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.,

Respondents.

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

REPLY BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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Ms. Windsor's opening brief on the jurisdictional questions shows why this Court can decide the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, on the United States' petition. First, there remains a live controversy within the meaning of Article III: the United States continues to enforce DOMA by refusing to refund $363,053 in federal taxes that Ms. Windsor was forced to pay on behalf of her late spouse's estate. *See* Windsor Juris. Br. 15-25. Second, because the district court entered judgment against the United States, and the court of appeals affirmed that judgment, the United States has standing to seek review in this Court. *See id.* 25-30; *see also* U.S. Juris. Br. 12-18.

The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) offers a different interpretation of this lawsuit. In its view, this case is essentially a conflict between the House leadership and the Executive Branch over how to litigate the question of DOMA's constitutionality. But this Court does not sit to hear that kind of interbranch dispute. To the contrary, "the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also INS v. Chadha*, 462 U.S. 919, 935-36 (1983). It is Ms. Windsor's equal protection claim against the United States that provides the source for this Court's jurisdiction.

1. For the district court to have had jurisdiction over this case, there had to have been a party before it asserting a concrete and particularized injury. Only one party could claim an injury from the Government's enforcement of DOMA. That party was Ms. Windsor. Contrary to suggestions in its brief, BLAG cannot plausibly claim any injury from the decision to continue enforcing DOMA.[1]

2. As federal law required, *see* 26 U.S.C. § 7422(f)(1), Ms. Windsor named the United States as the defendant in her lawsuit. BLAG never comes to terms with this basic fact. Instead, it claims that "the *executive branch* was the named defendant," BLAG Juris. Br. 15 (emphasis added), and

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[1] Though it stresses that DOMA was "duly enacted" by Congress, BLAG Juris. Br. 16, BLAG claims it somehow would have been less "affront[ed]" if the Executive Branch had ceased all enforcement of the statute, *id.* 12.

Had the Government taken BLAG's suggested approach, DOMA would have been insulated from judicial review. *See* BLAG Juris. Br. 12-13; *see also* Br. of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioner (Jurisdictional Questions) ("Scholars Br.") 17-18. But allowing DOMA to "remain on the books" so that it could "be enforced by subsequent administrations," BLAG Juris. Br. 12, would do nothing but leave hundreds of thousands of married gay couples in a state of legal limbo, *see, e.g.*, Scholars Br. 16-17; Br. of Empire State Pride Agenda et al. as *Amici Curiae* on the Jurisdictional Questions in Support of Respondent Edith Schlain Windsor 37-39; Br. of *Amicus Curiae* American Bar Association in Support of Respondent Edith Schlain Windsor on the Merits Question 9-11; *cf.* Br. on the Merits for the States of New York et al. as *Amici Curiae* in Support of Respondent Edith Schlain Windsor 20-23.

compounds this misrepresentation by referring to "the executive" as the "nominal defendant," *id.* 37. Indeed, throughout its brief, BLAG treats "the executive" as the "party." *Id.* 36; *see also id.* 7, 9-11, 15-16, 31-33, 35-38.

BLAG knows better. Before the district court, BLAG recognized that "[h]ere, of course, the United States is a party." J.A. 204. Before the court of appeals, BLAG equivocated, referring to "the appeal filed by the Department of Justice ('DOJ') on behalf of defendant United States" before adding a parenthetical equating the United States with the "Executive Branch." *Id.* 526. But in this Court, the only time BLAG acknowledges in its jurisdictional brief that the United States is the actual party is in the front matter. *See* BLAG Juris. Br. ii.

This is not a problem of mere semantics; it infects the substance of BLAG's jurisdictional analysis. BLAG argues in its merits brief that DOMA serves several interests of the United States. *See* BLAG Merits Br. 28-49. It would be totally inconsistent with that position for BLAG to claim in its jurisdictional brief that the United States has not been aggrieved by a judgment declaring DOMA unconstitutional and ordering it to pay hundreds of thousands of dollars to Ms. Windsor. Attempting to avoid that obvious problem, BLAG never discusses the interests of the *United States* in its jurisdictional brief. Instead it focuses exclusively on what it claims are the interests of "the Department" of Justice, BLAG Juris. Br. 35, 37 n.19 and "the executive," *id.* 32-33, 35-38. This Court should reject BLAG's attempt to deflect attention from the bright-line rule that the United States is "an aggrieved party" when

an "Act of Congress it administers" in hundreds of federal programs is "held unconstitutional." *Chadha*, 462 U.S. at 931; *see* Windsor Juris. Br. 25-26.

3. BLAG tries to recast Ms. Windsor's tax refund lawsuit against the United States as a separation of powers dispute between the legislative and executive branches. *See* BLAG Juris. Br. 37-38. This Court should not permit BLAG to reframe the injury at the core of this case as one to the House's "institutional interests." BLAG Juris. Br. 16.

It does not matter how "aggrieved" – in the colloquial sense of the word – BLAG considers itself to be by the fact that the district court and court of appeals entered judgment for Ms. Windsor and against the United States. BLAG is not aggrieved in any legal sense. Whatever "comfort and joy" BLAG might obtain "from the fact that the United States Treasury is not cheated . . . or that the Nation's laws are faithfully enforced" is nothing more than "psychic satisfaction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Moreover, the judgment Ms. Windsor obtained has no binding legal effect on BLAG. BLAG has not been ordered to pay her a dime, and nothing in the judgment below imposes any "defined and specific legal obligation" on BLAG, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989). And BLAG cannot rely on *Camreta v. Greene*, 131 S. Ct. 2020 (2011), for the proposition that it should be permitted to appeal because the judgment below "permanently diminish[es] the House's legislative power," BLAG Juris. Br. 13 (citing *Camreta*). In *Camreta*, the court of appeals' constitutional ruling required an

executive branch official to "either change the way he performs his duties or risk a meritorious damages action." 131 S. Ct. at 2029. Here, by contrast, Congress's duties (and its Members' immunity from suit) remain unchanged. In light of that fact, if this Court were to accept BLAG's argument, it would be permitting BLAG "in effect [to] file[] a new declaratory judgment action in this Court against the Court of Appeals" seeking to have DOMA upheld, *Camreta*, 131 S. Ct. at 2043 (Kennedy, J., dissenting). This BLAG cannot do.

4. BLAG argues that the United States "cannot ground its appellate standing on a desire for an opinion with . . . a broader precedential scope for other cases." BLAG Juris. Br. 36-37 (emphasis omitted). True enough: a desire for broad precedent, without more, might not be sufficient to confer appellate standing. But the United States' appellate standing here rests firmly on the concrete way in which it is aggrieved by the judgments below ordering it to issue a $363,053 refund and declaring DOMA unconstitutional. *See* Windsor Juris. Br. 26, 28-29; U.S. Juris. Br. 16-18.[2]

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[2] Both the United States and Ms. Windsor agree that the United States has appellate standing but reach this conclusion in slightly different ways. The United States argues that the "statutory aggrieved-party rule and the Article III 'injury' requirement examine the same thing: how the lower court's judgment affects the appealing party." U.S. Juris. Br. 18. The United States then explains that invalidation of a statute and an order to pay money each "constitute Article III injuries," *id.*, "directly traceable" to the lower court's decision and "redressed" by a reversal of that decision, *id.* 19. Ms. Windsor, by contrast,

And once jurisdiction is established, it is entirely appropriate for the United States in seeking certiorari to consider interests beyond "this case and controversy," BLAG Juris. Br. 37 (emphasis omitted). As Solicitor General Sobeloff long ago explained, the Department of Justice is the "advocate for a client whose business is not merely to prevail in the instant case. . . . but to establish justice." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963). Justice for the hundreds of thousands of married gay couples whose lives are daily and irreparably affected by DOMA's sweep turns on "the geographic reach" and precedential effect of the decision that DOMA is unconstitutional, BLAG Juris. Br. 37.

The briefs filed in this case illustrate the hardships DOMA inflicts.

- When Staff Sergeant Donna Johnson was killed by a suicide bomber in Afghanistan, DOMA prevented the Army from notifying her wife Tracy. DOMA also precluded the Army from returning Sergeant Johnson's wedding ring to Tracy and from giving her the American flag that draped Sergeant

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believes that while the Article III requirements might be necessary in a case where a prevailing party seeks review, *see Camreta*, 131 S. Ct. at 2028-29, they are redundant when a party against whom judgment has been entered files an appeal, *see* Windsor Juris. Br. 28-29 nn.7-8. In any event, the United States was objectively "injured" by the district court's order to pay $363,053; that injury was "caused" by the adverse judgment below; and this Court would "redress" that injury if it were to uphold DOMA.

Johnson's coffin. Br. of *Amicus Curiae* OutServe-SLDN Inc. on the Merits in Support of Respondent Edith Windsor 10-11.

- Kathy Bush and Mary Ritchie have been together for nearly a quarter century and were legally married in 2004. Ms. Ritchie is a Massachusetts state police officer, while Ms. Bush is a stay-at-home mother. Because of DOMA, Ms. Ritchie cannot use her income to make tax-deductable contributions to Ms. Bush's IRA, as a straight spouse would be allowed to do. Br. of *Amici Curiae* Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) et al. in Support of Respondents (Merits Brief) 30.
- Martin Koski cannot add his husband, James Fitzgerald, to his federal employee health benefit plan. As a result, in one year the couple had to pay nearly $3000 more for healthcare than they would have paid had they both been covered by Mr. Koski's insurance. Br. of American Federation of Labor and Congress of Industrial Organizations et al. as *Amici Curiae* Supporting Respondent Edith Schlain Windsor and Suggesting Affirmance 16.

These examples are but the tip of the iceberg. Every day, married gay couples are denied the benefits that the United States grants to all other married couples in areas ranging from bankruptcy, to tax, to immigration, to healthcare, to retirement planning, to veterans benefits, and many more. Denial of these benefits affects not just the married

couples themselves, but also the tens of thousands of children they are raising.[3]

Ms. Windsor's experience demonstrates both the harms wrought by DOMA and the importance of a precedential decision. Ms. Windsor was forced to pay hundreds of thousands of dollars in estate taxes because DOMA unconstitutionally denies Dr. Spyer's estate the marital deduction that the estate of a straight married decedent could claim. *See* J.A. 150-51. But although Ms. Windsor has obtained a judgment from the district court ordering a refund of those taxes, that judgment has done nothing to advance her claim for Social Security survivors benefits. Indeed, despite experienced counsel having spent more than two years on her Social Security claim, she has been unable even to obtain the "expedited" appeal from the Social Security Administration that would enable her to file suit seeking those benefits. Windsor Juris. Br. 5-6, 10a-15a. A precedential decision would presumably impel the SSA to provide those benefits since it acknowledges that she was in fact legally married. *Id.* 8a. What then of gay and lesbian seniors who lack access to legal representation and who live hand-to-mouth while seeking the benefits all other surviving spouses are entitled to receive?

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[3] For a catalogue of the federal statutory provisions that are affected by DOMA, see generally U.S. General Accounting Office, GAO/OGC-97-16, *Defense of Marriage Act* (1997) and U.S. Government Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (2004).

BLAG recognizes that "legislation often has the effect of limiting the autonomy of its subjects." BLAG Juris. Br. 14. But nowhere does it acknowledge how DOMA denies the autonomy and dignity of the married gay couples it excludes from federal recognition. This Court should therefore exercise the jurisdiction it possesses over the live controversy between Ms. Windsor and the United States to reach, and rectify, this denial of equal protection.

CONCLUSION

For the foregoing reasons, this Court should hold that it has jurisdiction to decide whether DOMA violates the Fifth Amendment.

Respectfully submitted,

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