

No. 12-16

---

IN THE  
**Supreme Court of the United States**

---

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,  
PETITIONERS,

v.

KAREN GOLINSKI,  
RESPONDENT.

---

On Petition for a Writ of Certiorari  
Before Judgment to the United States  
Court of Appeals for the Ninth Circuit

---

**BRIEF OF THE RESPONDENT IN SUPPORT  
OF PETITION FOR CERTIORARI BEFORE  
JUDGMENT**

---

JON W. DAVIDSON  
*Counsel of Record*

SUSAN L. SOMMER

TARA L. BORELLI

SHELBI D. DAY

IVAN ESPINOZA-MADRIGAL

Lambda Legal Defense and  
Education Fund, Inc.

3325 Wilshire Blvd., Ste. 1300

Los Angeles, CA 90010

(213) 382-7600

jdavidson@lambdalegal.org

JAMES R. MCGUIRE

GREGORY P. DRESSER

RITA F. LIN

AARON D. JONES

Morrison & Foerster  
LLP

425 Market Street  
San Francisco, CA

94105

(415) 268-7000

jmcguire@mfo.com

*Attorneys for Respondent*

---

**TABLE OF CONTENTS**

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	1
CONCLUSION .....	8

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Bolling v. Sharpe</i> 347 U.S. 497 (1954) .....	7
<i>Brown v. Bd. of Educ.</i> 344 U.S. 1 (1952) .....	7
<i>Dames &amp; Moore v. Regan</i> 453 U.S. 654 (1981) .....	6
<i>Fields v. Palmdale Sch. Dist.</i> 427 F.3d 1197 (9th Cir. 2005) .....	3
<i>Gratz v. Bollinger</i> 539 U.S. 244 (2003) .....	7
<i>Grutter v. Bollinger</i> 539 U.S. 306 (2003) .....	7
<i>Mistretta v. United States</i> 488 U.S. 361 (1989) .....	6
<i>Norman v. Baltimore &amp; Ohio R.R. Co.</i> 294 U.S. 240 (1935) .....	7
<i>R.R. Ret. Bd. v. Alton R.R. Co.</i> 295 U.S. 330 (1935) .....	7
<i>Reid v. Covert</i> 354 U.S. 1 (1957) .....	6-7

<i>Romer v. Evans</i> 517 U.S. 620 (1996) .....	4
<i>Strauss v. Horton</i> 207 P.3d 48 (2009) .....	1
<i>United States v. Booker</i> 543 U.S. 220 (2005) .....	6

### Statutes

1 U.S.C. § 7 .....	passim
28 U.S.C. § 1254(1) .....	6, 7
28 U.S.C. § 2101(e) .....	6, 7
110 Stat. 2419 .....	2

### Other Authorities

<i>Bipartisan Legal Advisory Group of the House of Representatives v. Gill</i> No. 12-13 (filed June 29, 2012) .....	7
<i>Dep't of Health &amp; Human Servs. v. Massachusetts</i> No. 12-15 (filed July 3, 2012) .....	7
Plaintiff-Appellee's Brief, <i>Golinski v. Office of Personnel Management</i> , et al. (July 3, 2012) (No. 12-15388, Docket No. 85) .....	3
Supreme Court Rule 11 .....	6, 7

U.S. Census Bureau, *Census Bureau Releases*  
*Estimates of Same-Sex Married Couples* (Sept. 27,  
2011), [http://www.census.gov/newsroom/releases/  
archives/2010\\_census/cb11-cn181.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html) .....2

## SUMMARY OF ARGUMENT

Respondent Karen Golinski (“Ms. Golinski”) submits this brief in support of the Solicitor General’s Petition for a Writ of Certiorari Before Judgment (the “Petition”), filed on July 3, 2012, to inform the Court that she acquiesces in the Petition and agrees with the Solicitor General that this case raises an issue of imperative and exceptional national public importance and is an ideal vehicle for the Court to consider, reach, and definitively resolve that issue.

## ARGUMENT

This case presents only one issue: whether Section 3 of the federal “Defense of Marriage Act” (“DOMA”), 1 U.S.C. § 7, is constitutional. After a thorough review of the undisputed facts and precedent, the district court concluded that it is not. Pet. App. 59a (“DOMA unconstitutionally discriminates against same-sex couples.”).

