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**

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


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## QUESTIONS PRESENTED

This brief addresses the two jurisdictional questions that this Court has directed the litigants to address:

1. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

## 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 appellant and appellee 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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## OPINIONS BELOW AND JURISDICTION

The Bipartisan Legal Advisory Group of the United States House of Representatives (the "House") incorporates its statements of the Opinions Below and Jurisdiction set forth in its Brief on the Merits.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Articles I, II, and III of the United States Constitution; Rules II.8 and IX of the Rules of the House of Representatives for the 113th Congress; Rule I.11 of the Rules of the House of Representatives for the 103d Congress; and House Resolution 5, 113th Cong. (2013) are reproduced in the Appendix to this brief at 1a.

## STATEMENT OF THE CASE

The House incorporates its Statement of the Case in its Brief on the Merits. The Statement below highlights the procedural events most relevant to the jurisdictional issues addressed in this brief.

### A. The Defense of Marriage Act

The Defense of Marriage Act ("DOMA") was enacted in 1996 with strong majorities in both Houses of Congress and signed into law by President Clinton. DOMA reflected Congress' determination that each sovereign should be able to determine for itself how to define marriage for purposes of its own law. Section 2 allows each state to decide for itself whether to retain the traditional definition without having another jurisdiction's decision imposed upon it via full faith and credit principles. And Section 3

preserves the federal government's ability to use the traditional definitions of marriage and spouse for purposes of federal law and programs. It clarifies that, for purposes of federal law, "marriage" means the legal union of one man and one woman, and "spouse" means a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7. But DOMA does not "preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition," provided only that the extension of benefits is not predicated on the definition of "marriage" or "spouse." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006).

### B. The Department of Justice Stops Defending DOMA and Starts Attacking It

Following DOMA's enactment, the Department of Justice successfully defended Section 3 of DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[1] The Department continued to defend DOMA during the first two years of the current Administration, even while advertising disagreement with DOMA as a policy matter, with the following disclaimer:

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[1] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *see also Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after Department moved to dismiss).

> [T]he Administration does not support DOMA as a matter of policy .... Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here. This longstanding and bipartisan tradition accords the respect appropriately due to a co-equal branch of government and ensures that subsequent administrations will faithfully defend laws with which they may disagree on policy grounds.

Br. for Respondents 52 n.30, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. Aug. 12, 2010) (ECF 41-2).

In February 2011, however, the Administration abruptly reversed course and ceased defending DOMA's constitutionality. The Attorney General announced that he and the President were now of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." JA 193.

The Attorney General acknowledged the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id.*, but did not apply that standard to DOMA. On the contrary, the Attorney General conceded that every federal court of appeals to have considered the

issue (eleven of the thirteen circuits) had applied rational basis review to sexual orientation classifications and that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.*[2]

Although the Attorney General advised Congress only that the Department would "cease defense" of DOMA Section 3, the Department did not merely bow out of DOMA litigation. Instead, it immediately and consistently attacked DOMA in court. It argued that Section 3 violates equal protection, advocated a heightened-scrutiny standard that would imperil other duly-enacted statutes, and urged courts to render judgment in favor of plaintiffs challenging the law even where rational basis review was binding Circuit law. The Department even went so far as to accuse the Congress that enacted DOMA—many of whose Members still serve—and implicitly the President who signed the bill of being motivated by "animus." Br. for United States 25, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012) (ECF 120).

On March 9, 2011, the Speaker of the House, pursuant to House Rule II.8, convened a meeting of the House's Bipartisan Legal Advisory Group. After

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[2] The timing of the executive's announcement on DOMA was not prompted by any developments within the courts of appeals or the legislative sphere. In fact, the decision to abandon the defense of DOMA came shortly after the *end* of a two-year period in which the President's party controlled both houses of Congress, which might have made repeal possible through the normal legislative process. *Cf.* A. Bickel, *Politics and the Warren Court* 134 (1965) (Supreme Court not the place "for replaying of the [political] game").

a full airing of views on how the House should respond to the executive's remarkable "about face," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012), the Group voted 3–2 to recommend that the Speaker direct the House General Counsel to take such steps as he considered appropriate, including intervention, to protect the interests of the House in litigation. Thereafter, the Speaker directed the General Counsel to represent the Group, on behalf of the House, as intervenor in cases in which DOMA Section 3's constitutionality was challenged, and where the Attorney General refused to defend the statute. The Speaker did so to protect the House's institutional interests; to ensure that the federal judiciary—rather than the executive branch unilaterally—ultimately would decide whether Section 3 is constitutional; and to ensure that the federal judiciary, in making that determination, would have the benefit of a full and vigorous defense of the statute.

To date, the House has intervened in fifteen DOMA Section 3 cases, including this case. (One additional motion to intervene is pending in a recently-filed case.) No court has denied intervention.

### C. Proceedings in This Case

Respondent Edith Schlain Windsor and Thea Clara Spyer obtained a certificate of marriage from the province of Ontario, Canada in 2007. Ms. Spyer died in 2009, naming Ms. Windsor the executor and sole beneficiary of her estate. At that time, New York did not issue marriage licenses to same-sex couples.

After paying federal estate taxes, Ms. Windsor, as executor, sought a refund on the theory that the estate was entitled to the marital deduction. The IRS denied the refund, and Ms. Windsor filed this suit in her capacity as executor.

In light of the Department's refusal to defend DOMA, the district court invited "Congress … to intervene in this matter … by motion pursuant to Fed. R. Civ. Pro. 24(a), consistent with 28 U.S.C. § 530D." Order, No. 10-8435 (S.D.N.Y. Mar. 15, 2011) (ECF 11). The House did so, and the court granted the House intervention as of right under Rule 24(a)(2). JA 221–25. The court found that the House "has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them" and that its "interests are not currently being adequately represented in this action." JA 223, 224.

Neither the Department nor Ms. Windsor opposed the House's intervention, JA 221, although the Department suggested that the House be limited to presenting arguments in defense of DOMA while the Department alone would "file all procedural motions, including notices of appeal and petitions for certiorari." JA 225. The House objected that this "would relegate it to the status of amicus curiae," and the district court agreed. JA 221. It refused to "circumscribe[]" the House's role in the case and granted the House the status of a "full party." JA 226. The district court also ruled that the House "has standing to intervene in this litigation to defend the constitutionality of Section 3 of DOMA." JA 227.

