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.

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

BRIEF FOR THE UNITED STATES ON THE JURISDICTIONAL QUESTIONS

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QUESTIONS PRESENTED

1. Whether the Executive Branch's agreement with the court below that Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, is unconstitutional deprives this Court of jurisdiction to decide this case.

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

PARTIES TO THE PROCEEDING

Petitioner, the United States, was a defendant in the district court and an appellant in the court of appeals. The private individual respondent, Edith Schlain Windsor, was the plaintiff in the district court and an appellee in the court of appeals. Respondent Bipartisan Legal Advisory Group of the United States House of Representatives intervened in defense of the constitutionality of Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

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OPINIONS BELOW

The opinion of the court of appeals (Supp. App. 1a-83a) is reported at 699 F.3d 169. The opinion of the district court (Pet. App. 1a-22a) is reported at 833 F. Supp. 2d 394. The district court's order granting the motion of the Bipartisan Legal Advisory Group of the United States House of Representatives to intervene (J.A. 218-229) is reported at 797 F. Supp. 2d 320.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (J.A. 522-525). The United States filed a petition for a writ of certiorari before judgment on September 11, 2012. The judgment of the court of appeals was entered on October 18, 2012,

and the United States filed a supplemental brief pursuant to Rule 15.8 of the Rules of this Court on October 26, 2012. The petition for a writ of certiorari was granted on December 7, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. Respondent Edith Windsor (plaintiff) was married to her same-sex partner, Thea Spyer. J.A. 218-219. When Spyer passed away in 2009, she left her estate to plaintiff. Pet. App. 3a. Plaintiff, the estate's executor, sought a refund from the Internal Revenue Service (IRS) of $363,053, relying on a statute that generally exempts property passing to a "surviving spouse" from federal estate tax. 26 U.S.C. 2056(a); see J.A. 169-170. The IRS denied that claim on the ground that Section 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419, defines the term "spouse" to include only "a person of the opposite sex." 1 U.S.C. 7; see J.A. 245-252. Plaintiff then sued the United States for a refund of the tax, along with declaratory and injunctive relief, claiming that Section 3 unlawfully discriminates on the basis of sexual orientation. J.A. 173, 219.

2. The Attorney General subsequently notified Congress that he and the President had determined that Section 3 violates equal protection as applied to same-sex couples legally married under state law. J.A. 183-194. Although the Department of Justice had defended the constitutionality of Section 3 in circuits

that apply rational-basis scrutiny to classifications based on sexual orientation, the President and the Attorney General determined, in consideration of new suits in a circuit without binding precedent on the appropriate level of scrutiny, that this Court's precedents required heightened scrutiny and that Section 3 could not survive such scrutiny. J.A. 183-191.

The Attorney General additionally explained that, notwithstanding that determination, the Executive Branch would continue to enforce Section 3. JA. 191-192. "To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 192. "This course of action," the Attorney General continued, "respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.*

In litigation concerning Section 3's constitutionality, however, the Department of Justice would present the President's constitutional views to the courts and decline to defend the statute. J.A. 191-193. The Department would "also notify the courts of [its] interest in providing Congress a full and fair opportunity to participate in the litigation of those cases" and would "remain parties to the case and continue to represent the interests of the United States throughout the litigation." J.A. 193.

3. Following the President's determination, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) moved to intervene

in this case in defense of Section 3. J.A. 195-198. BLAG is a five-member group of Representatives authorized by the then-current House rules to "consult" with the Speaker of the House about the direction of the Office of General Counsel. Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). Three of BLAG's members voted in favor of intervention; two voted against it. J.A. 196 n.1.

The Department did not oppose limited intervention by BLAG, but explained that the "Executive Branch, through the Department of Justice, represents the only defendant, the United States, in this litigation." J.A. 207 (citing 28 U.S.C. 516 and *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam)). The Department also explained that "consistent with what [it] has done in prior cases in which the Executive Branch has taken the position that an Act of Congress is unconstitutional but announced its intention to enforce or comply with the law pending a final judicial determination of the constitutional issue," it would take all steps necessary to ensure that the courts could consider Section 3's constitutionality and that BLAG could argue in support of Section 3. J.A. 208.

The district court granted BLAG's intervention motion. J.A. 218-229. The court found no law "explicitly authorizing intervention by the House (or any subgroup or representative thereof)," J.A. 222 n.2, and it rejected BLAG's effort to intervene as the United States under 28 U.S.C. 2403(a), reasoning that "the United States of America is already a party to the litigation," J.A. 222. But the court concluded that BLAG could intervene as an interested party under Fed. R. Civ. P. 24(a)(2). J.A. 222-226. The court found it unnecessary to address whether BLAG had

Article III standing, because the case already presented "an ongoing case or controversy between the existing parties." J.A. 226-227.

4. The district court ultimately issued a judgment against the United States, declaring Section 3 unconstitutional as applied and awarding plaintiff $363,053 plus interest. Pet. App. 23a-24a; see J.A. 437-439 (United States' motion to dismiss if court agreed with BLAG on constitutionality of Section 3); J.A. 486-489 (United States' brief supporting summary judgment for plaintiff). Both the United States and BLAG filed notices of appeal. J.A. 522-525. BLAG moved to dismiss the United States' notice of appeal, contending that only "the House ha[d] standing to appeal." J.A. 527. The United States also filed a petition for a writ of certiorari before judgment. Pet. 1-13.

The court of appeals denied BLAG's motion to dismiss the United States' appeal. Supp. App. 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court reasoned that the United States was an aggrieved party with standing to appeal because "the United States continues to enforce Section 3," and Section 3's constitutionality "will have a considerable impact on many operations of the United States." Supp. App. 4a-5a. On the merits, the court of appeals affirmed the district court's judgment. *Id.* at 1a-31a; see Gov't C.A. Br. 45 (United States' brief requesting affirmance).

5. Following supplemental certiorari-stage briefing, this Court granted the United States' petition for a writ of certiorari. 12-307 Docket entry (Sup. Ct. Dec. 7, 2012). The Court directed the parties to brief the two jurisdictional issues addressed below. 12-307 Docket entry (Sup. Ct. Dec. 14, 2012).

