No. 12-16

In the Supreme Court of the United States

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
Petitioners,

v.

KAREN GOLINSKI,
Respondent,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondent.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondent

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 Department of Justice argued, and the district court agreed, that DOMA violates equal protection. The Department now seeks certiorari before judgment in the Court of Appeals.

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) Petitioners are a federal agency and officer who do not have general responsibility for administering DOMA, but merely oversee a limited number of its applications. When such agencies or officers argue that a federal statute is unconstitutional and prevail in the lower courts, and where the House of Representatives has intervened to defend the statute, do the agencies and officers have prudential standing to seek this Court's review of the judgment they 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 is an appellant in the Ninth Circuit.[1] The Department of Justice's statement in its Petition on behalf of the Executive Branch defendants 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. App. 7a.

---

[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 functions on a majoritarian basis, like the institution it represents, 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.

Petitioners, the Office of Personnel Management and John Berry, Director of the Office of Personnel Management, are Appellants/Cross-Appellees in the Ninth Circuit.

Karen Golinski was the plaintiff in the district court and is an Appellee in the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Regulation & Rules

Other Authorities

INTRODUCTION

The House respectfully opposes the Petition for a Writ of Certiorari Before Judgment filed in this case ("Petition"). 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 it is the prevailing party in the district court that seeks to invoke this Court's review and the case is in other respects a less attractive vehicle for this Court's review.

Granting this extraordinary Petition for certiorari before judgment would accomplish nothing beyond needlessly complicating this Court's review on the merits. The Department of Justice ("Department") prevailed in both the district court in this case and in the decision and judgment of the First Circuit in *Gill*. There is certainly no reason for the Department to get the benefit of an opening and reply brief in both cases, and even less reason to have different briefing schedules in the two cases such that those defending DOMA would file first in *Gill* while the Department files first here. Thus, if this Court were to grant the Petition here, to preserve the proper alignment of the parties it would have to undo the effect of that 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. 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 request for certiorari before judgment.[2]

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 DOMA 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. Section 3 of DOMA simply asserts the federal government's right as a separate sovereign to

---

[2] 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).

provide its own definition for purposes of federal programs and funding.

While Congress was considering DOMA, it requested the opinion of 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. 2 (1996) ("Senate Hrg."). Congress also received and considered other expert advice on DOMA's constitutionality and determined that DOMA is constitutional. *E.g.,* House Rep. 33 (DOMA "plainly constitutional"); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 104th Cong. 87-117 (1996) (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell).

Congress, of course, did not invent the meanings of the words "marriage" and "spouse" when it enacted DOMA in 1996. Instead, it adopted the traditional definitions of those terms. Nor was the timing of Congress' decision a fortuity. Instead, Congress acted to ensure that Hawaii's novel and then-recent decision to take steps toward redefining marriage,

see Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), did not automatically dictate the definition in other jurisdictions. Thus, Section 2 of DOMA allowed each state to decide whether to retain the traditional definition without having another jurisdiction's decision imposed via full faith and credit principles, and Section 3 preserved the federal government's ability to retain the traditional definition for federal law purposes. Moreover, 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.[3] Indeed, in clarifying the meanings of "marriage" and "spouse" in federal law by enacting DOMA, Congress merely reaffirmed what it has always meant when

---

[3] *See, e.g.*, I.R.C. § 2(b)(2) (deeming persons unmarried who are legally 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); 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).

using those words in federal law—and what courts and the Executive Branch have always understood it to mean: A traditional male-female couple.[4]

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 during the Bush Administration successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[5] The Department continued to

---

[4] *See, e.g.*, Revenue Act of 1921, § 223(b)(2), 42 Stat. 227, 250 (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").

[5] *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

defend DOMA during the first two years of the current Administration, prevailing in an additional district court case in the Ninth Circuit. *See Torres-Barragan v. Holder*, No. 09-cv-8564 (C.D. Cal. Apr. 30, 2010).

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 ("Holder Letter"). Attorney General Holder stated that he and President Obama were of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

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

---

dismissal after the Department moved to dismiss); *In re Kandu,* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

In response, the House sought and received leave to intervene 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) 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, including the Ninth Circuit (rational basis review).

3. History of This Case

a. Procedural History

Ms. Golinski obtained a marriage license with Amy Cunninghis, another woman, in California.

---

[6] *See* Br. for OPM, et al., *Golinski*, Nos. 12-15388 & 12-15409 (9th Cir. July 3, 2012). The Department has filed substantive briefs in numerous other DOMA cases making this same argument. *See* briefs in *Windsor v. United States*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 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).

