No. 12-307

In the

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES (JURISDICTIONAL ISSUES)

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, CA 92886
jeastman@chapman.edu
(714) 628-2500

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether the President can deprive this Court of jurisdiction to consider the constitutionality of an act of Congress by refusing to defend the act when it is challenged?

2. Whether the Bipartisan Legal Advisory Group has Article III standing as the duly-authorized representative of the United States House of Representatives to defend a statute enacted by Congress and signed into law by the President when a subsequent President declines to defend the statute in litigation challenging its constitutionality?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the President has no power to suspend the laws. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *National Federation of Independent Business v. Sebelius*, __ U.S. __, 132 S. Ct. 2566 (2012); *Sackett v. E.P.A.*, __ U.S. __, 132 S. Ct. 1367 (2012); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

INTRODUCTION

This suit challenging the constitutionality of Section 3 of the Defense of Marriage Act was brought by Edith Windsor against the United States on November 9, 2010. J.A. 77. After the Department of Justice entered an appearance on behalf of the United States, J.A. 78 (Dkt. #4), participated in pre-trial

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, either through blanket consents filed with the Clerk or by individual consent submitted with this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

conferences, J.A. 80, and apparently even advised the Court that it would be filing a motion to dismiss the suit, J.A. 79 (Dkt. # 6), the President of the United States directed the Department of Justice to cease defending the statute, having determined for himself, contrary to the holdings of every court to have addressed the issue, that sexual orientation was a suspect classification subject to heightened scrutiny and that, again in his own determination, Section 3 of DOMA was therefore unconstitutional. J.A. 179, 181, 183-85, 191. The Department then switched sides in the litigation, aggressively litigating *against* the constitutionality of the statute it had previously defended successfully elsewhere. In so doing, the Department ceased its representation of the United States and instead undertook to represent the President in challenging a law the President had a duty to faithfully execute.

In the prior cases, the Department had expressly disavowed every single rationale that had been offered by Congress in support of the statute when it was adopted, inappropriate concessions that the Department apparently believed, however erroneously, became materially significant once the Department began pushing for heightened scrutiny in the case *sub judice*. *S*ee U.S. Response to Plaintiff's Mot. for Summary Judgment at 24 (J.A. 106, Dkt. #71) ("nor is there some other important governmental interest identified by Congress and substantially advanced by Section 3 of DOMA, as required under heightened scrutiny"). Indeed, arguably in violation of the ethical obligations of its attorneys, the Department specifically relied on the concessions against interest

and mischaracterizations of Congress's purpose it had made in prior cases, to bolster its arguments of *unconstitutionality* after it switch sides in the present case. *See, e.g.*, Defendants' Mem. of Points and Authorities in Opposition to Summary Judgment, 2010 WL 1935803, *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010) ("The defendants . . . have expressly disavowed any reliance on the purported interests set forth in DOMA's legislative history"); *see also* Ryan J. Reilly*, DOJ Official: Defending DADT, DOMA 'Difficult' For Administration*, TMPMuckraker (Nov. 22, 2012) (quoting statement by Assistant Attorney General Tony West during a November 2010 meeting with reporters that the Department had "presented the court through our briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of" DOMA) (available at http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php).[2]

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[2] The Department did file its own motion to dismiss on August 1, 2011, but "purely as a procedural matter, to ensure that [the district court could consider arguments on both sides of the constitutional issue and that the court [would have] jurisdiction to enter judgment on the basis of those arguments." J.A. 208; J.A. 98 (Dkt. #49). It then filed a brief *in support* of Plaintiff's motion for summary judgment. J.A. 106 (Dkt. #71). In essence, the Department sought to use the judiciary to accomplish a suspension of a law with which the President disagreed.