On December 28, 2012, BLAG filed its own petition for a writ of certiorari. *BLAG* v. *Windsor*, petition for cert. pending, No. 12-785 (filed Dec. 28, 2012). On January 3, 2013, the House of Representatives authorized BLAG to speak for the institutional position of the House in litigation matters, including this case. H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013).

SUMMARY OF ARGUMENT

This Court has jurisdiction to decide the constitutionality of Section 3 of DOMA in this case. The United States may properly invoke this Court's jurisdiction because the judgments of the courts below preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff. The United States thus satisfies both the statutory requirement that an appealing party be "aggrieved," and the Article III requirement that it be "injured," by a lower court's decision. This Court has twice reviewed, at the government's request, lower-court decisions invalidating federal statutes in circumstances where the Executive Branch agreed with the challenger that the statute was unconstitutional but continued to enforce it. See *INS* v. *Chadha*, 462 U.S. 919 (1983); *United States* v. *Lovett*, 328 U.S. 303 (1946). The United States has charted the same course here, and this Court can and should resolve the pressing question of undisputed national importance presented by this case.

I. No jurisdictional barrier prevents the Court from reaching the merits of the question presented. As an initial matter, the district court properly exercised jurisdiction over this case. Plaintiff had standing to sue the United States because she paid more than $360,000 in taxes; the tax bill resulted from the

allegedly unconstitutional application of Section 3; and the Executive Branch's enforcement of Section 3 made a refund suit the only avenue for her to seek redress. The Executive Branch's ongoing enforcement also created Article III adverseness because resolution of the case would determine whether plaintiff would pay the tax or would receive a refund.

After the district court entered judgment against the United States, the United States—whose full sovereign interests the Department of Justice represents—properly invoked both the court of appeals' and this Court's jurisdiction. The Executive Branch's agreement with the lower courts' decisions on the constitutional merits eliminates neither the injury that those decisions inflict upon the United States nor the adverseness between the parties. The enforcement of Section 3 is equally precluded, and the federal Treasury equally depleted, whether or not the United States argues on appeal that the judgments below were incorrect. And the President's direction that the Executive Branch continue to enforce Section 3, notwithstanding his legal arguments, creates just as much of an Article III controversy on appeal as in the district court.

Contrary to the views of the Court-appointed amica curiae, nothing compels the United States to endure adverse judgment after adverse judgment in district courts across the Nation unless and until some court upholds the statute and the plaintiff decides to appeal. By the same token, nothing compels the Judiciary to bear the burden of adjudicating potentially thousands of challenges to Section 3 in the district courts, without any reliable avenue for definitive resolution of the provision's constitutionality. Rather, the United

States itself may properly seek further review of a federal statute's constitutionality, as it did in *Chadha* and *Lovett*. The United States' steps to secure further review, while continuing to enforce Section 3, respect the authority of the Congress that enacted DOMA and the authority of the Judiciary (with the assistance of briefing by BLAG) to say what the law is respecting the provision's constitutionality.

II. Because this Court has jurisdiction based on the United States' requests for appellate review, it need not address whether BLAG independently has standing to appeal. If the Court reaches that question, it should conclude that BLAG has no such standing. BLAG lacks any basis for supplanting the Executive Branch's exclusive role in representing the United States' interests in this litigation and has no interests of its own that would satisfy Article III.

The lower-court judgments do not impose any restraints or obligations upon BLAG. BLAG's members, who are individual legislators, have no standing to assert an interest in the constitutionality of a federal statute. BLAG was not authorized to represent the interests of the full House of Representatives when it appealed and petitioned for a writ of certiorari in this case, and, in any event, the House's position as one half of a bicameral legislature gives it no cognizable Article III interest in a case like this. Even Congress as a whole lacks Article III standing to appeal to defend the constitutionality of Section 3. In the federal system, the authority to assert in litigation the sovereign's interest in the constitutionality of its laws belongs to the Executive Branch alone. It is thus the Solicitor General's petition, filed on behalf of the

United States, that provides the basis for jurisdiction here.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DECIDE THIS CASE

Notwithstanding the President's conclusion that Section 3 of DOMA is unconstitutional, he has directed the Executive Branch to continue to enforce the statute "unless and until * * * the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 192. That course of action is consistent with past practice. The Executive Branch likewise affirmatively challenged in litigation, while continuing to enforce, the statutes at issue in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *United States* v. *Lovett*, 328 U.S. 303 (1946). Additionally, it has either challenged or declined to defend agency action in circumstances in which an Executive or independent agency enforced or implemented a statute the Executive determined to be unconstitutional. See, *e.g.*, Letter from Andrew Fois, Assistant Att'y Gen., to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 3-7 (Mar. 22, 1996) (discussing, *inter alia*, *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990); *Chadha*, *supra*; *Lovett*, *supra*; *Simkins* v. *Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964); *Turner Broad. Sys.* v. *FCC*, 819 F. Supp. 32 (D.D.C. 1993), vacated by 512 U.S. 622 (1994); *League of Women Voters* v. *FCC*, 489 F. Supp. 517 (C.D. Cal. 1980); *Gavett* v. *Alexander*, 477 F. Supp. 1035 (D.D.C. 1979)).

The President's course of action here not only is fully consistent with past practice, but is also respectful of the responsibilities and prerogatives of all three

Branches. It carries out "the Executive's obligation to take care that the laws be faithfully executed," J.A. 192, including through the conduct of litigation for the United States, while assuring that the President's conclusion about the statute's unconstitutionality is made known to Congress and presented to the courts. It "respects the actions of the prior Congress that enacted" the statute, *ibid.*, and allows for the current Congress to present arguments in support of the statute's constitutionality in the context of an already pending case or controversy. And it "recognizes the judiciary"—and ultimately this Court—"as the final arbiter of the constitutional claims raised," *ibid.*, where the courts' jurisdiction is properly invoked. This Court has previously exercised jurisdiction in identical circumstances, see *Chadha*, *supra*; *Lovett*, *supra*, and it should do so again here.

