No. 12-63

IN THE

Supreme Court of the United States

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,

Petitioner,

v.

THE UNITED STATES OF AMERICA
and
THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents,

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Petitioner Edith Windsor respectfully submits this reply to the briefs of respondents the United States and the Bipartisan Legal Advisory Group ("BLAG"), filed on August 31, 2012. Both the United States and BLAG are in agreement that the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA") is squarely presented by this case and is an issue of exceptional importance that justifies the Court's immediate review.

The United States suggests that the Court should wait until it has considered the petitions in two other cases, *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13, 12-15, and 12-97 ("*Massachusetts*"), and *Office of Personnel Management* v. *Golinski*, No. 12-16 ("*Golinski*"). BLAG, on the other hand, argues that the only case in which the petition for certiorari should be granted is *Massachusetts* because, it contends, there should not be any grants of certiorari before judgment.

Although neither the United States nor BLAG seriously contest that petitioner has standing as the prevailing party in the District Court to seek certiorari before judgment, the United States has indicated its intent to file its own petition for certiorari in petitioner's case, which effectively renders the issue academic. BLAG further questions whether Ms. Windsor has standing to challenge DOMA's discriminatory effects due to purported uncertainty as to whether New York recognized her marriage as valid at the time of her late spouse's death. As explained below, however, there is no such uncertainty under New York law.

Whatever respondents' preferences, there can be no doubt that the Court would only benefit from having before it each of the various petitions for certiorari on DOMA, with the attendant ability to select its preferred vehicle(s). Petitioner respectfully submits that, for the reasons set forth below and in her petition, this case presents an excellent vehicle for consideration of this issue. The interests of judicial economy counsel in favor of the Court considering all of the related DOMA petitions simultaneously.

I. The Petitions Filed in All the DOMA Cases Should be Considered Together and This Petition Should Be Granted

The United States has now indicated that it intends to file a petition in Petitioner's case, but it suggests that the Court should consider and dispose of the petitions filed in two other DOMA cases (*Massachusetts* and *Golinski*) first in order to determine if either is an appropriate vehicle before considering any petitions in this case or in another case currently before the Second Circuit, *Pedersen* v. *Office of Personnel Management*, No. 12-231 ("*Pedersen*"). Such an approach would not only be inefficient, but would deny the Court, should it decide to grant certiorari on this important issue, the benefit of its choice of the available vehicles. Lower courts in each of the four cases have held that Section 3 of DOMA is unconstitutional, and the Court's decision-making process can only benefit from having all four cases before it at the same time when deciding in which case or cases to grant review.

The United States contends that *Golinski* may be a better vehicle for review because the district

court in *Golinski* applied heightened scrutiny after determining that it applied to discrimination based on sexual orientation. U.S. Br. at 14. However, Ms. Windsor also fully briefed and argued before the District Court that heightened scrutiny is the correct standard, an argument she would continue to advance before this Court. Indeed, the expert evidence on the issue of whether heightened scrutiny should be applied presented by petitioner is virtually identical to that presented in *Golinski*.[1] The fact that Ms. Windsor prevailed on a rational basis standard below clearly would not bar this Court from considering the question of what level of scrutiny should apply to sexual orientation discrimination.

Moreover, the District Court did not, as the United States suggests, "assume[] without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review." U.S. Br. at 7. To the contrary, it made clear that, rather than decide that issue, it would instead apply the rational basis standard, stating that "the constitutional question presented here may be disposed of under a rational basis review, it need not decide . . . whether homosexuals are a suspect class." Pet. App. at a12.[2]

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[1] Pursuant to a stipulation between counsel for BLAG and counsel for the plaintiffs in *Golinski* and *Pedersen*, the expert witness depositions that were conducted in *Windsor* were later used by the parties in *Golinski* and in *Pedersen* and were the only depositions taken on this issue.

[2] Contrary to BLAG's suggestion, it is inaccurate to describe the District Court's review as exceeding traditional rational basis. *See* BLAG Br. at 15-16. The District Court explicitly stated that "[r]egardless whether a more 'searching' form of rational basis

Like the United States, BLAG concedes that this case presents an issue of constitutional importance, but asserts that *BLAG* v. *Gill*, No. 12-13 is a superior vehicle for the Court's resolution of DOMA's constitutionality. As noted above, Ms. Windsor maintains that her case presents an excellent vehicle. The record in petitioner's case squarely and cleanly presents one and only one issue: whether Section 3 of DOMA violates equal protection. Petitioner's case concerns probably the most economically consequential example of how DOMA harms married same-sex couples. There is no dispute that if Ms. Windsor had inherited the estate of her husband, she would not have had to pay a penny of estate tax, rather than $363,000. And, as described below, neither of the standing-related objections should postpone or foreclose the consideration or granting of Ms. Windsor's petition.

II. Ms. Windsor Has Standing to Challenge DOMA

BLAG opposes Ms. Windsor's petition because it claims that it is unclear whether New York considered her Canadian marriage to be valid. However, as the District Court found, this purported concern is without basis.

There is no ambiguity or "sensitivity" about this issue of New York law. BLAG Br. at 22. Well before New York's passage of its recent marriage statute in 2011, every New York appellate court to have addressed the question—three out of the four

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scrutiny is required," traditional rational basis scrutiny compelled the conclusion that DOMA was unconstitutional. Pet. App. at a13.

New York intermediate appellate courts (including the First Department, where Ms. Windsor lives)—had concluded that New York recognizes out-of-state marriages of same-sex couples. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (2008 Canadian marriage); *Martinez* v. *Cnty. of Monroe*, 50 A.D.3d 189 (4th Dep't 2008) (2004 Canadian marriage); *see also Lewis* v. *N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (3d Dep't 2009), *aff'd on other grounds sub nom. Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009). By the time of the death of Ms. Windsor's spouse in 2009, New York's Governor, Attorney General and Comptroller had all reached the same conclusion. *See Godfrey*, 13 N.Y.3d at 368 n.3; *Dickerson* v. *Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010).

This is not surprising. The question requires application of the centuries-old, black-letter rule of marriage recognition under New York common law, which provides that an out-of-state marriage, even if it could not be performed in New York, "must" nevertheless be recognized as valid in New York unless one of two exceptions applies: (1) the marriage violates an express statutory intent to void such a marriage, *Lewis*, 60 A.D.3d at 219, or (2) "an aspect of the out-of-state marriage is *abhorrent* to New York public policy." *Id.* (emphasis added).[3] Applying this rule in other contexts, New York courts have recognized, among others, a marriage between an uncle and his half-niece, and of two individuals under the age of 18, neither of which could have been

[3] BLAG is simply wrong in asserting that the relevant legal inquiry is whether New York "seriously disapproved" of gay and lesbian relationships. BLAG Br. at 23.

performed in New York. *See Martinez*, 50 A.D.3d at 191-92 (citing cases).

There is no reason to believe that the New York Court of Appeals would have reached a different result. While BLAG is correct that in *Hernandez* v. *Robles*, a plurality of the New York Court of Appeals held that there was no right under the New York Constitution to have marriages between same-sex couples performed in New York, it certainly said nothing even approaching the notion that such marriages were "abhorrent" to New York public policy. 7 N.Y.3d 338, 366 (2006).[4] It is simply not reasonable to conclude that the very same court that stated in *Hernandez* in 2006 that "[i]t may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage" would have found same-sex relationships to be "abhorrent" to New York public policy only a year later when Ms. Windsor and Ms. Spyer were married, or three years later when Ms. Spyer died. *Id.* at 379 (Graffeo, J., concurring).

That explicit invitation from the New York Court of Appeals was accepted by the New York legislature five years later when marriage for same-sex couples became the law in New York. *See* N.Y. Dom. Rel. Law §10-a. As a result, there is no reason

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[4] The *Hernandez* decision did not address whether New York recognized valid out-of-state marriages of same-sex couples. While the court began its opinion by stating that the "New York Constitution does not compel *recognition* of marriages between members of the same sex," *id.* at 356 (emphasis added), the remainder of the decision addresses only whether New York must allow such couples to marry under its constitution.

to believe that this issue would qualify for certification to the New York Court of Appeals, particularly since it is now unlikely to recur. *See, e.g.*, *Rosenberg* v. *MetLife, Inc.*, 453 F.3d 122, 125 (2d Cir. 2006) (in the absence of a New York Court of Appeals decision on an issue of state law, the Second Circuit looks "to the decisions of the Appellate Division of the New York Supreme Court"); *State Farm Mut. Auto Ins. Co.* v. *Mallela*, 372 F.3d 500, 505 (2d Cir. 2004) (certification appropriate where "question is likely to recur").

III. As the Prevailing Party in a District Court Judgment Currently Before the Court of Appeals, Ms. Windsor Has Standing to Seek Certiorari Before Judgment

Edith Windsor also has standing to seek certiorari in this case, both as a statutory and as a constitutional matter. This Court may review cases "in the courts of appeals" upon a petition for certiorari before judgment by "*any* party to any civil or criminal case." 28 U.S.C. § 1254 (emphasis added). This statutory language plainly "covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011) (citing Eugene Gressman et al., *Supreme Court Practice* 87 (9th ed. 2007) (hereinafter "Gressman")). And because two appeals (one by BLAG and one by the United States) in Ms. Windsor's case were docketed in the Second Circuit and remain pending there, her case is "in the court[] of appeals," as required by 28 U.S.C. § 1254. *See* Gressman at 83-84.

The pendency of those appeals ensures that the constitutional standing requirements of Article III are

satisfied. There can be no dispute that a live case and controversy for constitutional purposes is currently pending in the Second Circuit; Ms. Windsor's petition effectively seeks to have that dispute moved here. It cannot be argued that the very same dispute between Ms. Windsor and BLAG and the United States is constitutionally justiciable in one forum, but not another.

Given the appeals currently being litigated against her, the fact that Ms. Windsor prevailed in the district court is of no moment in determining whether her petition for certiorari should be granted. This Court has granted petitions for certiorari before judgment filed by many such parties. *See, e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting petitions of both Mistretta and United States where district court ruled in favor of United States on constitutionality of federal sentencing guidelines); *United States* v. *Nixon*, 418 U.S. 683, 689-90 (1974) (granting petition of United States where district court denied President Nixon's motions regarding subpoena issued by United States); *Wilson* v. *Girard*, 354 U.S. 524, 526 (1957) (granting petitions of both Girard and Secretary of Defense Wilson where Girard's petition for writ of habeas corpus was denied by district court but court granted Girard declaratory relief and issued injunction on his behalf); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937, 937 (1952) (per curiam) (granting petitions of both steel mill owners and the government to review district court's injunction against enforcement of steel seizure order); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947) (granting petition of United States where respondents' appeal of district court's

decision holding them in civil and criminal contempt for violating temporary restraining order was pending).[5]

Although BLAG directs the Court to its opposition to certiorari in *Massachusetts*, none of the cases that BLAG cites there concerns the standing of a party who seeks certiorari before judgment while an appeal is still pending against her in the court of appeals. *See, e.g.*, *Camreta*, 131 S. Ct. at 2026 (discussing petition filed *after court of appeals* has ruled in petitioner's favor on qualified immunity grounds); *I.N.S.* v. *Chadha*, 462 U.S. 919, 930 (1983) (determining petitioner was "sufficiently aggrieved by the Court of Appeals decision").[6]

Similarly, while it is generally the case that litigants who have prevailed in the court of appeals have "'receive[d] all that [they] sought,'" *Chadha*, 462 U.S. at 930 (quoting *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980)), and effectively won a final victory, leaving them without the requisite injury needed to pursue certiorari, that is emphatically not the case for Ms. Windsor. Having prevailed only in the *district court*, Ms. Windsor's injuries remain acute and ongoing. Because the

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[5] While these cases do not directly address the rationale for why a party who prevailed in the district court has constitutional standing, they nonetheless make it clear that such standing exists. Indeed, several of the cases consider other questions of standing, and it is beyond credulity that the Court repeatedly overlooked a petitioner's lack of constitutional standing while discussing other material standing issues in the same opinion.

[6] BLAG acknowledges, moreover, that "appellate standing principles may apply differently in the certiorari before judgment context." BLAG Br. at 12.

District Court's ruling is subject to an automatic stay, per 28 U.S.C. § 2414, Ms. Windsor has not yet received the more than $363,000 due to her as the executor of her spouse's estate under the District Court's judgment, and she cannot receive it until the Second Circuit or this Court enters a final judgment in her favor.

Even were the District Court's judgment to be fully enforced immediately—which it has not been and will not be—Ms. Windsor would still suffer collateral injury of the type that establishes constitutional standing. *See, e.g.*, *Forney* v. *Apfel*, 524 U.S. 266, 271 (1998) ("[A] party is 'aggrieved' and ordinarily can appeal a decision 'granting in part and denying in part the remedy requested.'" (quoting *United States* v. *Jose*, 519 U.S. 54, 56 (1996) (per curiam))); *Roper*, 445 U.S. at 334 ("[A]ppeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits."). As explained in her petition, Ms. Windsor's marital status for federal purposes affects whether she will receive a refund of the New York state tax paid on Thea's estate. *See* N.Y. Tax Law § 961. Ms. Windsor also continues to suffer the dignitary harm of the federal government's refusal to recognize her marriage as equal to other legally valid marriages. *See Nguyen* v. *I.N.S.*, 533 U.S. 53, 83 (2001); *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994).

IV. Ms. Windsor's Health Continues to Militate for Expeditious Resolution

Finally, Ms. Windsor's health remains tenuous. Last month, she suffered several fractured or broken

ribs, and she continues to be treated for a chronic heart condition. As noted above, the judgment in Ms. Windsor's favor remains stayed and Ms. Windsor has not yet been able to enjoy the fruits of her success in the District Court. After over 44 years with Ms. Speyer, federal recognition of their lawful marriage is in sight—Ms. Windsor has reached the proverbial mountaintop. But an expeditious resolution of her case is required if, at the age of 83, she is to see the final resolution of her case. While the case will continue without Ms. Windsor if necessary (a successor executor has been named for Ms. Spyer's estate), having waited a lifetime for such recognition, Ms. Windsor obviously would like to be present when it happens.

There can be no serious dispute that the constitutional issue presented is an important one and that Ms. Windsor's case is a strong vehicle for its resolution. The United States has indicated that it too will shortly petition for certiorari in this case. Ms. Windsor respectfully requests that the Court grant her petition, or if not hers, then that of the United States.

Conclusion

For the foregoing reasons and for the reasons set forth in Ms. Windsor's opening brief, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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