No. 12-302

In the Supreme Court of the United States

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
PETITIONERS

v.

JOANNE PEDERSEN, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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Respondent Joanne Pedersen agrees that the Court should grant the petition for a writ of certiorari before judgment, and the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) agrees that the question presented by this case—whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection as applied to persons of the same sex who are legally married under state law—warrants this Court's immediate review. BLAG nevertheless opposes this petition on four grounds: (1) certain plaintiffs might lack Article III standing to pursue their income-tax claims; (2) the federal petitioners might lack appellate standing to seek this Court's review; (3) certiorari before judgment is not warranted because the petitions for a writ of certiorari in *Massachusetts* v. *Department of*

Health & Human Services, 682 F.3d 1 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012) and 12-15 (filed July 3, 2012), present the same question; and (4) granting this petition would unnecessarily complicate proceedings before the Court. None of those asserted grounds warrants denial of the present petition.

A. The Internal Revenue Code Poses No Obstacle To Review Of DOMA Section 3 In This Case

BLAG contends that "[m]any" of the plaintiffs might lack standing to pursue their DOMA challenges arising from the denial of income-tax claims because Internal Revenue Code Section 6013(a), which provides that "[a] husband and wife may make a single return jointly of income taxes," 26 U.S.C. 6013(a), may independently bar their claims. No. 12-302 Br. in Opp. 22. BLAG, however, does not contend that *all* plaintiffs in this case lack standing. Accordingly, regardless of the merits of BLAG's argument, Section 6013(a) simply cannot affect this Court's ability to resolve the constitutionality of Section 3 of DOMA in this case. As it turns out, only four of the thirteen petitioners raise claims based on joint filing; the other plaintiffs' claims underlying the Section 3 challenge arise in other statutory contexts. See No. 12-302 Pet. 3-4; No. 12-231 Pedersen Reply Br. 3. For that reason, BLAG ultimately acknowledges that the purported standing issue it raises here does not affect this Court's jurisdiction. Nos. 12-63 and 12-307 BLAG Supp. Br. 6.

B. Federal Petitioners, As Defendants Against Which Judgment Was Entered, Have Standing To Seek Certiorari

As explained more fully in the government's reply brief in No. 12-15 (at 2-6), this Court's precedents make clear that petitioners, as federal entities and officials charged with Section 3's enforcement and against which judgment was entered below, are proper parties to invoke this Court's jurisdiction to review the judgment in this case. See *INS* v. *Chadha*, 462 U.S. 919, 930-931 (1983) ("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," it may seek review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional."). BLAG's appellate-standing objection thus lacks merit.

BLAG's objection not only is foreclosed by this Court's decision in *Chadha*, but BLAG itself concedes (No. 12-302 Br. in Opp. 22; No. 12-307 Supp. Br. 9) that its objection may have even less force in the context of a petition for a writ of certiorari before judgment. In *Kinsella* v. *Krueger*, 354 U.S. 1 (1957), for example, the Court reviewed the district court's denial of a writ of habeas corpus based on a petition for a writ of certiorari before judgment filed by the government, the prevailing party in the district court. See *id.* at 5. Although the district court's ruling was favorable, the government filed the certiorari petition in order to supply an alternative vehicle to *Reid* v. *Covert*, which was then pending on appeal, for addressing Congress's power to authorize the trial by court-martial of civilians accompanying the Armed Forces overseas. Gov't Pet. 5-7, *Kinsella*, *supra* (No. 713). The government's petition stated that it was

"clear, of course, that the party prevailing in the district court may seek certiorari before judgment." *Id.* at 6 n.*. The Court granted the petition, consolidated the two cases, and decided them together. While the Court did not expressly address whether the government had properly invoked this Court's jurisdiction in *Kinsella*, 354 U.S. at 5, the government's standing to do so is even clearer in this case. Here, unlike in *Kinsella*, the government was *not* a prevailing party. Rather, the district court below entered judgment *against* petitioners. Accordingly, the government's standing to seek certiorari before judgment in this case should be beyond dispute.

