No. 12-302

In The

Supreme Court of the United States

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
Petitioners,

v.

JOANNE PEDERSEN, ET AL.,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 3 of the Defense of Marriage Act ("DOMA") provides that for purposes of federal law "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 wife." 1 U.S.C. § 7.

The questions presented are:

(1) Does Section 3 of DOMA violate the equal protection component of the Due Process Clause of the Fifth Amendment?

(2) Petitioners are federal agencies and officers who do not have general responsibility for administering DOMA, but merely oversee a limited number of its applications. When such agencies or officers argue that a federal statute is unconstitutional and prevail in the lower courts, and where the House of Representatives has intervened to defend the statute, do the agencies and officers have prudential standing to seek this Court's review of the judgment they requested?

PARTIES TO THE PROCEEDING

Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") was the intervenor-defendant in the district court and is an appellant in the Second Circuit.* The statement of the Department of Justice ("Department") in its Petition on behalf of the Executive Branch defendants that the House intervened merely "to present arguments" in favor of DOMA, *see* Pet. (II), is inaccurate. Although the Department argued in the district court that the House's intervention should be limited to those terms, the district court granted the House intervention as a party-defendant to fully litigate DOMA's constitutionality under equal protection principles.

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* 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, like the institution it represents, functions on a majoritarian basis 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.

Petitioners the Office of Personnel Management, Timothy F. Geithner, Secretary of the Treasury, Hilda L. Solis, Secretary of Labor, Michael J. Astrue, Commissioner of the Social Security Administration, the United States Postal Service, Patrick R. Donahoe, Postmaster General of the United States of America, Douglas H. Shulman, Commissioner of Internal Revenue, Eric H. Holder, Jr., Attorney General, Thomas J. Curry, Comptroller of the Currency, and the United States of Amerca were defendants in the district court and are appellants in the Second Circuit.

Respondents Joanne Pedersen, Ann Meitzen, Gerald V. Passaro II, Lynda DeForge, Raquel Ardin, Janet Geller, Joanne Marquis, Suzanne Artis, Geraldine Artis, Bradley Kleinerman, James Gehre, Damon Savoy, and John Weiss were plaintiffs in the district court and are appellees in the Second Circuit.

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INTRODUCTION

The Petition in this case is the latest in a series of extraordinary Petitions for a Writ of Certiorari Before Judgment that the Department has filed seeking review of DOMA's constitutionality. The Petitions are extraordinary both for the relief they seek, certiorari before judgment, and because they are totally unnecessary. The important issue of the constitutionality of Section 3 of DOMA is squarely presented to this Court in the House's earlier-filed Petition for Certiorari after judgment in No. 12-13, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. That Petition was filed by the party whose arguments did not prevail in court and comes in the ordinary course following the judgment and opinion of the Court of Appeals for the First Circuit. There is no reason to take the extraordinary step of granting certiorari before judgment here when the exact same issue is better presented in a pending petition for certiorari after judgment.

Granting this extraordinary Petition for certiorari before judgment would accomplish nothing beyond needlessly complicating this Court's review on the merits. The Department's arguments prevailed in the district court. Having prevailed below, there is certainly no reason for the Department to get the benefit of an opening and reply brief. Indeed, there is a substantial question whether the Department even has appellate standing to file a Petition here. But at a minimum, to preserve the proper alignment of the parties, if the Court were to grant the Department's Petition, it would have to undo the effect of its decision to grant certiorari to the

Department by realigning the parties and setting a unique briefing schedule that properly provides an opening and reply brief to the House and realigns the Department with the plaintiffs whose arguments it fully embraces. There is no need for any of that. The straightforward course here is also the correct one: This Court should grant the House's Petition in No. 12-13 to review the decision and judgment of the First Circuit and deny this request for certiorari before judgment.[1]

STATEMENT OF THE CASE

1. 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." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012). The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. *See* 142 Cong. Rec. 17094-95 (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

[1] For the same and additional reasons, the Court should also deny the other premature petitions, *see infra* pp. 12-13, and the Department's unnecessary Petition in No. 12-15. *See* the House's Br. in Opp., No. 12-15 (Aug. 31, 2012).

provide its own definition for purposes of federal programs and funding.

