No. 12-15

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS and THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
Petitioners,

v.

NANCY GILL, ET AL., and BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First 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 Department of Justice argued, and the court below agreed, that DOMA violates equal protection. The Department now seeks certiorari.

The questions presented are:

(1) Petitioners are federal agencies and officers 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?

(2) Does Section 3 of DOMA violate the equal protection component of the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDING

Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("the House") was the Intervenor-Appellant in the court below and is the Petitioner in No. 12-13, seeking review of the same judgment.[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 below that the House's intervention should be limited to those terms, the court of appeals granted the House leave "to intervene as a party appellant" to fully litigate DOMA's constitutionality under equal protection principles. Order,

[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.

Massachusetts v. U.S. Dep't of HHS, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. June 16, 2011).

Petitioners the U.S. Department of Health and Human Services, Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, the U.S. Department of Veterans Affairs, Eric K. Shinseki, in his official capacity as Secretary of the U.S. Department of Veterans Affairs, and the United States of America were Appellants in the court below and are Respondents in No. 12-13. Petitioners the Office of Personnel Management, the U.S. Postal Service, Patrick R. Donahoe, in his official capacity as Postmaster General of the United States, Michael J. Astrue, in his official capacity as Commissioner of the Social Security Administration, Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and the United States of America were Appellants/Cross-Appellees in the court below and are Respondents in No. 12-13.

Respondents Nancy Gill, Marcelle Letourneau, Martin Koski, James Fitzgerald, Mary Ritchie, Kathleen Bush, Melba Abreu, Beatrice Hernandez, Jo Ann Whitehead, Bette Jo Green, Randell Lewis-Kendell, Herbert Burtis, Marlin Nabors, Jonathan Knight, Dorene Bowe-Shulman, Mary Bowe-Shulman, and the Commonwealth of Massachusetts were Appellees in the court below and are also Respondents in No. 12-13. Respondent Dean Hara was an Appellee/Cross-Appellant in the court below and is also a Respondent in No. 12-13. Neither Massachusetts nor any of the individual Respondents oppose the House's Petition in No. 12-13, nor (with the exception of Massachusetts' conditional cross-petition, No. 12-97), have they filed their own petitions for certiorari.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Regulation & Rules

Other Authorities

INTRODUCTION

The House respectfully opposes the Department of Justice's unnecessary and duplicative Petition. The important issue of the constitutionality of Section 3 of DOMA is squarely presented to this Court in the House's own earlier-filed Petition in this case, No. 12-13. The House, and not the Department, shouldered the burden of defending DOMA's constitutionality in the First Circuit. While the House's arguments that DOMA is consistent with equal protection principles were rejected by the court of appeals, the Department's attack on DOMA as an equal protection violation succeeded. While the House was aggrieved by the court of appeals decision, the Department was the prevailing party. Under these circumstances, the House is clearly the proper party to invoke this Court's review, and the Court should reject the Department's superfluous Petition, which, if granted, only would confuse the alignment of the parties and complicate proceedings before this Court.

The Petitioners here are Respondents to the House's Petition in No. 12-13. Granting the House's Petition will reflect the proper alignment of the Executive Branch defendants with those parties that believe DOMA is unconstitutional. There thus is no need to grant a duplicative petition from parties who agree with—and, in fact, requested—the judgment below. Indeed, if the Court were to grant the instant Petition, it essentially would have to undo the effect of that grant by consolidating the two cases and realigning Petitioners with the other parties that seek to preserve the judgment of the court of appeals. There is no reason to complicate matters, particularly where, as here, the Department's Petition is defective because the Executive Branch defendants likely lack standing. A party that prevails in the court of appeals and seeks to defend—not enlarge—that judgment, is not only poorly positioned to invoke this Court's discretionary review, it is not clear that such a party has appellate standing in the circumstances of this case. There is no need to confront that difficult question because, as this Court has made perfectly clear, the House has standing to seek certiorari in these circumstances. Granting the House's Petition therefore would permit this Court to consider DOMA's constitutionality with a minimum of procedural confusion or rearrangement of parties and briefing schedules, while still permitting all parties, including Petitioners here, to participate in the case.

Moreover, in this context, where the Executive Branch has ceased to perform its constitutional role of defending a federal statute's constitutionality and has adopted the anomalous position of affirmatively attacking the statute and the motives of the legislators and the President who enacted it, the Department is operating as a de facto *amicus*. As such, its views about the proper vehicle for this Court's review are entitled to little weight.

