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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 ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

James D. Esseks
Joshua A. Block
Leslie Cooper
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Roberta A. Kaplan
Counsel of Record
Walter Rieman
Jaren Janghorbani
Colin S. Kelly
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the
Americas
New York, NY 10019
(212) 373-3000
rkaplan@paulweiss.com

Arthur Eisenberg
Mariko Hirose
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

QUESTIONS PRESENTED

1. Whether the Executive Branch's agreement with the court below that DOMA 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.

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BRIEF ON THE JURISDICTIONAL QUESTIONS FOR RESPONDENT EDITH SCHLAIN WINDSOR

This Court has directed the parties to address two jurisdictional questions. The answer to the first question is that this Court has jurisdiction to decide this case without regard to the Executive Branch's view on the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, because the United States continues to enforce DOMA against respondent Edith Windsor. And because the United States is a proper and indispensable party to this lawsuit, the answer to the second question does not affect this Court's ability to reach the merits.

STATEMENT OF THE CASE

A. Factual And Legal Background

1. Respondent Edith Schlain Windsor and her late spouse, Thea Clara Spyer, first met in 1963. J.A. 231. They soon became a couple, and in 1967, Dr. Spyer proposed to Ms. Windsor with a circular diamond pin. *Id.* 232-33. Following the same path as many newly engaged couples, they purchased a home together – a house near the beach on Long Island where they would spend the next forty summers until Dr. Spyer's death in 2009. *Id.* 233. During those four decades, in sickness and in health, the couple also shared an apartment in Manhattan, supported one another's careers, and built their lives together.

In 1977, Dr. Spyer was diagnosed with progressive multiple sclerosis, a chronic disease that causes debilitating and irreversible neurological

damage and paralysis. J.A. 234. As Dr. Spyer's condition deteriorated – and she moved from a cane, to crutches, to a wheelchair – Ms. Windsor cared for her. *Id.* In 1993, they expressed their continued commitment to one another by becoming the eightieth pair to register as domestic partners when New York City first offered legal recognition for gay couples. *Id.* 235. Over the next fourteen years, Dr. Spyer's disease wrought many changes in their daily lives, but one constant remained: Ms. Windsor and Dr. Spyer were determined to marry one another. *Id.*

In 2007, the couple married in Toronto. J.A. 236. At the ages of seventy-seven and seventy-five, they were featured on the wedding pages of the *New York Times*. *Id.* 175-77; *Thea Spyer, Edith Windsor*, N.Y. Times, May 27, 2007, at ST14. They spent the last two years of Dr. Spyer's life together as a married couple.[1]

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[1] New York, "through its executive agencies and appellate courts, uniformly recognized Windsor's same-sex marriage in the year that she paid the federal estate taxes." Pet. App. 8a; *see also* U.S. Supp. Br. App. 7a. In fact, years before Ms. Windsor's marriage to Dr. Spyer, the State Attorney General had already concluded that "New York law presumptively require[d]" that married gay couples "must be treated as spouses for purposes of New York law." N.Y. Att'y Gen. Informal Op. 2004-1, at 16 (Mar. 3, 2004), *available at* http://tinyurl.com/NYAG04OP. Similarly, the State Comptroller General had ordered that the state's retirement system "recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, based on the principle of comity." Letter from George S. King, Counsel to the Retirement System, to Mark E. Daigneault, at 5 (Oct. 4, 2004), *available at* http://tinyurl.com/NYCG04OP. And during Dr. Spyer's lifetime,

2. As most married couples do, Ms. Windsor and Dr. Spyer provided for one another in their wills. Dr. Spyer's will made Ms. Windsor executor and sole primary beneficiary of her estate. J.A. 164.

Under the Internal Revenue Code, an estate like Dr. Spyer's would usually qualify for an unlimited marital deduction and would therefore pass to the surviving spouse without imposition of the federal estate tax. *See* 26 U.S.C. § 2056. But DOMA denies this deduction when both spouses are of the same sex. Instead, when read together with DOMA, the Internal Revenue Code treats gay spouses as if they were total strangers to one another, forcing estates like Dr. Spyer's to pay the federal estate tax. *See id.* § 2001(a).

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the Governor issued a directive requiring all state agencies to afford "same-sex marriages that are legally performed in other jurisdictions" the "same recognition as any other legally performed union." Memorandum from David Nocenti to All Agency Counsel, at 1-2 (May 14, 2008), *available at* http://tinyurl.com/NYGOV08.

While New York's highest court has not directly addressed the question, three of the state's four intermediate appellate courts have, and they have each upheld the validity of out-of-state marriages involving gay couples. *See In re Estate of Ranftle*, 917 N.Y.S.2d 195 (App. Div. 1st Dep't 2011) (upholding the validity of a gay couple's 2008 Canadian marriage); *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578, 583-84 (App. Div. 3d Dep't) (upholding the Civil Service's decision to recognize marriages of gay couples performed in other jurisdictions), *aff'd on other grounds sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 4th Dep't 2008) (recognizing the validity of a gay couple's 2004 Canadian marriage).

Ms. Windsor, acting as executor of Dr. Spyer's will, made an advance payment to the Internal Revenue Service (IRS) and applied for an automatic extension of time within which to file the estate tax return. J.A. 169. The return she subsequently filed showed that the estate owed $363,053. *Id.* On the accompanying Schedule M form, she explained that the estate "was not claiming the marital deduction authorized by 26 U.S.C. § 2056(a) because of the operation of DOMA." *Id.* In March 2010, the U.S. Treasury accordingly issued the estate a refund for the difference between the advance payment and the amount owed. *Id.*

The following month, Ms. Windsor filed a Claim for Refund and Request for Abatement with the IRS seeking a refund of the remaining $363,053. J.A. 242. In the accompanying Disclosure Statement, she explained that she and Dr. Spyer had been validly married under New York law at the time of Dr. Spyer's death. *Id.* She further asserted that DOMA "discriminates against surviving spouses in married same-sex couples, such as Ms. Windsor," in violation of the equal protection component of the Fifth Amendment. *Id.* 244.

The IRS rejected Ms. Windsor's claim for a refund. J.A. 245. It insisted on "consider[ing] the facts of [the] claim without regard to the merits of [the] constitutional challenge" because "a determination regarding the constitutionality of a federal law is within the province of the courts." *Id.* 251-52. Instead, the IRS simply declared that since

"both spouses were women," the marital deduction was "inapplicable because the surviving spouse is not a spouse as defined by DOMA." *Id.* 252.[2]

3. The Social Security Act provides a surviving spouse with widow's insurance benefits and a lump-sum death payment (together, "survivors benefits"). *See* 42 U.S.C. § 402(e), (i). As Dr. Spyer's widow, Ms. Windsor sought the survivors benefits. J.A. 166-67. In November 2010, when Ms. Windsor's attorney hand delivered her application to the local Social Security Administration (SSA) office, a field supervisor rejected it on the spot, citing DOMA. Ms. Windsor immediately filed a request for reconsideration, but in April 2011 she received a Notice of Disapproved Claim, which purported to dismiss her request on the grounds that there had been no initial determination. In response, she filed a second request for reconsideration. In April 2012, that request was also denied. In its "Reconsideration Determination," the SSA acknowledged that Ms. Windsor's marriage was "considered valid" in New York "at the time of [Dr. Spyer's] death." Juris. App. 8a.[3] But like the IRS, the SSA disclaimed any ability

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[2] At the time, New York State, for purposes of imposing its own estate tax, calculated the value of a decedent's estate by reference to the estate's federal tax liability. Thus, the IRS's decision meant that Dr. Spyer's estate, instead of owing New York nothing, owed the State $275,528. The estate timely paid that sum to the New York Department of Taxation and Finance. Ms. Windsor has filed a protective claim for a refund of New York estate tax.

