No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF ON JURISDICTION FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE DAVENPORT
Senior Assistant Counsel
TODD B. TATELMAN
MARY BETH WALKER
ELENI M. ROUMEL
Assistant Counsels
OFFICE OF GENERAL COUNSEL
UNITED STATES HOUSE OF REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
MICHAEL H. MCGINLEY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondent

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellee and appellant in the court of appeals.

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* The Bipartisan Legal Advisory Group articulates the institutional position of the House in all litigation matters in which it appears. The Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. While the Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases, they support the Group's Article III standing.

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This Court made clear 30 years ago that the House "is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiff[] that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983). The House has a concrete interest in preserving its constitutional role and protecting DOMA Section 3—legislation the House passed—from effective repeal based on arguments made by the executive and approved by the judiciary. Such judicial nullification imposes a distinct injury on the House that is directly traceable to the executive's abdication and the decisions below, and redressable by this Court.

The House's standing not only is sufficient; it is necessary to this Court's appellate jurisdiction. Indeed, without the House's participation, there would be no ongoing case or controversy at all. Even the Department of Justice ("DOJ") and Ms. Windsor recognize that the House's participation is the answer to *amica*'s concerns about their lack of adversity. Although they would relegate the House to *amicus* status, *Chadha* was correct to recognize the House as a "proper party." The House's party status is even more important in the lower courts, where only a party can take discovery, file motions to dismiss, and notice appeals. Those steps cannot be reserved to the executive when it has abandoned the defense of the statute. Determinations about how best to proceed in defending a statute should be made by the party actually defending the statute. In sum, only the House's intervention and party status provide the adverseness that Article III demands.

ARGUMENT

I. The Bipartisan Legal Advisory Group Speaks For The House.

The Bipartisan Legal Advisory Group has articulated the House's institutional interests in litigation for the three decades since *Chadha*, and represents the House's interests here. House Resolution 5 confirms the Group's role as defender of the House's interests in this case, and neither the courts nor the executive may second-guess that definitive statement.

A. The Group Is Authorized by Longstanding Precedent and Tradition to Defend the House's Interests in Litigation.

The Group plainly speaks for the House in this case. *See* House Juris. Br. 24-30. Following *Chadha*, the House created the Group to assert the House's interests in litigation, without requiring a full House vote in each case. *See* House Juris. Br. 24-25. That is how the Group has functioned ever since. Indeed, although the House's Minority Leader and Minority Whip disagree with the House's merits position in this case, they agree that the Group can and does articulate the institutional position of the House here. *See supra* n.*. DOJ therefore is incorrect that the Group's "sole authority" is to "'consult' about the House's general counsel." DOJ Juris. Br. 29. Moreover, neither the executive nor this Court may substitute their interpretation of the House Rules for the House's own interpretation. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (rules adopted pursuant

to Rulemaking Clause are "absolute and beyond the challenge of any other body or tribunal."); House Juris. Br. 28-30.

DOJ's reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), is misplaced. *See* DOJ Juris. Br. 29-31. *Raines* did not address the institutional standing of a house of Congress, and the House does not assert that the Group has standing separate and apart from the House. And DOJ itself acknowledges, DOJ Juris. Br. 36, that this Court expressly "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress ..., and indeed both Houses actively oppose[d] their suit." *Raines*, 521 U.S. at 829. Here, by contrast, the Group *is* authorized by the House to articulate the House's institutional interests.

B. House Resolution 5 Confirms the Group's Authority.

The rules package for the 113th Congress adopted by the full House confirms the Group's long-standing authority to speak for and articulate the institutional position of the House in litigation. H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013), JA 579 ("[T]he … Group *continues* to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States." (emphasis added)); *see also* House Juris. Br. 26. House Resolution 5 is not an "'after-the-fact' authorization" of the Group to litigate on behalf of the House. *See* DOJ Juris. Br. 31. It is a confirmation of the Group's longstanding authority. Indeed, House Resolution 5 was expressly designed to "clarify the role of the Bipartisan Legal

Advisory Group generally, and in the Windsor litigation particularly," 159 Cong. Rec. 13 (2013), in response to this Court's order directing briefing on the standing issue. Thus, the resolution expresses the House's definitive confirmation of the Group's authority, which is binding on this Court under *Ballin*.

