No. 12-231 & No. 12-302

IN THE
Supreme Court of the United States

JOANNE PEDERSEN, ET AL.,
*Petitioners*,

v.

OFFICE OF PERSONNEL MANAGEMENT, 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

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT


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## INTRODUCTION

If the Court decides to hear one or more cases this Term involving the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), this case presents an ideal vehicle for doing so. Reflecting the vast sweep of DOMA through the U.S. Code, the Petitioners in this case represent a large number of both married and widowed persons who have been harmed by DOMA in a myriad of ways, spanning from disadvantageous treatment in private pension plans subject to ERISA, to discrimination in the Social Security program, to the denial of federal employee benefits, to less-favorable treatment under the federal Tax Code. The Petitioners have all been lawfully married in and by Connecticut, Vermont, or New Hampshire—all states that democratically chose to extend marital rights and responsibilities to same-sex couples. The district court issued a thorough and exhaustive analysis of the challenged law and struck it down. The factual record—including extensive expert testimony—is virtually identical to that in *Windsor v. United States*, No. 12-63, and indistinguishable from that in *Gill v. Office of Personnel Management*, No. 12-13. And there are no meaningful procedural or statutory obstacles in this case that would prevent the Court from squarely reaching the constitutional issue. If the Court declines to grant a writ of certiorari in *Gill,* which similarly exposes the vast all-encompassing effects of DOMA on married (and widowed) same-sex couples, this case stands ready as the perfect alternate vehicle to resolve this critical issue.

BLAG cannot seriously dispute the suitability of this case as a vehicle for adjudicating the many challenges to DOMA currently before the Court. While BLAG suggests that four of the thirteen Petitioners lack standing because a different statutory provision of the Internal Revenue Code would have the same effect on them as DOMA, this argument is a meritless sideshow. The objection raised by BLAG does not affect the majority of the Petitioners or claims in this case and would not prevent the Court from addressing the central constitutional challenge to DOMA. And the procedural posture of this case—a grant of certiorari before judgment sought by the prevailing party in the district court, while an appeal in the Court of Appeals is pending—is wholly appropriate and would not require any unusual procedural maneuvers. This case demonstrates the many ways in which DOMA impacts and disadvantages same-sex couples and disrespects the marital status determinations and marital eligibility policies chosen democratically by the states, and represents an ideal vehicle for the Court to consider these issues.

## ARGUMENT

### I. The Internal Revenue Code Poses No Obstacle To Granting Review In This Case.

BLAG opposes certiorari on the ground that some of the Petitioners—i.e., the two couples who sought to file joint tax returns ("Tax Petitioners")—were harmed not "solely" by DOMA, but also by the Internal Revenue Code Section 6013(a) ("Section 6013"). BLAG argues that Section 6013, which

states that a "husband" and "wife" may file joint tax returns, would preclude the Tax Petitioners from filing jointly even if DOMA were struck down as unconstitutional, thereby depriving them of standing. As an objection to a grant of certiorari in this case, BLAG's concerns are baseless.

At the outset, BLAG's novel reading of Section 6013 has no bearing on the suitability of this case as a vehicle for adjudicating the constitutionality of DOMA. While BLAG asserts that "*[m]any* of the Petitioners seek to file joint federal income tax returns," Opp. 15 (emphasis added), only four of the thirteen Petitioners—Suzanne and Geraldine Artis, Bradley Kleinerman, and James "Flint" Gehre—have claims based on joint filing. The remaining Petitioners have claims having nothing to do with taxes or joint filing; the Court would have a direct path for adjudicating Petitioners' constitutional challenge to DOMA in the context of those other claims (such as those predicated upon ERISA, Social Security, or Federal Employee Health Benefits) irrespective of BLAG's statutory argument. BLAG's argument under Section 6013 would thus do nothing to obstruct or complicate resolution of the constitutional challenge in this case.

