No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondents.

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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER (Jurisdictional Questions)

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

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INTEREST OF THE *AMICI CURIAE*

Amici are professors of law who teach and write about constitutional law and in addition served in the Department of Justice at earlier points in their careers. They have substantial expertise in litigation regarding the constitutionality of federal statutes from both the academic and practical perspectives. Their legal expertise thus bears directly on the question posed by the Court regarding the effect upon the Court's jurisdiction of the Executive Branch's view that the Defense of Marriage Act is unconstitutional.[1] *Amici* are:

- Rebecca L. Brown, Newton Professor of Constitutional Law, University of Southern California Gould School of Law;
- Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia Law School;
- David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School; and
- Amy Wax, Robert Mundheim Professor of Law, University of Pennsylvania Law School.[2]

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

[2] Institutional affiliations are provided for identification purposes only.

SUMMARY OF ARGUMENT

Amici do not necessarily agree regarding the appropriateness of the President's decision not to defend the constitutionality of the Defense of Marriage Act ("DOMA") or regarding the correct resolution of that constitutional question. They also may hold different views regarding the question posed by the Court regarding the standing of the Bipartisan Legal Advisory Group. But *amici* do all agree that where, as here, the President has directed the Executive Branch to continue to abide by a challenged statute in the absence of a contrary court order, the President's view that the statute is unconstitutional does not affect this Court's jurisdiction to address the merits of the constitutional question.

The Court-appointed *Amica*'s contrary position rests on her view that if the United States is sued in an action challenging the constitutionality of a federal law and agrees with the plaintiff that the statute is invalid, and the trial court so rules, then there is no continuing case or controversy by reason of any interest of the United States in obtaining a ruling from a higher court to resolve definitively the question of the statute's constitutionality. That novel and restrictive view of this Court's authority to resolve constitutional questions would impose new and very substantial burdens on private parties affected by a challenged law; on third parties obligated to take different actions depending on whether a challenged law is upheld; on the federal courts' dockets; and on the nation as a whole.

For example, review by a court of appeals or by this Court could be had only if a district court upheld the statute—the availability of a definitive decision regarding the statute's validity would therefore be

completely unpredictable. In the absence of a definitive appellate determination, moreover, each private party adversely affected by the challenge statute likely would have to file his or her own claim, and each of those claims would have to be determined by the federal district courts—imposing significant litigation costs on those private parties, significant burdens on the federal judiciary, and significant costs on the federal government, which would be forced to litigate these cases and could face significant liability for attorneys' fees under applicable fee-shifting statutes.

The burdens produced by *Amica*'s approach would also extend to third parties whose obligations turn upon the validity of the federal law. Here, for example, employers' own tax obligations as well as their obligations with respect to employees under federal tax and pension laws turn on whether an employee is married for purposes of those federal statutes, which in turn depends on the validity of the DOMA. Employers will incur significant additional costs in administering these requirements if the rules applicable to same-sex married couples depend on whether each affected individual has obtained a final judicial determination in an action challenging the statute's constitutionality.

In the absence of a definitive ruling, moreover, the chain of litigation—and resulting burdens—would extend into the future when, as here, the affected class of private individuals continues to increase over time. Acceptance of *Amica*'s legal rule would thus produce very significant adverse practical consequences when a President forthrightly states his view that a statute is unconstitutional but takes

the position that the final determination of the statute's validity should be made by the courts.

The other options available to a President—simply ordering the Executive Branch to stop enforcing the statute or concealing his view regarding the statute's validity and mounting only a limited defense of the statute in court—carry even more disturbing consequences. The former approach prevents individuals burdened by the challenged statute from obtaining a permanent determination of their rights: they would be unable to proceed in court notwithstanding the fact that a future President could conclude that the law is constitutional and seek to enforce it against them. And the latter approach would pose a significant threat to the adversary system as the President's concealed concerns about the constitutionality of the statute could compromise his defense of the statute.

There is no warrant for risking any of these adverse practical consequences—longstanding precedent, in particular this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983)—makes clear that the Executive Branch's position in court regarding the constitutionality of a statute does not deprive a court of the power to address that legal question as long as the President has instructed the Executive Branch to comply with the statute in the absence of a court order requiring otherwise. This Court accordingly has jurisdiction to address the question regarding the constitutionality of DOMA presented in this case.

