No. 12-63

In The
Supreme Court of the United States

EDITH SCHLAIN WINDSOR,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
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) Does Petitioner have standing to challenge DOMA given that her standing is premised on a Canadian marriage certificate obtained at a time when New York law did not recognize same-sex marriage?

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 and a respondent in this Court.[1]

Respondent the United States is an appellant in the Second Circuit.

Petitioner Edith Schlain Windsor, in her capacity as executor of the estate of Thea Clara Spyer, was the plaintiff in the district court and is the appellee in the Second Circuit.

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[1] 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.

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INTRODUCTION

The House respectfully opposes the extraordinary Petition for a Writ of Certiorari Before Judgment filed in this case. The important issue of the constitutionality of Section 3 of DOMA is squarely presented to this Court in the earlier-filed Petition 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 presented in a pending petition for certiorari after judgment. That is particularly true in this case, where the Petition is not only premature but presents a vehicle problem concerning Petitioner's standing that is unique to this case.

In short, granting certiorari here, instead of or in addition to in *Gill*, would serve only to complicate and confuse the Court's consideration of DOMA's constitutionality. 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. 17093-94 (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 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 Petitioner's suggestion, *see* Pet. 9-10, pre-1996 Congresses decidedly 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.[2]

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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

Indeed, in clarifying the meanings of "marriage" and "spouse" in federal law by enacting DOMA, Congress merely reaffirmed what it has always meant when using those words in federal law—and what courts and the Executive Branch have always understood it to mean: A traditional male-female couple.[3]

"living apart" from federal marriage definition for tax purposes); 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).

[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")); 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) ("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").

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. 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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[4] *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *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); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *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 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

Petitioner and Ms. Spyer obtained a marriage certificate in Ontario, Canada in 2007. At that time, New York did not issue marriage certificates to same-sex couples. *See Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). Petitioner and Ms. Spyer were domiciled in the State of New York at all relevant times. Ms. Spyer passed away in 2009, naming Petitioner the executor and sole beneficiary of her estate. After paying more than $363,000 in federal estate taxes, Petitioner, as executor, sought a refund of that amount on the theory that the estate was entitled to the marital deduction. Recognizing that federal law offers this deduction only when the beneficiary of the estate is a "spouse" within the meaning of federal tax law and DOMA, Petitioner

claimed that the failure to extend this favorable treatment to her violates the equal protection requirements of the Fifth Amendment. The IRS denied the refund, and Petitioner filed this suit in her capacity as executor of the estate. Her suit is premised on the notion that New York would have recognized the 2007 Canadian marriage certificate, even though New York did not issue marriage certificates to same-sex couples until after Ms. Spyer's passing.

Petitioner's suit was filed before the Department ceased defending DOMA, and the district court allowed the United States a period of four months to file a motion to dismiss. Order, Revised Scheduling Order, *Windsor*, No. 10-cv-8435 (S.D.N.Y. Dec. 3, 2010 & Jan. 28, 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, and the House sought and was granted leave to intervene. Mem. & Order, *Windsor* (S.D.N.Y. June 2, 2011). The district court then entered an unusual scheduling order under which Petitioner would move for summary judgment before the House could move to dismiss the complaint. Revised Scheduling Order, *Windsor* (S.D.N.Y. May 11, 2011). Proceedings were delayed, however, by a prolonged dispute over the extent to which the court could consider scholarly publications, articles, or books in connection with Petitioner's motion for summary judgment.[5] The

[5] *See* Mem. of Law in Supp. of Mot. to Strike, *Windsor* (S.D.N.Y. Aug. 10, 2011); Letters to the Court from Roberta A. Kaplan, dated Aug 11, 2011 (S.D.N.Y. ECF No. 120), Aug. 12, 2011 (two letters; ECF Nos. 119 & 120), Sept. 21, 2011 (ECF

district court ultimately denied Petitioner's motion to strike these materials from the House's briefing. Order, *Windsor* (S.D.N.Y. Aug. 29, 2011).

