Nos. 12-13, 12-15

IN THE

Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

NANCY GILL, *et al.*,
Respondents.

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

v.

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF CERTIORARI

MARK C. FLEMING
FELICIA H. ELLSWORTH
BRIAN J. BOYLE JR.
MARGARET E. O'GRADY
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

MARTHA COAKLEY
ATTORNEY GENERAL
MAURA T. HEALEY
Counsel of Record
JONATHAN B. MILLER
JOSHUA D. JACOBSON
CHRISTOPHER K. BARRY-SMITH
ASSISTANT ATTORNEYS GENERAL
One Ashburton Place
Boston, MA 02108
(617) 727-2200
Maura.Healey@state.ma.us

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937 7294

PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663 6534

QUESTIONS PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines a "marriage" for all purposes as "only a legal union between one man and one woman as husband and wife." Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7). It similarly defines a "spouse" as "a person of the opposite sex who is a husband or a wife." *Id.* The question presented is:

1. Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

The Commonwealth of Massachusetts also presents the following questions as alternative bases for affirmance of the judgment:

2. Whether Section 3 of DOMA violates the Tenth Amendment.

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

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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.

DOMA is an unwarranted expansion of federal power that violates the allocation of powers between the federal government and the States. The Commonwealth challenged DOMA on these grounds, which were adopted by the district court but not the court of appeals and which provide independent bases for ruling DOMA unconstitutional. DOMA expands federal power in two important and unjustifiable ways.

First, DOMA is an impermissible federal intrusion into the Commonwealth's regulation of marriage, which this Court has consistently recognized is a power exclusively reserved to the States. Whereas most States recognize a single marital status that is given effect under federal 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 the Nation's history and violates the Tenth Amendment.

Second, DOMA forces the Commonwealth, as a condition of its receipt of federal funds in connection with the Commonwealth's participation in the federal

Medicaid program and State Cemetery Grants Program, to engage in unconstitutional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Placing such a condition on the Commonwealth's receipt of federal funds exceeds Congress's power under the Spending Clause. DOMA also exceeds Congress's Spending Clause powers because its disregard of lawful marriages bears no relationship to the purposes of the federal programs it affects, including Medicaid and the State Cemetery Grants Program.

The Commonwealth agrees with the court of appeals' judgment, which correctly affirmed both the district court's ruling that DOMA is unconstitutional and its injunction forbidding enforcement of DOMA in Massachusetts. However, the Commonwealth recognizes that DOMA's unconstitutionality is a question of national significance and is likely to be addressed by this Court at some point. The Commonwealth believes that it is important that the Court address the matter in a case that presents the full complement of DOMA's constitutional infirmities, including the Tenth Amendment and Spending Clause issues that are best raised by a State and, to date, have only been raised in this litigation. Accordingly, the Commonwealth agrees that certiorari should be granted in this case.[1]

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[1] The Commonwealth takes no position on whether BLAG has independent standing to petition for certiorari in this case. Sufficient review is assured by granting the United States' petition and permitting BLAG to urge reversal. *See* U.S. Pet. (No. 12-15) at 12 n.3. Out of an abundance of caution, the Commonwealth is also filing a conditional cross-petition for a writ of certiorari raising its Tenth Amendment and Spending Clause arguments, in the event the Court determines that such a cross-petition is required in or-

B. History Of Marriage Laws In The United States

Since the Founding, the States have exclusively controlled the terms for entry into and exit from marriage. Pet. App. 89a-90a.[2] State marriage rules have varied substantially, including "'nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce.'" *Id.* 86a. Several variations among State marriage laws were the subject of serious controversy, including restrictions regarding consanguinity, hygiene, age, and most notably race. *Id.* 87a. Nevertheless, the federal government has consistently given effect under federal law to States' marital status determinations. *Id.* That changed with DOMA's enactment in 1996.

C. The Federal Defense Of Marriage Act

Congress enacted DOMA out of fear that, following *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993), Hawaii would recognize marriages between same-sex couples. *See* H.R. Rep. No. 104-664, at 2 (1996) (House Report) ("The prospect of permitting homosexual couples to 'marry' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.").

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der for this Court to reach those issues. *See* Conditional Cross-Petition for a Writ of Certiorari (filed July 20, 2012).

[2] 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.