ARGUMENT

The Case-Or-Controversy Requirement Is Satisfied When The United States Is A Party To An Action Challenging The Constitutionality Of A Federal Statute.

The President's obligation to "preserve, protect and defend the Constitution of the United States," embodied in the oath of office specified in the Constitution (Art. II, § 1, cl. 8)—as well as his duty to "take Care that the Laws be faithfully executed" (Art. II, § 3, cl. 4)—can compel a President to determine that a statute so plainly violates the Constitution that he cannot in good faith defend its validity. Presidents have reached that conclusion with respect to federal statutes, albeit infrequently, throughout our history.[3]

Indeed, Congress expressly recognized this reality by enacting a statute requiring that it be informed when the President or his subordinates decline to enforce or to defend a federal statute because of the Executive Branch's view that the enactment is unconstitutional. 28 U.S.C. § 530D(a)(1)(A)-(B). See also Act of Nov. 9, 1978, Pub. L. 95-624, § 13(a), 92 Stat. 3459, 3464 (predecessor provision). Notifications to Congress have been provided with respect to 80 separate statutory provisions pursuant to this obligation.[4]

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[3] Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507, 514-19 (2012) (describing this history).

[4] *Id*. at 561; information obtained by counsel from the Office of Senate Legal Counsel.

In some circumstances, the Executive Branch has not complied with, or has declined to enforce, certain statutes on the ground that they are unconstitutional. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52 (1926); *Lear Siegler, Inc., Energy Prods. Div.* v. *Lehman,* 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc).[5]

The Executive Branch also has—as here—continued to comply with certain statutes while taking the position in court that the measures violate the Constitution. See, *e.g.*, *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990) (preference for racial minorities seeking broadcasting licenses); *Morrison* v. *Olson*, 487 U.S. 654 (1988) (independent counsel); *INS* v. *Chadha*, 462 U.S. 919 (1983) (legislative veto); *United States* v. *Lovett*, 328 U.S. 303 (1946) (statute prohibiting payments to specified government officials).[6]

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[5] See also Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 977 (1994) (between 1789 and 1981, Presidents refused to enforce provision they deemed unconstitutional in 20 instances); Letter from Paul Clement, Acting Solicitor Gen., U.S. Dep't of Justice, to Patricia Mack Bryant, Senate Legal Counsel, U.S. Senate (Dec. 23, 2004), *available at* http://-tinyurl.com/co8hc2g (funding condition set by Congress requiring the Washington Metropolitan Area Transit Authority to reject an advertisement that promoted the legalization of marijuana).

[6] See also U.S. Br. on Jurisdictional Questions at 9 (listing cases): White House Press Briefing by Counsel to the President Jack Quinn and Asst. Att'y Gen. Walter Dellinger (Feb. 9, 1996), http://tinyurl.com/cj2sw9l (amendment to the 1996 military appropriations bill, which required the Department of Defense to dismiss from the military service members who were HIV positive).

This Court's resolution of the jurisdictional question that it has posed in this case therefore will have an impact far beyond the litigation regarding the particular statute challenged here. It will affect the options available to future Presidents confronted with other unconstitutional enactments, as well as the ability of private parties burdened by those statutes and third parties who bear consequential burdens from uncertainty regarding the statutes' validity to obtain relief from those burdens effectively and efficiently.

The court-appointed *Amica* contends that if the United States is sued in an action challenging the constitutionality of a federal law and agrees with the plaintiff that the statute is invalid, and the trial court so rules, then there is no continuing case or controversy by reason of any interest of the United States in obtaining a ruling from a higher court to resolve definitively the question of the statute's constitutionality. This restrictive view of this Court's authority to resolve constitutional questions is contrary to this Court's precedents and, if adopted by the Court, would have dramatic practical consequences, consequences that *Amica* does not address. By significantly reducing the ability of federal appellate courts, and in particular this Court, to decide the constitutionality of federal statutes, *Amica*'s proposed legal rule would impose new and very substantial burdens on private parties affected by a challenged law; on third parties obligated to take different actions depending on whether a challenged law is upheld; on the federal courts' dockets; and on the nation as a whole.