b. The District Court's Decision

The dispositive motions were fully briefed and pending before the district court for nearly nine months before the district court's decision. Ultimately, without hearing oral argument, the district court granted Petitioner's motion for summary judgment and denied the House's motion to dismiss. The district court first relied on decisions from New York's lower courts to infer that New York would have recognized foreign same-sex marriages before New York itself allowed such marriages, even though New York's highest court had expressly reserved the question. App. a5-a7. It found, therefore, that Petitioner had standing. *Id.* 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. App. a7-a9. 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 adopted a novel standard of constitutional review involving "intensified scrutiny," a level of scrutiny between

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No. 112), and Sept. 23, 2011 (ECF No. 115); Letters to Court from H. Christopher Bartolomucci, dated Aug. 11, 2011 (ECF No. 117), Aug. 12, 2011 (ECF No. 116), and Sept. 23, 2011 (ECF No. 111); House's Mem. of Law in Supp. of Mot. for Leave to File Sur-Reply, *Windsor* (S.D.N.Y. Sept. 2, 2011); Mem. in Supp. of Renewed Mot. for Leave to File Sur-Reply, *id.* (S.D.N.Y. Sept. 20, 2011). The district court ordered that substantial portions of these matters be litigated by letter brief.

ordinary rational-basis and intermediate scrutiny. App. a12-a13. The district court based this hybrid level of review on the First Circuit's decision in *Gill*, which had issued six days earlier.

The district court then considered the government interests that the House advanced to support DOMA's constitutionality. The court acknowledged that several of these interests—such as preserving the traditional institution of marriage and promoting responsible childrearing—are weighty enough to justify DOMA, but concluded that DOMA does not adequately further any of these interests. App. a14-a16, a17-a18. By contrast, the district court recognized that DOMA *is* sufficiently related to a government interest in ensuring the uniform nationwide distribution of federal benefits, but deemed this interest illegitimate because, in the district court's view, the Constitution gives states and not Congress the prerogative to define "marriage" even for federal-law purposes. App. a18-a20. The district court also held that conserving government resources is not a sufficient government interest to support DOMA without some further justification for how the savings are achieved. App. a20-a21.

c. Second Circuit Proceedings

The House expeditiously appealed the district court's judgment on June 8, 2012, a full 59 days before its notice of appeal was due. Although the district court adopted the result advocated by the Department, the Department filed its own Notice of Appeal.

Three days later, on June 11, Petitioner filed a "motion to expedite appeal" in the Second Circuit, which proposed a highly expedited schedule and emphasized, *inter alia*, that the Second Circuit's examination of whether heightened scrutiny should apply to sexual orientation classifications could have an impact on "courts in this Circuit and beyond." Mem. of Law in Supp. of Mot. for Expedited Appeal at 1, 11, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. June 11, 2012). The Second Circuit granted Petitioner's motion while adopting the House's alternative schedule for expedition, such that briefing will be complete by September 14, 2012. The Second Circuit has set oral argument for September 27, 2012, and denied the House's motion to suspend oral argument in light of the instant Petition.

On July 16, nearly a month after the Second Circuit granted her expedition motion and 17 days after the House filed its own petition after judgment in *Gill*, Petitioner filed in this Court the instant Petition for certiorari before judgment.

4. Other Pending Petitions Involving DOMA Section 3

The question of DOMA's constitutionality is also presented by five other petitions for certiorari pending before this Court. Three petitions arise out of the First Circuit's decision and judgment in *Gill*. The others are petitions for certiorari before judgment following appeals of district court judgments striking down DOMA on equal protection grounds in *Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2012), and *Pedersen v. OPM*, No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).

The House filed a petition for a writ of 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*. A few days later, the Department filed its own petition in that case, No. 12-15 (July 3, 2012), along with a petition for certiorari before judgment in *Golinski*, No. 12-16 (July 3, 2012), despite having its bottom-line position on DOMA adopted by the courts in both cases. On July 20 Massachusetts filed a conditional cross-petition for certiorari in the First Circuit case, No. 12-97, and 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). On August 21, a petition for certiorari before judgment was filed by the private plaintiffs in *Pedersen v. OPM*, No. 12-231.

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 importance, particularly given the confrontation between the Legislative and Executive Branches 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. There thus is nothing to be gained from granting certiorari before judgment in this case.

