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.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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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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REPLY BRIEF FOR PETITIONER

If the Court agrees—as, respectfully, it should—with the Bipartisan Legal Advisory Group of the United States House of Representatives ("House") that (i) the House has Article III standing, *see* House Juris. Br. 11–32 (No. 12-307), and (ii) the Department of Justice ("DOJ") lacks standing to appeal from the decisions below, *see id.* at 32–38, then this petition is the proper vehicle for resolving the important constitutional question presented in this case. DOJ agrees. *See* Br. for U.S. 6 (No. 12-785). Ms. Windsor's late-breaking suggestions that the House lacks standing or that this path is somehow foreclosed are incorrect. *See* Windsor Br. in Opp'n 1–5 (No. 12-785) (arguing for first time that House lacks standing).

For thirty years, this Court has recognized that the House is a "proper party to defend the validity of a statute when" the executive "agrees with [a] plaintiff[] that [a] statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983). Indeed, this Court has specifically recognized that in these circumstances the House "is both a proper party to defend the constitutionality of [the statute] *and a proper petitioner*." *Id.* at 939 (emphasis added). Ms. Windsor offers no response to this settled precedent. Remarkably, her brief in opposition does not so much as cite *Chadha*, let alone offer any attempt to distinguish it.

Her suggestion (at 4–5) that the House's petition could have been granted and consolidated if only it had been filed sooner is mystifying. Ms. Windsor provides no hint as to why the House's Article III

standing or ability to file a petition were in any way compromised by not filing sooner. The House filed its petition well before the applicable deadline, *cf. infra* n.1, and in ample time to permit it to be used as a vehicle for this Court to decide the constitutional merits of Section 3 of the Defense of Marriage Act ("DOMA") this Term, without the need for additional briefing or argument. The fact that Ms. Windsor and the United States filed their petitions even earlier—indeed, before judgment—does not undermine the House's right to petition; on the contrary, it only underscores the difficulties inherent in allowing the prevailing party to dictate the timing of appellate review. *See* House Juris. Br. 30–32 & n.18, 37–38; House Juris. Reply 6–9, 12–16 (No. 12-307).

The House undoubtedly is aggrieved by a decision striking down an Act of Congress, especially when, as here, the decision comes at the behest of the executive and imposes heightened scrutiny on the House's future legislative actions. *See* House Juris. Br. 11–20. Indeed, Ms. Windsor acknowledges that the House's participation as an intervenor-defendant in this case "sharpens the presentation of issues" and thus ensures the adverseness that Article III of our Constitution requires. Windsor Br. in Opp'n 2–3 (internal quotation marks omitted); *see also* House Juris. Br. 30–35. But with the House having been granted the right "to intervene in this action as a party defendant" (with no opposition from Ms. Windsor), JA 225, and having suffered a distinct injury that makes it the "proper party" to defend DOMA, it is far too late in the day for Ms. Windsor to attempt to demote the House to a mere amicus.

The Bipartisan Legal Advisory Group clearly is authorized to represent the House in this litigation. Pursuant to the House's internal rules, as interpreted by the House itself, the Group is authorized "'to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in [this case].'" House Juris. Br. 26 (quoting H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013)); *see also id.* at 24–30. For three decades since *Chadha* was decided, that is precisely how the House has understood the Group's authority—on this, the majority and minority leadership of the House are agreed, *see supra* n.*—and it is precisely how the Group has functioned. *See* House Juris. Br. 24–27.[1] Neither Ms. Windsor, the executive, nor this Court may second-guess the House's definitive interpretation of its own rules. *See id.* at 28–30; House Juris. Reply 2–4; *see also, e.g.*, U.S. Const. art. I, § 5, cl. 2; *United States v. Ballin*, 144 U.S. 1, 5 (1892).[2]

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[1] House Resolution 5 confirmed that the Group "*continues* to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears." H. Res. 5, 113th Cong. § 4(a)(1)(B) (emphasis added); House Juris. Br. 26. Thus, the Resolution is not the House's *initial* authorization of the Group's participation in this litigation, but instead is an express *reaffirmation* of the Group's long-established authority. In all events, the House adopted Resolution 5 within the jurisdictional time limit for filing this petition, unlike the Solicitor General's untimely "'after-the-fact' authorization" of the Federal Election Commission's petition in *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).

[2] This Court's decisions in *Reed v. County Commissioners of Delaware County, Pa.*, 277 U.S. 376 (1928), and *United States v.*

Ms. Windsor also is incorrect to assert that the decision below "has no binding legal effect on" the House. Windsor Br. in Opp'n 4. The "binding legal effect" of the Second Circuit's decision is that the House's passage of DOMA has "been overridden and virtually held for naught" and, within that circuit, a heightened standard of review has been imposed on any future federal statutes deemed to classify on the basis of sexual orientation. *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

It makes no difference that the district court's judgment lacked the precedential force of the Second Circuit's decision. As this Court noted in *Coleman*, agencies typically "are entitled as 'aggrieved parties' to an appeal to this Court from a decree setting aside an [agency] order," even when "the United States refuses to join in the appeal," 307 U.S. at 442 (quoting *ICC v. Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14 (1933)); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (FCC defended order, while DOJ argued that the order was unlawful), and even when the agency is appealing from a district court ruling, *see, e.g.*, *Oregon-Washington*, 288 U.S. at 24–27. The same is true for the House when a court sets aside a statute passed by the House according to the constitutionally prescribed procedures.

In all events, the Second Circuit decision plainly has precedential effect, and that is the decision the House seeks to have reviewed and reversed. Thus,

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Smith, 286 U.S. 6 (1932), do not hold otherwise. *See* House Juris. Br. 29 n.17.

just as the legislators in *Coleman* had "a plain, direct and adequate interest in maintaining the effectiveness of their votes" against the Child Labor Amendment, 307 U.S. at 438, the House has standing here to defend its passage of DOMA Section 3.[3]

The House's status as "both a proper party to defend the constitutionality of [the statute] and a proper petitioner," *Chadha*, 462 U.S. at 939, is not undermined merely because it "has not been ordered to satisfy the judgment in Ms. Windsor's favor" or "been enjoined from taking any future actions." Windsor Br. in Opp'n 4. The same was true in *Chadha*. *See* 462 U.S. at 939. And the same is true when DOJ intervenes in a private suit to defend the constitutionality of a statute. *See, e.g.*, 28 U.S.C. § 2403; *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456 (2003); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002). Surely, even in the absence of the type of decree posited by Ms. Windsor, DOJ has standing to appeal from a decision striking down an Act of

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[3] The legislators' standing in *Coleman*, of course, was premised on their *institutional* interest in preserving past legislative action as much as it was premised on their *personal* ability (as twenty out of forty senators) to defeat ratification in the absence of the lieutenant governor's vote. This Court recognized the legislators' standing not just to contest the lieutenant governor's vote (an issue on which the Court evenly divided), *but also* to contend that "the proposed amendment had lost its vitality" by virtue of the state's prior rejection of the amendment and "the failure of ratification within a reasonable time." *Coleman*, 307 U.S. at 436; *see also id.* at 447–56. The latter argument was advanced to preserve the *legislature's* past legislative action, just as the House seeks to preserve its passage of DOMA Section 3 in this case.

Congress when the other parties agree with the decision. *Cf. Maine v. Taylor*, 477 U.S. 131, 136–37 (1986) (state intervenor could appeal decision overturning federal Lacey Act prosecution on grounds that underlying state statute was unconstitutional). Otherwise, intervention to defend a statute would permit defense of the statute on appeal only if the entity defending the statute—be it DOJ, the House, or the state in *Taylor*—prevailed in the district court. Such a rule would make no sense and is not the law.

The House suffers at least as much injury from the Second Circuit's decision as the officers in *Camreta*, the states in *Taylor* and *Karcher v. May*, 484 U.S. 72 (1987), and the House and Senate in *Chadha*. There is no reason why the House cannot petition this Court to review a decision nullifying a federal statute when it is the *only* party defending the law. *See Chadha*, 462 U.S. at 939. Indeed, the House is not just *a* proper party to seek review of a decision that it alone among the parties would have reversed, it is *the* proper party. Thus, for the reasons stated above and in the House's Brief on Jurisdiction and Reply Brief on Jurisdiction, the Court should dismiss DOJ's petition, grant the House's petition, and resolve the constitutional question presented without additional briefing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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