No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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This supplemental brief, filed pursuant to Rule 15.8 of the Rules of this Court, brings to the Court's attention the opinion of the court of appeals in this case, which was issued after the filing of the government's petition for a writ of certiorari before judgment, and addresses its impact on the pending petition.

1. On June 6, 2012, the district court entered summary judgment for plaintiff based on its conclusion that Section 3 of the Defense of Marriage Act (DOMA) violates the equal protection guarantee of the Fifth Amendment. Pet. App. 1a-22a. On September 11, 2012, after both the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) and the government had filed timely notices of appeal to the United States Court of Appeals for the Second Circuit

(Pet. App. 25a-29a), the government filed a petition for a writ of certiorari before judgment in this case.

2. On October 18, 2012, the court of appeals affirmed the district court's judgment. App., *infra*, 1a-83a.

a. At the outset, the court of appeals denied BLAG's motion to strike the government's notice of appeal, rejecting BLAG's argument that the government does not constitute an aggrieved party that can take an appeal. App., *infra*, 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court held that the government is an aggrieved party because "the United States continues to enforce Section 3" and Section 3's constitutionality "will have a considerable impact on many operations of the United States." App., *infra*, 4a-5a.

b. The court of appeals then rejected BLAG's threshold request that it should certify to the New York Court of Appeals the question, which BLAG characterized as implicating plaintiff's standing, whether New York in 2009 recognized same-sex marriages entered into in other jurisdictions. App., *infra*, 5a-7a.[1] Relying on the "useful and unanimous" rulings of New York's intermediate appellate courts on that question, *id.* at 6a, the court of appeals agreed with the district court and concluded that New York recognized such marriages at the relevant time, *id.* at 6a-7a.

c. The court of appeals also rejected BLAG's argument that 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 up-

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[1] In denying plaintiff's refund claim, the Internal Revenue Service relied only on Section 3 of DOMA. It did not identify or address any question of the recognition or validity of plaintiff's marriage under New York law. See No. 12-307 Pet. 4; 1:10-cv-08435 Docket entry No. 31-12, at 7 (June 24, 2011).

holding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, controls plaintiff's equal protection challenge. App., *infra*, 7a-11a. After noting the limited precedential value of summary dismissals, the court of appeals explained that the "question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Id.* at 8a. The court reasoned, moreover, that even if "*Baker* might have had resonance" when it was decided, "it does not today" because of the "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker*. *Id.* at 9a.

d. Turning to the constitutionality of Section 3, the court of appeals noted that "the existence of a rational basis for Section 3 of DOMA is closely argued," App., *infra*, 12a, but concluded that it need not resolve that argument "if heightened scrutiny is available, as it is in this case," *id.* at 14a. In considering the applicable level of scrutiny, the court first looked to whether the class has been subjected to discrimination. *Id.* at 16a-17a. The court found "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Id.* at 16a. "Perhaps the most telling proof of animus and discrimination," the court determined, "is that, for many years and in many states, homosexual conduct was criminal." *Ibid.* The court rejected BLAG's effort to distinguish the history of discrimination against gay and lesbian people from that against racial minorities and women. That "homosexuals as a class have never been politically disenfranchised," the court reasoned, is "not decisive," pointing to this Court's application of heightened scrutiny to classifications based on illegitimacy. *Ibid.* Noting

that "BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s," the court concluded that "[n]inety years of discrimination is entirely sufficient." *Id.* at 17a.

The court of appeals then assessed whether sexual orientation, the distinguishing class characteristic, bears on a typical class member's ability to contribute to society. App., *infra*, 17a-18a. The court reasoned that, while "[t]here are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society," sexual orientation "is not one of them." *Id.* at 18a. In determining that sexual orientation "has nothing to do with aptitude or performance," the court rejected BLAG's argument that "the proper consideration is whether the classification turns on distinguishing characteristics relevant to interests the State has the authority to implement," rather than general ability to contribute to society. *Ibid.* (citation and internal quotation marks omitted). The court concluded that, among other problems, "BLAG cites no precedential application of that standard to support its interpretation, and it is inconsistent with actual cases." *Ibid.*

Next, the court of appeals examined the discernability of sexual orientation, App., *infra*, 19a-21a, determining that "what matters here is whether the characteristic invites discrimination when it is manifest," *id.* at 21a. The court rejected the characterization of this factor as one of "immutability," finding that "the test is broader." *Id.* at 19a-20a. Analogizing to classifications based on alienage, illegitimacy, and national origin, *id.* at 19a-21a, the court concluded that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals," *id.* at 21a.

