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 *AMICI CURIAE* OF FORMER FEDERAL ELECTION COMMISSION OFFICIALS SUPPORTING RESPONDENT EDITH SCHLAIN WINDSOR ON THE MERITS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former officials of the Federal Election Commission ("FEC"), an independent federal agency that administers and enforces the Federal Election Campaign Act of 1971, as amended ("FECA"). Pub. L. 92-225, 86 Stat. 3. FECA is the primary statute that governs federal campaign finance activity.

Amici have many years of experience, derived from both government service and other roles, in applying and interpreting the legal rules that affect participation in the political process. They have an interest in explaining to this Court the Defense of Marriage Act's deleterious effects on political expression and association. *Amici* are described and identified in the appendix to this brief.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *amici* or their counsel paid for brief preparation and submission. All parties consented to the filing of this brief. The United States and the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") provided blanket consent. Respondent Edith Windsor provided a letter of consent, which is filed with this brief. Trevor Potter submits this brief both in his individual capacity and in his role as counsel for *amici*. Other *amici* submit this brief only in their individual capacities and not on behalf of any organization or client.

SUMMARY OF ARGUMENT

An individual's right to political expression and association is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion).

The Defense of Marriage Act ("DOMA") hinders many Americans in exercising this "core" right. The term "spouse," DOMA says, must be interpreted in all federal statutes, regulations, rulings, and interpretations as "only . . . a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. DOMA's mandate, when superimposed on to federal campaign finance laws, legally precludes individuals in same-sex marriages from political expression and association opportunities afforded to other married citizens.

This inequality undermines any assertion that gays and lesbians are too politically powerful for DOMA to receive heightened scrutiny from this Court, since this inequality is embedded in the very rules that shape political involvement and speech. DOMA's broad reach into this area of particular constitutional sensitivity also offers this Court a prudential and practical reason for exercising its jurisdiction and ultimately issuing a definitive determination in this case. *Amici* therefore believe that although FECA and FEC rules are not presented directly in Edith Windsor's particular circumstance, this Court's deliberations would benefit from understanding DOMA's discriminatory impact on the core First Amendment freedoms of married gays and lesbians.

ARGUMENT

I. DOMA Legally Precludes Married Gays and Lesbians from Political Expression and Association Opportunities Available to Other Married Individuals.

DOMA dictates that "spouse," wherever it appears in FECA or FEC rules, refers only to an individual in an opposite-sex marriage. *Amici* describe below two particular consequences[2] of this public policy for married gays and lesbians: (A) federal candidates in same-sex marriages may not fund their own campaigns using personal resources that are accessible to other married candidates; and (B) individuals in same-sex marriages are prohibited from attending certain political meetings and interacting with certain political groups that are open to others who are married.

A. Federal Candidates in Same-Sex Marriages May Not Fund Their Campaigns from Personal Resources That Are Accessible to Other Married Candidates.

A candidate for public office, according to this Court, has "a First Amendment right to engage in the discussion of public issues and vigorously and

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[2] *Amici* do not intend this brief to catalogue all DOMA-related influences within FECA and FEC rules. Indeed, the application of a number of federal campaign finance provisions appear to be affected by DOMA. *See, e.g.*, 11 C.F.R. §§ 110.1(i) (permitting a "spouse" who does not earn income to make a contribution without attribution to an income-earning marital partner), 113.2(a)(1) (permitting a federal officeholder to use campaign funds to pay travel costs for an accompanying "spouse").

tirelessly to advocate his own election." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976). Past restrictions on a candidate's ability to spend personal funds to advocate his own election imposed a "substantial," "clea[r]," and "direc[t]" restraint on that right without serving a compelling governmental interest. *Id*. at 52-53.

Consequently, FECA and FEC rules permit a federal candidate to tap an unlimited amount of "personal funds" to further her candidacy. 2 U.S.C. § 441a(a)-(b); 11 C.F.R. § 110.10.

Amounts derived from an asset held exclusively by a candidate are obviously "personal funds," available for unlimited use in the candidate's campaign. 2 U.S.C. § 431(26)(A); 11 C.F.R. § 100.33(a). A candidate's jointly held assets are, however, conceptually distinct. A joint asset is held concurrently by the candidate and by at least one other individual, with each possessing an undivided interest in the entire asset. William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 5.1 (3d ed. 2000). Because of the concurrent and shared nature of the interest, a federal candidate who utilizes a jointly held asset raises the prospect of receiving from the asset's joint owner a campaign contribution, which is a receipt that is amount-limited under FECA and FEC rules. 2 U.S.C. § 441a(a); 11 C.F.R. § 110.11.

The FEC has addressed the campaign use of jointly held assets with this in mind. A federal candidate who encumbers a jointly held asset in order to secure a campaign loan is deemed to receive a contribution from any endorser, guarantor, or co-signer of the loan. 2 U.S.C. § 431(8)(B)(vii)(I); 11

C.F.R. §§ 100.52(b)(3), 100.82(c), 100.83(b), 100.142(c). The FEC has also determined that amounts derived from an asset are, as a general matter, "personal funds" only if the candidate has a unilateral right of access to and control over the asset. FEC Advisory Op. 1991-10 at 3 (Apr. 12, 1991) (concluding that when "withdrawals from [a joint] account require the signatures of both" account holders, "the candidate does not have legal right of access to or control over" the account, as that phrase is used in the "personal funds" definition).

However, these general restrictions on treating joint assets as "personal funds" are subject to special exemptions for assets held jointly with a "spouse." In fact, only a "spouse" may endorse, guarantee, or co-sign a campaign loan without making a campaign contribution. 11 C.F.R. §§ 100.52(b)(4), 100.82(c), 100.83(b), 100.142(c). Similarly, "to address the concept of 'personal funds' in joint ownership situations," FECA and the FEC "carve[d] out a narrow area to allow for the use of property in which the candidate's *spouse* has an interest." 48 Fed. Reg. 19,019, 19,019-19,020 (Apr. 27, 1983) (emphasis added). Pursuant to this "narrow" exemption, a federal candidate may utilize at least part of any asset held jointly with a "spouse" to support her own campaign. 2 U.S.C. § 431(26)(C); 11 C.F.R. § 100.33(c). A candidate's access to a personal asset in many instances therefore hinges on whether that asset is held jointly with a "spouse."

When imported into the "personal funds" context, then, DOMA' requirement that "spouse" mean "only . . . a person of the opposite sex who is a husband or a wife" financially handicaps federal

candidates in same-sex marriages, relative to other married candidates. The so-called "spouse exemptions" under FECA and FEC rules free a candidate in an opposite-sex marriage to utilize for his campaign at least part of any asset owned jointly by the married couple. A candidate in a same-sex marriage is not free to do so because his spouse is not recognized as a "spouse" under federal law.

This is not a mere technicality or theoretical issue. Many federal candidates rely on personal funds to support their own campaigns. FEC records show, for example, that over 40 percent of the 3,061 candidates for U.S. Senate and U.S. House during the 2012 election cycle drew on personal resources to finance their campaigns. FEC, 2012 Candidate Summary, *available at* http://www.fec.gov/data/CandidateSummary.do?format=html&election_yr=2012. Unfortunately, DOMA's application to federal campaign finance law means that married gays and lesbians who become federal candidates do not have the same opportunity as other married candidates to exercise the First Amendment right to advocate their own election.

B. Individuals in Same-Sex Marriages May Not Attend Certain Political Meetings or Interact with Certain Political Groups That Are Open to Other Married Individuals.

The First Amendment "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

FECA and FEC rules permit only the "restricted class" of a corporation or labor union to associate fully with political activities undertaken by

that corporation or union. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). "Restricted class" is carefully defined, and includes corporate executives, labor union members, and "their families." 11 C.F.R. § 114.1(j). The "family" of a corporate executive or union member may engage in the full range of corporate or union political activities by, among other things, attending sponsored political meetings that feature federal candidates and interacting with the "connected" political committee of the corporation or labor union. 2 U.S.C. § 441b(b)(2), (4)(A); 11 C.F.R. §§ 114.3(c)(2), 114.5(g). Those who are not "family" may not.

The FEC has drawn on legislative history to interpret "family" in this context to include only those within a historically conventional, heterosexual family unit: "the mother, father, sons, and daughters" who live in the same household. 117 Cong. Rec. 43,387-43,388 (1971) (remarks of Congressman Hansen). The FEC has adhered to this definition of "family" over the past 30 years based on this legislative history. FEC Advisory Op. 1980-102 at 2 (Oct. 1, 1980) ("For purposes of 2 U.S.C. § 441b therefore, the Commission views the term 'family' to mean the mother, father, sons, and daughters who live in the same household."); *see also* FEC Advisory Op. 1983-48 at 4 n.7 (Sept. 14, 1984); FEC Advisory Op. 1990-18 at 4 (Oct. 5, 1990); FEC, Campaign Guide for Corporations and Labor Unions 20 (2007), *available at* http://www.fec.gov/pdf/colagui.pdf.

In DOMA's absence, the FEC could perhaps look to state law definitions (as it does in other areas) or otherwise interpret "the mother" or "[the] father" to include individuals within a same-sex

marriage, and thereby facilitate full political association for them. But DOMA's prescribed interpretation of "spouse" (and its related provision concerning "marriage") as "only . . . a person of the opposite sex who is a husband or a wife" inhibits such an action. FECA's legislative history, like DOMA, refers to an adult couple with singular, gender-specific terms in a manner that contemplates a "family" relationship between adults as only a pairing of one man and one woman. Construing "the mother" or "[the] father," or adding to the list of "family" members, to include same-sex married couples could therefore be seen as essentially expanding the definition of "spouse" in violation of DOMA.

DOMA's practical consequences here are best demonstrated through a few examples. Consider, for instance, an employer that decides to hold a political meeting at which a federal candidate will appear in order to solicit and gather campaign contributions from the employer's executives and their spouses. An opposite-sex spouse could attend the meeting to hear the candidate speak and express, in association with others, their collective political and financial support for that candidate. A same-sex spouse could not attend, or even be invited to, this political meeting. Similarly, if the employer sponsored a federal political committee to pool voluntary contributions from its executives and their spouses for later distribution to various federal candidates, an opposite-sex spouse could openly communicate with and assist this committee, and have his contributions facilitated by the committee. A same-sex spouse could not.

Simply put, DOMA bars individuals in same-sex marriages from attending certain political meetings and interacting with certain political groups that are open to other married individuals. This unfairly burdens the freedom of political association, which is protected under the First Amendment.

II. DOMA's Impact on Political Expression and Association Informs This Court's Judgments on Applying Heightened Scrutiny and on Exercising Jurisdiction.

Amici realize Edith Windsor has made no claim under FECA or FEC rules. DOMA's effects on political expression and association, though, inform two key determinations by this Court in this case: whether to apply heightened scrutiny to DOMA and whether to exercise jurisdiction.

This Court has held that heightened scrutiny should apply under certain circumstances to statutes that single out groups of individuals for differential treatment. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985). To determine when such heightened scrutiny is appropriate, a court may consider whether the singled-out group is disadvantaged in attempting to influence the government's political branches. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987). In an attempt to distance DOMA from heightened scrutiny, BLAG makes much of recent political successes by gays, lesbians, and related advocacy groups, even heralding a record number of openly gay candidates for federal office. BLAG Br. 51-54. BLAG did not mention that DOMA causes those candidates, if married, to forgo sources of campaign funding that

are available to candidates in opposite-sex marriages. Indeed, it is difficult to argue that gays and lesbians are *not* politically disadvantaged when they are impaired by the very rules that shape political involvement and speech. Gays and lesbians are, perhaps, increasingly able to overcome political obstacles, such as those found at the confluence of DOMA and federal campaign finance law. But their newfound ability to do so should not save DOMA from heightened scrutiny here.

This Court has also specifically asked for briefing and argument on whether it has jurisdiction to decide this case, given "the Executive Branch's agreement with the court below that DOMA is unconstitutional." Order Granting Cert. (Dec. 7, 2012). *Amici* wish only to note their belief that DOMA's differential treatment of married persons who engage in federal political activity offers this Court a prudential reason to exercise jurisdiction here. *See* Windsor Jur. Br. 31. FECA and FEC rules are a prime example of "DOMA cut[ting] across a wide swath of federal law" that includes legal regimes administered by independent agencies. *Id.* at 33-34. The FEC, as an independent agency, is not legally able to ignore a federal statute merely because the Attorney General has stated that he believes it is unconstitutional. And the FEC itself has shown no signs of adopting an interpretation of law that could be at odds with the dictates of DOMA. A definitive determination from this Court is needed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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APPENDIX: LIST OF *AMICI CURIAE*[1]

Craig Engle has practiced federal election and campaign finance law for 27 years. He was legal counsel to a Commissioner of the Federal Election Commission for nine years, general counsel to a Republican national party committee for six years, founded the political law practice of a Washington, D.C.-based law firm, and has authored *amicus* briefs and law review articles on the constitutionality of campaign finance laws.

Kenneth A. Gross served as Associate General Counsel - Enforcement at the Federal Election Commission from 1980 to 1986. He currently leads the Political Law practice of a Washington, D.C. law firm, where he advises clients on matters relating to the regulation of political activity.

Robert D. Lenhard served as Chairman of the Federal Election Commission in 2007 and Vice Chairman of the agency in 2006. He has served as legal counsel on political law matters to labor organizations, corporations, trade associations and other politically active organizations and individuals for over twenty years. Mr. Lenhard currently practices political law at a Washington, D.C. law firm.

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[1] Trevor Potter submits this brief both in his individual capacity and in his role as counsel for *amici*. Other *amici* submit this brief only in their individual capacities and not on behalf of any organization or client.

Lawrence M. Noble was General Counsel of the Federal Election Commission from 1987 to 2000. He currently leads an election-related advocacy group and is an adjunct professor at George Washington University Law School, where he teaches campaign finance law.

Trevor Potter was appointed a Commissioner of the Federal Election Commission by President George H. W. Bush in 1991 and held the position of Chairman in 1994. He has also served as legal counsel to three Republican presidential campaigns, and is currently head of the Political Law practice at a Washington, D.C. law firm.

Scott E. Thomas served in various capacities at the Federal Election Commission from 1975 to 2006, including service as a Commissioner from 1986 to 2006 and Chairman in 1987, 1993, 1999, and 2005. Mr. Thomas is currently the head of the Political Law practice at a Washington, D.C. law firm.