Not surprisingly, the House of Representatives, acting through its designated Bipartisan Legal Advisory Group ("BLAG"), sought to intervene under Rule 24 in order to defend the constitutionality of DOMA, which had been approved in 1996 by overwhelming majorities in Congress (85-14 in the Senate, 342-67 in the House) and signed into law by President Clinton. Although the Department of Justice sought to limit BLAG's role in the case to something akin to an *amicus curiae*, J.A. 212, the District Court rejected the Department's position, granting BLAG's motion for full intervention as of right under Rule 24(a)(2). J.A. 225-26.

SUMMARY OF ARGUMENT

The manipulation of the judicial process outlined above, by top legal officers of the United States, should not be countenanced by this Court. Although the Department of Justice has in this case voluntarily taken steps to preserve this Court's jurisdiction to consider the constitutionality of the statute the Department is now actively challenging, it has also made clear its view that, absent those steps, there would be no jurisdiction. The potential for future judicial manipulation by any administration not only declining to defend a statute with which it disagreed, but refusing to file a notice of appeal or petition for writ of certiorari from an adverse judgment is simply too great to be ignored. Thus, while *amicus* agrees with the Department's argument that the steps it has taken *in this case* do provide the necessary elements for jurisdiction in this Court, we reject the notion that the Department's course is the only source of jurisdiction.

The Bipartisan Legal Advisory Group, as the duly authorized representative of the House of Representatives, also has standing to intervene as a party to defend statutes adopted by Congress, particularly when the President abrogates his duty to "take care that the laws be faithfully executed." To hold otherwise would give the President a *de facto* authority to suspend the law, the very concern that the Take Care Clause was designed to protect against.

ARGUMENT

I. The Executive Branch's Continued Involvement in this Case, and Continued Enforcement of DOMA, Sufficiently Keeps Alive the Case or Controversy Necessary For Ongoing Jurisdiction, But That Is Not the Exclusive Source of Jurisdiction.

Amicus agrees with the Department of Justice that the combination of its *procedural* conduct in this case (filing a perfunctory motion to dismiss, filing a notice of appeal, and filing the petition for writ of certiorari) as well as its ongoing enforcement of DOMA is more than adequate to retain the live "case or controversy" necessary for Article III jurisdiction. Brief for the United States on the Jurisdictional Questions ("U.S. Br."), at 5; J.A. 437-39; J.A. 522; U.S. Pet'n for Writ of Certiorari before Judgment; *see also* U.S. Br. at 11 (citing *I.N.S. v. Chadha*, 462 U.S. 919, 939 (1983)).

But Amicus vehemently disagrees with the Department's position that jurisdiction *only* obtains in such circumstances, that the Bipartisan Legal Advisory Group of the House of Representatives (or even

Congress as a whole) has no standing to defend a statute that the Department refuses to defend. U.S. Br., at 8. The view is based on the Department's erroneous claim that the President's constitutional duty to "take care that the laws be faithfully executed" vests in the President not only the exclusive authority *to execute* the laws of the United States, but also the exclusive authority *to defend* those laws (or, as here, to determine whether they should be defended at all). The first proposition cannot be squared with long-standing authority of private relators to enforce the laws of the United States via *qui tam* actions, and the second set of propositions not only finds no support in our nation's history, but is actually contrary to the Founders' deliberate efforts to prevent the President from having the power to suspend duly-enacted laws.

Indeed, the history of the Take Care Clause strongly leans in the opposite direction of what the Department asserts. That history strongly suggests that the Clause imposes on the President the *duty* to defend all laws of the United States, even those the President believes to be of dubious constitutionality. The time for the President to press his constitutional concerns is prior to enactment, by use of the veto, not post-enactment, by use of default in litigation raising a constitutional challenge.

To be sure, the Constitution also imposes on the President, by oath, the duty to "preserve, protect and defend the Constitution of the United States." U.S. CONST., art. II, § 1, cl. 8. But the almost universal practice of the Department of Justice to reconcile these at-times conflicting duties has been to defend

the laws despite any constitutional concerns by the Executive. The only exceptions recognized by the Department have been extremely narrow: laws that intrude on the executive powers of the President, and laws that are "clearly unconstitutional" under existing precedent of this Court. *See* Attorney General William French Smith, Press Release 5 (May 6, 1982) ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional") (cited in Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L. J. 970, 975 n.19 (1983)). Neither of those exemptions pertains here.

