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,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondent

QUESTIONS PRESENTED

(1) Does the Tenth Amendment to the Constitution prohibit Congress from defining the words “marriage” and “spouse” when it uses them in federal law, and instead require that each state define what federal law means by these words within the state’s borders?

(2) Does Congress’ constitutional power to spend “for the general welfare” prohibit Congress from defining the beneficiaries of federally-funded and state-administered programs, if a state believes that including additional beneficiaries would also promote the general welfare?

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("the House") was the Intervenor-Appellant in the court below and is the Petitioner in No. 12-13 and a Respondent in No. 12-15.[1]

The U.S. Department of Health and Human Services, Kathleen Sebelius, in her official capacity as 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 Secretary of the U.S. Department of Veterans Affairs, and the United States of America were

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[1] The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

Appellants in the court below and are Respondents in No. 12-13 and Petitioners in No. 12-15.

The Office of Personnel Management, the U.S. Postal Service, Patrick R. Donahoe, in his official capacity as Postmaster General of the United States, Michael J. Astrue, in his official capacity as Commissioner of the Social Security Administration, Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and the United States of America were Appellants/Cross-Appellees in the court below and are Respondents in No. 12-13 and Petitioners in No. 12-15.

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, Dorene Bowe-Shulman, Mary Bowe-Shulman, and the Commonwealth of Massachusetts were Appellees in the court below and are Respondents in Nos. 12-13 and 12-15.

Dean Hara was an Appellee/Cross-Appellant in the court below and is a Respondent in Nos. 12-13 and 12-15.

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INTRODUCTION

The House respectfully opposes the Conditional Cross-Petition for a Writ of Certiorari filed by Massachusetts. As Massachusetts itself correctly recognizes, the conditional cross-petition is not necessary. If the House's primary petition is granted, Massachusetts will be able to invoke both of the issues it seeks to raise in its cross-petition as alternative bases for affirmance of the judgment below. Thus, granting the conditional cross-petition will simply complicate the briefing and scheduling of this case on the merits without materially assisting the Court.

Moreover, the arguments Massachusetts raises in its conditional cross-petition are weak and do not merit separate focus or distinct briefing. The notion that the Tenth Amendment or limits on the spending power disable Congress from defining terms like "marriage" and "spouse" when they are used *for purposes of federal law* is meritless, especially when the federal government defines them in exactly the same way that every state did until only eight years ago, and that the majority of the states still do. No appellate court has adopted this novel theory. Indeed, both the First Circuit and the Department of Justice ("the Department") recognized the lack of merit of these claims, despite believing that DOMA is unconstitutional on the grounds raised by the House's Petition. Indeed, the Department continues to defend DOMA against non-equal-protection claims, a posture which would only further complicate briefing and argument before this Court were the cross-petition granted. The House opposes the admittedly superfluous cross-petition because

these unmeritorious theories are better suited for treatment as alternative grounds to support the judgment below.

Accordingly, the Court should grant the House's petition in No. 12-13, and deny the instant conditional cross-petition as unnecessary.

STATEMENT OF THE CASE

I. The Defense of Marriage Act

The Defense of Marriage Act of 1996 "was enacted with strong majorities in both Houses of Congress and signed into law by President Clinton." App. 3a.[2] The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. *See* 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate).

Section 3 of the Act defines "marriage" as the legal union of one man and one woman and "spouse" as a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7. These definitions apply for purposes of federal law only. DOMA does not bar or invalidate any state-law marriage, but leaves states free to decide whether they will recognize same-sex marriage. DOMA simply asserts the federal government's right as a separate sovereign to provide its own definition for purposes of federal programs and funding.

While Congress was considering DOMA, it requested the Department's opinion on the bill's constitutionality, and the Department three times

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[2] Citations to "App." are to the Appendix to the House's petition for certiorari in *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*, No. 12-13.

reassured Congress by letter that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* H.R. Rep. No. 104-664, 34 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."); to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary,* 104th Cong. 2 (1996) ("Senate Hrg."). Congress also received and considered other expert advice on DOMA's constitutionality and concluded that DOMA is constitutional. *E.g.*, House Rep. 33 (DOMA "plainly constitutional"); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 87-117 (1996) (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell).