There is no reason to impose these burdens—*Amica*'s legal argument is foreclosed by this Court's

decision in *Chadha*, and her attempts to distinguish that holding are unconvincing. This Court plainly has jurisdiction to adjudicate the constitutional challenge to DOMA presented here.

A. Holding That The United States' Presence As A Party Is Not Sufficient To Satisfy Article III Would Produce Severe Adverse Practical Consequences.

When a President is confronted with a federal law that he deems unconstitutional but that has not definitively been held unconstitutional by the courts, the President has three basic choices. First, he can direct the Executive Branch to continue to enforce the statute while advocating the statute's invalidity in judicial proceedings brought by third parties. Second, he can direct the Executive Branch not to enforce the statute. Third, he can direct the Executive Branch to enforce the statute but order the Department of Justice to present only a limited defense of the statute in court.

If *Amica*'s legal position were adopted, there would be numerous circumstances in which it simply would not be possible to obtain a definitive judicial determination of a federal statute's constitutionality when the Executive Branch takes the position that the statute is invalid. The resulting uncertainty and, possibly, need for the filing and adjudication of hundreds if not thousands of duplicative lawsuits, would impose significant burdens on parties injured by the unconstitutional statute; on the government, which would be forced to defend such actions; on the courts; and on numerous third parties. It also carries a substantial risk of reducing public confidence in the legitimacy of federal government actions.

1. Option #1: If the President Were to Continue to Enforce The Statute In the Absence of a Court Order Barring Enforcement Against a Particular Party.

Presidents in the past have often chosen to continue to enforce a statute they believe to be unconstitutional, leaving the courts—and ultimately this Court—to determine authoritatively the measure's validity. *Amica*'s legal theory would erect practically insuperable barriers to obtaining such a judicial determination and, as a result, impose significant new burdens on private parties adversely affected by the challenged statute.

First, whether or not the constitutionality of a statute could ever be addressed by an appellate court or by this Court would depend entirely on district courts' disposition of actions challenging the statute's validity. To the extent (as here) that district courts found the statute unconstitutional, further review would be precluded under *Amica*'s approach. Only if a district court upheld the statute would a court of appeals have the power to address the constitutional issue, and only if a court of appeals upheld the statute could the question be addressed by this Court.

Availability of review by this Court—and a conclusive decision regarding the constitutional issue—would therefore be unpredictable, depending entirely upon how the lower courts happened to decide the issue. Indeed, the more clearly unconstitutional the federal law, and the more likely the lower courts would be to hold the measure invalid, the more re-

mote the ability to obtain a definitive determination from this Court.[7]

Second, the necessary consequence of this legal rule, therefore, will be to force each private party adversely affected by an unconstitutional statute to file his or her own claim seeking an order barring application of that law. While a district court decision upholding the statute could be reviewed by a court of appeals—the only situation in which a decision on the constitutional question by a federal appeals court or this Court would be permitted under *Amica*'s view of the law—there is no reason to believe that situation would actually occur. Indeed, it has not occurred in any of the numerous lawsuits challenging the Defense of Marriage Act.[8]

This case-by-case process will impose significant litigation costs on these private parties. And it will delay vindication of their constitutional rights—and subject them to extended uncertainty in, for example, their planning for financial and health contingencies—while numerous district courts are forced to

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[7] It is possible that invalidating a federal law could inflict an injury on private parties sufficient to confer standing to defend that statute's constitutionality. But in most cases, as here, that will not be true because invalidation of the statute impacts only government spending or operations and therefore imposes no cognizable injury on private parties.

[8] Under *Amica*'s view of the law, both the Second Circuit in this case and the First Circuit in *Massachusetts* v. *U.S. Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, No. 12-97 (July 20, 2012), lacked jurisdiction, because in both cases the district courts ruled in the plaintiffs' favor and the President announced his determination that the statute is unconstitutional prior to both appellate decisions.

address the same constitutional issue without guidance from higher courts.[9]

Here, for example, Census Bureau data indicates that in 2010 there were more than 130,000 same-sex married couples. U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), http://tinyurl.com/43qu56t . That number is much greater today because a number of States—New York, Maryland, Washington, and Maine—have in the last two years changed their laws to recognize same-sex marriage.

