

No. 12-13

In The
Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

NANCY GILL, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

REPLY BRIEF FOR PETITIONER

KERRY W. KIRCHER <i>General Counsel</i>	PAUL D. CLEMENT <i>Counsel of Record</i>
WILLIAM PITTARD <i>Deputy General Counsel</i>	H. CHRISTOPHER BARTOLOMUCCI
CHRISTINE DAVENPORT <i>Senior Assistant Counsel</i>	NICHOLAS J. NELSON
TODD B. TATELMAN	BANCROFT PLLC
MARY BETH WALKER <i>Assistant Counsels</i>	1919 M Street, N.W.
OFFICE OF GENERAL COUNSEL	Suite 470
U.S. HOUSE OF REPRESENTATIVES	Washington, D.C. 20036
219 Cannon House Office Bldg.	(202) 234-0090
Washington, D.C. 20515	pclement@bancroftpllc.com
(202) 225-9700	

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
1. <i>The House’s Petition for Certiorari, No. 12-13</i>	2
2. <i>The Department’s Petition, No. 12-15</i>	3
3. <i>Massachusetts’ Conditional Cross-Petition, No. 12-97</i>	4
4. <i>The Department’s Petition for Certiorari Before Judgment in OPM v. Golinski, No. 12-16</i>	4
5. <i>The Individual Plaintiff’s Petition for Certiorari Before Judgment in Windsor v. United States, No. 12-63</i>	5
6. <i>The Individual Plaintiffs’ Petition for Certiorari Before Judgment in Pedersen v. OPM, No. 12-231</i>	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>Chadha v. INS</i> , 462 U.S. 919 (1983)	3
<i>Golinski v. U.S. OPM</i> , 824 F. Supp. 2d 968 (N.D. Cal. 2012)	4
<i>Massachusetts v. U.S. Department of Health and Human Services</i> , 682 F.3d 1 (1st Cir. 2012).....	2
<i>Pedersen v. OPM</i> , No. 10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).....	7
<i>Windsor v. United States</i> , 833 F. Supp. 2d 394 (S.D.N.Y. 2012)	5

Rule

S. Ct. R. 11.....	5
-------------------	---

Other Authorities

House’s Br. in Opp., <i>Windsor v. United States</i> , No. 12-63 (Aug. 31, 2012).....	6
House’s Br. in Opp., <i>OPM v. Golinski</i> , No. 12-16 (Aug. 31, 2012).....	5

REPLY BRIEF FOR PETITIONER

The Petition filed in this case by the Bipartisan Legal Advisory Group of the U.S. House of Representatives (“the House”) squarely presents a single important question that manifestly merits this Court’s review—namely, whether Section 3 of the Defense of Marriage Act (“DOMA”) comports with constitutional equal protection principles. Every party to this case agrees that this question merits plenary review. The only question is which petition or petitions this Court should grant to review this surpassingly important question. The House’s Petition in No. 12-13 unleashed a veritable torrent of subsequently-filed petitions, five at current count with more promised. Most of those petitions were extraordinary requests for certiorari before judgment, and all were filed by parties who prevailed in the lower courts. The House’s first-filed Petition in No. 12-13 is an ideal vehicle for addressing DOMA’s constitutionality. It is a Petition filed after judgment by the party whose arguments failed to persuade the Court of Appeals.

There is no need for the Court to look further and reach for another petition in an unusual posture, filed by a prevailing party, or both. Doing so only would complicate needlessly this Court’s review of DOMA’s constitutionality because the question of DOMA’s constitutionality does not turn on the facts of a particular case. Moreover, as the House has explained in its other filings, each of the other DOMA petitions presents one or more vehicle problems that do not encumber the House’s petition. The proper course here is also the most

straightforward course: The Court should simply grant the House's Petition.