While Congress was considering DOMA, it requested the opinion of the Department of Justice on the bill's constitutionality, and the Department three times 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 The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. at 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, it adopted the traditional definitions of those terms. Nor was the timing of Congress' decision a fortuity. Instead, Congress acted to ensure that Hawaii's novel and then-recent decision to take steps toward redefining marriage,

see Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), 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. 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.[2] In enacting DOMA, Congress merely reaffirmed what it has always meant when using the words "marriage" and "spouse" in federal law—and what courts and the Executive Branch have always understood it to

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[2] *See*, *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); Veterans and Survivors Pension Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(31), 89 Stat. 1013, *codified at* 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).

mean: A traditional male-female couple.[3] It further clarified its understanding that these terms would have that meaning for purposes of federal law regardless of how states might choose to redefine marriage for purposes of their own law.[4]

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[3] *See*, *e.g.*, Revenue Act of 1921, § 223(b)(2), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* I.R.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); 38 U.S.C. § 101(31) ("The term 'spouse' means a person of the opposite sex"); U.S. Dep't of Labor, Final Rule, *The Family And 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 "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), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's marriage statute of 1901, intended "that 'marriage' is limited to opposite-sex couples"); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (referring to "the union for life of one man and one woman in the holy estate of matrimony" as "the sure foundation of all that is stable and noble in our civilization").

[4] *See* House Rep. 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 30 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law.").

2. 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 Administration abruptly announced its intent to refuse to defend DOMA's constitutionality. 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 heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

The Attorney General acknowledged that, in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding

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[5] *See 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); *Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu,* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." *Id.* He did not, however, apply that standard to DOMA. On the contrary, he conceded that every Circuit to consider the issue (*i.e.*, eleven Circuits) had held that sexual orientation classifications are subject only to rational basis review, and he acknowledged that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *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. Notwithstanding that the Holder Letter said only that the Department would *not defend* DOMA Section 3, the Department went further and *affirmatively attacked Section 3* in court and accused the Congress that enacted DOMA—many of whose Members still serve—of doing so out of "animus."[6] The Department took this position even though

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[6] *See* Br. for OPM, et al., *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn. Sept. 14, 2011). The Department has filed substantive briefs in numerous other DOMA cases making this same argument. *See* briefs in *Windsor v. United States*, No. 12-2335 (2d Cir. Aug. 10, 2012); *Golinski v. OPM*, Nos. 12-15388 & 12-15409 (9th Cir. July 3, 2012); *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011); *Revelis v. Napolitano*, No. 1:11-cv-1991 (N.D. Ill. Apr. 23, 2012); *Dragovich v. U.S. Dep't of Treasury*, No. 4:10-cv-1564 (N.D. Cal. Jan. 19, 2012); *Cozen O'Connor, P.C. v. Tobits*, No. 2:11-cv-45 (E.D. Pa. Dec. 30, 2011); *Bishop v. United States*, No. 4:04-cv-848 (N.D. Okla. Nov. 18, 2011); *Lui v. Holder*, No. 2:11-cv-1267 (C.D. Cal. Sept. 2, 2011).

DOMA was the very same statute (i) that the Department had defended a few short months before, and (ii) that the Department acknowledges is constitutional under the equal protection standard that applies in the great majority of Circuits.

3. History of This Case

a. *Procedural History*

Plaintiffs-Respondents are a number of same-sex couples who have obtained marriage certificates from states that offer such certificates to same-sex couples, and surviving members of such couples. They seek to enjoin DOMA and to obtain federal benefits available to opposite-sex married couples.

Plaintiffs-Respondents filed suit before the Department ceased defending DOMA, and the district court allowed the Department a period of more than four months to move to dismiss. Pretrial Deadlines Order & Sched. Order, *Pedersen*, No. 10-cv-1750 (D.Conn. Nov. 9, 2010 & Jan. 6, 2011). Instead of filing such a motion, however, the Department ultimately notified the court that it would not defend DOMA's constitutionality against equal-protection attack, Notice to Ct., *id.* (D.Conn. Feb. 25, 2011), and the House sought and was granted leave to intervene. *See* Order, *id.* (D.Conn. May 27, 2011).