DOMA's impact is extremely broad, moreover, affecting the application of more than one thousand provisions of federal law that turn upon whether an individual is married. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, Defense of Marriage Act: Update to Prior Report 1 (2004), http://tinyurl.com/cajc6n9 (identifying 1138 statutory provisions in the U.S. Code in which marital status is a factor in determining or receiving benefits, rights, and privileges). For example, each taxpayer who could not file jointly with her wife, see 26 U.S.C. § 1(a)-(c), or each surviving same-sex spouse seeking Social Security benefits, see, *e.g.,* 42 U.S.C. § 402(f) & (i), would have to file a separate lawsuit to gain relief.

Indeed, a single individual or married couple might well be required to file multiple lawsuits because distinct timing, administrative exhaustion, or jurisdictional requirements may apply to claims

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[9] A claimant cannot invoke a prior decision to which she is not a party to estop the government from relitigating a constitutional issue in a subsequent case. *United States* v. *Mendoza*, 464 U.S. 154 (1984).

seeking relief with respect to different federal statutes. Here, for example, Ms. Windsor has separate tax refund and social security benefit claims and has not yet received the administrative determination with respect to the latter claim that is a prerequisite for obtaining judicial review. Windsor Juris. Br. 5-6.[10]

Third, this multiplication of litigation across the district courts will impose significant burdens on the federal government. These include not only the cost of litigating the issue in potentially thousands or tens of thousands of cases, but also the risk of paying the attorneys' fees incurred by the numerous plaintiffs in these actions. The Equal Access to Justice Act, 28 U.S.C. § 2412 (b)-(d), generally provides, among other things, for the payment of a prevailing party's attorneys' fees and other expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" (*id.* § 2412(d)(1)(A)). The United States could face significant liability for attorneys' fees after a number of district courts hold a statute unconstitutional—and no prospect of avoiding future fees, because of the likely inability to ob-

[10] Class actions might be feasible in some circumstances, but in many situations the requirements for class certification may not be satisfied—here, for example, different issues may be presented by the application of DOMA in the context of different federal statutory determinations that turn upon marriage. In addition, the government has an institutional interest in opposing unjustified class certification of challenges to federal statutes, and it has opposed class certification in some of the cases challenging DOMA. See Defendants' Opposition to Plaintiff's Motion for Class Certification, *Aranas* v. *Napolitano*, No. 8:12-cv-1137-CBM (AJWx) (C.D. Cal., Sept. 19, 2012).

tain a conclusive judicial determination regarding the law's validity that would end the litigation.

Fourth, case-by-case adjudication of the applicability of a challenged federal statute—and the resulting uncertainty and lack of uniformity (between those married individuals who have obtained a final judicial order and those who have not)—will also impose substantial burdens on third parties whose actions turn upon whether or not the federal law applies.

Here, for example, an employer's ability to obtain favorable tax treatment with respect to employee benefits depends on compliance with federal standards, which may turn on whether the employee is "married" under federal law. See, *e.g.*, *Dragovich* v. *U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1181 (N.D. Cal. 2011) (California, for instance, "cannot allow same-sex spouses to participate in its long-term care plan if it wishes to qualify for favorable [federal] tax treatment * * * [it has] no choice but to follow federal tax law."). And employers have different obligations with respect to retirement plans if the employee is married within the meaning of federal law. See, *e.g.*, 26 U.S.C. § 417 (spousal consent required for certain elections with respect to retirement plans). Employers will incur significant additional cost in administering these requirements if the rule applicable to each employee in a same-sex marriage must be determined individually, depending on whether he or she has obtained a final judicial determination in an action challenging the statute's constitutionality.[11]

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[11] Moreover, many companies wish to provide the equal benefits to all married couples. See Press Release, Human Rights Cam-

Federal grantees face similar burdens and uncertainty. Massachusetts, for instance, instituted an action challenging DOMA out of concern that federal agencies would revoke federal funding for programs it administered cooperatively with the federal government because Massachusetts was not complying with the federal definition of marriage. See *Massachusetts* v. *U.S. Dep't of Health & Human Serv.*, 682 F.3d 1, 7 (1st Cir. 2012) ("By combining the income of individuals in same-sex marriages, Massachusetts' Medicaid program is noncompliant with DOMA, and the Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, has discretion to rescind Medicaid funding to noncomplying states. Burying a veteran with his or her same-sex spouse removes federal 'veterans' cemetery' status and gives the Department of Veterans' Affairs discretion to recapture all federal funding for the cemetery.").