Congress, of course, did not invent the meanings of the words "marriage" and "spouse" when it enacted DOMA in 1996. Instead, Congress acted to ensure that Hawaii's novel decision to take steps toward redefining marriage did not automatically dictate the definition in other jurisdictions. Thus, Section 2 of DOMA allowed each state to decide whether to retain the traditional definition without having another jurisdiction's decision imposed via full faith and credit principles, and Section 3 preserved the federal government's ability to retain the traditional definition for federal law purposes. Moreover, pre-

1996 Congresses decidedly did not regard themselves as powerless to say what these words mean when they appear in federal law. Although Congress often has made eligibility for federal marital benefits or duties turn on a couple's state-law marital status, it also has a long history of supplying federal marital definitions in various contexts—definitions that always have been controlling for purposes of federal law, without regard to the couple's status under state law.[3] Indeed, in clarifying the meanings of "marriage" and "spouse" in federal law by enacting DOMA, Congress merely reaffirmed what it has always meant when using those words in federal law—and what courts and the Executive Branch have always understood it to mean: A traditional male-female couple.[4]

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[3] *E.g.*, I.R.C. § 2(b)(2) (deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); I.R.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes); 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria regarding marriage in immigration law context).

[4] *E.g.*, Revenue Act of 1921, § 223(b)(3), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return); 38 U.S.C. § 101(31) ("'[S]pouse' means a person of the opposite sex …."); U.S. Dep't of Labor, Final Rule, *Family Medical Leave Act of 1993*, 60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included

II. The Justice Department's About-Face and the House's Intervention

After DOMA's enactment, discharging the Executive's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the Department of Justice during the Bush Administration successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[5] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Attorney General abruptly notified Congress that the Department had decided "to forgo the defense" of DOMA. Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder stated that he and President Obama were of the view "that a

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"same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting a District of Columbia marriage statute, intended "that 'marriage' is limited to opposite-sex couples").

[5] *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *In re Kandu,* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

heightened standard [of review] should apply [to DOMA]" under equal protection principles, "that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.* In response the House sought and received leave to intervene as a party-defendant in the various cases nationwide involving equal-protection challenges to DOMA's constitutionality. The Department, however, has continued to defend DOMA against claims of unconstitutionality on Tenth-Amendment or spending-power grounds. *E.g.*, Superseding Br. for the U.S. Dep't of HHS, *et al.* at 55-61, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207 & 10-2214 (1st Cir. Sept. 23, 2011).

III. History of this Case

In 2003, Massachusetts' Supreme Judicial Court concluded that the Commonwealth's constitution requires it to extend marriage licenses to same-sex couples. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In 2009, Massachusetts filed this suit in the United States District Court for the District of Massachusetts, claiming that the federal government was also required to recognize such relationships as marriages under federal law. Massachusetts identified two areas in which it has chosen to administer federal funds or programs but does not wish to abide by the federal definition of marriage. First, with respect to its Medicaid program, Massachusetts wishes to combine the incomes of same-sex couples who are married under state law and have obtained marriage licenses, in order to render them ineligible for the program, without suffering a loss in federal funds. It also seeks federal matching funds for individuals in

same-sex marriages recognized by Massachusetts who do not qualify for assistance under federal law, but would if they were able to take advantage of the higher eligibility threshold for married couples.[6] Second, Massachusetts wishes to bury the same-sex partners of military veterans who are married under Massachusetts law in state-administered but federally-funded veterans' cemeteries, which with few exceptions are reserved under federal law for veterans and their spouses. 38 C.F.R. § 39.10(a).

The case was assigned to the same district judge who was also presiding over *Gill v. OPM*, a case involving an equal-protection challenge to DOMA by a number of same-sex couples. The two cases were consolidated for purposes of appeal, and the House's petition for certiorari in No. 12-13 covers both cases.

1. The District Court's Opinions

The district court granted summary judgment in favor of Massachusetts, concurrently granting summary judgment to the individual plaintiffs in *Gill* in a separate opinion. As to Massachusetts' claims, the district court first concluded that Massachusetts' alleged risk of losing federal funding was immediate and concrete enough to confer standing, even though the federal agencies in question had not actually moved to strip any federal funding. App. 99a-101a.

On the merits of Massachusetts' claims, the district court noted that Congress may not require states to

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[6] These primarily are individuals whose income is above the eligibility threshold for a single person, but then obtain a marriage certificate in Massachusetts with a person of the same sex whose income is significantly lower. *See* App. 94a.

engage in unconstitutional acts as a condition of receiving federal funding. App. 106a (citing *South Dakota v. Dole*, 438 U.S. 203, 210 (1987)). The court noted its holding in *Gill* that "DOMA violates * * * equal protection," and found it "equally applicable in this case." App. 107a. It therefore concluded that DOMA is not a valid exercise of the spending power. Having reached that conclusion, the district court found it unnecessary to consider Massachusetts' additional argument that DOMA is not germane "to the specific purposes of Medicaid or the State Cemetery Grants Program." App. 108a.

The district court then invoked the First Circuit's holding in *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997), that a federal statute violates the Tenth Amendment if it (1) "regulate[s] the States as States," (2) "concern[s] attributes of state sovereignty" and (3) "compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions." App. 109a. The district court concluded that "DOMA [r]egulates the Commonwealth 'as a State'" because it "impact[s] * * * the state's bottom line" by threatening lower levels of federal funding. *Id.* It also stated that Congress historically has often deferred on questions of marital status to the states, and so "the authority to regulate marital status is a sovereign attribute of statehood." App. 114a. The district court also found that DOMA interferes with Massachusetts' traditional governmental functions, because it contains funding conditions that are inconsistent with Massachusetts law. App. 116a-117a.

2. First Circuit Proceedings and Opinion

The Executive-Branch defendants filed a notice of appeal to the Court of Appeals for the First Circuit, where the *Gill* and *Massachusetts* appeals were consolidated. Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Nov. 24, 2010). The Department initially filed a brief defending DOMA against all constitutional claims. Corr. Br. for the U.S. Dep't of HHS, *et al.*, *id.* (1st Cir. Jan. 20, 2011). Shortly thereafter, however, the Department announced its conclusion that DOMA violated equal protection principles. After the House requested and received leave to intervene, the Court denied the Department's motion to withdraw its earlier brief defending DOMA, but allowed the Department to file a superseding brief, which argued that DOMA violated equal protection principles, but continued to maintain that DOMA does not violate the Tenth Amendment and is a valid exercise of the spending power. Superseding Br. for U.S. Dep't of HHS *et al.*, *id.* (1st Cir. Sept. 23, 2011).

The First Circuit held that "neither the Tenth Amendment nor the Spending Clause invalidates DOMA." App. 15a. It recognized that DOMA is broader than previous definitions of the word "marriage" that Congress has enacted, but noted that

> Congress surely has an interest in who counts as married. The statutes and programs that [DOMA] governs are federal regimes * * * and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth

> Amendment or Spending Clause require it to do so.

App. 16a. The panel observed that this Court's modern precedents in this area invalidate "[federal] statutes only where Congress [has] sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government," but that DOMA "governs only federal programs and funding, and does not share these two vices of commandeering or direct command." App. 16a-17a. Likewise, the Court noted that "the 'germaneness' requirement that conditions on federal funds must be related to federal purposes * * * is not implicated where, as here, Congress merely defines the terms of the federal benefit. * * * DOMA merely limits the use of federal funds to prescribed purposes." App. 17a.

The First Circuit thus rejected Massachusetts' claims. Nevertheless, although the panel disagreed with the district court's reasoning, it held that DOMA violates the equal protection component of the Fifth Amendment's Due Process Clause.

IV. Other Petitions Involving DOMA

The question of DOMA's constitutionality is also presented by five other petitions for certiorari pending before this Court. Two other petitions arise out of the First Circuit's decision and judgment in this case. The others are petitions for certiorari before judgment following appeals of district court decisions striking down DOMA on equal protection grounds.

Massachusetts' instant petition is conditioned on the Court's grant of the House's petition for

certiorari in No. 12-13, or the Department's in No. 12-15, both of which seek review of the First Circuit's judgment in the consolidated appeals. The Department also has sought certiorari before judgment in the court of appeals in *Golinski v. OPM,* No. 12-16, following a decision of the Northern District of California striking down DOMA on equal protection grounds. *See* 824 F. Supp. 2d 968 (N.D. Cal. 2012). Another petition for certiorari before judgment has been filed by the private plaintiff in *Windsor v. United States*, No. 12-63, following a judgment of the Southern District of New York striking down DOMA under equal protection. *See* 833 F. Supp. 2d 394 (S.D.N.Y. 2012). Another group of private plaintiffs has filed a similar petition for certiorari before judgment in *Pedersen v. United States*, No. 12-231, following a judgment of the District of Connecticut striking down DOMA under equal protection. No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).

REASONS FOR DENYING THE WRIT

As Massachusetts itself recognizes, if the Court grants the House's petition in *Gill*, Massachusetts will be a respondent and can, and undoubtedly will, raise its Tenth Amendment and spending power arguments as alternative reasons for affirming the judgment below regardless of whether its conditional cross-petition is granted. Granting the conditional cross-petition thus would only needlessly complicate the briefing and argument and increase the focus on these two arguments.

That is undesirable for at least two reasons. First, Massachusetts' Tenth Amendment and spending power arguments are insubstantial and have not

generated any confusion or even much discussion among the courts of appeals. The notion that the federal government cannot adopt its own definitions for purposes of its own federal programs, but must adopt for federal-law purposes whatever definitions the states favor, would turn the Supremacy Clause on its head. There is no need to give greater credence or briefing space to these contentions by granting a concededly unnecessary cross-petition, especially where the Department's awkward posture of defending DOMA against some claims but not others would further complicate matters. Second, while Massachusetts' Tenth Amendment and spending power claims are meritless as to all federal programs, Massachusetts' "germaneness" attack on DOMA would logically apply differently to different federal programs. This is in contrast to equal protection attacks on DOMA, which view DOMA's across-the-board application as part and parcel of its constitutional problem. Greater focus on Massachusetts' spending power challenge thus risks distracting the parties from the broader equal protection issues that all parties agree merit this Court's review.

I. Granting the Conditional Cross-Petition Would Be Superfluous and Would Needlessly Complicate the Briefing and Argument.

It is well-established that "the State, as respondent" in a case where it prevailed in the lower courts, "is entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994); *see also, e.g., Jones v. United States*, 527 U.S. 373, 397 (1999); *United*

States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Whether or not the Court grants Massachusetts' conditional cross-petition, Massachusetts is a respondent for purposes of the House's petition in No. 12-13 (and the Department's petition in No. 12-15). As Massachusetts accurately observes, having argued for DOMA's invalidity below and received a judgment to that effect, albeit on grounds the Commonwealth did not advance, its "separate grounds for affirmance could be fully considered without need for a conditional cross-petition," Cross-Pet. 9, because "[a] prevailing party need not cross-petition * * * so long as that party seeks to preserve, and not to change, the judgment." *Id.* (quoting *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994)).

Therefore, Massachusetts' "concern[] that petitioners * * * might interpret the court of appeals' judgment as something other than an affirmance in the Commonwealth's favor," Cross-Pet. 10, is misplaced. Massachusetts could raise the arguments presented in the conditional cross-petition as a respondent in *Gill*. Granting the conditional cross-petition thus would only clutter this Court's docket and complicate the briefing and argument of the case on the merits. What is more, the Department continues to defend DOMA against Tenth Amendment and spending power challenges, while joining the attack on equal protection grounds. Granting the conditional cross-petition could needlessly confuse the briefing and argument of this important case on the merits.

II. The Questions Presented by Massachusetts Are Neither Difficult Nor Independently Worthy of This Court's Extended Consideration.

Since Massachusetts will clearly be able to raise its Tenth Amendment and spending power arguments whether or not its conditional cross-petition is granted, the relevant question is whether these arguments merit separate briefing and extended focus by this Court. Clearly they do not. Massachusetts' arguments are novel, meritless and antithetical to our basic constitutional design, which grants the federal and state governments separate sovereignty and makes each superior in its own realm except where the Supremacy Clause gives the federal government the upper hand. Unlike the issues raised by the First Circuit's ruling that DOMA is unconstitutional and presented in the House's *Gill* petition, the additional arguments raised by Massachusetts and rejected by the court below do not remotely satisfy the criteria for plenary review or justify this Court's extended consideration. Equally important, granting the conditional cross-petition risks distracting attention from the equal protection issues that clearly warrant this Court's review.

As the House has explained in its *Gill* petition, the First Circuit's decision striking down DOMA is a prototypical candidate for this Court's review, because the court of appeals invalidated an important federal statute on novel grounds, in conflict with this Court's precedents and with decisions of the other courts of appeals, and regarding a topic that is the subject of great national

controversy. Those considerations apply to the First Circuit's equal protection ruling. They do not, however, apply to Massachusetts' Tenth Amendment and spending power arguments.

1. Tenth Amendment Argument

This Court has long made clear that Congress has ample authority to define the scope of and eligibility for federal benefits. *E.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987) (noting "Congress' plenary power to define the scope and the duration of the entitlement to * * * benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program" (quotation marks omitted; ellipsis in original)); *Helvering v. Davis*, 301 U.S. 619, 645 (1937) ("When money is spent to promote the general welfare, the concept of welfare * * * is shaped by Congress, not the states."). Massachusetts identifies no decision of this Court or any other even intimating the Commonwealth's proposed limitation on Congress' well-established ability to define terms in federal law. Nor does Massachusetts identify any court of appeals decision that has ever even discussed such an idea, let alone an actual conflict among the lower courts.

Instead, the cases cited by Massachusetts all stand at most for the unremarkable proposition that, where federal law requires reference to marital status or some other concept of domestic relations and *does not* specifically define the applicable terms, then reference to state law may be appropriate. *See*

Cross-Pet. 13 n.7.[7] But Congress also may legitimately pursue a policy of "uniformity" in federal definitions of family relationships, "rather than * * * the diversity which would flow from incorporating * * * the laws of [the several] States." *De Sylva*, 351 U.S. at 583 (Douglas, J., concurring). When it comes to federal programs, the choice between adopting state-law concepts or adopting a uniform federal rule is for Congress. To be sure, this Court has suggested limits on Congress' ability to preempt state law by setting up a federal system of issuing marriage licenses, divorce decrees, and child-custody or paternity determinations. *See* Cross-Pet. at 12 (citing *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("[S]tate family and family-property

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[7] Citing *Slessinger v. Sec'y of HHS*, 835 F.2d 937, 939 (1st Cir. 1987) (declining to create federal common law of divorce for purposes of "mother's benefits" where "[n]either the Act nor the Secretary's regulations specify to what law the Secretary should refer in determining whether a divorce decree has validly terminated a marriage for purposes of [the statute]"); *Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, 785 F.2d 1317, 1318-20 (5th Cir. 1986) (federal maritime common law incorporates state determinations of marital status, where analogous federal statutes did not define the term "wife"); *Bell v. Tug Shrike*, 332 F.2d 330, 334-336 (4th Cir. 1964) (similar). To similar effect is *De Sylva v. Ballentine*, relied upon by the district court. App. 64a & n.122. *See De Sylva*, 351 U.S. 570, 580 (1956) ("it is apparent that * * * the general scheme of the [federal] statute" incorporates state-law family status determinations).

Even when federal law does not define a family-status term it uses, this Court has clarified that it adopts state law determinations only "to the extent that [they] are permissible variations in the ordinary concept" of the term. *Id.* at 581.

law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.") (citation omitted)); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).[8] But DOMA manifestly does not preempt state law. To the contrary, DOMA preserves each sovereign's ability to define marriage for its own purposes. Section 2 of DOMA ensures that one state's decision to adopt a novel definition of marriage—such as appeared to be imminent in Hawaii—would not dictate the definition in other states pursuant to full faith and credit principles. Section 3, likewise, preserved the ability of the federal government to define marriage but only for federal law purposes. No issue of preemption arises under DOMA.

The theory Massachusetts proposes is far more radical than anything ever suggested by this Court: That even when Congress has specifically defined family-relationship terms for purposes of federal law, the Tenth Amendment provides that state law will "reverse preempt" the federal definition. Not only has Massachusetts not identified any decision (other than the now-reversed district court decision below) that struck down a federal law on this basis,

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[8] Other cases relied upon by the district court below likewise reflect this principle. *See* App. 63a-65a nn.119-120, 124 (citing *Elk Grove Unified Sch. Dist v. Newdow*, 542 U.S. 1, 12 (2004) (federal courts do not interfere in state-law determinations of family status); *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring in the judgment) (similar); *United States v. Lopez*, 514 U.S. 549, 580-583 (1995) (Kennedy, J., concurring) (noting constitutional concern regarding "[t]he tendency of [a federal] statute to *displace* state regulation in areas of traditional state concern") (emphasis added)).

it has not even identified any case that supports such a novel theory.

Massachusetts attempts to excuse this failure by arguing that DOMA is "unprecedented" in federal law. Cross-Pet. 12-13. But Massachusetts' exaggerated and unsupported claim that "prior to DOMA, Congress had never refused to recognize a State determination of marital status," *id.* at 12, is refuted by the Commonwealth's agreement with the First Circuit's conclusion—that Congress has an "interest in who counts as married" and has in fact defined marriage for purposes of a number of federal statutes. *See id.* at 14 n.8 (quotation marks omitted). In fact, Congress has supplied definitions of the word "marriage" in federal statutes for a century. *See supra* pp. 3-4 & nn.3-4.

Massachusetts attempts to distinguish such historical precedents by suggesting that Congress may define what it means by the term marriage only "in individual situations" and only if "every marriage can at least potentially satisfy" the definition. Cross-Pet. 14 n.8. But such a line is neither judicially administrable nor somehow lurking in the penumbras of the Tenth Amendment. The simple reality is that when the federal government defines terms for federal law purposes only the Tenth Amendment is not even implicated. In all events, Massachusetts remains free to raise its Tenth Amendment argument as an alternative ground to support the judgment below. For present purposes it is sufficient to recognize that this novel theory is not independently worthy of plenary review and is best treated as an alternative ground available for

Massachusetts as opposed to a basis for separate briefing and extended focus by this Court.

2. Spending-Power Argument

The spending-power issue presented by Massachusetts fares no better. Once again, no appellate court has ever adopted Massachusetts' theory or even intimated that it might be correct. Worse still, the spending power argument is at best superfluous and at worst threatens to complicate the proceedings.

The Commonwealth notes that Congress cannot require states to violate the Constitution as a condition of receiving federal funds, and it asserts that if DOMA violates equal protection, it therefore exceeds the spending power as well for that reason. Cross-Pet. 17-18. If the Commonwealth were correct it would only underscore that its spending power argument is dependent on the equal protection issues squarely presented in the House's petition and thus superfluous. DOMA's constitutionality would turn on whether it comports with equal protection, and the spending-power issue would add nothing to the analysis.

Massachusetts also suggests that DOMA fails the germaneness prong of this Court's spending power precedents. That argument is meritless as the First Circuit correctly concluded. App. 17a. Moreover, if the Court were to give extended consideration to that argument it would threaten to divert attention to program-specific arguments that are largely irrelevant for purposes of the equal protection arguments against DOMA. As the district court correctly recognized, Massachusetts' germaneness

claim raises the question of whether DOMA's definition of marriage is sufficiently related to "the specific purposes" of each *individual* federal program invoked by the Commonwealth. App. 108a. Thus, the spending power issue would require a program-by-program analysis. The equal protection issues raised in the House's petition, by contrast, implicate the full range of DOMA's applications. Indeed, challengers have assailed DOMA's across-the-board application as part and parcel of its equal protection difficulty. Extended consideration of the spending power issues thus risks diverting attention toward program-specific arguments and away from the broadly applicable equal protection arguments that merit this Court's plenary review.

* * *

Massachusetts' Tenth Amendment and spending power arguments are novel, weak and in deep tension with our basic constitutional design. The First Circuit's correct rejection of these claims does not remotely satisfy this Court's criteria for plenary review. There is thus no reason to grant Massachusetts' conditional cross-petition or to give these issues separate briefing or extended treatment. Whether or not the conditional cross-petition is granted, Massachusetts remains a respondent to the House's petition in No. 12-13 and remains free to raise these issues as alternative grounds for affirmance. Thus, granting the cross-petition will only needlessly complicate the briefing and argument of this case and distract from the serious equal protection issue raised by the House's petition.

CONCLUSION

For the foregoing reasons, Massachusetts' conditional cross-petition, No. 12-97, should be denied. The House's petition, No. 12-13, should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

Counsel for Respondent
The Bipartisan Legal Advisory
Group of the U.S. House of
Representatives

August 23, 2012