No. 12-231

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

BRIEF IN OPPOSITION

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QUESTION 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 question presented is:

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

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.*

Respondents 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

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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.

Currency, and the United States of America were defendants in the district court and are appellants in the Second Circuit.

Petitioners 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations & Rules

INTRODUCTION

Petitioners have filed the latest in a series of extraordinary Petitions for a Writ of Certiorari Before Judgment 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 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 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.

Accordingly, the Court should grant the House's Petition in No. 12-13, and deny the instant Petition and allow the Second Circuit to determine how best to proceed in light of this Court's consideration of *Gill*.

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 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 ("the Department") 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. Moreover, contrary to Petitioners' suggestion, *see* Pet. 3-4, pre-1996 Congresses did not regard themselves as powerless to define marriage for purposes of federal law. Although Congress often has made eligibility for federal marital benefits or duties turn on a couple's state-law marital status, it also has a long history of supplying federal marital definitions in various contexts—definitions that always have been controlling for purposes of federal law, without regard to the couple's status under state law.[1] Indeed, far from "amend[ing] the

[1] *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

eligbility criteria for [marital] benefits" and duties, Pet. 6, 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 mean: A traditional male-female couple.[2] It further clarified its understanding that

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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).

[2] *See, e.g.*, Revenue Act of 1921, § 223(b), 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

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.[3]

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.[4] 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.

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matrimony" as "the sure foundation of all that is stable and noble in our civilization").

[3] *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.").

[4] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part & vacated in part for lack of standing*, 447 F.3d 673 (9th Cir.), *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).

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 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 order to prevent an Act of Congress from going undefended before the courts, the House sought and received leave to intervene as a party-defendant in the various DOMA cases nationwide, including in *Gill* and in this case.

3. History of This Case

a. *Procedural History*

Petitioners 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.

Petitioners' suit was filed before the Department ceased defending DOMA, and the district court allowed Petitioners 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 Petitioner 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 issued its decision. Ultimately, without hearing oral argument, the district court granted Petitioners' motion for summary judgment and denied the House's motion to dismiss. The court first addressed a threshold question of standing regarding Petitioners' 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 Petitioners had

standing to seek joint tax returns by challenging DOMA but not the tax-code provision itself. App. 22a, 21a. The court also concluded that Petitioners' 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 Petitioners that, in the court's view, stated as much. App. 22a-24a.

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. 26a.

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. 84a, but found that it "need not apply a form of heightened scrutiny" because, in the court's view, DOMA fails rational-basis review. App. 86a.

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. 114a. 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. 115a-116a. 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. 107a-108a. 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. 108a.

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. 96a-98a, 101a-102a. 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 98a-99a.

The court also expressed its belief that, "by relieving homosexual couples of legal obligations imposed on heterosexual couples," DOMA "disincentivizes heterosexual marriage." App. 99a. 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. 101a-103a.

c. *Second Circuit Proceedings*

Although the district court adopted the result advocated by the Department, the Department

nonetheless 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 by

the Department 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-Petitioner in *Windsor*, *see* No. 12-63, and Petitioners here. The Department then filed its own Petitions in the latter cases as well. *See* Nos. 12-302 & 12-307.[5] The Department does not unequivocally support

[5] 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.

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 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. Thus, there is 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—and as the Department agrees—it is not clear that Petitioners, who prevailed in district court and thus could not and did not file an appeal, even have appellate standing to petition. While appellate standing principles may apply differently in the certiorari before judgment context, the fact that Petitioners were the prevailing parties would complicate the briefing and argument and is at least a prudential consideration counseling against certiorari.

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.

The question presented by the instant Petition regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. i *with* Pet. No. 12-13 at i.[6] 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

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

level of constitutional scrutiny to apply, and the government interests supporting DOMA considered by the two courts were virtually 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 do not really appear to suggest otherwise. Contrary to their sole suggestion on this score, Pet. 29, this is not a situation in which there is any particular need to grant certiorari in a case or cases presenting varied applications of a challenged statute. DOMA's constitutionality is a straight up-or-down proposition that will not vary by context: No party or court has yet contended or concluded that DOMA might be constitutional only in some situations or only as applied to some plaintiffs. Indeed, Petitioners themselves suggest that DOMA's across-the-board nature and lack of context-specificity are part and parcel of its constitutional difficulty. Pet. i, 3-5, 6-7, 27, 29.

II. Standing Issues and Vehicle Problems Counsel Against Granting This DOMA Petition.

Petitioners suggest that DOMA's application is somehow presented in especially sharp relief by their case, such that "all the harms caused to [them] are clearly and solely the consequence of the application of DOMA." Pet. 29. Even were this true, it would not distinguish this case from *Gill*. But it is not true. Indeed, some of the Petitioners here not only do not suffer harm "solely" from DOMA, but also have created questions about their own standing by failing to challenge provisions of the Internal

Revenue Code that employ language specific to opposite-sex married couples.

