No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent Edith Windsor agrees that the Court should grant the government's petition for a writ of certiorari in this case, and the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) agrees that the question presented by this petition—whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection as applied to persons of the same sex who are legally married under state law—warrants this Court's immediate review. To this point, BLAG has repeatedly objected to the petitions in this case and in *Office of Personnel Management* v. *Golinski*, No. 12-16, and *Office of Personnel Management* v. *Pedersen*, No. 12-302, on the ground (*inter alia*) that these cases lacked a court of appeals judgment and that BLAG's petition for a writ of certiorari (No. 12-13) in *Massachu-*

setts v. *Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), thus presented the preferred vehicle. The Second Circuit has now issued a decision in this case, however, changing the landscape materially.

BLAG nevertheless adheres to the view that the Court should deny review in this case and grant only its petition in *Massachusetts*, based on three reasons: (1) the status under New York law of Ms. Windsor's foreign marriage creates a potential "distraction[]" notwithstanding the Second Circuit's unanimous holding that New York law recognized her same-sex marriage (Supp. Br. 9); (2) the decision below "exacerbates" problems with the government's appellate standing notwithstanding the Second Circuit's express rejection of that objection under *INS* v. *Chadha*, 462 U.S. 919, 930-931 (1983) (Supp. Br. 9); and (3) the Second Circuit decision introduces a "procedural wrinkle" because the government's certiorari petition was filed before that decision was rendered (*id.* at 10). As explained in the government's supplemental brief in this case, and further below, none of those asserted grounds warrants denial of the present petition. To the contrary, in light of the Second Circuit's decision, this case now presents the optimal vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA.

A. The Second Circuit's Interpretation Of New York Law Eliminates Any Concern About Plaintiff's Standing

BLAG finds "mystifying" that the government, which had previously suggested that the state-law status of plaintiff's foreign marriage was a cause for hesitation, no longer thinks so. BLAG Supp. Br. 11. But the government explained precisely why in its own supplemental brief: the Second Circuit unanimously held, consistent with the conclusion of the federal district court

and the "useful and unanimous" rulings of New York's intermediate appellate courts, that New York law recognized plaintiff's marriage at the relevant time. Gov't Supp. App. 5a-7a; *id.* at 31a (Straub, J., dissenting). And as this Court has repeatedly explained, the Court generally "accept[s] the interpretation of state law in which the District Court and the Court of Appeals have concurred," and indeed, does so "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976); see also Gov't Supp. Br. 8 n.2 (collecting similar cases). The case for deference to the Second Circuit on New York law is particularly strong here, where BLAG—despite asserting without elaboration that the state-law question "seems close" (Supp. Br. 8)—has yet to come forward with a single reason why New York's highest court would reach a different conclusion or why this Court should disturb the consistent state-law interpretation reached by every other court to have decided the issue.

BLAG nevertheless suggests that this long established principle of deference, which if applied here would indisputably eliminate BLAG's purported concern about plaintiff's standing, does not apply to questions of state law implicating standing. Putting aside whether the New York law marriage-recognition issue in fact implicates plaintiff's standing rather than the merits of her tax-refund claim,[1] there is no support for BLAG's sug-

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[1] Before the Second Circuit's decision, the government had presumed that the Court would have to address the threshold question whether BLAG's objection goes to plaintiff's standing or instead goes to the merits. See No. 12-63 Gov't Resp. 16-17 (citing *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). That is no longer the case. Because BLAG concedes that

gestion that this Court's longstanding practice of accepting a uniform interpretation of state law held by the court of appeals and district court is inapplicable to questions of standing. To the contrary, in *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), every member of this Court invoked that settled practice in the context of a question of standing. *See id.* at 16-17; *id.* at 23 (Rehnquist, C.J., concurring in the judgment). To be sure, the majority ultimately concluded that the court of appeals' interpretation of state law "sp[oke] not at all" to the relevant issue for standing purposes. *Id.* at 17. But there was no dispute that, if the court of appeals' interpretation *had* spoken to the relevant issue, this Court's longstanding practice of deferring to the court of appeals' understanding of state law would have governed. And here, there is no dispute that the court of appeals' and district court's interpretation of state law speaks directly to the relevant question—whether New York law recognized petitioner's marriage at the pertinent time. Consequently, there is no basis for declining to apply this Court's customary deference on state-law questions here, where it is undisputed that the Second Circuit's and district court's common understanding of New York law fully resolves any conceivable standing concerns.[2]

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plaintiff possesses standing under the Second Circuit's interpretation of New York law (*i.e.*, that New York recognized her marriage at the time of Thea Spyer's death), and because there is no reason for this Court to disturb the state-law conclusion, it does not matter whether the marriage-recognition issue implicates standing.

