No. 12-307

In The
Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
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 Plaintiff-Respondent 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?

(3) Petitioner was sued because of the handling of a tax return by a federal agency that does not have general responsibility for administering DOMA. Under those circumstances, when the executive branch argues that a federal statute is unconstitutional and prevails in the lower courts, and where the House of Representatives has intervened to defend the statute, does the executive branch have prudential standing to seek this Court's review of the judgment it requested?

PARTIES TO THE PROCEEDING

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

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* The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

Petitioner the United States, as represented by the Department of Justice, was a defendant in the district court and an appellant in the Second Circuit.

Respondent Edith Schlain Windsor was the plaintiff in the district court and the appellee in the Second Circuit.

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INTRODUCTION

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

Granting this Petition would accomplish nothing beyond needlessly complicating this Court's review on the merits. Plaintiff-Respondent's standing to challenge DOMA depends on a sensitive question of New York law regarding the recognition of foreign same-sex marriage certificates—a question which the New York Court of Appeals has expressly reserved. Moreover, Petitioner prevailed in the courts below. Having prevailed below, there is certainly no reason for the Department to get the benefit of an opening and reply brief. Indeed, there

is a substantial question whether the Department even has appellate standing to file a Petition here. But at a minimum, to preserve the proper alignment of the parties, if the Court were to grant the Department's Petition, it would have to undo the effect of its decision to grant certiorari to the Department by realigning the parties and setting a unique briefing schedule that properly provides an opening and reply brief to the House and realigns the Department with the plaintiff whose arguments it fully embraces. There is no need for any of that. The straightforward course here is also the correct one: This Court should grant the House's Petition in No. 12-13 to review the decision and judgment of the First Circuit and deny this Petition.[1]

STATEMENT OF THE CASE

1. The Defense of Marriage Act

The Defense of Marriage Act of 1996 "was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012). The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. *See* 142 Cong. Rec. 17094-95 (1996) (House); *id.* at 22467 (Senate).

Section 3 of the Act defines "marriage" as the legal union of one man and one woman and "spouse" as a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7. These definitions apply for purposes of

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[1] For the same and additional reasons, the Court should also deny the other premature petitions, *see infra* pp. 13-14, and the Department's unnecessary Petition in No. 12-15. *See* the House's Br. in Opp., No. 12-15 (Aug. 31, 2012).

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 on the bill's constitutionality, and the Department three times reassured Congress by letter that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* H.R. Rep. No. 104-664, 34 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."); to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. at 2 (1996) ("Senate Hrg."). Congress also received and considered other expert advice on DOMA's constitutionality and concluded that DOMA is constitutional. *E.g.*, House Rep. 33 (DOMA "plainly constitutional"); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 104th Cong. 87-117 (1996) (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell).

Congress, of course, did not invent the meanings of the words "marriage" and "spouse" when it enacted

DOMA in 1996. Instead, it adopted the traditional definitions of those terms. Nor was the timing of Congress' decision a fortuity. Instead, Congress acted to ensure that Hawaii's novel and then-recent decision to take steps toward redefining marriage, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), did not automatically dictate the definition in other jurisdictions. Thus, Section 2 of DOMA allowed each state to decide whether to retain the traditional definition without having another jurisdiction's decision imposed via full faith and credit principles, and Section 3 preserved the federal government's ability to retain the traditional definition for federal law purposes. Although Congress often has made eligibility for federal marital benefits or duties turn on a couple's state-law marital status, it also has a long history of supplying federal marital definitions in various contexts—definitions that always have been controlling for purposes of federal law, without regard to the couple's status under state law.[2] In

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[2] *See*, *e.g.*, I.R.C. § 2(b)(2) (deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); I.R.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); Veterans and Survivors Pension Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(31), 89 Stat. 1013, *codified at* 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes); 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition); 5 U.S.C. §§ 8101 (6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria regarding marriage in immigration law context).

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.[3] It further clarified its understanding that these terms would have that meaning for purposes of federal law regardless of how states might choose to redefine marriage for purposes of their own law.[4]

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[3] *See*, *e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* I.R.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); 38 U.S.C. § 101(31) ("The term 'spouse' means a person of the opposite sex"); U.S. Dep't of Labor, Final Rule, *The Family And Medical Leave Act of 1993*, 60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's marriage statute of 1901, intended "that 'marriage' is limited to opposite-sex couples"); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (referring to "the union for life of one man and one woman in the holy estate of matrimony" as "the sure foundation of all that is stable and noble in our civilization").