II. The House Has Standing And Is A Necessary Party To This Case.

A. *Chadha* Definitively Establishes the House's Standing.

Chadha definitively establishes that the House has standing to defend DOMA's constitutionality here. In no uncertain terms, *Chadha* held that each house of "Congress is both a proper party to defend the constitutionality of" a statute when the executive declines to do so "and a proper petitioner under [28 U.S.C.] § 1254(1)." *Chadha*, 462 U.S. at 939. That statement was followed closely by a second: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiff[] that the statute is inapplicable or unconstitutional." *Id.* at 940.[1]

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[1] DOJ attempts to disarm this second statement by (i) relegating it to a discussion of prudential rather than Article III standing, and (ii) arguing that it only supports Congress' role as an *amicus*. The context of the statement and its proximity to the statement regarding Congress' role as a proper petitioner directly support the House's party status here. The House and Senate could not have been proper petitioners without adequate Article III standing. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980).

Thus, *Chadha* definitively established that each house of Congress is a proper party in an action where the executive has refused to defend the constitutionality of a statute. In *Chadha*, the House and Senate participated separately as independent parties; they had separate counsel and filed separate briefs; and this Court acknowledged that the "two Houses of Congress" were separate "parties." 462 U.S. at 931 n.6. Accordingly, *Chadha's* reasoning is equally applicable when only one house participates. Indeed, the Constitution requires as much. *See* House Juris. Br. 21-22.

B. Well-Established Constitutional Rules Confirm the House's Article III Standing.

Chadha's holding is wholly consistent with well-established Article III standing principles. The House has a concrete, particularized interest in protecting its role in the legislative process when the executive seeks to invalidate a law through the judicial process. By its participation as a party-defendant below and as the proper petitioner here, the House seeks to prevent a permanent nullification of the House-passed DOMA Section 3. *See* House Juris. Br. 11-20.

The potential injury to the House when the executive turns from defender of duly-enacted statutes to attacker is obvious. Not only does judicial invalidation of a statute on constitutional grounds permanently nullify House-passed legislation; it also leaves Congress—and each house thereof—without a remedy. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). And despite DOJ's contrary suggestion, DOJ

Juris. Br. 32, "a judicial decree precluding enforcement of a federal statute on constitutional grounds" is vastly "different from a Presidential determination not to enforce the statute." The latter carries no precedential effect and leaves DOMA on the books to be enforced by later administrations, while the former, by contrast, is the functional equivalent of repeal, in which the House is a constitutionally necessary party. The executive should not be permitted to evade the Constitution's "finely wrought" process for legislative repeal by orchestrating a judicial repeal without the possibility of full participation of one or both houses of Congress as parties. *Chadha*, 462 U.S. at 951.

The House adequately can protect its interests only through participation as a full party. Indeed, even DOJ and Ms. Windsor acknowledge that the House's participation is the answer to *amica*'s concerns about a lack of ongoing controversy. *See, e.g.*, DOJ Juris. Br. 34 (House's participation ensures "that both sides of the constitutional question will be before the court"); Windsor Juris. Br. 20 ("BLAG's participation in this case reinforces the presence of a live case or controversy here."). But their suggestion that the House be relegated to *amicus* status is inconsistent with *Chadha*, common sense, and Article III. As this Court recognized explicitly in *Chadha* (and as DOJ and Ms. Windsor acknowledge implicitly), when an Act of Congress is challenged as unconstitutional and the executive joins the attack, the House (and/or the Senate)—not a court-appointed *amicus*—is the proper party to defend the statute. That is because the House, unlike an *amicus* or member of the general public, suffers a concrete

institutional injury and thus has a real and direct stake in the outcome of the case. *Cf. Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (holding that state-intervenor could appeal decision rejecting federal Lacey Act prosecution on ground that underlying state statute was unconstitutional, even when DOJ abandoned its own appeal, because state-intervenor "clearly has a legitimate interest in the continued enforceability of its own statutes").

The House requires full-party status throughout the litigation. At the district court level, only a party can participate completely in the litigation by, for example, conducting discovery and filing jurisdictional and procedural motions. The discovery process is the sole avenue for developing a factual record, which in some cases may be critical to developing or countering constitutional arguments. Similarly, jurisdictional and procedural motions may be important processes for establishing a legitimate claim before a district court and for weeding out defective constitutional challenges.