Respondent's Br. in Supp. of Cert. 1. In this litigation, Ms. Golinski seeks federal health insurance coverage for Ms. Cunninghis based on Ms. Golinski's employment as a staff attorney for the Court of Appeals for the Ninth Circuit. *Id.*

The litigation began as an administrative proceeding in the Ninth Circuit Judicial Council's employee dispute resolution program. Chief Judge Kozinski, sitting in his administrative capacity, ruled that although Ms. Cunninghis could not be regarded as Ms. Golinski's "spouse" within the meaning of the relevant statutes, she nevertheless was entitled to benefits as a "member of [Ms. Golinski's] family." *In re Golinski*, 587 F.3d 901, 902 (9th Cir. Jud. Cncl. 2009). When the Office of Personnel Management disagreed and continued to deny Ms. Cunninghis' enrollment in the relevant health coverage plan, Ms. Golinski filed the instant suit in the Northern District of California. Her initial complaint sought only mandamus relief to enforce Judge Kozinski's administrative order. The district court dismissed this mandamus claim, concluding that OPM had no clear non-discretionary duty to comply with an administrative order of that type. *See generally Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2011).

In so ruling, however, the district court gratuitously expressed its "clear and resolute * * * condemnation of" DOMA as "a discriminatory rule of law." *Id.* at 971. The court further said that it "would, if it could, address the constitutionality of * * * the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages," and granted

Ms. Golinski "leave to amend to attempt to plead a [constitutional] claim." *Id.* at 975.

Ms. Golinski accepted this extraordinary judicial invitation and amended her complaint to challenge Section 3 on equal protection grounds, as well as re-asserting her statutory claim. After the Department notified the Court that it would not defend against these claims, the House then sought, and was granted, leave to intervene as a party-defendant to defend DOMA's constitutionality under equal protection. Order, *Golinski*, No. 10-cv-257 (N.D. Cal. June 3, 2011). Contrary to Petitioners' suggestion that the House intervened merely to "present arguments in defense" or to "present a defense" of DOMA Section 3, Pet. (II), 6; *see also* Pet. 7, 10 & n.4, the district court expressly stated that the House "intervene[d] as a party-defendant," App. 7a, and the House has participated as a party in this case.

The House moved to dismiss. The Department also filed a document styled a motion to dismiss, but, with respect to DOMA's constitutionality, the motion was *pro forma* only. Mot. to Dismiss, *Golinski* (N.D. Cal. June 3, 2011). Far from actually seeking dismissal, the Department filed an "opposition" *to its own motion to dismiss* as well as the House's motion, arguing that DOMA is unconstitutional and that the district court "should deny the motions to dismiss." Defs.' Br. in Opp. to Mots. to Dismiss 24, *Golinski* (N.D. Cal. July 1, 2011).

In its filing, the Department acknowledged that its heightened-scrutiny theory was foreclosed by "binding authority of this circuit hold[ing] that rational basis review applies to sexual orientation

classifications," but maintained that these Ninth Circuit precedents were "incorrect." *Id.* at vi.

b. The District Court's Opinion

The district court—making good on its earlier promise—agreed with the Department and held that DOMA is subject to heightened scrutiny and is unconstitutional under that standard. App. 18a-44a. Although the House and the Department both agreed that the district court was bound by the Ninth Circuit's "hold[ing] that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment," *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990), the district court described this holding as "outdated" and abrogated by this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), App. 23a, notwithstanding the Ninth Circuit's earlier conclusion that its precedents holding that sexual orientation classifications are not subject to heightened equal protection scrutiny "w[ere] not disturbed by *Lawrence*, which declined to address equal protection." *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

Having side-stepped circuit precedent calling for rational basis review, the district court then found heightened scrutiny appropriate under the factors identified by this Court as relevant to whether a classification should be treated as suspect. App. 25a-34a. The district court therefore invalidated DOMA under heightened scrutiny.

In the alternative, the district court declared that DOMA also failed rational-basis review, and concluded that none of the interests advanced by Congress in enacting DOMA, or the House in this litigation, supported it. App. 44a-60a. In doing so, the district court held that Congress could not credibly desire a nationally-uniform approach toward federal recognition of same-sex relationships, nor could it rationally desire to proceed with caution in this area. App. 54a-60a. This was clear because, in the district court's view, Congress also has not barred (or did not bar in the past) federal recognition of marriages on which the states take (or have taken) differing approaches—such as interracial marriages, teen marriages, or marriages by close relatives. App. 55a, 58a. The court concluded that saving money is not a rational basis for DOMA unless there is some further justification for how the money is saved. App. 48a. The district court also dismissed our society's preference for children to be raised by their biological mothers and fathers as a "bias," App. 51a, referred to the desire to preserve and nurture traditional marriage as being based on "the Bible," App. 51a, 52a, and assumed that DOMA cannot have a rational basis unless "denying marriage benefits only to same-sex couples will somehow make marriage between opposite-sex couples better." App. 52a.

The district court thus held DOMA as applied to Ms. Golinski's request for health insurance to be an equal-protection violation and entered a permanent injunction requiring OPM to enroll Ms. Cunninghis in its health coverage plan. The Department has not sought a stay of that injunction, and Ms. Cunninghis

has been enrolled in the plan. Letter from Shirley Patterson, Ass't Dir., Fed. Employee Ins. Ops., OPM, to William Breskin, V.P., Gov't Programs, Blue Cross and Blue Shield Ass'n (Mar. 9, 2012), *Golinski*, Nos. 12-15388 & 12-15409 (9th Cir. Apr. 5, 2012) (ECF No. 21-2).

c. Ninth Circuit Proceedings

The House appealed the district court's judgment on February 24, 2012. Although the district court had entered the judgment and accepted the legal theory advanced by the Department of Justice, the Department filed a separate Notice of Appeal. The Department made clear it was attempting to appeal on the same issues the House had appealed. *See* OPM Mediation Questionnaire, *Golinski*, No. 12-15409 (9th Cir. Mar. 5, 2012). The House moved to dismiss the Department's appeal on the grounds that it is superfluous and that the Department lacked appellate standing. A motions panel of the Ninth Circuit has deferred this issue to the eventual merits panel. Order at 2, *Golinski*, Nos. 12-15388 & 12-15409 (9th Cir. Apr. 11, 2012).

Presumably attempting to avoid the unwelcome prospect of explaining to a Ninth Circuit panel why DOMA was unconstitutional when the Department conceded that Ninth Circuit precedents require rational-basis review and had elsewhere conceded rational bases for DOMA exist, the Department petitioned for initial *en banc* hearing. Pet. for Initial Hrg. *En Banc*, *Golinski* (9th Cir. Mar. 26, 2012). That effort to circumvent the normal appellate process was denied by the Ninth Circuit, with no judge even requesting a poll. Order, *Golinski* (9th Cir. May 22, 2012). Recognizing that the

Department supported the judgment below despite being a nominal appellant, the Ninth Circuit set a briefing schedule under which the Department filed its substantive brief at the appellee stage. Order at 2, *Golinski* (9th Cir. Apr. 11, 2012). In its brief, the Department acknowledged that the district court had contravened binding circuit precedent by applying heightened scrutiny. Br. for OPM, et al. 17, *Golinski* (9th Cir. July 3, 2012).

Briefing in the Ninth Circuit was complete as of July 31, 2012. The Ninth Circuit has held the case in abeyance pending this Court's disposition of the Department's Petition for certiorari before judgment in this case. Order, *Golinski* (9th Cir. July 27, 2012).

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 the consolidated cases *Massachusetts v. U.S. Department of HHS* and *Gill v. Office of Personnel Management*, 682 F.3d 1 (1st Cir. 2012). In that case, the First Circuit held DOMA unconstitutional under a novel "intensified scrutiny" standard of equal protection review. *Id.* at 10. On June 29, 2012, the House filed the first petition for certiorari seeking review of the First Circuit's decision. *See* Pet. for Cert., No. 12-13, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. On July 3, the Department filed its own petition in that case, No. 12-15. And on July 20, Massachusetts filed a conditional cross-petition, No. 12-97. No party has opposed the House's Petition in No. 12-13.

Following the Department's decision to seek certiorari before judgment here, private party plaintiffs have filed petitions for certiorari before judgment in two cases now pending in the Second Circuit. *See Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *appeals pending*, Nos. 12-2335 & 12-2435, *pet. for cert. before judgment filed*, No. 12-63; *Pedersen v. OPM*, No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012), *appeal pending*, No. 12-3273, *pet. for cert. before judgment filed*, No. 12-231. The petitions for certiorari before judgment were filed in *Windsor* and *Pedersen* on July 16 and August 21, respectively. Unlike in this case, the Department has not petitioned for certiorari before judgment in *Windsor* or *Pedersen*.

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. Thus, nothing is gained from granting certiorari before judgment in this case.

Instead, granting the writ here would result only in unnecessary duplication and confusion. The Department prevailed both in the district court here and in the First Circuit in *Gill*. There is no justification for allowing the Department to file an opening and reply brief in either case, let alone to proceed on completely different briefing schedules in this case and in *Gill*. Moreover, not only is there no justification for taking the extraordinary step of granting certiorari before judgment when the exact same issue is squarely presented in an earlier-filed petition for certiorari after judgment, but this case features vehicle problems not present in *Gill*. As explained at length in the House's opposition in No. 12-15, it is not clear that a prevailing party even has appellate standing to seek this Court's review. Although those principles may apply differently in the certiorari before judgment context, there is certainly no reason to grant that extraordinary relief and confront those issues when the same underlying constitutional issue is squarely presented in a case in which the First Circuit has already issued its opinion and entered judgment.

The Department's effort to obtain certiorari before judgment in this case is truly extraordinary. If the Department were really eager to seek certiorari before judgment, 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 Court should grant the House's Petition in No. 12-13 and deny the Department's premature Petition here as well as the other premature petitions it has fostered.

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

The question presented by the Department's Petition in this case regarding DOMA is identical to the House's Question 1 in *Gill*. *Compare* Pet. (II) *with* Pet. No. 12-13 i.[7] 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 opinions involved discussion of the proper level of constitutional scrutiny to apply, and the government interests supporting DOMA considered by the two courts were virtually identical. Thus, there is no aspect of the issues that would be

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

presented in this case as to DOMA's constitutionality that the Court could not address as easily (or more easily) in *Gill* instead.

Petitioners do not really appear to suggest otherwise. Their only explanation for their Petition is their vague assertion that "[c]ertiorari before judgment is warranted * * * to ensure that this Court has an *adequate* vehicle to resolve the question of Section 3's constitutionality in a timely and definitive manner." Pet. 11 (emphasis added); *see also* Pet. 15 ("A grant of certiorari before judgment in this case is warranted to ensure that the Court will have an *appropriate* vehicle in which to resolve the issues presented in a timely and definitive fashion.") (emphasis added). But Petitioners offer little or no argument that *Gill*—a case in which normal appellate practice has been followed and in which the Department itself seeks review—is not an equally or more "adequate" and "appropriate" vehicle to consider the same issues.

Petitioners baldly state that "[t]he district court's analysis" in this case of whether heightened scrutiny should apply "may materially assist this Court's consideration of that question." Pet. 13. Ms. Golinski apparently agrees. Resp. 4-5. But, this Court will have the benefit of the district court's analysis—as well as that of multiple other district courts, some of which have upheld DOMA and some of which have struck it down—whether or not it grants an extraordinary petition for certiorari before judgment. Indeed, to the extent anything distinguishes the district court's analysis from that of other courts, it is that Petitioners have acknowledged that the district court's entire inquiry

into heightened scrutiny was inappropriate under binding Ninth Circuit precedent requiring rational basis scrutiny. *See supra* p. 13. In all events, nothing prevents the Department from citing the district court's analysis here in its merits brief 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 Petitioners and Ms. Golinski involving grants of certiorari before judgment to consider varying aspects of a single constitutional question, *see* Pet. at 14-15, Resp. at 7, are inapposite here.[8] In

[8] Citing *United States v. Fanfan*, 543 U.S. 220 (2005) (reviewing particular applications of the Federal Sentencing Guidelines with *United States v. Booker*); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (reviewing various university affirmative-action policies together with *Grutter v. Bollinger*, 539 U.S. 306 (2003)); *Brown v. Bd. of Educ.*, 344 U.S. 1, 3 (1952) (inviting petition in *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954), to review various racial classifications); *Norman v. Baltimore &*

addition, this case and *Gill* do not involve the *same* facts, as did the *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970). *See* Pet. 15. Indeed, this case involves a single application of DOMA, while it is *Gill* that considers its application in multiple contexts.

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 a petition seeking review of the decision and judgment of the First Circuit in *Gill*.

II. This Case Presents Vehicle Problems Not Presented by the House's Petition in *Gill*.

Granting certiorari in this case, however, *would* complicate consideration of the important constitutional issue raised in *Gill* both procedurally and substantively. Procedurally, because the Department prevailed both in the First Circuit and the district court here, it would make no sense to give the Department the benefit of an opening and reply brief in either case, and it would make even less sense to have disparate briefing schedules such that those defending DOMA would file first in *Gill* while the Department files first here. Thus, if the Court were to grant certiorari before judgment here, it would have to engage in a series of procedural machinations to align the parties properly. There is no reason to go through those steps when the Court can simply grant the House's Petition in No. 12-13, thereby allowing the aggrieved party to file as

---

O.R. Co., 294 U.S. 240, 243 (1935) (considering varying factual applications of a statute in two consolidated cases).

Petitioner and the prevailing parties to file as Respondents.

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. While appellate standing principles may apply differently in the certiorari before judgment context, there is no reason for this Court to get sidetracked by questions concerning appellate standing, the scope of *INS v. Chadha*, 462 U.S. 919, 930-931 (1983), or how those principles apply in the certiorari before judgment context. 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.

III. Certiorari in This Case Would Not Expedite This Court's Review of DOMA.

Petitioners assert that this Court has "previously granted certiorari before judgment when necessary to obtain expeditious resolution" of a case. Pet. 14. Ms. Golinski echoes this contention. Resp. 6. But promoting expedition is just one more reason why certiorari before judgment is inappropriate here. Given the concurrent pendency of the House's *Gill* Petition, granting certiorari before judgment in this case is not "necessary" for expeditious resolution of DOMA's constitutionality; in fact it would not speed the process at all. Moreover, neither Petitioners nor Ms. Golinski point to any injury that either of them might suffer if the Ninth Circuit were permitted to review this case, or if this Court were to consider DOMA's constitutionality in *Gill* instead. Nor could

they. Ms. Golinski currently is receiving all the relief she requested pursuant to the district court's injunction, Petitioners acquiesced in the grant of that relief rather than seek a stay, and this case's ultimate resolution will in no way be delayed if the writ is granted in *Gill* instead.

Even if this were not the case, the Department cannot credibly assert an extraordinary need for expedition, when the Executive Branch's own actions throughout the DOMA litigation have been thoroughly inconsistent with that position. If the Department believed that certiorari before judgment was appropriate, it could have sought such review as early as October 2010 when it appealed the *Gill* and *Massachusetts* cases. There would have been no question about appellate standing then either because at the time the Department was defending DOMA. If a desire for expedition were somehow linked to the Department's abdication of its defense of DOMA, it could have sought certiorari as early as February 2011. Thus, the Department offers no credible reason for waiting until July 2012. While presumably the decision to seek review here was somehow linked to the House's decision to seek review of the First Circuit's decision, that connection is baffling and in no way supports the Department's expedition argument. Indeed, the Department's filing for certiorari before judgment appears to have been precipitated by the one thing that makes certiorari before judgment less appropriate—a pending petition for certiorari allowing the Court to consider DOMA's constitutionality in the normal course of orderly appellate review.

Nor has the Department offered any credible reason why this case is a better vehicle for this Court's review than is any other case pending in, but not decided by, a court of appeals. This failure arguably explains why the Department's decision to seek certiorari before judgment was quickly followed by premature petitions filed by two private parties. There is no obvious yardstick for comparing these equally premature petitions, but there is an obvious reason to prefer review in *Gill*: The case has followed the normal course of appellate review and the Court has the benefit of the First Circuit's decision and judgment.

IV. The Department Operates As a De Facto *Amicus* in This Case And That Status Is Best Accommodated By Granting The House's Petition in No. 12-13 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 extraordinary Petition for certiorari before judgment should be viewed with deep skepticism.

Moreover, given the Department's role as a de facto *amicus* supporting the plaintiffs, 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 when the House's Petition in No. 12-13 accurately reflects the actual alignment of the parties. In the House's Petition, all of the parties attacking DOMA are respondents who support affirmance. They can file "bottom-side" briefs defending the decision and judgment below and propose a division of argument among themselves. If this Court grants the Department's Petition here, it will presumably need to consolidate the cases and realign the parties to achieve the same basic effect. There is no need for such machinations. The correct answer here is also the most straightforward: The proper petitioner is the party aggrieved by the one court of appeals decision to reach final judgment. The Court should grant the House's Petition in No. 12-13, and deny this premature Petition as well as the other Petitions seeking the extraordinary remedy of certiorari before judgment.

CONCLUSION

For the foregoing reasons, the Department's 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,

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

Counsel for Respondent
The Bipartisan Legal Advisory Group of the United States House of Representatives

August 31, 2012