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

2. The Justice Department's About-Face and the House's Intervention

After DOMA's enactment, discharging the Executive's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the Department of Justice during the Bush Administration successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[5] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Administration abruptly announced its intent to refuse to defend DOMA's constitutionality. Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder stated that he and President Obama were of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

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

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[5] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu,* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." *Id.* He did not, however, apply that standard to DOMA. On the contrary, he conceded that every Circuit to consider the issue (*i.e.*, eleven Circuits) had held that sexual orientation classifications are subject only to rational basis review, and he acknowledged that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.*

In response, the House intervened as a party-defendant in the various cases nationwide involving equal-protection challenges to DOMA's constitutionality. Notwithstanding that the Holder Letter said only that the Department would *not defend* DOMA Section 3, the Department went further and *affirmatively attacked Section 3* in court and accused the Congress that enacted DOMA—many of whose Members still serve—of doing so out of "animus."[6] The Department took this position even though DOMA was the very same statute (i)

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[6] *See* Br. for the United States, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012). The Department has filed substantive briefs in numerous other DOMA cases making this same argument. *See* briefs in *Golinski v. OPM*, Nos. 12-15388 & 12-15409 (9th Cir. July 3, 2012); *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011); *Revelis v. Napolitano*, No. 1:11-cv-1991 (N.D. Ill. Apr. 23, 2012); *Dragovich v. U.S. Dep't of Treasury*, No. 4:10-cv-1564 (N.D. Cal. Jan. 19, 2012); *Cozen O'Connor, P.C. v. Tobits*, No. 2:11-cv-45 (E.D. Pa. Dec. 30, 2011); *Bishop v. United States*, No. 4:04-cv-848 (N.D. Okla. Nov. 18, 2011); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn. Sept. 14, 2011); *Lui v. Holder*, No. 2:11-cv-1267 (C.D. Cal. Sept. 2, 2011).

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

3. History of This Case

a. *Procedural History*

Plaintiff-Respondent obtained a marriage certificate with the late Thea Clara Spyer 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). Plaintiff-Respondent and Ms. Spyer were domiciled in the State of New York at all relevant times. Ms. Spyer passed away in 2009, naming Plaintiff-Respondent the executor and sole beneficiary of her estate. After paying more than $363,000 in federal estate taxes, Plaintiff-Respondent, 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, Plaintiff-Respondent 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 Plaintiff-Respondent 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.

This suit was filed before the Department ceased defending DOMA, and the district court allowed Petitioner a period of four months to move to dismiss. Order & Revised Sched. 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, Notice to Ct., *Windsor* (S.D.N.Y. Feb. 25, 2011), and the House sought and was granted leave to intervene. Mem. & Order, *id.* (S.D.N.Y. June 2, 2011). The district court entered an unusual scheduling order under which Plaintiff-Respondent would move for summary judgment before the House could move to dismiss the complaint. Revised Sched. Order, *id.* (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 Plaintiff-Respondent's motion for summary judgment.[7] The district court ultimately denied Plaintiff-Respondent's motion to

[7] *See* Mem. of Law in Supp. of Mot. to Strike, *id.* ; 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. 118 & 119), Sept. 21, 2011 (ECF 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, *id.* (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.

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 Plaintiff-Respondent'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 in November 2009, after Ms. Spyer's passing. App. 6a-8a. It found, therefore, that Plaintiff-Respondent 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. 8a-9a. Turning to the question of the proper level of constitutional scrutiny for classifications based on sexual orientation—an issue that the Second Circuit had not yet addressed—the district court adopted a novel standard of constitutional review involving "intensified scrutiny," a level of scrutiny between ordinary rational-basis and intermediate scrutiny. App. 12a-14a. The district court based this hybrid level of review on the First Circuit's decision in *Gill*, which had issued six days earlier.[8]

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[8] Petitioner claims that it is "incorrect" to say that "the district court adopted a novel standard of constitutional review

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. 16a-19a. 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. 19a-21a. 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. 21a-22a.