Instead, granting the writ would result only in unnecessary multiplication and confusion of the issues. Indeed, 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 a unique vehicle problem, not present in *Gill*. In order to determine whether Petitioner even has standing to pursue her claims, this Court would be forced to answer a sensitive question of New York law—whether New York would have recognized foreign same-sex marriages while it forbade them to be entered into in-state—that the New York Court of Appeals thus far has expressly reserved. What is more, as explained more fully in the House's opposition in No. 12-15, it is not clear that Petitioner, who prevailed in district court, even has appellate standing to petition. While appellate standing principles may apply differently in the certiorari before judgment context, the fact that Petitioner was the prevailing party would complicate the briefing and argument and is at least a prudential consideration counseling against certiorari.

The House's *Gill* Petition is the overwhelmingly 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 Petition in this case regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. i *with* Pet. No. 12-13 i.[6] In its *Gill* opinion, the First Circuit passed on exactly the same question as did the district court in this case: 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—indeed, the district court below expressly adopted the First Circuit's approach, App. a12-a13—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.

Petitioner does not really appear to suggest otherwise. She observes that New York has the largest population of the states that currently permit same-sex marriages. Pet. 15. But New York did not

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

permit same-sex marriages until after Ms. Spyer's passing, and this Court will resolve the impact of same-sex marriages in New York, and in every other State that allows them, on federal benefits whether it addresses DOMA's constitutionality in *Gill* or in this case. Thus, while Petitioner's concern about geographical uniformity in the availability of federal marital benefits for same-sex couples (Pet. 17) illustrates the rationality of Congress' decision to enact a uniform federal rule on this subject,[7] as well as the need for the Court to decide the issue of DOMA's constitutionality, it does not at all suggest that it is necessary or even desirable to do so in this case, as opposed to *Gill*.

Petitioner's suggestion that the district court's ruling requires the federal government to recognize all "marriages of same-sex couples that are performed in or recognized by * * * New York," Pet. 17, is incorrect. The federal government does not necessarily acquiesce even in the face of a precedential circuit court opinion, and it clearly has no obligation to do so in the wake of a non-precedential district court opinion. "*[S]tare decisis* does not compel one district court judge to follow the decision of another." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 n.4 (2d Cir. 2008) (quotation marks omitted). "District [c]ourt

[7] Congress expressly relied on its concern for uniformity in enacting DOMA. *See*, *e.g.*, 142 Cong. Rec. S4870 (daily ed. May 8, 1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal benefits"); *id.* S10121 (daily ed. Sept. 10, 1996) (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits").

decisions do not * * * even establish 'the law of the district,'" let alone govern the entire state in which they are rendered. *In re Executive Office of President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (citation omitted). In any event, the *Gill* petition presents an ideal vehicle for this Court to settle DOMA's constitutionality for the entire country, including New York.

Petitioner also confusingly asserts that the district court's supposed application of "standard rationality review" to DOMA would permit "this Court [to] affirm the decision below without reaching the question of whether a more stringent standard of review should apply" to sexual orientation classifications. Pet. 20. Even if Petitioner were correct that the district court applied standard rational-basis scrutiny and was somehow unique in doing so—which she is not—she offers no real explanation for why that would make this case a better candidate than *Gill* for this Court's review. The *Gill* District Court did, in fact, strike down DOMA applying rational basis review, 699 F. Supp. 2d 374, 387 (D. Mass. 2010), and the plaintiffs in *Gill* have argued—and presumably will argue—that this Court can invalidate DOMA under rational basis without definitively resolving the appropriate level of scrutiny. In all events, Petitioner is doubly wrong in suggesting that the district court's decision applied "standard rationality review," or is somehow unique in having done so. First, the district court here does not appear to have applied "standard rationality review" at all. Instead, it found a need for "intensified scrutiny of purported justifications where minorities are subject to discrepant

treatment" and a requirement that, "in areas where state regulation has traditionally governed, * * * the federal government interest in intervention [must] be shown with special clarity." App. a13 (quoting *Massachusetts*, 682 F.3d at 10). The court expressly stated that these factors "affect[] the nature of the rational basis analysis required here." App. a12. Second, Petitioner cannot claim any uniqueness for the district court's purported application of "standard rationality review." The First Circuit expressly applied standard rational basis review to DOMA and observed that DOMA would pass scrutiny under that standard, *Massachusetts*, 682 F.3d at 9, before ultimately invalidating the statute under its novel "intensified scrutiny," *id.* at 10 (which appears to be what the district court here in fact applied). And the district court in *Golinski* found DOMA unconstitutional under both rational basis and heightened scrutiny. 824 F. Supp. 2d 968, 995-1002 (N.D. Cal. 2012). In all events, this parsing of the district court's holding is really beside the point when this Court has the benefit of the First Circuit's considered opinion in *Gill*.