The district court entered an unusual scheduling order under which Plaintiffs-Respondents would move for summary judgment before the House could move to dismiss the complaint. Sched. Order at 2, *id.* (D. Conn. May 27, 2011).

b. *The District Court's Decision*

The dispositive motions were fully briefed and pending before the district court for nine and one half months before the district court's decision. Ultimately, without hearing oral argument, the district court granted Plaintiffs-Respondents' motion for summary judgment and denied the House's motion to dismiss. The court first addressed a threshold question of standing regarding Plaintiffs-Respondents' claims to file joint income tax returns, holding that the tax code is "gender neutral" despite its specification that joint tax returns may be filed by "a husband and wife," and thus that Plaintiffs-Respondents had standing to seek joint tax returns by challenging DOMA but not the tax-code provision itself. App. 18a-20a. The court also concluded that Plaintiffs-Respondents' ineligibility for joint tax returns is defined solely by DOMA and not by the tax code, because the IRS sent letters to some of the Plaintiff-Respondents that, in the court's view, stated as much. App. 20a-21a.

The district court then found this Court's decision upholding traditional marriage laws in *Baker v. Nelson*, 409 U.S. 810 (1972), to be inapplicable, in part on the ground that in that case this Court had decided only "a state constitutional question while this case presents a United States constitutional question." App. 23a.

Turning to the question of the proper level of constitutional scrutiny for classifications based on sexual orientation—an issue that the Second Circuit has not yet addressed—the district court expressed the view that heightened scrutiny would apply, App. 85a, but found that it "need not apply a form of

heightened scrutiny" because, in the court's view, DOMA fails rational-basis review. App. 74a-75a.

In purporting to apply rational-basis review, however, the district court wholly inverted the burden of proof. It held that Congress could not rationally proceed with caution in the face of the unknown consequences of changing a foundational social institution, because that would be "permitting discrimination [to continue] until equal treatment is proven * * * to be warranted," which the court found unacceptable. App. 100a. The court also declared it irrational for Congress to desire a policy of nationwide uniformity in marital benefits eligibility for same-sex couples, rather than a uniform policy of deference to state law. App. 101a-102a. The district court concluded that DOMA is not rationally related to conserving government funds because even though the plaintiffs sought additional benefits, the court believed, recognizing same-sex marriages would result in a net transfer of wealth *away* from same-sex couples and *to* the government. App. 93a-94a. It also found that saving money is not a legitimate state interest unless there is some further justification for how the money is saved. App. 95a.

The court also stated that DOMA cannot rationally be thought to foster responsible childrearing because it does not permit every couple that is allowed to raise children to marry each other for purposes of federal law, does not require married couples to have children, and does not prohibit same-sex couples from raising children. App. 84a-86a, 88a-90a. The district court suggested that Congress may not conclude that it is best for children to be raised by married couples unless it is willing to accept

whatever definition of "married" the states might choose to adopt. App 86a.

The court also expressed its belief that, "by relieving homosexual couples of legal obligations imposed on heterosexual couples," DOMA "disincentivizes heterosexual marriage." App. 86a. The court found DOMA not rationally related to childrearing because the court believed that some marital benefits and duties are not related to children. App. 89a.

c. *Subsequent Proceedings*

Although the district court adopted the result advocated by Petitioners, they nevertheless filed a Notice of Appeal to the Second Circuit on August 17, 2012—only 15 days after the district court entered judgment, and 45 days before the deadline for filing a notice of appeal. *See* 28 U.S.C. § 2107(b). Petitioners filed the instant Petition only four days later, August 21, 2012, and on that same day moved in the Second Circuit for a highly expedited schedule. *See* Mot. for Expedited Appeal, *Pedersen*, No. 12-3273 (2d Cir. Aug. 21, 2012). That motion was denied. Order, *id.* (2d Cir. Aug. 28, 2012). Petitioners never filed their own appeal for the rather obvious reason that they prevailed in the district court.

The House filed its own Notice of Appeal to the Second Circuit on September 28, 2012. The two appeals apparently are being treated as consolidated in the Second Circuit. *See* Nos. 12-3273 & 12-3872 (2d Cir.). The House has moved to dismiss the Department's appeal on grounds that the Department lacks appellate standing and that its

appeal is superfluous, Mot. to Dismiss, *id.* (2d Cir. Oct. 4, 2012), but no merits briefing on DOMA's constitutionality has been filed.

