12-307

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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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.

PARTIES TO THE PROCEEDING

Petitioner, who was a defendant in the district court and is an appellant in the court of appeals, is the United States of America.

Respondent, who was plaintiff in the district court and is an appellee in the court of appeals, is Edith Schlain Windsor.

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened to present arguments in defense of the constitutionality of Section 3 of DOMA.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-22a) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (App., *infra*, 25a-26a, 27a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 30a.

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).

Although 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 programs 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. In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit. App., *infra*, 3a; Am. Compl. ¶¶ 10, 11.

In her capacity as executor of Spyer's estate, plaintiff paid approximately $363,000 in federal estate taxes. She thereafter filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from

a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a). App., *infra*, 3a-4a; Am. Compl. ¶¶ 72-78.

Plaintiff filed this suit challenging the constitutionality of DOMA Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating married same-sex couples in New York differently from opposite-sex couples, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,053 in federal estate taxes paid by Spyer's estate. App., *infra*, 4a; Am. Compl. ¶¶ 82-85.

3. After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 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 if binding precedent in the circuit required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a new examination of the issue after two lawsuits (this one and

[1] 1:10-cv-08435 Docket entry No. 10 (S.D.N.Y. Feb. 25, 2011). Text also available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

Pedersen v. *Office of Personnel Management*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 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 that standard of review and is therefore unconstitutional. *Id.* at 4-5.

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 partici-

pate" 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. 6/2/11 Mem. & Order 1; see App., *infra*, 4a.

Both BLAG and the government moved to dismiss plaintiff's 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 plaintiff's constitutional claim solely for purposes of ensuring that the court had 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 4-27 (Aug. 19, 2011).

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment. App., *infra*, 1a-22a.

As a preliminary matter, the district court rejected BLAG's argument that plaintiff lacks Article III standing because she had failed to prove that New York rec-

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[2] Two of the group's five members declined to support intervention. BLAG Mot. to Intervene 1 n.1 (Apr. 18, 2011).

ognized her marriage in 2009, the relevant tax year, and thus had failed to establish that her injuries were traceable to Section 3 of DOMA. App., *infra*, 6a-8a. The court acknowledged the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1, 6 (2006), which held that New York statutory law "clearly limit-[ing] marriage to opposite-sex couples" was not invalid under the New York Constitution. See App., *infra*, 6a.[3] The district court noted, however, that all three statewide elected officials and every state court to address the issue had concluded that principles of comity require recognition of same-sex marriages performed in other jurisdictions. *Id.* at 6a-7a.

The district court also rejected BLAG's threshold argument that plaintiff's equal protection challenge is foreclosed by this Court's summary dismissal 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). The district court explained that Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," but instead "defines marriage for federal purposes, with the effect of allocating federal rights and benefits." App., *infra*, 9a. The court concluded that *Baker* therefore did not "'necessarily decide[]' the question of whether DOMA vio-

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[3] In 2011, New York passed legislation permitting individuals of the same sex to marry in the State. Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)).

lates the Fifth Amendment's Equal Protection Clause." *Ibid.*

The district court assumed without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review. App., *infra*, 13a. The court also expressed the view that the nature of such review "can vary by context": while "[l]aws such as economic or tax legislation that are scrutinized under rational basis review" will "normally pass constitutional muster," laws that "exhibit[] . . . a desire to harm a politically unpopular group" receive "a more searching form of rational basis review." *Ibid.* (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 579-580 (2003) (O'Connor, J., concurring)).

Without deciding whether "a more 'searching' form of rational basis scrutiny is required," the district court held that Section 3 is invalid under rational basis review. App., *infra*, 14a.[4] 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. App., *infra*, 15a-22a.

The district court first determined that Section 3 does not advance a federal governmental interest in "maintain[ing] the definition of marriage that was uni-

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[4] In its response to plaintiff's certiorari petition in this case, BLAG contends that "the district court adopted a novel standard of constitutional review involving 'intensified scrutiny,' a level of scrutiny between ordinary rational-basis and intermediate scrutiny." BLAG No. 12-63 Br. in Opp. 8-9. That is incorrect. As noted above, the district court held Section 3 invalid under rational-basis review "*[r]egardless* whether a more 'searching' form of rational basis scrutiny is required." App., *infra*, 14a (emphasis added).

versally accepted in American law," App., *infra*, 16a (brackets in original; citation omitted), whether provisionally or otherwise, because it "does not affect the state laws that govern marriage," *ibid.* Nor could the court "discern a logical relationship" between Section 3 and a governmental interest in "[p]romoting the ideal family structure for raising children," *id.* at 18a, since Section 3 has "no effect at all on the types of family structures in which children in this country are raised," *id.* at 19a.

The district court also rejected BLAG's argument that Congress might have enacted Section 3 "to ensure that federal benefits are distributed consistently," without regard to differences between state marriage laws. App., *infra*, 19a-20a. The court reasoned that, although Section 3 is "link[ed]" to that goal, "the means used in this instance intrude upon the states' business of regulating domestic relations" and "therefore cannot be legitimate." *Id.* at 20a.

