No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE HONORABLE JOHN K. OLSON IN SUPPORT OF RESPONDENT ADDRESSING JURISDICTION

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Honorable John Karl Olson, a United States Bankruptcy Judge. In November 2010, Judge Olson married G. Steven Fender in the Commonwealth of Massachusetts. On December 1, 2010, Judge Olson filled out and submitted AO Form 162, Election to Participate in the Judicial Survivors' Annuities System ("JSAS"). Judge Olson named Steven as his spouse on this form, and also designated Steven as his husband and 100% beneficiary on the related Designation of Beneficiary Judicial Survivors' Annuities System Form.

Initially, the Administrative Office of the United States Courts ("AO") accepted Judge Olson's designations and began deducting the required premiums from his paycheck. Thereafter, however, the AO sent Judge Olson a letter stating that "the governing law does not currently permit your enrollment in JSAS based upon a same-sex marriage." The letter continued, "[t]his

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Petitioner's blanket consent has been filed with this Court, and a copy of Respondent's consent is filed herewith.

interpretation is consistent with the 1996 'Defense of Marriage Act ["DOMA"],' 1 U.S.C. § 7…[and] we must interpret the statute to preclude an opportunity to elect participation in JSAS based on a same-sex marriage, and to preclude survivors of same-sex marriages from qualifying for a JSAS annuity." The letter advised Judge Olson that the AO had cancelled his JSAS election, and the AO returned his premium payments. DOMA is the only reason the AO gave for rejecting Judge Olson's JSAS benefit for Steven. Judge Olson has a direct and personal interest in the outcome of this case.

In addition to addressing generally the issues of jurisdiction and standing, the distinct contribution of this brief is to discuss (1) the Court's use of *amicus curiae* to ensure adversarial presentations, and (2) the correctness and relevance of the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983).

STATEMENT

Respondent Edith Schlain Windsor married Thea Clara Spyer, her late spouse, in Toronto, Canada on May 22, 2007. Joint Appendix ("JA") 160, Amended Complaint. Windsor and Spyer remained married until February 5, 2009, when Spyer passed away after a decades-long battle with multiple sclerosis. JA158, 163.

Spyer's Last Will and Testament appointed Windsor as executor of Spyer's estate, as well as the sole beneficiary. JA164. A provision of the Tax Code, 26 U.S.C. § 2056(a), provides a marital deduction for property passing from a decedent to a surviving spouse, meaning that such property generally passes free of the federal estate tax. JA165. However, the Internal Revenue Service ("IRS") determined that property passing from Spyer to Windsor was subject to the federal estate tax because of Section 3 of DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996). JA164, 166.

Section 3 of DOMA provides that "[i]n 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." 1 U.S.C. § 7. The IRS determined that the marital deduction did not apply as between Spyer and Windsor because their marriage was between two women, instead of a man and a woman. JA170. As a result, Windsor was required to pay a $363,053.00 federal estate tax. JA166.

In November 2010, Windsor, in her capacity as executor of Spyer's estate, filed suit against the United States in the United States District

Court for the Southern District of New York, seeking a refund of the $363,053.00 imposed on Spyer's estate. JA77, District Court Docket Entries; JA173. Windsor argued that Section 3 of DOMA violates the equal protection component of the Fifth Amendment and is therefore unconstitutional. JA172.

Shortly thereafter, in February 2011, Attorney General Eric H. Holder, Jr. sent a letter to the Honorable John A. Boehner, Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D. JA183-194. After referencing two lawsuits challenging the constitutionality of DOMA, including the one brought by Windsor, the Attorney General wrote that he and President Obama had "concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional." JA184-185.

The Attorney General's letter further stated that pursuant to the President's directive, the Department of Justice ("DOJ") would cease defense of DOMA in cases such as Windsor's. JA193. The Attorney General explained that the Executive Branch would, consistent with its obligation to take care that the laws be faithfully executed, continue to enforce the statute "unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against

the law's constitutionality." JA192. The Attorney General also stated that DOJ would provide Congress a full and fair opportunity to participate in DOMA litigation. JA193. Finally, the Attorney General stated that he would "instruct Department attorneys to advise courts in other pending DOMA litigation…that the Department will cease defense of Section 3." JA193.