The executive's actions in other DOMA cases demonstrate why full-party status for the House is essential. For example, in *Bishop v. United States*, No. 04-cv-848 (N.D. Okla.), over the House's protest, DOJ refused to seek dismissal of plaintiffs' claims on standing grounds, instead "conced[ing]" that plaintiffs had standing. *See* Resp. of [DOJ] to Pls.' Notice to Ct. 1 (Aug. 18, 2010) (ECF 169); Consolidated Br. in Supp. of [House]'s Cross-Mot. for Summ. J, and in Opp. to Pls.' Mot. for Summ. J. 16-25 (Oct. 19, 2011) (ECF 215). The plaintiffs and the executive, whose interests in overturning DOMA

Section 3 were aligned, had no incentive to insist on the Article III prerequisites, let alone engage in traditional, full-scale litigation; only the House did.

Furthermore, only a party can determine when and where to seek appellate review. DOJ suggests that it respects the constitutional separation of powers by taking "steps to secure further review" of DOMA. DOJ Juris. Br. 8, 21-23. But there is no reason to think that a party actively attacking the constitutionality of a statute will select appellate vehicles with an eye to maximizing the statute's chances of surviving. Indeed, in the DOMA cases, DOJ has worked assiduously to expedite appeals in circuits that had not previously adopted rational basis as the governing standard, while slowing or torpedoing appeals in other circuits. While that strategy minimized DOJ's difficulties in explaining why it was attacking DOMA when it was on record as affirming that DOMA survives rational-basis review, it hardly maximized the chances that DOMA would survive appellate review.[2]

Moreover, it certainly is not the case that DOJ always appeals a decision holding an Act of Congress

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[2] DOJ says that absent its standing to appeal there would be no "reliable avenue for a definitive resolution of [DOMA's] constitutionality." DOJ Juris. Br. 22. Ignoring the obvious—namely, the avenue provided by the House's standing—the executive asks all of us to trust that it will control the appeals process fairly in its own attempt to invalidate DOMA. In DOJ's own words, that "approach has little to recommend it, and nothing to compel it." *Id.*

unconstitutional.[3] Accordingly, both Article III and common sense suggest that the party with an actual interest in defending a legal position—and not a party on the other side—should make the critical determinations about when and whether to appeal. And when DOJ abandons a statute, as it has here, there is every reason that one or both houses of Congress should make those strategic judgments, but doing so requires full party status.

C. The Constitution Fully Supports the House's Participation as a Party.

DOJ is wrong that the executive's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, bars the House's full participation. *See* DOJ Juris. Br. 27-29, 32-34. The House intervened to defend against DOMA's nullification, as *Chadha* envisioned. Doing so is not an exercise of, or infringement on, executive powers.

Moreover, the logic of DOJ's argument would require it to represent parties on both sides of a case even when the House seeks to enforce its rights *against* the executive. The executive, of course, has never made

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[3] *See, e.g.*, Letter from Eric H. Holder, Jr., Att'y Gen., to Kerry Kircher, House Gen. Counsel (Mar. 7, 2012) (declining to appeal decision holding application of 18 U.S.C. § 2261A(2)(A) violated First Amendment), App. 1a; Letter from Eric Holder, to Kerry Kircher (June 22, 2011) (declining to appeal decision holding 10 U.S.C. § 920 violated Due Process Clause), App. 5a; Letter from Eric Holder to Irving Nathan, House Gen. Counsel (Apr. 24, 2009) (declining to petition for certiorari in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), holding substantive due process challenge to 10 U.S.C. § 654 subject to heightened scrutiny), App. 10a.

this wholly impractical suggestion in non-DOMA cases where the House and Senate have routinely and appropriately litigated for themselves. *See, e.g.*, *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 96 (D.D.C. 1998); *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). This case is no different: When the executive and legislative branches have opposing interests, as they do here, the executive cannot attack and defend at the same time.

