

No. 12-785

IN THE
Supreme Court of the United States

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

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor
of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

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

**BRIEF IN OPPOSITION FOR RESPONDENT
EDITH SCHLAIN WINDSOR**

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BRIEF IN OPPOSITION FOR RESPONDENT EDITH SCHLAIN WINDSOR

This Court “has already granted certiorari in this case,” Pet. 10, to decide the constitutionality of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (DOMA). *See United States v. Windsor*, 133 S. Ct. 786 (2012) (No. 12-307). According to petitioner – the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) – the sole purpose of this petition is to provide “a vehicle for this Court’s review of DOMA’s constitutionality” in the event that the Court concludes that the United States lacks appellate standing. Pet. 10. BLAG’s petition presupposes that this Court somehow would have jurisdiction to reach the constitutional question even if it were to conclude that there is no longer an “actual controversy” between the United States and respondent Edith Schlain Windsor about “particular legal rights,” *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (internal quotation marks and citation omitted).

BLAG is mistaken. This case began as a lawsuit by Ms. Windsor against the United States for a refund of taxes Ms. Windsor paid as executor of the estate of her late spouse, Thea Clara Spyer. She alleged that she was forced to pay the taxes because DOMA unconstitutionally prevented her from invoking the marital deduction provided by 26 U.S.C. § 2056(a). *See* Pet. App. 2a.¹ With respect to that

¹ BLAG’s intimation that Dr. Spyer’s estate may have been ineligible for the marital exemption as a matter of New York

controversy, the United States – not BLAG – is the proper defendant. *See* Br. on the Jurisdictional Questions for Respondent Edith Schlain Windsor 14, 36, *United States v. Windsor* (No. 12-307) (“Windsor Juris. Br.”). A suit “for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,” 26 U.S.C § 7422(a), “may be maintained *only* against the United States,” *id.* § 7422(f)(1) (emphasis added). In other words, Ms. Windsor could not have sued BLAG for a refund of the taxes her spouse’s estate paid – the source of Ms. Windsor’s standing-conferring injury. Nor are counsel for Ms. Windsor aware of any other DOMA-related suit she could have filed naming BLAG as a defendant.

To be sure, throughout this litigation Ms. Windsor has acquiesced in BLAG’s participation in her lawsuit against the United States because BLAG’s involvement “sharpens the presentation of

law, *see* Pet. 3, 7, is meritless. The petition’s formulation that Ms. Windsor and Dr. Spyer “obtained a certificate of marriage from the province of Ontario,” *id.* 2, insults both the couple and the record. Ms. Windsor and Dr. Spyer were legally wed in a ceremony conducted in Toronto by a Canadian judge authorized to officiate. *See* J.A. 175, 236 (No. 12-307). New York, “through its executive agencies and appellate courts, uniformly recognized Windsor’s same-sex marriage in the year that she paid the federal estate taxes.” Pet. App. 89a; *see id.* 7a. In her jurisdictional brief in No. 12-307, Ms. Windsor provided this Court with citations to the relevant documents from the Governor, Attorney General, and Comptroller General of New York, as well as the relevant judicial decisions. *See* Windsor Juris. Br. 2 n.1.

issues,” *Baker v. Carr*, 369 U.S. 186, 204 (1962). But there is not now – nor has there ever been – an Article III case or controversy between her and BLAG.²

In No. 12-307, the United States and Ms. Windsor have argued that there remains an ongoing Article III case or controversy between them, and thus this Court has jurisdiction to decide DOMA’s constitutionality. *See Windsor Juris. Br.* 15-25; *Br. for the United States on the Jurisdictional Questions* 14-27, *United States v. Windsor* (No. 12-307). But if this Court concludes otherwise – on the grounds that the Executive Branch’s agreement with the decision of the Second Circuit extinguishes the necessary adverseness between Ms. Windsor and the United States or deprives the United States of standing to appeal because it is not “aggrieved” – then this Court cannot use this case as a vehicle for reaching the underlying constitutional question.

It does not matter how “aggrieved” – in the colloquial sense of the word – BLAG considers itself to be by the fact that the district court and court of

² Nor has there ever been an Article III case or controversy between BLAG and the United States. The United States “continues to enforce Section 3 of DOMA.” *Pet. App.* 4a. BLAG’s ability to intervene in an ongoing lawsuit does not mean there is a justiciable controversy between it and the Executive Branch over how to conduct the litigation. *See* 28 U.S.C. § 516 (providing that control over “the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General”).

appeals entered judgment for Ms. Windsor and against the United States. BLAG is not aggrieved in any legal sense. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (any “comfort and joy” a party may get “from the fact that the United States Treasury is not cheated . . . or that the Nation’s laws are faithfully enforced” is only “psychic satisfaction” that fails the demands of Article III).

The judgment Ms. Windsor obtained has no binding legal effect on BLAG. BLAG has not been ordered to satisfy the judgment in Ms. Windsor’s favor. Nor has BLAG been enjoined from taking any future actions. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989) (for this Court to exercise jurisdiction, the party seeking review must be “under a defined and specific legal obligation” that “will be directly affected to a specific and substantial degree” by a decision from this Court (internal quotation marks omitted)). Absent an adverse judgment *against BLAG*, and in the absence of a live controversy between Ms. Windsor and the United States, BLAG “has in effect filed a new declaratory judgment action in this Court against the Court of Appeals” seeking to have DOMA upheld, *Camreta v. Greene*, 131 S. Ct. 2020, 2043 (2011) (Kennedy, J., dissenting). This it cannot do.

It matters not, had BLAG acted more promptly in filing its petition, whether this Court might have granted both its petition and the United States’ and consolidated the two for briefing and argument. *See Windsor Juris. Br.* 37-38. At this late date, this Court’s order modifying the conventional briefing schedule for No. 12-307, *see United States v. Windsor*, 133 S. Ct. 815 (2012), has fully

accommodated the posture of the parties. BLAG's protective petition therefore serves no purpose since it cannot provide a basis for this Court's jurisdiction if one does not already exist.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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