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involving 'intensified scrutiny,'" apparently on the theory that the district court's statements in this regard were dicta. Pet. 8 n.4 (citation marks omitted). But before opining that "a more searching form of rational basis review" applies in some cases, the district court expressly stated that it was "elaborat[ing] on an aspect of the equal protection case law that it believes affects the nature of the rational basis analysis required here." App. 13a. At a minimum, this demonstrates that there is significant ambiguity in the record, and disagreement among the parties, about what level of scrutiny the district court applied.

c. *Subsequent Proceedings*

The House appealed this judgment to the Second Circuit. Although the district court had adopted the result advocated by the Department, Petitioner nevertheless filed its own Notice of Appeal.

Three days later, on June 11, Plaintiff-Respondent filed a "motion to expedite appeal" in the Second Circuit, proposing a highly expedited schedule. Mem. of Law in Supp. of Mot. for Expedited Appeal, *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, Order, *id.* (2d Cir. June 22, 2012), holding oral argument on September 27, 2012. The Second Circuit denied the House's motion to postpone oral argument pending the outcome of Plaintiff-Respondent's petition for certiorari before judgment. Order, *id.* (2d Cir. Aug. 23, 2012).

On July 16, 2012, 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*, Plaintiff-Respondent filed in this Court a petition for certiorari before judgment in the Second Circuit. *See* Pet. for Cert. Before Judgment, *Windsor v. United States*, No. 12-63 ("Windsor Pet."). The House has opposed that Petition. Br. in Opp'n, *id.* (Aug. 31, 2012). The instant Petition was filed 57 days later, on September 11.

On October 18, the day before this Brief was filed, a divided panel of the Second Circuit affirmed the district court's judgment. Given the timing of the court of appeals' decision, the House intends to address the Second Circuit's opinion and its

ramifications for this case in a forthcoming supplemental filing in this Court.

4. Other Pending Petitions Involving DOMA Section 3

The question of DOMA's constitutionality is also presented by seven other petitions for certiorari pending before this Court. Three petitions arise out of the First Circuit's decision and judgment in *Massachusetts v. U.S. Department of Health and Human Services,* 682 F.3d 1 (1st Cir. 2012). The others are petitions for certiorari before judgment following appeals of district court judgments striking down DOMA on equal protection grounds—one petition by the plaintiff 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 plaintiffs and the Department in *Pedersen v. OPM*, No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 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 Plaintiffs-Petitioners in *Pedersen*, *see* No. 12-231, and here. The Department filed its own Petition in *Pedersen* as well. *See* No. 12-302. The Department does not unequivocally support plenary review in either this case or *Pedersen*, 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 a petition for certiorari filed 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. There is thus

nothing "to justify deviation from normal appellate practice" in this case.

Instead, granting the writ here would result only in unnecessary multiplication and confusion of the issues. 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 even the Department acknowledges that this case features unique vehicle problems not present in *Gill*. To determine whether Plaintiff-Respondent even has standing to pursue her claims (an issue this Court would need to consider to confirm its own jurisdiction), this Court would be forced to consider a sensitive question of New York law—whether New York would have recognized foreign same-sex marriages at a time when 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, whose arguments prevailed in district court and have now prevailed in the court of appeals as well, even has appellate standing to petition. There is certainly no reason to confront that issue when the same underlying constitutional question is squarely presented in a Petition filed and briefed after the First Circuit had already issued its opinion and entered judgment.

The Department's effort to file a petition for certiorari before judgment in this case is truly extraordinary. If the Department were really eager to seek this Court's review of DOMA's constitutionality and thought petitioning for

certiorari before judgment was appropriate, it could have done so years ago. It makes little sense for the Department to make that extraordinary request only after a case—*Gill*—is properly before this Court in the ordinary course of appellate proceedings. This case would add nothing except procedural complications to this Court's consideration of DOMA's constitutionality in *Gill*. The proper course here is also the straightforward one: There is no reason for the Department or this Court to search through the dockets of the courts of appeals for cases implicating DOMA's constitutionality when the First Circuit has ruled. The First Circuit rejected the House's arguments, and the House alone seeks to have the First Circuit's judgment overturned.

