NOS. 12-63 & 12-307

In the Supreme Court of the United States

EDITH SCHLAIN WINDSOR,
Petitioner,
v.
THE UNITED STATES OF AMERICA
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents;

THE UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

KERRY B. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, DC 20515
(202) 225-9700

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondents

(Counsel continued on inside cover)

CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
ELENI M. ROUMEL
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF
REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, DC 20515
(202) 225-9700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUPPLEMENTAL BRIEF

The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") submits this Supplemental Brief regarding the Second Circuit's divided decision in *Windsor v. United States*, Nos. 12-2335 & 12-2435, 2012 WL 4937310 (2d Cir. Oct. 18, 2012), and the Supplemental Brief for the United States in No. 12-307.[1]

While this case was pending in the Second Circuit, Ms. Windsor and the United States filed Petitions for Certiorari Before Judgment in Nos. 12-63 and 12-307, respectively. The House opposed both Petitions, explaining why *Windsor* was a particularly problematic vehicle for reviewing the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"). The Second Circuit's decision does not change these vehicle problems.

Although the United States previously recognized that *Windsor* was the worst of the potential vehicles for this Court's review of DOMA, *see* Pet. in No. 12-307 at 13, it now claims that the Second Circuit's decision "materially strengthens this case as a vehicle." U.S. Supp. Br. 7. The United States was correct the first time. Indeed, the Second Circuit's

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[1] The Bipartisan Legal Advisory Group 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 Democratic Whip decline to support the Group's position on the merits of DOMA Section 3's constitutionality.

decision only underscores that in *Windsor*, alone among all possible vehicles for review, the plaintiff's standing depends critically on a state-law issue. It also exacerbates the appellate-standing problems with both Petitions and introduces a procedural wrinkle—the need to convert a pre-judgment Rule 11 petition into a post-judgment petition, something this Court has not done since 1976, and even then in quite different circumstances.

There is no need for such machinations when the same constitutional issue is cleanly presented in an after-judgment petition filed by the party with clear appellate standing, *i.e.*, the House's Petition in No. 12-13. If this Court is inclined to bypass that decidedly superior vehicle, then the House respectfully suggests that *Golinski*, not *Windsor*, provides the better vehicle. *Golinski*, along with *Gill*, is the only case with no question concerning the plaintiff's standing that could distract the Court from the important question of DOMA's constitutionality.

The Second Circuit's Decision

Standing

The Second Circuit recognized that Ms. Windsor's standing turned on an issue of New York law. It acknowledged that, "[a]t the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself" and therefore "*decisive for standing in this case*" is "whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions." 2d Cir. Slip. Op. ("Op.") 12–13 (emphasis added). The Second Circuit denied the House's request to certify this sensitive question of

New York law to the New York Court of Appeals based largely on its observation that "the Court of Appeals has signaled its disinclination to decide this very question" in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Op. 13. Instead, the panel predicted that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death." *Id*. at 15. It based that prediction on three New York lower-court rulings, two of which were available to the *Godfrey* court. Op. 14–15.

The Merits

Turning to the merits, the panel majority recognized that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection." Op. 10. Yet it concluded that "*Baker* has no bearing on this case," because DOMA is a federal law. Op. 20. It also suggested that *Baker* is no longer binding precedent. Op. 17–19.

The panel majority explained that "a party urging the absence of any rational basis takes up a heavy load" and "[t]hat would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress" and "the definition of marriage it affirms has been long-supported and encouraged." Op. 21–22. It did not dispute Judge Straub's conclusion that DOMA is rational. Op. 23 ("We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review."). It also declined to apply "rational basis plus" like "the district court in this case and the First Circuit" because this Court "has not expressly sanctioned

such modulation in the level of rational basis review." Op. 22.

The panel majority ultimately determined—in express conflict with eleven other Circuits—that intermediate scrutiny applies to sexual-orientation classifications. It found that the factors this Court has looked to in applying heightened scrutiny justified treating sexual orientation as a "quasi-suspect" classification. Finally, the panel majority concluded that Section 3 of DOMA could not survive heightened scrutiny.

Judge Straub's Dissent

Judge Straub "dissent[ed] from the majority's holding that DOMA is unconstitutional under the Fifth Amendment's equal protection guarantee." Dissenting Op. ("Dissent") 1.

Judge Straub explained that *Baker v. Nelson* is both binding and controlling. Dissent 8–13. "Since *Baker* holds that states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection." Dissent 12.

Judge Straub concluded that, even apart from *Baker*, DOMA satisfies rational basis review. Dissent 17–35; *id*. at 19 ("DOMA advances the governmental interest in connecting marriage to biological procreation"), 35 ("DOMA rationally serves the legitimate government interest in maintaining the status quo of the definition of marriage pending evolution of the issue in the states.").