The Department of Justice created quite a controversy when it asserted a much broader view during the Carter administration, namely, that it could decline to present in court any defense of an arguably constitutional federal statute that the Department had determined for itself (independently of Congress and the Judiciary) to be unconstitutional. *League of Women Voters of California v. F.C.C.*, 489 F. Supp. 517, 518 (C.D. Cal. 1980). After the Department notified Congress of its decision not to defend the statute, the Office of Senate Legal Counsel warned the Senate that if the statute were struck without a defense, the precedent would be established that the executive branch could nullify laws with which it disagrees by a default in court. *See* Notification to Joint Leadership Group from Senate Legal Counsel in Respect to League of Women Voters v. F.C.C., *reprinted in* 125 Cong. Rec. 35,416 (1979) (cited in Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L. J. 970, 1000

(1983) ("*Congressional Defense of Statutes*"). The district court dismissed the action for lack of an adversarial party (the Senate had intervened as an *amicus curiae* rather than a party), but while the appeal was pending, the Department under a new Attorney General advised the Court of Appeals that it would defend the statute, which was held unconstitutional after remand to the district court, a holding that was ultimately affirmed by this Court. *League of Women Voters of California v F.C.C.*, 547 F.Supp 379, 381 (C.D. Cal 1982), *aff'd sub nom. F.C.C. v League of Women Voters of California*, 468 U.S. 364 (1984).

The concerns that arose out of that controversy led eventually to the adoption of 28 U.S.C. § 530D, which requires the Attorney General to notify Congress any time he determines to refrain from defending any act of Congress on the ground that he believes the act is unconstitutional. But mere notification of the Executive's decision *not to defend* a duly-enacted law does nothing to address the problem that the President might, by deliberate non-defense, give to himself the power to suspend laws with which he disagrees. Section 530D necessarily assumes, therefore, that Congress has the power to take action when the President refuses to defend the law. Moreover, the contrary view would effectively give to the President a post-enactment veto power that this Court has expressly held to be unconstitutional. *Clinton v. City of New York*, 524 U.S. 417 (1998). And it would sanction a "suspension" power that the Take Care Clause was specifically designed to prevent.

A. The Origins of the Take Care Clause Strongly Suggest that the President's Duty to "Faithfully Execute" the Laws Prevents him from Conspiring with Private Litigants to Have the Judiciary Effect Suspension of Laws with which the President Disagrees.

One of the charges leveled against King George III in the Declaration of Independence was that he suspended laws adopted by the colonies until his assent to them should be obtained and then, once suspended, utterly neglected to attend to them. Decl. of Indep. Para. 4 (U.S. 1776). The concern was that the King was reasserting a power that had provoked serious tension between Parliament and the Stuart Kings during the 17th Century, where laws properly enacted through the political process were "dispensed with," or suspended, at the whim of the monarch. *See* Sydney George Fisher, 1 THE STRUGGLE FOR AMERICAN INDEPENDENCE 131 (Ulan Press 2011) ("the colonists, as good Whigs and lovers of liberty, would surely not uphold the wicked dispensing power of the Stuart Kings against whom their . . . ancestors had fought"). Early state constitutions also refused to countenance the view that the executive had the power to suspend laws. *See* VIRGINIA DECLARATION OF RIGHTS § 7 (1776) ("That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not be exercised."); DELAWARE DECLARATION OF RIGHTS § 7 (1776), ("That no power of suspending Law . . . ought be exercised unless by the legislature"); VERMONT

CONSTITUTION OF 1786, Ch. I, § XVII ("The power of suspending laws, or the execution of laws, ought never be exercised, but by the Legislature, or by any authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for").