A. The District Court Had Jurisdiction Over Plaintiff's Suit

The amica correctly acknowledges (Br. 23) that "[t]he district court plainly had jurisdiction" over plaintiff's lawsuit. The IRS denied plaintiff's claim for a tax refund based on Section 3; filing suit against the United States was the only remaining means for her to obtain relief; and the district court's exercise of jurisdiction was consistent with both Article III and prudential limitations on the authority of federal courts. See *Chadha*, 462 U.S. at 939 ("It would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.").

First, plaintiff demonstrated standing to sue by showing "a 'personal injury fairly traceable to the

defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). She claimed a loss of over $360,000, based on the allegedly unconstitutional application of Section 3, and sought a refund in that amount (along with declaratory and injunctive relief). J.A. 149-173.

Second, this Court's decision in *Chadha* makes clear that the Executive Branch's enforcement of a federal statute creates an Article III controversy irrespective of whether the Executive expresses in court that the statute is unconstitutional. In *Chadha*, a statute authorized either House of Congress to overturn, through a single-House resolution colloquially known as a "legislative veto," a discretionary decision of the Attorney General to allow a deportable alien to remain in the country. 462 U.S. at 919. An alien (Chadha) who had been subject to such a legislative veto sought initial review of his deportation order in the court of appeals, contending that the legislative-veto procedure violated separation-of-powers principles. *Id.* at 928. The INS, while enforcing the statute against Chadha, agreed that the statute was unconstitutional. *Ibid.* This Court held that "adequate Art[icle] III adverseness" existed in the court of appeals, "even though the only parties were the INS and Chadha," agreeing "with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him.'" *Id.* at 939 (quoting *Chadha* v. *INS*, 634 F.2d 408, 419 (9th Cir. 1980)). The Court reasoned that

"the INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment." *Ibid.* Similar reasoning applies here: without a final judgment in her favor, plaintiff—regardless of the Executive's agreement with her that Section 3 is unconstitutional—will have lost over $360,000.

Finally, the district court's jurisdiction over this case also satisfied any "prudential, as opposed to Art[icle] III, concerns about sanctioning the adjudication" of a constitutional dispute "in the absence of any participant supporting the validity of" the federal statute. *Chadha*, 462 U.S. at 940. The Court in *Chadha* found such concerns to be "dispelled * * * by inviting and accepting briefs from both Houses of Congress" as amici curiae. *Ibid.*; see *id.* at 928. BLAG's presentation of arguments in defense of Section 3 served the same function here.

B. The United States Properly Invoked The Court Of Appeals' And This Court's Jurisdiction

The district court's judgment against the United States injures the sovereign and financial interests of the United States by invalidating the application of a federal statute and requiring the payment of over $360,000 in federal Treasury funds to plaintiff. Contrary to the position of the amica, the United States was not required to accede to the district court's judgment, and to accept those injuries, by virtue of the Executive's belief that the statute is unconstitutional. Rather, the United States is entitled to seek further review of whether those injuries are constitutionally mandated. Such review satisfies the constitutional, statutory, and prudential limitations on appellate jurisdiction; follows the example set by past prac-

tice; and ensures that the Judicial Branch, and this Court in particular, will have the opportunity to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

1. ***The Department of Justice has constitutional and statutory authority to represent the full sovereign interests of the United States in this case***

The Constitution assigns to the Executive Branch the authority, and the duty, to represent all of the sovereign interests of the United States in court. The Take Care Clause "entrusts" to the President the "discretionary power to seek judicial relief." *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); see U.S. Const. Art. II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed"). Within the Executive Branch, the authority to represent the interests of the United States in litigation generally resides with the Department of Justice. See, *e.g.*, 28 U.S.C. 516 (generally reserving to Department of Justice "the conduct of litigation in which the United States * * * is a party"); 28 U.S.C. 518(b) (allowing Attorney General to "conduct and argue any case in a court of the United States in which the United States is interested"); 28 U.S.C. 519 (generally reserving to Attorney General authority to "supervise all litigation to which the United States * * * is a party"). The Attorney General and Solicitor General have exclusive authority over litigation by the United States in this Court. See 28 U.S.C. 518(a); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 699-700 (1988).

The notice of appeal and petition for a writ of certiorari filed by the Department of Justice in this case are therefore requests for further review *by the Unit-*

ed States. They are not, as the amica appears at times to suggest (Br. 33-35), requests on behalf of the Executive Branch alone. This Court has made clear that, for purposes of litigation, the United States consists of a singular "sovereign composed of the three branches." *Providence Journal*, 485 U.S. at 701 (quoting *United States* v. *Nixon*, 418 U.S. 683, 696 (1974)). The Court has also long recognized that "litigation conducted in the courts of the United States[,] * * * 'so far as the interests of the United States are concerned, [is] subject to the direction, and within the control of, the Attorney-General.'" *Buckley*, 424 U.S. at 139 (quoting *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869)). In this case, the Attorney General has exercised that authority by invoking the United States' right to seek appellate review of the judgments entered against it by the lower courts.

2. *The United States is aggrieved by the invalidation of Section 3 and the requirement to refund plaintiff's taxes*

a. The court of appeals had, and this Court has, statutory jurisdiction to review this case at the request of the United States. Congress has broadly granted to the courts of appeals the "jurisdiction of appeals from all final decisions of the district courts," subject only to certain exceptions not relevant here. 28 U.S.C. 1291. This Court enjoys similarly expansive statutory jurisdiction to review "[c]ases in the courts of appeals" by "writ of certiorari granted upon the petition of any party." 28 U.S.C. 1254(1). As this Court has recently recognized, the plain text of that statute "confers unqualified power" to grant certiorari regardless of how the petitioner fared in the court

below. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011).

b. Notwithstanding the textual breadth of those statutes, this Court has recognized a "rule * * * of federal appellate practice, * * * derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts," under which "only a party aggrieved by a judgment or order of a [lower] court may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see *Chadha*, 462 U.S. at 930 (quoting *Deposit Guaranty*, 445 U.S. at 333). Although the amica urges (Br. 38-40) application of that bar here, *Chadha* forecloses her suggestion. As *Chadha* makes clear, the sovereign interests of the United States are adversely affected whenever a court declares an Act of Congress unconstitutional and precludes its enforcement.

