, and else where in the administration.

Congress: Congress passed DOMA in 1996. This was two years after Republicans had taken the House of Representatives in the 1994 midterm elections. Although DOMA was passed with bipartisan support and signed by a Democratic president, the evolving nature of the parties has led this law to be associated almost entirely with the Republican party. DOMA has been ruled as unconstitutional, therefore it would take Congress passing another similar or related law (and overriding a likely presidential veto) in order for them

³⁰ Department of Justice. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act. United States Department of Justice. 23 Feb. 2011. Web. 26 June 2014. <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>

³¹ Igor Volsky, “BREAKING: Joe Biden Endorses Same-Sex Marriage” *ThinkProgress*, 2012 6-May, <http://thinkprogress.org/lgbt/2012/05/06/478786/biden-marriage/>, (Accessed 26 June 2014)

³² Josh Earnest, “President Obama Supports Same-Sex Marriage”, *The White House Blog*, 2012 10-May <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>, (Accessed 26 June 2014)

to get involved in the national same sex marriage debate. However, it is worth noting that the members of Congress of both parties will be watching our actions carefully.

Republicans in both chambers still support DOMA. In fact when DoJ announced it would no longer defend DOMA, the Republican led House of Representatives appropriated federal funds to retain a law firm to defend DOMA cases. In all, House Republicans spent nearly \$3 million on the failed effort. At this point it is unclear how House Republicans will proceed.³³ On the other side of the capitol, the Democratic led Senate is in a tenuous position leading up to the 2014 mid-term elections. There are some that believe Republicans may be able to take the Senate by flipping a few key seats. Having both chambers of Congress in Republican control would strengthen their efforts to reinstitute parts of DOMA, however Senate Republicans would not have a filibuster proof majority, and the house majority would be too thin to override a Presidential veto. Anything past that is too distant a consideration for this decision. It is likely that whatever policy choice is made by CMCS, both parties will have strong opinions on the outcome.

Governors and State Legislatures: Governors and state legislatures throughout the country have been at the forefront of state decisions on same sex marriage. Although governors have a national organization in the National Governors Association, they are much more able to advocate their own positions on a one on one and individual basis. Both parties also have representation in the Democratic Governor's Association and Republican Governor's Association, however those groups serve mostly as campaign

³³ Walter Hickey, "John Boehner Committed Six Times As Much Government Money As He Originally Said He Would Defending DOMA", *Business Insider*, 2013 27-March, <http://www.businessinsider.com/house-blag-money-doma-paul-clement-2013-3>, (Accessed 26 June 2014)

organizations. Governors of both parties have a great deal of autonomy on their stances for issues as contentious as same sex marriage. The same sex marriage stance of individual states are often closely aligned with those of the governor. Governors throughout the political spectrum will likely urge *Windsor* guidance to track closely with their own state's policy. For most Republican led states, that will mean supporting the historical role of states in defining marriage. For most Democratic led states it will mean the desire for a strong national rebuke of DOMA and support for the *Windsor* decision. State legislatures will follow along the same track. State legislatures have a national organization in the National Conference of State Legislatures (NCSL), however this organization is mostly used a way to disseminate national news down to the local level. The NCSL might weigh in to maintain state flexibility on this matter, but it is doubtful they would take a stance on the outcome of *Windsor* as they represent very disparate view points from state to state.

Social Advocacy Groups: Groups in support of same sex marriage heralded *Windsor* as a major victory and a big step forward in the fight to legalize same sex marriage at the national level. Although groups such as the Human Rights Campaign, GLAAD, and Lambda Legal celebrated the end of DOMA, they have taken a more measured response to how Medicaid and DOMA interact. These groups were immediately clear that the relationship between DOMA and Medicaid was unique and as such will be watching our actions closely to make sure they are able to communicate it quickly and simply to same sex couples and local advocates in need of guidance.

Policy Proposal

The Medicaid program should provide guidance in the form of a State Medicaid Director letter³⁴ to states, beneficiaries, and others on how the Medicaid and CHIP programs will recognize same sex marriage. The *Windsor* decision serves as a policy authorizing tool and impetus for guidance. In this letter CMS should inform states that in light of the *Windsor* decision to strike down Section 3 of DOMA, and in light of the unique federal-state relationship in Medicaid and CHIP, CMS will follow state policy on recognition of same sex marriage. For the purposes of Medicaid eligibility states will be able to define marriage in accordance with their own laws.

Policy Implementation

CMS, with guidance and coordination from the Department of Justice and the Social Security Administration, will put out guidance that pertains to the various Medicaid eligibility groups. The guidance will cover individuals who have Medicaid on the basis of income and individuals with Medicaid on the basis of physical disability and other factors. CMS can issue this guidance autonomously without consultation with Congress or the judiciary.

CMS will give states some flexibility in the actual implementation of recognizing same-sex marriages. States will be able to begin recognizing same-sex marriages immediately, but states will be given the opportunity to recognize marriages as soon as reasonably possible, with an opportunity to implement mitigations or work-arounds where necessary.

³⁴ CMS issues guidance in the form of State Medicaid Director letters when circumstances subscribe that new guidance is necessary for states to proceed in running their Medicaid programs. A recent, unrelated, example can be found at Medicaid.gov (<http://medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-004.pdf>)

CMS will also work with states to create the necessary template to ease the process of amending the state's State Plan to recognize same-sex marriages. However states may begin recognition prior to submitting the State Plan Amendment (SPA).

There are numerous legal and political considerations that must be taken into account when issuing this guidance. Like any policy decision, there are potentially both negative and positive outcomes. This memo will go into further detail on the proposed guidance, its implications for implementation and the policy and political response to the proposal.

Policy Analysis

The policy proposed above is straightforward. However there are practical, political, legal, and cultural issues that should be considered. This analysis will begin with a discussion of some of the benefits to this approach.

Pros:

The proposed policy is beneficial for the following reasons:

- Proposed flexibility respects the unique Medicaid state-federal partnership;
- States ability to implement due to flexible implementation timeline and proposed state plan template;
- Potential increase in coverage;

As mentioned in the background section of this memo, states have a widely disparate take on same-sex marriage. Some states recognize full, legal same sex marriage, others recognize civil unions or domestic partnerships, and some have legal prohibitions against same-sex unions of any kind. The policy proposed above would provide maximum state flexibility by simply allowing states to follow their own views and laws on same-sex

marriage when dealing with the implications of *Windsor*. The proposal would recognize the unique Medicaid state-federal partnership based upon the joint financial responsibility for Medicaid shared by states and the federal government. As mentioned above, states and the federal government both provide financing for Medicaid, with the federal government setting the baseline rules for running the program. Prior experience in the Medicaid program has taught us that states often prefer to have their own policies carry the day on national issues that require state level implementation.

This brings us to the next positive aspect of this policy which is the states ability to implement in the context of changes to the eligibility process. That is because these new eligibility rules will either be not taken up by states not participating, or will be already available and semi-ingrained into the systems of states that do participate.

Although our policy will urge states to recognize same-sex marriages for the purposes of Medicaid eligibility, currently the majority of states do not recognize those marriages. For states that currently do not recognize any form of same-sex union and wish to continue that lack of recognition, there is no action to take. That means it is likely that more than half of the states will have to take no action at this time.³⁵ That will be well received by Medicaid programs who are busy implementing the changes to their systems and programs required by the Affordable Care Act.³⁶ Again, it does not quite align with our aspirations for the policy, but it will be viewed as a positive by some states.

³⁵ Governing Data. "Same Sex Marriage Map, State Laws List." <http://www.governing.com/gov-data/same-sex-marriage-civil-unions-doma-laws-by-state.html>. Accessed July 13, 2014

³⁶ Regardless of a state's decision whether or not to take up the Medicaid expansion made possible by the Affordable Care Act, all states are required to make changes to their Medicaid eligibility systems to streamline and simplify the eligibility process.

For those states that recognize same-sex marriage, it is likely that they currently have state and local programs that recognize those marriages for other public purposes. At a minimum, those states have registrations, and all other required information for marriage, of the same-sex couples that have married. It should not require much on those states part to begin considering same-sex marriages as part of the Medicaid eligibility process. Those states will just need to plug the newly recognized families into the eligibility systems just as they would opposite-sex marriages they currently adjudicate as part of the eligibility process.

Additionally, as mentioned above, CMS will provide states who choose to recognize same-sex marriages in their Medicaid program templates in order to make the changes to their programs necessary to begin recognizing the marriages for the purposes of Medicaid eligibility. That said, CMS will provide states the flexibility to begin implementing the recognition prior to making the necessary changes to their program. This will make the transition to recognition very simple for states regardless of eligibility system.

The final benefit of the policy is enhanced access to health insurance coverage for individuals in a recognized same-sex marriage. As you know, the Affordable Care Act called for an expansion of Medicaid to all Americans up to 133 percent of poverty (\$15,521 for an individual).³⁷ As you also know, the Supreme Court, has ruled that the Medicaid expansion is optional and a state decision. That decision from the supreme court has left nearly 7.6 million people who should have been eligible for affordable

³⁷ Families USA, "Federal Poverty Guidelines", <http://familiesusa.org/product/federal-poverty-guidelines>, Accessed July 13, 2014.

health coverage in a coverage gap.³⁸ The *Windsor* case does not directly impact the expansion, however the interplay of same-sex marriage recognition and Medicaid eligibility has a potential benefit to individuals entering a recognized same-sex marriage – many of whom might have previously fallen into the coverage gap mentioned above. In states that have chosen to take up the Medicaid expansion, there is a possibility that the individuals income will decrease (due to a less affluent spouse). In this case, an individual formerly eligible only for the premium tax credits³⁹ in the Marketplace could become eligible for Medicaid, which is much less of a financial obligation. Alternatively, in a state that did not expand, but recognizes same-sex marriages, an individual who was below 100 percent of poverty would be in a coverage gap, without access to Medicaid or premium tax credits in the Marketplace. However if that individual married a more affluent spouse, their income could make them eligible for premium tax credits.

The proposed action has important benefits to the Medicaid program, to states, and to beneficiaries. However, there are also concerns with the policy. A proper policy analysis requires review of the potential negative aspects of the proposal.

Cons:

The proposed policy comes with the following challenges:

- Lack of consistency with policy of other federal agencies;
- Loss of coverage in certain situations;

³⁸ The Henry J. Kaiser Family Foundation, “Fact Sheet: A Closer Look at the Impact of State Decisions Not to Expand Medicaid on Coverage for Uninsured Adults”, <http://kff.org/medicaid/fact-sheet/a-closer-look-at-the-impact-of-state-decisions-not-to-expand-medicaid-on-coverage-for-uninsured-adults/>, Accessed July 13, 2014.

³⁹ The Affordable Care Act made tax credits available to individuals between 100 and 400 percent of the federal poverty level to put towards the purchase of health insurance through the health care Marketplace.

- Lack of inconsistency in access to Medicaid income protection;

This memo and our purview is exclusively related to Medicaid, however the *Windsor* decision struck down the federal prohibition on recognition of same-sex marriage for all federal programs. Naturally, our colleagues throughout the administration will also be providing guidance on the implications of *Windsor* to their programs. Already the Internal Revenue Service has put out guidance stating wide recognition of same sex marriage. The IRS, for the purposes of tax filing, created a policy that matched their recognition of opposite sex marriages that were legal, regardless of where the couple lived. The guidance from the IRS states:

Individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages. For over half a century, for Federal income tax purposes, the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile, to achieve uniformity, stability, and efficiency in the application and administration of the Code.⁴⁰

Perhaps more relevant to our policy is the policy put out by our CMS colleagues in the Center for Consumer Information and Insurance Oversight (CCIIO). Shortly after the IRS guidance, CCIIO released guidance pertaining to same-sex couples access to Advanced Premium Tax Credits (APTC). CCIIO's guidance aligned with the IRS in stating that couples would be eligible for premium tax credits if they were part of a legally

⁴⁰ Internal Revenue Service, Internal Revenue Ruling 2013-17; August 29, 2013; <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>, accessed July 12, 2014.

recognized marriage, regardless of where they lived.⁴¹ It is logical that this guidance, which relies on tax filing, would align with the IRS guidance discussed above.

The proposed guidance will not fully align with the aforementioned major pieces of guidance put out by our colleagues in IRS and CCIIO. As stated above, the Medicaid recognition policy will not apply in states that themselves do not recognize same-sex marriage. This could cause confusion among individuals and couples within states, particularly states that do not recognize marriage. It is possible that there will be same-sex couples, living in the same state, with similar incomes that are treated differently for the purposes of eligibility to affordable health care. In a state that does not recognize same-sex marriage, if one of those couples has an income that qualifies for APTC and the other has an income that qualifies for Medicaid the couple who qualify for Medicaid's marriage will not be recognized for the purposes of their eligibility.

Another potential issue with the policy is the potential loss of access to affordable health coverage as a result of the recognition of same-sex marriage. The problem is very similar to the additional access to coverage discussed above, however there is an alternative negative outcome. As you know, since income is the main driver of Medicaid eligibility, when income is counted together it can go up or down. As a result, for some same-sex couples, having their marriage recognized could result in loss of coverage. In a state that does not expand coverage if an individual had income above 100 percent of poverty, they would have access to APTC. If that individual married a same-sex partner

⁴¹ Center for Consumer Information and Insurance Oversight, Guidance on Internal Revenue Ruling 2013-17 and Eligibility for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions, September 27, 2013, <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/marketplace-guidance-on-irs-2013-17.pdf>, accessed July 12, 2014.

with lower income, their joint income would now bring them below 100 percent of poverty and thus without access to Medicaid or APTC.⁴²

The proposed policy will also lead to inconsistency in access to spousal protections within the Medicaid program. In certain instances, a person's access to income and resources can be protected and separated from the income of their spouse for the purposes of eligibility that is related to disability and other factors. Perhaps most importantly, in the event that a spouse covered by Medicaid dies, their surviving spouse is not at risk at losing significant resources to pay for the costs incurred by the care of the deceased spouse. This protection can apply to shared resources like a home that is still in use by the surviving spouse. This protection will be given same-sex couples whose marriages are recognized by their state. However, there is a scenario in which the surviving member of a same-sex couple could lose their home if that asset is considered eligible for repayment of costs incurred by Medicaid for the treatment of the deceased spouse. Since the couple's marriage is not recognized, the protections would not apply to the surviving individual.

Political Analysis

Recognition of same-sex marriage, either state or federal, remains one of the most politically contentious social issues facing our country today. As stated above, this Administration has leaned into the *Windsor* decision, and had even stopped defending DOMA in court prior to the *Windsor* decision. Further, the administration has gone further in defending and advocating equal rights and protections for the LGBT community than any prior administration. The policy that is being proposed will not go as

⁴² Patient Protection and Affordable Care Act, 42 U.S.C. § 1001 (2010).

far as some of the proposals already on the table among other parts of the Administration. However, the politics of this policy are a bit more complicated than the considerations made by our colleagues in other parts of HHS and the Administration. Truthfully, this policy is a bit esoteric, and not quite the lightning rod that same-sex marriage recognition is generally – or even as much as other *Windsor* guidance has been. However, by examining the political stances of some prominent stakeholders we can gain an understanding of the potential political pros and cons of this policy.

Pros:

The proposed policy is politically beneficial for the following reasons:

- Administration seen as flexible to the opinions/laws of states;
- Policy urges full marriage recognition in the Medicaid program;
- Stronger guidance from other parts of Administration not eliciting response;

When Congress was considering health care reform many different models of reform were debated. Trying to solve the problem of high rates of health care uninsurance was a difficult task. Ultimately the decision was made to pursue a solution that shared responsibility for coverage among the private sector, the federal government, and states. The result of that decision was that, although the federal government would make the rules of the game, there was a necessary element of flexibility in each major policy to recognize the issues faced by partners in states and the private sector. This flexibility has been outlined for states time and time again⁴³, however a constant refrain, particularly

⁴³ CMS, HHS, and the Administration have publicly stated various flexibilities in countless settings. Most notably in a late 2012 letter from then Secretary Sebelius: <https://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf>

from Republican states, is that the federal government is not flexible in its implementation of the Affordable Care Act.

As discussed above, this flexibility (and critiques of flexibility) is most acute in the Medicaid program where rules and funds are shared between the states and federal government. The proposal we are considering will be viewed as sound politics on both sides of the aisle. It will allow states that recognize same-sex marriage (overwhelmingly Democratic) to provide yet another service to their LGBT populations. For states that do not recognize same-sex marriage (overwhelmingly Republican) it will be seen as a federal decision that respects states ability to craft and implement their own policies.

Further, although the proposal will leave the decision of same-sex marriage recognition for the purposes of Medicaid eligibility to the states, the policy will urge states to recognize same-sex marriages, just as they do opposite sex marriages. Politically, this can be seen as another step forward by this administration in same-sex marriage recognition.

Finally, as mentioned above, CCIIO and IRS have put out guidance that same-sex marriages will be recognized nationally for the purposes of filing tax returns and eligibility for advanced premium tax credits. This guidance, although sweeping in their recognition of same sex marriage has been met almost exclusively with silence with the exception of various accounting and lobbying firms releasing explanations of the guidance.⁴⁴

⁴⁴ As an example, the lobbying firm McGuireWoods has released this guidance. This is an example of several other similar types of guidance:
<http://www.mcguirewoods.com/Client-Resources/Alerts/2014/5/IRS-Issues-Additional-Post-Windsor-Guidance.aspx>

The proposal has elements that are politically beneficial, however, there are also some political liabilities that should be considered.

Cons:

The proposed policy comes with the following political challenges:

- Does not go far enough in recognition of same-sex marriage;
- Opponents may feel CMS has overstepped;
- Could elicit response from opponents of both same-sex marriage and Medicaid;
- Policy will be implemented in states that oppose same sex marriage;

The political downside of the policy is the potential for it to be viewed as a half-measure. As discussed in earlier sections, the administration has moved swiftly to follow the letter and spirit of the *Windsor* decision. Our colleagues in CCIIO and at IRS have moved to uniformly break down the former prohibitions placed on same-sex couples by DOMA. The proposed policy will support a status quo of sorts in the same-sex marriage debate. Because the policy does not propose recognizing same sex marriage in every state, it can be viewed as a less than full-throated statement on same-sex marriage recognition.

At the same time, the policy could leave CMS open to the political argument that we are going too far by urging that all states recognize same-sex marriage as it relates to Medicaid. It does seem odd that this policy could simultaneously be seen as not going far enough and also going too far. However, such is the same-sex marriage debate. As mentioned throughout this document, states feel very strongly about the shared responsibility for Medicaid between states and the federal government. By urging states that have prohibitions against same-sex marriage to recognize those marriages for the

purposes of Medicaid we could be seen as pushing a federal agenda in states that are not supportive. This will leave CMS open to arguments from states with opposing politics that we are being inflexible, an image we have worked hard to dispense. Further, supporters of small government could potentially make arguments that CMS is without authority to implement this guidance – even though this is untrue. As we have seen in the past few years, groups are eager to oppose, through public campaigns as well as the courts, all administration policy related, even tangentially, to the Affordable Care Act. It is possible that groups in opposition could see this policy being implemented in states with leadership that oppose same-sex marriage, but in which courts have recognized same-sex marriage, and feel it is ripe for litigation.

It is also worth noting that this policy could undermine Medicaid support generally for those already inclined to oppose the program. Groups on the right are generally not supportive of the Medicaid program as it has been implemented by our administration. Republican elected officials from Governors and Senators to state and local legislators have, for some time, called for Medicaid to be given to states as a block grant – a large lump sum given to states to administer the program as they see fit.⁴⁵ Opponents of Medicaid are always looking for examples of too much federal involvement in this program in which states and the federal government share responsibility. Many of those who oppose Medicaid also oppose same-sex marriage. The policy being proposed,

⁴⁵ Right leaning think tanks and groups like the Republican Governors Association have been in favor of block grants for some time. Examples can be found here <http://www.rga.org/homepage/rga-leadership-supports-house-gop-budget-calls-for-medicaid-block-grants/> and here <http://www.forbes.com/sites/aroy/2012/09/30/why-block-granting-medicaid-will-result-in-better-health-care-for-the-poor/>

although completely consistent with each states' law on same-sex marriage, could elicit further opposition to the Medicaid program.

Finally, as was briefly mentioned in this section, this policy will be implementing a recognition of same-sex marriage in states that may not actually support same-sex marriage recognition. The policy battle over same-sex marriage recognition has been waged in state legislatures and in the courts. As a result, there are examples around the country in which a state's legislature or governor are opposed to same-sex marriage but a court has ruled that any prohibition the state has implemented is illegal.⁴⁶ In theory, these states will need to recognize same-sex marriage for the purposes of Medicaid eligibility. These contradictions could complicate implementation of the policy as it may require CMS to work with states on same-sex marriage recognition which have no interest in implementing the policy.

Part 2: Key Actors and Constituencies

Even with the above considerations, is likely that our policy will not garner much attention. A view of a few select stakeholders will make clear why, while same-sex marriage recognition is hotly debated among the extremes of either party, the mainstream opposition may be backing away from it and the general public may no longer view it as an issue worth opposing.

Republican Governors: While it is impossible to paint all of the Republican governors in the United States with one brush on any policy, of late, there has been a movement, politically, away from opposition of same-sex marriage as an issue on which to campaign

⁴⁶ There are numerous examples of this including Wisconsin:
<http://www.jsonline.com/news/statepolitics/federal-judge-overturms-wisconsins-gay-marriage-ban-b99286138z1-262161851.html>

and rally. A recent meeting of the Republican Governors Association showed a trend towards a softening on same-sex marriage.⁴⁷ Wisconsin Republican Governor Scott Walker, who is a leader in the party and a potential presidential candidate in 2016 was quoted as saying, “I don’t think the Republican Party is fighting it, I’m not saying it’s not important, but Republicans haven’t been talking about this. We’ve been talking about economic and fiscal issues.” This sentiment was echoed by several of Walker’s colleagues. There also appears to be some in the party who are fine to ignore the issue, letting the courts take action. We have not seen backlash from this group on the CCIIO or IRS guidance. It is likely that any political backlash will come from a perceived lack of flexibility, not as much in the content of the policy.

Democratic Governors: Support for same-sex marriage among Democratic governors is less controversial. So much so that the Chair of the Democratic Governor’s Association (DGA), Governor Pat Shumlin of Vermont, felt empowered to make an official statement on the DGA’s website condemning a Republican governor who had made disparaging remarks about same-sex marriage.⁴⁸ Other governors have not gone this far, particularly those in right-leaning states. Governor Steve Beshear, a Democratic governor in Kentucky who is appealing a court decision to reverse his state’s same-sex marriage ban, was quoted as saying, “My goal is to get that issue to the United States Supreme Court

⁴⁷ Associated Press, “GOP governors may be evolving message on same-sex marriage”, 2014 12-July, <http://www.pbs.org/newshour/rundown/nations-bible-belt-gop-governors-shift-message-sex-marriage/> (accessed 2014 2-August)

⁴⁸ Democratic Governors Association, “DGA Statement Regarding Tom Corbett’s Comparison Of Same-Sex Marriage To Incest”, <http://democraticgovernors.org/dga-statement-regarding-tom-corbetts-comparison-of-same-sex-marriage-to-incest/#~oM5xL5eyw4nJhF>, Accessed August 1, 2014.

and get a final decision that will tell us all what the law is going to be in the future, and then Kentucky will abide by it.”⁴⁹ There may be a push from some of the leadership of the DGA for Medicaid to go further on same-sex marriage, but we can expect minimal attention as our policy will allow supportive governors to implement recognition further in their states.

Social Advocacy Groups: As discussed in the Background section of this paper, the political response of advocacy groups to this particular policy is relatively muted. Leading groups like Human Rights Campaign and Lambda Legal have put out a fact sheet describing the impact of *Windsor* on Medicaid but again have been balanced with the understanding that being married is not always beneficial in Medicaid.⁵⁰ As of yet these groups have not called on CMS to go further in marriage recognition and there is unlikely to be negative political backlash.

Religious Groups: Religious groups, particularly Catholic church and employer groups have been active in support of their social views as they pertain to health care. The most notable example of this has been Catholic church and employers opposition to the coverage of female contraception as part of the health insurance coverage large

⁴⁹ Associated Press, “GOP governors may be evolving message on same-sex marriage”, 2014 12-July, <http://www.pbs.org/newshour/rundown/nations-bible-belt-gop-governors-shift-message-sex-marriage/> (accessed 2014 2-August)

⁵⁰ Lambda Legal, “After DOMA: Medicaid”, <http://www.lambdalegal.org/publications/after-doma-medicaid>, Accessed August 4, 2014.

employers are required to provide.⁵¹ The *Windsor* decision will require the federal government to recognize same-sex marriage for the purposes of federal programs. This action will certainly gain the attention of religious groups that opposed same-sex marriage. The policy being proposed could be one of the examples cited by these groups as inappropriate recognition of same-sex marriage on the part of the federal government. That said, it is unlikely that the Medicaid policy in particular will be challenged by these groups – more likely is a larger challenge to the federal policy of recognition.

General Public: This policy is complicated and a little harder to understand than some of the post-DOMA implementation going on among other departments. That said, there is some potential response from a public increasingly in support of same-sex marriage. Recent polling has shown that 55 percent of Americans are now in favor of laws that recognize same-sex marriage – this is up from 53 percent in 2011 and 54 percent in 2012.⁵² Further, the polling found that “nearly 8 in 10 young adults (age 18-29) favor same-sex marriage”.⁵³ The political reality is that future voters are overwhelmingly in favor of same sex marriage. Not surprisingly, the poll also found significantly stronger support for same-sex marriage among Democrats (74%) as opposed to Republicans (30%), while independents (58%) hovered around the national average.⁵⁴ This polling

⁵¹Associated Press, “Catholic group challenging Affordable Care Act because of birth control”, 2014 12-March, http://www.cleveland.com/nation/index.ssf/2014/03/catholic_group_challenging_aff.html (accessed 2014 10-August)

⁵² Justin McCarthy, “Same-Sex Marriage Support Reaches New High at 55%”, 2014 21-May, <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx> (accessed 2014 5-August).

⁵³ Ibid

⁵⁴ Ibid

was not done around Medicaid or the Medicaid response to *Windsor* but it is safe to say that the public will be politically accepting of a CMS decision that takes a step towards full recognition of same-sex marriage.

Recommendation

The evidence given here shows that CMS providing guidance to states that allows, for the purposes of Medicaid eligibility, to define marriage in accordance with their own laws is the prudent path forward.

There are reasons, both political and policy, that this decision makes sense. As stated above, this policy will recognize the unique state and federal relationship that comes from the shared responsibility for the rules and financing of Medicaid. This is both a policy and political argument. On the policy side, this flexibility will be consistent with the way Medicaid is generally run. That is to say, the federal government sets the baseline rules, but with deference to state law and policy. Politically, this flexibility is an asset in the Administration's argument that health care policy is being implemented with states and consumers in mind. The policy will meet states where they are politically and judicially and easily refute any assertion that CMS is overstepping its authority and role. Political analysis has also shown that the potential mainstream opposition to this policy is ready to move past this issue. These leaders have undoubtedly seen the same polling mentioned above and don't want their opposition to same-sex marriage as a mainstream political issue.

This policy can be implemented immediately with a simple release of guidance from CMS to the states and will be an appropriate response to the *Windsor* decision.

Curriculum Vitae

Adam Goldstein was born in New York on February 12th, 1984. He earned a Bachelor of Arts in May, 2006 from the University of Maryland in College Park, where he double majored in History and Rhetoric. He has been a candidate for the Masters in Public Management from Johns Hopkins University since September, 2012. Adam works for the United States Department of Health and Human Services.