As these cases demonstrate, DOJ's belief that only it can represent the "sovereign interests of the United States" is fundamentally inconsistent with our tripartite system of government. DOJ Juris. Br. 13. The framers' genius was to divide the "sovereign interests of the United States" among the three branches. In the ordinary case, the executive respects this separation of powers by making professionally responsible arguments in defense of statutes or judicial prerogatives, even when it disagrees with the policy reflected in such statutes or prerogatives. But when the executive abandons that role—or when a statute or cause of action implicates divergent interests of the executive and legislative branches—there is no reason the legislative branch, a coordinate and co-equal branch, cannot defend its own sovereign interests in litigation.[4]

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[4] DOJ's insistence that only it may defend against challenges to federal actions also threatens the independence of the *judiciary*. Typically, DOJ defends cases that implicate the interests of the

The executive's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976), is misplaced. Unlike in *Buckley*, the House does not seek to defend "public rights" or control the civil enforcement process against private parties. *See* 424 U.S. at 140. Nor does the House seek to step into the shoes of the United States. *See* DOJ Juris. Br. 27-29.[5] Rather, as explained above and in the House's Brief on Jurisdiction (at 11-16), the House's modest hope is to defend its own institutional interests against executive attack.[6]

Not only is the House a proper party to this litigation; it is a necessary party. For the same reasons it has standing here, the House is the only party truly adverse to Ms. Windsor. Indeed, without the House's participation, this Court would be left issuing an advisory opinion at the executive's urging,

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judiciary. *See, e.g.*, *In re United States*, 463 F.3d 1328 (Fed. Cir. 2006) (DOJ successfully defended challenge to Third Circuit's decision not to reappoint bankruptcy judge). But under DOJ's view, if it declines to defend the judiciary, the judiciary would have no right to appoint its own counsel to defend its distinct interests.

[5] For similar reasons, DOJ's reliance on *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), is also misplaced. *See id.* at 705 n.9 (decision does not "preclude[] Members of Congress or the Judiciary from adding their views in litigation before this Court as intervenors or *amici curiae*").

[6] DOJ's insistence that only it can represent the sovereign interests of the United States also is inconsistent with both the long tradition of *qui tam* statutes, *see, e.g.*, *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000), and the representation of the United States by Independent Counsels, *see, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

something it has no constitutional authority to do. *See, e.g.*, *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. 409, 410 n.† (1792). Faced with similar circumstances in *Chadha*, this Court's assessment of Article III jurisdiction was explicitly contingent on "the presence of the two Houses of Congress as adverse *parties*." *Chadha*, 462 U.S. at 931 n.6 (emphasis added). Here, too, the House's adverse presence is essential.

III. The Executive Does Not Have Independent Appellate Standing.

The executive lacks both Article III and prudential standing to appeal. The executive received precisely the result it requested in the Second Circuit. All it can possibly achieve here is to broaden the geographic scope of its success via the decision's precedential effect on *other* same-sex couples. But Article III and this Court's cases focus on the actual parties to the case or controversy. To establish Article III standing on appeal, a petitioner that prevailed below "must show that [it] has suffered an injury in fact that is caused by the [ruling] complained of and that will be redressed by a favorable decision." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quotation marks omitted). Both the executive and Ms. Windsor can obtain no more relief from this Court than they already received from the Second Circuit.[7]

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[7] Indeed, DOJ argued precisely this—but with respect to the House—in another DOMA case. *See* [DOJ] Mot. to Dismiss for Lack of Appellate Jurisdiction 11-12 & n.3, *Lui v. Holder*, No. 11-57072 (9th Cir. Jan. 26, 2012) (ECF 17) (DOJ insisting House lacked appellate standing—where district court had granted House motion to dismiss but only "without prejudice"—

Thus, by definition, they suffered no "injury in fact" from the decision below.

Without the House's full participation, this case is the sort of manufactured controversy this Court always has declined to hear. *See, e.g.*, *United States v. Johnson*, 319 U.S. 302, 303-05 (1943) (finding no case or controversy when parties arranged to bring case to court to further defendant's interest); *Muskrat*, 219 U.S. at 362-63. The Court's decision in *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971) (per curiam) is instructive, despite DOJ's efforts to distinguish it. In *Moore*, because "both litigants desire[d] precisely the same result," the Court declined to decide the question. *Id.* at 48. The fact that the Court reached the same issue in a companion case, with truly adverse parties, *see N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), does not distinguish *Moore*. It proves the House's point: Without the House, this case is like *Moore*; with the House, there is jurisdiction as in *Swann*.

