No. 12-97

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

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONER

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

MARTHA COAKLEY
ATTORNEY GENERAL
MAURA T. HEALEY
Counsel of Record
JONATHAN B. MILLER
CHRISTOPHER K. BARRY-SMITH
JOSHUA D. JACOBSON
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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND RULES

The Commonwealth of Massachusetts respectfully submits this reply brief in response to the opposition of the Bipartisan Legal Advisory Group of the House of Representatives (BLAG). The United States has not filed a brief in opposition.

INTRODUCTION

The Commonwealth filed a conditional cross-petition in order to preserve its opportunity to argue that the federal Defense of Marriage Act (DOMA) violates the Tenth Amendment and the Spending Clause in the event that the Court grants review in either No. 12-13 or No. 12-15, which raise the issue of DOMA's constitutionality under equal protection principles. BLAG agrees that the Commonwealth can raise its Tenth Amendment and Spending Clause arguments as a respondent in No. 12-13 or No. 12-15, and that the Court could rely upon those constitutional provisions in the context of those petitions. If the Court agrees with that position, the conditional cross-petition need not be granted. If the Court disagrees, however, then the Court should grant this conditional cross-petition to ensure that the Court may consider the full scope of DOMA's constitutional infirmity in its review.

BLAG's opposition is remarkable for what it does not oppose. BLAG agrees that this Court could affirm the court of appeals' judgment on the Tenth Amendment or Spending Clause grounds advanced by the Commonwealth. Opp. 11-12. BLAG also does not deny that, of the several petitions before this Court addressing the constitutionality of DOMA, only those in this case present the question whether and to what extent DOMA is a permissible exercise of federal power under the Tenth Amendment and the Spending Clause. *Id.* Finally, BLAG agrees that the decisions of this Court

uniformly treat family relations as a matter of traditional State concern not to be interfered with by the federal government (Opp. 16-17 & n.8), disputing only that DOMA is such an interference—which is of course the precise question presented by the Commonwealth.

BLAG argues that the Tenth Amendment and Spending Clause questions have not generated any division in the courts of appeals (Opp. 11-12)—an unremarkable fact given that no other State has filed a similar challenge to DOMA. That might be a relevant factor if the Commonwealth were seeking review of those issues on their own. But this is a *conditional* cross-petition. If the Court decides to review the equal protection issues raised by the United States and BLAG, it is only appropriate to consider every asserted ground of the statute's invalidity. Indeed, that is precisely why respondents may typically defend the judgment below on properly-preserved grounds supported by the record. The Court should therefore consider the Tenth Amendment and Spending Clause challenges to DOMA together with the equal protection challenge. To the extent a conditional cross-petition is required to do so, it should be granted.

ARGUMENT

1. The Commonwealth agrees with BLAG that the questions presented in this conditional cross-petition can and should be addressed by this Court in connection with case No. 12-13 or No. 12-15, and that the Court need not grant this conditional cross-petition in order for those questions to be properly before the Court. If the Court is also of that view, then the Court may deny the conditional cross-petition, which is intended only to ensure that the Court has the ability to

reach the Commonwealth's challenge to DOMA on Tenth Amendment and Spending Clause grounds.[1]

2. BLAG next argues that granting the Commonwealth's conditional cross-petition would "needlessly complicate the briefing and argument," particularly in light of the United States' position that DOMA violates equal protection principles but not the Tenth Amendment or Spending Clause. Opp. 11; *see also id.* 13. That argument is without merit; the Court is more than capable of managing whatever "complexity" BLAG fears will ensue if the cross-petition is granted. The Court's Rules establish a briefing schedule and sequence for cases involving cross-petitions and also permit the Clerk to alter the schedule as appropriate in a particular case. S. Ct. R. 25. The grant of a single cross-petition is no more complex than any of the other cases involving multiple parties, issues, and positions that the Court regularly considers on the merits.

BLAG's argument that the United States' "awkward posture" (Opp. 12) counsels denial of the cross-petition is likewise puzzling, particularly in light of the fact that BLAG agrees that the Commonwealth's Tenth Amendment and Spending Clause claims may be raised as alternative grounds for affirmance in No. 12-13 or No. 12-15. It is far from clear how the United States' posture will be any different if the same issues are raised in a conditional cross-petition; presumably the

[1] Of course, BLAG's agreement that the Commonwealth can raise these arguments as a respondent in No. 12-13 or No. 12-15 does not make the conditional cross-petition "superfluous." Opp. 19. It is the view of the Court, not of BLAG, that will determine whether the conditional cross-petition is necessary for full consideration of the Commonwealth's arguments.

United States is in the same position as it was before the court of appeals, which was able to address the issues without "diverting attention" from other questions. *Id.* 20. Indeed, the United States has declined to oppose the conditional cross-petition.

3. BLAG devotes the majority of its brief to disparaging the merits of the Commonwealth's Tenth Amendment and Spending Clause arguments. This is a curious development, as BLAG did not take any position on those issues before the court of appeals. BLAG intervened solely for the purpose of defending DOMA on equal protection grounds and made no argument before the court of appeals on the Commonwealth's federalism-based claims.

Even had they been developed and considered below, BLAG's merits arguments are not a basis for denying this cross-petition. The question is not whether the issues raised *independently* merit certiorari, though a sovereign State's challenge to a federal law on the grounds that the statute violates the Tenth Amendment and the Spending Clause surely would merit this Court's attention. Again, however, this cross-petition is conditional, to be granted only if the Court decides to review the equal protection issues raised in No. 12-13 or No. 12-15. If the Court decides to review DOMA's constitutionality, it is logical that it also review every constitutional challenge presented in this case.[2]

---

[2] It is for this reason that respondents are permitted to raise alternative arguments as bases for affirmance of the judgment below. *See, e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below[.]"). This

Nor are BLAG's merits arguments well-founded. DOMA's unprecedented federal definition of marriage encroaches on the Commonwealth's regulation of marriage, overriding the State's determinations of marital status for purposes of federal programs implemented jointly by the Commonwealth and the federal government, and effectively dividing marriage in the Commonwealth into two different statuses: married for all purposes for different-sex spouses, and married but "federally single" for same-sex spouses. Cross-Pet. 3. BLAG is simply wrong when it states that "DOMA manifestly does not preempt state law" and "preserves each sovereign's ability to define marriage for its own purposes." Opp. 17. To the contrary, DOMA interferes with State marital determinations and conditions federal funding on the adoption of its definition. This is an across-the-board incursion wholly different from any other statute cited by BLAG. *See id.* 4 n.3.

BLAG argues that the Commonwealth has "not even identified any case that supports" its Tenth Amendment claim (Opp. 18), but then conspicuously fails to discuss any of the Tenth Amendment precedent on which the Commonwealth relies. *See* Cross-Pet. 18-19. If there is a paucity of Tenth Amendment precedent addressing DOMA's precise constitutional infirmity, that is only further evidence that Congress has never before chosen to intervene in a "domain of activity set apart by the Constitution as the province of the states" in such a broad and sweeping fashion. *Hopkins Fed. Sav. & Loan Ass'n* v. *Cleary*, 296 U.S. 315, 338 (1935) (Cardozo, J.); *cf. National Fed'n of Indep. Bus.* v.

---

conditional cross-petition is presented only in the event that the Court concludes that route is somehow insufficient in the particular context of this case.

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) (second and third alterations in original))).

BLAG does not disagree with the Commonwealth's principal Spending Clause theory—that if DOMA violates equal protection principles it necessarily violates the Spending Clause because it requires the Commonwealth to violate the constitution as a condition of its receipt of federal funds. Opp. 19. Nor does BLAG deny that the court of appeals, having found an equal protection violation, should therefore have found a Spending Clause violation as well. *See* Cross-Pet. 17. Instead, BLAG contends that the Spending Clause argument is "superfluous" because it depends on this Court first finding an underlying equal protection violation and thus "would add nothing to the analysis." Opp. 19. That this Court must make a predicate finding of illegality before holding that DOMA violates the Spending Clause is no reason to avoid the question. Indeed, this Court's Spending Clause doctrine—which establishes that "Congress may not induce the recipient to engage in activities that would themselves be unconstitutional," *United States* v. *American Library Ass'n*, 539 U.S. 194, 203 (2003) (internal quotation marks omitted)—envisions precisely such a two-tiered inquiry.

As for the Commonwealth's claim that DOMA violates the Spending Clause because it imposes conditions

unrelated to the federal interests supposedly advanced by the programs at issue, BLAG contends only that consideration of this claim would divert the Court's attention from the equal protection question because it would require this Court to consider "program-specific arguments." Opp. 20. That argument is specious; the Commonwealth's Spending Clause challenge addresses only *two* specific programs—Medicaid and the State Cemetery Grants Program—and neither the United States nor BLAG has provided any "program-specific argument[]" explaining how a refusal to acknowledge marriages that are valid under Massachusetts law is germane to either program. On the contrary, the United States argued below that the germaneness requirement simply does not apply to a provision like Section 3 of DOMA. *See* Pet. App. 17a. That is an "across-the-board" argument (*id.*) that the Court can consider as readily as the other constitutional arguments presented in this case.

CONCLUSION

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

Respectfully submitted.

MARK C. FLEMING
FELICIA H. ELLSWORTH
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
CHRISTOPHER K. BARRY-SMITH
JOSHUA D. JACOBSON
ASSISTANT ATTORNEYS GENERAL
One Ashburton Place
Boston, MA 02108
(617) 727-2200
Maura.Healey@state.ma.us

SEPTEMBER 2012