No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

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

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

REPLY BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

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Neither the amica nor BLAG disputes that the district court's judgment runs against the United States, invalidates the application of a federal statute that the United States would otherwise enforce, and requires the United States to refund tax revenue from the Treasury. The amica and BLAG nevertheless assert that the United States is powerless to seek further review of that judgment. In the amica's view, the judgment is completely unreviewable. In BLAG's view, the party bound by the judgment—the United States—cannot itself seek further review, but a congressional subgroup mentioned nowhere in the Constitution or the United States Code, acting at the direction of three Members of the House of Representatives, can. Adopting either of those jurisdic-

tional theories would run counter to this Court's precedents and make little jurisprudential or practical sense.

A. The United States' Petition Gives This Court Jurisdiction To Decide This Case

As the United States' opening jurisdictional brief explains (Br. 10-27), the Executive Branch's agreement with plaintiff that Section 3 of DOMA is unconstitutional does not preclude either the district court, the court of appeals, or this Court from reaching the merits in this case. BLAG's arguments to the contrary are unavailing.

1. Plaintiff's suit presents a case or controversy between plaintiff and the United States

BLAG, like the amica, does not seriously dispute the existence of an Article III case or controversy in the district court. That case or controversy, which concerned plaintiff's tax liability, was between plaintiff and the United States, not plaintiff and BLAG (or the United States and BLAG). See U.S. Jur. Br. 10-12. Because the President had instructed federal agencies to continue enforcing Section 3, see J.A. 192, litigation was the only way for plaintiff to obtain a tax refund. She could obtain a refund only from the United States, see 26 U.S.C. 7422(f)(1), not from BLAG. Contrary to BLAG's suggestion (Br. 12 n.3), the Executive Branch's view that Section 3 is unconstitutional did not bar plaintiff from affirmatively seeking such relief. See *INS* v. *Chadha*, 462 U.S. 919, 939 (1983) (rejecting proposition that "a person could be denied access to the courts because the Attorney General of the United States agreed with [his] legal arguments").

BLAG suggests (Br. 37) that its presence as a full party in the district court was necessary to avoid "all manner of jurisdictional conundrums" that would other-

wise arise from the United States' agreement with plaintiff that Section 3 is unconstitutional. But this Court has made clear that such agreement raises, at most, "prudential, as opposed to Art[icle] III, concerns" and that any such concerns are "dispelled" by amicus participation supporting the law's constitutionality, with no need for party participation. See *Chadha*, 462 U.S. at 940 (1983); see also *United States* v. *Lovett*, 328 U.S. 303 (1946); see U.S. Jur. Br. 36-37. In any event, even if BLAG were correct that effective presentation of its views in this case required procedures beyond those ordinarily available to an amicus, the underlying controversy in this case—a tax-refund dispute between plaintiff and the United States that does not involve BLAG—would remain unchanged.

2. The case or controversy between plaintiff and the United States continues to exist

BLAG's challenge to the United States' ability to seek further review in this case relies on two arguments also advanced by the amica: (1) that the United States lacks "prudential standing," on the theory that it is not aggrieved by an order declaring a federal statute unconstitutional and requiring the payment of more than $360,000 from the federal Treasury (BLAG Jur. Br. 35-37); and (2) that the adverseness between plaintiff and the United States, which existed in the district court, disappeared once the district court entered judgment (*id.* at 32-35). Those arguments—for which BLAG largely relies on the same inapposite authorities as the amica—lack merit. See U.S. Jur. Br. 12-27.

a. On prudential standing, BLAG's basic contention is that "the executive cannot ground its appellate standing on the desire for an opinion with the identical effect on this case and controversy, but a broader precedential

scope for other cases." Br. 36-37 (emphasis omitted). That contention rests on two fundamental misconceptions. First, BLAG incorrectly views the Department of Justice as representing only "the executive." As the United States' opening jurisdictional brief explains (Br. 13-14), the Constitution and the relevant statutes make clear that the Department of Justice represents the United States as a whole. The jurisdictional inquiry therefore turns on the full interests of the sovereign, not some limited conception of what the Executive Branch's interests might be were it not the sovereign's representative. Indeed, BLAG describes this case as one in which "the executive branch was the named defendant," Br. 15, when the named defendant in fact is the United States.

Second, BLAG incorrectly views the United States' requests for further review merely as attempts to obtain a broader precedential scope for the lower courts' judgments. But the lower courts do not have the last word about what the Constitution requires in *this* case. The United States has been aggrieved and injured by the lower courts' decisions, see U.S. Jur. Br. 14-20; the United States would continue to enforce Section 3 against plaintiff unless barred by a final judicial decision from doing so, see *id.* at 21-22; and the United States has sought further review to determine whether the injuries that the lower courts' decisions inflict on its law-enforcement and financial interests in this case are, in fact, constitutionally compelled, see J.A. 192 (explaining that the President has instructed the Executive Branch to enforce Section 3 as written "unless and until * * * the judicial branch renders *a definitive verdict* against the law's constitutionality") (emphasis added).

An appellate decision in this case, like any appellate decision, will have precedential force in future cases. But that does not mean that the United States lacks a case-specific interest in seeking further review of the lower courts' adverse judgments. Nor does that interest disappear simply because the government's appellate briefs in this case, like its briefs in *Chadha* and *Lovett*, have taken the position that the correct constitutional result would be to affirm. See INS Br. at 77, *Chadha*, *supra* (Nos. 80-1832, 80-2170, 80-2171) (requesting affirmance); Pet. Br. at 72, *Lovett*, *supra* (No. 45-809) (same). The United States recognizes that a reviewing court may disagree with that position; it has made clear that it will enforce Section 3 if the Judicial Branch's final decision in this case is to uphold it, see J.A. 192; and it has a right to seek further review before being required permanently to comply with a judicial decision that injures the United States' sovereign interests, see *Chadha*, 462 U.S. at 931 ("The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.").

b. On adverseness, BLAG—like the amica—appears erroneously to believe that Article III requires the parties to disagree on the legal issue before the court. As the United States' opening jurisdictional brief explains (Br. 20-27), however, adverseness turns not on disagreement about a point of law, but instead on whether the parties each have "an ongoing interest in the dispute." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). That requirement is satisfied here, because appellate resolution of the case will determine whether the United States can enforce Section 3 against plaintiff or whether plaintiff will get a refund of her tax. See *Chadha*, 462

U.S. at 939-940 ("We agree with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'") (citation omitted); cf. *In re Reisenberg*, 208 U.S. 90, 107 (1908) (finding "controversy" under diversity-jurisdiction statute where "defendant admitted [its] indebtedness" but "demand of payment * * * had been made and refused").

Unlike cases relied upon by BLAG, moreover, this is not a circumstance in which the parties have manufactured a collusive suit. See *Lord* v. *Veazie*, 49 U.S. (8 How.) 251, 255 (1850) (finding no controversy where parties entered into contract and manufactured suit to defeat rights of absent third parties); *United States* v. *Johnson*, 319 U.S. 302, 304 (1943) (per curiam) (finding no controversy where one party "dominated the conduct of the suit by payment of the fees of both"). It is, instead, a circumstance in which the United States has enforced—and continues to enforce—a federal statute. The President's belief that the courts should find the statute unconstitutional, and his expression of that belief in litigation, does not deprive the Judiciary of authority to reach the merits of the parties' ongoing dispute over the statute's continued enforcement. See *Chadha*, 462 U.S. at 939 ("[T]he INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment."). This case therefore is distinct from a situation in which the parties to a dispute agree to settle it. See BLAG Jur. Br. 12; see also U.S. Jur. Br. 21.

BLAG, like the amica, has no explanation for why the adverseness that was concededly present in the district

court somehow vanished on appeal. A "decision that is 'final' for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see 28 U.S.C. 2414 (money judgment against United States not final if further review is sought). Thus, contrary to BLAG's assertion (Br. 34), appellate review of the district court's decision would in no way constitute an "advisory opinion." Because an appellate decision would conclusively determine whether the United States can—and will continue to—enforce Section 3 against plaintiff, and whether plaintiff should get a tax refund, such a decision would neither "decide questions that cannot affect the rights of litigants in the case" nor "advis[e] what the law would be upon a hypothetical state of facts," *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (citation omitted). The parties "continue to have a personal stake," *ibid.* (quotation marks and citation omitted), in the outcome of the appellate proceedings, and this Court has jurisdiction to decide the merits of the case.

B. BLAG Lacks Standing To Appeal

Because the Court can resolve this case based on the United States' already-granted petition, it need not address BLAG's argument (Br. 11-32) that it independently had standing to appeal the district court's decision and to seek certiorari in this Court. In any event, BLAG fails to establish that it had such standing. BLAG does not (and could not, see U.S. Jur. Br. 27-29) contend that it represents the interests of the United States, the only party against which plaintiff could obtain relief and the only party injured by the lower courts' judgments. BLAG also does not (and could not, see *id.* at 29-31) contend that it has standing as an inde-

pendent legislative body or as an organization with individual legislators as members. Instead, BLAG contends that (1) it should be deemed to have been representing the entire House of Representatives (but not Congress as a whole), and (2) the House has standing to seek further review of the judgments below. Neither contention is correct.

1. BLAG does not represent the House

As the government's opening jurisdictional brief explains (Br. 29), the full House did not authorize BLAG to represent it in this case until *after* BLAG had filed its notice of appeal and petition for a writ of certiorari. BLAG fails to show otherwise.

BLAG's assertion that it has, for the past 30 years, been litigating "on behalf of the House without any authorizing votes by the full House" (Br. 25) is question-begging. It presumes that that BLAG can, in fact, represent the full House without an "authorizing vote." That premise is incorrect. See *United States* v. *Ballin*, 144 U.S. 1, 7-8 (1892) (concluding that action by the House requires a quorum and a majority vote). BLAG's observation (Br. 26-27) that the House has not *forbidden* BLAG from representing the House in this case is therefore irrelevant.

BLAG suggests that an after-the-fact resolution stating that BLAG "'continues'" to represent the House in litigation matters, including this case, "confirms" that BLAG has always had authority to represent the House in this litigation. Br. 26 (citation omitted). But a resolution by the House as constituted in the 113th Congress cannot retroactively authorize BLAG to represent the previous House (of the 112th Congress) for purposes of an appeal BLAG filed six months before the relevant resolution was passed. See J.A. 522; U.S. Jur. Br. 29.

And BLAG offers no textual explanation for how its sole authority under the previous House's rules—to "consult" with the Speaker about directing the General Counsel, Rule II.8, Rules of the House of Representatives, 112th Cong. (2011)—could plausibly be understood as implicitly including the power to intervene in litigation, in its own name, on behalf of the full House.

BLAG nevertheless asserts (Br. 28-29) that this Court has no choice but to read the most recent House's resolution as a binding interpretation of the prior House's resolution, no matter how implausible such an interpretation might be. But this Court has not automatically deferred to the Legislature's interpretation of rules about an entity's litigating authority. See *Reed* v. *County Comm'rs*, 277 U.S. 376, 388-389 (1928) (concluding that Senate rules did not authorize Senate committee to file suit). And it has recognized that a legislative interpretation "arrived at subsequent to the events in controversy" warrants less deference. *United States* v. *Smith*, 286 U.S. 6, 33 (1932).

A holding that BLAG can represent the House, even in the absence of a formal vote by the House itself, would permit the House to escape political accountability. It would allow BLAG to place the weight of the full 112th House behind its notice of appeal and petition for a writ of certiorari, even though the 98.9% of that House's Members who do not belong to BLAG would have cast no vote about that intervention. If the House had litigating interests to assert in this case, it could have directly voted on the matter ahead of time, and it could have intervened in its own name, not BLAG's.

2. The House would have no standing in this case

In any event, as the United States' opening jurisdictional brief explains (Br. 31-37), even the House itself

would not have standing to seek further review of the judgments below.

a. As a threshold matter, even on BLAG's own theory, BLAG lacked standing to appeal from the district court. Neither of the interests BLAG purports to assert on behalf of the House—(1) "ensuring that * * * passage of DOMA is not completely nullified by a binding judicial determination" (Br. 9), and (2) avoiding the imposition of "a heightened standard of review" for hypothetical future "legislation that classifies on the basis of sexual orientation" (Br. 13)—was affected by the district court's decision. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta*, 131 S. Ct. at 2033 n.7 (quoting 18 James W. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed. 2011)). The district court's non-precedential, case-specific decision here thus could neither have "completely nullified" Section 3 nor have imposed a heightened standard of review applicable to future laws. All it could have done (and all it did) was to preclude the "execution of the Act" in the particular circumstances of plaintiff's tax-refund request, which affects an "executive function," not a legislative one. *Bowsher* v. *Synar*, 478 U.S. 714, 733-734 (1986). Even if the court of appeals' (geographically limited) decision could be seen as having the sort of effect BLAG asserts, BLAG's jurisdictional theory fails to explain how it could have appealed the case to the court of appeals in the first place.

b. In any event, the interests proffered by BLAG are not interests that the Constitution permits the House to assert in litigation. See, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 826 (1997) (rejecting claim of standing based on

"abstract dilution of institutional legislative power"). The "power to create and enforce a legal code" is an interest of the "sovereign." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 601 (1982). The sovereign in the federal system is the United States, not the House. Although the House plays a necessary role in passing legislation, it cannot enact laws without the involvement of the Senate and the President, see *Chadha*, 462 U.S. at 946-951 (discussing bicameralism and presentment requirements), and its relationship to the bill ends once the bill has passed Congress and been signed by the President. The House has no role at all in enforcing laws. See *Bowsher*, 478 U.S. at 733 ("[O]nce Congress makes its choice in enacting legislation, its participation ends."). Nor does the House have a judicially cognizable stake in the law's validity and enforcement any greater than the citizens its Members represent, who have only a generalized interest in the law. See U.S. Jur. Br. 30-31.

BLAG's theory of independent legislative litigating authority would impermissibly aggrandize the Legislative Branch, at the expense of the Executive Branch, in two distinct ways. First, the interests BLAG asserts are, at bottom, enforcement interests that properly belong to the Executive. BLAG acknowledges (Br. 15 n.4) that court decisions "do not *formally* constrain the House and Senate from proposing new legislation," but asserts that the "practical effect" (Br. 15) of such decisions nevertheless injures the legislature. But the only "practical effect" of the district court's decision here is to preclude *enforcement* of Section 3 to deny plaintiff a tax refund, and the only "practical effect" of the court of appeals' decision, even as a precedential matter, is to preclude *enforcement* of Section 3 against same-sex

couples within the Second Circuit. Those enforcement-related interests are not the House's to claim. See, *e.g.*, *Medellin* v. *Texas*, 552 U.S. 491, 526 (2008) (reciting the "fundamental constitutional principle that 'the power to *make* the necessary laws is in Congress; the power to *execute* in the President'") (emphasis added; citation omitted). This case does not involve a challenge to the role of the House (or Senate) in *enacting* legislation; it instead challenges the *enforcement* of an enacted law.

Second, allowing independent litigation by the Legislative Branch in this case would encroach upon the Executive Branch's role of representing the United States as sovereign in court. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed,'" including the "discretionary power to seek judicial relief." *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). Even assuming that the lower courts' decisions could be seen to interfere with legislative interests, those interests are so inextricably intertwined with enforcement that they cannot reasonably be separated out. See, *e.g.*, BLAG Jur. Br. 12 (characterizing House's interest as assuring that "DOMA would remain on the books and *could be enforced*") (emphasis added). BLAG asks this Court to endorse a novel theory under which the House or Senate could in many cases override strategic litigating decisions (such as the decision not to appeal a particular decision) that the President deems best for the United States as a whole, pursuant to his responsibilities under the Take Care Clause. But it can identify no constitutional provision that vests Congress, or any component thereof, with any responsibility or authority with respect to government litigation.

c. BLAG's expansive view of legislative authority contains no meaningful limiting principle. Although BLAG repeatedly impugns the President's determination to inform the courts that Section 3 is unconstitutional, BLAG's jurisdictional theory in no way depends on the Executive Branch's litigating position. BLAG makes clear that in its view, the House or Senate can independently litigate (possibly in competition with one another) *any* case concerning a federal statute's constitutionality, *regardless* whether the Executive is also in the case, subject only to possible "prudential" limitations that BLAG declines either to fully endorse or to explain. See Br. 23. Indeed, the implications of BLAG's jurisdictional theory would sweep even further. Its asserted legislative interest in court decisions defining constitutional standards (Br. 13) would allow the House or Senate to intervene in federal cases challenging the constitutionality of *state* statutes and then to seek further review of adverse decisions if the State itself declined to do so, based merely on the speculation that Congress might at some point try to pass a similar law.

BLAG identifies no decision of this Court that recognizes anything approaching such a far-reaching role for the federal Legislature. For reasons explained in the United States' opening jurisdictional brief (Br. 34-37), BLAG's reliance on *Chadha* is misplaced. Likewise misplaced is BLAG's reliance on cases concluding that a State may authorize its legislature or legislators to represent the State itself in litigation. See *Karcher* v. *May*, 484 U.S. 72, 82 (1987) (legislature had authority "under state law" to represent State's interests in litigation); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (legislators can have standing to challenge ruling that state law is unconstitutional "if state law au-

thorizes legislators to represent the State's interests"). Because the States are not constrained by the separation-of-powers principles embodied in the United States Constitution as among the three Branches of the United States government, those decisions suggest neither that Congress or one of its Houses may represent the United States as a sovereign in court nor that Congress or one of its Houses has a judicially cognizable interest independent of the sovereign interests of the United States represented by the Executive in court.

Nor can BLAG draw support from *Coleman* v. *Miller*, 307 U.S. 433 (1939), another case involving state legislators. The individual plaintiffs in *Coleman* were challenging a state procedural mechanism that, they alleged, had invalidated their votes and caused the legislature to ratify, rather than reject, a proposed federal constitutional amendment. *Id.* at 436-438. The state legislators had sued state officials in state court, and their interest in maintaining the effectiveness of their votes had been "treated by the state court as a basis for entertaining and deciding the federal questions." *Id.* at 438, 446. *Coleman* does not suggest that the United States House of Representatives has standing to appeal a decision of a federal district court precluding the United States from enforcing a federal statute against a particular plaintiff. See *Byrd*, 521 U.S. at 821-826 & n.8 (1997) (discussing the limited holding of *Coleman*).

d. BLAG asserts that denying independent litigating authority to the House would "significantly skew the separation of powers in favor of the executive and away from Congress and the courts." Br. 31 (emphasis omitted). But the assignment of sovereign litigating authority to the Executive Branch, rather than the Legislative or Judicial Branches, is a deliberate feature of the con-

stitutional design. See *Buckley*, 424 U.S. at 138-140. In any event, the course charted by the President in this case is inclusive, not exclusive, of the other Branches. It allows the Legislative Branch to present its views about Section 3 to the courts, and it allows the Judicial Branch to have the final word on the statute's constitutionality. Practical reasons, as well as precedential ones, accordingly support a decision on the merits of the United States' petition.

* * * * *

For the foregoing reasons and those stated in the United States' opening brief on the jurisdictional questions, this Court should reach the merits of this case based on the petition for a writ of certiorari filed by the United States.

Respectfully submitted.

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