Nor is this a situation in which the Court might wish to grant certiorari before judgment in a case similar to one that has come before it in the ordinary course, in order to articulate how the rule of law it announces will apply to different factual and legal contexts. 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, plaintiffs typically suggest that DOMA's

across-the-board nature and lack of context-specificity are part and parcel of its constitutional difficulty. *See*, *e.g.*, Br. of Pls.-Appellees Nancy Gill, et al. 8-12, *Massachusetts*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Oct. 28, 2011). For this reason, the cases cited by Petitioner involving grants of certiorari before judgment to consider varying aspects of a single constitutional question, *see* Pet. 21, are inapposite here.[8]

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[8] *Citing United States v. Booker*, 543 U.S. 220 (2005) (reviewing varying applications of the Federal Sentencing Guidelines together with *United States v. Fanfan*); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (reviewing various university affirmative-action policies together with *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Petitioner also cites *Taylor v. McElroy*, 360 U.S. 709, 710 (1959), a case that this Court ultimately dismissed as moot, but which presented a due process issue regarding confrontation of witnesses in a context where the truth of the witnesses' testimony was at issue in a way not presented by the companion case of *Greene v. McElroy*, 360 U.S. 474 (1959). *See* Pet. for Cert. at 12-14, *Taylor*, No. 504 (Nov. 8, 1958). Moreover, *Taylor* was in the Court of Appeals for the District of Columbia Circuit, which had also decided *Greene* on the basis that the denial of security clearances—at issue in both cases—was not justiciable. *See* 254 F.2d 944, 953 (D.C. Cir. 1958).

This also is not a situation in which the case coming before this Court after the ordinary appellate process involves a question of mootness that could be avoided by granting certiorari before judgment in another case presenting the same substantive question, as was true in the other case cited by Petitioner, *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (considering whether the district courts could entertain actions by the federal Price Administrator seeking injunctions against state-court eviction proceedings, along with *Porter v. Lee*, 328 U.S. 246 (1946); the Court of Appeals had dismissed *Lee* as moot because the eviction had already occurred, while in

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*.

II. Petitioner's Article III Standing Turns on a Question of State Law That Has Been Expressly Reserved by the New York Court of Appeals, and Presents a Vehicle Problem Unique to This Case.

"This Court, of course, does not sit to determine matters of state law * * * ." *Dixon v. Duffy*, 344 U.S. 143, 144 (1952). And *Gill*, like many DOMA cases, presents no questions of state law. Petitioner contends that here, too, DOMA's constitutionality "was the sole issue before the court below" and that "[t]here is no dispute as to the impact of DOMA." Pet. 18. But that is not so.

Petitioner presents the question of whether DOMA Section 3 denies equal protection to "same-sex couples who are lawfully married under the laws of their states (such as New York)." Pet. i, Question Presented. To have standing to assert this claim, she obviously must demonstrate that she was "lawfully married" to another woman "under the law[] of their state[]." But that is a state law question, the answer to which is far from clear.

New York has permitted same-sex marriages only since mid-2011. *See* Thomas Kaplan, *After Long*

Dicken the eviction had been enjoined pending the federal litigation).

Wait, Gay Couples Marry in New York, N.Y. Times (July 23, 2011) http://www.nytimes.com/2011/07/24/nyregion/across-new-york-hundreds-of-gay-couples-to-marry-on-sunday.html. Petitioner obtained her marriage certificate with Ms. Spyer in Ontario long before marriage certificates were available to same-sex couples in New York. *See id.*; Pet. 5. Ms. Spyer passed away on February 5, 2009, again long before New York issued same-sex marriage certificates of its own. Pet. 5. As the district court recognized, *see* App. a6, Petitioner's standing thus depends on whether New York law would have recognized her Ontario marriage before the time that New York began to permit same-sex marriages in-state. *See also Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (unmarried same-sex couple lacked standing to challenge DOMA), *cert. denied*, 549 U.S. 959 (2006). If the Windsor-Spyer same-sex foreign marriage certificate was not valid under New York law, then the premise for Petitioner's claim fails because she can trace no injury to DOMA, and DOMA's invalidation would provide no redress. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).[9]

[9] Even if an unmarried same-sex couple somehow might have standing to challenge DOMA, that would not change the reality that Petitioner's challenge to DOMA was premised on the notion that it violates equal protection principles for the federal government not to recognize a marriage that is valid under state law. Thus, the uncertainty over the validity of a foreign marriage certificate obtained while New York itself did not allow same-sex marriages creates a serious vehicle problem whether or not it is critical to Petitioner's standing.

It cannot be seriously disputed that for most of New York's history a foreign marriage between two persons of the same sex would not have been recognized under state law. The New York Court of Appeals has not resolved the question of whether foreign, same-sex marriage certificates were valid under New York law in 2009, when Ms. Spyer died. Just three years earlier, in rejecting an effort to compel New York to recognize same-sex marriage generally, the court held that the "New York Constitution does not compel recognition of marriages between members of the same sex." *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006). Then, in 2009, the year of Ms. Spyer's passing, it expressly reserved the question whether New York law recognizes foreign, same-sex marriage certificates. *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (declining to decide whether "New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages," and instead resting its decision on its conclusion that the statutory benefits in question were not limited to spouses).

Thus, even establishing federal jurisdiction in this case required the district court to consider the sensitive state-law question of whether Petitioner's and Ms. Spyer's Canadian marriage certificate would have been recognized under New York law at the time relevant for this case. *See* App. a6-a7. Because Petitioner's standing turns on the answer to this question, the House has requested that the Second Circuit certify it to the New York Court of Appeals. *See* Br. for Def.-Appellant at 13-14, 17-19, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 16, 2012). The

district court did not have the option to do so. *Penguin Grp. (USA) Inc. v. Am. Buddha*, 640 F.3d 497, 499 n.4 (2d Cir. 2011) ("The district court does not have statutory authority to ask the New York Court of Appeals for its views on unsettled and important issues of New York law. We do."). The inability of the district court to certify this question to the New York Court of Appeals is one reason why this is a particularly bad context in which to skip review by the first court with the power to certify such questions.

If this Court were to grant certiorari before judgment, it would need either to certify the question itself or determine for itself whether foreign same-sex marriages were recognized under New York law as of February 5, 2009, at the latest.[10] It would obviously make no sense to grant certiorari before judgment only to certify a question to the New York Court of Appeals, especially when the extraordinary step of granting certiorari before judgment would bypass the first court in the federal system with the authority to certify a question to the New York Court of Appeals. But it makes even less sense to take the extraordinary step of granting certiorari before judgment to confront a vehicle problem unique to this case. Petitioner is asking this Court to establish her standing by deciding a question of New York law that New York has yet to determine for itself. What is more, it is a question of

[10] Indeed even the relevant date for purposes of determining whether New York would recognize the foreign marriage certificate—either the date of the certificate or the date of Ms. Spyer's passing—is itself a question of state law that is not free from doubt.

great political sensitivity regarding New York's "prescri[ption of] the conditions upon which the marriage relationship between its own citizens shall be created," which this Court has always recognized as going to the heart of state authority. *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877); *see also, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The district court relied on a handful of decisions from the lower New York courts, as well as the opinions of New York's executive branch, to infer that foreign same-sex marriage recognition must have begun in New York before February 2009. App. a6-a7. Petitioner echoes this approach. Pet. 5 n.3, 11 n.7. But this Court has made clear that while the decisions of lower state courts on questions of state law should be considered, they are "not controlling" on federal courts "where the highest court of the State has not spoken on the point." *Comm'r v. Bosch's Estate*, 387 U.S. 456, 465 (1967). That is particularly true in this case, where most of the materials relied upon by the district court and Petitioner were in existence at the time the New York Court of Appeals reserved this question in *Godfrey*—indeed, many were cited in that opinion, *e.g.*, 920 N.E.2d at 331 & n.3, 337.[11]

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[11] In cases where the construction of state law goes to a non-jurisdictional question, this Court has avoided questions of state law by "accept[ing] the interpretation of state law in which the District Court and the Court of Appeals have concurred." *Bishop v. Wood*, 426 U.S. 341, 346 (1976); *see also Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("It is our practice to accept a reasonable construction of state law by the Court of Appeals"). But here, of course, granting the Petition would mean that the Court of Appeals would never have the chance to consider the state law question. In any event, there would seem to be serious doubt whether this Court could

As if that were not enough, the nature of the inquiry that would be required under New York law would be a difficult one for any federal court and would distract the Court and the parties from the central issues concerning DOMA's constitutionality. As the cases from the lower New York courts demonstrate, determining whether New York law recognized a foreign marriage that could not lawfully have been contracted within the state requires an inquiry into whether New York public policy seriously disapproved of the kind of relationship in question. *See, e.g.*, *Lewis v. N.Y. State Dep't of Civ. Serv.*, 60 A.D.3d 216, 219-222 (N.Y. App. Div. 2009); *Martinez v. Cnty. of Monroe*, 50 A.D.3d 189, 191-193 (N.Y. App. Div. 2008).[12] This inquiry plainly is very different in its nature, scope, and focus from the question of DOMA's constitutionality.

Fortunately, there is no need whatsoever for this Court to embroil itself in this sensitive question of state law: Granting the House's petition in *Gill* would present the same question regarding DOMA's constitutionality without any of the vehicle problems unique to this case.

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similarly decline to inquire into the correctness of the decision on the state-law issue below where, as here, the very existence of federal jurisdiction turns on the outcome.

[12] In addition, the question in this case would be not what New York public policy is now, but rather what it *was* in either 2007 or in early February 2009—which only highlights the fact that this issue is one of concern for the New York Court of Appeals, not this Court.

III. This Case Was Not "Fully Ventilated" Below.

Petitioner asserts that the "full ventilation of the legal arguments regarding the constitutionality of DOMA in the courts below" leaves this Court "no reason * * * to delay its review" in this case. Pet. 20. That is wrong for several reasons. First, the issues below have hardly been fully ventilated when granting certiorari before judgment would bypass the first federal court with an opportunity to certify the antecedent state-law question to the New York Court of Appeals. Second, far from being fully ventilated, the decision below was the product of an unusual briefing sequence and was issued without the benefit of oral argument. Finally, the lower court decided the case based on a novel level of scrutiny that was not addressed in the briefing. Thus, this case is a particularly poor candidate for certiorari before judgment.

Moreover, this "full ventilation" soon may be available. The Second Circuit is moving full speed ahead on an expedited schedule, with argument set for September 27—at Petitioner's request. Notwithstanding the pendency of this Petition and the House's corresponding request to postpone argument in the Second Circuit in light of it, Petitioner has insisted on pursuing her case before the Second Circuit at the same time. Indeed, she has noted in that court that she "want[s] a decision from the Second Circuit"—belying her claim that she believes the issue of DOMA Section 3's constitutionality has received full review by the lower courts. *See* Opp. to Mot. to Suspend Oral Arg. 10 n.5, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir.

Aug. 20, 2012). And the Second Circuit has granted her request to proceed with argument. Order, *Windsor* (2d Cir. Aug. 23, 2012).

IV. Certiorari in This Case Would Expedite Neither This Court's Review of DOMA Nor the Resolution of Petitioner's Claims.

Finally, Petitioner's counsel stress Petitioner's ill health as a reason for proceeding expeditiously, *see* Pet. 21, as they also did in the Second Circuit and the district court. *See* Mem. in Supp. of Mot. to Expedite Appeal at 1, 3, 5, 8, 11, 12, *Windsor* (2d Cir. June 11, 2012); Letters to Court from Roberta A. Kaplan dated Nov. 22, 2010, Dec. 8, 2011, Mar. 7, 2012, and May 28, 2012, *Windsor*, No. 10-8435 (S.D.N.Y. ECF Nos. 110, 102 & 101). What they fail to note is that, given the concurrent 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. Petitioner's claim against DOMA is identical to that presented in *Gill*. *See supra* Pt. I. Thus, if she has standing to pursue it, Petitioner's claim will be resolved by this Court's review of *Gill*. As normal appellate practice has already been followed in *Gill*, there plainly is no need to bypass it in order to resolve this particular case outside of the normal process.

* * *

The House agrees with the Department and with Petitioner 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 rather than taking 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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