The case arose after Ms. Golinski, a Staff Attorney with the Ninth Circuit Court of Appeals for more than 20 years, was denied health coverage for her spouse Amy Cunninghis, to whom she is lawfully married under California law. Pet. App. 2a; *Strauss v. Horton*, 207 P.3d 48, 122 (2009). They have been a committed couple for more than 22 years and are raising their nine-year-old son together. *See* Pet. App. 2a. Solely because of DOMA, Ms. Golinski was denied the same spousal health coverage that her heterosexual, married colleagues are able to take for

granted, even though Ms. Golinski has proudly provided the same valuable public service for more than two decades. *See* Pet. App. 14a-15a.

Section 3 of DOMA was adopted by 110 Stat. 2419 and sweepingly provides that “In determining the meaning of any Act of Congress, or 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.”

Section 3 of DOMA excludes state-sanctioned marriages of same-sex couples from recognition by the federal government for all purposes. In doing so, it causes grievous harms to tens of thousands of married same-sex couples and their families. *See* U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn181.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html); Pet. 3-4 (noting that the statute excludes the marriages of same-sex couples from recognition “for purposes of more than 1000 federal statutes and programs”). Delay in conclusively resolving the constitutionality of Section 3 of DOMA perpetuates and compounds such serious harms. Delay also burdens and creates uncertainty for state and local governments, businesses, and other third parties who currently must treat same-sex couples as married for purposes of state law but not married for purposes of federal law. Because the Executive Branch has concluded that Section 3 of DOMA is unconstitutional, but has

determined that it should continue to comply with that law until a “definitive” decision is reached regarding its constitutionality, *see* Pet. 5-6, delay in the authoritative resolution of this issue is all the more intolerable. This issue therefore calls out for prompt issuance of such a “definitive” decision.

The instant case is a particularly compelling case for consideration of whether Section 3 of DOMA is constitutional. As the District Court explained, “The pertinent facts are not in dispute.” Pet. App. 2a.

This case does not present any legal issue that might impede this Court from determining whether Section 3 of DOMA is unconstitutional. While Ms. Golinski previously raised in the district court a mandamus claim and a statutory claim under the Federal Health Benefits Act of 1959, she did not appeal dismissal of those claims by the district court and did not pursue these claims in her Ninth Circuit answering brief. *See* Plaintiff-Appellee’s Brief, *Golinski v. Office of Personnel Management*, et al. (July 3, 2012) (No. 12-15388, Docket No. 85). Those claims therefore have been waived. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 n.6 (9th Cir. 2005). Even were that not the case, Ms. Golinski hereby abandons any such claims before this Court. Additionally, this case was properly appealed to the Ninth Circuit because Ms. Golinski has neither pursued nor received damages in this action. Thus, the sole issue on appeal is whether Section 3 of DOMA is unconstitutional.

In addition, as explained in the Solicitor General's Petition, Pet. 13, in this case, the district court fully analyzed the considerations this Court has identified as relevant to determining the important predicate question of what level of scrutiny the judiciary should apply to laws like DOMA's Section 3 that discriminate on the basis of sexual orientation. Pet. App. 17a-20a, 25a-34a. This Court has never resolved this issue. *See* Pet. App. 24a (noting that, in *Romer v. Evans*, 517 U.S. 620, 632-33 (1996), this Court found it unnecessary to look beyond rational basis review to hold that Colorado's state constitutional amendment barring antidiscrimination protections for lesbians, gay men, and bisexuals violated the U.S. Constitution's guarantee of equal protection of the laws).

The district court carefully considered expert testimony and precedent establishing the long history of invidious discrimination against lesbians and gay men, the lack of relevance of a person's sexual orientation to the ability to contribute to society, and—although of less weight in determining the applicable level of scrutiny—the ways in which sexual orientation is a core, defining, and immutable trait, as well as the political vulnerability of the lesbian and gay minority in our country. The district court's factual findings, framing of the analysis, and thorough consideration of this initial question make this a particularly appropriate case in which to consider the constitutionality of Section 3 of DOMA.

Moreover, having determined that governmental discrimination based on sexual orientation should receive heightened judicial

scrutiny pursuant to the analysis established by controlling Supreme Court precedent, the district court analyzed whether Section 3 of DOMA could be justified under *either* heightened scrutiny or rational basis review, thoughtfully evaluating the expert testimony and legal authority relevant to both standards of review. Pet. App. 34a-44a, 47a-59a. The district court's factual findings and thorough consideration of whether Section 3 of DOMA can be justified under any applicable level of scrutiny further make this case an especially helpful one in which to review Section 3's constitutionality.

The significance of this case is testified to by the more than twenty amicus briefs submitted to the Ninth Circuit on all sides of the issue by, among others, the State of California; fourteen other states; ten senators; 132 members of the House of Representatives; numerous cities, including Boston, Los Angeles, New York, and Seattle; key medical and social science organizations such as the American Psychological Association, the American Medical Association, the American Academy of Pediatrics, and the National Association of Social Workers; scores of pre-eminent historians and law professors; leading businesses, unions, law firms, professional and trade organizations, and religious groups; and dozens of the nation's top civil rights advocacy organizations.

Ms. Golinski accordingly agrees with the Solicitor General that this case is one in which the Court should exercise its power to grant a writ of certiorari before judgment “[b]ecause the issues presented here are of great significance and demand

prompt resolution.” *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *see also* 28 U.S.C. § 1254(1) (noting that this Court may grant a writ of certiorari “upon the petition of any party ... before or after rendition of judgment”); 28 U.S.C. § 2101(e) (“An application to the Supreme Court for a writ of certiorari to review a case before judgment may be made at any time before judgment.”); S. Ct. R. 11 (a petition for writ of certiorari before judgment may be granted “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination by this Court”). The Ninth Circuit constitutes the largest circuit in this nation in both geography and population, and there are countless other married same-sex couples awaiting a final determination in Ms. Golinski’s case. This is one of the exceptional situations in which the grant of a petition for certiorari before judgment is clearly warranted in order to provide a swift and certain answer to a question of imperative public importance, which the question of the constitutionality of Section 3 of DOMA assuredly is and which this case optimally presents.

This Court has on numerous occasions invoked its power to grant a petition for certiorari before judgment to obtain prompt and final resolution of the constitutionality of an Act of Congress of broad or pressing concern like Section 3 of DOMA. *See, e.g., United States v. Booker*, 543 U.S. 220, 229 (2005) (constitutionality of provisions of Federal Sentencing Guidelines); *Mistretta v. United States*, 488 U.S. 361, 362, 371 (1989) (constitutionality of Sentencing Reform Act of 1984); *Reid v. Covert*, 354 U.S. 1, 5

(1957) (constitutionality of expansion of military jurisdiction over civilians under the Uniform Code of Military Justice); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 344 (1935) (constitutionality of Railroad Retirement Act); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 295 (1935) (constitutionality of congressional power and control over the monetary system under the Joint Resolution of June 5, 1933).

Cases involving acute national issues regarding the civil rights of minorities, like the present case, also have been recognized as particularly fitting for exercise of the Court's authority to grant certiorari before judgment under 28 U.S.C. §§ 1254(1) and 2101(e) and Supreme Court Rule 11 in order to obtain swift and definitive resolution by this Court. This has been especially true where other cases are pending before the Court raising the same constitutional issue or issues in other contexts, as is the case here where petitions for certiorari were pending in *Bipartisan Legal Advisory Group of the House of Representatives v. Gill*, No. 12-13 (filed June 29, 2012), and *Dep't of Health & Human Servs. v. Massachusetts*, No. 12-15 (filed July 3, 2012) at the time the Solicitor General filed the petition for certiorari before judgment in the instant case. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (noting decision to hear and decide prior to judgment in *Grutter v. Bollinger*, 539 U.S. 306 (2003), as well); *Brown v. Bd. of Educ.*, 344 U.S. 1, 3 (1952) (inviting filing of petition for certiorari before judgment in *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954)).

In sum, this case clearly meets the criteria for granting a petition for certiorari before judgment. The legal issue raised has far-reaching consequences that it is important to have authoritatively resolved as soon as possible. Furthermore, the district court's decision presents that issue in a clear and comprehensive manner, including determining both the appropriate level of scrutiny and whether Section 3 of DOMA can be justified under any level of scrutiny.

### CONCLUSION

For the reasons set forth above, Ms. Golinski acquiesces in the Petition for a Writ of Certiorari Before Judgment in this case and supports it being granted.

Respectfully submitted,

JON W. DAVIDSON <i>Counsel of Record</i>	JAMES R. MCGUIRE
SUSAN L. SOMMER	GREGORY P. DRESSER
TARA L. BORELLI	RITA F. LIN
SHELBI D. DAY	AARON D. JONES
IVAN ESPINOZA-MADRIGAL	Morrison & Foerster LLP
Lambda Legal Defense and Education Fund, Inc.	425 Market Street San Francisco, CA
3325 Wilshire Blvd., Ste. 1300	94105
Los Angeles, CA 90010	(415) 268-7000
(213) 382-7600	jmcguire@mofo.com
jdavidson@lambdalegal.org	

*Attorneys for Respondent*

July 23, 2012