In short, granting certiorari here, instead of, or in addition to, in No. 12-13, would serve only to complicate and confuse the Court's consideration of DOMA's constitutionality. Accordingly, the Court should grant the House's Petition in No. 12-13 and deny the instant Petition.

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." App 3a. 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 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 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. 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.[2] Indeed, in clarifying the meanings of "marriage" and "spouse" in federal law by enacting DOMA, Congress merely reaffirmed what it has always meant when using those words in federal law—and what courts and the Executive Branch have always understood it to mean: A traditional male-female couple.[3]

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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); 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes); 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A), (a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria regarding marriage in immigration law context).

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

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.[4] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Administration abruptly announced its intent to refuse to defend DOMA's constitutionality. Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html ("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

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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").

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

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.*

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."[5]

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[5] *See* Superseding Br. for the U.S. Dep't of HHS, et al. at 23, 46-48, 52, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 23, 2011) ("Dep't Superseding 1st Cir. Br."). 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); *Golinski v. OPM*, Nos. 12-15388 & 12-15409 (9th Cir. July 3, 2012); *Revelis v.*

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 (rational basis review).

3. History of This Case

a. Procedural History

Gill v. Office of Personnel Management was filed in March 2009 in the District of Massachusetts by six same-sex couples married in Massachusetts and three surviving spouses of such marriages. The *Gill* plaintiffs sought to enjoin the Executive-Branch defendants from enforcing DOMA and to force those defendants to extend to the *Gill* plaintiffs federal benefits available to opposite-sex married couples. In July 2009, Massachusetts filed a companion case styled *Massachusetts v. U.S. Department of Health and Human Services* asserting that DOMA also violated the Tenth Amendment and the Spending Clause. App. 4a-5a.

The Department defended DOMA in the district court in the *Gill* and *Massachusetts* cases, App. 5a, although it declined to defend many of Congress' stated justifications for the statute. *See* App. 53a

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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).

("[T]he government has disavowed Congress' stated justifications for the statute and, therefore, they are addressed below only briefly.").

In *Gill*, the district court held that Section 3 of DOMA violates the equal protection component of the Fifth Amendment's Due Process Clause. App. 33a. In *Massachusetts*, the district court held that Section 3 violates the Tenth Amendment and the spending power "by intruding on areas of exclusive state authority" and by "forcing" the Commonwealth to "discriminat[e] against its own citizens in order to receive and retain federal funds" for Medicaid and for veterans' cemeteries. App. 83a.

The Executive Branch defendants appealed the district court's rulings in *Gill* and *Massachusetts*, which were consolidated for purposes of appeal. The district court stayed its judgments pending appeal. C.A. J.A. 676, 1425.

b. First Circuit Proceedings

On appeal, the Department "filed a brief in [the First Circuit] defending DOMA against all constitutional claims." App. 6a. That brief argued that "DOMA is subject to rational basis review under the equal protection component of the Due Process Clause. Under such review the statute is fully supported by several interrelated rational bases." Corrected Br. for U.S. Dep't of HHS, et al. 25, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Jan. 20, 2011).

Only a few weeks later, in February 2011, the Department executed its "about face" on DOMA, App. 6a, and informed the First Circuit that it would "cease its defense" in the *Gill* and *Massachusetts* appeals. Letter from Tony West, Asst. Att'y Gen., to Margaret Carter, Clerk of Court (Feb. 24, 2011); *see* No. 12-13 Appendix 130a. The House then moved to intervene on appeal, and the Department moved to withdraw its opening brief. App. 6a. Although the Department attempted to limit the House's role as an intervenor, the First Circuit granted the House full party status. Order at 2, *Massachusetts* (1st Cir. June 16, 2011). The First Circuit also denied the Department's motion to withdraw its opening brief, while permitting the Department to file a superseding brief. *See* Dep't Superseding 1st Cir. Br. In its new brief, the Department not only failed to defend the constitutionality of an Act of Congress but affirmatively attacked it, arguing that "the equal protection claim should be assessed under a 'heightened scrutiny' standard and that DOMA failed that standard." App. 6a. Indeed, the brief went so far as to attack the motives of the individual legislators and the President who signed the legislation and to charge them with animus.

Nevertheless, the Department recognized "that binding authority of [the First C]ircuit"—indeed, binding authority issued based on arguments the Executive Branch made only a few years before—"holds that rational basis review applies to classifications based on sexual orientation." Dep't Superseding 1st Cir. Br. 22 (citing *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008)). The Department sought initial *en banc* consideration of the case in the First Circuit, but that petition was denied. Order at 1, *Massachusetts* (1st Cir. Aug. 23, 2011). Nevertheless, the Department's merits brief for the panel argued extensively for the application of heightened scrutiny to the equal protection claims, while acknowledging that this path was foreclosed to the panel. Dep't Superseding 1st Cir. Br. 24-53. In response to Massachusetts' claims, however, the Department conceded that DOMA is valid under the Tenth Amendment and (if it does not violate equal protection) under the spending power. *Id.* at 53-61.

c. First Circuit Opinion

Affirming the district court's equal protection holding, the First Circuit held that Section 3 of DOMA violates equal protection.

Although the *Gill* plaintiffs, the Department of Justice, and Massachusetts all urged the court below to recognize sexual orientation as a suspect or quasi-suspect classification and to apply heightened scrutiny to DOMA, the First Circuit declined to do so. The panel also rejected the Justice Department's request for the application of "the so-called intermediate scrutiny test." App. 10a.

Significantly, the First Circuit expressly recognized that DOMA passes the rational basis test, stating that, "[u]nder such a rational basis standard, the *Gill* Plaintiffs cannot prevail." App. 9a. The court also noted that the Department conceded this point. *See* App. 10a ("The federal defendants conceded that rational basis review leaves DOMA intact"); App. 8a ("The federal defendants said that DOMA would survive such rational basis scrutiny"). But it nevertheless struck down DOMA under a novel form of "intensified scrutiny" or "closer than usual review." App. 11a, 7a; *see also* App. 14a-15a ("closer than usual scrutiny").

Applying this form of review, the First Circuit concluded that "the rationales offered do not provide adequate support for section 3 of DOMA." App. 22a. Although it erred in striking down Section 3 of DOMA, the First Circuit correctly rejected the Department's suggestion "that DOMA's hidden but dominant purpose was hostility to homosexuality." App. 23a. The court explained that "[t]he opponents of section 3 point to selected comments from a few individual legislators; but the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." App. 23a; *see id*. ("[T]he elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect.").

The First Circuit also rejected Massachusetts' Tenth-Amendment and spending power claims. App. 15a-16a.

4. Other Pending Petitions Involving DOMA Section 3

The question of DOMA's constitutionality also is presented by five other petitions for certiorari pending before this Court. Two of those petitions arise out of the First Circuit's decision and judgment in this case. The others are petitions for certiorari before judgment following appeals of district court decisions striking down DOMA on equal protection grounds. 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 the instant Petition, in the same case. And on July 20, Massachusetts filed a conditional cross-petition, No. 12-97, responding to both the House's Petition and this one. No party opposed the House's Petition in No. 12-13.

The Department also has sought certiorari before judgment in the court of appeals in *Golinski v. OPM,* No. 12-16 (July 3, 2012), following a decision of the Northern District of California striking down DOMA on equal protection grounds. *See* 824 F. Supp. 2d 968 (N.D. Cal. 2012). Following the Department's lead, another petition for certiorari before judgment has been filed by the private plaintiff in *Windsor v. United States*, No. 12-63 (July 16, 2012), following a judgment of the Southern District of New York striking down DOMA under equal protection. *See* 833 F. Supp. 2d 394 (S.D.N.Y. 2012). Even more recently, another group of private plaintiffs has filed a similar petition for certiorari before judgment in *Pedersen v. United States*, No. 12-231 (Aug. 21, 2012), following a judgment of the District of Connecticut striking down DOMA under equal protection. No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).

REASONS FOR DENYING THE WRIT

The Department's Petition is duplicative and unnecessary, and granting it would only invite procedural confusion in this case. The House's earlier-filed Petition in this case, No. 12-13, presents the same question regarding DOMA's constitutionality. No one doubts the importance of that question or that the House is the only party to the litigation defending DOMA's constitutionality or seeking reversal of the judgment of the court of appeals. Under those circumstances, it is no mystery as to the proper party to invoke this Court's jurisdiction for purposes of reversing the judgment of the court of appeals—it is self-evidently the House. The interests of all the parties and the Court in convenience and procedural clarity—and even the Department's ability to mount its attack on DOMA's constitutionality—would be most straightforwardly served by granting the House's Petition, where the Department is properly aligned as a Respondent, and denying this Petition and the other pending petitions for certiorari before judgment.

Indeed, this Petition, unlike the House's Petition in No. 12-13, features a vehicle problem for this Court's review given the status here of the Executive Branch defendants. Those defendants prevailed in the court of appeals and they do not seek reversal, amendment or enlargement of the court of appeals' judgment. Nor is this a situation where the statute at issue is one that the Executive Branch defendants administer. Under these circumstances, it is far from clear that the Petitioners even have appellate standing to seek review of a judgment they procured. Granting this Petition would force the Court to confront that question and unnecessarily embroil itself in the resolution of a dispute between the Legislative and Executive Branches.

Moreover, having surrendered to the House its traditional role of defending federal statutes, the Department's role in this case has essentially been one of an *amicus curiae*, seconding the plaintiffs' arguments that DOMA is unconstitutional. As such, the Department's view that some petition other than the one filed by the aggrieved party seeking review of an adverse court of appeals decision should be granted is entitled to little weight. Likewise, as a de facto *amicus* seeking DOMA's demise, the Department's interests are fully aligned with those of the plaintiffs. It makes little sense—and would generate considerable procedural confusion—to grant a separate and unnecessary certiorari request by the Department in these circumstances.

I. The House's Petition Presents Exactly the Same Issues Regarding the Constitutionality of DOMA and the House Is the Proper and Logical Petitioner.

The question presented by the instant Petition is identical to the House's Question 1 in No. 12-13. *Compare* Pet. (I) *with* Pet. No. 12-13 i. Both Petitions seek review of the same First Circuit judgment. Thus, there is nothing unique as to the DOMA issues presented in this Petition that would not otherwise be addressed by granting the House's Petition.

Equally important, the House is the proper Petitioner. It was the House, and not the Department, that unsuccessfully defended DOMA below. It is the House, and not the Department, that is aggrieved by that decision and seeks to reverse the judgment of the court of appeals. And it is the House's Petition, and not the Department's, that properly aligns the real interests of those attacking and defending DOMA on opposite sides of the "v." Under these circumstances, the proper course is also the most straightforward course: The Court should grant the House's Petition in No. 12-13 and deny the instant Petition.

II. This Case Presents a Novel, Unlikely-to-Recur Standing Question Implicating the Separation of Powers That Is Not Presented by the House's Petition.

Granting certiorari in this case, however, *would* require this Court to consider an issue entirely unrelated to DOMA, and which is nearly as obscure as the issue of DOMA's constitutionality is prominent: The question whether there is an exception to normal appellate standing rules in the narrow circumstances presented here.

A. General Rules of Appellate Standing Suggest That Petitioners Lack Standing to Invoke This Court's Review.

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)); *accord Forney v. Apfel*, 524 U.S. 266, 271 (1998); *Parr v. United States*, 351 U.S. 513, 516 (1956); *Pub. Serv. Co. of Mo. v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). 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, even when the Constitution allowed [it] to do so." *Id.* at 2030. "On the few occasions when [it has] departed from that principle," the Court has "pointed to a policy reason of sufficient importance to allow an appeal by the winner below." *Id.* (quotation marks and alterations omitted).

In *Camreta*, for instance, this Court observed that "government officials who prevail on grounds of qualified immunity" generally may "obtain our review of a court of appeals' decision that their conduct violated the Constitution," *id.* at 2026, because such decisions are "self-consciously designed" to "establish[] controlling law and prevent[] invocations of immunity in later cases," *id.* at 2030. In such circumstances, the government officials do seek effectively to enlarge the scope of the judgment, since a decision finding no liability but a constitutional violation has serious collateral consequences compared with a decision finding no constitutional violation. Other reasons the Court has found sufficient to grant the petitions of parties who nominally obtained the relief they sought below include the avoidance of negative *stare decisis* or collateral-estoppel effects from interlocutory rulings, or the vindication of important procedural rights of the lower-court winner. *E.g., Roper*, 445 U.S. at 331, 337. In those cases, the petitioners also effectively sought to enlarge the relief obtained below by seeking to eliminate collateral consequences of the decisions.

Of course, in the instant situation, Petitioners clearly "receive[d] all that [they] sought" from the courts below, which entered exactly the judgment they had requested: Among other things, a determination that DOMA is unconstitutional. Petitioners do not seek a decision with different collateral consequences; rather, they seek to replicate the relief they obtained below. And the presentation of the exact same questions of law regarding DOMA by the House's Petition means that there can be no other "policy reason of sufficient importance" to grant the prevailing parties' request for certiorari. *Cf. Camreta*, 131 S. Ct. at 2030. Thus, under ordinary principles of appellate standing, Petitioners would clearly lack appellate standing.

B. Determining Whether An Exception to Ordinary Principles of Appellate Standing Is Applicable Would Require This Court to Confront Novel and Difficult Questions.

Under ordinary principles of appellate standing, Petitioners lack standing to invoke this Court's review of the First Circuit's decision. The question thus becomes whether Petitioners in this case fit into an exception to the standing doctrine carved out by this Court in *Chadha*.

There, the Court stated that "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal," even where the agency requested the judgment below. 462 U.S. at 931. Although that principle provided appellate standing for the INS in *Chadha*—since the statutory provision in that case was a section of the Immigration and Nationality Act which the INS administered, *id.* at 926—it does not work here. To find appellate standing in the instant case would require an extension of *Chadha* because DOMA is a definitional statute codified alongside the Dictionary Act and affects hundreds of statutes across the U.S.

Code, not just those that OPM administers. Notably, OPM has not been entrusted with any unique authority to administer DOMA itself.

This case therefore is substantially different from *Chadha*, and presents the question of whether the exception to ordinary rules of appellate standing applied in that case should be expanded—to permit a federal agency to seek this Court's review of a judgment invalidating a statute that the agency requested, even where the agency does not have a unique relationship to the challenged statute. The Department cites *United States v. Lovett*, 327 U.S. 773 (1946), as establishing its prudential standing here, *see* Pet. 12, but *Lovett* does not nearly lay the issue to rest. In that case, the Solicitor General petitioned for certiorari at the *request* of Congress, even permitting Congress to frame one of the Questions Presented, and Congress expressly supported the petition. *See* Pet. for Cert. at 2 & n.1, 9, *Lovett*, Nos. 809-811 (Feb. 5, 1946); Br. for The Congress of the U.S. in Supp. of Cert., *id.* (Mar. 14, 1946). The Court did not expressly address the appellate standing question and there have been substantial developments in the doctrine in the ensuing six and a half decades. Questions such as the Department's appellate standing in *Lovett*, "which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Air Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). *Lovett* therefore cannot be dispositive of the issue.

Determining the Department's prudential standing in these circumstances would require this Court to wade into a separation of powers dispute in circumstances where doing so is wholly unnecessary. There is no need to engage this question in order to determine DOMA's constitutionality because granting the House's Petition would avoid the question entirely. *See also infra* Pt. II.C. And there is precious little practical need to resolve this question, for the cases in which the Executive Branch refuses to defend a federal statute are few in number, and the circumstances in which the challenged statute is too broad to be administered by any single agency—and in which the Executive Branch seeks this Court's review against the wishes of the Congressional body actively seeking this Court's review—are vanishingly rare.

C. As the House Plainly Has Standing to Pursue Its Own Petition, Granting No. 12-13 Would Avoid This Question.

As this Court stated plainly in *Chadha*, "Congress is both a proper party * * * and a proper petitioner" when the Executive Branch refuses to defend a statute, and the Legislative Branch's presence in such a case ensures that the courts have Article III jurisdiction. *See* 462 U.S. at 939, 931 n.6. Nevertheless, the Department suggests that it is the House that lacks independent standing to defend DOMA. *See* Pet. 12-13 n.3. This argument is facially incompatible with this Court's holding in *Chadha*, and indeed would eviscerate the rationale of *Chadha*. It also implausibly suggests that the Executive Branch could preclude this Court's review of the constitutionality of a statute that the House or

Senate or both actively seek to defend by the simple expedient of not filing a petition.

The Department appears to believe that this Court did not mean what it said in *Chadha* when it held that "Congress is both a proper party * * * and a proper petitioner" in cases such as this one, 462 U.S. at 939. The Department appears to think that Congress should be relegated to the status of *amicus curiae*. But that is decidedly not what this Court said in *Chadha* and it ignores the House's institutional interest in defending an Act of Congress that the Executive Branch refuses to defend.

The Department's view necessarily means that but for an act of Executive Branch grace in filing a petition for certiorari, both Congress and this Court would be powerless to review a decision invalidating an Act of Congress. Such a system would skew the separation of powers profoundly. It would deny Congress the ability to defend the constitutionality of its enactments and deny this Court the ability to review a particularly important and sensitive class of judicial decisions, those invalidating an Act of Congress. It would arrogate to the Executive Branch the ability to nullify acts of Congress based on a lower federal court's decision and its own refusal to seek further review. This would frustrate the Framers' deliberate decision to place this Court atop the judiciary hierarchy, and it would be tantamount to providing the Executive Branch with an extra-constitutional, post-enactment veto over federal statutes to which it objects. The Executive Branch simply does not possess that kind of unilateral authority under our Constitution. *See generally*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-589 (1952) (it is the judiciary's responsibility to interpret and enforce constitutional limits on the Executive Branch when it seeks to exercise authority assigned to other branches); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1122 (9th Cir. 1988) ("[T]he executive branch [may not] interpret the Constitution so as to assume additional powers or thwart the constitutional functions of a coordinate branch."), *vacated in part on other grounds*, 893 F.2d 205 (9th Cir. 1989).

It is no answer for the Department to represent that it will facilitate review by filing Petitions like this. The separation of powers is too important to rely on one branch's acts of grace. The Framers designed a system by which each branch could vindicate its own institutional interests. They did not make Congress dependent on the Executive Branch for the procedural steps necessary for this Court's jurisdiction even in cases in which the Executive Branch emphatically refuses to defend the substance of Congress' work. As the *Chadha* Court recognized, Congress is as much a part of the government of the United States as the Executive Branch, and when the latter defaults on its normal obligation to defend the constitutionality of a law, the House or Senate are the obvious and proper parties to step in and represent their institutional interest in the validity of the statutes they have enacted.

The cases cited by Petitioners, *see* Pet. 12-13 n.3, do not even begin to establish otherwise. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464

(1982), dealt only with standing of taxpayers in that capacity, not Congress. *Diamond v. Charles*, 476 U.S. 54 (1986), likewise involved only the standing of a private individual in defending the constitutionality of a state law, not Congress' much more concrete institutional interest in defending the validity of a federal statute. *Raines v. Byrd*, 521 U.S. 811 (1997), dealt with the standing of *individual* legislators—as opposed to the House as an institution—to challenge statutes implicating congressional procedure. And *Lovett* plainly is not dispositive of the issue. *See supra* pp. 19-20. The case that is dispositive is *Chadha* and there is no reason to reconsider its holding that Congress is a proper party—and here *the* proper party—to petition the Court and defend the statute's constitutionality.[6]

As a result, there is no serious issue under this Court's precedents as to the House's standing to seek certiorari here—but there *is* an unsettled question as to the Petitioners' appellate standing to do so. If the Court grants the House's Petition, the Petitioners here will of course remain parties to the case and as such will be able to bring their views before the Court. But given the cloud over their standing, granting their separate Petition would be neither prudent nor necessary.[7]

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[6] Likewise, the Ninth Circuit case cited by Petitioners, *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002), involved only whether Congress may intervene in a case where the Department *is* defending a statute's constitutionality. *See id.* at 497 & n.2, 500.

[7] Even if any doubt remained as to the House's own standing, it could be addressed simply by granting the House's Petition in No. 12-13 and holding the instant Petition, to be granted only if

III. The Department Operates as a De Facto *Amicus* in This Case and That Status Is Best Accommodated by Granting the House's 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 the statute'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) has sought certiorari in this case and no party has opposed it, the Department's suggestion that this Court should accept its Petition instead 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

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and when the Court determined it was necessary to allow it to decide the case.

Department's Petition here, it presumably will need to 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 judgment below. The Court should grant the House's Petition in No. 12-13, and deny this Petition as well as the various Petitions seeking the extraordinary remedy of certiorari before judgment.

CONCLUSION

For the foregoing reasons, the Department's Petition for a writ of certiorari should be denied. The House's Petition for certiorari in No. 12-13 should be granted.

Respectfully submitted,

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