In *Chadha*, both the government and Chadha argued to the court of appeals that the legislative-veto statute was unconstitutional. 462 U.S. at 928. After the court of appeals invalidated the statute, the INS sought further review in this Court under a since-repealed statute that permitted "[a]ny party" in a proceeding involving the federal government to appeal a judgment "of any court of the United States * * * holding an Act of Congress unconstitutional." *Id.* at 929 (quoting 28 U.S.C. 1252 (1976)). This Court concluded that it had authority to decide the merits of that appeal, rejecting the contention that "the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal." *Id.* at 930.

The Court determined that "[a]t least for purposes of deciding whether the INS is 'any party' within the grant of appellate jurisdiction in § 1252, * * * the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take." *Chadha*, 462 U.S. 930; see *ibid.* (observing that the court of appeals had "ordered the Attorney General to cease and desist from taking any steps to deport Chadha; steps that the Attorney General would have taken were it not for that decision"). The Court reasoned that "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the" legislative-veto statute. *Ibid.* "When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," the Court concluded, "it is an aggrieved party for purposes of taking an appeal under § 1252," and its "status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 931; see *id.* at 939 ("[T]he INS's agreement with the Court of Appeals' decision * * * does not affect that agency's 'aggrieved' status for purposes of appealing that decision under 28 U.S.C. § 1252.").

c. A similar conclusion necessarily follows in this case. Although appellate jurisdiction here is based on 28 U.S.C. 1291 and 28 U.S.C. 1254(1), rather than on former Section 1252, the requirement that a party be "aggrieved" in order to appeal applies no more strictly under the current provisions. See *Deposit Guaranty*, 445 U.S. at 333 (discussing rule under Section 1291); *Camreta*, 131 S. Ct. 2028-2033 (discussing Court's

authority under Section 1254(1) to grant certiorari on petition of a prevailing party).

The only part of the relevant discussion in *Chadha* that was particular to Section 1252 was a comment 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." 462 U.S. at 930-931. That observation about the difference between mandatory and discretionary jurisdiction is irrelevant to whether the United States is aggrieved here. Appellate jurisdiction in the courts of appeals under Section 1291 is just as mandatory as was appellate jurisdiction in this Court under former Section 1252. And Congress's repeal of Section 1252—which reduced this Court's docket by eliminating its direct and mandatory appellate jurisdiction over decisions invalidating federal statutes—did not reflect any congressional doubt about whether the United States is aggrieved when a federal statute is struck down. See H.R. Rep. No. 660, 100th Cong., 2d Sess. 11 & n.24 (1988) (stating that "the removal of direct appeal authority should not create an obstacle to the expeditious review of cases of great importance" and that "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable").

Indeed, in some ways, the United States may be more aggrieved here than the INS was in *Chadha*. The judgment not only precludes the United States from enforcing a statute, but also requires the payment of more than $360,000 in federal Treasury funds. Pet. App. 23a-24a. Although BLAG has previously

argued that the aggrievement recognized in *Chadha* extends only to the "agency" that "administers" the invalidated statute, BLAG Br. in Opp. 22 (quoting *Chadha*, 462 U.S. at 931), the United States as a whole is surely no less aggrieved than an individual agency when a federal statute is held unconstitutional.

3. The United States has Article III standing to seek further review

The Article III standing of the United States to seek appellate review of the lower courts' decisions follows *a fortiori* from the United States' status as an aggrieved party for purposes of the statutory rule. An appealing party has a constitutionally sufficient "stake" in seeking further review so long as it can demonstrate that it was injured by the decision below and that further review could redress that injury. *Camreta*, 131 S. Ct. at 2028-2029. Both the statutory aggrieved-party rule and the Article III "injury" requirement examine the same thing: how the lower court's judgment affects the appealing party. Compare *Deposit Guaranty*, 445 U.S. at 333 (statutory rule), with *Camreta*, 131 S. Ct. at 2028-2029 (injury requirement). The statutory rule would serve no purpose if it demanded *less* than the injury that Article III already requires. Contrary to the amica's suggestion (Br. 26), therefore, a party that is sufficiently "aggrieved" under the more restrictive statutory rule is necessarily "injured" under Article III.

This Court's decisions, in any event, recognize that the same aspects of the lower-court decisions that aggrieve the United States—the requirement to pay money, the invalidation of a statute, and the prevention of enforcement actions that would otherwise occur—also constitute Article III injuries. See, *e.g.*,

Horne v. *Flores*, 557 U.S. 433, 445 (2009) (finding standing where district court entered declaratory and injunctive relief against state official); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000) (finding "ongoing injury" where public entity was "barred from enforcing * * * provisions of its ordinance"); *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (finding standing based on threatened "actual financial injury"); *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986) (concluding that State's "legitimate interest in the continued enforceability of its own statutes" gave it standing to appeal a ruling that invalidated a state statute).

Those injuries are directly traceable to the lower-court decisions, and they would be redressed by reversal of those decisions. See, *e.g.*, *Camreta*, 131 S. Ct. at 2028-2033 (concluding that an official had standing to seek certiorari based on adverse effect produced by appellate decision); *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2752-2753 (2010) (concluding that injury caused by remedial order could be redressed by contrary appellate ruling); *City of Erie*, 529 U.S. at 288 ("If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.").

Contrary to the amica's assertions (Br. 31), the United States' injuries remain fully in place notwithstanding the President's conclusion that Section 3 cannot survive judicial scrutiny. The position adopted by the United States in its briefs can neither replenish the federal Treasury nor restore the United States' ability to enforce Section 3 against plaintiff. See

Chadha, 462 U.S. at 930-931. Only an appellate decision can do so.