C. Certiorari Before Judgment Is Warranted Here If Necessary To Ensure Timely and Definitive Resolution Of The Question Presented

All parties in this case agree that the question of Section 3's constitutionality is one of exceptional public importance warranting this Court's expeditious review. BLAG nevertheless argues that "[t]here is no reason to take the extraordinary step of granting certiorari before judgment here when the exact same issue is presented in a pending petition for certiorari after judgment" in *Massachusetts*. No. 12-302 Br. in Opp. 1. That argument fails to grapple with the principal justification for the government's petition in this case: to ensure that this Court can timely and definitively resolve Section 3's constitutionality. No. 12-302 Pet. 13. For the reasons explained in the government's supplemental and reply briefs in *United States* v. *Windsor*, No. 12-307, in which the court of appeals has now issued its decision, the Court should grant review in that case. If, however, this Court were to determine that neither *Windsor* nor *Massachusetts* provides an appropriate vehicle to do so, this case could.

Although BLAG claims that the government could have sought certiorari before judgment "years ago" (No. 12-302 Br. in Opp. 14), the first court of appeals decision holding that Section 3 violated the Fifth Amendment's guarantee of equal protection was issued on May 31, 2012. That recent development significantly changed the landscape of DOMA litigation, which has continued to advance quickly and has produced similar holdings in every court to have considered the issue since, including the Second Circuit's decision in *Windsor*. In any event, BLAG agrees with the government that Section 3's constitutionality now warrants this Court's prompt resolution.

D. Granting This Petition Would Not Unnecessarily Complicate Proceedings Before This Court

BLAG expresses concern that granting this petition would "needlessly complicat[e]" this Court's review on the merits. No. 12-302 Br. in Opp. 1. The complication it repeatedly refers to is the possible need for a briefing and argument order to realign the parties. See *id.* at 1, 17, 24-25. The potential issuance of a modified briefing and argument schedule, however, involves a modest step readily within the Court's capability and prior practice.

In *Chadha*, for example, in which the Executive Branch agency (INS) appealed to the Court and in which the Court also granted certiorari petitions filed by both the Senate and House of Representatives, the parties filed briefs in the following order: the Senate and House filed "top-side" briefs as appellee-petitioner on the same day; the individual alien filed a "bottom-side" brief as appellee-respondent 42 days later, and the INS also filed a "bottom-side" brief shortly thereafter; and the Senate and House of Representatives filed reply briefs 30 days after the filing of the INS brief. See also

Department of Health & Human Servs. v. *Florida*, 132 S. Ct. 840 (2011) (No. 11-398) (ordering briefing schedule on Anti-Injunction Act issue under which Court-appointed amicus curiae filed first; the Solicitor General and plaintiffs-respondents filed next simultaneously; the Solicitor General and plaintiffs-respondents then filed simultaneous reply briefs; and Court-appointed amicus filed its reply last). Of course, unlike in *Chadha* and *Massachusetts*, BLAG has not filed its own petition for certiorari in this case.

* * * * *

For the reasons explained in the government's supplemental brief (at 10-11) and reply brief in *United States* v. *Windsor*, No. 12-307, the Court should grant the petition for a writ of certiorari in that case. Although *Department of Health and Human Services* v. *Massachusetts*, petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), is also a case in which a court of appeals has rendered a decision, *Windsor* now provides the most appropriate vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in *Massachusetts* was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals in *Windsor* was not so constrained, and its analysis may be beneficial to this Court's consideration of that issue.

In the event the Court grants review in *Windsor*, it should hold the petitions in *Massachusetts* pending final resolution on the merits. In the event the Court decides that neither case in which the court of appeals has issued a decision provides an appropriate vehicle, it

should grant the government's petition for a writ of certiorari before judgment in either *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management* v. *Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

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