[3] The relevant Social Security materials are contained in the Appendix to this brief and are cited as "Juris. App."

to entertain Ms. Windsor's equal protection claim: "We are not permitted to make judgment regarding the constitutionality of the law at this level of your request, and we must follow the law as written." *Id.*

The SSA also informed Ms. Windsor that, for constitutional claims, an "expedited appeal" process was available. Under that process, a claimant can bypass the usual requirement of full administrative exhaustion and "go directly to court." Juris. App. 2a. Before an expedited appeal can proceed, both the claimant and the SSA must sign off. Ms. Windsor filed the necessary request for an expedited appeal in June 2012 and a revised request in August. *Id.* 10a-15a. The SSA has yet to respond.

B. Proceedings Below

1. Ms. Windsor filed suit in the United States District Court for the Southern District of New York, naming the United States as the defendant. Her amended complaint invoked the district court's jurisdiction under 26 U.S.C. § 7422 and 28 U.S.C. §§ 1331 and 1346(a)(1). J.A. 151. She sought three forms of relief: a refund of the $363,053 Ms. Windsor had paid on behalf of Dr. Spyer's estate; a declaratory judgment that DOMA violates the equal protection component of the Fifth Amendment as applied to her in her capacity as executor; and an injunction requiring the United States to treat Dr. Spyer's estate as if her spouse had been of the opposite sex. *Id.* 173. Her amended complaint stated that she was seeking the Social Security survivors benefit and notified the court that she would amend her complaint to add a claim for that relief if her application were ultimately to be denied. *Id.* 166-67.

2. Shortly before the United States' answer was due, Attorney General Eric Holder announced that, while DOMA "will continue to be enforced by the Executive Branch . . . unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality," the Department of Justice would "forgo the defense of this statute." J.A. 191-92.

The Attorney General explained that he was instructing the Department's lawyers to "immediately inform" the district court in this case "of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law." J.A. 193.

3. The Attorney General's announcement prompted the district court to invite Congress to intervene. *See* J.A. 528.

The Senate did not respond to the district court's invitation. But the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) voted 3-2 along party lines to participate. BLAG then filed a motion to intervene for the limited purpose of defending DOMA's constitutionality. J.A. 195. Neither Ms. Windsor nor the United States opposed BLAG's motion.

The magistrate judge granted BLAG's motion. J.A. 218. Under Second Circuit precedent, BLAG was not required "to establish independent Article III standing" given that there was "an ongoing case or controversy between the existing parties to the

litigation." *Id.* 226. Since then, BLAG has participated actively at every stage of this litigation.

4. Ultimately, Ms. Windsor moved for summary judgment, J.A. 90, and BLAG and the United States moved to dismiss her complaint, *id.* 98.

The district court granted Ms. Windsor's motion for summary judgment, and consequently denied the United States' and BLAG's motions to dismiss. J.A. 114. The district court held that DOMA failed to satisfy rationality review. Pet. App. 13a-14a. Accordingly, the court declared DOMA "unconstitutional as applied to Plaintiff" and awarded "judgment in the amount of $363,053.00, plus interest and costs allowed by law." *Id.* 23a.

5. BLAG and the United States each filed a notice of appeal. J.A. 522, 524.

Before the Second Circuit, BLAG moved to dismiss the United States' appeal and to "realign the appellate parties to reflect that the United States prevailed in the result it advocated in the district court." U.S. Supp. Br. App. 4a. The Second Circuit denied that motion, agreeing unanimously that it had jurisdiction over the United States' appeal. *See id.* 4a, 31a. On the merits, a divided panel then held that because DOMA discriminated against individuals on the basis of sexual orientation, heightened scrutiny was appropriate. *Id.* 15a-16a. Applying that standard, the majority held that "DOMA's classification of same-sex spouses was not substantially related to an important government interest." *Id.* 30a. It therefore affirmed the judgment of the district court. *Id.* 31a.

6. While the case had been pending before the Second Circuit, both Ms. Windsor and the United States filed petitions for a writ of certiorari before judgment raising the question of DOMA's constitutionality under the Fifth Amendment.

BLAG filed its brief in opposition to the United States' petition after the Second Circuit's decision. Although the Second Circuit had held that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death," U.S. Supp. Br. App. 7a, BLAG questioned whether Ms. Windsor met "Article III prerequisites" to bring her action, BIO 20. Accordingly, BLAG argued that her case was an inappropriate vehicle for resolving a concededly important constitutional question. In addition, BLAG contended that because the United States had "prevailed" in the court of appeals, it was "not clear" that the United States had appellate standing. *Id.* 21.

Once the Second Circuit had ruled, the United States filed a supplemental brief requesting that this Court consider its earlier-filed petition "as one for certiorari after judgment." U.S. Supp. Br. 7. BLAG also filed a supplemental brief, reiterating its claims that Ms. Windsor's case was a problematic vehicle for resolving DOMA's constitutionality.

7. This Court granted the United States' petition. It directed the parties to brief and argue two jurisdictional questions in addition to the question presented by the United States. *See* 133 S. Ct. 786 (2012).

Three weeks later, BLAG filed its own petition for certiorari in Ms. Windsor's case, ostensibly "so

that this Court has a vehicle to reach the question of DOMA's constitutionality even if it concludes that the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction over DOJ's petition." Pet. Cert. 10, *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor* (No. 12-785). That petition is pending. Subsequently, the House of Representatives passed a resolution purporting to authorize BLAG's participation in this lawsuit. J.A. 578-79.

SUMMARY OF ARGUMENT

Respondent Edith Windsor was compelled to pay hundreds of thousands of dollars in federal estate tax because the Defense of Marriage Act precluded her from claiming the marital deduction on behalf of her spouse's estate. She sued the United States and obtained a judgment declaring DOMA unconstitutional as applied to her and ordering a refund of the tax she had paid. The United States has appealed that judgment against it and continues to withhold the taxes it collected. These facts, which *Amica* does not dispute, provide this Court with jurisdiction to decide this case.

1. As in *INS v. Chadha*, 462 U.S. 919 (1983), this Court has jurisdiction to reach the constitutional question even though the Executive Branch, the private party who has challenged the statute, and the courts below have agreed at every stage of this litigation that the statute is unconstitutional. Here, too, this Court can review the constitutional question at the behest of the Solicitor General.

a. This case presents a concrete controversy within the meaning of Article III. The United States has enforced DOMA against Ms. Windsor throughout this litigation. It will continue do so in the future if DOMA is upheld by this Court. Thus, this Court's decision "will have real meaning" for both parties. *Chadha*, 462 U.S. at 939. Furthermore, the participation of a congressional intervenor in support of the statute allays any concern about whether the issues will be sharply presented.

b. This Court has statutory jurisdiction over this case. The plain language of 28 U.S.C. § 1254(1) grants this Court jurisdiction to hear a petition from "any party," and the United States undeniably meets that criterion. For purposes of appeal, moreover, the United States is an "aggrieved party" within the traditional understanding of that term. Judgment was entered against the United States. That judgment requires the United States both to pay hundreds of thousands of dollars to Ms. Windsor and to alter its administration of more than one thousand statutory provisions that affect married gay couples. These are legally cognizable consequences that, by any objective standard, make the United States an aggrieved party. Nothing bars a government defendant from appealing this sort of adverse judgment.

c. Assuming that this Court has jurisdiction, prudential and practical concerns militate strongly in favor of deciding the constitutionality of DOMA now. Leaving that question to the lower courts will perpetuate the harmful uncertainty faced by Ms. Windsor and hundreds of thousands of others. It may also result in significant disuniformity across

jurisdictions in the application of a federal statute. *See* Br. of *Amici Curiae* New York et al. Requiring every individual or couple affected by DOMA to bring a separate lawsuit until the relevant courts of appeals have ruled would create a legal morass for no good reason.

Furthermore, this is not a situation where, if this Court declines to review the constitutional question, unilateral Executive Branch action can provide a stable solution. With respect to federal benefits programs, the Appropriations Clause and the Anti-Deficiency Act may mean that federal agencies cannot simply write individuals a check. And because DOMA applies outside the Executive Branch, and binds Congress, the Judiciary, and independent agencies, executive "non-enforcement" would not resolve the application of DOMA in many contexts.