4. The parties have a continuing controversy

The United States' requests for further review also satisfy the requirement of a continuing "case or controversy" between the parties. See, *e.g.*, *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 623-624 (1989) (requiring both standing to appeal from state supreme court and a continuing "case or controversy"). It is just as true on appeal as it was in the district court that a judicial decision "will have real meaning." *Chadha*, 462 U.S. at 939 (quoting *Chadha*, 634 F.2d at 419). A merits decision by this Court will not be an advisory opinion for potential future cases, but will determine the outcome of this very case. If the Court finds Section 3 unconstitutional, the United States will refund plaintiff's estate tax; if the Court upholds Section 3, the United States will continue to enforce the statute against plaintiff. J.A. 191-192; see *Chadha*, 462 U.S. at 939-940 ("[I]f we rule for Chadha, he will not be deported; if we uphold [the legislative-veto statute], the INS will execute its order and deport him.") (quoting *Chadha*, 634 F.2d at 419). And BLAG's presentation of arguments in defense of the statute continues to assuage any prudential concerns about adequate presentation of the legal issues. See *id.* at 940.

a. The amica acknowledges (Br. 23) that a case or controversy existed in the district court. She thus accepts that the President is under no constitutional compulsion to disregard the will of the enacting Congress—and cut the Judicial Branch completely out of the constitutional decisionmaking process—by refusing altogether to enforce a statute he has determined to be unconstitutional, such that the matter would

never come before even a district court. But although she acknowledges the President's authority to await a decision by the Judiciary before ceasing to enforce Section 3, she contends that a case or controversy ceased to exist the instant the district court entered judgment against the United States. That is incorrect.

A district court's entry of judgment may change the status quo, but does not eliminate the adverseness between the parties that justified exercise of the judicial power in the first place. The amica errs in asserting that "the United States agrees it is obligated to pay" the district court's judgment and attempting to analogize this to a case in which the government settles or decides not to appeal at all. Br. 31-32 & n.21. As was made clear by the filing of a notice of appeal and then a petition for a writ of certiorari, the United States will not agree that it is "obligated" to comply with the district court's decree until all appellate avenues have been exhausted. See 28 U.S.C. 2414 (judgment becomes final only after Attorney General determines not to seek further review). Consistent with his "obligation to take Care that the Laws be faithfully executed," the President has directed the Executive Branch to enforce Section 3 unless and until he receives a definitive judgment from the Judicial Branch that the statute is unconstitutional. J.A. 192. The President considers that course of action to be the most appropriate way to fulfill his Take Care Clause responsibilities because it "respects the actions of the prior Congress that enacted DOMA" and "recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* Because the rights and obligations of the United States and plaintiff will thus be

affected by an appellate decision, the parties remain just as adverse as in the district court. See *Chadha*, 462 U.S. at 939-940.

b. Under the amica's approach, Article III would require the United States repetitively to suffer the same injury, an unlimited number of times over in district courts around the Nation, with no prospect for appellate review unless and until a district court potentially enters judgment in *favor* of the United States (in which event the *plaintiff* could elect to seek further review). And the Judiciary would be saddled with the obligation to resolve potentially thousands of challenges to Section 3 in the district courts, without any reliable avenue for a definitive resolution of the provision's constitutionality. On that understanding, the President's decision that the Executive Branch should continue enforcing a statute he has determined to be unconstitutional—out of respect for the Judiciary and Congress—would come at a considerable judicial, administrative, and financial cost. That impractical approach has little to recommend it, and nothing to compel it. To the contrary, not only *Chadha*, but also *Lovett*, demonstrates that the Solicitor General may seek review of a judgment against the United States in a case like this.

In *Lovett*, like *Chadha*, the United States, through the Solicitor General, obtained this Court's review of a decision invalidating a federal statute that the Department of Justice had declined to defend on the merits. See *Chadha*, 462 U.S. at 940 (citing *Lovett*). *Lovett* involved challenges by three federal employees to the constitutionality of a statute forbidding the use of appropriated funds to pay their salaries. 328 U.S. at 304-306. The Executive Branch agreed that the

statute was unconstitutional, and a joint resolution of Congress authorized special counsel to defend the statute. *Id.* at 306. After the Court of Claims entered judgments for the employees, this Court granted the United States' petitions for a writ of certiorari, permitted amicus argument on behalf of Congress, and affirmed the lower court's judgments, notwithstanding the parties' agreement that the judgments had been correct. *Id.* at 304, 307-318; see Pet. Br. at 72, *Lovett*, *supra* (No. 45-809) (request by United States, as petitioner, "that the judgments below should be affirmed").

Nothing precludes the Court from following the same course here. It is true that the review sought in *Lovett* was from a non-Article III court (Amica Br. 25), but that did not relieve the United States of the need to satisfy Article III in order to obtain review in this Court. See *ASARCO*, 490 U.S. at 618 (party seeking this Court's review of state-court decision must establish Article III jurisdiction). And while the amica correctly points out (Br. 25) that decisions exercising but not discussing jurisdiction are not binding jurisdictional precedent, the Court should not lightly "disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962). Tellingly, Congress itself supported the United States' petitions in *Lovett*. Br. for the Congress of the United States in Support of Pet. for Writs of Cert. at 2, *Lovett*, *supra* (No. 45-809).

c. None of the cases relied on by the amica (Br. 29-31) supports her position.

In *Princeton University* v. *Schmid*, 455 U.S. 100 (1982) (per curiam), a state supreme court reversed a

defendant's conviction for trespassing on a private university because it found that application of the university's property regulations violated the "defendant's State constitutional rights of expression." *State* v. *Schmid*, 423 A.2d 615, 633 (N.J. 1980). The intervenor university appealed to this Court, asserting that the state-law invalidation of its regulations had infringed its federal constitutional rights to control the use of its property. Princeton Br. at 6, *Schmid*, *supra* (No. 80-1576); see *Schmid*, 455 U.S. at 101-102. This Court found the appeal to be moot because the university had modified its regulations. *Id.* at 102-103. The Court also found that the State's presence in the case did not create a justiciable dispute, noting that the State had not itself appealed, but had instead filed a brief requesting a decision without taking a position on the merits. *Ibid.* The Court's per curiam opinion observed that "if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy," because the Court does "not sit to decide hypothetical issues or to give advisory opinions." *Id.* at 102.