When Congress enacted DOMA, however, no State in fact permitted same-sex couples to marry. House Report 3. Some voices in Congress warned that a federal definition of marriage would interfere with the States' ability to define and regulate marriage:

> Section three of the bill … represents for the first time in our history a Congressional effort, if successful, to deny states full discretion over their own marriage laws … [D]enying a marriage federal recognition substantially diminishes its legal force …. Thus, the bill is exactly the opposite of a states rights measure: the only real force it will have will be to deny a state and the people of that state the right to make decisions on the question of same sex marriage.

House Report 42 (dissenting views).

DOMA sweeps broadly across all federal laws, affecting *all* federal rights and responsibilities, however significant or minute, that involve marital status. For example, DOMA releases employers from the obligation of offering unpaid leave to care for an ailing same-sex spouse under the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(C); prevents same-sex spouses from filing joint federal income tax returns, often at substantial expense, 26 U.S.C. § 6013; requires a same-sex spouse receiving health benefits through his or her spouse to pay federal income tax on those benefits where a different-sex spouse's identical benefits are excluded from taxable income, *id.* § 106; and prevents a surviving same-sex spouse from renewing and extending the term of his or her spouse's copyright, 17 U.S.C. § 304(a)(1)(C). Notwithstanding this broad scope, Congress declined to consider how DOMA's new federal

definition of marriage would affect the citizens affected by these and myriad other federal laws.[3]

D. Marriage In The Commonwealth Of Massachusetts

Since 2004, the Commonwealth has permitted all qualified couples, whether same-sex or different-sex, to marry. *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Pet. App. 90a. As the first State to achieve marriage equality, the Commonwealth has also been the first State to test Congress's premise that DOMA would not interfere with a State's ability to define and regulate marriage. The Commonwealth's experience demonstrates the opposite and illustrates DOMA's "serious adverse consequences … for states that choose to legalize same-sex marriage." Pet. App. 4a.

1. DOMA's direct effect on the Commonwealth

As of February 12, 2010, the Commonwealth had issued marriage licenses to at least 15,214 same-sex couples—marriages that, as a result of DOMA, are not recognized under federal law. Pet. App. 90a. In addition to invading powers reserved to the Commonwealth by the Constitution, DOMA's non-recognition of these

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[3] *See* House Report 42 (dissenting views) ("That this bill's consequences are not adequately analyzed was conceded by [its supporters who] argued that we must deny recognition to same sex marriages declared by states to be legal because we do not know what the implications of this will be for various federal programs."); *see also* Pet. App. 18a ("[N]one of the testimony [at congressional hearings] concerned DOMA's effects on the numerous federal programs at issue.").

marriages imposes significant additional costs on the Commonwealth. For example, because health benefits for same-sex spouses of Commonwealth employees are considered taxable income for federal tax purposes, the Commonwealth must pay an additional Medicare tax for the value of the health benefits provided to these spouses. Pet. App. 100a. In addition, to comply with DOMA, the Commonwealth has incurred other costs to create and implement systems to identify employees who provide healthcare coverage to their same-sex spouses. *Id.* 101a.

2. DOMA's effect on the Commonwealth's operation of veterans' cemeteries

The Commonwealth receives funding through the federal State Cemetery Grants Program for two veterans' cemeteries located on Commonwealth-owned land in Agawam and Winchendon, Massachusetts. This program provides federal funding for the establishment, expansion, and improvement of veterans' cemeteries owned and operated by a State. 38 U.S.C. § 2408; 38 C.F.R. pt. 39. The Commonwealth received over $19 million in federal funds to construct and expand these cemeteries and has also received nearly $1.5 million in federal funds to cover costs associated with burying veterans in these cemeteries. Pet. App. 91a-92a.

A condition on the Commonwealth's receipt of these funds is that the cemeteries must "'be operated solely for the interment of veterans, their *spouses*, surviving *spouses*, and [certain of their] children.'" Pet. App. 93a (quoting 38 C.F.R. § 39.10(a)) (emphasis added). Failure to comply with this condition could result in the cemetery no longer qualifying as a veterans' cemetery, which would allow the United States to re-

capture all of the funds it has provided to the Commonwealth for that cemetery. *Id.* 93a.

In 2004, in response to the Commonwealth's inquiry, the United States Department of Veterans Affairs informed the Commonwealth that, should it elect to bury the same-sex spouse of a veteran in one of its two veterans' cemeteries, that cemetery would not comply with federal law, and the United States could recapture all of the federal funding provided in connection with that cemetery. Pet. App. 93a-94a.

In 2007, the Commonwealth approved an application for burial in the Winchendon cemetery submitted by a decorated United States Army veteran and his same-sex spouse. Pet. App. 118a-119a. The Commonwealth intends to honor their wish to be buried together in a veterans' cemetery. The United States conceded below that, as a result of that decision, the Commonwealth is subject to the threat of recapture of federal funds.