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

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

As Petitioner acknowledges, Pet. 13, the question presented in this case regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. (I) *with* Pet. No. 12-13 at i.[9] In its *Gill* opinion, the First Circuit passed on exactly the same question as the district court and court of appeals here: Whether DOMA is compatible with the Fifth Amendment's

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

implicit guarantee of equal protection. 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.[10]

Recognizing that this case adds nothing to *Gill*, Petitioner suggests that the Court hold it pending the disposition of the *Gill* petitions, and grant this petition filed before judgment if it denies the writ in that case. Pet. 13. But as is explained *infra*, this case is inferior to *Gill* in multiple ways as a vehicle for reviewing DOMA's constitutionality. Indeed, even Petitioner recognizes that this case is an inferior vehicle not only to *Gill*, but even to the before-judgment *Pedersen* petitions. Pet. 12. If the Court somehow deems that issue not to warrant certiorari after judgment in *Gill*, then *a fortiori* it will not warrant certiorari here.

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[10] Ms. Windsor argues, in support of certiorari, that "the record in this case could not be clearer or cleaner" because "it is undisputed by the parties" that her injury arose "solely because she * * * was married to a woman (instead of a man)." Resp. 10. Leaving aside the threshold question whether Ms. Windsor even was recognized as "married" under the law of New York, *see infra* Pt. II, this contention does nothing to distinguish this case from *Gill*, or indeed from any of the other DOMA petitions before the Court: All of them involve one or more claims that undisputedly are predicated solely on the fact that the respective plaintiffs' same-sex relationships leave them ineligible for federal benefits available to married couples.

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. But as Petitioner acknowledges, this case does present an important state-law question.

Petitioner presents the question whether DOMA Section 3 denies equal protection to "persons of the same sex who are legally married under the laws of their State." Pet. I, Question Presented. To have standing to assert this claim, Plaintiff-Respondent obviously must have been "legally married" to another woman "under the law[] of their State." But that is a state law question, the answer to which remains uncertain.

New York has permitted same-sex marriages only since mid-2011. *See* Thomas Kaplan, *After Long 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. Plaintiff-Respondent obtained her marriage certificate with Ms. Spyer in Ontario long before marriage certificates were available to same-sex couples in New York. *See id.*; Windsor Pet. 5. Ms. Spyer passed away on February 5, 2009, again long before New York issued same-sex marriage certificates of its own. Windsor Pet. 5. As the district court recognized, *see* App. 6a, Plaintiff-Respondent'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 Plaintiff-Respondent'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).[11]

The New York Court of Appeals has not resolved the critical 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

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[11] The Department suggests, without explaining why, that the validity in New York of Plaintiff-Respondent's Ontario marriage certificate might go to the merits of her claim rather than her standing to pursue it. Pet. 12. But since, on Petitioner's own account, Plaintiff-Respondent must have been a member of a state-recognized marriage in order to bring her within the class of persons whose equal-protection rights DOMA violates, it is not clear how this could be anything other than a standing issue. In any event, Petitioner acknowledges that 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 Plaintiff-Respondent's standing. *Id.*

(N.Y. 2006). Then, in November 2009, *after* 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 the court's 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 courts below to consider the sensitive state-law question of whether Plaintiff-Respondent'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. 6a-8a. Because Plaintiff-Respondent's standing turns on the answer to this question, the House 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 Second Circuit declined to do so, but because the question goes to the plaintiff's standing, that does not end the matter. This Court retains an obligation to ensure that the Article III prerequisites are satisfied, and plaintiff's standing clearly depends on a state law question. This standing issue is unique to this case and the underlying foreign marriage certificate. In light of the alternative vehicles, most notably the House's Petition in *Gill*, that do not present this vehicle problem, there is no reason to grant the Department's Petition here.

III. Because Petitioner Prevailed Below, Granting the Petition Would Create Unnecessary Procedural and Substantive Complications.

Additionally, because the Department prevailed below, granting its Petition here would only introduce unnecessary procedural and substantive complications to this Court's consideration of DOMA. Procedurally, because the Department prevailed in the district court and has now prevailed in the court of appeals, it would make no sense to give the Department the benefit of an opening and reply brief in this Court. Thus, if the Court were to grant certiorari 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*.

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

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

[this Court has] generally declined to consider cases at the request of a prevailing party." *Id.* at 2030.

Indeed, in a footnote in the instant Petition, the Department acknowledges that granting certiorari here would require the Court to expand the existing executive-branch appellate-standing rule in cases like this one—from a rule allowing "an agency of the United States" to appeal a judgment striking down "the Act of Congress it administers" even where it agrees with that outcome, *INS v. Chadha*, 462 U.S. 919 (1983), to one allowing *any* executive-branch defendant to obtain review of *any* judgment striking down a statute that the executive branch maintains is unconstitutional. *See* Pet. 11-12 n.6.

Petitioner maintains that this "is a distinction without a difference," *id.*, but that of course is the precise question that the Court would be required to consider if it granted any of the Department's pending petitions. And there are significant arguments why the difference may be material. This rule of *Chadha* is already in the nature of an exception to the general rule that a party cannot appeal from a judgment it requested. The *Chadha* Court indicated that an agency's special relationship with "the Act of Congress it administers" is a reason for permitting such an exception when the agency believes the statute to be invalid. 462 U.S. at 931. That is very different from giving the Department an open-ended mandate to seek this Court's affirmance of the invalidation of any statute the Department chooses, in cases where a Congressional party has intervened to defend the statute. Certainly, there is no compelling reason to make it costless for the Department to abandon its traditional obligation to

defend the constitutionality of duly-enacted statutes. Moreover, *Chadha* involved the executive branch resisting what it regarded as an encroachment on its own constitutional power by the legislative veto at issue there. For both these reasons, the agency in *Chadha* had a considerably more concrete and particularized interest at stake than the Department here has in DOMA's invalidity. Granting one of the Department's petitions would needlessly force this Court to decide whether to extend the rule of *Chadha* to this situation.

Additionally, the events of the DOMA litigation suggest that this Court should not be over-eager to reaffirm *Chadha*'s holding regarding executive-branch standing in cases where a Congressional body has taken on the Department's normal role of defending a statute's validity. In *Chadha*, Congress' involvement was essentially limited to the proceedings before this Court, and the Executive Branch and Legislative Branch agreed that Chadha's case was the proper one for this Court's review. It was relatively uncomplicated, therefore, to permit both of them to seek that review. The procedural circumstances here are very different and cast the question in a significantly different light.

When the Executive Branch opines that a major federal statute is unconstitutional and drops its legal defense of that statute in the lower courts, any Congressional body that intervenes will instantly become the sole operative defendant in what is likely to be (or become) sprawling, nationwide litigation—and one that will be prolonged even further by the delays necessarily caused by the intervention process and the re-setting of dispositive briefing

deadlines. That is exactly what happened here: The House has been defending DOMA for well over a year, and has intervened in 15 lawsuits challenging DOMA's validity. Many of these cases involved discovery, including the depositions of numerous expert witnesses; nearly all of them involved briefing multiple dispositive motions and/or appeals. And in all of the cases, the House has been required to defend the statute's validity against the attacks not only of private plaintiffs, but of the Department as well.

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

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

unnecessarily considering whether to extend this aspect of *Chadha*, by granting the House's unopposed *Gill* petition and denying the Department's petitions.

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

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

Ever since the Department abandoned its traditional responsibility of defending the constitutionality of DOMA, it has operated as a de facto *amicus* supporting the arguments of plaintiffs attacking DOMA's constitutionality. As such, the Department is not entitled to any special consideration of its views as to the appropriate vehicle for this Court's review. Thus, where the only party defending DOMA (the House) and the plaintiffs who have attacked DOMA all agree that *Gill* is an appropriate vehicle for this Court's review, the Department's suggestion that this Court should accept its petition in these extraordinary procedural circumstances, even if it rejects the House's *Gill* Petition, should be viewed with deep skepticism.

Moreover, given the Department's role as a de facto *amicus* supporting the plaintiff, granting this Petition would lead to procedural complications and

require the Court to realign the parties for purposes of briefing and argument. There is no need to scramble the parties by granting this Petition only to undo the effect by granting later procedural motions.

* * *

The House agrees with the Department and with Plaintiff-Respondent that this Court should review DOMA's constitutionality. But there clearly is no need to deviate from normal appellate practice to do so—especially when this case presents unique vehicle problems which could only distract this Court from the central issues concerning DOMA. DOMA's constitutionality can be fully resolved by granting the House's petition in *Gill*, and this Court should take that path. In all events, it should decline to take the extraordinary step of granting certiorari in this case at the request, filed before judgment in the court of appeals, of the parties who prevailed in the courts below.

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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