Although the Department nominally represented the defendant in this case, it urged the district court to strike down DOMA and enter judgment ordering the government to issue a refund to Ms. Windsor. *See* JA 488 ("Section 3 of DOMA fails heightened scrutiny, and this Court should … grant Plaintiff's motion for summary judgment."). To this end, the Department filed a "Motion to Dismiss"—surely one of the strangest documents ever to bear that label—that did not, in fact, seek dismissal of Ms. Windsor's suit. *See* JA 437–39. On the contrary, the Department's so-called motion to dismiss *itself* stated that, if the district court "agrees with Plaintiff *and the United States* …, it should *not* dismiss" the complaint. JA 439 (emphases added).

The district court invalidated DOMA under a variant of rational basis review it labeled "intensified scrutiny." 682 F.3d at 10. The House appealed the district court's decision. Soon thereafter, the Department noticed its own appeal. The House moved to dismiss the Department's separately-numbered appeal, arguing that, because the Department had urged the district court to strike down DOMA and enter judgment for the plaintiff, and the district court had done exactly that, the Department lacked standing to appeal.

The Second Circuit denied the House's motion to dismiss the Department's appeal, even though the executive had "prevailed in the result it advocated in the district court," because the executive "continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money." App. to Supp. Br. for U.S. 4a. On the merits, the Second Circuit

determined—in conflict with eleven other circuits—that heightened scrutiny applies to classifications based on sexual orientation. *Id.* at 15a. And the court concluded that Section 3 of DOMA could not survive heightened scrutiny.

Following the Second Circuit's decision, on December 7, 2012, this Court granted the Department's petition, which had been filed before the Second Circuit's judgment issued. In doing so, this Court ordered the parties to address the two jurisdictional questions addressed in this brief.

On December 28, 2012, the House filed its own petition for a writ of certiorari to the Second Circuit. The House's petition, No. 12-785, is currently pending before this Court.

### D. House Resolution 5

On January 3, 2013, the opening day of the 113th Congress, the House adopted H. Res. 5, 113th Cong. (2013), App.5a. House Resolution 5 expressly "authorize[d] the Bipartisan Legal Advisory Group … to defend the constitutionality of Section 3 of [DOMA] … including in the case of Windsor v. United States." *Id.* § 4(a)(1)(A)(i), App.5a. And it affirmed that "the Bipartisan Legal Advisory 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." *Id.* § 4(a)(1)(B), App.6a.

## SUMMARY OF THE ARGUMENT

The House, speaking through its Bipartisan Legal Advisory Group, has standing to intervene to

defend the constitutionality of DOMA Section 3 when, as here, the executive declines to do so. Indeed, without the House's participation, it is hard to see how there is any case or controversy here at all. Both Ms. Windsor and the executive agree that DOMA is unconstitutional and that Ms. Windsor was entitled to a refund. And the lower courts granted them all the relief they requested. Only the House's intervention provides the adverseness that Article III demands.

**I.** The House certainly has a concrete interest in ensuring that its passage of DOMA is not completely nullified by a binding judicial determination. Such a judicial determination of unconstitutionality imposes a distinct injury on the House that is directly traceable to the decision and redressable by the decision's reversal. Article III requires no more.

All of this is obvious in the familiar situation where the executive discharges its traditional duty to defend the constitutionality of an Act of Congress. But when the executive refuses to discharge that function, as it has here, the House clearly has standing to intervene and defend the constitutionality of legislation it has passed pursuant to its core lawmaking powers. This Court held as much in *INS v. Chadha*, 462 U.S. 919, 940 (1983). *Amica*'s efforts to distinguish *Chadha*, or otherwise suggest the House lacks standing, are unavailing.

**II.** The House's standing is both necessary and sufficient for this Court's Article III jurisdiction. Without the House's participation, there is no ongoing controversy between Ms. Windsor and the executive. Their shared desire to have their Second

Circuit victory embraced by this Court would not satisfy Article III, absent the House as an adverse litigant.

Indeed, even with the House's participation as a party, the executive lacks appellate standing to seek this Court's review of a Second Circuit decision that entered the precise relief the executive sought on the precise ground the executive advocated. The executive and Ms. Windsor can obtain no relief from this Court they are not already entitled to under the Second Circuit's judgment. The desire for greater precedential impact *on other cases* is not sufficient to create appellate standing *in this one*.

Fortunately, there is a party aggrieved by the decision below that can obtain greater relief if the judgment below is reversed. That party is, of course, the House. Thus, if this Court agrees with the House's argument in Section I that the House has Article III standing, and with its argument in Section II that the executive lacks appellate standing, the proper course is clear: This Court should dismiss the executive's petition in No. 12-307, grant the House's petition in No. 12-785, and use the latter petition as the vehicle to resolve the question of DOMA's constitutionality.

## ARGUMENT

### I. The House Of Representatives, Acting Through Its Bipartisan Legal Advisory Group, Has Standing.

#### A. The House Has Standing to Defend a Statute Against a Constitutional Challenge When the Executive Branch Refuses to Do So.

Although questions of Article III standing most often concern plaintiffs, standing to intervene or to "defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (internal quotation marks omitted). Such a direct stake is present when a party "has 'suffered an injury in fact' that is caused by 'the conduct complained of,' and that 'will be redressed by a favorable decision.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The House undeniably has a direct stake in this litigation. Ms. Windsor and the executive seek relief that would harm the House's concrete interests by permanently nullifying its passage of DOMA and subjecting future legislative action to a heightened standard of equal protection review. Those harms flow directly from the relief sought and granted in the courts below. And reversal by this Court will provide a complete remedy.