The ratification debates reveal that the Take Care Clause was adopted to prevent the President in the new constitutional system from being able to exercise such a power to suspend duly-enacted laws with which he disagreed. *See* Americanus I, Virginia Independent Chronicle, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, *et al.* eds 2009) at 203-04 (arguing that under the Constitution, the President had no power to affect laws without participation of Congress); Virginia Ratification Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 (John P. Kaminski, *et al.* eds 2009) at 1552 (proposing an explicit amendment to prohibit a "power of suspending laws"); Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1304-05 (1995-96) (reviewing scholarship demonstrating that Take Care Clause was a "textual rejection by the framers of the various royal devices for avoiding executive implementation of the laws"); *see also Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838) (holding that there is no "dispensing power" in the President); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dis-

pense with its execution").[3] But as the Senate Legal Counsel recognized in response to the Department's actions in *League of Women Voters*, the ability to suspend or even "nullify" a law can be as effectively accomplished indirectly by non-defense and default in response to a constitutional challenge as it can be directly by refusal to enforce the law in the first place.

B. Accepting the Propositions of Both Non-Defense and Sole Authority to Defend that the Department of Justice Has Proffered Would Create an Opportunity For Manipulation of the Judicial Process In Order to Give the Executive a *De Facto* Post-Enactment Veto.

The Department's claim that the President can decline to defend any statute that he believes to be unconstitutional, even when perfectly reasonable arguments in support of its constitutionality exist, when combined with the further claim that the Department alone has the authority to defend Acts of Congress that have been enacted into law, creates a serious risk that the judicial system might be ma-

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[3] *Cf.* American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report*, 18 (2006) ("because the 'take care' obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign into law and then emulate King James II by refusing to enforce them") (available at http://www.greenmountainpac.com/ABA_SigningStatementsTF.pdf).

nipulated to give the President a *de facto* post-enactment veto or suspension power.

The risk is more than hypothetical, but has manifested itself in this very case, for the Department has done more than simply decline to defend the Defense of Marriage Act; it has actively sought to tilt the scales of justice by defaulting on the rationales Congress had for its overwhelming approval of the law, and then using those defaults to attack the law.

The legislative history of the Act contains several rationales that Congress asserted were both important and furthered by the Defense of Marriage Act, including the development of relationships that are optimal for procreation and encouraging the creation of stable relationships that facilitate the rearing of children by both of their biological parents. H.R. Rep. No. 104-664, at 13, *reprinted in* 1996 U.S.C.C.A.N. 2905.

In several prior court decisions, these rationales were held to be more than sufficient to uphold the law's constitutionality. *See, e.g.*, *Smelt v. County of Orange*, 374 F.Supp.2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir 2006); *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 2004 WL 3334722 (M.D.Fla.) Yet in *Gill v. Office of Personnel Mgmt.*, 699 F.Supp.2d 374 (D. Mass. 2010), the Department "disavowed" all of the rationales that had been identified by Congress, choosing instead to rely on the hypothesized interest in maintaining the status quo. Consolidated Mem. of Points and Authori-

ties in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Summary Judgment, 2010 WL 1935803 (April 30, 2010); *see also Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) ("Federal Defendants disavow the governmental interests identified by Congress in passing the DOMA, and instead assert a post-hoc argument that the DOMA advances a legitimate governmental interest in preserving the status quo").

Then, in the case *sub judice*, the Department mischaracterized the rationales actually advanced by Congress, contending instead that "the legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians." U.S. Br. in Support of Plaintiff's Mot. for Summary Judgment (Dkt. #71), at 22. Indeed, the Department made concession after concession in the court below that no lawyer, complying with the ethical obligation to zealously advocate *for* his client,[4] would have made. *See, e.g.*, *id.* at 4 (contending that opposite-sex and same-sex couples are "similarly situated"); *id.* at 22 (equating the view that homosexual