The executive also cannot satisfy the prudential standing requirement. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Roper*, 445 U.S. at 333. For the same reasons that the executive has suffered no Article III injury, it is not "aggrieved" for the purposes of prudential standing. One need look no further than the hearing list for this case to spot the anomaly: DOJ is listed as "petitioner in support of affirmance."

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because House "successfully achieved all of its reasons for its limited intervention in this case").

Res ipsa loquitur—the appellate standing problem with that label speaks for itself.[8]

Neither *Chadha* nor *Camreta* assist the executive on this point. In *Chadha,* because the executive relied on 28 U.S.C. § 1252, a statute no longer in effect, this Court never reached the issue of prudential standing under 28 U.S.C. § 1254. *See* House Juris. Br. 36. Moreover, the executive is mistaken that *Chadha* supports its *appellate* standing based on this Court's statement that "prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha." 462 U.S. at 939. That is because the particular procedural path of *Chadha* made the initial petition for review before the Ninth Circuit equivalent to the district court proceeding here. *See Chadha*, 462 U.S. at 928, 937. There was no district court proceeding in *Chadha* and no "appeal" to the Ninth Circuit. Thus, this Court's holding regarding Article III adversity before intervention by the two houses of Congress turned on the agency's order to deport Chadha. *See id.* at 939.

In *Camreta*, the petitioners sought review of an "adverse constitutional ruling." 131 S. Ct. at 2029. Although they were prevailing parties below (on less-favorable qualified immunity grounds), the petitioners had appellate standing because the decision on the constitutional question was adverse

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[8] To be sure, the executive claims it is injured because it was ordered to issue Ms. Windsor a refund. Tellingly, it does not ask this Court to redress that injury; instead, it seeks *affirmance* of that order.

to the position they advocated (and would deprive them of qualified immunity prospectively). *See id.* at 2029-33. There is no analog here. The executive received *everything* it requested below, and it does not seek to prevail here on a different, more-favorable ground.

The executive cannot grant itself appellate standing by insisting that it will not issue a refund without this Court's direction. The bare refusal to act might be enough for a justiciable controversy in the district court; otherwise "a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *Chadha*, 462 U.S. at 939. Absent participation by a genuinely adverse party, however, the district court should at most enter a consent decree—or, if the executive agrees to issue a refund, dismiss the case as moot. *Cf. Johnson*, 319 U.S. at 305. That is how the courts would treat private parties in the same position, regardless of any desire to obtain binding precedent or stated unwillingness to comply with an order they hope to see affirmed. *See, e.g.*, *Lord v. Veazie*, 49 U.S. 251 (1850); Wright & Miller, et al., 13 *Federal Practice & Procedure* § 3530 (3d ed. 2012).

There is no reason to bend this Court's prudential standing principles or to allow a party opposed to DOMA to appeal a decision striking it down. There is a party with constitutional standing to appeal (and the ordinary incentives of an adverse party) actively defending DOMA. That party is the House. This Court can, by granting the House's petition, resolve DOMA Section 3's constitutionality

without disfiguring bedrock Article III principles, which require adverseness and disfavor feigned controversies.

CONCLUSION

For the foregoing reasons and those articulated in the House's Brief on Jurisdiction, this Court should dismiss the petition in No. 12-307, grant the House's petition in No. 12-785, and resolve the constitutionality of DOMA Section 3 in No. 12-785 without re-briefing or re-argument.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
NICHOLAS J. NELSON
MICHAEL H. MCGINLEY
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
ELENI M. ROUMEL
Assistant Counsels
OFFICE OF GENERAL COUNSEL
UNITED STATES HOUSE OF
REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, D.C. 20515
(202) 225-9700

Counsel for Respondent
The Bipartisan Legal Advisory
Group of the United States
House of Representatives

March 19, 2013

Appendix

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OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

March 7, 2012

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: *United States* v. *William L. Cassidy*, No. 8:11-91 (D. Md. Dec. 15, 2011)

Dear Mr. Kircher:

Consistent with 28 U.S.C. 530D, I write to advise you that on February 28, 2012, the Department of Justice determined not to appeal the decision of the district court in the above-referenced case. A copy of the decision is enclosed.