1. The House clearly has standing to intervene to defend DOMA's constitutionality when the executive

will not. Indeed, without the House's participation as a party, it is hard to understand how there is any case or controversy at all. Both Ms. Windsor and the executive agreed in the district court that DOMA was unconstitutional, that Ms. Windsor should receive a refund, and that the courts should order exactly that result. Parties that agree on a legal issue and the appropriate relief normally do not go to court, let alone have a justiciable controversy. The "concrete adverseness which sharpens the presentation of issues" is a core requirement of Article III, and the requirements of standing, along with justiciability doctrines, are designed to ensure adversary presentation and avoid feigned controversies or efforts to obtain advisory opinions. *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (internal quotation marks omitted).[3]

Here, however, the executive took the position that it would issue Ms. Windsor a refund only if the district court declared DOMA unconstitutional. Such a judicial declaration affects the House very differently from an executive decision to issue a refund on the ground that a particular administration views DOMA as unconstitutional and will not enforce it. The latter decision—although also an affront to Congress—at least would mean that DOMA would remain on the books and could be enforced by subsequent administrations. The former,

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[3] The situation here before the House's intervention is distinguishable from the circumstances of *Chadha* where the executive initiated deportation proceedings and the issue on which the executive and Chadha ultimately agreed arose only as a defense asserted by Chadha.

by invoking the powers of the third branch of government, would if successful render the House's exercise of its core lawmaking function "completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

The executive's effort to procure permanent judicial nullification of DOMA Section 3 clearly implicates the House's interests. And, *a fortiori*, once the executive obtained that relief from the lower courts, the House clearly had standing to appeal. The House has "a plain, direct and adequate interest in maintaining the effectiveness of" its passage of a law. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). The House is a constitutionally necessary participant in the lawmaking process; DOMA could not become law without passage by the House. *See* U.S. Const. art I, § 7, cl. 2. Thus, the lower court's invalidation of DOMA Section 3 at the executive's urging inflicts a concrete, particularized institutional injury on the House. There is no doubt that such harm is "fairly traceable" to the lower court's decision, which expressly held the law to be unconstitutional on its face. Nor can it be doubted that the harm will be redressed by a favorable decision from this Court.

But the institutional harm to the House's core constitutional authority does not end there. The decision below, if not reversed, will permanently diminish the House's legislative power by imposing a heightened standard of review for legislation that classifies on the basis of sexual orientation. *Cf. Camreta*, 131 S. Ct. at 2029 (public officials have standing to challenge qualified immunity "judgment [that] may have prospective effect on the parties"). This new limit on the House's lawmaking powers

follows from the Second Circuit's decision, and reversal by this Court would directly remedy that harm. *See, e.g.*, *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.").

The House's interests in this case are concrete and particularized, not generalized grievances. The House has a distinct, concrete institutional interest in ensuring that its legislative acts have substantive effect and are not "completely nullified" by a judicial decision procured with executive branch acquiescence. The damage suffered by virtue of a permanent judicial invalidation of duly-enacted legislation is unique to the House. It is not, as *amica* suggests (at 8), "widely shared by the people at large." The legislative power is constitutionally vested in the House and Senate. *See* U.S. Const. art. I, § 1. And because legislation often has the effect of limiting the autonomy of its subjects, the House's interest in the scope of its legislative powers is not widely shared by the populace at large. That is particularly true of legislation alleged to run afoul of equal protection principles. "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Schweiker v. Wilson*, 450 U.S. 221, 234–35 (1981) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)).

Thus, the lower court's nullification of DOMA Section 3 and its application of heightened scrutiny "peculiarly" affect the House's legislative conduct and prerogatives. Judicial invalidation of the law at the behest of the executive permanently undoes the

*House*'s constitutionally mandated role in the passage of a law, and heightened scrutiny will constrict the scope of the *House*'s ability to legislate with practical effect going forward.[4] The House must have standing to defend these interests when the executive ceases to defend a duly-enacted statute.

All of this is second nature when it comes to the executive's standing to intervene to defend the constitutionality of Acts of Congress in cases in which the federal government is not otherwise a party. Here, the executive branch was the named defendant because of its role as the withholder of the claimed refund. But even in cases involving disputes between private parties concerning federal statutes for which the executive has no enforcement role, no one doubts that the executive has standing to intervene to defend the statutes with full party status and to appeal an adverse decision. Thus, for example, when a litigant challenges the constitutionality of a federal statute like 28 U.S.C. § 1637(d), which implicates the filing deadlines for private party cases in state court and implicates no direct enforcement role for the federal executive, it is commonplace for the executive to intervene as a party. *See, e.g.*, *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 457 (2003); *Raygor v.*

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[4] This Court's decisions, of course, do not *formally* constrain the House and Senate from proposing new legislation, but judicial decisions do determine the practical effect of legislative enactments, and that *practical* reality is surely relevant to whether the House suffers harm sufficient for Article III purposes.

*Regents of Univ. of Minn.*, 534 U.S. 533, 535 (2002).[5] At least in the unusual circumstances in which the executive refuses to shoulder its traditional responsibility to defend the constitutionality of federal legislation, there is no reason the House cannot play the same role to prevent an injury to its institutional interests and to ensure that an Act of Congress receives an adequate defense.

2. This Court has "long held" that the House has standing to defend a duly enacted statute when the executive "agrees with plaintiffs that the statute is … unconstitutional." *Chadha*, 462 U.S. at 940.[6] In *Chadha*, each chamber of Congress separately

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[5] Because a statute cannot confer standing where it does not otherwise exist, *see Lujan*, 504 U.S. at 576–77, it is irrelevant to the Article III analysis that the Department has statutory authority to defend legislation, *see* 28 U.S.C. § 2403(a)

[6] At times, congressional interests have been represented by *amici curiae*. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 304 (1946); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968); *Myers v. United States*, 272 U.S. 52, 176 (1926). The executive branch likewise has participated as an *amicus* in private party cases in which an Act of Congress has been called into question. *See, e.g.*, Br. for United States as *Amicus Curiae* Supporting Pet'r 2, *Stern v. Marshall*, 131 S. Ct. 2594 (2012) (No. 10-179), 2010 WL 4717271 ("The United States also has a substantial interest in this case because … the court's analysis calls into question the scope of Congress's constitutional authority …."). In neither circumstance, however, is the fact of *amicus* participation in some cases inconsistent with the House's Article III standing here. That much certainly is clear from *Chadha*, where the two houses presented briefs as *amici* before the court of appeals panel, then separately intervened and participated as full parties before the *en banc* Ninth Circuit and in this Court. *See* 462 U.S. at 930 n.5.

intervened and participated as a party defending the constitutionality of the statute in question. *See id.* at 930 n.5. The court of appeals granted their intervention, and this Court agreed that the two chambers were "proper parties," *id.* (quotation marks omitted), to satisfy this Court's statutory and Article III jurisdiction, *see id.* at 931 n.6 (holding that an Article III "controversy clearly exists … because of the presence of the two Houses of Congress as adverse parties"); *id.* at 939 ("Congress is … a proper party to defend the constitutionality of [the statute]."). Both houses similarly participated as parties to defend the constitutionality of legislative actions in cases like *Burke v. Barnes*, 479 U.S. 361 (1987) (House and Senate participated separately), and *Bowsher v. Synar*, 478 U.S. 714 (1986) (House and Senate participated separately).[7]

More broadly, this Court has consistently recognized the standing of legislative actors to prevent nullification of their acts. In *Coleman v.*

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[7] The lower courts also have recognized each house's standing to defend a statute's constitutionality when the executive has declined to do so. *See, e.g.*, *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 893 F.2d 205, 206 (9th Cir. 1989); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 & n.8 (3d Cir. 1986) ("There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the [statute]."). In at least two lower court cases, involving disputes between private parties, the House and Senate were allowed to intervene as parties to defend the constitutionality of a statute after the Department intervened to attack the law. *See In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987); *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986).