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[4] *See, e.g.,* New York Lawyers Code of Professional Responsibility, Canon 7, Ethical Consideration 7-1 ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law"); *see also* 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

conduct is immoral with animus toward gays and lesbians); *id.* at 24 (accusing Congress of having the "bare desire to harm a politically unpopular group"); *id*. at 25 (contending that "Congress's interest in 'promoting responsible procreation and child-rearing'" is "not materially advanced by" Section 3 of DOMA). The Department even urged the court to apply heightened scrutiny after acknowledging that numerous other courts, including this Court, had applied rational basis review to sexual orientation classifications. *Id*. at 5 n.1. And then, having "disavowed" or mischaracterized the rationales actually relied upon by Congress, the Department argued that Section 3 must be held unconstitutional because, under heightened scrutiny, "a statute must be defended by reference to the 'actual [governmental] purpose behind it, not a different 'rationalization'" (such as the one the Department itself had offered in the *Gill* case). *Id.* at 22.

The Department's conduct in this case is thus a far cry from long-standing policy that the Department has a duty to defend the constitutionality of an Act of Congress whenever a *reasonable argument* can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts." *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 U.S. Op. Off. Legal Counsel 25 (O.L.C.), 1981 WL 30934 at *25 (emphasis added). It does not come close to "zealous advocacy" for the client—in this case, the United States itself, the policies of which are reflect-

ed in the laws—that the standards of ethical conduct require.[5] It is, instead, a manipulation of the judiciary to have a duly-enacted Act of Congress declared unconstitutional.

When combined with the Department's attempts to deny standing to the Bipartisan Legal Advisory Group of the House of Representatives (or even, as it argued, the full Congress), and even to silence it, *see* U.S. Br. at 29 ("no counsel will be heard for the United States in opposition to the views of the Attorney General," *citing Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868)), the danger of nullification about which the Office of Senate Legal Counsel warned more than three decades ago is manifest.

II. The Bipartisan Legal Advisory Group Has Authority to Defend Section 3 of the Defense of Marriage Act.

Happily, there is a remedy to the dangers identified above. Congress has its own institutional interest in defending duly-enacted laws that the Execu-

[5] Neither can the Department's refusal to defend be characterized as an exercise of prosecutorial discretion. There is a dramatic difference between a decision not to prosecute in a particular case, and a decision not to defend a statute; the former permits a prosecutor to prosecute some but not all violations of criminal statutes, while the latter effectively wipes a statute off the books. In any event, the Department's conduct in this case goes far beyond simple refusal to defend. Instead, the Department has manipulated the judicial process in an attempt to effect a Presidential Suspension. The Department has purposefully defaulted on Congress' purposes, and has used those defaults to attack the law.

tive branch refuses to defend.[6] As this Court noted in *Chadha*, "Congress is the proper party to defend the validity of a statute when a Government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional." 462 U.S. at 921; *see also Karcher v. May*, 484 U.S. 72 (1987) (permitting state legislative officials, in their official capacities and on behalf of the legislature itself, to defend the constitutionality of a statute when the state Attorney General declined to do so); *United States v. Lovett*, 328 U.S. 303 (1946) (authorizing special counsel of Congress to appear to defend the Urgent Deficiency Appropriation Act).

There is nothing in this Court's prior discussions that requires a different result when one house, rather than the whole Congress, determines to intervene to defend a statute. Indeed, the fact that *Chadha*'s holding was rooted as much in bicameralism as in presentment strongly counsels in favor of single-house intervention. The power to suspend or repeal a law requires the full exercise of the lawmaking power – House, Senate, and President (or House

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[6] The Department's claim that Congress itself would not have standing because "enforcement" of the law is a power exclusively assigned to the Executive conflates the power to "enforce" and the power to "defend." The two are significantly different, and the case law upon which the Department relies addresses only enforcement. (And even the claim that enforcement is exclusively assigned to the executive is overstated. *See* 31 U.S.C. § 3730(b) (authorizing private persons to bring a *qui tam* action "in the name of the Government" to enforce the requirements of the False Claims Act)).

and Senate with override of a Presidential veto). Any one of the three therefore has an institutional interest in defending the handiwork of the legislative process.

