

No. ____

In The
Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

EDITH S. WINDSOR AND UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

KERRY W. KIRCHER <i>General Counsel</i>	PAUL D. CLEMENT <i>Counsel of Record</i>
WILLIAM PITTARD <i>Deputy General Counsel</i>	H. CHRISTOPHER BARTOLOMUCCI
CHRISTINE DAVENPORT <i>Senior Assistant Counsel</i>	NICHOLAS J. NELSON
TODD B. TATELMAN	MICHAEL H. MCGINLEY
MARY BETH WALKER	BANCROFT PLLC
ELENI M. ROUMEL <i>Assistant Counsels</i>	1919 M Street, N.W.
OFFICE OF GENERAL COUNSEL	Suite 470
U.S. HOUSE OF REPRESENTATIVES	Washington, D.C. 20036
219 Cannon House Office Bldg.	(202) 234-0090
Washington, D.C. 20515	p.clement@bancroftpllc.com
(202) 225-9700	

Counsel for Petitioner

QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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 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 in the court of appeals.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
<i>Ms. Windsor’s Challenge to DOMA</i>	2
<i>District Court Proceedings</i>	3
<i>Second Circuit Proceedings and Respondents’ Petitions for Certiorari Before Judgment</i>	6
<i>This Court’s Actions</i>	9
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	11
APPENDIX	
Appendix A	
Opinion of the United States Court of Appeals for the Second Circuit, No. 12-2335 and 12-2435 (Oct. 18, 2012)	1a

Appendix B

Opinion of the United States District
Court for the Southern District
of New York, No. 10-civ-8435
(June 6, 2012)..... 82a

Appendix C

Memorandum and Order of the
United States District Court for
the Southern District of New York,
No. 10-civ-8435
(June 2, 2011)..... 107a

Appendix D

Judgment of the United States
District Court for the Southern
District of New York, No. 10-civ-8435
(June 7, 2012)..... 118a

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Baker v. Nelson</i> , 409 U.S. 810 (1971)	7
<i>Camreta v. Greene</i> , 131 S. Ct. 2020 (2011)	9
<i>Deposit Guar. Nat’l Bank v. Roper</i> , 445 U.S. 326 (1980)	6
<i>Godfrey v. Spano</i> , 920 N.E.2d 328 (N.Y. 2009)	3
<i>Hernandez v. Robles</i> , 855 N.E.2d 1 (N.Y. 2006)	3
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	11
<i>Mass. v. U.S. Dep’t of Health & Human Servs.</i> , 682 F.3d 1 (1st Cir. 2012)	5
Constitutional Provision	
U.S. Const. amend. V	2
Statute	
1 U.S.C. § 7	2
Rules	
Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993)	1
Rule II.8, Rules of the House of Representatives, 112th Cong. (2011)	1

PETITION FOR A WRIT OF CERTIORARI

The Bipartisan Legal Advisory Group of the United States House of Representatives (“the House”) respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit in this case.¹

OPINIONS BELOW

The opinion of the Second Circuit is reported at 699 F.3d 169 and reproduced in the appendix hereto (“App.”) at App. 1a. The opinion of the district court on the merits is reported at 833 F. Supp. 2d 394 and reproduced at App. 82a. The opinion of the district court granting the House’s motion to intervene is

¹ The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980’s (although the formulation of the group’s name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory 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. 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.

reported at 797 F. Supp. 2d 320 and reproduced at App. 107a.

JURISDICTION

The judgment of the Second Circuit was entered on October 18, 2012. App. 1a. On December 15, 2012, the Second Circuit granted the House's motion for an extension of time to file a petition for rehearing en banc to December 31, 2012. The jurisdiction of the Second Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

STATEMENT OF THE CASE

Ms. Windsor's Challenge to DOMA

Respondent Edith Schlain Windsor and another woman, the late Thea Clara Spyer, obtained a certificate of marriage from the province of Ontario,

Canada in 2007. At that time, their state of residence, New York, did not issue marriage license to same-sex couples. See *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (“New York’s statutory law clearly limits marriage to opposite-sex couples.”).

Ms. Spyer passed away in 2009, naming Ms. Windsor the executor and sole beneficiary of her estate. Nine months after Ms. Spyer’s passing, the New York Court of Appeals expressly reserved the question whether New York law recognizes foreign, same-sex marriage certificates. See *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009).

As executor, Ms. Windsor sought a refund of \$363,053 in federal estate taxes paid by the Spyer estate on the view that the estate was entitled to the marital deduction.

District Court Proceedings

After the IRS denied the refund, Ms. Windsor filed suit in the district court seeking a declaration that Section 3 of DOMA violates equal protection principles. The U.S. Department of Justice (“DOJ”) appeared on behalf of the party defendant, the United States of America, but DOJ did not defend DOMA against Ms. Windsor’s constitutional challenge. Instead, DOJ informed the court that it would not defend DOMA. Nevertheless, the Executive Branch refused to grant the refund claimed by Ms. Windsor.

In light of DOJ’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 (S.D.N.Y. Mar. 15, 2011). The House did so, and the

court granted the House intervention as of right under Rule 24(a)(2). App. 107a. 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.” App. 112a, 113a.

Neither DOJ nor Ms. Windsor opposed the House’s intervention, App. 110a, but DOJ argued that the House should be limited to presenting arguments in defense of DOMA while DOJ alone would “file all procedural motions, including notices of appeal and petitions for certiorari.” App. 114a. The House objected that this “would relegate it to the status of amicus curiae.” App. 110a. The district court rejected DOJ’s position. It refused to “circumscribe[]” the House’s role in the case and granted the House the status of a “full party.” App. 115a. The district court also ruled that the House “has standing to intervene in this litigation to defend the constitutionality of Section 3 of DOMA.” App. 116a (citing *INS v. Chadha*, 462 U.S. 919, 939 (1983) (“Congress is * * * a proper party to defend the constitutionality of [the challenged statute].”)).

Although DOJ represented the Executive Branch defendant in this case, DOJ affirmatively urged the district court to strike down DOMA and enter judgment for the plaintiff, Ms. Windsor. See Response to Motion for Summary Judgment (S.D.N.Y. Aug. 19, 2011) (“Section 3 of DOMA fails heightened scrutiny, and this Court should * * * grant Plaintiff’s motion for summary judgment.”). DOJ filed a “Motion to Dismiss”—surely one of the

stranger documents ever to bear that label—but it did not, in fact, seek the dismissal of Ms. Windsor’s case. See Motion to Dismiss Amended Complaint (S.D.N.Y. Aug. 1, 2011). On the contrary, DOJ’s so-called motion to dismiss stated that if the district court “agrees with Plaintiff *and the United States* * * * it should *not* dismiss” the complaint. *Id.* at 2 (emphases added).

The district court held that Section 3 of DOMA violates equal protection. App. 91a–105a. The court first ruled that Ms. Windsor had standing to challenge DOMA despite the *Godfrey* court’s reservation in 2009 of the question whether New York law recognized foreign, same-sex marriages. See App. 89a (noting that “the Court of Appeals has yet to readdress the question of same-sex marriage recognition”).

The district court then held that DOMA fails rational basis review. The court did not, however, apply ordinary rational basis review. Instead, it followed the First Circuit’s decision in *Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012), which had applied to DOMA a form of review it called “intensified scrutiny.” *Id.* at 10. Describing “the nature of the rational basis analysis required here,” the district court said that “a more ‘searching’ form of rational basis scrutiny is required where a classification burdens homosexuals as a class and the states’ prerogatives are concerned.” App. 95a–96a. And like the First Circuit in *Massachusetts*, the district court invoked “principles of federalism” in support of both its more searching form of review and its

conclusion that DOMA lacks a rational basis. App. 103a.

Although it agreed with the district court's judgment, the Executive Branch did not comply with the judgment it helped to procure.

Second Circuit Proceedings and Respondents' Petitions for Certiorari Before Judgment

The House appealed the district court's decision. Soon thereafter, DOJ noticed its own appeal.

The House moved the Second Circuit to dismiss DOJ's separately-numbered appeal on the ground that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). The House argued that, since DOJ had urged the district court to strike down DOMA and enter judgment for the plaintiff, and since the district court had done exactly that, DOJ had no standing to appeal.²

For her part, Ms. Windsor moved the Second Circuit to expedite the briefing and oral argument. After the Second Circuit agreed to do so, she then filed with this Court a petition for a writ of certiorari before judgment, which was docketed as No. 12-63.

² During oral argument in the Second Circuit, Chief Judge Jacobs pressed DOJ to explain how it could appeal from a victory, stating "In my day when you won, you didn't appeal." App. to Response in Support of Writ of Cert. Before Judgment, No. 12-307, at 32a. And when DOJ's representative offered that the district court judgment orders the Executive Branch to pay Ms. Windsor her refund, Chief Judge Jacobs replied that that "make[s] the United States a defendant[.] I am not sure I know why it would make it an appellant, if it's satisfied with the adoption of its arguments in the court below." *Id.*

DOJ then filed its own pre-judgment petition, No. 12-307.

While those petitions for certiorari before judgment were still pending, the Second Circuit rendered its judgment. App. 1a.

The Second Circuit first denied the House's motion to dismiss DOJ's appeal. The court ruled that DOJ could appeal, even though DOJ had "prevailed in the result it advocated in the district court," because the Executive Branch "continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money."³ App. 4a.

On the merits, the Court, with Judge Straub dissenting, affirmed the district court's decision. The panel majority recognized that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1971), "held that the use of the traditional definition of

³ The Second Circuit also addressed Ms. Windsor's standing, which turned on an issue of New York law. The court recognized that, "[a]t the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself" and thus "*decisive for standing in this case*" is "whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions." App. 5a (emphasis added).

The Second Circuit denied the House's request to certify this sensitive question of New York law to the New York Court of Appeals largely on the strength of its observation that "the Court of Appeals has signaled its disinclination to decide this question" in *Godfrey*. App. 6a. Instead, the panel predicted that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death." App. 7a. It based that prediction on three New York lower court rulings, two of which were available to the *Godfrey* court. App. 6a–7a.

marriage for a state’s own regulation of marriage status did not violate equal protection.” App. 3a. Nonetheless, the panel majority concluded that “*Baker* has no bearing on this case,” because DOMA is a federal law. App. 11a. The panel majority also suggested that *Baker* is no longer binding precedent. App. 8a–11a.

In its equal protection analysis, the panel majority explained that “a party urging the absence of any rational basis takes up a heavy load” and “[t]hat would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress” and “the definition of marriage it affirms has been long-supported and encouraged.” App. 12a. The panel majority did not dispute Judge Straub’s conclusion that DOMA is rational. See App. 14a (“We * * * decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.”). It also declined to apply “rational basis plus” like “the district court in this case and the First Circuit” because this Court “has not expressly sanctioned such modulation in the level of rational basis review.” App. 12a–13a.

The panel majority ultimately determined—in express conflict with the law of eleven other Circuits—that heightened scrutiny applies to classifications based on sexual orientation. App. 14a. The panel majority found that the factors this Court has looked to in applying heightened scrutiny justified treating sexual orientation as a “quasi-suspect” classification subject to intermediate scrutiny. App. 14a–23a. Finally, the panel majority concluded that Section 3

of DOMA could not survive under heightened scrutiny. App. 23a–30a.

DOJ continued to urge this Court to grant its petition for certiorari before judgment even though the Second Circuit had adopted DOJ's favored disposition and embraced DOJ's favored reasoning. *Cf. Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (“As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party”).

This Court's Actions

On December 7, 2012, this Court granted DOJ's petition for certiorari filed before judgment in No. 12-307, which had presented the question whether DOMA violates equal protection.

In addition, the Court directed the parties to brief the questions “whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.”

On December 11, 2012, this Court appointed Vicki Jackson as *amicus curiae* to argue that the additional questions should be answered affirmatively as to first question and negatively as to the second.

REASONS FOR GRANTING THE WRIT

This Court has already granted certiorari in this case. The constitutionality of Section 3 of DOMA is a question of great national importance that this Court should resolve, in this case if at all possible.

By adding a question concerning DOJ's appellate standing, however, this Court has recognized that DOJ's petition for certiorari before judgment may be a defective vehicle for presenting the question of DOMA's constitutionality.

The House has filed this petition so that this Court has a vehicle to reach the question of DOMA's constitutionality even if it concludes that the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction over DOJ's petition. The House, of course, does not agree with the court below on the constitutionality of DOMA.

The House recognizes that the Court has requested briefing on the question whether "the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case." The House believes that it has standing in this case to defend the constitutionality of DOMA—a duly-enacted and presumptively constitutional Act of Congress—and will fully brief that issue. If this Court ultimately agrees with the House's position on its standing, and agrees with the House and the Court-appointed *amicus* that DOJ lacks appellate standing, this petition would provide a vehicle for this Court's review of DOMA's constitutionality, a question all agree merits this Court's review and resolution.

Accordingly, this Court should either hold the House's petition, and grant it and use it as a vehicle to address DOMA's constitutionality on the merits (without the need for further briefing, argument, or delay) in the event it decides that the Executive Branch's agreement with the court below deprives this Court of jurisdiction, or, alternatively, grant the House's petition for certiorari now and consolidate it with No. 12-307 for purposes of briefing and argument.

The questions this Court has added are of surpassing importance to the separation of powers. But the resolution of those critical questions should not delay this Court's resolution of DOMA's constitutionality on the merits. Nor should the Court's ability to resolve DOMA's constitutionality this Term—something all parties view as desirable—in any way skew this Court's consideration of the important standing questions that are wholly independent of the particular statute at issue here and are likely to recur in very different contexts over time. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983). Whatever the jurisdictional consequences of DOJ's abandonment of its traditional role of defending duly-enacting statutes, that decision imposes substantial burdens on the House. It is thus highly desirable for the Court to have a vehicle available that will allow it to rule definitively on DOMA's constitutionality this Term.

CONCLUSION

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

Respectfully submitted,

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

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

Counsel for Petitioner

December 28, 2012