Following the Attorney General's letter, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG"), a five-member bipartisan leadership group, voted 3-2 to intervene in the litigation to defend the constitutionality of DOMA. JA195-196 & n.1, Unopposed Mot. of BLAG to Intervene for a Limited Purpose. The District Court permitted BLAG to intervene as of right and as a full party under Federal Rule of Civil Procedure 24(a)(2), finding that "BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them." JA223, June 2, 2011 Mem. and Order of the District Court. The District Court also held that BLAG had Article III standing. JA226-227.

The District Court subsequently granted summary judgment for Windsor, holding that Section 3 of DOMA was unconstitutional. The court awarded Windsor a $363,053.00 refund for the estate tax she paid. Pet. App. 22a.

DOJ noticed an appeal to the Second Circuit. JA524-525, DOJ Notice of Appeal. BLAG also noticed an appeal, JA522-523, and moved to dismiss DOJ's appeal for lack of appellate standing, arguing that the United States had prevailed before the District Court and was therefore not an aggrieved party entitled to appeal. JA526-527, BLAG's Mot. to Dismiss Appeal. DOJ opposed the motion, arguing that because the District Court's judgment prevented the Executive Branch from taking enforcement action it would otherwise take, i.e., the enforcement of DOMA, it was aggrieved by the judgment and therefore had appellate standing. JA532-533, DOJ's Opp'n to Mot. to Dismiss Appeal. Prior to the Second Circuit's decision, Windsor and DOJ petitioned this Court separately for certiorari before judgment.

On October 18, 2012, the Second Circuit denied BLAG's motion to dismiss DOJ's appeal and affirmed the District Court's decision that Section 3 of DOMA is unconstitutional. Supp. App. 3a. The Second Circuit held that "[n]otwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money. The constitutionality of the statute will have a considerable impact on many operations of the United States." *Id.* at 4a (citing *INS v. Chadha*, 462 U.S. 919, 931 (1983)).

Shortly thereafter, DOJ filed a supplemental brief advising this Court of the Second Circuit's decision and suggesting that the Court consider its petition as one for certiorari after judgment, and to review the judgment of the court of appeals. U.S. Supp. Br. 7. Windsor also asked the Court to grant the United States' petition, Windsor Supp. Br. 1, while BLAG opposed the request. BLAG Supp. Br. 2.

This Court granted the United States' petition for a writ of certiorari before judgment on December 7, 2012, on the question of DOMA's constitutionality. The Court also directed the parties to brief two jurisdictional questions. The first is "[w]hether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case." The second is "whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case."

On December 28, 2012, BLAG filed a petition for a writ of certiorari from the Second Circuit decision. On January 3, 2013, the House of Representatives adopted a resolution authorizing the 113th Congress's BLAG to act as successor-in-interest to the 112th Congress's BLAG in civil actions in which BLAG had intervened during the 112th Congress to defend the constitutionality of DOMA Section 3, including this case.

H.R. Res. 5, 113th Cong. § 4(a)(1) (2013). The resolution further states that BLAG continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including *United States v. Windsor*. *Id.*

SUMMARY OF THE ARGUMENT

Regardless of whether BLAG has standing, this matter presents a live, justiciable controversy over which the Court possesses jurisdiction under 28 U.S.C. § 1254(1) and Article III of the U.S. Constitution. The United States continues to enforce DOMA, inflicting a tangible, pecuniary loss on Respondent in the form of the $363,053.00 in taxes she was obligated to pay, and for which she is seeking a refund. Moreover, the Court's resolution of the matter is outcome determinative: if this Court upholds the decision below, Windsor will receive her refund; if not, then not. At the end of the day, the Court's exercise of jurisdiction in this case *matters* to the parties in a direct, tangible way and would not serve merely to address a generalized grievance or resolve a purely abstract inquiry.

Moreover, the merits of this live controversy have been, and will continue to be, vigorously litigated in this Court, and the issues have been, and will continue to be, presented and joined in a manner fully consistent with traditional notions of adversarial resolution. Although Windsor and

DOJ both argue that DOMA is unconstitutional, that position has been vigorously disputed by BLAG since it intervened in the district court. And regardless of whether BLAG has standing as a party, or whether BLAG were designated simply as an *amicus curiae*, its vigorous advocacy (together with the advocacy of the various other *amici* that urge reversal of the decision below) ensures that the issues will be fully vetted. Because an actual, live controversy exists between Windsor and the United States, and because the participation of BLAG and its *amici* ensure vigorous adversarial advocacy, the case and controversy requirement of Article III is satisfied.