[2] BLAG also cites certain decisions outside the standing context in which the Court has not deferred to a court of appeals' interpretation of state law. See BLAG Supp. Br. 8 n.2. That the Court on occasion might decline to defer to a court of appeals' resolution of state law casts no doubt on the applicability of the ordinary practice where, as

B. The United States, As A Defendant Against Which Judgment Was Entered, Has Standing to Seek Certiorari

In light of the Second Circuit's decision affirming the district court's decision holding Section 3 unconstitutional, BLAG raises (Supp. Br. 9-10) the same standing objection that it makes to the government's petition for a writ of certiorari in *Massachusetts*. As explained more fully in the government's reply brief in *Massachusetts*, No. 12-15 (at 2-6), this Court's precedents make clear that the United States, as a defendant against which judgment was entered by the district court and affirmed by the court of appeals, is a proper party to invoke this Court's jurisdiction to review the judgment in this case. See *Chadha*, 462 U.S. at 930-931 ("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," it may seek review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional.").

As explained in the government's supplemental brief, the Second Circuit below, citing *Chadha*, *supra*, unanimously rejected BLAG's contention that the government lacked standing to appeal the district court's judgment holding that Section 3 violates equal protection. The decision below thus reinforces the government's reliance on *Chadha*—which similarly arose after a court of appeals' decision accepting the Executive Branch's merits argument against the constitutionality of a federal law—in seeking the Court's review in this case. Gov't Supp Br. 9. BLAG's appellate-standing objection continues to lack merit.

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here, there is no reason—and BLAG offers none—to question the correctness of the court of appeals' and district court's uniform understanding.

C. The Timing Of The Government's Certiorari Petition Poses No Obstacle To The Court's Review Of This Case

The government's supplemental brief explains why the issuance of the court of appeals' decision after the filing of the government's petition for a writ of certiorari does not deprive the Court of the authority to grant it. And the government points to clear precedent of the Court exercising such authority. See Gov't Supp. Br. 9-10 (discussing *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976)). BLAG nevertheless characterizes the intervening Second Circuit decision as creating a "procedural wrinkle." BLAG Supp. Br. 10.

That is no impediment to granting review in this case. Notably, BLAG provides no affirmative reason why this Court would lack authority to consider the government's petition, nor does it contend that the Court is foreclosed from doing so. Rather, BLAG relies on the fact that the government cites only one prior example (*General Elec.*, *supra*) of this procedural circumstance. But that is entirely unsurprising: the situation in which a party files a petition for certiorari before judgment, but the court of appeals issues a judgment before the Court has considered that petition, by nature arises exceedingly infrequently. The fact that at least one such prior instance exists, and the Court granted certiorari in that case to review the court of appeals' decision, should eliminate any doubt about the Court's authority to act here.

BLAG also suggests that the situation in *General Electric* is distinguishable because both parties jointly petitioned for certiorari in that case. BLAG Supp. Br. 10-11. But the fact that BLAG did not also petition in this case matters only if, as BLAG urges elsewhere, the government lacks appellate standing to seek this Court's

review. For the reasons explained above (p. 5, *supra*), that objection lacks merit.

* * * * *

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted. Although *Department of Health and Human Services* v. *Massachusetts*, petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), is also a case in which a court of appeals has rendered a decision, this case now provides the most appropriate vehicle for this Court's resolution of the constitutionality of Section 3 of DOMA. In particular, the court of appeals in *Massachusetts* was constrained by binding circuit precedent as to the applicable level of scrutiny, No. 12-15 Pet. App. 10a, whereas the court of appeals here was not so constrained, and its analysis may be beneficial to this Court's consideration of that issue.

In the event the Court grants review in this case, it should hold the petitions in *Massachusetts* pending final resolution on the merits. In the event the Court decides that neither case in which the court of appeals has issued a decision provides an appropriate vehicle, it should grant the government's petition for a writ of certiorari before judgment in either *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012), or *Office of Personnel Management* v. *Pedersen*, No. 12-302 (filed Sept. 11, 2012).

Respectfully submitted.

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