3. DOMA's effect on Medicaid services in the Commonwealth

The federal Medicaid program, enacted in 1965 as Title XIX of the Social Security Act, is a federal-State partnership designed to offer subsidized medical services to certain qualifying low-income individuals. Under Medicaid, the federal government provides funds to States to operate the program, so long as the States comply with the Medicaid statute and regulations. The Commonwealth's Medicaid program, known as MassHealth, receives billions of dollars annually in federal reimbursement for the benefits it pays out under this program. Pet. App. 95a-96a.

An individual's marital status is often relevant to eligibility for Medicaid (and therefore MassHealth) benefits because spousal income and assets are typically combined to determine whether an applicant meets an eligibility threshold. A person who would be eligible for benefits if considered as single might be ineligible when assessed as part of a married couple, and vice versa. Because DOMA requires MassHealth to ignore same-sex marriages for purposes of Medicaid, in some instances it requires the Commonwealth to extend coverage to individuals who would not qualify if their marriages were recognized. In other instances, DOMA forces the Commonwealth to deny to same-sex spouses the coverage that it extends to identically-situated different-sex spouses. Pet. App. 96a.[4]

In 2008, the Commonwealth enacted the MassHealth Equality Act, which provides that, in administering MassHealth, "no person who is recognized as a spouse under the laws of the commonwealth shall be

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[4] For example, the incomes of a different-sex married couple with one spouse earning $65,000 and the other $13,000 are combined to determine MassHealth eligibility. The couple's combined income ($78,000) is too high for either spouse to be eligible for MassHealth. But if the spouses are of the same sex and the marriage is disregarded under DOMA, the spouse earning $13,000 would be eligible for MassHealth benefits. Conversely, in a household consisting of two different-sex spouses under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year, the couple's combined income ($40,000) falls below the $43,716 minimum threshold for couples and both spouses are eligible for healthcare under MassHealth. If the spouses are of the same sex and the marriage is disregarded under DOMA, only the spouse earning $7,000 per year would be eligible for Medicaid coverage, because only that spouse's income falls below the federal minimum for individuals. Pet. App. 97a-98a.

denied benefits that are otherwise available under this chapter due to the provisions of [DOMA] or any other federal non-recognition of spouses of the same sex." Mass. Gen. Laws ch. 118E, § 61. As required by the MassHealth Equality Act, the Commonwealth accordingly follows its definition of marriage, not DOMA's, in determining eligibility for MassHealth, including denying coverage to individuals who would be eligible for coverage if they were considered as a single person. The United States has informed the Commonwealth that DOMA "'preclude[s] recognition of same-sex couples as 'spouses' in the Federal program'" and warned the Commonwealth that it "'must pay the full cost, including the cost of administration of a program that does not comply with Federal law.'" Pet. App. 99a. As with the veterans' cemeteries program, the United States conceded below that the Commonwealth is subject to the threat of recapture of these federal funds.

E. District Court Proceedings

The Commonwealth, by and through its Attorney General, filed a declaratory judgment action challenging the application of DOMA in Massachusetts under the Spending Clause and the Tenth Amendment. With regard to the Tenth Amendment, the Commonwealth claimed that DOMA invades the reserved powers of the States, thereby exceeding Congress's power and violating the Tenth Amendment. With regard to the Spending Clause, the Commonwealth claimed that DOMA violated the Spending Clause by requiring it to violate the Equal Protection Clause as a condition of receiving and retaining federal funding for its Medicaid program and veterans' cemeteries. Pet. App. 109a. The Commonwealth also argued that DOMA fails the "relatedness" (or germaneness) limitation on the Spending

Clause articulated in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), because DOMA's disregard of same-sex marriages bears no relationship to the purposes of the Medicaid and veterans' cemetery programs. Pet. App. 110a-111a.

The United States moved to dismiss. The Commonwealth cross-moved for summary judgment, adducing detailed evidence demonstrating, *inter alia*, that State determinations of marital status have traditionally governed not only under State law, but also under federal law. Pet. App. 113a (district court decision relying on the Commonwealth's "extensive affidavit on the history of marital regulation"). For example, the evidence showed that "the federal government consistently relied on state determinations with regard to marriage" even when "a great deal of tension surrounded the issue of interracial marriage." *Id.* 87a, 90a. The Commonwealth also provided evidence that sexual orientation satisfies the factual predicates for the application of heightened scrutiny under this Court's precedent. Dist. Ct. Dkt. Nos. 36, 37, 38. The United States did not contest this or any other of the Commonwealth's evidence, nor did it offer any evidence of its own.

In a parallel case, *Gill* v. *Office of Personnel Management*, a group of individuals who are or had been lawfully married in Massachusetts to someone of the same sex sued for certain federal benefits that had been denied them through operation of DOMA, asserting that the denial violated their equal protection rights under the Fifth Amendment. The cases were not formally consolidated in the district court, but they were heard by the same district judge and were decided on the same day.

The district court denied the United States' motion to dismiss and granted summary judgment to the Commonwealth and the *Gill* plaintiffs. In *Gill*, the court concluded that DOMA violates the equal protection component of the Due Process Clause because no conceivable rational basis for DOMA exists. Pet. App. 70a-71a. In its separate opinion in the Commonwealth's case, the district court concluded that DOMA violates the Spending Clause by imposing an unconstitutional condition on the Commonwealth's receipt of federal funds. As the court explained, "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. The district court also acknowledged the pressure to comply with DOMA that results from the fact that substantial federal funds are conditioned on that compliance. *See, e.g.*, *id.* 103a ("[T]he federal government is entitled to recapture millions of dollars in federal grants if the Commonwealth decides to entomb an otherwise ineligible same-sex spouse of a veteran [in one of its veterans' cemeteries]."). 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. *Id.* 110a-111a.

With regard to the Tenth Amendment, the district court found that, by enacting DOMA, "Congress has intruded on the exclusive province of the state to regulate marriage." Pet. App. 105a. The district court observed that marital status definitions have always been "a core area of state sovereignty" (*id.* 111a), and family law generally "is often held out as *the* archetypal area

of local concern" (*id.* 113a). Indeed, the court noted that marital status determinations have been the sole province of the States since before the Founding, which has resulted in an evolving "checkerboard of rules and restrictions on the subject." *Id.* 114a. The district court concluded Congress may not "siphon off a portion of that traditionally state-held authority for itself" without running afoul of the Tenth Amendment. *Id.* 104a. Accordingly, 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.

The district court entered a judgment that "[DOMA] is unconstitutional as applied in Massachusetts, where state law recognizes marriages between same-sex couples." Pet. App. 124a.

F. 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 defending 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 equal protection challenges to 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 the consolidated cases in order to defend DOMA against the equal protection challenge.[5]

The United States then 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 defending DOMA on equal protection grounds and did not address the district 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. In its opinion in the consolidated cases, the court of appeals acknowledged that DOMA "burden[s] the choice of states like Massachusetts to regulate the rules and incidents of

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[5] 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.

marriage" and carries "potentially serious adverse consequences" for States that have legalized same-sex marriage. Pet. App. 4a, 16a.

With regard to the Tenth Amendment, the court of appeals acknowledged the district court's finding that, before DOMA's enactment, marital status determinations were the sole province of the States. Pet. App. 15a. However, the court of appeals stated that DOMA did not run afoul of the Tenth Amendment because it did not "directly dictate the *internal operations* of state government." *Id.* 16a.

The court of appeals also found that DOMA did not violate the Spending Clause because it did not "run afoul of the 'germaneness' requirement." Pet. App. 16a. 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 equal protection and, accordingly, runs afoul of the rule that Congress cannot condition federal funds on a State's violation of an independent constitutional requirement. *Dole*, 483 U.S. at 206.

Although the court of appeals declined to rule that DOMA violates the Tenth Amendment, the "federalism concerns" underlying the Commonwealth's Tenth Amendment arguments were integral to the court's holding that DOMA violates the guarantee of equal protection. The court noted that "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" (Pet. App. 11a) and explained that "in

areas where state regulation has traditionally governed, the [Supreme] Court may require that the federal government interest in intervention be shown with special clarity" (*id.* 15a).

The court of appeals' judgment in the consolidated cases states: "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 WRIT

I. DOMA'S UNCONSTITUTIONALITY IS AN IMPORTANT QUESTION THAT SHOULD BE CONCLUSIVELY SETTLED BY THIS COURT

The Commonwealth agrees with the court of appeals' judgment that Section 3 of DOMA is unconstitutional and normally would oppose further review in order to ensure that the judgment takes effect as soon as possible. However, the Commonwealth recognizes that the question is one of national importance and that this Court is likely to review it in the near future, if only to ensure uniformity in the enforcement or non-enforcement of DOMA throughout the country. On that assumption, the Commonwealth believes that the Court should conduct that review in the context of a case that presents the full range of constitutional challenges to DOMA, including challenges under the Tenth Amendment and Spending Clause that are best presented by a State. The Commonwealth accordingly agrees that the Court should grant review in this case and affirm the judgment of the court of appeals.

II. THE JUDGMENT CAN AND SHOULD BE AFFIRMED ON THE ALTERNATIVE BASES THAT DOMA VIOLATES THE TENTH AMENDMENT AND SPENDING CLAUSE

In its review of the court of appeals' judgment, this Court can and should consider holding DOMA unconstitutional based on the additional, alternative grounds that DOMA violates the Tenth Amendment and the Spending Clause. Although the court of appeals rejected these arguments in the decision below (Pet. App. 16a-17a), the Commonwealth can "defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997); *see also* Gressman *et al.*, *Supreme Court Practice* § 6.35 (9th ed. 2007).[6]

A. DOMA Violates The Tenth Amendment

The court of appeals properly recognized the substantial impairment of State sovereignty wrought by DOMA. Pet. App. 15a; *see Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States."). The court stopped short, however, of finding that DOMA violates the Tenth Amendment based on the mistaken rationale that a Tenth Amendment violation occurs "only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government." Pet. App. 16a. The court of ap-

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[6] As stated in note 1 above, the Commonwealth is also filing a conditional cross-petition in the event the Court views these arguments as potentially expanding the court of appeals' judgment. *See Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) (cross-petition unnecessary "so long as [the prevailing] party seeks to preserve, and not to change, the judgment").

peals' narrow reading of the Tenth Amendment is inconsistent with this Court's jurisprudence.

The Tenth Amendment provides that Congress is not authorized to 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.").[7] This Court has in recent decisions confirmed that the Tenth Amendment serves as a substantive check on Congress's exercise of legislative power, repeatedly addressing the proper balance of authority between federal and State government. *See, e.g.*, *Printz* v. *United States*, 521 U.S. 898, 920-921 (1997); *see also United States* v. *Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring) (expressing concern that broad "construction[s] of the scope of congressional authority … com[e] close to turning the Tenth Amendment on its head"). The Tenth Amendment is violated when Congress purports to regulate a

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[7] *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.").

"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.).

As the court of appeals properly recognized, domestic relations constitute one such domain. 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.").

The uncontroverted record in the district court established that the States' exclusive authority over domestic relations and marital status has never been limited to defining its contours for purposes of State law. *Cf. Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-129 (1937) (State has exclusive authority over corporate status of State-chartered corporation for both State and federal purposes). Rather, State marital determinations have controlled for purposes of both State law and federal law to the extent Congress chooses to predicate federal law on marital status. Indeed, prior to DOMA, Congress had never refused to recognize a State determination of

marital status. Pet. App. 60a-61a n.126; *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 *Lopez*, 514 U.S. at 564 (first three alterations in original))).[8]

By imposing a federal definition of marriage, DOMA impermissibly creates two marital statuses among Massachusetts citizens. While different-sex married couples remain married for all purposes, same-

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[8] *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).

sex couples are married under State law, but federally single. The impact of DOMA's rule of exclusion is substantial, affecting many aspects of these citizens' lives, from healthcare to employment to taxes. This imposition of two different types of marriage within Massachusetts precludes the Commonwealth from "exercis[ing] fully [its] reserved powers." *United States* v. *Darby*, 312 U.S. 100, 124 (1941).

DOMA is therefore a sweeping and unprecedented federal incursion into an area that, for centuries, has been a domain of exclusive State regulation, supplanting 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*, 131 S. Ct. at 2366 ("Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." (citation omitted)); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").[9]

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[9] 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

This Court should grant certiorari to clarify that Congress intrudes into a realm reserved to the States when it legislates in an area of traditional State concern such as defining marriage and to correct the court of appeals' unduly restrictive application of 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); *see also National Fed'n of Indep. Bus.*, 132 S. Ct. at 2601-2603 (opinion of Roberts, C.J.); *id.* 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").

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 Pro-

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large category of marriages for all federal purposes, contrasts starkly with these narrow, program-specific statutory criteria.

tection Clause of the Fourteenth Amendment.[10] *Second*, DOMA fails the "relatedness" (or germaneness) requirement articulated by *Dole* because its disregard of State marriage determinations bears no relationship to the federal statutes and regulations that 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 differentiate between same-sex and different-sex married couples, DOMA forces the Commonwealth to violate the Equal Protection Clause and, accordingly, exceeds Congress's power under the Spending Clause.

This Court clearly 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*

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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.

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)).

A 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 requires the Commonwealth to treat the same-sex spouse of a veteran who wishes to be buried with his or her same-sex spouse in a cemetery funded under the program differently from how it treats a similarly-situated different-sex spouse. Likewise, DOMA forces the Commonwealth to differentiate between individuals in same-sex marriages and similarly-situated individuals in different-sex marriages in its administration of Medicaid.

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.

The Commonwealth and the *Gill* Respondents offered the lower courts several means by which an equal protection violation could be found. *First*, Respondents demonstrated that no rational basis plausibly supported DOMA's blanket non-recognition of marriages lawfully contracted under State law, whether one considered the actual interests invoked by Congress at the

time or the *post hoc* justifications now marshaled by BLAG in this litigation.

Second, the legislative record demonstrates that DOMA's underlying (and in some cases expressly stated) purpose was impermissible animus towards gays and lesbians, a factor that this Court has suggested justifies particularly exacting scrutiny. *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (invalidating provision that was nothing more than a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests"); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (law enacted based on "mere negative attitudes, or fear" invalid); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534, (1973) (law invalid because it was motivated by a "bare congressional desire to harm a politically unpopular group").

Third, the Commonwealth, like the United States and the *Gill* Respondents, asserted that DOMA's classification based on sexual orientation should be subject to heightened scrutiny, a proposition the court of appeals panel believed was off-limits to it due to prior circuit precedent in *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom. Pietrangelo* v. *Gates*, 129 S. Ct. 2763 (2009). Pet. App. 10a. This Court is not so constrained, however. Under this Court's jurisprudence, a classification is subject to heightened scrutiny if (1) the targeted class has suffered a history of discrimination, and (2) the characteristics that distinguish the group are unrelated to their ability to contribute to society. *See Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986) (citing *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313-314 (1976) (per curiam)). In determining the applicability of heightened scrutiny, the Court at times has also considered (3) whether members of the

class exhibit immutable distinguishing characteristics, and (4) whether the class is a minority or evidences political powerlessness requiring protection from the majoritarian political process. *Murgia*, 427 U.S. at 313-314. As the uncontroverted record below demonstrated, gays and lesbians meet each of these requirements. *See supra* p.11.[11]

The court of appeals' opinion offered yet a fourth route, viewing the weaknesses of the justifications offered for DOMA in light of the Commonwealth's federalism arguments and the unprecedented nature of DOMA's interference in State regulation of marital status. This overextension of congressional power, the court ruled, warranted a more robust review under

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[11] Review of this question is particularly necessary because the courts of appeals have been reluctant to undertake the multifactor analysis that *Lyng* requires. Neither *Cook* nor most of the other cases cited by BLAG for the proposition that heightened scrutiny should not apply to classifications based on sexual orientation discusses the heightened scrutiny factors in any substantial way. *See Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Witt* v. *Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113-1114 & n.9 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Secretary of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Nabozny* v. *Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996). Many such cases, including *Cook*, involved military policies, which are given special judicial deference. *See Thomasson* v. *Perry*, 80 F.3d 915, 927-928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 684-685 (D.C. Cir. 1994) (en banc); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 577 (9th Cir. 1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Cook*, 528 F.3d at 57-58.

equal protection principles—a review DOMA could not survive.

Any of these routes leads to the same conclusion: DOMA's discrimination on the basis of sexual orientation is unconstitutional, and by requiring Massachusetts to carry out such discrimination against its own citizens as a condition of receiving and retaining federal funds, DOMA violates the Spending Clause.

2. DOMA also 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 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 United States nor the court of appeals 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* v. *United States*, 505 U.S. 144, 172 (1992) 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 this Court should correct the court of appeals' erroneous ruling to the contrary.

CONCLUSION

The Court should grant certiorari and affirm the judgment of the court of appeals.

Respectfully submitted.

MARK C. FLEMING
FELICIA H. ELLSWORTH
BRIAN J. BOYLE JR.
MARGARET E. O'GRADY
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

MARTHA COAKLEY
ATTORNEY GENERAL
MAURA T. HEALEY
Counsel of Record
JONATHAN B. MILLER
JOSHUA D. JACOBSON
CHRISTOPHER K. BARRY-SMITH
ASSISTANT ATTORNEYS GENERAL
One Ashburton Place
Boston, MA 02108
(617) 727-2200
Maura.Healey@state.ma.us

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