This Court's decision in *INS v. Chadha*, 462 U.S. 919, 931 (1983), is instructive and controlling. First, *Chadha* was decided correctly. The government is not a monolithic institution. It performs many discrete tasks, including administrative functions (such as routinely collecting and refunding taxes) and litigation functions (such as defending lawsuits brought against it in court challenging the constitutionality of a federal statute). *Chadha* recognizes that, although the government must take care to enforce the laws faithfully in its administrative capacity, it may in good faith argue the unconstitutionality of a law where the United States has been sued and a litigant has raised the issue. The government does not thereby deprive a court of jurisdic-

tion where, as here, a live controversy actually exists. This only makes sense. If DOJ believes in good faith that a federal statute is unconstitutional, it does not have to feign opposition in order to render the matter justiciable. In addition, *Chadha* was decided correctly because it is faithful to the governing statutory provision, 28 U.S.C. § 1254(1), conferring broad jurisdiction on this Court to review the decisions of the lower federal courts; it properly respects the role of this Court in determining the meaning of the Constitution; and it adheres to the longstanding principle that a federal court should accept jurisdiction where Congress has conferred it.

Second, this case is substantively similar to *Chadha*. As in *Chadha*, the United States here remains aggrieved: the IRS would not issue a refund to Windsor except for the decisions of the courts below. The fact that DOJ agrees with Windsor that the statute is unconstitutional does not alter this fundamental jurisdictional fact.

Prudential concerns further weigh in favor of exercising jurisdiction here and ruling on DOMA's constitutionality. Because the United States is enforcing but not defending DOMA, innumerable individuals like Windsor will continue to be harmed by the statute for the foreseeable future and will be in need of filing suit to vindicate their rights. In other words, this issue is classically capable of repetition yet evading

review if the courts lack appellate jurisdiction because the United States will no longer defend DOMA's constitutionality in ensuing ligation. Where, as here, a live controversy exists involving a matter of pecuniary interest to a litigant and the United States, but DOJ has aligned itself with the litigant in asserting a statute's unconstitutionality, the appropriate route to assure adversarial presentation is for the Court either to recognize a representative of the legislature to urge the statute's constitutionality or appoint an *amicus curiae* to do so.

Over the past several decades, this Court has often appointed an *amicus curiae* to fill the shoes of a litigant who has declined to defend the merits of a judgment below. Because the option of recognizing BLAG as a participant and/or the option of recognizing BLAG as an *amicus curiae* are both available and efficacious in this instance, the exercise of jurisdiction is warranted.

Alternatively, BLAG has standing to participate in this case as a party, removing any jurisdictional concerns. It may do so because it represents an entity with a legitimate, tangible interest in the outcome of this case, and because it may acquire the standing of the United States where, as here, DOJ has abandoned its initial defense of DOMA's constitutionality.

ARGUMENT

A. The Executive Branch's Agreement with the Court Below that DOMA Is Unconstitutional Does Not Deprive this Court of Jurisdiction.

1. The Court Has Statutory Jurisdiction.

The Court has statutory jurisdiction over this controversy under 28 U.S.C. § 1254(1), which provides in relevant part that "[c]ases in the courts of appeals may be reviewed by the Supreme Court…(1) [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of the judgment or decree…." 28 U.S.C. § 1254(1). This provision "confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (emphasis in original) (quoting 28 U.S.C. § 1254(1)). Likewise, the statutory "language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Id.* (citation omitted). These statutory requirements are satisfied here.

Although the Court has noted in the past that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S.

326, 333 (1980), that general prudential consideration is not expressed anywhere in section 1254(1) and is not controlling in this instance where (1) the IRS would not issue Windsor a tax refund except for the decisions of the courts below, (2) a live controversy thus exists between the parties and a decision on the merits by this Court will be outcome determinative, and (3) the issues will be presented in a manner consistent with traditional notions of adversarial resolution.

It is true, of course, that the judgment below affords relief to both Windsor and DOJ in the narrow sense that it vindicates a particular *legal position* on the constitutionality of DOMA that both advocate, but that hardly ends or controls the analysis. The United States will still enforce DOMA absent judicial intervention, and Windsor remains without her tax refund. In turn, whether the federal courts may afford relief to Windsor and litigants like her turns on the constitutionality of DOMA, and *that* question, properly presented here, is one only this Court can finally settle authoritatively. In the context of this case, prudential concerns do not override the plain breadth of section 1254(1).

Moreover, the United States is an indispensible party in this litigation. The government is in possession of the refund Windsor seeks, and no one may sue it for a tax refund without nam-

ing the United States as a party. *See* 26 U.S.C. § 7422(f)(1). It is axiomatic that the United States may properly insist on this requirement as an incident to its waiver of sovereign immunity to suit.

Amica Jackson argues that, because Windsor and DOJ agree that DOMA is unconstitutional, they may simply settle this controversy. Brief for Court Appointed *Amica Curiae* Addressing Jurisdiction ("Jackson Br.") 32. Respectfully, the possibility of settlement is irrelevant because it exists in virtually *every* case, and if the possibility of settlement could deprive a federal court of jurisdiction there would be little left for the federal courts to do. Here the United States and Windsor have not settled, and a live controversy remains for the Court to adjudicate.

Likewise, it does not matter that Windsor and DOJ both agree that the Second Circuit in this case decided the matter correctly. *See* Jackson Br. 24. Windsor still does not have her refund, and it is for this Court to decide whether, in fact, the court below was correct in its judgment.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Court upheld jurisdiction under similar circumstances. There, the House of Representatives exercised its statutory right under Section 244(c)(2) of the Immigration and Nationality Act to legis-

latively veto the Attorney General's decision to suspend Chadha's deportation. *Id.* at 926-27. In the ensuing litigation, the Immigration and Naturalization Service ("INS") agreed with Chadha that Section 244(c)(2) was unconstitutional. *Id.* at 928. Nonetheless, because it had no authority to decide unilaterally the constitutionality of the statute, INS continued processing Chadha's removal. *Id.* at 930. Both the Senate and House of Representatives intervened in the Ninth Circuit to defend the statute. After the Ninth Circuit agreed with Chadha and INS that Section 244(c)(2) was unconstitutional (and directed INS to cease its deportation efforts), INS filed a petition for certiorari review. *Id.* at 928.

The Senate and House moved to dismiss INS's appeal, arguing that because INS agreed with Chadha that Section 244(c)(2) was unconstitutional, this Court lacked jurisdiction under the *Deposit Guaranty* rule. *Id.* at 930. The Congressional parties argued that INS had received all it sought before the Ninth Circuit and was therefore not an aggrieved party. *Id.* at 930 & n.5. The Court, however, rejected this argument, holding that INS was sufficiently aggrieved by the Ninth Circuit's decision because that decision prohibited INS from taking action it otherwise would take, namely the deportation of Chadha. *Id.* at 930-31. That analysis applies here.

a. *Chadha* was decided correctly.

The Court's decision in *Chadha* was decided correctly for several reasons. To begin with, the federal government is not a monolithic institution. It performs many discrete functions, including those of an administrative nature (such as the routine collection and refund of taxes), and those involving litigation defense and management (such as the defense of a lawsuit brought against it claiming a federal statute is unconstitutional). In the exercise of its administrative functions, and consistent with the Constitution, the government routinely takes care to apply federal law as it is written. On the other hand, in the exercise of its litigation function, DOJ acting in good faith may arrive at the considered conclusion that a federal statute that the government has been enforcing is, in fact, unconstitutional. Where it does so, the United States (acting through DOJ) need not feign the statute's constitutionality to preserve federal jurisdiction. Where, as here, a live controversy remains between the parties, DOJ may candidly argue its position. *Chadha* respects these constitutional divisions of labor.

In addition, *Chadha* is faithful to the governing statutory jurisdictional provision, 28 U.S.C. § 1254(1), which confers broad authority on this Court to review the decisions of the lower federal courts—a function that is especially important where a lower court had determined a

statute of the United States to be unconstitutional. Similarly, *Chadha* properly preserves for this Court the ultimate authority to settle the constitutionality of a particular statute, regardless of whether another branch of government agrees or disagrees with the litigation posture of a particular litigant on a constitutional question. In addition, it adheres to the longstanding principle that a federal court should accept jurisdiction where Congress had conferred it. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."); *see also Marshall v. Marshall*, 547 U.S. 293, 298 (2006) (same).

b. *Chadha* is controlling.

This case is substantially no different from *Chadha*. The United States remains aggrieved here essentially for the same reason INS in *Chadha* was aggrieved: in this case IRS would not issue Windsor her tax refund except for the decisions of the courts below. It is the decisions below that require the refund. As noted, the Executive Branch continues to enforce DOMA as part of its obligation to take care that the laws be faithfully executed. It also acknowledges that it cannot unilaterally determine the constitutionality of Section 3 of DOMA. Because the constitutionality of Section 3 is ultimately for the courts to resolve, the United States remains an aggrieved party for purposes of this Court's appellate jurisdiction. *Chadha*, 462 U.S. at 931; Supp. App. 4a-5a.

It bears noting that the Second Circuit also had appellate jurisdiction over this case. 28 U.S.C. § 1291 provides that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States…." This provision conferred jurisdiction on the Court of Appeals to hear the appeal from the District Court. For the same reason that *Deposit Guaranty* does not defeat jurisdiction in this Court, it likewise did not divest the Second Circuit of jurisdiction. Supp. App. 4a-5a (citing *Chadha* in concluding

that the United States is an aggrieved party for purposes of taking an appeal because it "continues to enforce Section 3 of DOMA" and "[t]he constitutionality of the statute will have a considerable impact on many operations of the United States"); *see also* Jackson Br. 38-39 (noting that the *Deposit Guaranty* rule applies to 28 U.S.C. § 1291).

2. The Court Has Jurisdiction Under Article III.

This Court also has Article III jurisdiction because (1) the constitutionality of DOMA continues to be zealously litigated in a manner fully consistent with traditional notions of adversarial resolution, (2) the controversy is justiciable under traditional case or controversy doctrine, and (3) the Court's decision will resolve a concrete, particularized dispute between Windsor and the United States.

a. The Constitutionality of DOMA Continues To Be Zealously Litigated.

Although DOJ and Windsor both argue that DOMA is unconstitutional, BLAG vigorously opposes their position and did so in the courts below. In addition, at least twenty-five *amici* have filed briefs in this Court in support of

BLAG on the merits,[2] and at least nineteen *amici* filed briefs in the court of appeals.[3]

As an historical fact, this Court has often heard and determined cases in which opposing parties have agreed on an issue, or where only one party defends the case. For example, the Court issued its landmark decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) in spite of James Madison's failure to participate. *See id.* at 139, 154. Similarly, the Court decided *United States v. Miller*, 307 U.S. 174 (1939), even though the defendants did not file a brief or appear at oral argument, and "the Court heard from no one but the Government." *Dist. of Columbia v. Heller*, 554 U.S. 570, 623 (2008).

Since *Marbury* and *Miller*, this Court has often appointed an *amicus curiae* to brief and argue the matter when one party does not respond. For example, in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955), the respondent did not

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[2] *See* American Bar Ass'n, *Preview of the United States Supreme Court Cases: U.S. v. Windsor*, http://www.americanbar.org/publications/preview_home/12-307.html.

[3] *See* Mark Hamblett, *Amicus Briefs Pour Into Second Circuit for Review of DOMA Validity*, NEW YORK LAW JOURNAL, Sept. 13, 2012, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202571134398&Amicus_Briefs_Pour_Into_Second_Circuit_for_Review_of_DOMA_Validity.

file a brief and the Court noted "the lack of genuine adversary proceedings at any stage in th[e] litigation." *Id.* at 2, 4. Nevertheless, the Court "invited specially qualified counsel to appear and present oral argument as *amicus curiae* in support of the judgment below," and proceeded to decide the merits. *Id.* at 4 (internal quotation marks omitted). There is no reason to abandon that tradition here.