BLAG's argument under Section 6013 also fails as a factual matter. The Tax Petitioners in this case were *actually* harmed by DOMA, *not* by Section 6013. As the district court recognized, "the IRS has repeatedly stated that DOMA—and not Code Section 6013—is the reason that same sex couples may not file joint tax returns." Pet. App. 22a. In fact, it did

so in this case, finding that Tax Petitioner Suzanne Artis could not file a joint return because of "DOMA," not because Section of 6013.[1]

At best, BLAG is arguing that there is a reading of the Internal Revenue Code that the IRS *could* adopt, but *has not actually yet adopted*, that would deprive the Tax Petitioners of the ability to file joint tax returns even absent DOMA. But the possibility of a future adverse ruling by the IRS does not deprive the Tax Petitioners of standing to challenge the *actual* adverse rulings based on DOMA that the IRS made in their cases. An agency—much less an intervenor such as BLAG—cannot simply cook up alternative, *post hoc* bases for the agency's action in litigation filings, and then claim that a litigant lacks standing because the litigant failed to challenge those alternative, not-yet-existing bases at the time the litigant challenged the agency action in court.[2]

Standing does not require an absolute guarantee that Petitioners will prevail on remand; it requires only that there be some "realistic possibility" that an agency would, absent a challenged statute, grant the relief the Petitioners seek. *Townes v. Jarvis*, 577 F.3d 543, 548 (4th Cir. 2009) (quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 56 (D.C. Cir.

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[1] This finding was set forth in an IRS Determination Letter to Suzanne Artis dated February 18, 2011, which is contained in the record as an attachment to Petitioners' summary judgment motion. In the case of Tax Petitioners Kleinerman and Gehre, the IRS never even provided a determination letter at all.

[2] *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

1991)). What matters is that it is not "merely speculative" that Tax Petitioners' injuries will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). There is no doubt a "substantial likelihood" that the Tax Petitioners will be able to file joint tax returns if DOMA is held to be unconstitutional. *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006).

Indeed, BLAG's novel interpretation of Section 6013 is unlikely ever to be adopted by the IRS. As the district court properly held, the far better reading of Section 6013 is that it would not bar same-sex couples from filing joint returns absent DOMA. Pet. App. 22a. The Dictionary Act, 1. U.S.C. § 1, and the Tax Code dictate that gendered terms such as "husband" and "wife" be read as gender-neutral, so that same-sex and opposite-sex couples may file jointly. Pet App. 22a.[3]

Moreover, BLAG has not mustered any evidence to suggest that the IRS has interpreted or ever would interpret Section 6013 to preclude the Tax Petitioners from filing joint returns absent DOMA. In fact, the IRS has never adopted the narrow,

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[3] While BLAG's preferred reading of Section 6013 is that "husband" and "wife," when viewed in context, suggest reference to opposite sex spouses, Opp. 15-16, it cites no authority to that effect. In any event, "spouse" is used synonymously with "husband" and "wife" throughout the Tax Code. *Cf. Estate of Tilyou v. Comm'r*, 470 F.2d 693, 694 n.2 (2d Cir. 1972) (interpreting "his surviving spouse" to include husband or wife).

gendered construction of Section 6013 that BLAG urges here. Before DOMA, the IRS took the position that the statute allowed couples to file jointly so long as couples were married under state law. *See* IRS Pub. 17, at 22 (1995) (explaining that filing status depends on marital status); Rev. Rul. 58-66, 1958-1 C.B. 60 (explaining that "martial status" is determined "under state law"). After DOMA, the IRS took the position that DOMA *changed the meaning of 6013* to exclude same-sex couples. *See* IRS Information Letter 2001-0294 (Dec. 31, 2001) (stating that "Vermont civil union cannot *under DOMA*, be a marriage for purposes of the Internal Revenue Code") (emphasis added). The IRS's consistent decisions pointing to DOMA, rather than to Section 6013, as precluding married same-sex couples from filing joint returns, are both "contemporaneous" and "have long been in use," and as such are due "considerable weight." *Davis v. United States*, 495 U.S. 472, 484 (1990). The IRS's documented position also suggests that, if DOMA were struck down, the IRS, as the agency responsible for interpreting and implementing the Tax Code, would *not* interpret Section 6013 to preclude same-sex married couples from filing jointly, but would instead interpret Section 6013 to allow joint filing for *all* married couples.

The flaws in BLAG's argument are compounded by the fact that its preferred reading of Section 6013 would be untenable on remand in the event DOMA were struck down. In such a scenario, Section 6013 would suffer from the same constitutional infirmity as DOMA, and as a matter of constitutional

avoidance would almost certainly be construed to permit same-sex couples to file joint tax returns. And in the unlikely event the IRS were to rely on Section 6013 to deny joint filing in the future, the Tax Petitioners—as well as any similarly situated couples—would likely succeed in a constitutional challenge to such action. At a bare minimum, the Tax Petitioners have standing to challenge DOMA so they can so make this argument on remand. BLAG's tax theory is not a reason to decline to hear this case.