Finally, the district court concluded that the government's interest in "conserving government resources" alone is insufficient to "'justify the classification used in allocating those resources.'" App., *infra*, 21a-22a (quoting *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982)).

5. Both BLAG and the government filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. App., *infra*, 25a-26a (government notice of appeal); *id.* at 27a-29a (BLAG notice of appeal). The court of appeals has jurisdiction pursuant to 28 U.S.C. 1291. The appeals were docketed as Nos. 12-2335 and 12-2435 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).

6. Plaintiff filed a petition for a writ of certiorari before judgment in this case on July 16, 2012 (No. 12-63), and the government and BLAG filed responses to that petition on August 31, 2012.

REASONS FOR GRANTING THE PETITION

The question of 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),[5] 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). For the reasons explained in those pending petitions, that question warrants this Court's review now.

The Court should hold this petition pending its consideration and disposition of the petitions in *Massachusetts* and *Golinski*. Should the Court grant review in either of those cases, it need not grant review in this case. If the Court concludes that neither *Massachusetts* nor *Golinski* provides an appropriate vehicle for resolving the question presented, it should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court also concludes that *Pedersen* is not an appropriate vehicle, it should grant this petition to ensure a timely and definitive ruling on Section 3's constitutionality.

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[5] 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).

As noted above, the plaintiff in this case has also filed a petition for a writ of certiorari before judgment on Section 3's constitutionality (No. 12-63, filed July 16, 2012), and the plaintiffs in *Pedersen* v. *Office of Personnel Management*, No. 12-231 (filed Aug. 21, 2012), have done so as well. As explained in the government's response to plaintiff's petition in this case (at 15-19), however, her petition raises two threshold questions potentially posing obstacles to this Court's review: (1) whether plaintiff, who obtained a district court judgment and decision entirely in her favor, has appellate standing to seek certiorari before judgment, and (2) whether New York law recognized her Canadian marriage at the time of Thea Spyer's death. As further explained in that response (at 19-20), the government, which plainly is a proper party to invoke this Court's jurisdiction to review the district court's judgment in this case, has filed this petition (as well as one in *Pedersen*) to obviate the Court's need to resolve the first issue if it is inclined to grant review in this case or in *Pedersen*.[6]

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[6] BLAG contends that plaintiff in this case potentially lacks appellate standing by referring to its argument that the government lacks standing to seek this Court's review of the First Circuit's judgment in *Massachusetts*. See BLAG No. 12-63 Br. in Opp. 12 ("What is more, as explained more fully in the House's opposition in No. 12-15, it is not clear that [plaintiff Windsor], who prevailed in the district court, even has appellate standing to petition."). But one critical fact materially distinguishes the government from plaintiff in this case (and from the plaintiffs in the other DOMA cases): the district court's judgment was entered *against* the government, such that the government is *not* a "prevailing party" in the relevant sense. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028-2029 (2011). As the Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), makes clear, "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers

The second potential obstacle in this case is not present in *Massachusetts*, *Golinski*, or *Pedersen*. As the government noted in its response to plaintiff's petition (at 16), "BLAG has identified no reason to believe that the State's highest court would reach a conclusion different from the uniform decisions of its intermediate appellate courts" recognizing foreign same-sex marriages. And as the government further noted (*ibid.*), the Court may conclude that the issue in fact goes to the merits of plaintiff's tax-refund claim rather than to her standing. BLAG itself appears to acknowledge that possibility. See BLAG No. 12-63 Br. in Opp. 19 n.9 (suggesting that validity of plaintiff's foreign marriage is a vehicle problem "whether or not it is critical to [her] standing"). But the Court would at least have to address whether the foreign-marriage issue implicates plaintiff's standing before reaching the merits of Section 3's constitutionality. For that reason, and because the district court in *Pedersen* (unlike the district court in this case) examined the applicability of heightened scrutiny (see *Pedersen* Pet. App. 27a-75a), *Pedersen* would be preferable to this case as a vehicle for resolving the constitutionality of Section 3 in the event the Court does not grant review in *Massachusetts* or *Golinski*.

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is held unconstitutional," it may seek this Court's review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 930-931. Although BLAG points out in its response to the government's petition in *Massachusetts* that Section 3 (unlike the statute at issue in *Chadha*) is not administered by a single agency, that is a distinction without a difference. Indeed, BLAG makes no effort to explain why that distinction could matter. See BLAG No. 12-15 Br. in Opp. 18-19.

CONCLUSION

This petition for a writ of certiorari before judgment should be held pending the Court's consideration and disposition of the petitions in *United States 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), and *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). If the Court determines that neither *Massachusetts* nor *Golinski* provides an appropriate opportunity to decide the question presented, the Court should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court determines that *Pedersen* is not an appropriate vehicle, the Court should grant this petition.

Respectfully submitted.

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