Given the stakes in this case and the extensive presentation of the issues in a manner fully consistent with traditional notions of adversarial resolution, the bare fact that Windsor and DOJ agree that DOMA is unconstitutional does not render this "a friendly, non-adversary, proceeding" beyond this Court's jurisdictional reach. *Chadha,* 462 U.S. at 939 (citation omitted). As the Court observed in *Chadha*, "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." *Id.*; *accord Chadha v. INS*, 634 F.2d 408, 420 (9th Cir. 1980) (Kennedy, J.) (rejecting notion "that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional.").

Amica Jackson argues that there is no case or controversy here because the parties seek

"precisely the same result." Jackson Br. 31 (citing *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980)). But that is not the test, nor should it be. Regardless of whether DOJ agrees with Windsor regarding the constitutionality of DOMA, it acknowledges that, as an administrative matter, the government is powerless to unilaterally give her a tax refund. On the contrary, without judicial intervention, it would not do so. As a consequence, a live controversy exists as to which the decision of the courts—including this Court—is outcome determinative, and, thus, a case or controversy exists within the meaning of Article III.

Even where all the litigants in a particular case desire precisely the same result, this does not necessitate a finding that the Court lacks jurisdiction. *See Camreta*, 131 S. Ct. at 2029 n.3 ("this Court has previously identified no special Article III bar on review of appeals brought by parties who obtained a judgment in their favor below."). Again, what matters is the existence of an actual controversy in need of judicial resolution. *See Chadha*, 462 U.S. at 939 ("[P]rior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha.").

b. *Chadha* and *Lovett* Support Justiciability.

In both *Chadha* and *United States v. Lovett*, 328 U.S. 303 (1946), the Court reached the merits of the questions presented, and overturned the statutes at issue on constitutional grounds, even though both the United States and the particular plaintiffs agreed arm-in-arm that the Court should do so.[4] Because the Court's opinions in *Chadha* and *Lovett* did not expressly state that the United States had Article III standing under the circumstances, *amica* Jackson argues that those precedents do not support a finding that the United States has Article III standing in this case. *See* Jackson Br. at 25, 28 (citing *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996)). Jackson then appears to take the view that because the United States lacked Article III *standing* in *Chadha* and *Lovett* (and likewise here), the Court also lacked Article III *jurisdiction* in those cases (and likewise here). *See* Jackson Br. 25-28. But the latter does not follow from the former, and, in any event, the United States possesses Article III standing in this controversy and the Court possesses Article III jurisdiction.

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[4] In *Lovett*, an appeal was taken from a judgment in favor of federal employees whose compensation had been terminated by an act of Congress. 328 U.S. at 304-05.

The question of Article III standing focuses on whether a particular litigant has a sufficient stake in a particular dispute so that it may argue the matter in court. The question of Article III jurisdiction focuses on whether the court faces an actual case or controversy. Here the United States has Article III standing to litigate this matter because Windsor seeks to recover a tax refund from the Treasury. The Court has Article III jurisdiction because a case or controversy actually exists: whether Windsor prevails and receives her tax refund depends on how the Court rules. The fact that the United States agrees with Windsor that Section 3 of DOMA is unconstitutional does not strip the United States of its standing because it remains an indispensible party and still has much at stake in spite of its agreement on the discrete constitutional issue. The Court does not lose jurisdiction because the agreement of the United States does not resolve the controversy—it remains for the Court to decide DOMA's constitutionality, whether the Second Circuit was right, and whether Windsor gets her refund.

Even if the United States bowed out of the litigation altogether and refused to participate (thereby *de facto* agreeing that judgment could enter against it), that still would not destroy jurisdiction. If refusing to participate could destroy jurisdiction, default judgments would not be possible in federal court and a litigant could

always terminate the litigation at will at any point simply by refusing to show up and participate in any further proceedings. That, of course, is not the law. As noted, when a litigant refuses to participate in this Court in a case selected for certiorari review, the Court simply appoints an *amicus* to participate in its stead.

In support of her argument, Jackson recites footnote 2 in *Lewis*, 518 U.S. at 352 n.2, where the Court stated that "we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." Jackson Br. 25. But this comment on the precedential effect of unaddressed issues in no way requires the jurisdictional rule Jackson urges. Moreover, *Lewis* itself acknowledged that, in many cases, actual injury (and standing to sue) will often be "apparent on the face of" the relevant decisions. *Id.* at 351. That is the case here, just as it was "apparent" in *Chadha* and *Lovett*.

Inasmuch as the Court in *Chadha* expressly held that Article III adverseness existed in the Ninth Circuit, 462 U.S. at 939, the Court impliedly held that Article III adverseness existed in this Court, particularly given the intervention of Congress. *See id.* at 939-40. Likewise, the Court in *Lovett* impliedly held that Congress as *amicus curiae* supplied the requisite Article III adverseness. 328 U.S. at 306-07, 313. Those conclusions are sound, and respecting them here

gives meaning to the Court's responsibility (undoubtedly exercised in *Lovett* and *Chadha*) of examining its own jurisdiction.[5]

c. The Court Has Jurisdiction Under Article III Because Its Decision Will Resolve a Concrete Dispute Between Windsor and the United States.

As noted, Windsor seeks a refund of $363,053 in federal tax she paid because the United States refused to recognize her marriage to another woman. Because Windsor prevailed below, the United States must pay Windsor her tax refund if this Court does not reverse.[6] Thus, the United States has suffered a concrete injury to its financial interest. *Camreta*, 131 S. Ct. at 2028 (to establish Article III standing, party

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[5] *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (citation omitted).

[6] Although Windsor prevailed in the courts below, the judgment in her favor is not final because the United States has appealed it. *See* 28 U.S.C. § 2414 ("Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.").

seeking review must demonstrate "'injury in fact'…caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'") (citation omitted). In addition, as the Court of Appeals recognized, "[t]he constitutionality of the statute will have a considerable impact on many operations of the United States." Supp. App. 4a.

The Executive Branch's decision to stop defending DOMA in court has not diminished the concrete injury Windsor suffered in having to pay the tax in question, or the adverse monetary judgment the United States incurred in the courts below. In *Lovett*, the United States and various federal employees agreed that the relevant statute denying those employees compensation was unconstitutional, but the Court did not find the parties' agreement on the issue to be equivalent to a monetary settlement of the case mooting the appeal. *See Lovett*, 328 U.S. at 307, 313.

Despite Jackson's urging to the contrary, Jackson Br. 32., *Alliance to End Repression v. City of Chicago*, 820 F.2d 873 (7th Cir. 1987), does not compel a different conclusion. In *Alliance to End Repression*, the appeal challenged the award of attorneys' fees for time worked after the parties agreed on money damages. *Id.* at 874. Here, the United States and Windsor have not agreed to settle the case for a certain amount.

Jackson asserts that the United States' "only real interest here is in obtaining a precedent from a higher court." Jackson Br. 29. In support of this contention, she discusses *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982). Jackson Br. 29-30. In that case, the Court held that Princeton's appeal of a state court decision invalidating its old regulations was moot because "the regulation at issue [wa]s no longer in force" and "the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution." *Schmid*, 455 U.S. at 103. No analogous legislative amendment has occurred here, and for this reason this case is vastly different.

Jackson also makes much of the hypothetical issue of whether the Court in *Schmid* would have accepted the appeal if the state had been the only appellant. Jackson Br. 29-30. But in *Schmid*, the state declined to take *any* position on the merits of the case,[7] whereas here the United States has argued that DOMA is unconstitutional. In *Schmid*, the state was no longer

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[7] *Schmid*, 455 U.S. at 102 ("The State of New Jersey has filed a brief in this Court asking us to review and decide the issues presented, but stating that it 'deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action.'").

required to enforce the unconstitutional regulations by the time review was sought in this Court (because those regulations had been amended), whereas here the Executive Branch must continue enforcing DOMA unless and until this Court strikes it down or Congress repeals it.

3. The Exercise of Jurisdiction Respects Separation of Powers.

The Executive Branch's decision to enforce but not defend Section 3 of DOMA not only maintains its active interest in this case, but respects the constitutional limitations on its own power and the proper roles of co-equal branches. Through its continued enforcement of DOMA and its participation in this litigation, the Executive Branch is fulfilling its own constitutional mandate to faithfully execute the laws, while respecting the authority of Congress to enact legislation and the authority of the courts to determine its constitutionality.

A finding that this Court does not have jurisdiction based on the Executive Branch's agreement with the court below would result in an unwarranted expansion of Executive power at the expense of Congress and the Judiciary, creating an imbalance: by simply agreeing with a litigant that a law is constitutionally invalid (all the while continuing to enforcing the same law out of court), judicial review is foreclosed. Noth-

ing in the Constitution requires such an odd anomaly.

It is this Court that is "the final arbiter of federal law," *Danforth v. Minnesota*, 552 U.S. 264, 291-92 (2008) (Roberts, C.J., dissenting); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012), and it is "the province and duty" of this Court "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It follows that "[u]nder the basic concept of separation of powers...the judicial Power of the United States...can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the power to override a Presidential veto." *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (quoting *United States v. Nixon,* 418 U.S. 683, 704 (1974) (internal quotations omitted)).

Consistent with this fundamental principle, DOJ has properly brought this matter to this Court to determine "what the law is." Until the Court issues a final determination, Executive agencies will continue to enforce DOMA. As noted, there is nothing untoward about the United States, acting through DOJ, seeking a decision by this Court on the constitutionality of a federal statute where, as here, there exists a live controversy with actual, meaningful consequences to the litigants.

4. The Court Should Decide this Case Because the Constitutionality of Section 3 of DOMA Is Capable of Repetition Yet Evading Review.

The Court should also decide this case because if it does not, the pressing and significant question of DOMA's constitutionality will not be resolved authoritatively, and the issue will continue to fester. As the Court stated in an analogous setting, "[o]ur Constitution did not contemplate such a result." *Lovett*, 328 U.S. at 314.

Because the government continues to enforce DOMA, it is inevitable that absent an authoritative decision by this Court, homosexual married couples will be denied federal marital benefits; those couples will sue the United States and/or its agencies challenging the constitutionality of the deprivation of marital benefits under DOMA; DOJ will not defend the constitutionality of DOMA; and a judgment will likely be entered against the United States. If appellate jurisdiction is lacking, this sequence of events will repeat over and over again—classically capable of repetition yet evading appellate review. Nothing in the Constitution requires this extraordinarily wasteful result.

B. BLAG Has Standing.

As discussed, this Court has statutory and constitutional jurisdiction over this matter regardless of whether BLAG has standing. Accordingly, the Court need not reach this issue. In any event, BLAG does have standing because it can "ride 'piggyback' on the State's undoubted standing" given the ongoing controversy between Windsor and the United States. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). In *Diamond*, this Court explained that an intervening defendant is "entitled to seek review,...file a brief on the merits, and to seek leave to argue orally...if the State is in fact an appellant before the Court." *Id.* "To appear before the Court as an appellant, a party must file a notice of appeal…." *Id.* at 63 (citing 28 U.S.C. § 2101(c), which requires a writ of certiorari to be filed within ninety days of a civil judgment or decree).

Here, in contrast to the State of Illinois in *Diamond*, the Solicitor General filed for a writ of certiorari, rendering the United States an appealing party. Because a case or controversy exists and the United States properly invoked this Court's jurisdiction, BLAG can piggyback onto this appeal. This Court has consistently applied *Diamond* and should do so here. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that because members of the National Treasury Employees Union had Article III and statutory standing, the Court "therefore need not

consider the standing issue as to the Union or Members of Congress").

BLAG and DOJ agree that intervenors can piggyback onto a case without establishing independent standing. *See* JA207, Def.'s Resp. to Mot. to Intervene ("[T]he Executive Branch's continuing role in the litigation...makes it unnecessary for BLAG to have an independent basis for standing in order to participate in the litigation to present arguments in support of the constitutionality of Section 3."); JA213, Reply of BLAG to Def.'s Resp. to Mot. to Intervene (stating that whether the House has standing is "beside the point" because "[a]s long as the United States is a defendant in this action…the House need not demonstrate any standing whatever"). Consistent with this Court's precedents, the lower court found that BLAG had intervenor standing because there is an ongoing case and controversy between Windsor and DOJ. *See* JA226-227 (quoting *Chadha*, 462 U.S. at 939). This conclusion was correct, and the Court should reject *amica* Jackson's arguments to the contrary.

CONCLUSION

For the foregoing reasons, as well as those offered by Respondent, this Court possesses jurisdiction, and the decision of the court below should be affirmed.

Respectfully submitted,

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