IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS Plaintiff-Appellee, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants-Appellants	)	No. 10-2204
DEAN HARA, Plaintiff-Appellee/Cross-Appellant, NANCY GILL, et al., Plaintiffs-Appellees v. OFFICE OF PERSONNEL MANAGEMENT, et al., Defendants-Appellants/Cross-Appellees.	)	Nos. 10-2207; 10-2214

PETITION OF PLAINTIFFS-APPELLEES NANCY GILL, ET AL. AND DEAN HARA, PLAINTIFF-APPELLEE FOR HEARING *EN BANC*

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FED. R. APP. P. 35(b) STATEMENT

Appellees request an initial *en banc* hearing of this appeal because the case involves "a question of exceptional importance." Fed. R. App. P. 35(a)(2). This Court must adjudicate a fundamental constitutional issue of first impression in connection with a statute unparalleled in scope and effect that, as the district court properly held, violates the Constitution by denying Plaintiffs equal protection under the law.

STATEMENT OF ISSUE

Whether, as the district court held, the Defense of Marriage Act, which has disenfranchised legally married couples from more than 1,100 federal statutes, violates the right of equal protection secured by the Due Process Clause of the Fifth Amendment?

INTRODUCTION

By this petition, appellees ask that the Court grant initial *en banc* review of this appeal, rather than having the case reviewed in the first instance by a panel. They do so because the question at issue in this case is one of first impression in this Circuit and arises in connection with an appeal from a wide-ranging federal statute that has been declared unconstitutional by the district court. Section 3 of the Defense of Marriage Act,[1] Pub. L. No. 104-199, 100 Stat. 2419 (1996), *codified at* 1 U.S.C. § 7 ("DOMA"), defines "marriage" for purposes of all federal statutes, regulations, and agency interpretations as the union of one man and one woman and defines "spouse" as a husband or wife of someone of the opposite sex. The law is unprecedented in terms of its impact, nature, and scope. Affecting more than 1,100 federal statutes, it takes the single class of persons legally married under State law and divides them into two classes, mandating that the marital status of married same-sex couples (but not other married couples) be disregarded in the

[1] Section 3 of DOMA, provides:

> Definition of "marriage" and "spouse"
>
> 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.

application of all federal laws. This discrimination among married couples contravenes the federal government's centuries-old tradition of deferring to state determinations of marital status, and, as the district court properly held, violates equal protection. Given the vitally important nature of this case, its highly unusual procedural history, and confusion regarding a prior decision of this Court, this Court should address this issue with the full Court sitting *en banc*.

STATEMENT OF THE CASE

The *Gill* Plaintiffs are 17 lawfully married or widowed men and women whose marriages the United States government has unilaterally invalidated for purposes of federal law. Plaintiffs exercise all of the rights and discharge all of the responsibilities of married people in Massachusetts. But because Plaintiffs were or are married to someone of the same sex, Section 3 of DOMA excludes their marriages from any federal recognition.[2]

[2] The Defense of Marriage Act also contains a separate provision, Section 2, authorizing States to disregard marriages of same-sex couples performed and recognized by other States. *See* 28 U.S.C. § 1738C. Section 2 is not at issue in this lawsuit. The shorthand reference to "DOMA" in this memorandum is intended to refer exclusively to Section 3 of the Act.

A. PROCEEDINGS BELOW

Plaintiffs brought suit alleging that this dramatically disparate treatment of married people violates the equal protection guarantee of the Fifth Amendment. U.S. Const. Amend. V. In August 2010, the district court entered judgment for Plaintiffs on their motion for summary judgment, declaring Section 3 of DOMA unconstitutional as applied to them and enjoining application of the provision because "'there exists no fairly conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective." Joint Appendix ("JA") 1388 (quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)). On August 17, 2010, the district court entered an amended final judgment and, upon the government's unopposed motion, entered a stay pending appeal. On October 12, 2010, the government timely appealed. JA 1426.

B. SUBSEQUENT EVENTS

The Department of Justice ("DOJ"), representing the Defendants-Appellants, filed its opening brief on January 19, 2011. *Gill* Appeal No. 10-2207, docket entry #38. Just over a month later, on February 23, 2011, the United States Attorney General wrote to the Speaker of the U.S. House of Representatives to inform him that:

> After careful consideration, including review of a recommendation from [the Attorney General], the President of the United States has

> made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.

Gill Appeal No. 10-2207, docket entry #119 ("AG Letter") at 4. The AG Letter also stated:

> The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies . . . . Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation.

AG Letter at 5. One day after sending the AG Letter, DOJ wrote to the Clerk of this Court to add this case to the list of cases which DOJ would cease to defend. In particular, DOJ stated:

> [T]he Attorney General and President have concluded: that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation; that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department will cease its defense of Section 3 in such cases.

Id. at 3. This notification also was sent to the Speaker of the House of Representatives informing him of DOJ's intent to cease defending *Gill* because of the President's determination that DOMA Section 3 is unconstitutional.

DOJ informed this Court that, pursuant to 28 U.S.C. § 530D, the Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") had stated that it intended to participate in this appeal in light of DOJ's

decision to cease defense of the constitutionality of the statute. *See Gill* Appeal, No. 10-2207, docket entry #127, at 3.

On May 20, 2011, the House filed a motion to intervene in the case, and on June 2, 2011, DOJ filed a motion to withdraw its opening brief. *See Gill* Appeal, No. 10-2207, docket entry #130, 134.

On June 16, 2011, this Court granted the motion of the House to intervene; denied the federal defendants' motion to withdraw their brief; and granted the federal defendants permission to file a superseding brief. The Court also set a renewed briefing schedule. *See Gill* Appeal, No. 10-2207, docket entry #142.

ARGUMENT

I. THIS COURT SHOULD RULE *EN BANC* IN THE FIRST INSTANCE AS TO THE CONSTITUTIONALITY OF SECTION 3 OF DOMA

The unprecedented nature, breadth, and impact of Section 3 of DOMA render the decision as to its constitutionality one of exceptional importance that merits *en banc* review. Moreover, the procedural history of this case is unusual and further demonstrates the exceptional importance of the question at issue. The district court and the Executive Branch both have determined that this federal statute is unconstitutional. Two of the three branches of government are divided, and this Court, as the deciding third branch, should sit *en banc* to resolve this

important question.[3] Also counseling for *en banc* review, this case offers the Court its first opportunity to resolve the level of scrutiny appropriate for classifications based on sexual orientation with the benefit of a full and complete factual record and resolve any confusion over a previous case.

A. THE CONSTITUTIONALITY OF SECTION 3 OF DOMA IS A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE OF THE UNPRECEDENTED REACH AND EFFECTS OF THE STATUTE.

DOMA's definition of "marriage" is an historical aberration that breaks with the long-standing federalist tradition of deferring to state determinations of marital status, a subject that has been states' exclusive province from the time of this country's founding until the passage of DOMA. *See Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 392 (D. Mass. 2010). The consequences of this law are directed at a minority, since it is only the lawful marriages of same-sex couples that DOMA disenfranchises from all federal protections. DOMA effectively

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[3] Although *en banc* review is most common as a rehearing after a panel decision, it is also appropriate for the Court to hear a case *en banc* initially. *See* Fed. R. App. P. 35. *See also United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (initial hearing *en banc* to reverse holding in prior line of cases); *United States v. Scherrer*, 444 F.3d 91 (1st Cir. 2006) (initial hearing *en banc* to provide guidance on recurring issue of severity of sentencing); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (initial hearing *en banc* to give guidance in light of recent Supreme Court precedent); *United States v. Li*, 206 F.3d 56 (1st Cir. 2000) (ordering hearing *en banc*, before panel decision, regarding applicability of international law).

amended 1,138 federal laws that provide benefits, protections, rights, or responsibilities to spouses or married couples, and "inject[ed] complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two." *Id.* at 395.

Because of DOMA Section 3, plaintiffs are each treated differently from their married neighbors and friends. Plaintiffs are a chief financial officer of a Boston not-for-profit, a writer, a Massachusetts State Trooper, a U.S. Postal Service employee, stay-at-home moms, a college administrator, a government lawyer, a university finance associate, retired educators, musicians, and a retired nurse. Section 3 of DOMA severely and concretely harms each one. For example, in the wake of DOMA's passage, Plaintiffs may not enroll their spouses in federal employee benefits programs such as insurance; they are prohibited from filing federal income tax returns as "married filing jointly" and must pay income tax on the value of employer-provided insurance to their spouses, costing families thousands of dollars in taxes; and certain Plaintiffs are widowers and have been denied social security survivors' and death benefits solely because of Section 3 of DOMA. Plaintiffs are even required to disavow their legal and fundamental commitment to each other when completing U.S. government forms. Compl. ¶¶ 373-387, 402-413.

This Court's determination of the constitutionality of this unprecedented, exceptionally broad, and harsh law that extends into families' innermost corners should be made with the weight of the full Court behind it.

B. THE OTHER BRANCHES OF GOVERNMENT ARE DIVIDED AS TO THE CONSTITUTIONALITY OF SECTION 3 OF DOMA

The Executive and Legislative Branches of the federal government are in conflict as to the constitutionality of Section 3 of DOMA. The Executive Branch has executed its responsibility to assess the constitutionality of the statute and has determined, after a careful consideration of the relevant factors, that the statute is unconstitutional. The House disagrees and intends to assert that the statute is constitutional. Faced with a case in which the Court must resolve a conflict between certain of the highest officials in the other two branches of the federal government, the Court should resolve the issue in the first instance with an *en banc* Court.

C. THE QUESTION OF THE LEVEL OF SCRUTINY APPLICABLE TO CLASSIFICATIONS BASED ON SEXUAL ORIENTATION IS BEFORE THE COURT FOR THE FIRST TIME ON A FULL FACTUAL RECORD AND SHOULD BE DECIDED BY THE FULL COURT.

This Court has never before been provided with the full factual record required to determine whether, under the factors set forth by the Supreme Court,

heightened scrutiny should apply to legislative classifications that discriminate against gay men and lesbians as DOMA Section 3 does.

In its opening brief in this appeal, DOJ stated that the panel decision in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), "held that classifications of sexual orientation do not target a suspect class." App. Br. at 25. As DOJ has since acknowledged, however, *Cook* did not examine the factors used by the Supreme Court for determining the appropriate level of scrutiny. AG Letter at 7 & n. 6.

Although this Court in *Cook* upheld the district court's application of rational basis review to the U.S. military's "Don't Ask Don't Tell" policy, that ruling is not binding as to the level of scrutiny due classifications based on sexual orientation. In fact, whether sexual orientation is a suspect or quasi-suspect classification was not even argued to the Court in *Cook*. Rather, the Court was called upon to examine only whether either the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), or *Lawrence v. Texas*, 539 U.S. 558 (2003), mandated heightened scrutiny. *Cook*, 528 F.3d at 61. See Br. of Plaintiffs-Appellants, Cook v. Rumsfeld, Nos. 06-2313, 2381 (Nov. 14, 2006), at 31-35. [4]

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[4] One of the *Cook* plaintiffs, James Pietrangelo, proceeded pro se and called sexual orientation a suspect class twice in his brief. He did not actually develop an argument for any particular equal protection standard of review although he did consistently and repeatedly assert that the government's actions were variously irrational, arbitrary, an endorsement of "blatant bigotry," and an expression of "pure animus."

Neither *Romer* nor *Lawrence*, however, "reached, let alone resolved," the appropriate level of scrutiny, as the AG Letter indicates, "because in both the [Supreme] Court concluded that the laws could not even survive the more deferential rational basis standard." AG Letter at 7.

Moreover, because the *Cook* panel did not have the factual record necessary to make such a determination, that panel could not have conclusively resolved the appropriate level of scrutiny. *See Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record"); s*ee also Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 431-61 (Conn. 2008) (analyzing the relevant factors and holding that heightened scrutiny is warranted for classifications based on sexual orientation).

The brief discussion in *Cook* also is dicta not "essential to the result reached in the case." *Rossiter v. Potter*, 357 F.3d 26, 31 (1st Cir. 2004). *Cook's* basic holding was that the Court would not overrule "Don't Ask, Don't Tell" notwithstanding the fact that the policy was subject to heightened scrutiny on due process grounds. *See* 528 F.3d at 60. Thus, a finding that the classification in the military context in *Cook* was subject to heightened scrutiny on equal protection grounds for any reason would not have changed the ultimate result.

Nevertheless, there is apparent confusion as to the role of *Cook* in this analysis, which this Court *en banc* can resolve, and in contrast to *Cook*, this case presents a fully developed factual record from which this Court can evaluate and determine the appropriate level of scrutiny. Questions as to the scope and intent of previous panels, especially where exceptional concerns are at issue, are best resolved by the full Court. Therefore, this case merits *en banc* review.

CONCLUSION

This case raises a question of exceptional importance that has divided the branches of the federal government. Initial review by this Court *en banc* is appropriate here.

Respectfully submitted,

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DATED: June 21, 2011

Certificate of Service

I hereby certify that on June 21, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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