## II. It Is Not A "Problem" That Petitioners Previously Prevailed In The District Court.

Petitioners also have standing to seek certiorari in this case. It is black-letter law that "*any party*" to a case pending "in the court of appeals" may petition for a writ of certiorari. 28 U.S.C. § 1254(1) (emphasis added). This language covers not only those who have lost in the court below but also "petitions brought by litigants who prevailed." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (citing Eugene Gressman et al., *Supreme Court Practice* 87 (9th ed. 2007)). BLAG and DOJ have filed notices of appeal in this case, and both of those appeals are pending in the Second Circuit. *See* No. 12-3872 (BLAG appeal); No. 12-3273 (DOJ appeal). As a statutory matter, therefore, Petitioners have standing to seek certiorari because this case is undoubtedly "in the court[] of appeals," as required by 28 U.S.C. § 1254(1). *See* Eugene Gressman et al., *Supreme Court Practice* 83-84 (9th ed. 2007).

Article III's standing requirements are satisfied in this case for the same reason. Given BLAG's and

DOJ's pending appeals, there is no doubt that a case or controversy is pending before the Second Circuit. That petitioners seek to "transfer [those] appeal[s] from one appellate court to another," does not alter the fact that there remains a live case or controversy in this action for purposes of Article III. *Gressman*, *supra*, at 426.

The fact that petitioners prevailed in the district court does not alter the analysis. This Court has granted such petitions for certiorari before judgment filed by similarly situated parties. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting petitions for certiorari of both Mistretta and the United States where the district court had ruled in favor of the United States in a decision concerning the constitutionality of the federal sentencing guidelines); *United States v. Nixon*, 418 U.S. 683, 686-87 & n.2 (1974) (granting petition for certiorari before judgment of United States where district court had ruled in favor of the United States in a decision concerning the issuance of a subpoena).

In urging the contrary conclusion, BLAG points to its brief in opposition to certiorari filed in *U.S. Dep't Health & Human Servs. v. Massachusetts*, No. 12-15. *See* Opp. 17. But none of the cases cited in that brief involves the standing of parties seeking certiorari *before* judgment. *See, e.g.*, *Camreta*, 131 S. Ct. at 2026 (discussing petition for certiorari filed *after* petitioners had prevailed in the *court of appeals*

on issues of qualified immunity); *INS v. Chadha*, 462 U.S. 919, 930 (1983) (similar).[4]

To be sure, a party who prevails in the court of appeals often may have "receive[d] all that he has sought," *Chadha*, 462 U.S. at 930, and is not sufficiently "aggrieved" to petition for certiorari. But that is not what has occurred here. Given the appeals currently pending against them, Petitioners have not received any such final resolution, and have not received any benefit from prevailing in the district court. They still suffer adverse consequences from DOMA—which continues to deprive them myriad dignitary and financial benefits. In short, Petitioners' injuries—like those of other prevailing parties who have sought certiorari before judgment, *see supra*—are ongoing.

Further, even if BLAG were correct that Petitioners' victory in the district court deprived them of appellate standing (which it does not), that should be of no moment in considering whether to accept this case for review. That is because the federal defendants have also filed a petition for certiorari before judgment in this case. DOJ Pet.,

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[4] Even BLAG concedes that appellate standing principles "may apply differently to a petition for a writ of certiorari before judgment." Opp. 17. In fact, although the language of 28 U.S.C. § 1254(1) permits "any party" to file seek certiorari either "before *or after* rendition of judgment," by a court of appeals, § 1254(1) (emphasis added), it appears that the Court has historically granted such petitions by parties prevailing in the district court only where, as here, an appeal was pending in the court of appeals. *See Gressman*, *supra*, at 426.

No. 12-302 (filed Sept. 2012). As that petition points out, "the district court's decision was entered *against* the government such that it is *not* a "prevailing party." *Id.* at 14 n.4. As this Court's decision in *Chadha*, 462 U.S. 919, makes clear, "[w]hen an agency of the United States is a party to a case in which the Act of Congress is held unconstitutional," it may seek this Court's review of that decision, even if, as here, the Executive "agree(s) with the holding that the statute in question is unconstitutional." *Id.* at 930-31. Because the federal defendants have standing to seek review in his case, any question about Petitioners' standing to do so is largely academic. Put simply, this Court need not even assess whether Petitioners have appellate standing here in order to grant review in this case.

## CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' opening petition, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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