No. 12-63

In the Supreme Court of the United States

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

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.

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OPINION BELOW

The opinion of the district court (Pet. App. a1-a21) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 7, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (Pet. App. a25-a27, a29-a30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA or Act) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two principal provisions. The first, Section 2 of the Act, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (*1996 House Report*). Although Hawaii ultimately did not permit same-sex marriage, other States later recognized such marriages under their respective laws. See *Massachusetts* v.

United States Dep't of Health & Human Servs., 682 F.3d 1, 6 nn.1 & 2 (1st Cir. 2012), petition for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012).

Although Section 3 of DOMA does not purport to invalidate same-sex marriages in those States that permit them, it excludes such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor). Section 3 of DOMA thus denies to legally married same-sex couples many substantial benefits otherwise available to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. See *id.* at 16-18.

2. In 2007, petitioner married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for petitioner's benefit. Pet. App. a3; Am. Compl. ¶¶ 10, 11.

In her capacity as executor of Spyer's estate, petitioner paid approximately $363,000 in federal estate taxes. She thereafter filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim on the ground that petitioner is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse"

within the meaning of Section 2056(a). Pet. App. a3; Am. Compl. ¶¶ 72-78.

Petitioner filed this suit challenging the constitutionality of DOMA Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating married same-sex couples in New York differently from opposite-sex couples, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,000 in federal estate taxes levied on Spyer's estate. Pet. App. a4; Am. Compl. ¶¶ 82-85.

3. After petitioner filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) (Attorney General Letter).[1] The letter explained that, while the Department of Justice had previously defended Section 3 in courts whose binding precedent required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a new examination of the issue after two lawsuits (this one and *Pedersen* v. *Office of Personnel Management*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. Attorney General Letter 1-2. The Attorney General explained

[1] 1:10-cv-08435 Docket entry No. 10 (S.D.N.Y. Feb. 25, 2011). Text also available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html, and reprinted at Pet. App. a35-a44.

that, after examining several factors this Court has identified as relevant to the applicable level of scrutiny, including the history of discrimination against gay and lesbian individuals and the relevance of sexual orientation to legitimate policy objectives, he and the President had concluded that Section 3 warrants application of heightened scrutiny rather than rational basis review. *Id.* at 2-4. The Attorney General further explained that both he and the President had concluded that Section 3 fails that standard of review and is therefore unconstitutional. *Id.* at 4-5.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Attorney General Letter 5. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to cease defense of Section 3. *Id.* at 5-6. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to participate" in litigation concerning the constitutionality of Section 3. *Id.* at 6.

Following the Attorney General's announcement, respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to inter-

vene to present arguments in defense of the constitutionality of Section 3.[2] The district court granted the motion. 6/2/11 Mem. & Order 1; see Pet. App. a4.

Both BLAG and the government moved to dismiss petitioner's challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss petitioner's constitutional claim solely for purposes of ensuring that the court had Article III jurisdiction to enter judgment for or against the federal officials tasked with enforcing Section 3. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 of DOMA and that, under that standard of review, Section 3 violates the equal protection guarantee of the Fifth Amendment. Gov't Resp. to Pl. Mot. for Summ. J. and Intervenor's Mot. to Dismiss 4-27 (Aug. 19, 2011).

4. The district court denied the motions to dismiss and granted summary judgment in favor of petitioner, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment. Pet App. a1-a21.

As a preliminary matter, the district court rejected BLAG's argument that petitioner lacks Article III standing because she had failed to prove that New York recognized her marriage in 2009, the relevant tax year, and thus had failed to establish that her injuries were traceable to Section 3 of DOMA. Pet. App. a5-a7. The court acknowledged the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1, 2 (2006), which held that New York statutory law "clearly limit-

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[2] Two of the group's five members declined to support intervention. BLAG Mot. to Intervene 1 n.1 (Apr. 18, 2011).

[ing] marriage to opposite-sex couples" was not invalid under the New York Constitution. See Pet. App. a6.[3] The district court noted, however, that all three statewide elected officials and every state court to address the issue had concluded that principles of comity require recognition of same-sex marriages performed in other jurisdictions. *Id.* at a6-a7.