*Miller*, this Court addressed a challenge brought by Kansas state legislators to prevent formal ratification of the proposed Child Labor Amendment, on the grounds that the Lieutenant Governor's tie-breaking vote in favor of the amendment was unconstitutional. *See* 307 U.S. at 438. The plaintiffs included twenty state legislators whose votes would have been sufficient to defeat the amendment, absent the Lieutenant Governor's vote. This Court held that the legislators had standing because their "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.*

More recently, in *Karcher v. May*, 484 U.S. 72, 80–81 (1987); *id.* at 84 (White, J., concurring in the judgment), and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997), this Court has reaffirmed that legislative bodies have standing to defend against, and appeal from, judicial invalidation of their legislative acts.[8] Here, the House possesses a similarly "plain, direct and adequate interest in

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[8] In *Karcher* and *Arizonans for Official English*, this Court seemed to suggest that a state legislative body is a proper party when state law authorizes it to defend. *See* 484 U.S. at 82; 520 U.S. at 65. But this requirement (if it exists) can be only a prudential check on legislative participation because state law authorization to litigate cannot itself create the requisite elements of Article III standing. *See, e.g.*, *Lujan*, 504 U.S. at 576–77. Thus, *Karcher* and *Arizonans for Official English* necessarily rest on the premises that a legislative body suffers a cognizable injury when its legislative acts are nullified by judicial invalidation and that statutory authorization overcomes any prudential obstacle.

maintaining the effectiveness of [its] votes." *Coleman*, 307 U.S. at 438. The decision below has "overridden and virtually held for naught" the House's passage of DOMA Section 3, but if the House's constitutional defense is correct, then its legislative actions will be preserved. *Id.*

Although *amica* invokes *Raines v. Byrd*, 521 U.S. 811 (1997), that case is inapposite for multiple reasons. As an initial matter, here, the House itself (through its Bipartisan Legal Advisory Group) has intervened to defend its institutional interests, while *Raines* concerned the claims of only a handful of individual plaintiff legislators who could not, and did not purport to, speak for the House or Senate as an institution. *See id.* at 814. Nor were the legislators in *Raines* defending against nullification of legislative action, as were the legislators in *Coleman* and the House here. *Id.* at 823–24. Rather, "[t]hey simply lost th[e] vote" over the legislation they attacked. *Id.* at 824. Here the situation is just the opposite: The House seeks to *defend* legislation actually *enacted*; *i.e.*, the vote was won, not lost. And unlike the circumstances in *Raines*—where "a majority of Senators and Congressmen c[ould] vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act," *id.*—the House cannot remedy the harms that will result from judicial invalidation of DOMA or the imposition of heightened scrutiny. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("[I]t must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations

must be disappointed."). Finally, there is a fundamental difference between individual legislators as plaintiffs enlisting the courts to invalidate a law passed by a majority of their colleagues and the House intervening as an institution to defend a statute against attacks from private parties and a co-equal branch of government. *See Chadha*, 462 U.S. at 940.

### B. *Amica*'s Arguments That the House Lacks Standing Are Mistaken.

1. *Amica* is wrong to suggest that standing is limited to the defense of some small set of "distinct, statutorily created powers of the Houses of Congress," or "distinct legislative prerogative[s]." That putative distinction fails on its own terms. In this case, the House has intervened to defend its legislative authority to pass DOMA. And the House's lawmaking authority *is* a "distinct legislative prerogative." Indeed, it is the House's *core* legislative prerogative under Article I. It would be more than passing strange for the House to possess standing to defend the constitutionality of ancillary legislative powers, like its powers to investigate, *see Buckley v. Valeo*, 424 U.S. 1, 137 (1976), and subpoena documents, *see McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), or to defend extra-constitutional assertions of power, like the one-house legislative veto, *see Chadha*, 462 U.S. 919, and congressionally-controlled agencies, *see Bowsher*, 478 U.S. 714, but lack standing to defend its core legislative power against nullification. Indeed, *Chadha* categorically held that the House and Senate are proper parties "to defend the validity of a statute when" the executive

"agrees with plaintiffs that the statute is … unconstitutional." 462 U.S. at 940. Nothing in the Court's reasoning depended on the type of statute being defended.

2. *Amica* is also wrong that the two houses of Congress are required to intervene and litigate together. *Chadha* confirms this. *See* 462 U.S. at 919 n.* (noting separate appeals by House and Senate); *id.* at 922 (noting separate counsel for House and Senate); *id.* at 930 n.5 (noting separate interventions by House and Senate). This Court never suggested that either house's participation was in any way dependent on the participation of the other. *See also Burke*, 479 U.S. at 362 (House and Senate participated separately).[9]

*Amica*'s proposed rule would make no sense. Each body is an independent, constitutionally-necessary actor in the legislative process. *See* U.S. Const. art. I, § 7, cl. 2; Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 983 n.43 (1983) ("Defense of a statute by one house of Congress (as opposed to a defense undertaken by Congress as a whole) is consistent with the constitutionally independent roles of each house with respect to the other."). Any challenge to a

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[9] To suggest otherwise, *amica* quotes selectively (at 15–16) from portions of *Chadha* referring to the two houses collectively as "Congress." But this Court's convenient shorthand did not change the fact that the two chambers acted independently of one another at all times. Likewise, *amica* is wrong to imply (at 16) that this Court's brief description of *Chadha* in *Arizonans for Official English* somehow changed the facts, reasoning, or scope of the earlier opinion.

federal statute is thus necessarily a challenge to the actions of *each* chamber, and the harm resulting from judicial invalidation of a duly-enacted statute falls independently on *each* chamber.[10]

Moreover, our basic constitutional arrangement does not allow either house acting alone to nullify a law previously enacted with the concurrence of both chambers. Neither house of Congress can repeal a statute on its own. *See* U.S. Const. art. I, § 7, cl. 2; *Chadha*, 462 U.S. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I" of the Constitution.). But allowing one house to prohibit the other from defending a statute would have the same practical effect by empowering the non-consenting house to facilitate the permanent nullification of a duly-enacted statute. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) ("A group of senators … had the right to intervene. The concurrence of the house was not necessary as it would have been to enact legislation.").[11]

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[10] *Amica*'s suggestion that Article I's bicameral lawmaking requirements demand the House and Senate to act in concert when intervening to defend a statute is wrong on its own terms. Article I also requires the President to approve legislation passed by Congress, but the President quite obviously did not assent to the House and Senate's shared position in *Chadha*, just as he consciously rejects the House's position in this case.

