No. 12-231

In the Supreme Court of the United States

JOANNE PEDERSEN, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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

BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-117a) is not yet reported but is available at 2012 WL 3113883.

JURISDICTION

The judgment of the district court was entered on August 2, 2012. A notice of appeal was filed on August 17, 2012 (Pet. App. 120a-121a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA or Act) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two principal provisions. The first, Section 2 of the Act, provides that no State is required to give effect to any public act, record, or judicial

proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. Section 3 provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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 a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (*1996 House Report*). Although Hawaii ultimately did not permit same-sex marriage, other States later recognized such marriages under their respective laws. See *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 6 nn.1 & 2 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012).

While Section 3 of DOMA does not purport to invalidate same-sex marriages in those States that permit them, it excludes such marriages from recognition for purposes of more than 1000 federal statutes and pro-

grams whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor). Section 3 of DOMA thus denies to legally married same-sex couples many substantial benefits otherwise available to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. See *id.* at 16-18.

2. Plaintiffs are six same-sex couples married in Connecticut, New Hampshire, and Vermont, and one surviving spouse of a same-sex couple married in Connecticut. First Am. Compl. ¶¶ 37, 39. They filed suit in the United States District Court for the District of Connecticut, alleging that, as a result of Section 3, they have been denied certain federal benefits otherwise available to married couples or surviving spouses. *Id.* ¶ 11. Those benefits include federal health plan benefits for spouses of federal employees, see 5 U.S.C. 8901 *et seq.*, social security benefits for surviving spouses of insured individuals, see 42 U.S.C. 402(i), defined benefit pension plan benefits for spouses and surviving spouses of plan participants, see 26 U.S.C. 401(h), 420; 29 U.S.C. 1055(a)(2), federal leave benefits for covered individuals caring for spouses with serious health conditions, see 29 U.S.C. 2601 *et seq.*, and married joint-filer status for federal income tax purposes. First Am. Compl. ¶¶ 6-10. Plaintiffs contend that, by treating married same-sex couples differently from married opposite-sex couples, Section 3 violates the right of equal protection secured by the Fifth Amendment. *Id.* ¶ 11. They seek declaratory and injunctive relief. *Ibid.*

3. After plaintiffs filed their complaint, the Attorney General sent a notification to Congress pursuant to 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) (Attorney General Letter).[1] The letter explained that, while the Department of Justice had previously defended Section 3 where binding circuit precedent required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted an examination of the issue after two suits (this one and *Windsor* v. *United States*, petitions for cert. before judgment pending, Nos. 12-63 (filed July 16, 2012) and 12-307 (filed Sept. 11, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. Attorney General Letter 1-2. The Attorney General explained that, after examining factors this Court has identified as relevant to the applicable level of scrutiny, including the history of discrimination against gay and lesbian individuals and the relevance of sexual orientation to legitimate policy objectives, he and the President had concluded that Section 3 warrants application of heightened scrutiny rather than rational basis review. *Id.* at 2-4. The Attorney General further explained that both he and the President had concluded that Section 3 fails heightened scrutiny and is therefore unconstitutional. *Id.* at 4-5.

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[1] 3:10-cv-01750 Docket entry No. 39 (D. Conn. Feb. 25, 2011). Text also available at http://www.justice.gov/opa/pr/2011/February/11-ag- 223.html.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Attorney General Letter 5. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to cease defense of Section 3. *Id.* at 5-6. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to participate" in litigation concerning the constitutionality of Section 3. *Id.* at 6.

Following the Attorney General's announcement, respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene to present arguments in defense of the constitutionality of Section 3.[2] The district court granted the motion. 5/27/11 Order.

Both BLAG and the government moved to dismiss plaintiffs' challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss plaintiffs' constitutional claim solely for purposes of ensuring that the court had

[2] Two of the group's five members declined to support intervention. BLAG Mot. to Intervene 1 n.1 (Apr. 26, 2011).

Article III jurisdiction to enter judgment for or against the federal officials tasked with enforcing Section 3. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 of DOMA and that, under that standard of review, Section 3 violates the equal protection guarantee of the Fifth Amendment. Gov't Resp. to Pl. Mot. for Summ. J. and Intervenor's Mot. to Dismiss 8-34 (Sept. 14, 2011).

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiffs, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment. Pet. App. 1a-117a.

a. As a preliminary matter, the district court rejected BLAG's argument that plaintiffs who claim that Section 3 prohibited them from filing federal income tax returns as married joint filers lack Article III standing because the statute governing married joint filers, 26 U.S.C. 6013, does not extend by its own terms to married same-sex couples. Pet. App. 20a-24a. While acknowledging that Section 6013 uses the terms "husband" and "wife," the court explained that when used in federal statues generally and the Tax Code specifically, those terms are presumptively gender-neutral. *Id.* at 21a-22a (citing 1 U.S.C. 1; 26 U.S.C. 7701(p)(1)(3)). The district court concluded, moreover, that Section 3 of DOMA, not Section 6013 of the Tax Code, caused plaintiffs' alleged injury: Section 3 "was the reason the IRS no longer deferred to state law and instead denied same-sex couples who were validly married under state law the ability to file joint tax returns." *Id.* at 23a.

b. The district court also rejected BLAG's threshold argument that plaintiffs' equal protection challenge is foreclosed by this Court's summary dismissal for want

of a substantial federal question of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, see *Baker* v. *Nelson*, 191 N.W.2d 185, 185-187 (1971). Pet. App. 24a-27a. After noting the "limited precedential value" of summary dismissals, *id.* at 24a, the court explained that, unlike in *Baker*, "the issue of whether there is a constitutional right to same-sex marriage is not present" in this case because plaintiffs "are validly married under state law," *id.* at 26a. The district court concluded therefore that *Baker* "is clearly unrelated" to the question whether Section 3 violates the equal protection guarantee of the Fifth Amendment. *Ibid.*

c. Turning to the constitutionality of Section 3, the district court determined that laws drawing distinctions on the basis of sexual orientation are subject to heightened scrutiny. Pet. App. 30a-86a. The court first concluded that the appropriate level of scrutiny was an open question in the Second Circuit, noting that this Court and the Second Circuit "have not had occasion to squarely address it." *Id.* at 33a. The district court declined to follow opinions from other circuits applying rational basis review because most relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), since overruled by *Lawrence* v. *Texas*, 539 U.S. 558 (2003), Pet. App. 34a-36a; gave only "cursory consideration to the suspect class analysis," *id.* at 34a; or involved "challenges to military policy on homosexual conduct," which the district court viewed as "distinguishable from challenges within the civilian context," *id.* at 36a.

The district court then considered the factors this Court has assessed in determining whether to apply

heightened scrutiny to laws drawing distinctions on the basis of a particular classification. Pet. App. 39a-86a. The court first examined the history of discrimination against the class. *Id.* at 40a-49a. The court found that "the evidence in the record detailing the long history of anti-gay discrimination which evolved from conduct-based proscriptions to status or identity-based proscriptions perpetrated by federal, state and local governments as well as private parties amply demonstrates that homosexuals have suffered a long history of invidious discrimination"—a history "widely acknowledged in American jurisprudence, including United States Supreme Court jurisprudence." *Id.* at 47a, 49a.

The district court then examined whether the distinguishing class characteristic indicates a typical class member's ability to contribute to society. Pet. App. 49a-53a. The court noted that "BLAG's argument fails to address and therefore apparently concedes that this factor is met." *Id.* at 50a. Nevertheless, the district court pointed to the societal contributions of gays and lesbians, *ibid.*, "the long-held consensus of the psychological and medical community," *ibid.*, and other evidence to determine that sexual orientation "is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to society," *id.* at 53a. Instead, the district court found that "like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Ibid.*

Next, the district court assessed whether the distinguishing class characteristic is immutable, Pet. App. 54a-69a, determining that "the key inquiry is whether sexual orientation is enduring or resistant to change af-

ter its development or emergence in adolescence," *id.* at 59a. Relying on the apparent "consensus in the scientific community," *id.* at 55a (citation omitted), "the increasing recognition that sexual orientation is fundamental and central to one's identity," *id.* at 66a, and other evidence, the court concluded that sexual orientation "should be considered immutable," *id.* at 69a. "To hold otherwise," the court explained, "would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity." *Ibid.*

Finally, the district court looked to the class's political power. Pet. App. 69a-86a. The court acknowledged that gays and lesbians have had "some modest successes in mitigating existing discrimination." *Id.* at 83a. Relying on evidence demonstrating that gays and lesbians "are legally discriminated against in a variety of ways," *id.* at 72a, and "are underrepresented in political office," *ibid.*, however, the court concluded that they "lack meaningful political power sufficient to satisfy this factor," *id.* at 84a.

Having assessed what it considered the relevant factors, the district court determined that "homosexuals display all the traditional indicia of" a suspect or quasi-suspect class. Pet. App. 84a. The court accordingly held that laws drawing distinctions on the basis of sexual orientation are subject to heightened scrutiny. *Ibid.*

d. To assess the constitutionality of Section 3, the district court nevertheless applied rational basis review. Pet. App. 86a-117a. The court reasoned that this Court has opted "to apply rational basis review rather than definitively address whether sexual orientation constitutes a suspect or quasi-suspect class." *Id.* at 86a.

The district court held that Section 3 violates the Fifth Amendment's guarantee of equal protection. Pet.

App. 86a. The court concluded that neither the legislative purposes articulated in support of Section 3 at the time of its enactment (see *1996 House Report* 12) nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. *Id.* at 89a-117a.

The district court first could discern "no rational relationship" between Section 3 and an asserted federal governmental interest in defending and nurturing the institution of heterosexual marriage. Pet. App. 93a. The court explained that, among other problems, "[b]y excluding a same-sex spouse from [certain] ethical obligations and financial disclosure requirements, Section 3 of DOMA illogically burdens heterosexual couples and accords a benefit upon homosexual couples." *Id.* at 99a-100a (citing various disclosure requirements involving spouses of federal officials). The court also rejected BLAG's argument that Congress might have enacted Section 3 with the "objective of ensuring that children have parents of both sexes." *Id.* at 101a. The court reasoned that Section 3 "is at once too narrow and too broad" to be rationally related to that objective, *ibid.* (quoting *Romer* v. *Evans*, 517 U.S. 620, 633 (1996)), because Section 3 "does not impede or restrict the ability of same-sex couples to adopt or otherwise raise children," *id.* at 102a, and "confers [federal marital] benefits upon opposite-sex married couples who have elected not to create or raise children," *id.* at 101a.

Next, the district court concluded that the asserted federal governmental interest in defending traditional notions of morality cannot withstand rational basis review. Pet. App. 106a. "[M]oral disapproval of [a] group," the court reasoned, "is an interest that is insufficient." *Id.* at 105a-106a (quoting *Lawrence*, 539 U.S. at

582 (O'Connor, J., concurring in the judgment)). The court also determined that "the government's interest in preserving scarce governmental resources" alone cannot "provide a rational basis for both depriving benefits to and saddling a financial burden on a particular class." *Id.* at 106a, 109a.

Turning to "the objective of advancing the government's interest in protecting state sovereignty and democratic self-governance," Pet. App. 109a, the district court explained that "same-sex marriage is the product of democratic self-governance at the state level in Connecticut, Vermont, and New Hampshire," *id.* at 111a. The court therefore concluded that Section 3 itself "can be seen to frustrate the utility and promise of federalism and the democratic process" to the extent it "abridges these states' right to confer marital status on [their] residents." *Id.* at 112a.

The district court also rejected BLAG's argument that "Congress could have rationally enacted [Section 3] in an effort to proceed with caution in an area of social policy of such great significance." Pet. App. 113a. That rationale, the court found, "is simply a modified articulation of the assertion that preservation of tradition can justify the use of a legislative classification to deny governmental benefits," an assertion already deemed insufficient by the district court. *Id.* at 115a. Finally, the court determined that Section 3 does not advance an asserted federal governmental interest in maintaining consistency and uniformity in federal benefits because Section 3 "in fact infuses complexity and inconsistency" into that realm by "requiring the federal government to identify and exclude all same-sex marital unions from federal recognition." *Ibid.*

5. Both the government and BLAG filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. Pet. App. 120a-121a. The court of appeals has jurisdiction pursuant to 28 U.S.C. 1291. The appeals were docketed as No. 12-3273 and No. 12-3872, and remain pending before that court. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 83-84 (9th ed. 2007) (citing *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974)).

6. On September 11, 2012, after plaintiffs filed this petition, the government filed its own petition for a writ of certiorari before judgment in this case (No. 12-302).

DISCUSSION

The question whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection as applied to same-sex couples legally married under state law is presented in the government's petition for a writ of certiorari in *United States Department of Health & Human Services* v. *Massachusetts*, No. 12-15 (filed July 3, 2012),[3] and in the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). The question is also presented in the government's petition for a writ of certiorari before judgment in *United States* v. *Windsor*, No. 12-307 (filed Sept. 11, 2012).[4] For the

[3] Two other petitions for a writ of certiorari have been filed in the *Massachusetts* case, one by BLAG (No. 12-13) and a conditional cross-petition by the Commonwealth of Massachusetts (No. 12-97).

[4] On October 18, 2012, the Second Circuit in *Windsor* issued a decision applying intermediate scrutiny to hold that Section 3 violates equal protection. 2012 WL 4937310. The government plans to take

reasons explained in those pending petitions, that question warrants this Court's review now.

In the event the Court determines that *Massachusetts*, *Windsor*, and *Golinski* do not provide an appropriate vehicle to decide the question presented, it should grant review in this case to ensure a timely and definitive ruling on Section 3's constitutionality. As in the recent court of appeals opinion in *Windsor* (see note 4, *supra*) and the district court's decision in *Golinski*, the district court's consideration of the applicable level of scrutiny in this case (Pet. App. 32a-86a) may materially assist this Court's consideration of that issue. See No. 12-16 Pet. 13.

As explained in the government's response in No. 12-63 (at 17-19) and in the government's petition (No. 12-302) in this case (at 14), plaintiffs' petition raises a threshold question about whether plaintiffs, who obtained a district court judgment and decision entirely in their favor, have standing to independently seek certiorari before judgment. As further explained in those filings (No. 12-63 Gov't Resp. 19-20; No. 12-302 Pet. 14 & n.4), however, the government's filing of a petition in this case obviates any need for this Court to resolve that threshold question if it is inclined to grant review in this case.

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further steps to seek this Court's review in *Windsor* in light of that decision.

CONCLUSION

The Court should hold the petition for a writ of certiorari before judgment pending its consideration of the petitions in *Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), *United States* v. *Windsor*, Nos. 12-63 (filed July 16, 2012) and 12-307 (filed Sept. 11, 2012), and *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). If the Court does not grant review in *Massachusetts*, *Windsor*, or *Golinski*, the Court should grant the government's petition for a writ of certiorari before judgment in this case (No. 12-302) and, in that event, grant this petition in conjunction therewith.

Respectfully submitted.

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