Judge Straub also rejected the majority's conclusion that DOMA triggers heightened scrutiny. Dissent 35–40. He pointed out that this Court in *Romer v. Evans*, 517 U.S. 620 (1996), and eleven federal circuit courts, have declined to apply heightened scrutiny to sexual-orientation classifications. Dissent 36–37. He warned that heightened scrutiny and "[t]he majority's holding that DOMA's definition of marriage as between a man and a woman is unconstitutional will doubtless be used to invalidate the laws of th[e] forty-one states" that use that definition. Dissent 24 n.7. Finally, Judge Straub underscored that the definition of marriage is "an issue for the American people and their elected representatives to settle through the democratic process. Courts should not intervene where there is a robust political debate * * * as we can intervene in this robust debate only to cut it short." Dissent 40.

ARGUMENT

I. The Second Circuit's Decision Confirms the Need for This Court to Review DOMA's Constitutionality.

The Second Circuit's decision confirms beyond all doubt that this Court should review DOMA's constitutionality, with the only disputed question being the proper vehicle (or vehicles) for this Court's review. The Second Circuit has now joined the First Circuit in declaring DOMA unconstitutional, and has opened an express conflict with eleven other Circuits as to the proper standard for reviewing sexual-orientation classifications. Moreover, the Second Circuit disagrees with the First Circuit as to both the continuing vitality of *Baker v. Nelson* and

the First Circuit's decision to apply "rational basis plus." The case for this Court's review, which was always strong, has become overwhelming.

II. The Second Circuit's Decision Underscores the Difficulties of *Windsor* as a Vehicle for this Court's Review.

The Justice Department previously recognized that, of the various potential vehicles for this Court's review, this case—via either Ms. Windsor's Petition in No. 12-63 or the Department's Petition in No. 12-307 (the last of all the DOMA Petitions filed)—was the most problematic. *See* Pet. in No. 12-307 at 13. Like the *Pedersen* case, *Windsor* features a standing issue that could distract this Court from the issue of DOMA's constitutionality. But unlike *Pedersen*, the standing issue here affects the only plaintiff in the case (and thus this Court's jurisdiction) and turns on state, rather than federal, law. The Department has now done an about-face and suggests that the Second Circuit's decision changes everything and makes *Windsor* the best vehicle for this Court's review. The Department was correct the first time, as the Second Circuit's decision only underscores the vehicle difficulties in *Windsor*.

First, the Second Circuit recognized that the state-law status of Ms. Windsor's foreign marriage certificate, issued when New York did not recognize same-sex marriage, was "*decisive for standing in this case*." Op. 12–13 (emphasis added). While the Department gives short shrift to this aspect of the Second Circuit's decision and glibly labels this state-law issue as one the House "characterize[s] as implicating plaintiff's standing," U.S. Supp. Br. 2, the Second Circuit clearly viewed this issue as

"decisive" for Article III jurisdiction. The District Court took the same view. Pet. in No. 12-307, Appendix 6a. Thus, there is nothing idiosyncratic about the House's view that this state-law issue goes to the heart of Ms. Windsor's standing and this Court's jurisdiction. Both courts to review the question have agreed that this state-law issue determines Ms. Windsor's standing.

To be sure, both courts have also resolved the state-law issue in favor of Ms. Windsor's standing. But here too the Second Circuit's decision underscores that this state-law question is not free from doubt. The Second Circuit declined to certify the question not because the answer would be obvious, but out of comity because the New York Court of Appeals had gone out of its way not to decide the issue in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Recognizing that "the Court of Appeals has signaled its disinclination to decide this very question," the Second Circuit concluded that New York's high court would not welcome a federal-court invitation to do so. Whether or not that conclusion was correct, the fact that the New York Court of Appeals went out of its way to avoid this issue in November 2009—nine months after Ms. Spyer's passing—makes clear that this state-law issue is hardly free from doubt.

The Justice Department nonetheless suggests that this Court may ignore this state-law issue because two lower courts resolved it in Ms. Windsor's favor. The Department correctly notes (U.S. Supp. Br. 8 n.2) this Court's "custom" on state-law questions to defer to the interpretation of the Court of Appeals for the Circuit in which the state is located. But that

"custom" cannot possibly trump this Court's responsibility to ensure for itself that it has Article III jurisdiction and that the plaintiff has standing. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists").[2] For this reason, it is not surprising that none of the cases the Department invokes for this "custom" involved a question of state law that is "decisive for standing." Op. 13. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16-18 (2004) (holding that respondent lacked prudential standing despite Ninth Circuit's contrary conclusion based on construction of California family law).

At this stage, the ultimate resolution of the underlying state-law question (which seems close) and the question whether this Court is free to ignore a state-law question that is decisive to its Article III jurisdiction (which does not seem close) is not

[2] Even outside the standing context, this custom of deference "is not ironclad" as this Court "surely ha[s] the authority to differ with the lower federal courts" on state-law questions, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985), and has done so on numerous occasions. *E.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005) (declining to defer to Tenth Circuit on question of Colorado law); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (per curiam) ("Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases, not a belief that the courts of appeals have some natural advantage in this domain." (internal citations omitted)); *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (certifying state-law question to Maryland Court of Appeals despite identical holdings of Fourth Circuit and federal district court in Maryland).

critical. What is critical—indeed, dispositive—is that these questions arise uniquely in this case and could only distract this Court from the important question concerning DOMA's constitutionality. If *Windsor* were the only vehicle for this Court's review, the presence of these side issues might not be fatal, but in light of the alternative vehicles, including the House's Petition in No. 12-13, there is no reason to invite these distractions by granting either of the *Windsor* Petitions.

Second, the panel majority's acceptance of Ms. Windsor's and the Department's arguments only exacerbates the problems with their appellate standing. As the House has previously noted, *see* Br. in Opp. 16–20, No. 12-15, "[a]s a matter of practice and prudence," this Court "generally decline[s] to consider cases at the request of a prevailing party. *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (citing cases). *See also California v. Rooney*, 483 U.S. 307, 310-311 (1987) (per curiam) (writ of certiorari dismissed as improvidently granted where the judgment below "was entirely in [petitioner]'s favor" and thus it was not appropriate "for the prevailing party to request us to review it"). While there is some question whether these principles are fully applicable in the certiorari-before-judgment context, there is no question that they apply squarely to petitions by parties whose arguments prevailed in the courts of appeals. At a minimum, granting either *Windsor* Petition would require realigning the parties to allow the House to file an opening and reply brief. But it would also force the Court to confront the question of why normal rules of

appellate standing are inapplicable here.[3] None of that would be necessary if the Court granted the House's Petition in No. 12-13.

Third, the intervening Second Circuit decision creates a procedural wrinkle for the Petitions in Nos. 12-63 and 12-307, both of which were filed as extraordinary Rule 11 petitions for certiorari before judgment. Accepting either Petition would require procedural machinations that this Court has not employed for over thirty-five years. By contrast, accepting the House's Petition in No. 12-13 would allow this Court to employ the good old-fashioned process of accepting a Petition actually filed after judgment, as it does seventy or more times a Term.

The Department proposes that this Court ignore the fact that its Petition was filed long before the Second Circuit's decision and asks this Court to "consider the present petition as one for certiorari after judgment." U.S. Supp. Br. 7. The Department has searched the Court's records and unearthed exactly one prior instance of such a transformation, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But that case involved a very different situation. "All of the parties to the suit joined in petitioning for a writ of certiorari." *Id.* at 127 n.1. This Court treated the two petitions for certiorari as "a joint petition." *Id.* at 133 n.12. But here, the House—the only party that did not prevail in the Second

[3] Additionally, it would require this Court to confront the question whether the executive branch may petition when it abandons the defense of a statute and operates as only a "nominal defendant," to borrow the Second Circuit's phrase. Op. 11. *See* House Opp. 21–25, No. 12-307. Granting the House's Petition in No. 12-13 would avoid this question as well.

Circuit—has not petitioned for certiorari in *Windsor* (either before or after judgment), and does not join either Petition. This is no small difference. In *General Electric*, although both General Electric and Gilbert were petitioners, they "agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument." *Id*. at 127 n.1. Here, by contrast, the only party that disagrees with the decision below and can fill the top-side role in this case—the House—has not petitioned.

But even if *General Electric* can be extended to this quite different context, there remains the burning question of why it would be necessary or prudent to engage in such extraordinary machinations when the House's Petition in No. 12-13 would allow this Court to review the exact same issue in the ordinary course. Indeed, despite the Department's apparent conclusion that *Windsor* is a superior vehicle to *Gill* for this Court's review, the Department's supplemental brief never advances any persuasive reason why this is so. The fact that *Gill* applied a form of rational basis review—the dominant view in the courts of appeal—is hardly problematic. And no matter which case this Court grants, the parties will be able to cite the analysis of the majority and dissent in *Windsor*. In the Department's view, the Second Circuit's decision alone seems to have transformed *Windsor* from worst to first as a vehicle for this Court's review. That is mystifying. If the existence of a circuit court decision is the most important criterion for Supreme Court review, then that only underscores the attractiveness of *Gill* as a vehicle.

In all events, if for some reason this Court is disinclined to grant plenary review in *Gill*, the House respectfully suggests that the Department's Petition in *Golinski* is the best of the remaining vehicles. Alone among the non-*Gill* DOMA petitions, *Golinski* presents no question concerning the plaintiff's standing. Moreover, although *Golinski*, like every Petition besides the House's in No. 12-13, presents an appellate-standing issue, it does so in the arguably distinguishable certiorari-before-judgment context. Thus, of the remaining vehicles, *Golinski* provides this Court with the best opportunity to focus on the critical issue that all agree merits this Court's review—DOMA's constitutionality.

CONCLUSION

The Petitions in Nos. 12-63 and 12-307 should be denied. The House's *Gill* Petition, No. 12-13, should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
ELENI M. ROUMEL
Assistant Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

Counsel for Respondent
The Bipartisan Legal Advisory
Group of the United States
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