4. Other Pending Petitions Involving DOMA Section 3

The question of DOMA's constitutionality is also presented by seven other petitions for certiorari pending before this Court. Three petitions arise out of the First Circuit's decision and judgment in *Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012). The others are petitions for certiorari before judgment following appeals of district court judgments striking down DOMA on equal protection grounds—one petition by the plaintiffs in this case, one by the Department in *Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2012), and petitions by both the plaintiff and the Department in *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

The House filed a Petition for Certiorari in the First Circuit case on June 29, 2012. *See* Pet. for Cert., No. 12-13, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. No party opposes the House's *Gill* Petition. A few days later, the Department filed its own Petition in that case, No. 12-15 (July 3, 2012), despite having its bottom-line position on DOMA adopted in that case. On July 20, Massachusetts filed a Conditional Cross-Petition for Certiorari in the First Circuit case, No. 12-97; both Massachusetts and the individual *Gill* plaintiffs support this Court's review in *Gill*. Resp. of the Commonwealth of Mass. in Supp. of Cert., Nos. 12-13 & 12-15 (July 20, 2012); Br. in Resp. of Nancy Gill et al., Nos. 12-13 & 12-15 (Aug. 2, 2012).

Similarly, the Department filed a Petition for a Writ of Certiorari Before Judgment in *Golinski*, No. 12-16 (July 3, 2012), despite prevailing below—an action subsequently duplicated by the Plaintiff-Petitioners in *Windsor*, *see* No. 12-63, and Petitioners here, *see* No. 12-231. The Department then filed its own Petition in Windsor as well. *See* Nos. 12-307.[7] The Department does not unequivocally support plenary review in either this case or *Windsor*, but merely requests that the Court hold those Petitions for review in the event it denies the writ in the other DOMA cases.

REASONS FOR DENYING THE WRIT

A grant of certiorari before judgment in the Court of Appeals "is an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). This Court's Rule 11 provides that such a writ "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

This case does not remotely satisfy that standard. Although the issue of DOMA's constitutionality is indeed a matter of great public importance, particularly given the confrontation between the House and executive branch engendered by the

[7] On October 18, the day before this Brief was filed, a divided panel of the Second Circuit affirmed the judgment of the district court in *Windsor*. Whether the *Windsor* petitions are now treated as coming before or after judgment, it remains the case that the parties seeking review are the ones who prevailed in the lower courts.

Department's actions in this litigation, that issue has already been brought before this Court by "normal appellate practice"—in the form of the House's petition after decision and judgment in *Gill*, a case in which the House, Department, Massachusetts, and the individual plaintiffs all agree that certiorari is appropriate. There is thus nothing "to justify deviation from normal appellate practice" in this case.

Instead, granting the writ here would result only in unnecessary duplication and confusion. Not only is there no justification for taking the extraordinary step of granting certiorari before judgment when the exact same issue is squarely presented in an earlier-filed petition for certiorari after judgment, but this case features vehicle problems not present in *Gill*. As explained more fully in the House's opposition in No. 12-15, it is not clear that a prevailing party even has appellate standing to seek this Court's review. Although those principles may apply differently in the certiorari before judgment context, there is certainly no reason to grant that extraordinary relief and confront those issues when the same underlying constitutional issue is squarely presented in a case in which the First Circuit has already issued its opinion and entered judgment.

The Department's effort to obtain certiorari before judgment in this case is truly extraordinary. If the Department were really eager to seek certiorari before judgment, it could have done so years ago. It makes little sense for the Department to make that extraordinary request only after a case—*Gill*—is properly before this Court in the ordinary course of appellate proceedings. This case would add nothing

except procedural complications to this Court's consideration of DOMA's constitutionality in *Gill*. The proper course here is also the straightforward one: There is no reason for the Department or this Court to search through the dockets of the courts of appeals for cases implicating DOMA's constitutionality when the First Circuit has ruled. The First Circuit rejected the House's arguments and the House alone seeks to have the First Circuit's judgment overturned.

Under these circumstances, the House's *Gill* Petition is the superior vehicle for review of DOMA's constitutionality by this Court. The Court can avoid all of the side issues presented by this case and focus on the important question of DOMA's constitutionality by granting the House's Petition in No. 12-13, and denying the Petition in this case.

I. *Gill* Presents Exactly the Same Question Regarding DOMA's Constitutionality.

As Petitioners acknowledge, Pet. 13, the question presented in this case regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. (I) *with* Pet. No. 12-13 i.[8] In its *Gill* opinion, the First Circuit passed on exactly the same question as the district court here: Whether DOMA is compatible with the Fifth Amendment's implicit guarantee of equal protection. Likewise, the sub-issues addressed by the two courts were the same: Both cases focused on the proper level of constitutional scrutiny to apply, and the government interests supporting DOMA considered by the two courts were virtually

[8] The Department's Petition in *Gill* also presents that same question. *See* Pet. No. 12-15 (I).

identical. Thus, there is no aspect of the issues that would be presented in this case as to DOMA's constitutionality that the Court could not address as easily (or more easily) in *Gill* instead.

Petitioners baldly state that "the district court's consideration of the applicable level of scrutiny in this case may materially assist this Court's consideration of that issue." Pet. 13 (internal citation omitted). But this Court will have the benefit of the district court's analysis—as well as that of multiple other district courts, some of which have upheld DOMA and some of which have struck it down—whether or not it grants an extraordinary petition for certiorari before judgment. Nothing prevents the Department from citing the district court's analysis here in its merits brief in *Gill*.

Recognizing that this case adds nothing to *Gill*, Petitioners suggest that the Court hold it pending the disposition of the *Gill* petitions, and grant certiorari before judgment here if it denies the writ in that case. Pet. 13. But as is explained *infra*, this case is inferior to *Gill* in multiple ways as a vehicle for reviewing DOMA's constitutionality. If the Court somehow deems that issue not to warrant certiorari after judgment in *Gill*, then *a fortiori* it will not warrant certiorari before judgment in cases presenting additional vehicle problems, such as this case and the other pending DOMA cases. Moreover, if this Court grants certiorari in *Gill*, it still would make sense to deny the various premature petitions for certiorari before judgment and allow the courts of

appeals to decide how best to handle the cases during the pendency of *Gill* before this Court.[9]

II. This Case Presents Unique Vehicle Problems Not Present in *Gill*.

Granting certiorari in this case, however, *would* complicate consideration of the important constitutional issue raised in *Gill* both procedurally and substantively, as this case raises at least two vehicle problems not present in *Gill*.

A. Because Petitioners Prevailed Below, Granting Their Petition Would Create Unnecessary Procedural and Substantive Complications.

Because the Department prevailed in the district court in this case, it would make no sense to give the Department the benefit of an opening and reply brief in this Court. Thus, if the Court were to grant certiorari before judgment here, it would have to engage in a series of procedural machinations to align the parties properly. There is no reason to go

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[9] Nor is there any sensible reason to hold this Petition, or any of the other DOMA petitions for certiorari before judgment, for a possible grant and summary action following a decision on the merits in *Gill*. When this Court considers the constitutionality of a statute, it rarely if ever has felt the need concurrently to grant certiorari before judgment in every case implicating that statute's constitutionality—obviously, the courts of appeals are bound by this Court's decision either way. Changing course and granting certiorari before judgment here thus might encourage similar floods of premature certiorari petitions in future litigation, for no good reason.

through those steps when the parties are already properly aligned in the House's Petition in *Gill*.

The complications flowing from the Department's success in the district court go well beyond scheduling. As explained more fully in the House opposition in No. 12-15, it is not clear that the Department even has appellate standing to petition. One of the basic rules of federal procedure is that "a party who receives all that he has sought generally is not aggrieved by the judgment affording [the] relief and cannot appeal from it." *INS v. Chadha*, 462 U.S. 919, 930 (1983) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (brackets omitted)).

Two Terms ago this Court made clear that the same principle applies to its certiorari jurisdiction. *Camreta v. Greene*, 131 S. Ct. 2020, 2030-33 (2011). As a result, "[a]s a matter of practice and prudence, [this Court has] generally declined to consider cases at the request of a prevailing party." *Id.* at 2030.

Indeed, in a footnote in the instant Petition, the Department acknowledges that granting certiorari here would require the Court to expand the existing executive-branch appellate-standing rule in cases like this one—from a rule allowing "an agency of the United States" to appeal a judgment striking down "the Act of Congress it administers" even where it agrees with that outcome, *INS v. Chadha*, 462 U.S. 919, 931 (1983), to one allowing *any* executive-branch defendant to obtain review of *any* judgment striking down a statute that the executive branch maintains is unconstitutional. *See* Pet. 14 n.4.

Petitioners maintain that this "is a distinction without a difference," *id.*, but that of course is the precise question that the Court would be required to decide if it granted any of the Department's pending petitions. And there are significant arguments why the difference may be material. This rule of *Chadha* is already in the nature of an exception to the general rule that a party cannot appeal from a judgment it requested. The *Chadha* Court indicated that an agency's special relationship with "the Act of Congress it administers" is a reason for permitting such an exception when the agency believes the statute to be invalid. 462 U.S. at 931. That is very different from giving the Department an open-ended mandate to seek this Court's affirmance of the invalidation of any statute the Department chooses, in cases where a Congressional party has intervened to defend the statute. Certainly, there is no compelling reason to make it costless for the Department to abandon its traditional obligation to defend the constitutionality of duly-enacted statutes. Moreover, *Chadha* involved the executive branch resisting what it regarded as an encroachment on its own constitutional power by the legislative veto at issue there. For both these reasons, the agency in *Chadha* had a considerably more concrete and particularized interest at stake than the Petitioners here have in DOMA's invalidity. Granting one of the Department's petitions for certiorari before judgment would needlessly force this Court to decide whether to extend the rule of *Chadha* to this situation.

Additionally, the events of the DOMA litigation suggest that this Court should not be over-eager to

reaffirm *Chadha*'s holding regarding executive-branch standing in cases where a Congressional body has taken on the Department's normal role of defending a statute's validity. In *Chadha*, Congress' involvement was essentially limited to the proceedings before this Court, and the Executive Branch and Legislative Branch agreed that Chadha's case was the proper one for this Court's review. It was relatively uncomplicated, therefore, to permit both of them to seek that review. The procedural circumstances here are very different and cast the question in a significantly different light.

When the Executive Branch opines that a major federal statute is unconstitutional and drops its legal defense of that statute in the lower courts, any Congressional body that intervenes will instantly become the sole operative defendant in what is likely to be (or become) sprawling, nationwide litigation—and one that will be prolonged even further by the delays necessarily caused by the intervention process and the re-setting of dispositive briefing deadlines. That is exactly what happened here: The House has been defending DOMA for well over a year, and has intervened in 15 lawsuits challenging DOMA's validity. Many of these cases involved discovery, including the depositions of numerous expert witnesses; nearly all of them involved briefing multiple dispositive motions and/or appeals. And in all of the cases, the House has been required to defend the statute's validity against the attacks not only of private plaintiffs, but of the Department as well.

But, when it came time to appeal in these cases, the House found itself in an extended tug-of-war

with the Department—which opposes the relief the House seeks—over which cases should receive further review, and when, and how.[10] In such circumstances, there is at least a serious question whether it is more appropriate for the Congressional body, as the real party in interest aggrieved by the lower-court judgment, to have the normal right accorded any other multi-case defendant of determining its own appellate strategy, rather than being forced to deal with whatever appeals the Department, an opposing and prevailing party, chooses to file.

The Court need not decide this matter in the DOMA litigation. Since the House's standing to seek this Court's review of a judgment striking down DOMA is clear, granting the House's *Gill* petition would avoid the question entirely. But granting the Department's petition not only would lend fresh credence to, but would affirmatively expand, the *Chadha* rule in a manner that is at best premature and inappropriate without plenary consideration of the issue. The far simpler route is to avoid unnecessarily considering whether to extend this aspect of *Chadha*, by granting the House's unopposed *Gill* petition and denying the Department's petitions.

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[10] Indeed, the instant Petition and the plaintiffs' Petition in this very case were made possible only by the Department's filing of a notice of appeal to the Second Circuit well before the deadline for doing so—while the House waited to file its own appeal until near the end of the applicable period, and well after the parties seeking DOMA's invalidation had already sought this Court's review. *See supra* 11.

In short, while appellate standing principles may apply differently in the certiorari before judgment context, there is no reason for this Court to get sidetracked by questions concerning appellate standing, the scope of *Chadha*, or how those principles apply in the certiorari before judgment context. To the contrary, the Court can avoid all of these side issues and focus on the important question of DOMA's constitutionality simply by granting the House's Petition in No. 12-13.

B. This Case Presents a Question of Article-III Standing Regarding Petitioners' Income-Tax Claims Not Present In *Gill*.

Many of the Plaintiffs-Respondents seek to file joint federal income tax returns, and they claim that only DOMA prevents them from doing so. But it is far from clear that this is true. The applicable tax statute, I.R.C. § 6013(a), also precludes same-sex couples from filing jointly because it expressly provides that "[a] husband and wife may make a single return jointly of income taxes." Because Plaintiffs-Respondents have not challenged the constitutionality of § 6013(a), there is a serious question whether their claimed income-tax injuries would even be redressed if DOMA were struck down as they request, or whether § 6013(a) would independently bar the relief they seek—and thus whether they have standing to pursue those claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-562 (1992).[11]

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[11] *See McConnell v. FEC*, 540 U.S. 93, 228-229 (2003) (decision striking down challenged portions of BCRA would not

The district court relied on the provisions of the Dictionary Act, 1 U.S.C. § 1, and the tax code providing that masculine terms include the feminine to conclude that the terms "husband and wife" should be read as "gender neutral." App. 20a. But this conclusion is far from obvious. Section 6013(a)'s use of the terms husband and wife in contradistinction from each other strongly suggests a reference to opposite sex married couples, which would negate any inference that the terms could be read to be gender-neutral.

There is a further complication with the District Court's invocation of the Dictionary Act. The Dictionary Act provides only that the masculine includes the feminine, not vice versa. Thus, if read literally, the Dictionary Act would suggest, at most, that two women with a marriage certificate could file a joint tax return but two men could not. That non-sensical result strongly suggests that while the Dictionary Act was meant to address antiquated uses of male-specific references, it was not intended to override gender-specific references to terms like mother and wife, let alone override a specific

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redress plaintiffs' injuries because parallel provisions of FECA were not before the Court); *Renne v. Geary*, 501 U.S. 312, 319 (1991) (similar); *Galindo-Del Valle v. Att'y Gen.*, 213 F.3d 594, 598 (11th Cir. 2000), *superseded by statute on other grounds as stated in Balogun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1359 (11th Cir. 2005); *cf. Transp. Workers Union of Am., AFL-CIO v. TSA*, 492 F.3d 471, 475-76 (D.C. Cir. 2007); *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 955 (9th Cir. 2006); *S.D. Myers, Inc v. City & Cnty. of San Francisco*, 253 F.3d 461, 474-76 (9th Cir 2001).

reference to opposite-sex couples, such as § 6013(a)'s reference to a husband and wife.

The far better reading of § 6013(a) is that its reference to "husband" and "wife" independently limits joint filing status to opposite-sex married couples. At a minimum, it was imprudent for Petitioners to challenge DOMA without also challenging § 6013(a), as that tactical judgment has called their standing into question. And no matter how this Court would ultimately resolve these case-specific and largely self-inflicted issues, there is no reason for this Court to invite those extra complications in considering DOMA's constitutionality by granting certiorari before judgment here, when *Gill* comes to it after judgment and presents no such wrinkles.

In short, there is no good reason for this Court to take the extraordinary step of granting certiorari before judgment when the exact same issue is before the Court—and better presented—in the House's Petition seeking review of the decision and judgment of the First Circuit in *Gill*.

III. The Department Operates as a De Facto *Amicus* in This Case and That Status Is Best Accommodated by Granting the House's *Gill* Petition Alone.

Ever since the Department abandoned its traditional responsibility of defending the constitutionality of DOMA, it has operated as a de facto *amicus* supporting the arguments of plaintiffs attacking DOMA's constitutionality. As such, the Department is not entitled to any special consideration of its views as to the appropriate

vehicle for this Court's review. Thus, where the only party defending DOMA (the House) and the plaintiffs who have attacked DOMA all agree that *Gill* is an appropriate vehicle for this Court's review, the Department's suggestion that this Court should accept its extraordinary Petition for Certiorari Before Judgment even if it rejects the House's *Gill* Petition should be viewed with deep skepticism.

Moreover, given the Petitioners' role as de facto *amici* supporting the plaintiffs, granting this Petition would lead to procedural complications and require the Court to realign the parties for purposes of briefing and argument. There is no need to scramble the parties by granting this Petition only to undo the effect by granting later procedural motions.

* * *

The House agrees with the Department and with Plaintiffs-Respondents that this Court should review DOMA's constitutionality. But there clearly is no need to circumvent normal appellate practice to do so—especially when this case presents unique vehicle problems which could only distract this Court from the central issues concerning DOMA. DOMA's constitutionality can be fully resolved by granting the House's Petition in *Gill*, and this Court should take that path. In all events, it should decline to take the extraordinary step of granting certiorari before judgment in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari Before Judgment should be denied. The House's Petition for Certiorari in No. 12-13 should be granted.

Respectfully submitted,

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