[11] The House and Senate previously considered, but consciously rejected, the creation of a joint litigation authority. *See* 123 Cong. Rec. 21007, 21010 (1977) (proposed "Congressional Legal Counsel"); H. Rep. No. 95-1756, at 80 (1978) (explaining House's decision against joint Congressional Legal Counsel).

3. *Amica* is also wrong that the House's participation in this case encroaches on executive power. The House is not asking this Court to compel the executive to enforce DOMA Section 3. Indeed, the whole reason the House is here is the executive's puzzling decision to *enforce* a law that its chief law enforcement officer believes is unconstitutional and will not *defend*.[12]

To be sure, in a typical case, the Department takes the lead in defending Acts of Congress, sometimes even those it does not directly or indirectly enforce. In such cases, there may be prudential reasons to limit congressional participation and, in many instances, the issue does not even arise because Congress assumes that the executive will protect Congress' interests. The House and Senate certainly have not proven eager to intervene when the executive does its job and defends challenged statutes. The statutory provisions addressing constitutional challenges to statutes reflect this preference. While Congress has required the Department to be notified by courts and private litigants whenever the constitutionality of an Act of

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[12] If anything raises separation of powers concerns, it is the executive's attempt to nullify DOMA outside the constitutionally prescribed procedures for repeal. In contrast to the constitutionally proper legislative repeal of the "don't ask, don't tell" policy, *see* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 10 U.S.C. § 654 note, the Administration seeks to invalidate DOMA through Article III—by enforcing the law, while affirmatively attacking it in court, and asking each level of the federal judiciary to declare it unconstitutional in a manner that will constrain future legislative action.

Congress has been called into question, 28 U.S.C. § 2403(a), it has required notification of both houses (independently) only when the Attorney General declines to defend, 28 U.S.C. § 530D(a)(1)(B)(ii).[13] However, in the relatively rare case when the executive refuses to defend, this Court's decisions make clear that each house of Congress has standing to defend the effectiveness of its votes. And in the three decades since *Chadha*, intervention motions by the House and Senate have hardly overwhelmed the lower courts. *See infra*.

4. Finally, *amica* is wrong that the Bipartisan Legal Advisory Group does not speak for the House. The Group is fully authorized to speak for, and does in fact speak for, the House in this litigation.

The Group has articulated the institutional interests of the House in litigation matters since the early 1980s (although the precise formulation of the Group's name has changed somewhat over time). After the conclusion of the *Chadha* case in 1983, where the House by privileged resolution specifically authorized the Speaker to participate as intervenor on behalf of the House, *see* H. Res. 49, 97th Cong. (1981) (voice vote), the House leadership, on a bipartisan basis, created a five-member leadership group (the Speaker, majority leader, majority whip, minority leader, and minority whip) to conduct litigation on behalf of the House without the need for full House authorization. Over the next decade, the

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[13] One obvious purpose of this statute is to permit the House and/or Senate to intervene in litigation to defend challenged statutes when the executive refuses to do so.

Group intervened on behalf of the House in at least twelve cases.[14] During that same period of time, the Group appeared as *amicus curiae* in a number of other cases. *See* 159 Cong. Rec. H13 (daily ed. Jan. 3, 2013) (collecting cases). In all these cases, the Group litigated on behalf of the House without any authorizing vote by the full House.

In 1993, the House amended its rules to formally refer to the Bipartisan Legal Advisory Group in connection with its function of providing direction to the Office of General Counsel, which is charged with providing legal assistance and representation to the House. *See, e.g.*, Rule I.11, Rules of the House of Representatives 103d Cong. (1993), App.9a.[15] Since then, the Group has continued to litigate on behalf of the House without any authorizing votes by the full House, mostly as *amicus*, *see* 159 Cong. Rec. H13 (daily ed. Jan. 3, 2013) (collecting cases), but also as intervenor in the DOMA cases.

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[14] *See Burke*, 479 U.S. at 362; *Bowsher*, 478 U.S. 714; *Adolph Coors*, 944 F.2d at 1545; *Lear Siegler*, 893 F.2d 205; *In re Benny*, 812 F.2d at 1135; *In re Koerner*, 800 F.2d at 1359; *Ameron*, 787 F.2d at 877; *North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *Am. Fed'n of Gov't Emps. v. United States*, 634 F. Supp. 336, 337 (D.D.C. 1986); *In re Prod. Steel, Inc.*, 48 B.R. 841, 842 (M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 232 (M.D.N.C. 1985); *In re Tom Carter Enters., Inc.*, 44 B.R. 605 (C.D. Cal. 1984).

[15] The House has readopted this rule in substantially the same form in every succeeding Congress. *See, e.g.*, Rule II.8, Rules of the House of Representatives, 112th Cong. (2011), App.10a; Rule II.8, Rules of the House of Representatives, 113th Cong. (2013), App.11a.

The recently-adopted rules package for the 113th Congress confirms the Group's long-standing authority sanctioned by House precedent: "[T]he Bipartisan Legal Advisory 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." H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013), App.6a (emphasis added). It is of no moment that House Resolution 5 was adopted after the beginning of this suit. The Resolution affirms that the Group "continues" to represent the House in litigation, including in this case. And the word "continues" confirms that the full House understands its rules to authorize the Bipartisan Legal Advisory Group to speak for the House at every stage of this case. Indeed, the House's Minority Leader and Minority Whip, while they disagree with the House's position on the merits of DOMA Section 3's constitutionality, expressly agree that the Bipartisan Legal Advisory Group has Article III standing in this case to articulate that position on behalf of the House. *See supra* n.*. In any event, the House's Article III standing turns on the impairment of its interests occasioned by the executive's decision to join Ms. Windsor in seeking the permanent and complete nullification of DOMA. Whether and when the House confirmed the Group's authority to litigate on behalf of the House to vindicate those interests has no impact on the Article III question here.

All of this is further buttressed by the fact that the House has not voted to countermand the Group's intervention—or any litigation decision made after intervention—in this or any other DOMA case. The

House has an effective procedural mechanism, which has existed in the House Rules since 1880, that enables it to countermand any such decision. *See* Rule IX, Rules of the House of Representatives, 113th Cong. (2013) (Members may bring to floor of House for vote "questions of privilege"), App.12a–13a; *id.* Rule IX.2(a)(1) (question of privilege, when brought by Majority or Minority Leader, "shall have precedence of all other questions"); *id.* (question of privilege brought by other Members "shall have precedence of all other questions … within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution"). And the House knows how to use Rule IX to force a vote on litigation decisions made by the Group, if the House so chooses.[16] But it has not so chosen in this or any other DOMA case.

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[16] In 1990, the House Minority Leader brought to the floor a resolution seeking the withdrawal of a brief the Group had filed in *United States v. Eichman*, Nos. 89-1433, 89-1434 (U.S.), "pending a full and proper review by the Bipartisan Legal Advisory Group." H. Res. 362, 101st Cong. (1990); 136 Cong. Rec. 4997 (1990). The Chair ruled that this resolution raised a question of privilege under Rule IX, *see* 136 Cong. Rec. at 4997, and thereafter the full House adopted the resolution. *Id.* at 5005-06. *See also* H. Res. 268, 102d Cong. (1991); 137 Cong. Rec. 29968, 30526-27 (1991) (treating as privileged resolution concerning brief prepared by House Counsel on behalf of Member and filed with Florida Supreme Court; resolution tabled).

Finally and significantly, the adoption, interpretation, and application of the House's internal rules are constitutionally committed to the House alone. "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. And rules adopted pursuant to the Rulemaking Clause, within constitutional limits, are "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). The judiciary is not empowered to second-guess the House's interpretation and application of its own rules, including the rules by which the Bipartisan Legal Advisory Group has intervened and litigated on behalf of the House in this and many other cases. Just as the courts will not look behind an enrolled bill to determine whether its text is precisely the law assented to by both houses of Congress and signed by the President, "[t]he respect due to coequal and independent departments requires the judicial department to act upon th[e] assurance" that each chamber of Congress properly interprets its own rules. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892); *see also Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (upholding Senate's interpretation of Impeachment Clause permitting holding of trials by committee); *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring in part and in judgment) ("Because of the respect due to a coequal and independent department …, courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts."); *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in judgment) ("Mutual regard between the

coordinate branches, and the interest of certainty, both demand that official representations regarding … matters of internal process be accepted at face value.").[17]

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[17] *Amica* is wrong to suggest (at 17 n.6) that the Court may disregard the House's interpretation and application of its own rules here because "the rights of those outside" the House "are at stake." The only "right" that turns on the House's internal rules is the Group's authority to speak for the House in this litigation. The House rules, and the House's interpretation of those rules, have no bearing on Ms. Windsor or the executive. Thus, this case is not remotely analogous to *United States v. Smith*, where the Senate's interpretation of its internal rule would have deprived an executive officer of his commission. *See* 286 U.S. 6, 30 (1932).

Similarly, *Reed v. County Comm'rs of Del. Co., Pa.*, 277 U.S. 376 (1928), does not support *amica*'s contentions (at 17) that the Group lacks "authority to intervene as a party," and that courts should disregard the House's interpretation of its own rules and practices. The issue in *Reed* was whether the federal courts had jurisdiction to hear a subpoena enforcement case brought by a Senate committee under a statute that provided "that the District Courts shall have original jurisdiction 'of all suits of a civil nature … brought by the United States, or by any officer thereof authorized by law to sue,'" and the Senate resolution that created the committee authorized it to "do such other acts as may be necessary in the matter of said investigation." 277 U.S. at 386–87. The Court held that the Senate resolution creating the committee was insufficiently explicit to render the committee "authorized by law to sue" *within the meaning of the statute*. *Id.* at 389. This case is distinguishable because the issue here is not whether some House action satisfies statutory language that limits the Court's jurisdiction, but rather whether the House has Article III standing. In resolving that issue, the Court is bound by the House's determination that the Group speaks for the House and is authorized to intervene and defend DOMA.

Given the House's plenary authority to interpret its own rules; its unbroken practice over nearly thirty years of articulating its institutional position in litigation matters through a five-member leadership group; and the full House's recent, explicit confirmation that the Bipartisan Legal Advisory 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," H. Res. 5, 113th Cong. § 4(a)(1)(B), there is no sound basis for this Court to look behind the Group's intervention in this case.

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Both practical considerations and the bedrock Article III requirement of adverseness strongly support the House's standing here. This Court's "right to declare an act of Congress unconstitutional, c[an] only be exercised when a proper case between opposing parties [i]s submitted for judicial determination." *Muskrat v. United States*, 219 U.S. 346, 357 (1911) (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). But Ms. Windsor and the executive both argue that DOMA is unconstitutional and that Ms. Windsor should receive a refund. It is the House's intervention that ensures the adversarial presentation that Article III demands. As already demonstrated, the House is no interloper; it has a concrete interest in not having its legislation permanently nullified. Thus, the House is not only a proper litigant, but a constitutionally necessary one.

The alternative suggested by the executive has little to recommend it. In the executive's view, when

it agrees with a private party that an Act of Congress is unconstitutional, the House has no ability to intervene and file dispositive motions, to take depositions or obtain other discovery, or to take appeals. This is not a problem, the executive maintains, because it stands ready to file the necessary motions on the House's behalf. In the district court, the executive even went so far as to file a "motion to dismiss" which made clear that the executive opposed the relief it nominally sought. That makes no sense. Our Article III judicial system, which values adversary presentation, should not countenance such Alice-in-Wonderland filings. And a constitutional system that respects co-equal and coordinate branches of government should not require the spectacle of one branch litigating for another like a ventriloquist.

In addition to flunking the test of commonsense, the executive's position, if accepted, would significantly skew the separation of powers in favor of the executive and away from Congress *and the courts*. Implicit in the executive's insistence that only it can file dispositive motions and appeals is the notion that its willingness to do so is necessary to facilitate this Court's review. That, of course, would allow the executive, by withholding its favor, to control which cases the courts review.[18] But neither

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[18] Indeed, that is precisely what the executive has done. In some DOMA cases, like this one, the Department has pursued expedited appeals. In others, particularly when district courts applied existing precedent to uphold DOMA, the Department delayed review and actively sought to prevent the appellate courts from reviewing DOMA. *See, e.g.*, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. 2010) (Department

this Court's ability to review constitutional issues nor the House's ability to prevent permanent nullification of its legislation should depend on acts of executive grace—or the executive's strategic decision making.

## II. The House's Participation As A Party Ensures This Court's Article III Jurisdiction, But The Executive's Lack Of Appellate Standing Requires Dismissal Of Its Petition.

### A. If the House Lacks Standing, This Court Lacks Jurisdiction to Decide This Case.

It is elementary that Article III of the Constitution permits the judiciary to resolve only "Cases" or "Controversies." An essential element of that constitutional limitation is that "there must be an actual controversy, and adverse interests." *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850). Without truly adverse parties, "a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." *United States v. Johnson*, 319 U.S. 302, 304 (1943) (per curiam). And "there is no Art. III case or controversy when the parties desire 'precisely the same result.'" *GTE Sylvania v. Consumers Union of the U.S.*, 445 U.S. 375, 383 (1980) (quoting *Moore v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam)).

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sought remand of case to Board of Immigration Appeals, urged Board to close case, and urged Ninth Circuit to dismiss appeal).

If this Court finds that the House lacks standing, then there is no Article III case or controversy to resolve because there is no genuine adversity between Ms. Windsor and the executive. Both parties agree that DOMA Section 3 is unconstitutional and Ms. Windsor should receive a refund. Thus, like the parties in *Moore*, Ms. Windsor and the executive requested "precisely the same result" in the proceedings below and do so again now before this Court. *See* 402 U.S. at 47–48 ("At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside."). And both received precisely the results they requested. When "confronted with th[is] anomaly," *Moore* expressly held that there was "no case or controversy within the meaning of Art. III of the Constitution" and dismissed the appeal. *Id.*

Similarly, in *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam), where the State of New Jersey encouraged this Court to decide a constitutional question, but declined to take a position adverse to the defendant it successfully prosecuted in the courts below, the Court dismissed the case, reiterating that it "do[es] not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Id.* at 102. If the House is denied standing, the same result must occur here.

*Chadha* does not assist the executive, especially given its opposition to the House's standing. In *Chadha*, the House and Senate *did* have standing

and filed their own petitions. And the Court expressly relied on those facts to assure itself of Article III jurisdiction. *See* 462 U.S. at 931 n.6, 939. Thus, *Chadha* did not confront the question of its Article III jurisdiction in the absence of a proper legislative defendant. The Court's "case or controversy" analysis relied chiefly upon the House and Senate's presence in the case, except to the extent that a genuine controversy existed between Chadha and the executive *before* the Ninth Circuit's decision invalidating the executive's deportation order. *See id.* at 939–40. Once the court cancelled that order, the executive's interests became squarely aligned with Chadha's and the House and Senate immediately intervened as parties.

Without the House's participation as the sole adverse party in this suit, this Court would be left issuing an advisory opinion on a novel question of constitutional law concerning a hotly contested matter of social policy. But Article III's prohibition against advisory opinions is central. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792). This Court has not hesitated to find itself without jurisdiction when it becomes "evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress." *Muskrat*, 219 U.S. at 361. And that is precisely what this litigation would be without the House's participation. Both this Court and the Second Circuit lack judicial power to grant that request. *Cf. Johnson*, 319 U.S. at 305 ("Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may

set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits.”).

### B. Because the Executive Branch Received Precisely the Result It Sought Below, It Lacks Appellate Standing.

The House, unlike *amica* and the executive, believes that its participation is both necessary and sufficient to satisfy Article III. But even assuming the House’s standing eliminates any Article III problem, the Department still lacks appellate standing to seek this Court’s review of a decision accepting the Department’s position *in toto* and ordering relief that it thinks is appropriate. Simply put, it prevailed completely below and had no business seeking review of that favorable decision.

This Court’s decisions make clear that the executive lacks appellate standing here. “Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980). And “[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” *Id.* (citing *Pub. Serv. Comm’n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *N.Y. Tel. Co. v. Maltbie*, 291 U.S. 645 (1934); *Corning v. Troy Iron & Nail Factory*, 56 U.S. (15 How.) 451 (1853)). Though this rule does not derive from Article III, it is firmly rooted in “the statutes granting appellate jurisdiction and the historic practices of the appellate courts.” *Roper*, 445 U.S. at 333–34; *see also Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of

certiorari) (This Court's "practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." (quoting R. Stern & E. Gressman, *Supreme Court Practice* 79 (8th ed. 2002))).

Moreover, the Court's analysis of the executive's appellate standing in *Chadha* focused entirely on *statutory* jurisdiction under 28 U.S.C. § 1252, a provision that is not relevant here (and in fact has been repealed). *See* 462 U.S. at 931 (painstakingly tying each sentence of analysis to § 1252—*e.g.*, "aggrieved party for purposes of taking an appeal *under § 1252*"; "aggrieved party *under § 1252*" (emphases added)); *see also id.* at 931 n.6 (relying exclusively on the presence of the House and Senate to assure the Court of its own Article III jurisdiction). In short, this Court in *Chadha* held its usual prudential standing requirements displaced by the mandatory nature of § 1252 review: "It is apparent that Congress intended that this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court is available only by writ of certiorari." *Id.* at 930–31. Here, the Court's prudential standing jurisprudence applies with full force.

Plainly, the executive was a prevailing party below. It obtained the precise relief it believed was appropriate based on the precise theory (heightened scrutiny) it advocated. The executive can fare no better before this Court. While this Court's affirmance would have a greater precedential impact, the executive cannot ground its appellate standing on

a desire for an opinion with the identical effect *on this case and controversy*, but a broader precedential scope *for other cases*. *See, e.g.*, *Muskrat*, 219 U.S. at 361. The executive may not base its appellate standing on the desire to expand the geographic reach of its victory.[19]

* * *

If the House lacks standing to defend the constitutionality of an Act of Congress when the executive declines to do so, all manner of jurisdictional conundrums follow. Without the participation of the House and the adverseness it provides, it is not clear why there was a case or controversy once the executive abandoned DOMA's defense. Both Ms. Windsor and the executive—the plaintiff and nominal defendant—agreed that DOMA was unconstitutional and that Ms. Windsor was entitled to a refund. Without the House, it is unclear who could move to dismiss the complaint, depose a witness, or oppose summary judgment. And without the House, it is even less clear why the executive would have appellate standing to seek not reversal, but affirmance of a judicial decision that accepted its arguments and ordered the relief it requested.

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[19] This argument equally suggests that the executive lacked appellate standing to file its own appeal in the Second Circuit, but that issue is of no moment because the House filed its own appeal which independently justified the Second Circuit's appellate jurisdiction. In similar fashion, recognition that the Department lacks appellate standing to file the petition in No. 12-307 need not delay this Court's resolution of DOMA's constitutionality. This Court can grant the House's petition in No. 12-785 and issue its merits decision in that case without the need for further briefing and argument.

Recognition of the House's standing solves these conundrums and respects the separation of powers. With the House, there was a clear case and controversy. With the House, there was adverseness and no doubt that the House was the proper party to move to dismiss, take depositions, and oppose summary judgment. And with the House, it is clear which party should appeal (*i.e.*, seek reversal of) a decision that rejects the House's arguments. In short, without the House, it is hard to understand this case as anything other than an elaborate effort to procure an advisory opinion from this Court. With the House, there is a case or controversy on a constitutional issue of the greatest importance.

## CONCLUSION

For the foregoing reasons, this Court should recognize that the House of Representatives, acting through its Bipartisan Legal Advisory Group, has Article III standing to defend the constitutionality of DOMA Section 3, and that the executive lacked appellate standing to file the petition in No. 12-307. This Court should dismiss the petition in No. 12-307, grant the House's petition in No. 12-785, and definitively resolve the constitutionality of DOMA Section 3 without the need for re-briefing or re-argument.

Respectfully submitted,

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# APPENDIX

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*Appendix A*

## Relevant Constitutional Provisions

### U.S. Const. art. I, § 5, cl. 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

**U.S. Const. art. I, § 7, cl. 2**

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

**U.S. Const. art. II, § 3**

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**U.S. Const. art. III, § 2, cl. 1**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Appendix B*

**House Resolution 5,**
**113th Cong. § 4(a) (2013)**

SEC. 4. COMMITTEES, COMMISSIONS, AND HOUSE OFFICES.

(a) LITIGATION MATTERS.—

(1) CONTINUING AUTHORITY FOR THE BIPARTISAN LEGAL ADVISORY GROUP.—

(A) The House authorizes the Bipartisan Legal Advisory Group of the One Hundred Thirteenth Congress—

(i) to act as successor in interest to the Bipartisan Legal Advisory Group of the One Hundred Twelfth Congress with respect to civil actions in which it intervened in the One Hundred Twelfth Congress to defend the constitutionality of section 3 of the Defense of Marriage Act (1 U.S.C. 7) or related provisions of titles 10, 31, and 38, United States Code, including in the case of Windsor v. United States, 833 F. Supp.2d 394 (S.D.N.Y. June 6, 2012), aff'd, 699 F.3d 169 (2d Cir. Oct. 18, 2012), cert. granted, No. 12–307 (Dec. 7, 2012), cert. pending No. 12–63 (July 16, 2012) and 12–785 (Dec. 28, 2012);

(ii) to take such steps as may be appropriate to ensure continuation of such civil actions; and

(iii) to intervene in other cases that involve a challenge to the constitutionality of section 3 of the Defense of Marriage Act or related provisions of titles 10, 31, and 38, United States Code.

(B) Pursuant to clause 8 of rule II, the Bipartisan Legal Advisory 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.

(2) CONTINUING AUTHORITIES FOR THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM AND THE OFFICE OF GENERAL COUNSEL.—

(A) The House authorizes—

(i) the Committee on Oversight and Government Reform of the One Hundred Thirteenth Congress to act as the successor in interest to the Committee on Oversight and Government Reform of the One Hundred Twelfth Congress with respect to the civil action Committee on Oversight and Government Reform, United States House of Representatives v. Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, filed by the Committee on Oversight and Government Reform

in the One Hundred Twelfth Congress pursuant to House Resolution 706; and

(ii) the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel to take such steps as may be appropriate to ensure continuation of such civil action, including amending the complaint as circumstances may warrant.

(B) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform and until such committee has adopted rules pursuant to clause 2(a) of rule XI, to issue subpoenas related to the investigation into the United States Department of Justice operation known as "Fast and Furious" and related matters.

(C) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel to petition to join as a party to the civil action referenced in paragraph (1) any individual subpoenaed

by the Committee on Oversight and Government Reform of the One Hundred Twelfth Congress as part of its investigation into the United States Department of Justice operation known as "Fast and Furious" and related matters who failed to comply with such subpoena, or any successor to such individual.

(D) The House authorizes the chair of the Committee on Oversight and Government Reform (when elected), on behalf of the Committee on Oversight and Government Reform, and the Office of General Counsel, at the authorization of the Speaker after consultation with the Bipartisan Legal Advisory Group, to initiate judicial proceedings concerning the enforcement of subpoenas issued to such individuals.

*Appendix C*

**Rules of the House of Representatives, Rule I.11, 103d Cong. (1993)**

11. There is established in the House of Representatives an office to be known as the Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

**Rules of the House of Representatives, Rule II.8, 112th Cong. (2011)**

*Office of General Counsel*

8. There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

**Rules of the House of Representatives, Rule II.8, 113th Cong. (2013)**

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8. There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

**Rules of the House of Representatives, Rule IX, 113th Cong. (2013)**

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member, Delegate, or Resident Com missioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two legislative days after the day on which the proponent announces to the House an intention to offer the resolution and the form of the resolution. Oral announcement of the form of the resolution may be dispensed with by unanimous consent.

(2) The time allotted for debate on a resolution offered from the floor as a question of the privileges of the House shall be equally divided between (A) the proponent of the resolution, and

(B) the Majority Leader, the Minority Leader, or a designee, as determined by the Speaker.

(b) A question of personal privilege shall have precedence of all other questions except motions to adjourn.