No. 12-

IN THE

# Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS,
*Cross-Petitioner*,

*v.*

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

*and*

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
*Cross-Respondents.*

**ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

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

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

## PARTIES TO THE PROCEEDINGS

The Commonwealth of Massachusetts was the plaintiff in the district court and an appellee in the court of appeals and is a respondent and conditional cross-petitioner in this Court.

The U.S. Department of Health and Human Services; Kathleen Sebelius, in her official capacity as the Secretary of the U.S. Department of Health and Human Services; the U.S. Department of Veterans Affairs; Eric K. Shinseki, in his official capacity as the Secretary of the U.S. Department of Veterans Affairs; and the United States (collectively, the United States) were defendants in the district court and appellants in the court of appeals and are petitioners (No. 12-15) and conditional cross-respondents in this Court.

In the companion case of *Gill* v. *Office of Personnel Management*, Nancy Gill, Marcelle Letourneau, Martin Koski, James Fitzgerald, Mary Ritchie, Kathleen Bush, Melba Abreu, Beatrice Hernandez, Jo Ann Whitehead, Bette Jo Green, Randell Lewis-Kendell, Herbert Burtis, Marlin Nabors, Jonathan Knight, Mary Bowe-Shulman, and Dorene Bowe-Shulman were plaintiffs in the district court and appellees in the consolidated court of appeals proceeding and are respondents in this Court. Dean Hara was a plaintiff in the district court and was both appellee and cross-appellant in the consolidated court of appeals proceeding.

In *Gill*, the Office of Personnel Management; the United States Postal Service; Patrick R. Donahoe, in his official capacity as the Postmaster General of the United States; Michael J. Astrue, in his official capacity as the Commissioner of the Social Security Administration; Hillary Rodham Clinton, in her official capacity as

United States Secretary of State; Eric H. Holder, Jr., in his official capacity as the Attorney General of the United States; and the United States were defendants in the district court and appellants in the consolidated court of appeals proceeding and are petitioners (No. 12-15) in this Court.

The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) intervened as an appellant in the consolidated court of appeals proceeding and is a petitioner (No. 12-13) and conditional cross-respondent in this Court.

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## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Massachusetts, by and through its Attorney General, respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. For the reasons set forth in the Commonwealth's response to the petitions for certiorari filed in Nos. 12-13 and 12-15, the Commonwealth does not oppose this Court's review of this case. However, if this Court grants either of those petitions, it should also grant this conditional cross-petition to the extent necessary to address the Commonwealth's contentions under the Tenth Amendment and Spending Clause.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 682 F.3d 1 and reproduced at Pet. App. 1a-28a.[1] The opinion of the district court is reported at 698 F. Supp. 2d 234 and reproduced at Pet. App. 82a-120a. The opinion of the district court in *Gill*, the companion case, is reported at 699 F. Supp. 2d 374 and reproduced at Pet. App. 29a-72a.

## JURISDICTION

The judgment of the court of appeals was entered on May 31, 2012. BLAG Pet. App. 30a-31a. BLAG and the United States filed petitions for certiorari on June 29, 2012, and July 3, 2012 respectively, and both peti-

[1] References to "Pet. App." are to the appendix to the United States' petition in No. 12-15. References to "BLAG Pet. App." are to the appendix to BLAG's petition in No. 12-13.

tions were docketed on July 3, 2012. This conditional cross-petition is timely pursuant to this Court's Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article I, section 8, clause 1 of the Constitution provides, in relevant part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

The text of Section 3 of DOMA, codified at 1 U.S.C. § 7, is reproduced at Pet. App. 125a.

## STATEMENT

### A. Introduction

The Commonwealth of Massachusetts, pursuant to its sovereign prerogative and the Massachusetts Declaration of Rights, has issued marriage licenses to same-sex couples since 2004. These marriage licenses are indistinguishable from those issued to different-sex couples in all respects but one: they are singled out and rendered invalid for purposes of federal law under DOMA's unprecedented federal definition of marriage. DOMA disregards lawful marriages between same-sex couples for all purposes under federal law—affecting over a thousand federal statutes as well as numerous federal regulations. In addition to harming lawfully-

married residents of the Commonwealth by giving their marriages no effect under federal law, DOMA harms the Commonwealth by encroaching on its sovereign prerogative in two important ways.

*First*, DOMA is an impermissible federal intrusion into the Commonwealth's regulation of marriage, an area that this Court has consistently recognized is—and has been since the Founding—one of exclusive State authority. Whereas most States recognize a single marital status that is given effect under federal law as well as State law, DOMA effectively divides marriage in Massachusetts into two different statuses: married for all purposes for different-sex spouses, and married but "federally single" for same-sex spouses. This federal interference in the State regulation of domestic relations is unprecedented in our history and violates the Tenth Amendment.

*Second*, in violation of the Spending Clause, DOMA forces the Commonwealth, as a condition of receipt of federal funds, to engage in unconstitutional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. For example, as a condition of continued federal funding of its Medicaid program, DOMA requires the Commonwealth to disregard the marriages of only same-sex couples when assessing eligibility for the program. Likewise, DOMA requires the Commonwealth to refuse to bury a decorated veteran alongside his same-sex spouse in a veterans' cemetery on Commonwealth-owned land that has been funded under the federal State Cemetery Grants Program or else risk recapture of the federal funds used to establish and maintain that cemetery. Placing such conditions on the Commonwealth's receipt of federal funds exceeds Congress's power. DOMA separately violates the Spending Clause because it fails even the most leni-

ent articulation of the germaneness requirement: DOMA's disregard of lawful marriages bears no relationship whatsoever to the purposes of the federal programs it affects, including Medicaid and the State Cemetery Grants Program.

### B. District Court Proceedings

The Commonwealth sued the United States and various federal defendants, seeking a declaration that DOMA violates the Tenth Amendment and the Spending Clause and asking the district court to enjoin DOMA's application in Massachusetts. Pet. App. 82a-120a. In *Gill* v. *Office of Personnel Management*, same-sex spouses married under Massachusetts law brought a parallel claim that the United States' failure to recognize their marriages under federal law violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* 29a-72a. The United States moved to dismiss, and the Commonwealth and the *Gill* plaintiffs cross-moved for summary judgment, submitting detailed evidence in support of their claims. The United States did not dispute the evidence submitted. Pet. App. 44a n.68, 101a n.112.

The district court granted summary judgment to the Commonwealth and the *Gill* plaintiffs, ruling in *Gill* that DOMA is unconstitutional because it violates equal protection, and in the Commonwealth's case that DOMA is unconstitutional because it violates the Spending Clause and the Tenth Amendment. Pet. App. 29a-30a, 83a. With regard to the Spending Clause, the district court held that "DOMA induces the Commonwealth to violate the equal protection rights of its citizens" and thereby "imposes an unconstitutional condition on the receipt of federal funding," in contravention of "a well-established restriction on the exercise of

Congress' spending power." *Id.* 110a.[2] With regard to the Tenth Amendment, the district court held that DOMA encroaches upon the Commonwealth's sovereign authority "to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status." *Id.* 120a.[3]

The district court declared DOMA unconstitutional as applied to the Commonwealth and the *Gill* plaintiffs and entered injunctions preventing DOMA's enforcement against them. Pet. App. 75a-81a, 123a-124a. In particular, the court entered judgment in the Commonwealth's favor on its Tenth Amendment and Spending Clause claims and enjoined DOMA's enforcement against the Commonwealth and any of its agencies or officials. *Id.* 124a. The judgment also provided that DOMA "is unconstitutional as applied in Massachusetts, where State law recognizes marriages between same-sex couples." *Id.*

### C. Court Of Appeals Proceedings

The United States appealed. At the United States' request, the court of appeals consolidated the *Gill* case with the Commonwealth's case. The United States filed an opening brief in the consolidated cases defend-

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[2] The district court did not reach the Commonwealth's alternative argument that DOMA violates the Spending Clause by imposing a condition that is not germane to the federal spending programs at issue. Pet. App. 110a-111a.

[3] The facts and prior judgments in the two cases are discussed in greater detail in the Commonwealth's response in support of certiorari in Nos. 12-13 and 12-15.

ing DOMA's constitutionality under the Fifth Amendment's equal protection component, the Tenth Amendment, and the Spending Clause. Before the Commonwealth and the *Gill* plaintiffs filed their responsive briefs, the United States informed the court of appeals that the President and Attorney General had concluded that classifications based on sexual orientation should be evaluated under heightened scrutiny, that Section 3 of DOMA could not survive that level of scrutiny, and that the United States would therefore cease its defense on equal protection grounds of the constitutionality of Section 3. Pet. App. 6a. BLAG then sought and was granted leave to intervene as an appellant in order to defend DOMA against the equal protection challenge.[4]

The United States filed a superseding brief, asserting that DOMA should be evaluated under a heightened equal protection standard, which the United States agreed DOMA could not satisfy. The United States' superseding brief also agreed that because DOMA violates equal protection, it necessarily violates the Spending Clause by imposing an unconstitutional condition on the Commonwealth's receipt of federal funds. However, the United States continued to argue that DOMA violates neither the Tenth Amendment nor the Spending Clause's germaneness requirement.

BLAG filed a brief addressing only the equal protection arguments and did not address the district

[4] After BLAG was permitted to intervene, the *Gill* plaintiffs moved for initial hearing en banc, and the United States later joined in the request. The Commonwealth and BLAG neither supported nor opposed the request. The court of appeals denied initial hearing en banc by an equally divided vote.

court's ruling that DOMA violates the Tenth Amendment and Spending Clause.

The court of appeals affirmed the district court's judgment. BLAG Pet. App. 30a-31a. The court of appeals' decision stated, however, that "[i]n our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA." Pet. App. 14a. With respect to the Tenth Amendment, the court acknowledged that before DOMA's enactment, Congress consistently looked to State law to determine marital status for purposes of federal law. *Id.* 15a. Nonetheless, the court concluded that a Tenth Amendment claim could succeed "only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government." *Id.* 16a. Because DOMA "does not share these two vices of commandeering or direct command," the court discerned no Tenth Amendment violation. *Id.*

The court did not address the Commonwealth's primary Spending Clause argument: that by conditioning federal funds under Medicaid and the State Cemetery Grants Program on a requirement that the Commonwealth disregard lawful same-sex marriages, DOMA makes federal funds turn on a violation of the Equal Protection Clause and, accordingly, runs afoul of the rule that Congress cannot condition federal funds on a State's violation of an independent constitutional requirement. *See South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). The court ruled that DOMA did not "run afoul of the 'germaneness' requirement [of the Spending Clause] that conditions on federal funds must be related to federal purposes." Pet. App. 16a.

With respect to equal protection, the court of appeals concluded that discrimination on the basis of sex-

ual orientation, standing alone, did not warrant "strict" or "intermediate" scrutiny under this Court's equal protection jurisprudence—a conclusion it based both on circuit precedent and its reading of this Court's precedent. Pet. App. 8a-14a. However, "[g]iven that DOMA intrudes broadly into an area of traditional state regulation," the court of appeals concluded that "a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns." *Id.* 18a.

Analyzing DOMA through the lens of federalism, the court observed that "the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts to regulate the rules and incidents of marriage." Pet. App. 16a. After addressing each of BLAG's proffered justifications in defense of DOMA on equal protection grounds, the court concluded that, while these reasons might suffice under a traditional rational-basis analysis, they did not clear the higher bar required by the added federalism concerns raised in this case. *Id.* 22a-23a ("If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.").

The court of appeals entered a judgment in the consolidated cases that states, in full: "The judgment of the district court is affirmed. The mandate is stayed, maintaining the district court's stay of its injunctive judgment, pending further order of this court. The parties will bear their own costs on these appeals." BLAG Pet. App. 30a-31a.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

### I. IN REVIEWING DOMA'S CONSTITUTIONALITY, THIS COURT SHOULD ALSO CONSIDER WHETHER DOMA VIOLATES THE TENTH AMENDMENT AND THE SPENDING CLAUSE

The petitions for certiorari in Nos. 12-13 and 12-15 seek review of the court of appeals' holding that DOMA violates equal protection. As the Commonwealth's response (incorporated here by reference) explains, that holding, although correct, is worthy of this Court's consideration. Accordingly, this Court should grant certiorari and affirm DOMA's unconstitutionality.

In addressing the constitutionality of DOMA, this Court should also consider the Commonwealth's Tenth Amendment and Spending Clause arguments pressed and decided below, which present important questions of federalism that are best addressed in a case where a State appears as a party. As the Commonwealth's response explains more fully, the Tenth Amendment and Spending Clause provide additional and independent bases for affirming the judgment in the Commonwealth's favor.

Indeed, the Commonwealth believes that these separate grounds for affirmance could be fully considered without need for a conditional cross-petition: "A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). Because the district court entered judgment for the Commonwealth (Pet. App. 123a-124a), and the court of appeals' judgment fully affirmed that judgment (BLAG Pet. App. 30a-31a), a determina-

tion by this Court that DOMA violates the Tenth Amendment or the Spending Clause would not alter the existing judgment. *See Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) (no cross-petition required where "an affirmance on [an] alternative ground would neither expand nor contract the rights of either party established by the judgment below").

However, in light of the court of appeals' statement that "neither the Tenth Amendment nor the Spending Clause invalidates DOMA" (Pet. App. 14a), and BLAG's assertion that the court of appeals "squarely rejected Massachusetts' Tenth Amendment and Spending Clause challenges" (BLAG Pet. 15), the Commonwealth is concerned that petitioners or the Court might interpret the court of appeals' judgment as something other than an affirmance in the Commonwealth's favor. The Commonwealth therefore files this conditional cross-petition out of an abundance of caution, to ensure that there is no impediment to the Court's consideration of the full scope of DOMA's constitutional infirmities. As the remainder of this conditional cross-petition shows, the Tenth Amendment and Spending Clause are additional bases for ruling DOMA unconstitutional.[5]

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[5] As discussed *infra* pp. 17-18, the court of appeals' conclusion that DOMA violates equal protection cannot be reconciled with its statement that DOMA does not violate the Spending Clause, because Congress cannot condition the grant of federal funds under the spending power on a State's violation of another constitutional provision. *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). If DOMA violates equal protection, its enforcement in the context of joint federal-State programs such as Medicaid and the State Cemetery Grants Program necessarily violates the Spending Clause as well.

## II. DOMA VIOLATES THE TENTH AMENDMENT AND THE SPENDING CLAUSE

### A. DOMA Violates The Tenth Amendment

As the Commonwealth's response explains in greater detail, DOMA violates the Tenth Amendment because it purports to regulate a "domain of activity set apart by the Constitution as the province of the states." *Hopkins Fed. Sav. & Loan Ass'n* v. *Cleary*, 296 U.S. 315, 338 (1935) (Cardozo, J.). In so doing, DOMA exceeds the scope of permissible congressional power and violates the State sovereignty secured by the Tenth Amendment.

The Tenth Amendment provides that Congress may not enact legislation in areas reserved to the States. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").[6] As the court of

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[6] *See, e.g.*, *United States* v. *Darby*, 312 U.S. 100, 124 (1941) (purpose of Tenth Amendment was "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers"); *see also New York* v. *United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) ("States remain sovereign as to all powers not vested in Congress or denied them by the Constitution[.]"); Federalist No. 45 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

appeals properly acknowledged, domestic relations are one such area. Pet. App. 15a ("DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation—domestic relations and the definition and incidents of lawful marriage—which is a leading instance of the states' exercise of their broad police-power authority over morality and culture."). This Court has also repeatedly recognized that "'[t]he whole subject of the domestic relations of husband and wife … belongs to the laws of the States and not to the laws of the United States.'" *McCarty* v. *McCarty*, 453 U.S. 210, 220 (1981) (quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979)); *see also Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce …. [T]he Constitution delegated no authority to the Government of the United States on th[at] subject.").

As the uncontroverted record in the district court established, the States' exclusive authority over marital status has never been limited to defining its contours for purposes of State law. Rather, to the extent Congress has chosen to predicate federal law on marital status, State marital determinations have controlled for purposes of federal law as well. Indeed, prior to DOMA, Congress had never refused to recognize a State determination of marital status. Pet. App. 60a-61a; *see also id.* 15a ("Congress has never purported to lay down a general code defining marriage or purporting to bind to the states to such a regime."); *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem … is the lack of historical precedent' for Congress's

action. At the very least, we should 'pause to consider the implications' … when confronted with such new conceptions of federal power." (quoting *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010), and *United States* v. *Lopez*, 514 U.S. 549, 564 (1995) (first three alterations in original))).[7]

DOMA is therefore a sweeping and unprecedented federal incursion into an area that, for centuries, has been a domain of exclusive State regulation, supplanting the States' settled, uninterrupted authority to define marital status for all purposes. Because the Tenth Amendment "reserve[s]" the regulation of marriage to "the States," DOMA's federal definition of marriage exceeds the limited powers conferred on the federal government by the Constitution. *See Bond* v. *United States*, 131 S. Ct. 2355, 2366 (2011) ("Impermissible interference with state sovereignty is not within the enu-

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[7] *See* Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602-1603 (1996); *see also, e.g.*, *Slessinger* v. *Secretary of HHS*, 835 F.2d 937, 939 (1st Cir. 1987) (rejecting application of federal common law rule to eligibility determination under Social Security Act and instead deferring to State rule: "This conclusion is strongly reinforced by the settled principle that matters of divorce and marital status are uniquely of state, not federal concern. It would do violence to this principle for a court to apply federal law under the Act to give effect to a foreign divorce decree that would not be honored in the state of domicile." (citations omitted)); *Tidewater Marine Towing, Inc.* v. *Curran-Houston, Inc.*, 785 F.2d 1317, 1318-1320 (5th Cir. 1986) (rejecting application of federal common law rule in eligibility determination under federal maritime law: "We are aware of few instances in which state interests are accorded more deference by federal courts than in defining familial status."); *Bell* v. *Tug Shrike*, 332 F.2d 330, 334-336 (4th Cir. 1964) (same).

merated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." (citation omitted)).[8]

While the court of appeals correctly recognized that "no precedent exists for DOMA's sweeping general 'federal' definition of marriage for all federal statutes and programs" (Pet. App. 15a), the court nonetheless found that DOMA did not violate the Tenth Amendment. The court based this conclusion on the mistaken rationale that a Tenth Amendment claim can succeed "only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government." *Id.* 16a. This conclusion misstates this Court's Tenth Amendment doctrine, which has never suggested that the Tenth Amendment is violated only by commandeering or direct command. To the contrary, this Court has ruled that States' immunity from commandeer is not necessarily "the outer limit[] of [State] sovereignty." *New York* v. *United States*, 505 U.S. 144, 188 (1992). The Court reaffirmed that understanding in *McConnell* v. *FEC*, explaining that "in maintaining the federal system envisioned by the Founders, this Court has done

[8] As the court of appeals correctly acknowledged, this is not to say that Congress has no interest in "who counts as married," but rather that this interest can be satisfied by Congress's legislation "in individual situations—such as the anti-fraud criteria in immigration law, 8 U.S.C. § 1186a(b)(1)(A)(i)," where Congress has added requirements beyond marriage. Pet. App. 15a. Moreover, every marriage can at least *potentially* satisfy such additional federal criteria. DOMA's omnibus approach, effectively nullifying a large category of marriages for all federal purposes, contrasts starkly with these narrow, program-specific statutory criteria.

more than just prevent Congress from commandeering the States. We have also policed the absolute boundaries of congressional power under Article I." 540 U.S. 93, 187 (2003), *overruled in part on other grounds*, *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010).[9]

The court of appeals' narrow reading of the Tenth Amendment directly conflicts with this Court's precedents. Certiorari is warranted to clarify that DOMA, in addition to violating the equal protection rights of Massachusetts citizens, also violates the constitutional structure of federalism enshrined in the Tenth Amendment.

### B. DOMA Violates The Spending Clause

Congress's power under the Spending Clause (U.S. Const. art. I, § 8, cl. 1) includes the ability to condition States' receipt of federal funds upon compliance with federal directives. While this power is broad, it is not unfettered, and is circumscribed by the limitations articulated in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). A valid exercise of the spending power must be: (1) "in pursuit of the general welfare"; (2) unambiguous; (3) related to "'the federal interest'" in furtherance of which the spending power is being exercised; (4) not independently barred by other constitutional provisions; and (5) not "so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 207-208, 211 (internal quotation marks omitted).

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[9] Holding Congress to its delegated powers is not simply a matter of protecting State prerogatives. "'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York*, 505 U.S. at 181 (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

The Commonwealth argued below that DOMA runs afoul of two of these restrictions. *First*, it conditions federal funds on the Commonwealth's violation of another constitutional provision, namely the Equal Protection Clause of the Fourteenth Amendment.[10] *Second*, DOMA fails the "relatedness" (or germaneness) requirement because its disregard of State marriage determinations bears no relationship to the federal spending programs it affects—notably here, Medicaid and the State Cemetery Grants Program. Both grounds provide independent bases for invalidating DOMA.

### 1. DOMA violates the Spending Clause because it conditions receipt of federal funds on the Commonwealth's violation of the Equal Protection Clause

By conditioning the Commonwealth's receipt of federal funds under Medicaid and the State Cemetery Grants Program on a requirement that the Commonwealth discriminate on the basis of whether a person is married to a spouse of the same sex, DOMA forces the Commonwealth to violate the Equal Protection Clause and, accordingly, exceeds Congress's power under the Spending Clause.

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[10] As the lower courts, the United States, and BLAG all agree, this Court's approach "to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 217 (1995) (internal quotation marks omitted). Thus, if DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment when enforced by the federal government, it also violates the Equal Protection Clause of the Fourteenth Amendment when enforced by a State.

This Court ruled in *Dole* that "a grant of federal funds conditioned on invidiously discriminatory state action … would be an illegitimate exercise of Congress' broad spending power." 483 U.S. at 210-211; *see also United States* v. *American Library Ass'n*, 539 U.S. 194, 203 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. But Congress may not 'induce' the recipient 'to engage in activities that would themselves be unconstitutional.'" (citation omitted; quoting *Dole*, 483 U.S. at 210)).

The court of appeals' ruling that DOMA violates equal protection thus compels a finding that DOMA also violates the Spending Clause. In the context of the State Cemetery Grants Program, DOMA prevents the Commonwealth from burying the same-sex spouse of a veteran in a cemetery on Commonwealth-owned land that was funded under the program: If the Commonwealth treats the same-sex spouse as eligible for burial in the cemetery (as a different-sex spouse would be), the Commonwealth risks being required to return the federal funding the Commonwealth has received to establish and maintain the cemetery. Likewise, DOMA forces the Commonwealth to administer Medicaid in a way that treats different-sex marriages differently from identically-situated same-sex marriages, forcing the Commonwealth to engage in unconstitutional discrimination as a condition of receipt of federal funds.

The court of appeals did not discuss this aspect of the Commonwealth's Spending Clause argument. But the court's statement that DOMA does not violate the Spending Clause (Pet. App. 16a-17a) cannot be reconciled with its finding that DOMA violates equal protection. Indeed, neither the United States nor BLAG has ever disputed that if DOMA violates equal protection,

it must also violate the Spending Clause by forcing the Commonwealth to violate equal protection in its dealings with its own citizens.

By requiring the Commonwealth to engage in unconstitutional discrimination as a condition of receiving and retaining federal funds, DOMA is precisely the type of impermissible exercise of Congress's spending power prohibited by the Constitution. *See Dole*, 483 U.S. at 208; *cf. National Fed'n of Indep. Bus.*, 132 S. Ct. at 2659 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("our cases have long held that the power to attach conditions to grants to the States [under the Spending Clause] has limits"). Certiorari is warranted to address this unconstitutional exercise of federal power.

**2. DOMA violates the Spending Clause because it bears no relation to the federal spending programs at issue**

DOMA separately violates the Spending Clause's requirement that federal funds not be limited by conditions "unrelated to the federal interest in [the affected] national projects or programs." *Dole*, 483 U.S. at 207 (internal quotation marks omitted). The court of appeals believed that this requirement was "not implicated" because DOMA "merely defines the terms of the federal benefit." Pet. App. 16a. If that were true, however, *Dole*'s germaneness requirement would be a dead letter, because any irrelevant condition may be cast as a limit on "the terms of the federal benefit." In *Dole*, the germaneness requirement was met because the goal of the federal highway funds program at issue was to ensure safe interstate highway travel. That goal was promoted by the condition that States adopt a uniform minimum drinking age: "the lack of uniformity in the States' drinking ages created an incentive to drink and

drive because young persons commut[e] to border States where the drinking age is lower." 483 U.S. at 209 (internal quotation marks omitted).

Here, unlike in *Dole*, neither the court of appeals nor the United States in its briefing below has ever provided a plausible explanation of how the purposes of the programs affected by DOMA are served by refusing to recognize marriages lawfully contracted under Massachusetts law. Medicaid is designed to provide subsidized medical care to needy individuals, yet DOMA compels the Commonwealth to provide and pay for coverage of individuals in high-income families because their potentially disqualifying marriages cannot be recognized for purposes of federal Medicaid eligibility. And no colorable argument can be made that DOMA's prohibition on burying a decorated veteran with his husband is "related" to a program that exists for the purpose of burying veterans with their loved ones.

DOMA's disregard of lawful marriages is not "reasonably related to the purpose[s]" of these programs. *New York*, 505 U.S. at 172. If anything, it is directly at odds with them. Accordingly, as a limitation on the receipt of federal funds, it cannot pass even the most lenient test for "relatedness," and certiorari is warranted to correct the court of appeals' contrary ruling.

## CONCLUSION

If the Court grants certiorari in either No. 12-13 or No. 12-15, it should also grant this conditional cross-petition to the extent necessary to reach the Commonwealth's Tenth Amendment and Spending Clause claims.

Respectfully submitted.

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