That comment does not cast doubt on appellate jurisdiction here. *Schmid* did not address whether an Article III controversy exists when the Executive Branch agrees with a challenger that a federal statute is unconstitutional, but continues to enforce the statute. See New Jersey Mot. To Dismiss at 1-2, *Schmid*, *supra* (No. 80-1576) (stating that University and appellee had the "real interests" in the case). That distinct question was considered the following Term in *Chadha*, which squarely supports appellate jurisdic-

tion here. This case, unlike *Schmid*, presents a concrete and ongoing controversy—namely, whether plaintiff should receive a refund of her tax—that this Court's decision will definitively resolve. See *Chadha*, 462 U.S. at 939.

Second, in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (per curiam), the Court stated that no case or controversy existed between parties who had both argued to the district court that a state anti-busing statute was constitutional. *Id.* at 48. The Court dismissed the appeal, however, for lack of *statutory* appellate jurisdiction. See *ibid.* In a companion case decided the same day, the Court affirmed the underlying district-court judgment, which involved many additional parties, in an appeal involving some of those additional (and adverse) parties. See *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971).

The two-paragraph opinion in *Moore* arose out of unique circumstances and in a unique procedural posture, and says nothing about the circumstances here. The House of Representatives expressly argued in *Chadha* that *Moore* was controlling in a case like this. See U.S. House of Representatives Br. at 46-47, U.S. House of Representatives Reply Br. at 12-13, *Chadha*, *supra* (Nos. 80-1832, 80-2170, 80-2171). This Court did not accept that argument, but instead concluded that "adequate Art[icle] III adverseness" exists when the government enforces a challenged statute, even when it agrees with the challenger that the statute is unconstitutional. *Chadha*, 462 U.S. at 939.

Finally, in *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), this Court *found* adequate Article III adverseness be-

tween the parties, notwithstanding their agreement about the requirements of a particular federal statute. See *id.* at 382-383. The amica cites *GTE* solely because it quoted *Moore* for the proposition that a case or controversy is absent "when the parties desire precisely the same result." *Id.* at 383 (quoting *Moore*, 402 U.S. at 48). But even the amica herself does not believe that statement to be absolute. If it were, then not only the appellate courts, but also the district court, would have lacked jurisdiction in this case.

Mere agreement on a question of law, or on the order that a court should enter, does not deprive a federal court of jurisdiction. It is, for example, "a judicial function and an exercise of the judicial power to render judgment on consent * * * or when the defendant is in default." *Pope* v. *United States*, 323 U.S. 1, 12 (1944) (citing cases). This Court has also found the exercise of its original jurisdiction to be proper in a circumstance where both parties agreed on the proper legal outcome, but the defendant insisted upon a judicial decision before proceeding. *Kentucky* v. *Indiana*, 281 U.S. 163, 169-180 (1930). And this Court has a longstanding practice of appointing amici when the parties to the case agree on the proper appellate disposition, as where the government confesses error. See Eugene Gressman et al., *Supreme Court Practice* 743 (9th ed. 2007).

The amica attempts (Br. 31 n.19) to distinguish this Court's amicus-appointment practice by noting that the parties in amicus-appointment cases are typically both challenging, rather than defending, the judgment below. But the substance of the parties' legal agreement is irrelevant for purposes of assessing their adverseness. So long as the party seeking further re-

view is aggrieved by the judgment below (as the United States is here) and the parties retain adverse interests in the outcome of the underlying case (as the parties do with respect to Section 3's application to plaintiff's tax here), Article III is satisfied irrespective of whether the parties agree that the decision below was wrong (as in a confession-of-error case) or that it was right (as in *Chadha*, *Lovett*, and this case). As *Chadha* makes clear, disagreement on the merits is unnecessary to create adverseness in a case, like this one, in which the government "intend[s] to enforce [a] challenged law against [an opposing] party" in the absence of a judicial prohibition against doing so. 462 U.S. at 940 n.12 (describing *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 585 n.9 (1983)).

II. BLAG LACKS ARTICLE III STANDING TO SEEK REVIEW OF THE LOWER COURTS' DECISIONS

Because this Court has jurisdiction to reach the merits of this case based on the United States' petition, it need not address whether BLAG independently has standing to seek review. See, *e.g.*, *Horne*, 557 U.S. at 446. Should the Court consider the question, however, it should conclude that BLAG does not. BLAG's right to appeal "is contingent upon a showing * * * that [it] fulfills the requirements of Art[icle] III." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). BLAG, which neither represents the interests of the United States nor can demonstrate any Article III injury of its own, cannot make that showing.

A. BLAG Does Not Represent The Interests Of The United States

This Court has made clear that only "one 'United States' * * * may appear before this Court."

Providence Journal, 485 U.S. at 701. As previously discussed, see Part I.B.1, *supra*, the Department of Justice is constitutionally and statutorily empowered to represent the interests of the United States in this litigation. BLAG is not.

BLAG is an entity located within the Legislative Branch. The Constitution assigns to that Branch only specifically enumerated "legislative Powers." U.S. Const. Art. I, § 1. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." *Buckley*, 424 U.S. at 139 (citation omitted). "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const. Art. II, § 3).

Although Congress (and the individual Houses) may create offices to assist with legislative tasks, the authority of such an office may not include the "discretionary power to seek judicial relief" on behalf of the United States. *Buckley*, 424 U.S. at 138-140. Such power "cannot possibly be regarded as merely in aid of the legislative function," *id.* at 138, and Congress "may not 'invest itself or its Members with * * * executive power,'" *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Rather, the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights * * * may be discharged only by persons who are 'Officers of the United States'" under

the control of the President. *Buckley*, 424 U.S. at 140 (quoting U.S. Const. Art. II, § 2, Cl. 2). In particular, as this Court has recognized, "no counsel will be heard for the United States in opposition to the views of the Attorney General." *Confiscation Cases*, 74 U.S. (7 Wall.) at 458.

B. BLAG Has Suffered No Independent Article III Injury

The decisions below also do not cause BLAG any distinct Article III injury that it can assert on its own behalf. The injuries inflicted by the decisions below were injuries to the United States, not to BLAG.

1. BLAG is a group of five Members of the House of Representatives. See Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). At the time of the relevant filings in this case (up to and including BLAG's petition for a writ of certiorari), BLAG's sole authority was to "consult" about the House's general counsel. *Ibid.* Nothing about the judgment in this case affects BLAG's performance of that function. Even assuming the district court's judgment could be interpreted to run against BLAG as well as the United States, see Pet. App. 23a-24a, it neither requires nor forecloses any action by BLAG. The judgment accordingly does not injure BLAG in any cognizable way.

Although an association can have standing based on an injury to its members, see *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977), no such standing exists here. BLAG's members are individual legislators, who suffer no Article III injury upon the invalidation of a law. This case is far afield of the narrow circumstances in which this Court has recognized legislator standing: a Member's exclusion from the House of Representatives, see *Powell* v.

McCormack, 395 U.S. 486, 496, 512-514 (1969); an invocation of a procedural mechanism in a state legislature to nullify votes sufficient to defeat a constitutional amendment, where the state legislators' suit originated in state court, see *Coleman* v. *Miller*, 307 U.S. 433, 437-446 (1939); and a specific authorization by a State (unconstrained by federal separation-of-powers doctrine) for particular legislative officers, on behalf of the full legislature, to represent the State's interests in court, see *Karcher* v. *May*, 484 U.S. 72, 82 (1987).

In *Raines* v. *Byrd*, 521 U.S. 811 (1997), this Court concluded that individual Members of Congress lacked standing to challenge the President's then-existing statutory authority to "cancel" selected portions of duly enacted laws through a procedure known as the line-item veto. *Id.* at 813-814. The Court concluded that the legislators had "alleged no injury to themselves as individuals," *id.* at 829, and observed that they had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," *id.* at 821. The Court also concluded that "the institutional injury they allege is wholly abstract and widely dispersed," *id.* at 829, and observed that the "claimed injury * * * runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power," *id.* at 821.

Both conclusions apply equally here. When a legislator casts a vote, "[t]he legislative power thus committed is not personal to the legislator but belongs to the people." *Nevada Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2350 (2011). Legislators' "personal

interest in full and unfettered exercise of their authority" is thus "no greater than that of all the citizens for whose benefit * * * the authority has been conferred." *Moore* v. *United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). A legislator's constituents cannot themselves elevate an abstract interest in a statute's constitutionality into an Article III injury, *Diamond*, 476 U.S. at 66-67, and a legislator thus cannot invoke his representative capacity as a basis for doing so.

2. BLAG also does not have standing in this case based on asserted interests of the House of Representatives as a whole. To begin with, the resolution authorizing BLAG to represent the House in this case was passed only after BLAG filed its notice of appeal and petition for a writ of certiorari. See p. 6, *supra*. BLAG therefore lacked authority to make the relevant filings on behalf of the House. A party may not invoke appellate jurisdiction in a capacity in which it has not previously participated in the case. *Karcher*, 484 U.S. at 78. And an "'after-the-fact' authorization" cannot cure a jurisdictional defect. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994) (concluding that Solicitor General could not retroactively authorize agency to file petition for a writ of certiorari).

More fundamentally, even had BLAG represented the full House at the relevant times, the House has suffered no more of a cognizable injury than BLAG itself. The House is "composed" of its individual "Members," U.S. Const. Art. I, § 2, Cl. 1, who themselves lack standing for reasons explained above. In addition, Congress "consist[s] of a Senate *and* House

of Representatives." U.S. Const. Art. I, § 1 (emphasis added). The Framers consciously rejected a unicameral legislature, *Chadha*, 462 U.S. at 948-951; the powers of the House as an individual body are "narrowly and precisely defined" in the Constitution, *id.* at 955; and none of those powers is called into question by a judicial decision invalidating the application of a particular substantive law passed by both Houses of a previous Congress.

3. Finally, even assuming *arguendo* BLAG could be seen as representing the entire Congress, it would still lack Article III standing. "[O]nce Congress makes its choice in enacting legislation, its participation ends." *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986). Congress has no judicially cognizable interest in the "execution of the Act" it has enacted. *Id.* at 734. That is an "executive function," which Congress may affect only "indirectly," namely, "by passing new legislation." *Ibid.* This Court has made clear that Congress "is dependent on the Executive and the courts for enforcement of the laws it enacts." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 817 (1987) (Scalia, J., concurring in judgment).

From Congress's perspective, a judicial decree precluding enforcement of a federal statute on constitutional grounds is no different from a Presidential determination not to enforce the statute because he himself considers it unconstitutional. Either way, the law is not being enforced as written. Congress, however, has no standing to sue the President for nonenforcement of a law. See *Byrd*, 521 U.S. at 826-830 (noting the absence of direct suits between the Executive and Legislative Branches "on the basis of claimed injury to official authority or power"); see also *Young*,

481 U.S. at 817 (Scalia, J., concurring in judgment) ("Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial."). No principled basis exists for finding congressional standing simply because it is a decision of the Judicial Branch, rather than the Executive Branch, that precludes a law's enforcement.

Nor is the situation any different when the Executive Branch has declined to defend the law against a constitutional challenge. That infrequent practice is an example of the Constitution's separation of powers and checks and balances at work, not a license for congressional encroachment on the litigating authority that the Constitution vests in the President alone. See *Buckley*, 424 U.S. at 138-140. The Framers were fearful of "the tendency of republican governments * * * to an aggrandizement of the legislative, at the expense of the other departments," *The Federalist No. 49*, at 341 (James Madison) (Jacob E. Cooke ed. 1961), and separated legislative authority from enforcement authority to avoid such a result.

This Court has rejected the notion that Congress can diminish "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'" by authorizing courts to adjudicate individual suits based on an "undifferentiated public interest in executive officers' compliance with the law." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. Art. II, § 3). Direct litigation by Congress itself would, if anything, intrude even more deeply upon the President's prerogatives. It is, moreover, unclear that the intrusion would be limited to cases involving a statute's consti-

tutionality. If Congress has independent standing when the Executive Branch contends that a statute cannot *constitutionally* be applied in certain circumstances, then Congress might also assert independent standing when the Executive Branch contends that a statute should not be *construed* to apply in certain circumstances.

All of this is not to say that Congress lacks any role in a situation where the Executive Branch has declined to defend a statute. The Attorney General is required to inform Congress of any such decision. 28 U.S.C. 530D(a)(1)(B). Presentation of arguments by Congress in an amicus-type role assures that both sides of the constitutional question will be before the court, where its jurisdiction is properly invoked. See *Chadha*, 462 U.S. at 940; see also, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 659 & n.* (1988) (Senate and House leadership appeared as amici). And Congress also has various tools at its disposal, including the power of the purse, to express any displeasure with the President's actions in a particular case. See, *e.g.*, *Olson*, 487 U.S. 654 at 711 (Scalia, J., dissenting); *Young*, 481 U.S. at 817-818 (Scalia, J., concurring in judgment). It neither needs nor possesses independent litigating authority as well.

C. *Chadha* Does Not Establish BLAG's Standing To Appeal

In the court of appeals, BLAG's argument for standing relied primarily on *Chadha*. See 12-2335 Docket entry 94-2, at 13-15 (2d Cir. July 19, 2012). BLAG's reliance on *Chadha* is misplaced.

1. In *Chadha*, the INS and Chadha initially were the sole parties, but the court of appeals invited amicus briefs from the House and Senate, which it consid-

ered before concluding that the legislative-veto statute was unconstitutional. 462 U.S. at 928. After the panel issued its decision, the House and Senate passed resolutions authorizing intervention as parties, and the court of appeals permitted them to intervene. *Chadha*, 462 U.S. at 930 n.5. In parallel with the INS's appeal to this Court under Section 1252, the congressional parties filed petitions for writs of certiorari under 28 U.S.C. 1254(1). *Id.* at 928. This Court, in addition to finding jurisdiction for the INS's appeal, also granted the House's and Senate's petitions. *Id.* at 928-931. The Court stated, without any sustained discussion of standing, that "Congress is both a proper party to defend the constitutionality of [the statute] and a proper petitioner under 28 U.S.C. 1254(1)." *Id.* at 939.

That conclusion does not control the issue of BLAG's standing here. For reasons already discussed, BLAG is not "Congress." See *Chadha*, 462 U.S. at 930 n.5 (noting that both Houses of Congress authorized intervention). Moreover, especially in light of the Court's consideration of legislative standing in subsequent decisions, see *Raines* v. *Byrd*, *supra*, that statement in *Chadha*, which was not necessary to the Court's resolution of the case, should not be understood to establish the proposition that Congress, or one of its Houses, would have independent standing to initiate a suit—as distinguished from intervening in an already-existing case or controversy between other parties (like plaintiff and the United States here). Nor should it be understood to establish that Congress or one of its Houses would have independent Article III standing to seek review of a court decision if another party (like the United States here), through

its own appeal, had not already sought review. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 n.20 (1997) (describing *Chadha* as a case in which INS "appealed Court of Appeals ruling to this Court but declined to defend constitutionality of one-House veto provision" and this Court "held Congress a proper party to defend [legislative-veto] measure's validity where both Houses, by resolution, had authorized intervention"). Indeed, the Court in *Byrd* emphasized the absence of any history of judicial resolution of disputes between Congress and the Executive Branch. See 521 U.S. at 826-828. And while holding that the individual Members of Congress had no standing, the Court declined to decide whether the case would have been different if, *inter alia*, the Members' suit had been authorized by their respective Houses. *Id.* at 829-830.

In any event, *Chadha* involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action. 462 U.S. at 923. Even assuming Congress has standing to appeal in that situation, that would not mean that BLAG has standing to take an appeal to defend a statute like Section 3, which has no such effect on Congress, much less BLAG.

2. The *Chadha* opinion also stated, while discussing "prudential, as opposed to Art[icle] III concerns," that "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." 462 U.S. at 940. The context, however, indicates that the Court's

statement concerned the participation of Congress as an amicus. The Court observed that the court of appeals had "properly dispelled any [prudential jurisdictional] concerns by inviting and accepting briefs from both Houses of Congress"—*i.e.*, amicus briefs. *Ibid.*; see *id.* at 929. And the Court cited examples involving arguments of amici, not cases in which Congress had brought a dispute before this Court as a party. *Id.* at 940 (citing *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (invited amicus), and *Lovett*, *supra* (congressional amicus)). Those amicus examples do not establish that Congress, much less BLAG, has independent standing to seek further review of the lower-court decisions here.

Finally, *Chadha* twice noted that the presence of the congressional parties erased any doubt about the existence of Article III adverseness with respect to both the congressional petitions and the INS's appeal. See 462 U.S. at 931 n.6 ("[A] controversy clearly exists in [the INS appeal], as in the other two cases, because of the presence of the two Houses of Congress as adverse parties); *id.* at 939 ("[F]rom the time of Congress' formal intervention, * * * concrete adverseness is beyond doubt."). But the Court also expressly concluded that "adequate Art[icle] III adverseness" existed in the case even before Congress's intervention, when "the only parties were the INS and Chadha," *ibid.*, which was a sufficient basis for finding a case or controversy. Similar adverseness exists in this case between the United States and plaintiff, and the Court can and should adjudicate the merits of that dispute on the petition of the United States, the party injured by the decisions below.

CONCLUSION

For the foregoing reasons, this Court should reach the merits of this case based on the petition for a writ of certiorari filed by the United States.

Respectfully submitted.

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APPENDIX

1. Article III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> 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; * * * [and] to Controversies to which the United States shall be a Party; * * * .

2. Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3. Section 1254(1) of Title 28 of the United States Code provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * * .