

No. 12-15

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL., PETITIONERS

v.

MASSACHUSETTS, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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TABLE OF CONTENTS

	Page
A. The federal agency defendants have standing to seek certiorari	2
B. By granting this petition, the Court may consider but should reject the Commonwealth's alternative bases for affirmance	6

TABLE OF AUTHORITIES

Cases:

<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	1, 2, 3
<i>Massachusetts v. United States</i> , 435 U.S. 444 (1978)	7
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	8
<i>Northwest Airlines, Inc. v. County of Kent</i> , 510 U.S. 355 (1994)	6
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	8
<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987)	7, 8
<i>United States v. Lovett</i> :	
327 U.S. 773 (1946)	3
328 U.S. 303 (1946)	3
<i>Windsor v. United States</i> , No. 12-2335, 2012 WL 4937310 (2d Cir. Oct. 18, 2012)	3

Constitution and statute:

U.S. Const.:

Art. I, § 8 (Spending Clause)	6, 7, 9
Art. III	3
Amend. V	1
Amend. X	6, 8, 9

II

Statute—Continued:	Page
Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, § 3, 110 Stat. 2419 (1 U.S.C. 7).....	1, 2, 4, 6, 7, 8
Miscellaneous:	
Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011)	2

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All parties agree that this case warrants this Court’s review on the question whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment’s guarantee of equal protection as applied to persons of the same sex who are legally married under state law. The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) nevertheless opposes the government’s petition for a writ of certiorari, in favor of its own petition, on the ground that “the Executive Branch defendants likely lack [appellate] standing.” BLAG No. 12-15 Br. in Opp. 2.

The federal agency defendants plainly have standing to seek certiorari under *INS v. Chadha*, 462 U.S. 919, 930-931, 939 (1983). While the Executive Branch agrees with the constitutional ruling reached by the courts below that Section 3 of DOMA violates equal protection, it

continues to enforce Section 3 pending definitive judicial resolution of its constitutionality. Because judgment was entered *against* the federal agency defendants, because the court of appeals affirmed that judgment, and because that judgment would prevent them from taking enforcement action they would otherwise take, the federal agency defendants are aggrieved by the judgment. The government is thus a proper party to seek this Court's review of the judgment below.

A. The Federal Agency Defendants Have Standing To Seek Certiorari

1. This Court's precedents make clear that the federal agency defendants, as federal entities and officials charged with Section 3's enforcement and against which judgment was entered below, are proper parties to invoke this Court's jurisdiction to review the judgment in this case. While the government concurs substantively with the court of appeals' conclusion that Section 3 is unconstitutional, the President has directed federal agencies to continue to enforce DOMA "unless and until * * * the judicial branch renders a definitive verdict against the law's constitutionality." Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives 5 (Feb. 23, 2011). Absent the stays pending further review entered by both the district court and the court of appeals, the federal agency defendants would be enjoined from enforcing Section 3 in this case. See No. 12-15 Pet. App. 26a, 75a-81a, 123a-124a. They accordingly are "aggrieved" by the judgment below for purposes of establishing standing to seek this Court's review. See *Chadha*, 462 U.S. at 930, 939. As the *Chadha* Court explained, even "prior to Congress' intervention" in that case, the Executive's decision to comply with the challenged law, despite its view

that the law was unconstitutional, created “adequate Art. III adverseness.” *Id.* at 939; see also *Windsor v. United States*, No. 12-2335, 2012 WL 4937310, at *2 (2d Cir. Oct. 18, 2012) (denying BLAG’s motion to strike the government’s notice of appeals because “[t]he constitutionality of the statute will have a considerable impact on many operations of the United States”) (citing *Chadha*, 462 U.S. at 931).

In *Chadha*, the Court faced a situation materially indistinguishable from the present one on the issue of the Executive Branch’s standing. An Executive Branch agency, the former Immigration and Naturalization Services (INS), sought to appeal a court of appeals’ judgment against it that invalidated a provision in the Immigration and Nationality Act, despite the fact that the INS had joined the alien in the court of appeals in arguing that the provision was unconstitutional. 462 U.S. at 928. This Court directly addressed whether the Executive Branch could seek this Court’s review in those circumstances. The Court held that “[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional,” it may seek review of that decision, even though “the Executive may agree with the holding that the statute in question is unconstitutional.” *Id.* at 930-931. That holding is dispositive here. It is also consistent with the course of proceedings in *United States v. Lovett*, 328 U.S. 303 (1946), where the Court reviewed the constitutionality of a congressional enactment on the petition of the Solicitor General alone, even though the Solicitor General agreed with the lower court’s holding that the statute was unconstitutional. *Id.* at 306-307; see *United States v. Lovett*, 327 U.S. 773 (1946) (granting Solicitor General’s petition for a writ of certiorari).

BLAG's attempt to distinguish the Executive Branch's posture in *Chadha* from its posture in this case does not withstand scrutiny. BLAG relies on the fact that Section 3, unlike the statute at issue in *Chadha*, is not administered by a single agency "entrusted with any unique authority to administer DOMA." No. 12-15 Br. in Opp. 18-19. But that is a distinction without a difference: nothing in *Chadha* affords any weight to the fact that the INS was the *sole* agency charged with administering the immigration statute at issue in that case. See 462 U.S. at 929-931. And it is clear that the federal agencies and officials that are defendants here at least mutually share authority in administering Section 3 of DOMA. BLAG also notes that *Chadha* involved a separation-of-powers dispute between the Executive Branch and Congress, No. 12-307 Br. in Opp. 23, but that distinction suggests only that *BLAG's* claim of standing, not that of the federal agency defendants, may be more dubious in this case where Congress has no such direct interest. *Chadha* therefore establishes the federal petitioners' standing to seek the Court's review in this case.

BLAG's response to *Lovett* is also unpersuasive. Although it is true that "[t]he Court did not expressly address the appellate standing question" in *Lovett*, BLAG No. 12-15 Br. in Opp. 19, the fact that Congress (which sought to defend the statute) requested the Solicitor General to file a petition for a writ of certiorari (*ibid.*)—rather than file its own petition—only confirms the conclusion that the United States or its agencies and officials are the proper parties to seek this Court's review in circumstances like those present here. See U.S. Br. 2, *Lovett, supra* (Nos. 809, 810, 811) ("The United States, against which judgments were rendered in the court below, has sought review of these cases * * * because

amici curiae, representing the Congress, having no independent means of access to the Court, requested that a petition for writs of certiorari be filed.”) (citation omitted).

Relatedly, BLAG’s suggestion that the federal agencies and officials that are defendants in this suit are “operat[ing] as a de facto *amicus*” supporting DOMA’s challengers (No. 12-15 Br. in Opp. 24) has it backwards. Those agencies and officials are the *only* parties against which judgment was entered in this case. Pet. App. 26a (affirming judgment of district court), 75a-81a (district court judgment in *Gill*), 123a-124a (district court judgment in *Massachusetts*). In *Lovett*, the United States participated as a party, and Congress participated as an amicus to defend the statute because the United States sided with the challenger. Here, the Executive Branch would likewise participate as a party; and BLAG would present arguments in defense of the statute.

2. Contrary to BLAG’s contention (No. 12-15 Br. in Opp. 1), granting this petition would not unnecessarily “confuse” or “complicate” the proceedings before this Court. Rather, granting the petition of the federal agencies and officials—the parties against which judgment was entered—would simplify matters by rendering it unnecessary to decide any constitutional or prudential questions arising from BLAG’s own request for review in No. 12-13. See No. 12-15 Pet. 12 n.3. That is especially true where, as here, the district court’s judgment (Pet. App. 75a-81a, 123-124a), affirmed by the court of appeals in pertinent part (*id.* at 26a), was entered against only the federal agency defendants, not BLAG. If the Court were to deny the government’s petition and grant BLAG’s petition alone, but then decide that BLAG is mistaken about its independent standing, that would

force the Court to dismiss the case on standing grounds. Accordingly, the government’s petition is necessary to ensure that this Court can definitely resolve the question of Section 3’s constitutionality in this case.¹

B. By Granting This Petition, The Court May Consider But Should Reject The Commonwealth’s Alternative Bases for Affirmance

The Commonwealth of Massachusetts raises two independent grounds for affirming the judgment below: (1) Section 3 violates the Spending Clause’s “germaneness” requirement because Section 3 is unrelated to the purposes of the federal programs it affects;² and (2) Section 3 violates the Tenth Amendment by impermissibly intruding into the Commonwealth’s regulation of marriage. See Nos. 12-13, 12-15 Commonwealth Resp. in Supp. of Cert. 1-2; No. 12-97 Conditional Cross-Pet. 3-4. As both the Commonwealth (Cross-Pet. 9) and BLAG (No. 12-97 Br. in Opp. 2, 12-13) recognize, the Court may adjudicate both alternative grounds without any need to grant the Commonwealth’s separate cross-petition. See, *e.g.*, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S.

¹ BLAG’s apparent concern that granting the government’s petition would require the Court to undertake procedural “machinations” (No. 12-15 Br. in Opp. 24-25)—*i.e.*, the modest step of adjusting the alignment of the parties for purposes of briefing and argument—is far outweighed by the potential obstacle to justiciability noted above if this Court were to grant BLAG’s petition alone. Indeed, the proceedings in *Chadha* reflect such a realignment. See No. 12-16 Reply Br. 5.

² The Commonwealth argues that Section 3 also violates the Spending Clause because it forces the Commonwealth to engage in unconstitutional discrimination against same-sex couples lawfully married under state law in violation of equal protection, see Nos. 12-13, 12-15 Resp. in Supp. of Cert. 1-2; No. 12-97 Conditional Cross-Pet. 3, but that ground is merely derivative of the main question presented.

355, 364 (1994) (“A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.”). The Court need not reach either claim, however, if it determines that Section 3 violates equal protection. In any event, as explained below and as the court of appeals correctly concluded, both claims fail on the merits.

1. Statutes that impose conditions on the receipt of federal funds or on the collection of federal taxes generally raise no constitutional concerns under the Spending Clause. See *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). This Court in *Dole* identified certain limitations on Congress’s spending power, including, as pertinent to the Commonwealth’s argument here, “that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality op.)).

The Commonwealth argues that Section 3 exceeds Congressional authority under the Spending Clause because Section 3’s bar on the provision of certain benefits to same-sex couples lawfully married under state law is insufficiently related to the purposes of the many federal programs it affects, including the Medicaid and State Cemetery Grants programs at issue here. See Nos. 12-13, 12-15 Commonwealth Resp. in Supp. of Cert. 26-27; No. 12-97 Conditional Cross-Pet. 18-19. That argument lacks merit. As the court of appeals explained (Pet. App. 16a), “the [‘germaneness’] requirement is not implicated where, as here, Congress merely defines the terms of the federal benefit.” In *Dole*, the Court upheld against a germaneness challenge Congress’s conditioning of federal funds for highway construction on a state’s adoption

of a minimum drinking age for all driving on state roadways. 483 U.S. at 205. The validity of the funding limitation in this case follows *a fortiori* from *Dole*, because, unlike in *Dole*, Congress here has not required the Commonwealth to take any action apart from the use of federally appropriated funds in accordance with federal law. Section 3 “merely limits the use of federal funds to prescribed purposes.” Pet. App. 16a.

2. This Court has invalidated statutes based on the Tenth Amendment only where Congress sought to commandeer state governments or otherwise directly dictate the internal operations of state government. See *New York v. United States*, 505 U.S. 144, 161 (1992); *Printz v. United States*, 521 U.S. 898, 907-909 (1997). As the Court has explained, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” *New York*, 505 U.S. at 156. Accordingly, absent a commandeering claim, the Tenth Amendment is inapplicable to situations in which Congress properly exercises its authority under an enumerated constitutional power.

The Commonwealth argues that Section 3 “violates the Tenth Amendment because it purports to regulate a ‘domain of activity set apart by the Constitution as the province of the states.’” No. 12-97 Conditional Cross-Pet. 11 (citation omitted); see Nos. 12-13, 12-15 Commonwealth Resp. in Supp. of Cert. 16-21. Although domestic relations and the incidents of marriage have fallen largely within the realm of state regulation, “Congress surely has an interest in who counts as married” for purposes of federal benefit programs. Pet. App. 15a. As the court of appeals recognized (*id.* at 16a), moreover, “section 3 governs only federal programs and fund-

ing, and does not share the[] two vices of commandeering or direct command.” But for its violation of equal protection, Section 3 would be a proper exercise of the Congress’s Spending Clause power. See pp. 7-8, *supra*. The Commonwealth’s Tenth Amendment claim thus fails.

* * * * *

For the reasons explained in the government’s supplemental brief (at 10-11) and reply brief in *United States v. Windsor*, No. 12-307, the Court should grant the petition for a writ of certiorari in that case. Although a court of appeals has also rendered a decision in this case, *Windsor* now provides the most appropriate vehicle for this Court’s resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in this case was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals in *Windsor* was not so constrained, and its analysis may be beneficial to this Court’s consideration of that issue.

In the event the Court grants review in *Windsor*, it should hold the petitions in this case pending final resolution on the merits. In the event the Court decides that neither case in which the court of appeals has issued a decision provides an appropriate vehicle, it should grant the government’s petition for a writ of certiorari before judgment in either *Office of Personnel Management v. Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management v. Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

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