As a result of the litigation in the district court, Massachusetts has obtained a judgment (currently stayed) that orders the relevant federal agencies to recognize same-sex marriages in Massachusetts as it relates to certain tax, social security, and other claims. 682 F.3d at 7, 17. But, under *Amica*'s proposed rule, every federal grantee would have to go through the same legal process in order to resolve the issue.

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paign, Business Coalition Launches in Support of Respect for Marriage Act, http://tinyurl.com/ctothpj (Jan. 28, 2013). Those businesses will be required to maintain multiple benefits systems—one for same-sex couples who have not obtained legal relief and another for those who have obtained a final judicial determination.

Fifth, in the absence of a definitive ruling that a statute is unconstitutional, the chain of litigation would stretch indefinitely into the future when, as here, the federal law affects a class of private parties that is not fixed at the time of the statute's enactment, but instead will increase over time.

Every new same-sex married couple would be obliged to file a lawsuit challenging the application of DOMA with respect to federal laws that applied to them. And as the couple sought benefits under, or was subject to the burdens of, new federal laws whose applicability turns on marital status, they would be required to bring still more lawsuits.

Sixth, this Court has long recognized the significance of the Judiciary's authority to invalidate federal statutes on constitutional grounds and has consistently granted review where a lower court has invalidated a congressional enactment. *Amica*'s conception of Article III would have the bizarre effect of confining such determinations to the lower courts and, in cases where a district court agrees with the government's submission that a statute is unconstitutional, making it impossible for this Court to address the constitutional question.

In sum, by creating a legal regime that will make the availability of a definitive ruling on a law's unconstitutionality completely uncertain, *Amica*'s standard imposes new and substantial burdens on private parties and the government when the President forthrightly states his view regarding a measure's unconstitutionality but takes the position that the final determination regarding that question should be made by the courts. That result is particularly disturbing for two reasons: judicial determination of the validity of a statute best comports with our con-

stitutional values, and the other options available to the President carry very significant adverse consequences, including significant damage to constitutional values.

2. Option #2: If the President Were to Order the Executive Branch to Cease Enforcing the Statute.

To avoid these adverse consequences, a President could choose instead to direct the Executive Branch to stop complying with any federal statute that the President believes to be clearly unconstitutional. That approach, however, carries different but equally damaging practical consequences.

First, individuals burdened by the challenged statute would not be able to obtain a permanent determination of their rights. The President's position would eliminate the need to obtain a court order, and at least under *Amica*'s view, the President's issuance of a non-enforcement directive certainly would preclude an affected private party from obtaining judicial relief.

But the President himself or any future President could reverse the non-enforcement directive. See, *e.g.*, Daniel J. Meltzer, *Lecture: Effective Defense of Congressional Acts*, 61 Duke L.J. 1183, 1228 (2012) (observing that a new administration may come into office with "sharply different views about the appropriate occasions for, and the appropriate theories underlying, such [non-enforcement] decisions"). As a result, an individual could never be certain that she was protected against the adverse consequences that would result from application of the challenged statute. That uncertainty, and the very significant unfairness that would occur in the event

of a change in position, present very serious practical obstacles to a President's use of this approach.

Second, important considerations of institutional competence and accountability weigh against forcing the President to issue a non-enforcement order whenever he believes a statute to be clearly unconstitutional.

To begin with, in our system of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle [is] a permanent and indispensable feature of our constitutional system." *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

Indeed, the Judiciary's adherence to precedent allows it to settle constitutional issues more permanently than the political branches. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455, 477 (2000). It settles those issues in a framework of "established and constraining procedures" not present in any other branch; for example, it must publish written opinions and cannot select its own agenda. *Ibid.* And it stands apart from the political process. *Id.* at 476.

Forcing the President to make these determinations on his own would limit the Judiciary's role, depriving the institution best suited to deciding constitutional questions of the ability to resolve them.

Repeated use by Presidents of non-enforcement directives—because of the absence of any alternative—would also raise significant questions about the legitimacy of such presidential determinations. See Dawn E. Johnsen, *Presidential Non-Enforcement of*

Constitutionally Objectionable Statutes, Law & Contemp. Probs. 7, 12 (Winter/Spring 2000) (persistent presidential non-enforcement could "grossly distort the constitutionally preferred means" by which the President executes his constitutional responsibilities). Political opponents could argue that the President was using non-enforcement on constitutional grounds in lieu of politically-unsustainable vetoes, for example.

Third, a Congress frustrated by a President's unilateral non-enforcement of statutes would try to use other means to pressure the President to change his position, such as refusing to enact legislation favored by the President or refusing to appropriate funds for some or all of the Executive Branch. But those actions would inflict collateral damage upon Americans protected by the government programs at issue. Congress therefore might conclude that impeachment—for failing to faithfully execute the laws—is the only means available to protect its constitutional prerogatives.[12] By creating a legal regime in which unilateral presidential action may be the only viable means to achieve uniformity and avoid unacceptable litigation burdens—but in which the courts are sidelined—*Amica*'s approach is likely to lead to significantly increased inter-Branch friction, which in turn will further undermine the legitimacy of constitutional decisionmaking.

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[12] Indeed, some scholars have questioned the constitutionality of this practice. See, *e.g.*, Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. Rev. 381, 383 (1986); Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 869 (1994); Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 W. & M. Bill Rts. J. 113, 122 (2007).

3. Option #3: If the President Were to Advance a Limited Defense of the Statute's Constitutionality.

Faced with these two unacceptable choices, a President could well be tempted to withhold his views regarding a law's unconstitutionality, and instead instruct the Attorney General to tailor the law's legal defense as much as possible to the President's views of the relevant constitutional principles—but retaining the "bottom line" that the statute is constitutional in order to obtain a definitive judicial determination regarding the measure's validity. That option too carries adverse practical consequences.

Most significantly, our adversary system is founded on the principle that a party will vigorously argue the position that it espouses. If the President has concluded that a law is unconstitutional, but the Department of Justice nevertheless defends the law's constitutionality in order to secure a definitive judicial decision regarding that issue, it "can hardly be expected that [the Department] will take [this] pretended view with enthusiasm." Peter L. Strauss, *The President and Choices Not To Enforce,* Law & Contemp. Probs. 107, 119-120 (Winter/Spring 2000) (suggesting that a feigned defense makes the President "a party, in effect, to a friendly suit"); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 Colum. L. Rev. 507, 572 (2012) ("[A] law's proponents are more likely to vigorously defend the statute than is the Solicitor General, who, in the course of a tepid defense of a law, might admit its constitutional infirmities.").

Indeed, other attempts by the United States to hedge positions regarding constitutional issues have

not been particularly successful. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081 (2001) (describing the "odd position" of the Solicitor General in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), and the situation in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), both cases in which the Executive Branch presented the Court with conflicting opinions about the constitutionality of the law at issue).

Because this approach would undermine a key attribute of the adversary process, its adoption by a President would raise significant practical concerns.

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In sum, if *Amica*'s view of the law were accepted by this Court, it would in a large category of cases effectively eliminate the ability of the Executive Branch, and adversely affected parties as well, to obtain a the fair, efficient, and definitive resolution of constitutional challenges to federal laws.[13]

B. This Court's Precedents Make Clear That A Constitutional Challenge Is Justiciable As Long As The United States Continues To Enforce The Statute In Question.

The adverse practical consequences that would result from *Amica*'s legal principle, severe as they

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[13] *Amici* take no position on the standing of the Bipartisan Legal Advisory Group, but note that even if such standing were recognized it is not at all certain that Congress would choose to intervene to defend the constitutionality of federal statutes in every case in which the President determines a law to be plainly unconstitutional. Upholding congressional standing therefore would not protect against the adverse consequences of adopting *Amica*'s proposed legal rule.

are, are not sufficient to establish this Court's jurisdiction. That depends on satisfying the requirements of Article III. But longstanding precedent makes clear that the Executive Branch's position in court regarding the constitutionality of a statute does not deprive a court of the power to address that legal question. As long as the President has instructed the Executive Branch to comply with the statute in the absence of a court order directing the contrary, the matter is justiciable.

This Court has identified two essential elements of Article III's case-or-controversy requirement: the party seeking "to invoke the authority of a federal court" must have "standing," *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 624 (1989), and the parties must be "adverse," *id.* at 619; see *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011) (A "case or controversy" exists where the "party invoking the Court's authority" satisfies standing and where the parties have "an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens presentation of the issues.'" (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983))). The Executive Branch's agreement that the lower court's decision should be affirmed does not affect either standing or adverseness. A case or controversy, and therefore jurisdiction, plainly exists.

If the Court were to hold otherwise in this case, that determination could raise serious questions about even the ability of a district court to issue an injunction in a case challenging a statute that the President has determined to be unconstitutional. That result is clearly unacceptable.

1. Chadha *is Dispositive of the Case-or-Controversy Question.*

This Court faced a very similar question regarding the case-or-controversy requirement in *INS* v. *Chadha*, *supra*. The Court's holding that it had jurisdiction there requires rejection of *Amica*'s position here.

The question in *Chadha* was the validity of a deportation order that was based on the exercise by the House of Representatives of its statutory authority to overturn through a one-house "veto" a decision of the Attorney General to allow a deportable alien to remain in the United States. Chadha sought review of the order in the Ninth Circuit, where both he and the INS argued that the statute authorizing a congressional "veto" was unconstitutional. The court of appeals agreed and "directed the Attorney General 'to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives.'" 462 U.S. at 928 (citation omitted).

This Court held that it had jurisdiction over the INS's appeal of that determination, notwithstanding the INS's agreement that the legislative veto was unconstitutional:

> [T]he 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. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold

> [the challenged statute], the INS will execute its order and deport him."

Id. at 939-40.

Here, the agreement between the United States and Ms. Windsor regarding the statute's unconstitutionality—the very same agreement that was present in *Chadha*—similarly does not deprive this Court of jurisdiction. If the Court rules for Ms. Windsor, DOMA will not be enforced, and she will receive the tax refund payment ordered by the district court. If the Court upholds the statute, the United States will comply with DOMA and she will not receive the tax payment. As in *Chadha*, therefore, the requisite case or controversy is present.[14]

Indeed, the case for finding a case or controversy is, if anything, stronger here because the order under review requires the United States to pay money. *Windsor* v. *United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y.) (requiring the United States to pay more than $350,000 to Ms. Windsor, plus interest), *aff'd,* 699 F.3d 169 (2d Cir. 2012). Economic damage is the paradigmatic injury-in-fact. See *Craig* v. *Boren*, 429 U.S. 190, 194 (1976) ("This Court repeatedly has recognized that such [economic] injuries establish the threshold [standing] requirements of a 'case or controversy' mandated by Art[icle] III."); *Sierra Club* v.

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[14] *Amica* argues that *Chadha* addressed only this Court's appellate jurisdiction under 28 U.S.C. § 1252, but the Court separately and specifically addressed the Article III question. 462 U.S. at 939-40; compare *id*. at 931 (addressing Section 1252 issue); see also *Cardinal Chemical Co.* v. *Morton Int'l, Inc*., 508 U.S. 83, 88 n.9 (1993) (noting that *Chadha* "[found] Art[icle] III adverseness even though the two parties agreed on the unconstitutionality of the [statute] that was subject of that case").

Morton, 405 U.S. 727, 733 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing.").

If the decision below is reversed by this Court, the United States will not pay this sum. And if the decision is affirmed, the amount will be paid from the Treasury. The resolution of this case will therefore plainly affect the judicially cognizable interests of the United States. Accord *United States* v. *Lovett*, 328 U.S. at 318 (where the plaintiffs had obtained a money judgment against the government in the lower court by successfully challenging the constitutionality of a statute, this Court granted the government's certiorari petition and affirmed the lower court's judgment notwithstanding the agreement between the plaintiffs and the government that the statute was unconstitutional).

The injury to the United States from the obligation to pay money does not evaporate simply because the United States and Ms. Windsor both espouse legal arguments that, if accepted, will require the United States to pay Ms. Windsor—just as the agreement between Chadha and the United States did not vitiate the Article III controversy in that case. In both situations, the injury—the invalidation of the deportation order issued by a federal agency and the order directing payment of money that the United States otherwise would not pay—stems from the order of the court of appeals under review. That injury would be eliminated by reversal of the lower court order by this Court; in consequence, there is a sufficient controversy to establish jurisdiction.