The House of Representatives, as an institution, therefore has standing to intervene in defense of a duly-enacted law when the Executive refuses to provide that defense. And the Bipartisan Legal Advisory Group is the entity within the House duly authorized to undertake that responsibility on behalf of the House, just as the legislative leaders in *Karcher v. May* had been authorized (until they lost their legislative positions) to represent the institutional interests of the New Jersey legislature in defense of a state statute that the Attorney General of that state refused to defend. *Karcher*, 484 U.S. at 77. House Rule II.8, 113th Cong. (2013) established the Office of the General Counsel "for the purpose of providing legal assistance and representation to the House." The office functions "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group." The attorneys in the office, including any counsel specially retained by the office, are also statutorily authorized "to enter an appearance in any proceeding before any court of the United States or of any State . . . ." 2 U.S.C. § 130f.[7]

[7] Together, the Rule and the Statute thus provide to the Office of the General Counsel of the House an authority parallel to that provided to the Office of Senate Legal Counsel by 2 U.S.C. § 288B.

Moreover, if there were any ambiguity in the authority conferred upon the Bipartisan Legal Advisory Group by the Rule itself, the "continuing authority for the Bipartisan Legal Advisory Group" of the 113th Congress to "act as successor in interest" to the Bipartisan Legal Advisory Group of the 112th Congress "with respect to civil actions in which it intervened" to defend the constitutionality of Section 3 of DOMA (including explicitly in this case), was confirmed by the adoption of House Resolution 5 at the outset of the current Congress. H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(A) (Jan. 3, 2013). The House Resolution expressly noted that "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*." *Id.*, § 4(a)(1)(B) (emphasis added).[8]

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[8] The Department's reliance on *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), for the proposition that the January 2013 House Resolution could not authorize the December 2012 filing of a petition for writ of certiorari by the Bipartisan Legal Advisory Group is misplaced, for two reasons. First, the Resolution clearly confirms that the necessary institutional litigation authority already existed by virtue of the longstanding Rule II.8 . Second, *FEC v. NRA* dealt with a retroactive authorization by the Solicitor General for an agency to file a petition for writ of certiorari, but the authorization was not granted until after the time for filing a petition had lapsed. 513 U.S. at 98-99. The January 3, 2013 resolution confirming the litigation authority of the Bipartisan Legal Advisory Group was within the 90-day window for filing a petition for writ of certiorari.

Raines v. Byrd, 521 U.S. 811 (1997), also relied on by the Department and by the Court-appointed *amicus curiae*, is not to the contrary. *Raines* rejected standing for legislators seeking to protect a non-particularized interest as individual legislators, not standing for legislators authorized to speak on behalf of the institution itself. *Id*. at 829. Indeed, the Court expressly noted that it "attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress in th[e] action." *Id.* Because the Bipartisan Legal Advisory Group has been expressly authorized to represent "the institutional position of[] the House in all litigation matters in which it appears," including specifically in this action, *Raines* is inapposite.

CONCLUSION

The continued participation by the Department of Justice in this case, by filing a notice of appeal and then a petition for certiorari, combined with the Executive's continued enforcement of DOMA, is alone sufficient for this Court to have jurisdiction to consider the merits of the case. But, contrary to the Department's claim, that is not the sole basis of jurisdiction.

The Bipartisan Legal Advisory Group, duly authorized to represent the *institutional* interests of the House of Representatives, also has standing to intervene, to appeal, and to petition this court for a writ of certiorari, in order to present a defense of a duly-enacted statute when the Department of Justice refuses to do so. Not only does such standing comport with the requirements of Article III, it is crucial to counter the danger, manifested by this very case, that the Executive might lay claim to a *de facto* post-enactment veto power by declining to defend and/or deliberately undermining the defense of the law at issue.

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Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence