

No. 12-785

In the Supreme Court of the United States

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

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS
EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term “marriage” for all purposes under federal law, including the provision of federal benefits, as “only a legal union between one man and one woman as husband and wife.” 1 U.S.C. 7. It similarly defines the term “spouse” as “a person of the opposite sex who is a husband or a wife.” *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 699 F.3d 169. The opinion of the district court (Pet. App. 82a-106a) is reported at 833 F. Supp. 2d 394. The district court's order granting the motion of the Bipartisan Legal Advisory Group of the United States House of Representatives to intervene (Pet. App. 107a-117a) is reported at 797 F. Supp. 2d 320.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2012. The Bipartisan Legal Advisory Group of the United States House of Representatives filed its petition for a writ of certiorari on December 28, 2012.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Edith Windsor (plaintiff) was married to her same-sex partner, Thea Spyer. Pet. App. 108a. When Spyer passed away in 2009, she left her estate to plaintiff. *Id.* at 85a. Plaintiff, the estate’s executor, sought a refund from the Internal Revenue Service (IRS) of \$363,053, relying on a statute that generally exempts property passing to a “surviving spouse” from federal estate tax. 26 U.S.C. 2056(a); see J.A. at 169-170, *United States v. Windsor*, cert. granted, No. 12-307 (oral argument scheduled for Mar. 27, 2013) (12-307 J.A.). The IRS denied that claim on the ground that Section 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419, defines the term “spouse” to include only “a person of the opposite sex.” 1 U.S.C. 7; see 12-307 J.A. 245-252. Plaintiff then sued the United States for a refund of the tax, along with declaratory and injunctive relief, claiming that Section 3 unlawfully discriminates on the basis of sexual orientation. *Id.* at 173, 219.

2. The Attorney General subsequently notified Congress that he and the President had determined that Section 3 violates equal protection as applied to same-sex couples legally married under state law. 12-307 J.A. 183-194. Although the Department of Justice had defended the constitutionality of Section 3 in circuits that apply rational-basis scrutiny to classifications based on sexual orientation, the President and the Attorney General determined, in consideration of new suits in a circuit without binding precedent on the appropriate level of scrutiny, that this Court’s precedents required apply-

ing heightened scrutiny and that Section 3 could not survive such scrutiny. *Id.* at 183-191.

The Attorney General additionally explained that, notwithstanding that determination, the Executive Branch would continue to enforce Section 3. 12-307 J.A. 191-192. “To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.” *Id.* at 192. “This course of action,” the Attorney General continued, “respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.” *Ibid.*

In litigation concerning Section 3’s constitutionality, however, the Department of Justice would present the President’s constitutional views to the courts and decline to defend the statute. 12-307 J.A. 191-193. The Department would “also notify the courts of [its] interest in providing Congress a full and fair opportunity to participate in the litigation in those cases” and would “remain parties to the case and continue to represent the interests of the United States throughout the litigation.” *Id.* at 193.

3. Following the President’s determination, petitioner, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), moved to intervene in this case in defense of Section 3. 12-307 J.A. 195-198. BLAG is a five-member group of Representatives authorized by the then-current House rules to “consult” with the Speaker of the House about the direction of the Office of General Counsel. Rule II.8, Rules of

the House of Representatives, 112th Cong. (2011). Three of BLAG's members voted in favor of intervention; two voted against it. 12-307 J.A. 196 n.1.

The Department did not oppose limited intervention by BLAG, but explained that the "Executive Branch, through the Department of Justice, represents the only defendant, the United States, in this litigation." 12-307 J.A. 207 (citing 28 U.S.C. 516 and *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam)). The Department also explained that "consistent with what [it] has done in prior cases in which the Executive Branch has taken the position that an Act of Congress is unconstitutional but announced its intention to enforce or comply with the law pending a final judicial determination of the constitutional issue," it would take all steps necessary to ensure that the courts could consider Section 3's constitutionality and that BLAG could argue in support of Section 3. *Id.* at 208.

The district court granted BLAG's intervention motion. Pet. App. 107a-117a. The court found no law "explicitly authorizing intervention by the House (or any subgroup or representative thereof)," *id.* at 111a n.2, and it rejected BLAG's effort to intervene as the United States under 28 U.S.C. 2403(a), reasoning that "the United States of America is already a party to the litigation," Pet. App. 111a. But the court concluded that BLAG could intervene as an interested party under Federal Rule of Civil Procedure 24(a)(2). Pet. App. 111a-115a. The court found it unnecessary to address whether BLAG had Article III standing, because the case already presented "an ongoing case or controversy between the existing parties." *Id.* at 115a-116a.

4. The district court ultimately issued a judgment against the United States, declaring Section 3 unconsti-

tutional as applied and awarding plaintiff \$363,053 plus interest. Pet. App. 118a-119a; see 12-307 J.A. 437-439 (United States' motion to dismiss if court agreed with BLAG on constitutionality of Section 3); *id.* at 486-489 (United States' brief supporting summary judgment for plaintiff). Both the United States and BLAG filed notices of appeal. 12-307 J.A. 522-525. BLAG moved to dismiss the United States' notice of appeal, contending that only "the House ha[d] standing to appeal." *Id.* at 527. The United States also filed a petition for a writ of certiorari before judgment. Pet. at 1-13, *United States v. Windsor, supra*.

The court of appeals denied BLAG's motion to dismiss the United States' appeal. Pet. App. 4a-5a. Relying on *INS v. Chadha*, 462 U.S. 919, 931 (1983), the court reasoned that the United States was an aggrieved party with standing to appeal because "the United States continues to enforce Section 3," and Section 3's constitutionality "will have a considerable impact on many operations of the United States." Pet. App. 4a-5a. On the merits, the court of appeals affirmed the district court's judgment. *Id.* at 1a-30a; see Gov't C.A. Br. 45 (United States' brief requesting affirmance).

5. Following supplemental certiorari-stage briefing, this Court granted the United States' petition for a writ of certiorari. 12-307 Docket entry (Sup. Ct. Dec. 7, 2012). The Court directed the parties, and a Court-appointed amicus, to brief whether the Executive Branch's agreement with the court below that Section 3 is unconstitutional deprives this Court of jurisdiction to decide this case, and whether BLAG has Article III standing. 12-307 Docket entries (Sup. Ct. Dec. 7, 11, 14 2012).

On December 28, 2012, BLAG filed its own petition for a writ of certiorari. On January 3, 2013, the House of Representatives authorized BLAG to speak for the institutional position of the House in litigation matters, including this case. H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013).

ARGUMENT

The United States agrees with BLAG (Pet. 10) that the question presented is exceptionally important and warrants further review. In the United States' view, however, (1) this Court can and should review the decision below based upon the already-granted petition for a writ of certiorari filed by the United States, and (2) BLAG lacks independent standing to file its own petition. The positions of the United States and the other parties (as well as those of the Court-appointed amicus) on those issues are set forth in the jurisdictional briefing in *United States v. Windsor*, cert. granted, No. 12-307 (oral argument scheduled for Mar. 27, 2013). It would therefore be appropriate to hold this petition pending the Court's consideration and resolution of those issues.

If the Court concludes that it has jurisdiction to review the decision below based on the United States' already-granted petition (12-307), then it should deny BLAG's instant petition as unnecessary, without addressing whether BLAG had standing. Otherwise, the appropriate disposition of BLAG's petition would turn on BLAG's standing: if the Court concludes that BLAG lacked standing, BLAG's petition should be denied; if the Court concludes that BLAG had standing, the Court could grant BLAG's petition and decide the question presented based on the merits briefs that the parties have already filed in *United States v. Windsor*, No. 12-307, *supra*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's resolution of the jurisdictional questions in *United States v. Windsor*, cert. granted, No. 12-307 (oral argument scheduled for Mar. 27, 2013), and disposed of as appropriate in light of that decision.

Respectfully submitted.

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