2. Whether BLAG has independent Article III standing does not affect this Court's jurisdiction. The United States' continued – indeed, necessary – presence dictates that BLAG can properly assert "piggyback" standing and participate fully in this litigation.

ARGUMENT

I. Ms. Windsor Properly Invoked The Jurisdiction Of The Federal Courts.

This case raises profound questions of constitutional law regarding the Defense of Marriage Act, but those questions are "embedded" in an "actual controversy" about Ms. Windsor's "particular legal rights." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (internal quotation marks and citation

omitted). Ms. Windsor filed suit seeking "the recovery of" $363,053 in federal estate taxes "alleged to have been . . . illegally assessed." 28 U.S.C. § 1346(a)(1). The United States refused, and continues to refuse, to refund this money.

1. As the executor of Dr. Spyer's estate and the filer of the claim for refund, Ms. Windsor is the proper plaintiff in this lawsuit. *See* 26 U.S.C. §§ 6511(a), 7422(a); 26 C.F.R. § 301.6402-2(e). In that capacity, she has suffered injury in fact: "[A] claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action" is a "concrete and particularized injury." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment).[4] Here, to add insult to this "wallet injury," *id.*, the tax was imposed on Dr. Spyer's estate

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[4] DOMA clearly caused this tax liability. While BLAG may continue to cast aspersions on Ms. Windsor and Dr. Spyer's marriage, *see, e.g.*, BLAG Br. 14, 24 n.6, both courts below agreed that at the time of Dr. Spyer's death, Ms. Windsor and Dr. Spyer were legally married, *see* U.S. Supp. Br. App. 7a; Pet. App. 8a; *see also supra* p. 2 n.1. Absent DOMA, Dr. Spyer's estate would have qualified for the marital deduction. Even BLAG concedes that Ms. Windsor has produced documents that, "if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death." J.A. 465.

Redressability is not in doubt: the federal courts are entirely capable of curing the injury Ms. Windsor suffered by issuing a judgment in her favor. But in any event, questions about the validity of a claimant's marriage go to the merits, and not to jurisdiction.

because DOMA treats married gay couples differently from all other married couples. As this Court has "repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons" who are "denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal citation omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

2. The United States is the proper – indeed, the indispensable – defendant in this lawsuit. The Internal Revenue Code requires that the "United States," and only the United States, be named as the defendant in a lawsuit seeking a tax refund. *See* 26 U.S.C. § 7422(f)(1). When a plaintiff names any other official defendant – for example, the IRS or the Commissioner of Internal Revenue – the "court shall order . . . that the pleadings be amended to substitute the United States as a party." *Id.* § 7422(f)(2). Moreover, because this is a tax refund case, the United States is the only party that can provide the relief Ms. Windsor seeks.

3. In light of these facts, *Amica* states the obvious: "The district court plainly had jurisdiction over Windsor's lawsuit." *Amica* Br. 23. For the reasons that follow, as long as the United States continues to withhold the taxes DOMA forced Ms. Windsor to pay on behalf of Dr. Spyer's estate, the appellate courts continue to have jurisdiction over her lawsuit.

II. The Executive Branch's Agreement With The Court Below That DOMA Is Unconstitutional Does Not Deprive This Court Of Jurisdiction To Decide This Case.

Ms. Windsor obtained a declaratory judgment against the United States holding DOMA unconstitutional as applied to her and ordering the United States to refund $363,053 in federal estate taxes unconstitutionally levied. Under these circumstances, the United States had standing to appeal to the Second Circuit and to seek review in this Court. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 445 (2009). The straightforward conclusion that the United States can seek this Court's review of the judgment entered against it is in no way undercut by the Executive Branch's motives for doing so. Its views on the constitutionality of DOMA do not alter the fact that this Court's "decision will have real meaning" for the parties in this case, and for Ms. Windsor in particular. *Chadha*, 462 U.S. at 939. Accordingly, this Court should reach the merits.

A. There Remains A Live Article III Case Or Controversy Between Ms. Windsor And The United States.

1. This case involves a concrete dispute between Ms. Windsor and the United States. Article III, Section 2, of the Constitution confers on the federal courts "'judicial Power' [for] the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). For purposes of determining whether such a case or controversy exists here, the two most instructive cases, as *Amica* acknowledges, are *INS v. Chadha*, 462 U.S. 919

(1983), and *United States v. Lovett*, 328 U.S. 303 (1946). *See Amica* Br. 25. In each case, this Court exercised jurisdiction to reach the merits of the constitutional challenge despite the fact that the Solicitor General agreed with the lower court's decision striking down the federal statute in question.

Chadha offers a particularly detailed analysis that shows why the lawsuit between Ms. Windsor and the United States remains a live case or controversy before this Court. *See Chadha*, 462 U.S. at 939-40. Chadha challenged a decision by the Immigration and Naturalization Service (INS) to reinstate deportation proceedings against him following a one-house "veto" of the Attorney General's earlier decision to suspend those proceedings. *See id.* at 927-28.

The Attorney General agreed with Chadha, both before the court of appeals and in this Court, that the statute providing for a one-house veto was unconstitutional. *See Chadha*, 462 U.S. at 928, 939. Before this Court, the House and Senate argued that, because Chadha and the INS took "the same position on the constitutionality of the one-House veto," there was no "genuine controversy." *Id.* at 939. This Court rejected that argument, explaining 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." *Id.* Thus, this Court "agree[d] 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 § 244(c)(2), the INS will execute its order and deport

him.'" *Id.* at 939-40 (quoting *Chadha v. INS*, 634 F.2d 408, 419 (9th Cir. 1980) (Kennedy, J.)). On this basis, the Court concluded that an Article III case or controversy was "present[]" in the case before it. *Id.* at 939.

For purposes of Article III adverseness, Chadha's case and Ms. Windsor's are indistinguishable. As in *Chadha*, a decision on the merits by this Court would have "real meaning." If this Court rules for Ms. Windsor, she will receive a $363,053 refund; if the Court upholds DOMA, the United States will keep the money.[5]

This Court's opinion in *Chadha* expressly relied on *Lovett* in reaching its conclusion that there was a live case or controversy before it. *Chadha*, 462 U.S. at 940. In *Lovett*, the Executive Branch declined to defend a provision of a congressional appropriations act that forbade salary payments to Lovett and two other government employees suspected of being subversives. 328 U.S. at 304-08. In a suit by the employees for back pay, the Court of Claims entered judgment against the United States – the sole defendant before it. The United States then sought review in this Court. Its petition for certiorari, which this Court granted, expressly reaffirmed the Attorney General's view that the statute was "unconstitutional," but asked the Court to grant review nonetheless because an "[a]uthoritative

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[5] A ruling in Ms. Windsor's favor would also provide her with binding precedent requiring the SSA to grant her application for survivors benefits. *See infra* p. 32.

decision by this Court" was "of the highest importance to the Government of the United States." Pet. Cert. 9, *Lovett v. United States*, 328 U.S. 303 (1946).

Lovett was not a case in which jurisdictional questions went entirely "unaddressed." *Amica* Br. 25 (internal quotation marks omitted). To the contrary, this Court was acutely aware that the case before it raised some questions of Article III justiciability, and it addressed those questions directly. *See Lovett*, 328 U.S. at 313-14. But no Justice so much as hinted that the Court lacked jurisdiction over the constitutional issue because the Executive Branch had agreed with the judgment of the court below.[6] Given the uncommon alignment of the parties, it is just not plausible that this Court would have overlooked a serious question about its jurisdiction. The best reading of *Lovett* is therefore that this Court "found the requisite case or controversy was not absent." *Chadha v. INS*, 634 F.2d at 420 n.9 (Kennedy, J.).

2. The Executive Branch's motivation for continuing to enforce DOMA against Ms. Windsor by withholding her refund has no bearing on the continued existence of this live case or controversy.

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[6] That silence is all the more telling given that Justice Frankfurter at oral argument vowed to "avoid the constitutional question" if he could do so "with intellectual integrity." 14 U.S.L.W. 3379, 3382 (1946). His solution was to urge that the case be decided on statutory grounds. *See Lovett*, 328 U.S. at 320 (Frankfurter, J., concurring). He never suggested that the Court lacked jurisdiction altogether.

This Court has long understood that the presence of a case or controversy turns on whether the plaintiff has obtained the relief she is seeking, and not on the defendant's view of the ultimate merits of the plaintiff's claim. As this Court explained in *In re Metropolitan Railway Receivership*, 208 U.S. 90, 107-08 (1908), "where there is a justiciable claim of some right," it is "not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it." This Court took the same approach in *Chadha*, observing that "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." 462 U.S. at 939. As then-Judge Kennedy stated in reaching the same conclusion, "it would be a perversion of the judicial process" to "dismiss[] [Chadha's] appeal for lack of adversity" because doing so "would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional." *Chadha v. INS*, 634 F.2d at 420.

The same analysis applies here. *Chadha* is merely one illustration of the general point that government defendants may be "happy to be sued and happier still to lose," *Horne*, 557 U.S. at 449 (internal quotation marks and citation omitted). That point goes to the scope of courts' remedial powers, *see id.* at 449-50, and not to the scope of their jurisdiction. This Court has never suggested that courts lack jurisdiction to enter judgments against government defendants that agree with an injured

plaintiff's claim on the merits. Whatever its reasons for doing so, the United States continues to withhold hundreds of thousands of dollars that Ms. Windsor contends are rightfully hers. That fact alone establishes an Article III case or controversy before this Court.

BLAG's participation in this case reinforces the presence of a live case or controversy here. As in *Chadha*, where Congress's participation before this Court assured that "concrete adverseness" was "beyond doubt," 462 U.S. at 939; *see also id.* at 931 n.6, so too here. BLAG's full participation in briefing and oral argument continues to "sharpen[] the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

3. *Amica*'s attempts to distinguish *Chadha* are unavailing.

First, *Amica* claims that this Court's finding of an Article III case or controversy between Chadha and the United States only "sustained the justiciability of the case in the Ninth Circuit," *Amica* Br. 27, and does not answer the question whether there was jurisdiction in this Court. *Amica*'s reading, however, cannot be reconciled with this Court's actual language. Three times, this Court used the word "we" in its discussion of why a "concrete controversy" existed: "*We* agree with the Court of Appeals" that "'if *we* rule for Chadha, he will not be deported; if *we* uphold § 244(c)(2), the INS will execute its order and deport him.'" *Chadha*, 462 U.S. at 939-40 (emphases added) (quoting *Chadha v. INS*, 634 F.2d at 419). Had this Court meant to restrict its analysis to the Ninth Circuit, it would not have

repeatedly used the first-person plural. Moreover, *Amica* does not explain why this Court would have addressed the Ninth Circuit's jurisdiction, while ignoring questions about its own, if in fact it had them. The only plausible reading of the Court's discussion, therefore, is that it was directed at the question whether this Court – and not just the Ninth Circuit – had jurisdiction to decide the case.

Amica is also incorrect in asserting that *Chadha* "did *not* decide . . . whether, without the intervenors, a sufficient case or controversy would have been present on appeal to this Court." *Amica* Br. 28 (emphasis in original). Again, a straightforward reading of *Chadha* undermines her argument. This Court squarely stated, "*prior to Congress' intervention*, there was adequate Art. III adverseness even though the only parties were the INS and Chadha." *Chadha*, 462 U.S. at 939 (emphasis added). That adverseness did not evaporate when the status of the House and Senate changed from that of *amici* to that of intervenors as the case advanced to this Court. Indeed, as this Court later explained, in *Chadha* there was "Art. III adverseness even though the two parties agreed on the unconstitutionality of the one-House veto." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9 (1993).

To be sure, "prudential, as opposed to Art. III, concerns" may exist when a case comes to this Court "in the absence of any participant supporting the validity of" a challenged statute. *Chadha*, 462 U.S. at 940. But just as those prudential concerns were "properly dispelled" in *Chadha* by the briefs filed by Congress, *id.*, those concerns are dispelled here by BLAG's participation. Whether or not the Executive

Branch's agreement with a lower court judgment implicates prudential concerns – and Ms. Windsor believes it does not, *see infra* pp. 31-35 – Article III poses no barrier to hearing this case.

4. *Amica*'s reliance on this Court's per curiam decisions in *Princeton University v. Schmid*, 455 U.S. 100 (1982), and *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), is also misplaced.

Amica herself acknowledges that *Schmid*, a case involving mootness, "is not on all fours" with this one. *Amica* Br. 30 n.18. At most, *Schmid* casts doubt on jurisdiction only when a party's refusal "to take a position on the merits" forces the Court to either "decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties." 455 U.S. at 102.

None of these difficulties exists here. Ms. Windsor, the United States, and BLAG have all taken positions on the merits. Like the INS and Chadha, the United States and Ms. Windsor are "adverse parties." *See supra* pp. 15-20. There is nothing "hypothetical" about Ms. Windsor's $363,053 refund claim or her application for the Social Security survivors benefits.

Nor does *Moore* support *Amica*'s argument. To be sure, this Court did observe there that when "both litigants desire precisely the same result" there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore*, 402 U.S. at 48; *see also Amica* Br. 31. But it did so in a singular context far removed from this case. As this Court has explained, *Moore* was an "ancillary proceeding" to the well-

known *Swann v. Charlotte-Mecklenburg* desegregation lawsuit. *N.C. State Bd. of Ed. v. Swann*, 402 U.S. 43, 44 (1971); *see Moore*, 402 U.S. at 47. Moore sued the Board in a separate action to prevent it from complying with the desegregation remedy that Swann had been seeking in his ongoing lawsuit against the Board. Without consolidating the two cases, a three-judge district court entered an order enjoining both Moore and the Board from enforcing or seeking to enforce North Carolina's anti-busing statute. *N.C. State Bd. of Ed.*, 402 U.S. at 44 n.2. Thus, as it arrived at this Court, *Moore* was essentially a case with two defendants against whom relief had been granted, but no plaintiff. This problem, although it resulted in Moore's appeal being dismissed for lack of adverseness, did not preclude the Court from reaching and adjudicating the underlying constitutional issue, which it did in a companion case (in which the Board participated). *See id.* at 44.

Finally, it bears mentioning that although the House of Representatives relied on *Moore* at every stage of its briefing in *Chadha*, *see* House Supp. Br. 71, 1982 U.S. S. Ct. Briefs LEXIS 1631; House Reply Br. 12-13, 1982 WL 607218; House Br. 47, 1981 WL 388493; House Mot. to Dismiss 24-25, 1981 U.S. S. Ct. Briefs LEXIS 1429, not a single Justice was persuaded that *Moore* undermined this Court's jurisdiction. This Court should once again reject that argument here. *See also* 20 Charles Alan Wright & Mary Kay Kane, *Federal Practice and Procedure Deskbook* § 13 nn.25-27 (2012) (distinguishing *Schmid* and *Moore* from *Chadha* for purposes of the Article III case or controversy requirement).

5. *Amica* recognizes that this Court has repeatedly granted review in cases where the Government has confessed error and therefore is seeking "precisely the same result" as the opposing party. *Amica* Br. 31 & n.19 (internal quotation marks omitted) (quoting *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 383 (1980)). *See generally* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting* Amici Curiae *to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011).

Amica contends, however, that "Government 'confession of error' is quite distinct" from the situation here. *Amica* Br. 31 n.19. She is mistaken. *Amica* conflates the question of adverseness under Article III with the question of appellate standing. With respect to adverseness, the only difference between confession of error cases and this case is the timing of the Government's change of position. There is no reason why that timing affects the nature of the relationship between the litigants. Whether the Executive Branch declined to defend DOMA before the district court, or it waited until the court of appeals, the certiorari stage, or even merits briefing, *see Millbrook v. United States*, No. 11-10362, is immaterial. The factor that preserves the ongoing case or controversy here is the United States' continuing enforcement of DOMA against Ms. Windsor.

Amica's observation that in confession of error cases "the parties seek to *undo* a judgment," while "here, the government *agrees* with the judgment below," *Amica* Br. 31 n.19 (emphases in original), goes not to the relationship between the litigants, but

to the distinct question of the United States' relationship to the judgment below. That is a matter of appellate standing, which as the next section of this brief explains, the United States satisfies.

B. Section 1254(1) And Ordinary Rules Of Appellate Practice Confirm That This Court Has Jurisdiction.

1. This Court reviews cases coming from the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), this Court held that the statute means what it says: Section 1254 "confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party.'" *Id.* at 2028 (emphasis in original) (quoting 28 U.S.C. § 1254(1)). The United States was undeniably a party to Ms. Windsor's lawsuit in both the district court and the court of appeals. That fact disposes of the question whether, as a matter of statutory construction, the United States can seek review in this Court. It can.

2. "[O]rdinary rules of appellate jurisdiction," *Amica* Br. 24, do not alter that conclusion. Once again, *Chadha* controls. There, this Court rejected the argument that the United States could not seek review in this Court because it was not an "aggrieved party." *Chadha*, 462 U.S. at 930. This Court offered two bases for its holding. First, the INS was "sufficiently aggrieved" because "the Court of Appeals decision prohibit[ed] it from taking action it would otherwise take" – namely, deporting Chadha. *Id.* Second, the INS was "an aggrieved party for purposes

of taking an appeal" because an "Act of Congress it administers" was "held unconstitutional." *Id.* at 931. Importantly, the "agency's status as an aggrieved party" was "not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.*

The same analysis governs this case. As in *Chadha*, although the Executive Branch may agree with the holding that the challenged statute is unconstitutional, the decision of the court of appeals prohibits the United States from taking action it would otherwise continue to take – here, enforcing DOMA by withholding the taxes collected from Dr. Spyer's estate and denying Ms. Windsor Social Security survivors benefits. And it goes without saying that DOMA, an Act of Congress that the United States administers through many different agencies (including, in Ms. Windsor's case, the IRS and the SSA), was held unconstitutional. The United States is therefore "sufficiently aggrieved" by the lower court's judgment.

3. *Amica* attempts to downplay this aspect of *Chadha* by claiming that the case "spoke only in statutory terms" applicable to the since-repealed 28 U.S.C. § 1252, which concerned this Court's mandatory jurisdiction. *Amica* Br. 26. That argument is unpersuasive. For purposes of deciding which parties are entitled to seek this Court's review, nothing distinguishes former Section 1252 from Section 1254(1). Both expressly confer that right on "any party."

The salient difference between Sections 1252 and 1254(1) does not concern who can seek review, but

rather whether this Court's exercise of review is mandatory or permissive. *Amica* claims that the "permissive" nature of Section 1254 "weighs in favor of hewing to prudential limits on the exercise of jurisdiction." *Amica* Br. 37. Even if that were true, it would be irrelevant in a case like this, where the need to resolve the constitutional question is manifest. The logic of the House Report that accompanied the legislation repealing Section 1252 is incompatible with *Amica*'s argument. That Report declared it "unlikely" that the contraction of this Court's mandatory jurisdiction would lead it to "deny review to important constitutional questions that merit its immediate attention." 100 H.R. Rep. No. 100-660, at 10 (1988). The class of litigants that could previously bring an appeal under Section 1252 would still, after repeal, be able to seek review of courts of appeals' decisions by petition for certiorari. The Report further explained that "the removal of direct appeal authority should not create an obstacle to the expeditious review of cases of great importance." *Id.* at 11. No one disputes the great importance of this case.

4. *Amica*'s reliance on *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), is similarly unavailing. *Amica* argues that the United States is not aggrieved because "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Amica* Br. 38 (quoting *Deposit Guar.*, 445 U.S. at 333). But in *Chadha*, this Court rejected an identical invocation of *Deposit Guaranty*. 462 U.S. at 930. There, Congress contended that because the INS had "already

received what it sought from the Court of Appeals" – namely, a holding that a statute permitting the one-house veto was unconstitutional – the agency was "not an aggrieved party." *Id.* In response, this Court flatly declared: "We cannot agree." *Id.*

It did so for good reason. *Deposit Guaranty* addressed the question whether *plaintiffs* who have been awarded the relief they sought nonetheless qualify as aggrieved parties for purposes of appeal. The answer to that question says nothing about whether – as in *Chadha* and here – a *defendant* against whom judgment has been entered may appeal.[7] Counsel are aware of no case in which a government defendant against whom judgment was entered has been denied the right to appeal on the grounds that it believed the adverse judgment was the correct legal result.

In any event, "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984). And in this case, there is no question that "judgment was entered against the United States." *Amica* Br. 39. First, it was ordered to pay hundreds of thousands of dollars to Ms. Windsor. How this one-way transfer from the U.S. Treasury to Ms. Windsor could mean that *both* parties "prevailed" in any legal sense is a mystery. Furthermore, an Act of Congress that the United

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[7] *Camreta*, by contrast, involved the very different question of whether a defendant, *in whose favor* judgment has been entered, may nonetheless appeal because he retains an interest in seeking review of a legal issue.

States administers with respect to hundreds of different federal programs was "held unconstitutional" – essentially the situation that led this Court in *Chadha* to hold that the Government was "an aggrieved party." 462 U.S. at 931. When a named defendant has a declaratory judgment entered against it, that defendant "has alleged a sufficiently 'personal stake in the outcome of the controversy' to support standing" to seek review of the lower court's judgment. *Horne*, 557 U.S. at 445 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). By any objective standard, then, the United States is an aggrieved party, entitled to seek review of the judgment against it.[8]

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[8] *Amica* claims that *Chadha* does not answer the question whether the United States has "Article III standing to appeal" in this case. *Amica* Br. 28. She then suggests that such standing is lacking because, with respect to the judgment below, "no 'injury' to the United States was 'caused' by that judgment, nor could this Court's overturning of that judgment provide 'redress.'" *Id.* 31.

Amica is wrong. Her discussion confuses the requirements a *plaintiff* must show to invoke the judicial power of the United States in the first place, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), with the quite different standard applicable to a *defendant* against whom the judicial power has been exercised and judgment has been entered. Although the words "injury," "caused," and "redress" appear in quotation marks, the brief provides no supporting authority for the proposition that Article III imposes injury, causation, and redressability requirements on defendants seeking to appeal. The question with respect to standing to appeal is not whether a defendant against whom judgment has been entered can show an "injury" from the lower court's judgment (as a plaintiff must show an "injury traceable to the defendant," *Lewis v. Cont'l*

Amica would have this Court fashion "more common-sense standards for determining who is a prevailing party." *Amica* Br. 40. But common sense confirms the wisdom of the existing bright-line rule: a party prevails when a court "materially alters the legal relationship between the parties" in a manner that "directly benefits" the party in question. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (internal quotation marks omitted) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). In this case, that definition makes Ms. Windsor, not the United States, the prevailing party. Accordingly, the Executive Branch's agreement with the court below that DOMA is unconstitutional in no way forecloses the United States from obtaining review in this Court.[9]

Bank Corp., 494 U.S. 472, 477 (1990)), but rather, as *Chadha* makes clear, whether the defendant can show that it is "aggrieved" by the judgment, 462 U.S. at 930. As the preceding discussion shows, the United States is an aggrieved party, and in any event that requirement "does not have its source in the jurisdictional limitations of Art. III," *Deposit Guar.*, 445 U.S. at 333-34.

[9] For the reasons outlined above, *see supra* pp. 15-29, *Amica*'s suggestion that "any government appeal from the District Court is barred," *Amica* Br. 33 n.22, is also misplaced. The Article III case or controversy analysis is identical at both stages. Moreover, the relevant jurisdictional statute was satisfied here because that statute gives the courts of appeals "jurisdiction of appeals from *all* final decisions of the district courts." 28 U.S.C. § 1291 (emphasis added). Finally, the United States was aggrieved by the district court's judgment against it for the same reasons it was aggrieved by the Second Circuit's affirmance of that judgment.

C. Prudential And Practical Concerns Strongly Favor This Court Exercising Its Jurisdiction Here.

It is axiomatic that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Thus, this Court rarely delays reviewing cases where congressional statutes have been declared unconstitutional. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010). Doing so is necessary to avoid the confusion that inevitably arises from differing lower court decisions.[10]

1. There are particularly strong reasons for this Court to reject *Amica*'s suggestion that it leave the question of DOMA's constitutionality undecided to

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[10] *Amica* points to no instance in which this Court has denied the Solicitor General's request to review a lower court decision striking down a federal statute as unconstitutional. Counsel for Ms. Windsor are aware of just two. *FCC v. Action for Children's Television*, 503 U.S. 914 (1992), was both interlocutory in posture and presented a real likelihood of an equally divided court, given that then-Judge Thomas was on the panel below. *Mukasey v. ACLU*, 555 U.S. 1137 (2009), was a case where this Court had already affirmed the grant of a preliminary injunction barring enforcement of the challenged statute on First Amendment grounds. Those two cases are a far cry from this one.

allow for more "time and reflection in the lower courts." *Amica* Br. 38.

First, "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011); *see Camreta*, 131 S. Ct. at 2033 n.7. So even a raft of decisions striking down DOMA as applied to particular plaintiffs would leave thousands of similarly situated people unprotected until the relevant courts of appeals have ruled. *See* Br. of *Amici Curiae* Former Senior Justice Department Officials et al. And until then, individuals and couples may be forced to litigate each discrete claim for equal treatment separately.

Ms. Windsor's predicament illustrates this very point. If this case were unwound back to the district court's judgment, it is unclear whether that judgment would bind the Government with respect to Ms. Windsor's ongoing Social Security claim. Collateral estoppel is available against the United States in only limited circumstances. *See United States v. Mendoza*, 464 U.S. 154, 162-64 (1984). Ms. Windsor obtained the existing judgment in her capacity as executor of Dr. Spyer's will, J.A. 173, but in seeking her Social Security survivors benefits, she would be proceeding in her individual capacity. She might therefore be forced to relitigate DOMA's constitutionality because "[a]cts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) (internal quotation marks and citation omitted).

Second, leaving DOMA's constitutionality to the courts of appeals poses its own set of problems for married gay couples. It may well take years for "a uniform rule" to emerge. *Amica* Br. 38. And absent this Court's intervention, uniformity may never come. In the meantime, married gay couples will continue to be denied equality under the law and essential government benefits that all other married couples can depend on. *See* Br. of *Amici Curiae* Empire State Pride Agenda et al. (highlighting some of the burdens DOMA imposes on married gay couples). *Amica* provides no persuasive argument why the speculative benefits of further percolation outweigh the quite tangible harms that DOMA inflicts every day.

2. The Executive Branch's decision to enforce but not defend DOMA was expressly designed to ensure that this Court would remain "the final arbiter of the constitutional claims raised" in Ms. Windsor's case. J.A. 192. Any suggestion that the Executive Branch should stop enforcing DOMA now that two courts of appeals and several district courts have held the statute unconstitutional ignores the difficulties that course of action would pose for tens of thousands of people. Indeed, it is a misnomer even to speak of "enforcing" or "declining to enforce" DOMA. Because DOMA cuts across a wide swath of federal law, "non-enforcement" in many instances would actually require government officials to take affirmative steps.

Even within the Executive Branch itself, "non-enforcement" raises a host of difficult issues. For example, the Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S.

Const. art. I, § 9, cl. 7. Similarly, the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1350, dictates that "[i]f an executive officer on his own initiative had decided that, in fairness, [a claimant] should receive benefits despite [a] statutory bar, the official would risk prosecution." *OPM v. Richmond*, 496 U.S. 414, 430 (1990). It is therefore unclear whether the Executive Branch could decide unilaterally to provide married gay couples with the federal benefits from which DOMA undeniably excludes them or whether "non-enforcement" would nevertheless require those couples to continue litigating to secure their right to equal treatment.[11]

Even if the Executive Branch could unilaterally start cutting checks from the U.S. Treasury, "non-enforcement" would do absolutely nothing to resolve the daily quandaries confronting married gay couples and the government actors outside the Executive Branch with whom they deal. DOMA affects every branch of the federal government, including Congress, the Judiciary, and independent agencies. Consider just a few examples:

- House Rules require a Member to prohibit "lobbying contact" between the Member's "spouse" and the Member's staff. House Rule XXV, cl. 7 (rev. Jan. 3, 2013), *available at* http://tinyurl.com/House-Rules113thCong. If

[11] Once a federal court has issued an order requiring that benefits be provided, the Government may, through the Judgment Fund, *see* 28 U.S.C. § 2414; 31 U.S.C. § 1304(a), issue payments that the Appropriations Clause or the Anti-Deficiency Act might otherwise have prohibited.

DOMA controls, could a married Representative direct his staff to meet with his male spouse to discuss pending legislation if his spouse is a lobbyist?

- The rules for admission to the Supreme Court Bar provide that an applicant-attorney must have two sponsors who are "not related to [the applicant] by blood or marriage." Supreme Court of the United States, *Instructions for Admission to the Bar*, *available at* http://tinyurl.com/afb24er (last visited Feb. 18, 2013). Could an attorney sponsor her female spouse for admission to this Court's Bar?
- The Federal Election Commission, an independent agency, has promulgated a regulation permitting the use of campaign funds to pay for the "costs of travel by the recipient Federal officeholder and an accompanying spouse." 11 C.F.R. § 113.2(a)(1). Could a married Senator be prohibited from using campaign funds to bring her female spouse with her on a trip?

In the absence of a definitive determination from this Court, married gay couples, government officials, and other actors whose behavior is affected by DOMA cannot rely on the Attorney General's views about the statute to resolve any of these questions. *See* Br. of *Amici Curiae* New York et al. In short, prudential considerations cut decisively in favor of this Court resolving the constitutionality of DOMA, and resolving it now.

III. Because Ms. Windsor Has A Cause Of Action Only Against The United States, Whether BLAG Has Independent Article III Standing Does Not Affect This Court's Jurisdiction.

1. Given the nature of Ms. Windsor's cause of action, the United States is an indispensable party defendant in this case. With respect to Ms. Windsor's cause of action for a tax refund, federal law requires the claimant to file suit against the United States – and permits her to sue no one else, including BLAG. *See* 26 U.S.C. § 7422(f)(1). And in general, "the proper defendant in a suit for prospective relief is the party prepared to enforce the relevant legal rule against the plaintiff." *Camreta v. Greene*, 131 S. Ct. 2020, 2043 (2011) (Kennedy, J., dissenting). Thus, with respect to her claim for the $363,053 refund, Ms. Windsor was required to sue the United States, not BLAG.

Moreover, Ms. Windsor has never had any legally cognizable cause of action against BLAG for prospective or injunctive relief. Here, too, because her injuries are caused by the action of Executive Branch officials (in the IRS or SSA), Ms. Windsor is required to sue the United States or the relevant officials, and not the five members of the House leadership who constitute BLAG. In short, because BLAG did not cause Ms. Windsor's injury and could not provide her with redress, Ms. Windsor could not have sued it, even assuming that BLAG is a legal entity subject to suit. *Cf. Barnes v. Kline*, 759 F.2d 21, 67 (D.C. Cir. 1984) (Bork, J., dissenting) (explaining that in *Chadha*, Congress functioned more like an *amicus curiae* than a party, as "[n]o judgment could be entered against Congress"),

vacated on other grounds sub nom. Burke v. Barnes, 479 U.S. 361 (1987).

2. Nor, of course, could BLAG have sued Ms. Windsor. Counsel are aware of no lawsuit in which a group of elected officials has been permitted to pursue a declaratory judgment action against a private individual in order to obtain a ruling on the constitutionality of a statute it supports. *See* Brief For *Amici Curiae* Former Senior Justice Department Officials et al.; *cf. Camreta*, 131 S. Ct. at 2043 (Kennedy, J., dissenting) (suggesting that the party there was "in effect fil[ing] a new declaratory judgment action in this Court").

In light of this reality, BLAG can at most be an intervenor in an ongoing lawsuit between Ms. Windsor and some other party – in this case, the United States. As such, BLAG's independent Article III standing is irrelevant to this Court's ability to adjudicate this case.

3. The United States' continuing presence as a party means that BLAG can assert "piggyback" standing without regard to Article III. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). In *Diamond*, the State of Illinois did not appeal a decision striking down its abortion law, but a doctor who had intervened in the lower court proceedings did. *Id.* at 61. This Court rejected the doctor's claim that he had independent Article III standing. *Id.* at 56. But it nonetheless confirmed that, had Illinois sought review, "this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below," also would have been "entitled to seek review, enabling him to file a brief on the merits, and to seek leave to

argue orally." *Id.* at 64. The Court further explained that "this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." *Id.* The same principles apply here. Because the United States sought certiorari, BLAG can participate fully in the proceedings before this Court, regardless of whether it has independent Article III standing.

4. Whether BLAG would have had independent Article III standing if the United States had not petitioned for certiorari is a counterfactual question that this Court need not answer. Indeed, because of controlling Second Circuit precedent, neither court below found it necessary to resolve the nature of BLAG's standing.[12] This Court should reserve the question for another day, when answering it would actually affect this Court's ability to reach the merits.

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[12] Along with the Fifth, Sixth, Tenth, and Eleventh Circuits, the Second Circuit has held that intervening parties need not establish independent standing so long as there is an Article III case or controversy between the original plaintiff and the original defendant. *See U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998); *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991); *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007); *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007). This position conflicts with the view of the District of Columbia and Seventh Circuits. *See Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996).

CONCLUSION

For the foregoing reasons, this Court should hold that it has jurisdiction to decide whether DOMA violates the Fifth Amendment.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

James D. Esseks
Joshua A. Block
Leslie Cooper
Steven R. Shapiro
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004

Roberta A. Kaplan
Counsel of Record
Walter Rieman
Jaren Janghorbani
Colin S. Kelly
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
LLP
1285 Avenue of the
Americas
New York, NY 10019
(212) 373-3000
rkaplan@paulweiss.com

Arthur Eisenberg
Mariko Hirose
NEW YORK CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004

February 22, 2013

APPENDIX A

SOCIAL SECURITY ADMINISTRATION
NOTICE OF RECONSIDERATION

[Caption Omitted in Printing]

EDITH SCHLAIN WINDSOR

[address redacted]

You asked us to take another look at your claim for Social Security widow's benefits. Someone who did not make the first decision reviewed your case, including any new facts you gave us. After this review, we found that our first decision was correct.

You are not entitled to benefits because you do not meet the marriage requirements to be entitled to widow's benefits.

On the enclosed form, we discuss the reasons for our decision in more detail.

Do You Disagree With The Decision?

If you disagree with the decision, you have the right to request a hearing. At the hearing, a person who has not seen your case before will look at it. That person is an Administrative Law Judge. The judge will review your case again and consider any new facts you have.

- You have 60 days to ask for a hearing.
- The 60 days start the day you receive this letter. We assume you got this letter 5 days after the date on it, unless you show us that you did not get it within the 5-day period.

- You must have a good reason if you wait more than 60 days to ask for a hearing.
- You have to ask for a hearing in writing. We will ask you to fill out a Form HA-501, called "Request for Hearing." If you want to make a request, please contact one of our offices. We can help you fill out the form.

Please read the enclosed pamphlet, "Your Right to an Administrative Law Judge Hearing and Appeals Council Review of Your Social Security Case." It contains more information about the hearing.

There is a different way to appeal if you think the Social Security law is not constitutional. It is called expedited appeal. If you choose expedited appeal, after an agreement is signed by you and by our representative, you can go directly to court for a decision about whether the law is constitutional. The Social Security Administration cannot make that decision. Only the court can decide if the law is constitutional. Social Security will not make any other appeal decision about your claim for benefits if you choose an expedited appeal.

If you want to use this appeal or have any questions, you should contact any Social Security office within 60 days to file a written request.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with this decision and you file a new application instead of appealing:

- you might lose some benefits, or not qualify for any benefits, and
- we could deny the new application using this decision, if the facts and issues are the same.

So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

We invite you to visit our website at www.socialsecurity.gov on the Internet to find general information about Social Security. If you have any specific questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-866-335-1089. We can answer most questions over the phone. If you are deaf or hard of hearing, you may call our TTY number, 1-800-325-0778. You can also write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
ROOM 120 31ST FLOOR
26 FEDERAL PLAZA
NEW YORK, NY 10278

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

Social Security Administration

RECONSIDERATION DETERMINATION

(Form SSA-662)

PROGRAM SERVICE CENTER	DISTRICT OFFICE OR BRANCH OFFICE
Processing Center Operations Northeastern Program Service Center	Downtown NY, NY
NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON	SOCIAL SECURITY CLAIM NO.
Thea C Spyer	[redacted]
NAME OF CLAIMANT	TYPE OF CLAIM
Edith Schlain Windsor	Widow's Insurance Benefits

DETERMINATION:

On November 15, 2011 [sic], you applied for widow's insurance benefits and the lump sum death payment, on the record of Thea C Spyer, who died February 5, 2009. On or about April 22, 2011 you were told that your claim had been disallowed because you do not meet the marriage requirements for widow's benefits, or the lump sum death payment. On June 15, 2011, you asked for reconsideration stating that the Defense of Marriage Act and Social Security law violate the United States Constitution.

The issue to be decided is whether or not you are entitled to widow's insurance benefits, and the lump

sum death payment on the record of Thea C Spyer. This depends on whether you meet the requirements for entitlement under the Social Security Act and the regulations of the Social Security Administration.

Section 202(e)(1) of the Act permits entitlement of a widow (as defined in Section 216(c) whose spouse died fully insured if she:

(1) is unmarried, and

(2) has attained

(a) age 60, or

(b) age 50 and is disabled, and

(3) (a) filed a widow's benefit application, or

(b) meets one of the exceptions to filing, and

(4) is not entitled to a benefit amount on her own record which equals or exceeds the insured's primary insurance amount.

Section 216(c) indicates that a woman qualifies as a widow only if the marriage lasted at least nine months before the insured died.

Section 202(i) of the Social Security Act, as amended in 1981, provides that upon the death of a fully or currently insured individual who dies on or after September 1, 1981, $255.00 shall be paid in a lump-sum to the person, if any, determined by the Secretary to be the widow or widower of the deceased and to have been living in the same household as the deceased at the time of death.

If there is no such person, or if such person dies before receiving payment, then such amount is to be paid in the following order of priority:

(1) To the widow or widower, other than a divorced spouse, who is entitled to benefits (or would have been so entitled had a timely application been filed) as a widow, widower, mother or father, based on the earnings record of the deceased individual for the month of death.

(2) In equal shares, to each child who is entitled to benefits (or would have been so entitled had a timely application been filed) based on the earnings record of the deceased individual for the month of death.

The Social Security Act provides that an individual is the insured's widow or widower if she or he:

- is considered validly married to the insured under State law, or
- is not validly married but has the same status as a spouse to share in the insured's intestate personal property, or
- meets the requirements of the Federal deemed marriage provision.

Individuals who are free to marry each other may enter into a valid marriage under the law of all States.

Public Law 104-199, Section 2, amends Chapter 115 of title 28, United States Code by adding Sec. 1738C after Sec. 1738B:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is

treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.' .

Public Law 104-199, Section 3, amended Chapter 1 of title 1, United States Code by adding the following definition of 'marriage' and 'spouse':

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage' means only a legal union between one man and one woman as husband and wife, and the word spouse' refers only to a person of the opposite sex who is a husband or a wife.' .

Section 216(a)(1) of the Act states: The term "spouse" means a wife as defined in subsection (b) or a husband as defined in subsection (f).

Section 216(a)(2) of the Act states: The term "surviving spouse" means a widow as defined in subsection (c) or a widower as defined in subsection (g).

Section 202(e) of the Social Security Act provides for the payment of monthly benefits to an otherwise qualified woman who meets the legal status requirement as widow under Section 216(h)(1) of the Act.

Section 216(h)(1)(A) of the Social Security Act provides that a claimant is the spouse of a worker for purposes of Social Security benefits if, under the law of the state of the worker's domicile at the time of death, the claimant would be considered the worker's spouse or would have the same status as spouse for

purposes of inheriting personal property in the event the worker left no will.

When you applied for widow's benefits, and the lump sum death payment, on the record of Thea C Spyer, you presented your marriage certificate issued October 28, 2010, which indicated you married Thea C Spyer on May 22, 2007 in Toronto Canada. You also submitted a death certificate for Thea C Spyer, which verified her date of death as February 05, 2009 and listed you as the surviving spouse of the deceased.

You do not qualify for benefits as the surviving spouse of Thea C Spyer, or the lump sum death payment, because you do not meet the definition of a widow as defined in the Social Security Act. A widow by definition is the surviving spouse of a deceased wage earner; a spouse by definition is someone of the opposite sex who is a husband or a wife. Although your marriage to Thea C Spyer is considered valid in Canada and in the state of her domicile at the time of death, Federal Regulations define the term marriage as: a legal union between one man and one woman as husband and wife. In your request, you state that you should be awarded benefits because the Defense of Marriage Act, and Social Security law violates the United States Constitution. We are not permitted to make judgment regarding the constitutionality of the law at this level of your request, and we must follow the law as written.

Accordingly, upon reconsideration, the initial determination is affirmed. The initial determination is correct and proper and in accordance with the pertinent provisions of the law and regulations.

Authority: Section (s) 202(e), 202(i), and 216 of the Social Security Act. Public Law 104-199 Section (s) 2 and 3.

Social Security Administration

April 28, 2012

Enclosure(s):

Form SSA-662

SSA Pub No 70-10281

APPENDIX B

WRITTEN REQUEST FOR EXPEDITED APPEAL

Claimant:	Edith S. Windsor
Claimant's SSN:	[redacted]
Wage Earner:	Thea C. Spyer
Wage Earner's SSN:	[redacted]

Pursuant to 20 C.F.R. §§ 405.701–405.725 (attached as Tab 4), Edith S. Windsor hereby requests expedited appeal of her claim for survivors benefits (including widow's insurance benefits and the lump-sum death benefit). On April 28, 2012, the Social Security Administration (the "SSA") rejected Ms. Windsor's request for reconsideration. A copy of this rejection letter is attached as Tab 3.

Ms. Windsor does not dispute the findings of fact or the interpretation of the controlling law by the SSA. However, Ms. Windsor believes, consistent with her prior correspondence with the SSA (attached as Tab 2), that Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), and (insofar as it precludes a surviving spouse of a same-sex married couple from qualifying as a surviving spouse or widow) Social Security law violate the United States Constitution. Indeed, since Ms. Windsor filed her request for survivors benefits, every federal circuit, district, or bankruptcy court to have considered this issue in the non-immigration context has agreed that DOMA is unconstitutional for the very reasons asserted by Ms. Windsor. *See Massachusetts* v. *Dep't of Health and*

Human Servs., *Gill* v. *Office of Pers. Mgmt.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. May 31, 2012); *Dragovich* v. *Dep't of Treasury*, No. C 10-1564 (CW), 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski* v. *Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011). Because DOMA is the only reason that Ms. Windsor was denied these SSA benefits to which she is otherwise entitled, she respectfully submits that her request for an expedited appeal should be granted.

Please copy Colin S. Kelly, Ms. Windsor's attorney, on all correspondence with Ms. Windsor. A copy of Form SSA-1696-U4 (Appointment of Representative) is attached in Tab 2.

* * *

I declare under penalty of perjury that I have examined all the information in this written request, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Date: June 05, 2012 *Edith S. Windsor*
Edith S. Windsor (Claimant)
[redacted]

Colin S. Kelly
Colin S. Kelly (Attorney)
Paul, Weiss, Rifkind, Wharton
& Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel. No.: (212) 373-3961
Fax No.: (212) 492-0961

APPENDIX C

Form Approved
OMB No. 0960-0045

SOCIAL SECURITY ADMINISTRATION
STATEMENT OF CLAIMANT OR OTHER PERSON

Name of Wage Earner, Self-Employed Person, or SSI Claimant Thea Spyer	Social Security Number [redacted]
Name of Person Mating Statement (if other than above wage earner, self-employed person, or SSI claimant) Edith Windsor	Relationship to Wage Earner, Self-Employed Person, or SSI Claimant SurSpo
Understanding that this statement is for the use of the Social Security Administration, I hereby certify that –	
1. EAP Requirements	
For the EAP to apply, all of the following requirements must be met:	
A formal decision at the reconsideration level or higher has been made.	
The EAP request is in writing.	
The written request was filed timely, that is:	
Within 60 days from date of receipt of the notice of determination or decision, unless good cause for late filing is found (GN 03101.020), or	

After filing a timely request for a hearing or Appeals Council (AC) review but prior to a decision having been issued.
The claimant is willing to enter into a written agreement with SSA in which he/she concedes that:
SSA's determination or decision was correct based on the law and the facts in the case; and
The law, or a specific section of the law applicable in his/her case, is unconstitutional, and
The adverse determination or decision is due solely to the unconstitutionality of the law which SSA followed, or
The constitutional issue is the sole issue precluding the individual from receiving benefits or receiving a favorable determination in a nonclaim earnings discrepancy case. 1. Claimant's Written Statement
If, after explaining the requirements, the claimant decides to proceed with EAP, then the FO will:
Obtain a signed statement indicating that he/she:
Received an explanation of EAP.
Agrees that the requirements in GN 03107.100D.1. are met; and
Wishes to enter into an EAP agreement.

* * *
Paperwork Reduction Act Statement – This information collection meets the requirements of 44 U.S.C. §3507, as amended by Section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 15 minutes to read the instructions, gather the facts, and answer the questions. **SEND THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE. The office is listed under U. S. Government agencies in your telephone directory or you may call Social Security at 1-800-772-1213**. *You may send comments on our time estimate above to: SSA, 1338 Annex Building, Baltimore, MD 21235-0001.* ***Send only comments relating to our time estimate to this address, not***
I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.
SIGNATURE OF PERSON MAKING STATEMENT

Signature *(First name, middle initial, last name) (Write in ink)* Sign Here> *Edith S. Windsor*	Date *(Month, day, year)* August 9, 2012 Telephone Number *(include Area Code)* [redacted]
Mailing Address *(Number and street, Apt. No., P.O. Box, Rural Route)* [redacted]	
City and State New York, NY	ZIP Code [redacted]
Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the individual must sign below, giving their full addresses.	

1. Signature of Witness	2. Signature of Witness
Address *(Number and street, City, State and ZIP Code)*	Address *(Number and street, City, State and ZIP Code)*

NEW YORK, N.Y.
Jul 18 2012
21100
SSA FIELD OFFICE