The district court also rejected BLAG's threshold argument that petitioner's equal protection challenge is foreclosed by this Court's summary dismissal of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, see *Baker* v. *Nelson*, 191 N.W.2d 185, 185-187 (1971). The district court explained that Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," but instead "defines marriage for federal purposes, with the effect of allocating federal rights and benefits." Pet. App. a8. The court concluded that *Baker* therefore did not "'necessarily decide[]' the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause." *Ibid.*

The district court assumed without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review. Pet. App. a12. The court explained that the nature of such review "can vary by context": while "[l]aws such as economic or

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[3] In 2011, New York passed legislation permitting individuals of the same sex to marry in the State. Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)).

tax legislation that are scrutinized under rational basis review" will "normally pass constitutional muster," laws that "exhibit[] . . . a desire to harm a politically unpopular group" receive "a more searching form of rational basis review." *Id.* at a12-a13 (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 579-580 (2003) (O'Connor, J., concurring)).

Without deciding whether "a more 'searching' form of rational basis scrutiny is required," the district court held that Section 3 is invalid under rational basis review. Pet. App. a13. The court concluded that neither the legislative purposes articulated in support of Section 3 at the time of its enactment (see *1996 House Report* 12) nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. *Id.* at a14-a21.

The district court first determined that Section 3 does not advance a federal governmental interest in "maintain[ing] the definition of marriage that was universally accepted in American law," Pet. App. a15 (brackets in original; citation omitted), whether provisionally or otherwise, because it "does not affect the state laws that govern marriage," *ibid.* Nor could the court "discern a logical relationship" between Section 3 and a governmental interest in "[p]romoting the ideal family structure for raising children," *id.* at a17, since Section 3 has "no effect at all on the types of family structures in which children in this country are raised," *id.* at a18.

The district court also rejected BLAG's argument that Congress might have enacted Section 3 "to ensure that federal benefits are distributed consistently," without regard to differences between state marriage laws. Pet. App. a18-a19. The court reasoned that, although

Section 3 is "link[ed]" to that goal, "the means used in this instance intrude upon the states' business of regulating domestic relations" and "therefore cannot be legitimate." *Id.* at a19.

Finally, the district court concluded that the government's interest in "conserving government resources" alone is insufficient to "'justify the classification used in allocating those resources.'" Pet. App. a20-a21 (quoting *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982)).

5. Both BLAG and the government filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. Pet. App. a29-a30 (government notice of appeal); *id.* at a25-a27 (BLAG notice of appeal). The court of appeals has jurisdiction pursuant to 28 U.S.C. 1291. The appeals were docketed as Nos. 12-2335 and 12-2345 and remain pending before that court. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 83-84 (9th ed. 2007) (Gressman).

DISCUSSION

Section 3 of DOMA denies to same-sex couples legally married under state law significant federal benefits that are otherwise available to persons lawfully married under state law. Because such differential treatment bears no substantial relationship to any important governmental objective, Section 3 violates the guarantee of equal protection secured by the Fifth Amendment.

Although the Executive Branch agrees with the conclusion that Section 3 is unconstitutional, to ensure that the Judiciary is the final arbiter of Section 3's constitutionality, the President has instructed Executive depart-

ments and agencies to continue to enforce Section 3 unless and until there is a definitive judicial ruling that Section 3 is unconstitutional. Attorney General Letter 5; see p. 5, *supra*. Authoritative resolution of Section 3's constitutionality is of great importance to the United States, as well as to the many thousands of individuals who are being denied the equal enjoyment of the benefits that federal law makes available to persons who are legally married under state law.

The government has accordingly filed a petition for a writ of certiorari seeking review of the First Circuit's decision invalidating Section 3. See *United States Dep't of Health & Human Servs.* v. *Massachusetts*, No. 12-15 (filed July 3, 2012). To ensure that the Court has an adequate vehicle to resolve the question in a definitive and timely manner, the government has also filed a petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), which is currently pending in the Ninth Circuit on appeal from a district court judgment invalidating Section 3 as violative of equal protection.[4]

Although this case potentially raises threshold justiciability issues not present in other cases pending before the Court, it also squarely raises the question whether Section 3 violates the equal protection guarantee of the Fifth Amendment. Accordingly, the Court should hold the petition in this case pending its consideration and disposition of the petitions in *Massachusetts* and

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[4] On August 21, 2012, plaintiffs filed a petition for a writ of certiorari before judgment in *Pedersen* v. *Office of Personnel Management*, No. 12-231 , which (like this case) is pending in the Second Circuit on appeal from a district court judgment invalidating Section 3 as violative of equal protection. The government has not yet filed its response to that petition; the response is currently due September 21, 2012.

Golinski. In the event the Court does not grant review in *Massachusetts* or *Golinski*, it should consider granting review in this case, in conjunction with *Pedersen*, *supra*, to ensure a timely and definitive ruling on Section 3's constitutionality. As explained below (see pp. 19-20, *infra*), the government will shortly file a petition for certiorari in this case and in *Pedersen* to facilitate the Court's grant of review if the Court concludes that neither *Massachusetts* nor *Golinski* presents an appropriate vehicle for resolving Section 3's constitutionality.

1. This case is one of a number of recent cases in which federal courts, including the First Circuit, have invalidated Section 3 of DOMA as unconstitutional. See *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), petition for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012); see also *Golinski* v. *Office of Personnel Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), appeal pending, No. 12-15388 (9th Cir. filed Feb. 24, 2012) and No. 12-15409 (9th Cir. filed Feb. 28, 2012), petition for cert. before judgment pending, No. 12-16 (filed July 3, 2012); *Dragovich* v. *United States Dep't of the Treasury*, No. C 10-1564, 2012 WL 1909603 (N.D. Cal. May 24, 2012), appeal pending, No. 12-16461 (9th Cir. filed June 26, 2012) and No. 12-16628 (9th Cir. filed July 23, 2012); *Pedersen* v. *Office of Personnel Mgmt.*, No. 3:10-cv-1750 (D. Conn. July 31, 2012), appeal pending No. 12-3273 (2d Cir. filed Aug. 17, 2012), petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012).

As the government explains in its petition for a writ of certiorari in *Massachusetts*, this Court's ordinary practice is to grant review when a court of appeals holds a federal statute unconstitutional, even in the absence of

a circuit conflict. See *Massachusetts* Pet. 13-14. The question of Section 3's constitutionality thus merits this Court's review.

Moreover, the question of Section 3's constitutionality raises important questions of federal law that have not been, but should be, settled by this Court. See Sup. Ct. R. 10(c); *Massachusetts* Pet. 14-22. As the petition in *Massachusetts* explains, although every court of appeals to address the issue has concluded that classifications based on sexual orientation are subject to rational basis review, none has offered an explanation for that conclusion that comports with this Court's precedents. *Id.* at 18-21.

The federal courts that have ruled Section 3 unconstitutional have taken different approaches to that question. In *Massachusetts*, the First Circuit, constrained by circuit precedent to apply rational basis review, concluded that Section 3's adverse effect on gay and lesbian individuals warranted application of a "closer" form of that review than the "extreme deference accorded to ordinary economic legislation." 682 F.3d at 10-12. In *Golinski*, the district court concluded that circuit precedent applying rational basis review to sexual orientation classifications is irreconcilable with intervening precedent of this Court, and determined that heightened scrutiny should apply. See 824 F. Supp. 2d at 982-990. And in the decision below, the district court simply assumed without deciding that rational basis review applies to classifications based on sexual orientation and further declined to decide whether "a more 'searching' form of rational basis scrutiny is required where a classification burdens homosexuals as a class and the states' prerogatives are concerned." Pet. App. a12-a13. The proper

standard for reviewing classifications based on sexual orientation should be resolved by this Court.

2. In this case, unlike *Massachusetts*, the court of appeals has not yet reviewed the judgment of the district court. But as the government explains in its petition for a writ of certiorari before judgment in *Golinski*, the question of Section 3's constitutionality is a matter of "such imperative public importance as to justify the deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; see *Golinski* Pet. 13-16.

This Court has previously granted certiorari before judgment when necessary to provide expeditious resolution of exceptionally important legal questions. See, *e.g.*, *United States* v. *Fanfan*, 543 U.S. 220, 229 (2005) (constitutionality of mandatory applications of the Sentencing Guidelines); *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2003) (constitutionality of race-conscious undergraduate admissions program); *Mistretta* v. *United States*, 488 U.S. 361, 362, 371 (1989) (constitutionality of the Sentencing Guidelines); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981) (validity of Iran hostage agreement); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974) (validity of subpoena to the President); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952) (validity of President's steel seizure order); *Ex parte Quirin*, 317 U.S. 1, 19-20 (1942) (validity of President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs). See generally James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259.

As the government explains in seeking this Court's review in *Golinski*, a grant of certiorari before judgment is warranted to ensure that the Court will have an appropriate vehicle in which to resolve the question of Section 3's constitutionality in a definitive and timely fashion. Assurance that the Court will have such a vehicle is warranted in light of the great public importance of the issues at stake. See *Golinski* Pet. 15-16.

As the government also explains in its *Golinski* petition, the district court's analysis in that case of the applicable level of scrutiny, and its examination of several factors bearing on the applicability of heightened scrutiny, may materially assist this Court's consideration of that issue and thus further support the grant of certiorari before judgment in that case. See *Golinski* Pet. 13-14. In this case, unlike in *Golinski* or *Pedersen*, the district court did not engage in *de novo* consideration of the applicable level of scrutiny, instead assuming without deciding that rational basis review applies. Compare Pet. App. a11-a12 with *Golinski* Pet. App. 24a-34a; *Pedersen* Pet. App. 38a-86a. But because the district court in this case nevertheless concluded that Section 3 of DOMA violates the Fifth Amendment's equal protection guarantee, see Pet. App. a13, this case squarely presents that exceptionally important question, which encompasses the appropriate standard of review. Petitioner has stated that if this case proceeds on appeal in the Second Circuit, that court, which lacks binding precedent on the applicable level of scrutiny, could then "provide important guidance to other courts throughout the country (as well as the Supreme Court) on the appropriate level of scrutiny for laws that discriminate on the basis of sexual orientation." Pet. C.A. Opp'n to Intervenor's Mot. to Suspend Oral Argument Pending

Sup. Ct. Ruling on Pending Petitions for Cert. 16-17 (Aug. 20, 2012). This case would also potentially allow this Court to resolve that issue in the first instance, especially if it declines to grant the petitions in *Massachusetts* and *Golinski*.

3. This case presents a threshold question not present in *Massachusetts*, *Golinski*, or *Pedersen*. In the courts below, BLAG has argued that the courts lack jurisdiction over petitioner's challenge because she failed to prove that New York recognized her Canadian marriage in 2009, the relevant tax year. See Pet. App. a5-a6. BLAG has argued that petitioner therefore failed to establish that her injuries are traceable to Section 3, and that she thus has failed to establish that she has standing to challenge Section 3. BLAG C.A. Br. 17-18; see, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 818-820 (1997) (plaintiff seeking to invalidate a federal statute must demonstrate that it has suffered an injury in fact caused by the challenged statute and fairly redressable by a decision in its favor). The district court rejected BLAG's argument, Pet. App.7a, but BLAG has reasserted it in the court of appeals, BLAG C.A. Br. 17-18.

In support of its argument, BLAG has pointed to the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1, 2 (2006), which upheld a state law limiting marriage to opposite-sex couples against a challenge under the New York Constitution.[5] See Pet. App. a6. After *Hernandez*, however, three state intermediate appellate courts held that same-sex marriages celebrated in foreign jurisdictions warrant comity under New York's marriage recognition rule, which "recog-

[5] As noted earlier (note 3, *supra*), the New York Legislature in 2011 enacted the Marriage Equality Act, which permitted individuals of the same sex to marry in the State.

nizes as valid a marriage considered valid in the place where celebrated," *In re Estate of Ranftle*, 917 N.Y.S.2d 195, 196 (N.Y. App. Div. 2011) (quoting *Van Voorhis* v. *Brintnall*, 86 N.Y. 18, 25 (1881)), unless it is "contrary to the prohibitions of natural law or the express prohibitions of a statute," *ibid.* (quoting *Moore* v. *Hegeman*, 92 N.Y. 521, 524 (1883)). See *ibid.*; *Lewis* v. *N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div.), aff'd on other grounds *sub nom. Godfrey* v. *Spano*, 920 N.E.2d 328 (N.Y. 2009); *Martinez* v. *County of Monroe*, 850 N.Y.S.2d 740, 742-743 (N.Y. App. Div. 2008). New York's highest court has not addressed that question. See *Godfrey*, 920 N.E.2d at 337.

To date, BLAG has identified no reason to believe that the State's highest court would reach a conclusion different from the uniform decisions of its intermediate appellate courts. BLAG has nevertheless suggested to the Second Circuit that it might certify the question to the New York Court of Appeals, reasoning that the question of how petitioner's Canadian marriage would have been treated under New York law "concerns issues central to two core sovereign matters—the definition of marriage for the sovereign's own purposes and the recognition of foreign judgments—that are better resolved by the state's highest court." BLAG C.A. Br. 19.

If this Court were to grant the petition for certiorari before judgment, it presumably would address the threshold issue raised by BLAG before it reached the merits of Section 3's constitutionality, at least for purposes of assessing whether the issue raised by BLAG in fact goes to petitioner's standing, as BLAG contends, or instead goes to the merits of petitioner's entitlement to a reduction in federal estate taxes. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528

U.S. 167, 180 (2000) (noting that this Court has "an obligation to assure" itself of litigants' Article III standing). The Court would, moreover, address that question before the Second Circuit would have had the opportunity either to rule on BLAG's suggestion to certify the issue to the New York Court of Appeals or to "predict how the New York Court of Appeals would resolve the question," BLAG C.A. Br. 17; cf. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004) (noting that, with respect to questions of state law, the Court ordinarily "defer[s] to the interpretation of the Court of Appeals for the Circuit in which the State is located"). Although BLAG has offered no reason to believe that New York would have declined to recognize plaintiff's marriage in 2009, the state-law question BLAG raises at least could potentially pose an obstacle to the Court's deciding the merits of the question presented. Because the individual plaintiffs in *Massachusetts*, *Golinski*, and *Pedersen* were married in States whose laws permit same-sex marriage, BLAG has raised no similar question in those cases.

4. At least in its current posture, this case could also raise questions about whether petitioner, who prevailed in the district court, is a proper party to seek this Court's review. Article III's case-or-controversy requirement requires that a party invoking this Court's jurisdiction demonstrate her standing "not only at the outset of litigation, but throughout its course." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011) (citing *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). This Court has recognized that a prevailing party—that is, one in whose favor judgment was entered below—may have Article III standing to "challenge an unfavorable lower court ruling" on appeal. *Id.* at 2029 (explaining that, notwithstanding the favorable grant of immu-

nity in the particular case, an official who regularly engages in the challenged conduct as part of his job "suffers injury caused by [an] adverse constitutional ruling" that can be redressed "[o]nly by overturning the ruling on appeal").

Here, petitioner has not invoked this Court's jurisdiction to challenge an "unfavorable lower court ruling" or an unfavorable aspect of a ruling, *Camreta*, 131 S. Ct. at 2029, but rather to confirm a district court ruling entirely in her favor. Although it is well established that a party with standing is entitled to seek certiorari before judgment once an appeal is pending in the court of appeals, see 28 U.S.C. 1254(1); Gressman 83-84, this Court has not specifically addressed whether a prevailing party has standing to invoke this Court's jurisdiction to review a district court decision before judgment is rendered in the court of appeals, where the decision is wholly favorable.

In *Kinsella* v. *Krueger*, 354 U.S. 1 (1957), however, the Court reviewed the district court's denial of a writ of habeas corpus based on a petition for a writ of certiorari before judgment filed by the government, the prevailing party in the district court. See *id.* at 5. Although the district court's ruling was favorable, the government filed the certiorari petition in order to supply an alternative vehicle to *Reid* v. *Covert*, which was then pending on appeal, for addressing Congress's power to authorize the trial by court-martial of civilians accompanying the Armed Forces overseas. Gov't Pet. 5-7, *Kinsella*, *supra* (No. 713). The government's petition stated that it was "clear, of course, that the party prevailing in the district court may seek certiorari before judgment in the Court of Appeals." *Id.* at 6 n.*. The Court granted the petition, consolidated the two cases, and decided them to-

gether, but the Court did not expressly address whether the government had properly invoked this Court's jurisdiction in *Kinsella*. 354 U.S. at 5.[6]

Moreover, insofar as a prevailing party does have standing to invoke this Court's jurisdiction to review a wholly favorable district court decision before judgment is rendered in the court of appeals, "an important question of judicial policy remains." *Camreta*, 131 S. Ct. at 2030. Beyond any constitutional question that might arise, "[a]s a matter of practice and prudence," this Court generally has not considered cases "at the request of the prevailing party, even when the Constitution allowed [the Court] to do so." *Ibid.*

While this case in its present posture raises those threshold questions concerning this Court's exercise of its certiorari jurisdiction, the government will shortly file a petition for a writ of certiorari before judgment in this case to facilitate the Court's grant of review in this

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[6] In other cases, the Court has granted petitions for certiorari before judgment filed by prevailing parties seeking review of favorable decisions, but it also granted petitions filed by opposing parties without addressing which parties, or both, were the proper parties to invoke this Court's jurisdiction. See *Nixon*, 418 U.S. at 689-690 (Court granted both a petition for certiorari before judgment filed by the special prosecutor and a cross-petition filed by President Nixon, whose motion to quash a third-party subpoena had been denied by the district court); see also *Mistretta*, 488 U.S. at 371 (Court granted petitions of both criminal defendant and the United States to review a district court judgment upholding the constitutionality of the federal Sentencing Guidelines); *Youngstown Sheet & Tube Co.*, 343 U.S. at 583-584 (Court granted petitions of both steel mill owners and the government to review the district court's injunction against enforcement of the President's steel seizure order); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947) (Court granted petitions filed by the United States, the prevailing party in the district court, and by the defendants subject to judgments of contempt in labor dispute).

case if the Court determines that it provides a more appropriate vehicle for resolving the question of Section 3's constitutionality than *Massachusetts* or *Golinski*. For the same reason, the government will also file a petition for a writ of certiorari before judgment in *Pedersen*. This Court's cases make clear that the United States, as the federal entity charged with Section 3's enforcement and against which judgment was entered below, is a proper party to invoke this Court's power to review the district court's judgment in those cases. See *INS* v. *Chadha*, 462 U.S. 919, 930-931 (1983) ("When 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 appeal that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional."); *United States* v. *Lovett*, 328 U.S. 303, 306-307 (1946) (reviewing constitutionality of a congressional enactment on the petition of the Solicitor General, even though the Solicitor General agreed with the lower court's holding that the statute was unconstitutional); see also *United States* v. *Lovett*, 327 U.S. 773 (1946) (granting Solicitor General's petition for a writ of certiorari). As in previous cases (see note 6, *supra*), granting the petition of the party against which judgment was entered—here and in *Pedersen*, the government—would render it unnecessary to decide any constitutional or prudential questions arising from petitioner's own request for review.

CONCLUSION

This Court should hold the petition for a writ of certiorari before judgment pending its consideration and disposition of the petitions in *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), and *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). If the Court determines that neither *Massachusetts* nor *Golinski* provides an appropriate opportunity to decide the question presented, the Court should consider granting the petition in this case, in conjunction with the petition to be filed by the government, and with the petition in *Pedersen* v. *Office of Personnel Management*, No. 12-231 (filed Aug. 21, 2012), and the petition to be filed by the government in that case.

Respectfully submitted.

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