Many of the Petitioners seek to file joint federal income tax returns, and it is very far from "clear[]" that DOMA is the "sole[]" statutory barrier to that outcome. 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 Petitioners 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).[7]

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. 22a. But

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[7] *See McConnell v. FEC*, 540 U.S. 93, 228-229 (2003) (decision striking down challenged portions of BCRA would not redress plaintiffs' injuries because parallel provisions of FECA were not before the Court); *Renne v. Geary*, 501 U.S. 312, 319 (1991) (similar); *see also 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 of Am., AFL-CIO v. TSA*, 492 F.3d 471, 475-476 (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, 474-476 (9th Cir. 2001).

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 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.

Additionally, and as the Department correctly notes in its own Petition in this case, the fact that Petitioners prevailed in the district court raises serious questions as to whether they have appellate standing to seek this Court's review. As the House has explained more fully in its Brief in Opposition in No. 12-15, 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. Petitioners here plainly are the "prevailing part[ies]" below—that is precisely why they did not themselves appeal to the Second Circuit. While these principles may apply differently to a petition for certiorari before judgment, there plainly is no sound reason to grant such a petition here, where exactly the same issue has already come before the Court following ordinary appellate practice in *Gill*.

Practical complications also would flow from Petitioners' success in the district court. Because they prevailed below, it would make no sense to give Petitioners 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 through those steps when the parties are already properly aligned in the House's Petition in *Gill*.

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. Certiorari in This Case Would Expedite Neither This Court's Review of DOMA nor the Resolution of Petitioners' Claims.

Petitioners offer a variety of reasons why prompt resolution of the issue of DOMA's constitutionality is important. Pet. 24-27. What they fail to note is that, given the pendency of the *Gill* petition, granting certiorari before judgment in this case instead of, or in addition to, *Gill* would not speed its resolution at all. Indeed, the filing of this final round of DOMA Petitions appears to have actually delayed the Court's consideration of which case or cases to grant, with an attendant delay of the oral argument should certiorari be granted.

Petitioners' claim against DOMA is identical to that presented in *Gill*. *See* Part I, *supra*. Thus, to the extent Petitioners have standing to pursue their claim, it will be resolved by this Court's review of *Gill*. As the normal appellate practice has already been followed in *Gill*, there plainly is no need to deviate from it in order to resolve this particular case outside of the normal process.

Additionally, Petitioners' generalized claim of urgency would not justify certiorari before judgment

in any event. Petitioners maintain, for instance, that the Executive Branch's refusal to defend DOMA's constitutionality in court increases the need to resolve the issue quickly. Pet. 26. The House completely agrees with this proposition, but it is not a reason to grant certiorari before judgment instead of granting the House's earlier-filed post-court-of-appeals *Gill* Petition. Moreover, to the extent that the Executive Branch's anomalous position on DOMA harms anyone, it is not Petitioners (who if anything are assisted by having the Department on their side), but rather the House, which is forced to shoulder the Department's traditional responsibility to defend the constitutionality of a duly-enacted statute. In such circumstances, if the party most directly impacted by the Department's decision—namely, the House—is content to pursue review in the normal course, then private plaintiffs cannot persuasively raise this issue as a justification for certiorari before judgment.

Similarly, while Petitioners claim that DOMA causes ongoing harm to them and others, Pet. 26-27, they offer no reason why the extraordinary step of certiorari before judgment would lead to appropriate relief any sooner. Filing their Petition already has resulted in some delay, and this Court presumably will resolve the constitutionality of DOMA as expeditiously as appropriate, no matter which vehicle it chooses for review.

IV. The Record in This Case Is Less Developed Than That in *Gill*.

Petitioners also suggest that there is something especially comprehensive about the record or the district court's opinion in this case, such that

certiorari before judgment is particularly appropriate. Pet. 30-31. They also claim that the issues have "been fully and exhaustively aired in preparation for this Court's resolution." Pet. 30. That is an inaccurate description of the record and proceedings. Far from being fully aired, the decision below was the product of an unusual briefing sequence and was issued without the benefit of oral argument. And, of course, unlike *Gill*, this case was not "fully and exhaustively aired" or aired at all in the one place in which cases are supposed to be aired before review in this Court—the Court of Appeals. Moreover, most of the expert witnesses appearing in this case and in *Gill* were identical, and their affidavits were highly similar. *Compare* Affidavits filed July 15, 2011, *Pedersen*, (D. Conn.) (ECF Nos. 71-74), *with* Affidavits filed Nov. 17, 2009, *Gill v. Office of Pers. Mgmt.*, No. 09-cv-10309 (D. Mass.) (ECF Nos. 39-42, 45).[8] In any event, 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.

* * *

The House agrees with the Department and with Petitioners that this Court should review DOMA's constitutionality. But there clearly is no need to circumvent normal appellate practice to do so—

[8] The only changes were that psychologist Gregory Herek, an expert witness in *Gill*, was replaced by psychologist Letitia Anne Peplau in this case, who gave similar evidence. Nancy Cott was an expert witness in *Pedersen* and submitted an amicus brief in *Gill*.

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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