

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 12-3273 Caption [use short title] _____

Motion for: Expedited Review

Set forth below precise, complete statement of relief sought:

Plaintiffs-Appellees seek an expedited schedule for briefing and oral argument of this appeal: schedule is in keeping with that of Windsor v. United States.

Pedersen v. Office of Personnel Management

MOVING PARTY: Plaintiffs

- Plaintiff Defendant
- Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: BiPartisan Legal Advisory Group of the U.S. House of Representatives

MOVING ATTORNEY: Karen L. Dowd

OPPOSING ATTORNEY: Paul D. Clement

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: United States District Court for District of Connecticut (Bryant, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Karen L. Dowd Date: 8/21/2012

Service by: CM/ECF Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-3273

JOANNE PEDERSEN, et al.,

Plaintiffs-Appellees,

v.

OFFICE OF PERSONNEL
MANAGEMENT, et al.,

Defendants-Appellants,

THE BIPARTISAN LEGAL ADVISORY
GROUP OF THE U.S. HOUSE OF
REPRESENTATIVES,

Intervenor-Defendant

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLEES’
MOTION FOR AN EXPEDITED APPEAL**

We respectfully request that this Court grant expedited consideration of the appeal from the ruling of the District Court for the District of Connecticut (Bryant, J.) that 1 U.S.C. § 7, the Defense of Marriage Act (or “DOMA”) is unconstitutional so that this case can be decided by the same panel considering *Windsor v. United States*, Nos. 12-2335 and 12-2435, another DOMA case scheduled for oral argument on September 27, 2012.

Plaintiffs-Appellees are six same-sex couples and a widower from the states of Connecticut, New Hampshire and Vermont. Each married under their home

state's law after one or more decades of commitment to one another. They now assume the responsibilities of married persons under state law. However, by operation of DOMA, they have been denied federal legal protections available to other married families in the areas of federal Family and Medical Leave Act benefits, federal income taxation, social security benefits, workplace benefits for federal employees and retirees, and state and private pension plan protections.

As discussed *infra*, there are multiple reasons to expedite this appeal. *First*, the plaintiffs face ongoing harms from DOMA's *de jure* discrimination against them as married same-sex couples by negating their marital status for all federal purposes. *Second*, expediting this appeal to allow it to be assigned to the same panel of judges hearing the *Windsor* case would advance judicial economy while allowing both cases to be resolved on the merits. The Intervener-Defendant Bipartisan Legal Advisory Group ("BLAG") itself agrees that the two cases address the common core legal issue of DOMA's constitutionality. *Third*, the District Court's thorough attention to the standard of review, including extensive record citations to the issue of whether sexual orientation classifications merit heightened scrutiny, could aid this Court as it considers the proper standard of review to be applied to DOMA. (District Court Order at 27-76, Dowd Decl. Ex.

A.).¹ *Finally*, an expedited schedule will not unduly burden BLAG, which has intervened to defend DOMA's constitutionality in all cases since early 2011.

Accordingly, we respectfully request that this Court grant this Motion and order an expedited briefing schedule whereby Intervener-Defendant's Brief and the Defendants-Appellants' Brief is due no later than September 12, 2012, Plaintiffs-Appellees Brief is due no later than September 26, 2012, and the Intervener-Defendant's Reply Brief and the Defendants-Appellants' Reply Brief is due no later than October 3, 2012. This schedule would ensure that the principal party briefs are submitted by the time of argument in *Windsor*.

In order to accommodate the two appeals, and given that oral argument is already scheduled for September 27, 2012 in *Windsor*, Plaintiffs-Appellees would waive oral argument if doing so would facilitate expedition and coordination with the Court's consideration of *Windsor*.

We have been advised that Plaintiff-Appellee Edith S. Windsor does not object to this proposed schedule *as long as* there are no changes to the expedited briefing schedule in *Windsor*, the September 27 oral argument date for that appeal, and this Court's expedited resolution of *Windsor*.

BLAG does not consent to this motion and intends to file a response to it.

¹ Citations in the form of "Dowd Decl." refer to the Declaration of Karen L. Dowd, dated August 21, 2012.

The Department of Justice will file a response on behalf of Defendants Office of Personnel Management et al.

STATEMENT OF THE CASE

Plaintiffs-Appellees and Their DOMA-Related Harms

As the District Court found, the issue of DOMA's constitutionality is squarely presented in this case: "The pertinent facts are undisputed. Plaintiffs are gay men or lesbians who legally married a person of the same sex under the laws of the States of Connecticut, Vermont and New Hampshire and have applied and been denied federal marital benefits or sought to file federal income tax returns based on their married status." (*Id.* at 11 (footnote omitted.)) Specifically:

After more than 30 years of service as a civilian employee of the Department of the Navy, Office of Naval Intelligence, Joanne Pedersen has been unable to add her spouse, Ann Meitzen, to the health insurance coverage she receives under the Federal Employees Health Benefits Program ("FEHB") (*Id.* at 11-12.);

Damon Savoy, a federal government attorney with the Office of the Comptroller of the Currency, has been denied the right to add his spouse, Plaintiff John Weiss, to his health insurance coverage, even though Savoy's "family" plan covers the couple's three children (*Id.* at 15.);

Raquel Ardin and Lynda DeForge, both Navy veterans and both long term employees of the United States Post Office, have been precluded from obtaining

one FEHB “Self and Family” plan for their health insurance needs and instead purchase separate “Self Only” plans (*Id.* at 13.);

Lynda DeForge has been denied leave under the Family and Medical Leave Act to care for Ardin, who suffers from a serious medical condition that requires DeForge to take off a day of work every three months to transport Ardin and care for her (*Id.* at 13.);

Geraldine Artis and Suzanne Artis, the parents of three children, have been forced to file federal income tax returns as “head of household” and “single,” thus imposing a higher aggregate tax burden, notwithstanding that they have been married since 2009 (*Id.* at 14.);

Bradley Kleinerman and James (“Flint”) Gehre, who have three adopted sons, have similarly faced higher income taxes because of their inability to file their federal income tax returns with the “married” status (*Id.* at 15.);

Widower Gerald Passaro, after losing his husband, was denied the “One-Time Lump-Sum Death Benefit” from the Social Security Administration that is ordinarily available to a surviving spouse. (*Id.* at 12.) In addition, Passaro was denied the Qualified Preretirement Survivor Annuity (“QPSA”) that is ordinarily guaranteed to a surviving spouse under a defined benefit pension in which his deceased husband had been a vested participant at the time of his death

(*Id.*);² and

Retired New Hampshire school teachers Joanne Marquis and Janet Geller are unable to access from the New Hampshire Retirement System a financial supplement for Geller – as Marquis’s spouse - to purchase Medicare Part B insurance. (*Id.* at 14.).

The Government’s Response

On February 23, 2011, more than four months after the case was filed, the President and the Attorney General of the United States announced that they had determined that heightened judicial scrutiny is the appropriate standard of review for government classifications based on sexual orientation and that, under that standard, Section 3 of DOMA is unconstitutional. (*Id.* at 4.) Unlike DOMA cases pending in other Circuits, the *Pedersen* suit in the District of Connecticut and the *Windsor* case in the Southern District of New York would “require the Department [of Justice] to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue.” (Docket No. 39, at 1–2.) Accordingly, the executive branch ceased defense of

² A private, defined benefit pension plan is subject to both the Employee Retirement Income Security Act (“ERISA”) as well as the Internal Revenue Code and is required under both statutes to provide a Qualified Preretirement Survivor Annuity (“QPSA”) to the surviving spouse of any “vested participant who dies before the annuity starting date and who has a surviving spouse. . . .” 29 U.S.C. § 1055(a)(2); 26 U.S.C. § 401(a)(11)(A)(ii) (same); *see also id.* § 417(c).

DOMA in this suit. (Docket No. 39.1.)

On April 26, 2011, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, or “BLAG,” filed a motion to intervene for the purpose of defending the constitutionality of Section 3 of DOMA (Docket No. 48), which motion was granted on May 27. (Docket No. 55). The discovery in the *Pedersen* and *Windsor* cases proceeded in tandem with the same experts and coordinated expert depositions (Docket No. 54). Fully briefed cross-motions to dismiss and for summary judgment were submitted to the District Court in *Pedersen* on October 11 and 5, respectively. (Docket Nos. 105, 103.)

The Ruling Below

On July 31, 2012, the District Court granted summary judgment to Plaintiffs-Appellees, issuing an Order holding that there is “no conceivable rational basis” for DOMA and that it violates the equal protection guarantees incorporated into the 5th Amendment. (District Court Order at 104.) Importantly, the District Court also conducted a thorough and robust review, complete with detailed record and citations to expert testimony, that a heightened level of judicial scrutiny should apply to laws— such as Section 3 of DOMA—that discriminate on the basis of sexual orientation. (*Id.* at 27-75.) The Court refrained from applying heightened scrutiny only because “DOMA fails to pass constitutional muster under even the most deferential level of judicial scrutiny.” (*Id.* at 76.)

On August 17, 2012, the Department of Justice filed its notice of appeal.

ARGUMENT

This case presents a stark question of constitutional law: Does the federal government violate the equal protection guarantee of the Constitution when it departs from its long-standing practice of deferring to state marital status determinations, solely because the spouses are of the same sex? The District Court properly held that the answer to this question is yes.

Under Federal Rule of Appellate Procedure 2, this Court has the power to suspend any other provision of the Federal Rules of Appellate Procedure “to expedite its decision or for other good cause” suspend any provision of the rules. Furthermore, this Court is “generous in granting motions to expedite.” *In re Iceland Inc.*, 112 F.3d 504 (2d Cir. 1997) (table). As set forth below, expedited consideration of this appeal is warranted here.

1. The Plaintiffs-Appellees’ Ongoing Harms

Because DOMA imposes indisputable *de jure* discrimination on the basis of sexual orientation, DOMA consistently undermines the security of the Plaintiffs-Appellees by erasing their marriages under federal law and casting them into a confusing legal status in which their marriages “count” for some purposes but not others. And of course, each Plaintiff satisfies standing requirements with demonstrable (and ongoing) economic harms until there is a final disposition that

the Government may no longer enforce DOMA. *See* pp. 3-6 *supra*.

DOMA stains the Plaintiffs-Appellee's marriages and burdens them economically. Such considerations manifestly support expedited consideration of this appeal.

2. Judicial Economy In Considering this Important Constitutional Question.

Expediting this appeal to allow coordinated consideration of this case and *Windsor* would advance judicial economy by allowing the same panel to address the critical question of DOMA's constitutionality in both *Windsor* and *Pedersen*. *Cf. Kirch v. Liberty Media Corp.*, 449 F. 3d 388, 404 (2d Cir. 2006) (judicial economy served by directing appeals from district court's further orders or judgments in particular case to the same panel).

Expediting this appeal also serves judicial economy by complementing *Windsor* in demonstrating DOMA's impact on other federal programs (federal income tax, federal employee and retiree workplace benefits, and social security benefits), important federal statutes (*e.g.* ERISA, FMLA), state retirement systems (*e.g.* health benefits), and private companies (*e.g.* pension plans).

Finally, granting the motion now would also allow the *Pedersen* plaintiffs – who obtained a District Court judgment within two months of the *Windsor* plaintiff's judgment - to participate in setting the rule of law that will define their rights. And because of the important legal rights at stake, nothing should delay

this Court's resolution of the constitutionality of Section 3 of DOMA with respect to both *Windsor* and *Pedersen*.

3. Expediting This Appeal Would Assist This Court As It Considers The Appropriate Level of Scrutiny for Laws that Discriminate on the Basis of Sexual Orientation.

While the First Circuit and two District Court Judges in the Ninth Circuit have held that DOMA cannot be sustained under rational basis review based on existing Circuit precedent,³ the appropriate standard of judicial scrutiny to apply to laws that classify on the basis of sexual orientation is an open question in this Circuit.

The District Court's extensive consideration of this issue in *Pedersen* could aid this Court as it addresses this important question. Relying on the expert declarations and testimony in this case, the District Court provides a detailed and fact-specific analysis of the factors the Supreme Court has identified in cases involving other classifications. Importantly, the District Court's analysis addresses

³ *Massachusetts v. HHS*, 682 F.3d 1, 9 (1st Cir. 2012) (First Circuit precedent "has already declined to create a major new category of 'suspect classification' for statutes distinguishing based on sexual preference"); *Dragovich v. Dep't of Treasury*, No. C 10-01564 (CW), 2012 WL 1909603, at *9 (N.D. Cal. May 24, 2012) ("Although the Ninth Circuit may revisit its ruling that gay men and lesbians do not constitute a suspect or quasi-suspect class, the Court tests the constitutionality of § 3 of the DOMA . . . pursuant to current Ninth Circuit law, by applying rational basis review."); *Golinski v OPM*, 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012) (alternative holding that DOMA fails rational basis review); *id.* at 985 (holding that "the outdated holding [of the Ninth Circuit], subjecting gay men and lesbians to rational basis review, is no longer binding precedent").

BLAG's contentions point-by-point, again with detailed references to the case record. *See e.g., id.* at 36-43 (addressing history of discrimination and expert affidavit of George Chauncey, docket no. 74); 48-62 (as to "defining or immutable characteristic," addressing Peplau expert affidavit and rebuttal affidavit with deposition testimony, docket nos. 73, 83); and 62-75 (addressing political power and expert affidavit of Gary Segura, docket no. 72).

4. An Expedited Schedule Will Not Burden BLAG.

Finally, the proposed schedule is reasonable under the circumstances. The *Windsor* litigation is on an expedited schedule already and there is therefore no reason to delay consideration of the *Pedersen* appeal. In addition, BLAG is well-versed in its arguments, having filed merits briefs in other cases, including a petition for a writ of certiorari in *Gill v. OPM*, No. 12-13; three briefs in Courts of Appeal, *Massachusetts*, 2012 WL 1948017; Brief of Intervenor- Defendant-Appellant, *Golinski v. Office of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. June 4, 2012), ECF No. 36, *Windsor v. United States*, Nos. 12-2335 and 12-2435 (2d Cir. Aug. 10, 2012), ECF No. 98, and several District Court cases, and thus will not present any undue hardship.⁴ While factual differences exist in terms of

⁴ *See also Dragovich*, 2012 WL 1909603; *Golinski*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Lui v. Holder*, No. 2:11-cv-01267 (SVW) (C.D. Cal. Sept. 28, 2011); *Revelis v. Napolitano*, 11-cv-1991 (N.D. Ill.), ECF Nos. 40, 54; *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-01750 (D. Conn.), ECF Nos. 81, 82, 103.

how DOMA has applied to the respective marriages in these cases, each addresses the common legal issue of DOMA's constitutionality. The burden on BLAG's counsel should therefore not be substantial, particularly when weighed against the daily hardships encountered by the Plaintiffs-Appellees and married same-sex couples in this Circuit.

CONCLUSION

For the above reasons, Plaintiffs-Appellees respectfully requests the Court to order the following expedited schedule for consideration of this appeal: Intervener-Defendant's Brief and Defendants-Appellants' Brief are due no later than September 12, 2012; Plaintiffs-Appellees Brief is due no later than September 26, 2012; and the Intervener-Defendant's Reply Brief Defendants-Appellants' Reply Brief are due no later than October 3, 2012.

Should the Court not order the above schedule, Plaintiffs-Appellees' counsel agrees to submit responsive papers on whatever accelerated schedule this Court deems just and appropriate. Given that the *Windsor* oral argument is already scheduled for September 27, 2012, the Plaintiffs-Appellees also agree to waive oral argument in *Pedersen* if doing so would facilitate expedition and coordination with the Court's consideration of *Windsor*.

Respectfully submitted,

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Dated: August 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2012 I caused the foregoing Memorandum to be served upon all counsel of record electronically via ECF, with copies sent via email and Federal Express to:

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