Indeed, as this Court has consistently held, the fact that the parties before it agree regarding the proper resolution of the case does not preclude find-

ing a controversy sufficient to satisfy Article III. See *Chadha*, 462 U.S. at 940 n.12 (explaining the Court's jurisdiction to decide *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), by stating that "[e]ven though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party" unless this Court held the law unconstitutional); *Cardinal Chem. Co.*, 508 U.S. at 88 n.9; *id.* at 104 (Scalia, J., concurring) ("I agree with the Court that the parties' total agreement as to disposition of this case poses no constitutional barrier to its resolution.").

Finally, the Court in *Chadha* also rejected the argument that prudential concerns weighed against upholding jurisdiction. 462 U.S. at 940. The same conclusion applies here, both because of the presence of BLAG before the Court defending the challenged statute's constitutionality, see *ibid.*, and because of the significant adverse consequences that would result from a determination that prudential concerns preclude adjudication by this Court of the merits of the constitutional question.[15]

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[15] As in *Chadha*, the statutory standard for seeking review in this Court—here, 28 U.S.C. § 1254(1)—is satisfied for the reasons discussed in the text. See 462 U.S. at 930 (discussing parallel requirements of former 28 U.S.C. § 1252).

2. Concluding That the President's View That a Statute is Unconstitutional Vitiates This Court's Jurisdiction, Could in Some Contexts Deprive District Courts of the Power to Enter Injunctions Providing Relief.

If this Court were to hold that the President's view of a statute's unconstitutionality deprives this Court of jurisdiction to determine the statute's validity, the reasoning underlying that determination could be invoked to argue that district courts might not necessarily have the power to enter injunctions in cases in which the President has concluded that a statute is unconstitutional.

If the presence of the United States is not sufficient to establish a case or controversy in this Court, despite its obligation to pay money, that presumably would be because the Court accepts *Amica*'s position that the parties' agreement on the law, and on the proper outcome of the case, makes the suit collusive or feigned. *Cf. Flast* v. *Cohen*, 392 U.S. 83, 100 (1968) ("[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature." (citations omitted)).

But the prohibition against "friendly" suits applies in the district courts as well. *Sierra Club*, 405 U.S. at 732 n.3. See also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) ("[A]bsent 'a genuine adversary issue between * * * parties,' [a] federal court 'may not safely proceed to judgment.'" (omission in original) (quoting *United States* v. *Johnson*, 319 U.S. 302, 304 (1943) (per curiam))).

To avoid the contention that a similar defect precludes district court jurisdiction, the President could be obligated to demonstrate that he lacks the power to direct the Executive Branch not to comply with the challenged statute, and therefore judicial action is required. While that might be true here—Ms. Windsor suggests that the Constitution and the Anti-Deficiency Act might prevent the President from unilaterally directing the payment of federal funds (Windsor Juris. Br. 33-34)—it may not be true with respect to noncompliance with other unconstitutional laws.

In the absence of such a showing, it could be argued that a President's insistence on a court order—notwithstanding his ability to implement unilaterally his determination regarding the statute's unconstitutionality—would not be sufficient to establish the district court's jurisdiction. After all, *Amica*'s argument here is that the President's ability to comply with the district court injunction, combined with his agreement that entry of an injunction is proper, eliminates jurisdiction. In each case, the President's view of the underlying legal merits is the same and the Article III prerequisites are either satisfied or not by the President's own discretionary determination that a court adjudication of the constitutional issue is necessary and appropriate.

Acceptance of *Amica*'s argument could therefore force the courts to adjudicate a variety of difficult questions regarding the scope of Executive Branch authority. *Amica*'s position also could open the door to arguments that all courts are precluded from adjudicating a constitutional challenge when the President agrees that the statute is unconstitutional. As this Court observed in *Chadha*, however, "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." *Chadha*, 462 U.S. at 939.

The Court should reject *Amica*'s argument and preserve access to federal courts for resolution of constitutional challenges to federal statutes.

CONCLUSION

The Court should hold that it has jurisdiction to address the question regarding the constitutionality of the Defense of Marriage Act presented in this case.

Respectfully submitted.

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