Finally, the court of appeals evaluated the political power of gay and lesbian people. App., *infra*, 21a-23a. The court acknowledged that "homosexuals have achieved political successes over the years," but determined that the "question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id.* at 21a. Pointing to "the seemingly small number of acknowledged homosexuals" in positions of power, among other evidence, *id.* at 22a, the court concluded that gay and lesbian people cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public," *id.* at 23a.

Based "on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court concluded that "the class is quasi-suspect (rather than suspect)," and that laws drawing distinctions on the basis of sexual orientation are thus subject to intermediate scrutiny. App., *infra*, 23a.

e. The court of appeals then held that Section 3 of DOMA fails under intermediate scrutiny. App., *infra*, 23a-31a. The court concluded that the purposes that BLAG advanced in support of Section 3 do not bear a substantial relationship to an important governmental objective, *id.* at 24a-30a, noting that "BLAG's counsel all but conceded [at argument] that these reasons for enacting DOMA may not withstand intermediate scrutiny," *id.* at 24a.

The court first determined that an asserted interest in "maintaining a consistent federal definition of marriage" cannot withstand intermediate scrutiny. App., *infra*, 24a. The court explained that, among other problems, "DOMA's sweep arguably creates more discord and anomaly than uniformity"; "[b]ecause DOMA defined only a single aspect of domestic relations law, it

left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity." *Id.* at 25a. Nor could the court discern a substantial relationship between Section 3 and the interest in "sav[ing] government resources." *Id.* at 26a. "DOMA is so broad," the court concluded, *id.* at 27a, that it "transcends a legislative intent to conserve public resources," *id.* at 28a. And while "[f]iscal prudence is undoubtedly an important government interest," *id.* at 27a, the court noted, the "saving of welfare costs cannot justify an otherwise invidious classification," *ibid.* (quoting *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971)).

Turning to the asserted interest in "preserving traditional marriage as an institution," App., *infra*, 28a, the court explained that the "ancient lineage of a legal concept does not give a law immunity from attack," *ibid.* (quoting *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) (brackets omitted)). The court concluded, moreover, that "[e]ven if preserving tradition were in itself an important goal, DOMA is not a means to achieve it"; "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, preserve the institution of marriage as one between a man and a woman." *Id.* at 29a (citation and internal quotation marks omitted). Finally, the court determined that Section 3 does not advance an interest in the "encouragement of responsible procreation and child-rearing," *id.* at 30a, because "DOMA does not affect in any way" the incentives for opposite-sex couples to engage in such procreation and child-rearing, *id.* at 29a. "Incentives for opposite-sex couples to marry and procreate (or not)," the court concluded, "were the same after DOMA was enacted as they were before." *Id.* at 30a.

f. Judge Straub dissented in part. While he concurred with the parts of the court's opinion denying BLAG's motion to dismiss the government's appeal and declining to certify to the New York Court of Appeals the marriage-recognition issue, App., *infra*, 31a, he would have held that *Baker*, *supra*, forecloses petitioner's equal protection challenge, *id.* at 40a-48a. Even if *Baker* did not control, Judge Straub would have applied rational basis scrutiny and held that Section 3 is constitutional under that standard of review. *Id.* at 48a-83a.

3. Although the government initially recommended that its petition be held pending the consideration of petitions in other cases raising the same issue, the court of appeals' decision materially strengthens this case as a vehicle for resolving the constitutionality of Section 3 of DOMA. In its brief in opposition to the government's petition, BLAG raised three main vehicle objections: (1) that the grant of a petition for certiorari before judgment is "an extremely rare occurrence" (No. 12-307 Br. in Opp. 14 (citation omitted)); (2) that plaintiff's standing turns on an unresolved question of State law (*id.* at 18-20); and (3) that the government's "appellate standing" is unclear (*id.* at 21-25). The decision below eliminates or substantially mitigates all three objections.

First, and most obviously, as a result of the court of appeals' decision, this case is no longer one in which this Court is faced with the decision whether to grant certiorari before judgment. As explained below (pp. 9-10, *infra*), the Court, consistent with past practice, can now consider the present petition as one for certiorari after judgment and, if it were to grant the petition, review the judgment of the court of appeals.

Second, after finding New York law sufficiently clear to resolve the issue directly rather than requiring certi-

fication to the New York Court of Appeals, the court of appeals unanimously held—consistent with the "useful and unanimous" rulings of New York's intermediate appellate courts—that New York law recognized plaintiff's foreign marriage at the relevant time. App., *infra*, 5a-7a; *id.* at 31a (Straub, J., dissenting). The district court had reached the same conclusion. Pet. App. 6a-8a. As this Court has repeatedly explained, the Court generally "accept[s] the interpretation of state law in which the District Court and Court of Appeals have concurred," and indeed, does so "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976).[2] Accordingly, the court of appeals' resolution of the state-law marriage-recognition issue in plaintiff's favor eliminates any potential vehicle concerns that a contrary conclusion might have raised.

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[2] See also, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004) (noting this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"); *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.") (quoting *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949)); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 629-630 (1946) ("On such questions [of local law] we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.'") (quoting *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (per curiam)); *MacGregor* v. *State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) ("In the absence of [state court] guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.").

Third, citing *Chadha*, *supra*, the court of appeals rejected BLAG's contention that the government lacked standing to appeal the district court's judgment holding that Section 3 violates equal protection. App., *infra*, 4a-5a. The decision below thus reinforces the government's reliance on *Chadha* to seek the Court's review in this case and in other cases in which Section 3 has been held unconstitutional. See No. 12-307 Pet. 11 n.6.

4. Although the government's petition in this case was filed as one for certiorari before judgment, the issuance of the court of appeals' intervening decision does not deprive the Court of the authority to grant it. If granted, the writ of certiorari would still be directed to the court of appeals, and this Court could still exercise jurisdiction pursuant to 28 U.S.C. 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court by * * * writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."). This Court's rules do not establish any additional requirements, other than inclusion of the court of appeals' opinion (attached as an Appendix to this brief), for a petition for a writ of certiorari after judgment. See Sup. Ct. R. 10-16.

The Court's authority to grant this petition is consistent with the course of proceedings in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the most analogous example of which the government is aware. In *General Electric*, the parties jointly petitioned for a writ of certiorari before judgment. Before the Court considered that petition, however, the court of appeals rendered an opinion and judgment in the case. The parties then jointly filed a "Supplemental Brief of All Parties," to which they attached a copy of the court of appeals' opinion and judgment. See Supp. Br. of All Parties to

Joint Pet. for a Writ of Cert. to the U.S. Ct. of Appeals for the Fourth Circuit, App. F & G, Nos. 74-1589 and 74-1590, *General Elec.*, *supra*. That brief stated that "[t]he fact that the court of appeals has now issued a judgment * * * does not render the petition for certiorari herein either moot or less viable," and reaffirmed the request that certiorari be granted. *Id.* at 2-3. The Court granted certiorari, 423 U.S. 822 (1975), and reviewed the court of appeals' decision, ultimately reversing the judgment of the court of appeals, 429 U.S. at 128, 146. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 86 n.28 (9th ed. 2007) (discussing certiorari procedure in *General Electric*). Here, the Court should likewise grant the petition for a writ of certiorari and review the court of appeals' decision.

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For the foregoing reasons, the petition for a writ of certiorari in this case should be granted. Although *Department of Health and Human Services* v. *Massachusetts*, petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), is also a case in which a court of appeals has rendered a decision, this case now provides the most appropriate vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in *Massachusetts* was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals here was not so constrained, and its analysis may be beneficial to this Court's consideration of that issue.

In the event the Court grants review in this case, it should hold the petitions in *Massachusetts* pending final

resolution on the merits. In the event the Court decides that neither case provides an appropriate vehicle, it should grant the government's petition for a writ of certiorari before judgment in either *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management* v. *Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

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