1. The House's Petition for Certiorari, No. 12-13

The House's Petition seeks review of the First Circuit's judgment in *Massachusetts v. United States Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012). No party opposes the House's Petition. Massachusetts and the individual plaintiffs acquiesced in the grant of certiorari. See Resp. of Commw. of Mass. in Supp. of Cert. 27, Nos. 12-13 & 12-15 (July 20, 2012); Br. in Resp. of Nancy Gill *et al.* 39, Nos. 12-13 & 12-15 (Aug. 2, 2012). The Department did not oppose or respond to the House's Petition.

Of all the DOMA petitions before this Court, the House's Petition is the only one filed by the party whose arguments failed to persuade the lower courts. It thus is the only petition that would facilitate this Court's review by allowing the losing party the traditional benefit of an opening and reply brief. It is also the only petition that reflects the true alignment of parties in DOMA litigation. The House—the only party defending DOMA's constitutionality and the only party aggrieved by the judgment below—is the Petitioner in No. 12-13. The Department, Massachusetts, and the individual plaintiffs—all of whom contend that DOMA is unconstitutional and sought the judgment below—are the Respondents. While other petitions would require a post-grant realignment of the parties to reflect the reality that only the House defends DOMA, the House's Petition already reflects that reality. In short, the House's Petition is the ideal and traditional vehicle for this Court's review: A

petition filed after judgment by the party whose arguments failed to persuade the Court of Appeals.

2. The Department's Petition, No. 12-15

The Department's Petition in No. 12-15 also seeks review of the First Circuit's judgment. But the Department's Petition does not present any issue for this Court's review that is not better presented in the House's Petition. *See* House's Br. in Opp. 15, No. 12-15 (Aug. 31, 2012). Thus, the Department's Petition is unnecessary.

Furthermore, because the Department received all the relief it sought from the First Circuit, it is far from clear that the Department has standing to seek review of that judgment, and granting the Department's Petition would require the Court to decide that question. *See id.* at 16-20. In contrast, this Court has made clear that the House is "both a proper party * * * and a proper petitioner" in a case such as this one. *Chadha v. INS*, 462 U.S. 919, 939 (1983). *See* House's Br. in Opp. 20-23, No. 12-15.

Granting the Department's Petition would also needlessly complicate the proceedings because it would leave parties attacking DOMA on both sides of the "v." in this Court—a situation that would have to be remedied by realigning them to the precise positions where they already are in the House's Petition. *See id.* at 24-25. Since the Department is essentially acting as an *amicus curiae* supporting DOMA's challengers, it would make little sense to invite these procedural complications by granting its superfluous and problematic Petition. *See id.*

3. *Massachusetts' Conditional Cross-Petition, No. 12-97*

Massachusetts' Conditional Cross-Petition, No. 12-97, presents two questions: Whether Section 3 of DOMA "violates the Tenth Amendment" and whether it "violates the Spending Clause." Cond. Cross-Pet. for Cert. i, No. 12-97 (July 20, 2012). The First Circuit rejected both claims. *See* Pet. App. 15a-17a, No. 12-13.

There is no need to grant the Conditional Cross-Petition because Massachusetts is free to raise its federalism arguments as alternative grounds for affirming the judgment below. *See* House's Br. in Opp., No. 12-97 (Aug. 23, 2012). Granting the Cross-Petition would only lead to excessive briefing on the federalism claims that the First Circuit rejected, and distract from the equal protection claim that the court below accepted.

4. *The Department's Petition for Certiorari Before Judgment in OPM v. Golinski, No. 12-16*

The Department also seeks certiorari before judgment in No. 12-16, a case in which a federal district judge declared DOMA unconstitutional. *See Golinski v. U.S. OPM*, 824 F. Supp. 2d 968 (N.D. Cal. 2012). The House has appealed the *Golinski* decision, and its appeal is pending in the Ninth Circuit.

The Department's Petition for Certiorari Before Judgment in *Golinski* presents the same question regarding DOMA's constitutionality presented by the House's Petition in No. 12-13 (and the Department's Petition in No. 12-15). The *Golinski* Petition is thus

wholly superfluous. See House's Br. in Opp. 16-17, No. 12-16 (Aug. 31, 2012). Furthermore, the Department has not come close to carrying the heavy burden of showing that granting certiorari before judgment in *Golinski* "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. See House's Br. in Opp. 17-19, No. 12-16.

The *Golinski* Petition also presents the same vehicle problem as the Department's Petition in the First Circuit case, No. 12-15: The district court granted the relief the Department had sought (*i.e.*, a judgment that DOMA is unconstitutional), and thus granting the *Golinski* Petition would require this Court to decide whether the Department has appellate standing. See House's Br. in Opp. 16-20, No. 12-15; House's Br. in Opp. 20, No. 12-16. And, in all events, because the Department's arguments persuaded the District Court, granting that Petition would also require this Court to re-align the parties for purposes of briefing and argument.

*5. The Individual Plaintiff's Petition for
Certiorari Before Judgment in Windsor v.
United States, No. 12-63*

Once the Department took the extraordinary step of seeking certiorari before judgment in *Golinski*, private parties, including the individual plaintiff in *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), followed suit.

There is no reason to grant the Petition for Certiorari Before Judgment in *Windsor*, No. 12-63, as it presents the same question presented by the

House's Petition. *See* House's Br. in Opp. 13-14, No. 12-63 (Aug. 31, 2012). There are, however, good reasons to prefer the House Petition over the *Windsor* Petition: Like the Department's Petition in *Golinski*, the *Windsor* Petition does not come close to meeting the demanding standard for certiorari before judgment set by this Court's Rule 11. *See id.* at 16-18, 24-26. And in common with all the DOMA petitions filed by prevailing parties, *i.e.*, all the petitions except for the House's petition: (1) Ms. Windsor's appellate standing to seek review of the district court's favorable decision is at least questionable; and (2) granting the *Windsor* Petition would require the Court to re-align the parties for briefing and argument.

In addition, the *Windsor* Petition is uniquely problematic in that Ms. Windsor's standing turns on a sensitive question of New York state law that has been expressly reserved by the New York Court of Appeals, and granting certiorari before judgment would bypass the first court with authority to certify that question to New York's highest court. *See id.* at 18-23. There is no reason to inject that state-law question into this Court's consideration of DOMA's constitutionality when the House's Petition does not raise any analogous difficulty.

*6. The Individual Plaintiffs' Petition for
Certiorari Before Judgment in Pedersen v.
OPM, No. 12-231*

Like the *Golinski* and *Windsor* Petitions, the Petition in No. 12-231 seeks certiorari before judgment following a district court decision declaring DOMA unconstitutional. *See Pedersen v. OPM*, No.

10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012). The *Pedersen* Petition was filed on August 21, 2012, by the individual plaintiffs in that case; the House's brief in opposition is forthcoming. But the reasons to prefer the House's Petition to this Petition for Certiorari Before Judgment by the party who prevailed in the district court are familiar and obvious.

The *Pedersen* plaintiffs offer no serious reason why certiorari before judgment is necessary when they seek to present the exact same issue as the House's Petition in this case. Moreover, as the *Pedersen* plaintiffs also seek to replicate the district court's judgment in their favor, their Petition raises the same problems regarding appellate standing that are present in the other petitions, as well as the issues of party alignment that granting the House's Petition would avoid. The House intends to oppose the *Pedersen* Petition.

* * *

In the final analysis, the reasons for this Court to grant the House's Petition are straightforward and compelling. While everyone agrees that the question of DOMA's constitutionality merits this Court's review and there are multiple petitions presenting this question, only one arises in the traditional posture of a petition filed after judgment in the court of appeals, by the party aggrieved by that judgment. There are sound reasons why this is the posture historically favored by this Court. A petition filed after judgment ensures that the issues are fully explored below and that this Court has the benefit of the court of appeals' considered judgment. Granting the petition filed by the party who failed to persuade

the court below ensures a proper alignment of the parties and the optimal briefing structure—an opening brief to address the unfavorable decision below and a reply to address the arguments in support of the judgment below. The proper course here is both the straightforward and traditional one: This Court should grant the House Petition and that Petition alone.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the House's Petition for a Writ of Certiorari, No. 12-13, should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
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
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 Petitioner

September 11, 2012