In 2007, defendant William Cassidy became involved with a Tibetan Buddhist sect called Kunzang Palyul Choling, but only after Cassidy had misrepresented his religious background. The sect's leader, A.Z., eventually confronted Cassidy about his actual background, and Cassidy left the group. Then, over the course of several months in 2010, Cassidy posted hundreds of vulgar and derogatory comments about A.Z. on Twitter and a personal blog. The government indicted Cassidy on one count of interstate stalking, in violation of 18 U.S.C. 2261A(2)(A). As relevant here, that provision makes it a crime to use "any interactive computer service" "to engage in a course of conduct that causes substantial emotional distress" to a person in another

State, with the intent to "cause substantial emotional distress to that person."

The district court dismissed the indictment, holding that Section 2261A(2)(A) violates the First Amendment as applied in this case. The court reasoned that Cassidy's Internet postings did not fall within any category of speech unprotected by the First Amendment; that Section 2261A(2)(A) regulated Cassidy's speech based on its content and was therefore subject to strict scrutiny; and that the government lacked a compelling interest in criminalizing Cassidy's speech because, although the speech was emotionally distressing, A.Z. could have avoided it by blocking Cassidy's tweets or not reading his blog. The court further reasoned that even if the statute were analyzed as a content-neutral regulation of conduct, Section 2261A(2)(A) placed more than an incidental restriction on Cassidy's speech regarding matters of public concern. The district court emphasized that it was invalidating Section 2261A(2)(A) only as applied to the facts of this case, without addressing Cassidy's facial challenges.

The Department defended the constitutionality of Section 2261A(2)(A) in this case, and it will continue to do so in future cases to the extent consistent with recent Supreme Court precedent. In *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219 (2011), the Court held that speech in a public place on matters of public concern may not be subject to civil liability on the ground that such speech inflicts emotional distress on its listeners. *Snyder* involved a public protest of a funeral, and the Court recognized that

Internet postings might pose distinct issues. See *id.* at 1214 n.1; *id.* at 1221 (Breyer, J., concurring). The Court also recognized that it had permitted restrictions on speech in other contexts in order to protect unwilling but captive listeners; however, the Court held that doctrine inapplicable in *Snyder* because the funeral attendees were largely able to avoid the speech at issue. See *id.* at 1220.

Accordingly, the Department may be able to defend the constitutionality of Section 2261A(2)(A) as applied in future cases, consistent with the Court's decision in *Snyder*. Here, however, the district court found that Cassidy's speech did not target A.Z. in a way that made the speech difficult to ignore, because A.Z. could have avoided the speech by blocking Cassidy's tweets or not reading his blog. Because the district court declined to address Cassidy's facial challenge and held that the statute was unconstitutional only as applied to these specific facts, the decision in this case does not prejudice the Department's ability to defend Section 2261A(2)(A) in appropriate future cases. Finally, to the extent that Cassidy's Internet postings threatened physical harm, the government retains the ability to prosecute those threats under Section 2261A(2)(B).

A notice of appeal was due on January 17, 2012, and the Department filed a protective notice of appeal on that date. The Department's opening brief is currently due on April 13, 2012, but the Department intends to dismiss the appeal in advance of that date. Please let me know if we can be of further assistance in this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosure

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

June 22, 2011

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: *United States* v. *Prather*, 69 M.J. 338 (C.A.A.F. 2011)

Dear Mr. Kircher:

In accordance with 28 U.S.C. 530D, I write to advise you of the Department of Justice's decision not to petition the Supreme Court to review the decision of the U.S. Court of Appeals for the Armed Forces (CAAF) in this case. The CAAF held that a provision of the Uniform Code of Military Justice (UCMJ) violates the Due Process Clause because it unconstitutionally shifts to the defendant the burden to disprove an element of the offense. Because the decision is not an unreasonable application of existing law, because the Department of Defense has recommended to Congress that it amend the relevant UCMJ provision to eliminate the problem, and because jury instructions have cured the problem in other pending cases, the issue does not warrant petitioning for a writ of certiorari in this case.

Article 120 of the UCMJ, 10 U.S.C. 920, defines the military offenses of rape, sexual assault, and other sexual misconduct crimes. In particular, Article 120(c)(2) defines aggravated sexual assault as, among other things, engaging in a sexual act with

another person "if that person is substantially incapacitated or substantially incapable" of appraising the nature of the sexual act, declining participation in it, or communicating unwillingness to engage in the sexual act. Article 120(r) provides that "consent" is not "an issue," but may be raised as an affirmative defense by the accused. Article 120(t)(14) defines "consent" but provides that a person cannot consent if that person is "substantially incapable" of appraising the nature of the sexual act due to mental impairment or unconsciousness resulting from, among other things, consumption of alcohol or drugs. Article 120(t)(16) provides that the accused "has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

Defendant Stephen Prather, an airman in the United States Air Force, was tried by a general court-martial on charges including aggravated sexual assault, in violation of Article 120(c)(2). The charge alleged that Prather had sexual intercourse with a woman who was substantially incapacitated due to her intoxication. His defense was consent. The court-martial found Prather guilty. He was sentenced to a dishonorable discharge, confinement for two years and six months, forfeiture of all pay and allowances, and reduction in rank.

The CAAF reversed the aggravated sexual assault conviction. It concluded that the "interplay" of the element of substantial incapacity in Article 120(c)(2), the definition of consent in Article

120(t)(14), and the affirmative defense in Article 120(t)(l6) "results in an unconstitutional burden shift to the accused." 69 M.J. at 343. The CAAF explained that "[i]f an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated." *Ibid.* The CAAF rejected the government's argument that the military judge's instructions cured "any constitutional infirmity in the statutory scheme." *Ibid.*; *see id.* at 343–345. It also concluded that, because the initial burden shift in Article 120(t)(16) was unconstitutional under the circumstances of the case, any question concerning the second burden shift (*i.e.*, providing that once a defendant has met his burden to prove an affirmative defense, the government has the burden to disprove it beyond a reasonable doubt) was "moot." *Id.* at 345. Even if the issue were not moot, however, the CAAF held that the second burden shift is a "legal impossibility." *Ibid.* Separately, the CAAF upheld Prather's conviction for adultery and ordered resentencing. *Ibid.*

Judge Baker, joined by Judge Stucky, dissented in part and concurred in the result. They believed that the first burden shift in Article 120(t)(l6) is not unconstitutional on its face and can be applied constitutionall1y with proper instructions. But they also believed that the second burden shift is unconstitutional on its face. 69 M.J. at 348.

The CAAF applied well-settled due process principles in reaching its conclusion, and its decision

breaks no new ground. The Department of Defense has recently transmitted to Congress recommended amendments to Article 120. One aspect of those amendments, if adopted by Congress, would eliminate the constitutional defect identified in this case—in particular, by striking the affirmative-defense provisions, Article 120(r) and (t)(16). And the CAAF's application of due process principles in this context does not have independent jurisprudential significance for military prosecutions. Accordingly, the ability to respond legislatively to the CAAF's decision counsels against seeking Supreme Court review.

Furthermore, in nearly every other case pending in the military courts, military judges have given an instruction specifying that the government bears the burden of proving the absence of consent beyond a reasonable doubt. *See* 69 M.J. at 340 & n.2. Since deciding this case, the CAAF has affirmed a conviction obtained after such an instruction. *See United States v. Medina*, 69 M.J. 462, 465–466 (C.A.A.F. 2011). The minimal effect on cases beyond Prather's own case, while Congress considers whether to amend the statute, is a further reason why Supreme Court review is not warranted at this time.

In this case, the Department of Defense, which is responsible for litigating before the CAAF, did not advise the Department of Justice of its recommendation with respect to whether to seek certiorari until June 13, 2011, and the Criminal Division of the Department of Justice did not provide the Solicitor General with its recommendation until

June 14, 2011. The Solicitor General promptly sought an extension from the Supreme Court to and including July 15, 2011, and the Chief Justice granted an extension to June 29, 2011. Accordingly, a petition for a writ of certiorari would be due on June 29, 2011.

Please let me know if we can be of further assistance in this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosure

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

April 24, 2009

Mr. Irving Nathan
General Counsel
U.S. House of Representatives
Washington, D.C. 20515

Re: *Witt* v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)

Dear Mr. Nathan:

I am sending this letter consistent with my obligation under 28 U.S.C. 530D to report to Congress on the enforcement of laws. Because this is the first such letter I have sent to Congress, I take this opportunity to note the process that I will generally follow. As the chief law enforcement officer of the United States, I intend in the usual case to send notifications consistent with Section 530D in my own name.

Consistent with the purposes of 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has decided not to seek Supreme Court review of the interlocutory decision of the United States Court of Appeals for the Ninth Circuit in the above-referenced case, but instead to continue defending the constitutionality of the statute at issue, 10 U.S.C. 654, on remand in the district court. This decision was made after extensive consultation with the Department of Defense and is based on the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical

litigation considerations. The government retains all rights to petition the Supreme Court to review a final decision in the case, including every aspect of the Ninth Circuit's ruling, after the proceedings on remand are completed.

The court of appeals held in *Witt* that a discharged service member's challenge to 10 U.S.C. 654, which establishes the policy concerning homosexuality in the armed forces, is subject to intermediate scrutiny under the substantive component of the Due Process Clause. 527 F.3d at 817–19. Under that standard, the court of appeals concluded that the government had advanced a sufficiently important interest, but remanded to the district court to determine whether applying the statute to the service member at issue, plaintiff Margaret Witt, would significantly further that interest and whether that interest could be achieved substantially through a less intrusive means. *Id.* at 821. The Ninth Circuit subsequently denied the government's petition for rehearing en banc, over the dissent of six judges. *Witt* v. *Department of the Air Force*, 548 F.3d 1264 (2008). Copies of the opinions are enclosed.

The court of appeals' decision neither declared 10 U.S.C. 654 unconstitutional on its face nor held the statute unconstitutional as applied to Margaret Witt. The court of appeals instead instructed the district court to determine the statute's constitutionality as applied to Witt. The question at this juncture concerns the most appropriate way to continue defending the constitutionality of the statute against Witt's claims in this procedural context.

The Supreme Court ordinarily does not review nonfinal, interlocutory decisions. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "to review the adverse rulings made by the Court of Appeals ... because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (stating the general rule that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order"); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007) ("'[E]xcept in extraordinary cases, the writ is not issued until final decree.'") (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). The government's usual practice is to respect this principle of certiorari jurisdiction in its decisions about whether and when to petition the Supreme Court for review. Indeed, the government often invokes the Supreme Court's presumption against reviewing interlocutory decisions as a reason to deny certiorari, because it avoids decision of unnecessary questions.

In this case, if the remand and any subsequent appeal results in the upholding of the statute as applied, Margaret Witt's claims against the government will terminate. If, instead, the remand and a subsequent appeal results in the invalidation

of the statute as applied, the government can raise any and all of its arguments in defense of the statute in a petition for a writ of certiorari seeking review of the final judgment. In the event that defense of the statute in the Supreme Court should prove necessary, the development of the factual record on remand will provide the government with an opportunity to strengthen its case; at a minimum, it will afford the Court a more complete basis on which to assess the parties' various contentions concerning the statute. And the Department of Justice's assessment is that the burdens associated with any discovery requests by the plaintiff in the remand proceedings likely can be appropriately cabined.

The Department of Defense has provided views to the Solicitor General about this case consistent with the above analysis. Noting the interlocutory nature of the court of appeals' decision and the ability of the government to petition for certiorari in the case at a later time, the General Counsel of the Department of Defense advised that "a remand will allow DoD to develop a factual record in the case which will, we believe, demonstrate that the discharge was fully appropriate and consistent with law." Letter from J. Johnson to E. Kagan (Apr. 20, 2009). A copy of the recommendation from the Department of Defense is enclosed.

The appropriate course, in light of the Department of Defense's views, all relevant litigation considerations, and the government's usual practice of waiting for a final judgment to petition the Supreme Court for certiorari, is now to defend the

constitutionality of 10 U.S.C. 654 on remand in the district court.

At the same time, the Department of Justice will oppose a petition for certiorari in *Pietrangelo* v. *Gates*, No. 08-824 (filed Dec. 23, 2008). In that case, the United States Court of Appeals for the First Circuit dismissed a service member's constitutionally-based challenge to his discharge under 10 U.S.C. 654. See *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008). The government will file its opposition to certiorari, defending the constitutionality of the statute, by May 6.

Thank you for your attention to this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosures