No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

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

BRIEF FOR AMICI CURIAE FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS AND FORMER COUNSELS TO THE PRESIDENT ON JURISDICTION

MARK C. FLEMING
FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PAUL R.Q. WOLFSON
Counsel of Record
DANIEL WINIK*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

EXECUTIVE AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

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

BRIEF FOR AMICI CURIAE FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS AND FORMER COUNSELS TO THE PRESIDENT ON JURISDICTION

INTEREST OF AMICI CURIAE[1]

Amici curiae are former United States Solicitors General, Assistant Attorneys General for the Office of Legal Counsel, and Counsels to the President who have served in administrations of both major political parties

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

and have confronted the difficult questions of constitutional duty and inter-branch comity that arise when the President concludes that there is no reasonable argument to support the constitutionality of an Act of Congress.[2] Amici take no position in this brief on the constitutionality of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, on the propriety of the current Administration's decision not to defend that statute, or on the specific standard for determining when a statute should not be defended. Indeed, amici disagree among themselves on those questions.

Amici agree, however, that this Court is not divested of jurisdiction by the Executive's decision not to proffer what it considers unreasonable arguments in support of a statute's constitutionality, where the Executive continues to enforce the statute and appeals a judgment declaring it unconstitutional. To the contrary, amici believe that the decision not to defend a statute—under strictly limited circumstances—is a crucial prerogative for the Executive. Amici also agree that, in appropriate circumstances, the Executive may enforce a statute but not defend its constitutionality in a judicial challenge, and that when the Executive so acts, the federal courts, including this Court, have Article III jurisdiction to determine the statute's constitutionality, assuming the other necessary constitutional and statutory prerequisites of jurisdiction are present. In this case, which involves a matter of great public import, the United States, having determined that Section 3 of DOMA could not be defended, acted appropriately by denying Ms. Windsor an estate tax refund and by appealing judgments declaring the statute unconsti-

[2] A complete list of amici is set forth in an appendix to this brief.

tutional in order to preserve a justiciable case or controversy for this Court to decide.

SUMMARY OF ARGUMENT

The President of the United States is bound by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In the rare event that the President concludes that a federal statute conflicts with the Constitution—the highest of "the Laws" that the President must take care to execute faithfully—the Executive confronts a dilemma: enforcement of one law will cause it to violate a higher law.

Those officials charged with assisting the President in identifying the obligations of the Executive Branch—the Attorney General, the Solicitor General, the Assistant Attorney General for the Office of Legal Counsel, the Counsel to the President, and others—historically have tried to resolve such dilemmas by considering a variety of factors, including separation of powers, inter-branch comity, and the private interests affected by the statute in question. In rare cases, the Executive has concluded that a statute should not be enforced at all. But in other circumstances, especially those involving matters of great public import where enforcement does not require criminal prosecution, the Executive has concluded that the public interest warrants a definitive determination of the statute's constitutionality. In such cases, and in particular where the Executive has concluded that it cannot offer reasonable arguments in defense of the statute, it has acted to ensure a definitive judicial resolution by enforcing the statute, declining to proffer arguments in favor of the statute's constitutionality when it is challenged in court, and appealing judgments declaring it unconstitu-

tional.[3] This practice honors the presumption of constitutionality accorded to Acts of Congress and ensures that the Judiciary has an opportunity to exercise its ultimate authority to "say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The current Administration has explained its decision to enforce but not defend DOMA as an application of these principles. Whether or not that decision was proper or wise—a point on which amici take no position in this brief—it reflects the same difficult calculus of comity and constitutional duty in which Executive Branch officials (including amici) have historically engaged. When the Executive concludes that a federal statute cannot reasonably be defended, the Executive may enforce the statute—even while declining to defend it—so as to leave the ultimate resolution of the statute's constitutionality to the Judiciary and, ultimately, this Court. This practice is an act of considered fidelity to our constitutional structure.

The utility and continued vitality of this practice depend, however, on this Court's exercise of jurisdiction to decide such constitutional questions when they are presented. The constitutionality of DOMA is a question of abiding national importance, affecting thousands of federal programs and hundreds of thousands of citizens who are treated as married under state law but unmarried under federal law. There is an actual controversy between the parties—the United States will not pay Ms. Windsor in the absence of a final, nonappealable judgment declaring the law unconstitution-

[3] The circumstances under which the Executive has declined to defend the constitutionality of a statute turn on a variety of factors. *See infra* note 8. Amici take no position with respect to the specific contours of the standard for a decision not to defend.

al. Were this Court to hold that it lacks jurisdiction because the Executive agrees with Ms. Windsor and the lower courts that DOMA violates the Constitution—even where it has continued to enforce the statute, and even where it intends to do so in the future until a definitive judicial ruling to the contrary—that holding would depart from the historical practice of both this Court and the Executive, and would unduly constrain the Executive's ability to deal with constitutionally questionable statutes in a manner that takes appropriate account of the separation of powers and interbranch comity.

ARGUMENT

I. THE DECISION TO ENFORCE A STATUTE WHILE DECLINING TO ARGUE IN ITS DEFENSE IS A MEASURED APPROACH THAT RESPECTS BOTH THE PRESUMPTION OF VALIDITY ACCORDED TO ACTS OF CONGRESS AND THE JUDICIARY'S ROLE AS THE ARBITER OF CONSTITUTIONALITY

The Constitution reserves to Congress the power to make laws and to this Court the power to interpret them. On the President, the Constitution imposes a singular duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Executive respects this obligation by enforcing and defending any duly enacted statute that, in its judgment, complies with the Constitution.

In those rare cases where the Executive concludes that a statute conflicts with the Constitution, however, the Executive's duty becomes more difficult to discern. The President and all Executive officials swear oaths to "defend the Constitution of the United States" (U.S. Const. art. II, § 1, cl. 7; 5 U.S.C. § 3331), and the Constitution is the highest of "the Laws" that the President

must "take Care" to execute (U.S. Const. art. VI, cl. 2; *see Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 31 (1992) ("Among the laws that the President must 'take Care' to faithfully execute is the Constitution.")). Determining the proper course of action when a statute and the Constitution appear to conflict is among the most serious duties of the President and of the attorneys advising him. In a 1980 opinion providing guidance on the subject, Attorney General Civiletti wrote that the Attorney General's duty is to "exercise conscientious judgment," to "examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other," to "acknowledge his dilemma and decide how to deal with it." *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55 (1980) ("Civiletti Mem.").

On rare occasions, the Executive has determined that a statute should not be enforced at all. A number of those occasions have involved laws that trenched on individual rights, were clearly unconstitutional under this Court's precedents, and could be enforced only by criminal prosecutions. *See, e.g.*, Letter from Janet Reno, Attorney General, to Albert Gore, Jr., President of the Senate (Feb. 9, 1996) (noting the Executive's "longstanding policy to decline to enforce the abortion-related speech prohibitions" in several statutes). In such circumstances, the President may properly conclude that his duty to uphold the Constitution requires him not to enforce a patently unconstitutional law. The President is accountable for such decisions to Congress, which has required that the Executive report any such

nonenforcement decisions (28 U.S.C. § 530D(a)(1)(A)), as well as to the electorate.

But in other circumstances—for example, where the constitutional question is not directly controlled by a decision of this Court, and where the statute can be enforced by means other than criminal prosecution—the Executive may properly conclude that the public interest and comity between the branches warrant a definitive judicial determination of a statute's constitutionality, even when the statute is subject to serious constitutional doubt. Typically, in those circumstances, the Executive Branch has continued to enforce and defend the statute. *See, e.g.*, Civiletti Mem., 4A Op. O.L.C. at 55 (observing that when an Executive Branch official "is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress"). The Executive pursues each of these courses—enforcement and defense—for distinct reasons of inter-branch comity, as explained more fully below. The Executive *defends* statutes, as a general matter, out of respect for the presumption that Congress has independently determined any statute it enacts to be consistent with the Constitution, and because the Department of Justice is charged by statute with the duty to represent the interests of the United States—that is, "the sovereign composed of the three branches" (*United States* v. *Providence Journal Co.*, 485 U.S. 693, 701 (1988))—in "the conduct of litigation" (28 U.S.C. § 516). And the Executive *enforces* statutes in deference to comity between the branches and to the Judiciary's unique role in resolving constitutional disputes in properly presented cases or controversies.

But there are also circumstances, such as this one, where the Executive may properly *enforce* a statute

even if it does not *defend* it.[4] In doing so, the Executive properly takes account of the powers and prerogatives of other branches—Congress's authority to enact statutes and the Judiciary's authority to "say what the law is" when presented with a justiciable case or controversy. And in doing so, the Executive also properly takes account of the public interest in a definitive and uniform resolution of constitutional questions surrounding a statute, such as Section 3 of DOMA, that affects innumerable private and public decisions every day and as to which a definitive judicial resolution would serve the public interest.

A. The Executive Shows Respect For Congress By Defending Duly Enacted Statutes Except In Strictly Limited Circumstances

Acts of Congress carry a "strong presumption of constitutionality" (*United States* v. *Di Re*, 332 U.S. 581, 585 (1948)), and the Executive in almost all circumstances defers to the constitutional judgment of its coequal branch by enforcing and defending duly enacted statutes, at least where Congress has not infringed on the Executive's core powers. This presumption of enforcement and defense has been the policy of the Solicitor General's Office across both Democratic and Repub-

[4] There are also cases where the Executive has the inverse option: it may defend, but not immediately enforce, a statute—for example, in litigation presenting a pre-enforcement challenge to the facial validity of a statute. *See, e.g.*, *Reno* v. *ACLU*, 521 U.S. 844 (1997). In such cases, the Executive may properly exercise its prosecutorial discretion to withhold enforcement of a statute until its constitutionality is definitively determined by the courts, and the pre-enforcement challenge may present a justiciable controversy for the courts to make that determination.

lican administrations.[5] This has also been the consistent position of the Office of Legal Counsel, which has regularly stated that the "Executive's duty faithfully to execute the law and recognition of the presumption of constitutionality generally accorded duly enacted statutes result in all but the rarest of situations in the Executive's enforcing and defending laws enacted by Congress." *Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183, 193 (1984) ("Olson Mem.").[6] In short, the practice of the Execu-

---

[5] *See, e.g., Confirmation Hearings on the Nominations of Thomas Perrelli Nominee To Be Associate Attorney General of the United States and Elena Kagan Nominee To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Elena Kagan) ("Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made."); *Confirmation Hearing on the Nomination of Paul D. Clement To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Paul D. Clement) ("[O]utside a narrow band of cases implicating the President's Article II authority, the [Solicitor General's] office will defend the constitutionality of the acts of Congress as long as reasonable arguments can be made in the statute's defense.").

[6] *See also Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 26 (1982) ("It is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."); *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 Op. O.L.C. 25, 25-26 (1981) ("In my view, the Department has the duty to defend an act of Congress whenever a reasonable argu-

tive Branch—across the decades and across administrations of both major political parties—is to enforce and defend Acts of Congress in nearly all instances.

Indeed, the Solicitor General may decide to defend a statute even where the President has concluded that it is unconstitutional or expressed reservations as to its constitutionality. In signing the Voting Rights Act Amendments of 1970, for example, President Nixon publicly stated his view that a provision of the statute conferring the right to vote on eighteen-year-olds violated the Constitution. *Statement on Signing the Voting Rights Act Amendments of 1970*, 1970 Pub. Papers 512, 512 (June 22, 1970). Solicitor General Griswold, however, filed a brief before this Court defending the constitutionality of the statute. U.S. Br., *Oregon* v. *Mitchell*, No. 43 Orig. (U.S. Oct. 1970); *see also* Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081-1082 (2001). Similarly, the Solicitor General defended the Bipartisan Campaign Reform Act of 2002, notwithstanding the President's publicly expressed doubts whether portions of the Act were constitutional. *Compare Statement on Signing the Bipartisan Campaign Reform Act of 2002*, 1 Pub. Papers 503, 503 (Mar. 27, 2002) (expressing "reservations about the constitutionality" of certain provisions), *with* U.S. Br., *McConnell* v. *FEC*, Nos. 02-1674, et al. (U.S. Aug. 2003) (defending the statute).

Notwithstanding the nearly uniform practice of both enforcing and defending duly enacted statutes, So-

---

ment can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."); Civiletti Mem., 4A Op. O.L.C. at 55 ("The Attorney General has a duty to defend and enforce the Acts of Congress[.]").

licitors General in both Republican and Democratic administrations have in infrequent instances determined (typically after consultation with the President, the Attorney General, and other Justice Department and Executive Branch officials[7]) that a statute should not be defended, where the Executive has concluded that no reasonable argument supports the statute's constitutionality.[8] The Department of Justice has de-

[7] Although the Solicitor General typically enjoys "a marked degree of independence" in his function, the Attorney General—and through him, the President—does have the power to direct the Solicitor General to defend (or not to defend) a statute. *Role of the Solicitor General*, 1 Op. O.L.C. 228, 229 (1977); *see* Days, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. App. Prac. & Process 509 (2001).

[8] This brief does not attempt to define the precise contours of the "reasonable arguments" that might be raised in a statute's defense (or the unreasonable arguments that should not be). Different administrations have approached that question differently. To amici's knowledge, however, no administration has concluded that the Justice Department must or should offer all arguments in support of a statute except those that would be frivolous. Thus, the Executive has in the past concluded, and surely may conclude, that professionally responsible, non-frivolous arguments are nonetheless not sufficiently "reasonable" to be raised in defense of a statute. For example, to amici's knowledge, the Department of Justice has never thought itself required to ask this Court to overrule one of its precedents in order to sustain a statute, even when such an argument would not be frivolous.

The Solicitor General has also declined to defend statutes that appeared to trench on the power of the Executive, even when reasonable arguments could be made in the statutes' defense. *See, e.g.*, Days, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 499-500 (1995). This case does not involve such a circumstance, and so this brief does not consider such instances of non-defense, which the Department of Justice has consistently treated differently from other cases where statutes raise serious constitutional problems.

clined to make arguments defending a statute's constitutionality in numerous cases before both this Court and the lower courts. *See, e.g.*, Letter from Andrew Fois, Assistant Attorney General for the Office of Legislative Affairs, to Orrin G. Hatch, Chairman, Senate Committee on the Judiciary (Mar. 22, 1996) (listing cases).[9]

The decision not to defend a statute is never taken lightly; indeed, it invariably involves debate at the highest levels of the Executive Branch. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), for example, President Ford was required personally to intercede in a dispute between the Solicitor General and Attorney General on the one hand, who wanted the government's brief to be neutral on the question of the constitutionality of the expenditure and contribution limits of the Federal Election Campaign Act, and the Chair of the FEC on the other hand, who wanted the government to defend all provisions of the statute. In the end, the Executive filed two briefs—one on behalf of the FEC (an independent agency) defending the statute, and another signed by the Attorney General and Solicitor General expressing "marked skepticism" toward it. Hasen, *The Nine Lives of* Buckley *v.* Valeo, *in First Amendment Stories* 345, 361 (Garnett & Koppelman eds., 2012); *see*

[9] In *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), for example, the Acting Solicitor General declined to defend a statute forbidding the FCC from spending money to change its policy of favoring minority applicants for broadcast licenses. In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Solicitor General declined to defend a statute authorizing each House of Congress to veto the INS's decision to suspend an alien's deportation. And in *United States* v. *Lovett*, 328 U.S. 303 (1946), the Solicitor General declined to defend a statute requiring the Executive to withhold the salaries of certain identified officials.

also, e.g., Letter from Alfred C. Sikes, Chairman of FCC, to Dick Thornburgh, Attorney General (Jan. 12, 1990) (urging the Attorney General to defend the FCC policy at issue in *Metro Broadcasting*, while acknowledging the Acting Solicitor General's "reluctance … to do so").

B. When The Executive Determines That A Statute Cannot Reasonably Be Defended, The Executive Respects the Judiciary's Role As The Arbiter of Constitutionality By Enforcing The Statute And Appealing Adverse Judgments

The Constitution vests in the Judiciary the ultimate authority "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and "the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law," *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984).[10] The Executive acts appropriately and in recognition of this authority when it declines to defend a statute but takes measures to ensure that the statute does not escape definitive judicial review.

---

[10] *See also City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997) ("Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

Outside the exceedingly rare cases where the Executive determines that a statute is so patently unconstitutional that it cannot be enforced, the Executive acts appropriately under our constitutional structure by taking steps to ensure the presentation of a justiciable case or controversy, including enforcing the statute and appealing adverse judgments.[11] Some have framed this as a matter of constitutional duty: in a 1984 opinion of the Office of Legal Counsel, for example, Assistant

[11] The Executive has, on occasion, declined to file appeals or petitions for certiorari from lower-court judgments against the constitutionality of federal statutes. *See, e.g.*, Letter from Paul D. Clement, Acting Solicitor General, to Patricia Mack Bryant, Senate Legal Counsel (Dec. 23, 2004) (explaining the decision not to authorize an appeal of a district-court judgment invalidating a statute that conditioned the receipt of federal funds for mass transit on the rejection of advertisements promoting legalization or medicinal use of substances including marijuana).

In some such cases, the Executive's decision not to appeal an adverse judgment might be viewed as a form of non-enforcement rather than non-defense. For example, in the case that was the subject of Solicitor General Clement's letter—*ACLU* v. *Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)—the Executive could not have chosen not to enforce the statute, because the law was effectively implemented by an independent entity, the Washington Metropolitan Area Transit Authority, that received federal funds; it was that entity's obedience to the statute, not the Executive's enforcement, that gave rise to the alleged constitutional injury. In other circumstances, the Solicitor General might not have been aware of a constitutional challenge to a statute until after the entry of a judgment declaring the statute unconstitutional; a decision by the Solicitor General not to appeal such a judgment might amount to an acknowledgment that the statute ought never have been enforced at all. Finally, the Executive might decline to take steps to appeal a judgment against the constitutionality of a statute when the statute has been challenged in a lawsuit between private parties. Where the private party who is aggrieved by the judgment against a statute has adequate motive and resources to file an appeal, the Executive need not necessarily do so.

Attorney General Olson explained that "[i]t is … generally for the courts, and not the Executive, finally to decide whether a law is constitutional," and stated that "[a]ny action of the President which precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts." Olson Mem., 8 Op. O.L.C. at 194. Whether or not submission of disputes about the constitutionality of legislation to the Judiciary is constitutionally obligated, it is certainly typical in practice. *See*, *e.g.*, Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 Va. L. Rev. 1001, 1069 (2012) ("The creation and preservation of a justiciable controversy is a goal routinely stipulated in official defenses of enforcement-litigation gaps."); *see also* 1970 Pub. Papers at 512 (President Nixon's statement on signing the Voting Rights Act Amendments of 1970, in which he "directed the Attorney General to cooperate fully expediting a swift court test of the constitutionality" of the voting-age provision that he considered unconstitutional).

Thus, even while declining to offer arguments in defense of a statute, the Executive can and properly often does seek to present the Judiciary with a justiciable case in which it can review the statute's constitutionality. In our federal system, where advisory opinions are unavailable and the United States typically cannot sue a private citizen for a declaratory judgment of unconstitutionality, an Executive that has determined that no reasonable argument supports a statute's constitutionality has few options. In general, the most efficacious way for the Executive to secure the Judiciary's ability to pass on such a statute is to enforce it, setting the stage for an aggrieved citizen to bring suit. *See* Waxman, 79 N.C. L. Rev. at 1078 n.14 ("Unlike a

decision not to enforce a statute at all, the practice of 'enforce but decline to defend' permits the will of Congress to be honored in the first instance, allows the Executive Branch to make its views known to the Court, and ordinarily places before the Court the opportunity to resolve the constitutional dispute between the other two branches."); *cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (1994) ("[T]he President may base his decision to comply (or decline to comply) [with a statute he views as unconstitutional] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch."). This is the course that the Administration has pursued in this case. *See* Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker of the House of Representatives (Feb. 23, 2011) ("Holder Letter") (explaining the decision to continue enforcing DOMA, even while declining to defend it in this and other cases, on the ground that "[t]his course of action … recognizes the judiciary as the final arbiter of the constitutional claims raised").

But enforcing a statute and triggering a constitutional challenge are not enough by themselves to secure a definitive judicial resolution of the statute's constitutionality; if that is the Executive's objective, it may and should take steps to ensure that the constitutional issue is presented not only to a district court, but also to a court of appeals and ultimately to this Court so that the Judiciary has an opportunity to rule definitively. The Constitution vests "[t]he judicial Power of the United States" not in the ninety-four district courts but in "one supreme Court." U.S. Const. art. III, § 1. Under the Constitution, this Court wields the ultimate authority of the Judicial Branch, and the Executive may there-

fore properly determine—as it determined here, and as it determined in *Chadha* and *Lovett*—that it will enforce an Act of Congress unless and until *this* Court has had an opportunity to render judgment on the Act. *See* Holder Letter ("[T]he President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the *judicial branch renders a definitive verdict* against the law's constitutionality." (emphasis added)).

The Executive's typical practice of appealing adverse lower court judgments shows respect not only for the Judiciary but also for Congress. If the Executive were not to appeal lower-court judgments against the constitutionality of a statute, Congress's independent judgment as to the constitutionality of legislation could be overridden by a single court, and federal statutes could have nonuniform application across the country (if different lower courts were to arrive at different conclusions). By appealing and filing petitions for certiorari from adverse judgments of laws the Executive has concluded are not subject to reasonable defense, the Executive as a general matter ensures that Congress's will cannot be overridden without at least putting the matter before this Court.[12]

---

[12] Because the reasons for the Executive to appeal judgments against the validity of federal statutes arise from the structure of the Federal Constitution, those reasons do not necessarily apply to state and local executives. Nor are state and local executives necessarily subject to the same duties of enforcing or defending statutes, ordinances, or initiatives. To the extent that any such duties exist for state and local executives—a question on which this brief takes no position—they would be matters of state constitutional

II. WHERE THE EXECUTIVE CONTINUES TO ENFORCE A STATUTE, THIS COURT POSSESSES JURISDICTION TO REVIEW ITS CONSTITUTIONALITY, WHETHER OR NOT THE EXECUTIVE ARGUES IN ITS FAVOR AND WHETHER OR NOT A LOWER COURT HAS STRUCK IT DOWN

The court-appointed amica curiae argues that no genuine case or controversy exists here, where the Executive agrees with Ms. Windsor and the lower courts that DOMA violates the Constitution. That is incorrect; rather, all the relevant aspects of Article III adversity are present here. The interests animating Article III are not offended by permitting the Solicitor General to take the steps necessary to present the question of a statute's constitutionality to this Court—both by continuing to enforce it and by filing the necessary appeals from adverse judgments in the lower courts—and then to notify the Court that the Executive does not believe the statute is constitutional. Article III does not require DOMA's constitutionality to be adjudicated multiple times in the lower courts before this Court has the option of reviewing it.

A. Article III Adversity Is Present Here

Article III requires that this Court hear only cases in which "the questions will be framed with the necessary specificity, … the issues will be contested with the necessary adverseness and … the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968). Where, as here, the Executive continues to enforce a statute, and where inter-

---

law, distinct from any federal constitutional considerations (including Article III standing).

venors or amici will present vigorous arguments in support of the statute even if the Executive does not, the requirements of Article III adversity are satisfied.

First, there is a genuine controversy between the United States and Ms. Windsor, who claims entitlement to $363,053 that the United States refuses to pay her. This controversy is in all relevant respects the same as the controversy the Court found to exist in *Chadha*. There, as here, the Executive considered the statute in question unconstitutional. There, as here, the Executive refused to defend the statute against a challenge. And there, as here, the Executive took the position that it would continue to implement the statute unless this Court rendered a definitive judgment invalidating it. In *Chadha*, this Court agreed with then-Judge Kennedy's opinion for the Ninth Circuit that an Article III controversy existed because the result of the proceeding would determine whether or not Mr. Chadha could remain in the country. *See INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983) ("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 § 244(c)(2), the INS will execute its order and deport him.'"). Precisely the same is true here: regardless of the Executive's agreement with Ms. Windsor on the constitutional question presented and on the correctness of the judgment below, this Court's ruling will conclusively determine whether Ms. Windsor receives the money she claims the government owes her.

Second, there can be no question that this proceeding will be marked by the "sharp[] … presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The "concrete adverse-

ness" of the case is preserved (*id.*)—notwithstanding the Executive's decision not to defend DOMA—by the ability of the Bipartisan Legal Advisory Group and amici to present what in their view are the strongest arguments in favor of the statute's constitutionality. And it can hardly be said that DOMA's defense by BLAG has been anything less than skillful and zealous.

B. The Executive Is A Proper Party To Petition For Certiorari

While the court-appointed amica acknowledges (at 23) that the district court was properly seized of Article III jurisdiction in this case, she suggests that the Executive lacked standing to appeal the district court's judgment. But the United States, represented by attorneys within the Executive Branch, is a proper party to invoke the jurisdiction of the court of appeals and this Court.

The judgment of the district court, which was affirmed by the court of appeals, directed the United States to pay Ms. Windsor a sum of money. The judgment was thus adverse to the financial interests of the United States. In keeping with its policy of enforcing DOMA, the United States has not in fact paid the disputed amount to Ms. Windsor, and it presumably would not do so if this Court were to reverse the judgment of the court of appeals.

In addition, the United States maintains an ongoing interest in the definitive, uniform resolution of DOMA's constitutionality. The Executive's position here, just as in *Chadha* and *Lovett*, is that it considers the statute unconstitutional and would prefer to stop enforcing it, but that obligations of comity towards Congress and the Judiciary warrant enforcing the statute unless and

until this Court "renders a definitive verdict against the law's constitutionality." Holder Letter. The President could have ordered the IRS to pay Ms. Windsor's refund upon the entry of judgment by the district court. Instead, he directed the Department of Justice to appeal and seek certiorari, not because he was interested in making life more difficult for Ms. Windsor, or because he had second thoughts on DOMA's validity, but because (as the Holder Letter explains) he did not find it appropriate to stop enforcing the statute unilaterally, without allowing this Court to fulfill its constitutional function.

There are good reasons for the Executive's conclusion that a district court judgment would not resolve DOMA's constitutionality with sufficient definitiveness and finality for it to stop enforcing the statute. Our legal system depends on the orderly accretion of precedent, and district court judgments do not create precedent. *See Rogers* v. *Tennessee*, 532 U.S. 451, 461 (2001) ("[T]he incremental and reasoned development of precedent … is the foundation of the common law system."); *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."). If the Executive were not to appeal from a district court judgment against DOMA, then the statute's constitutionality could be determined only in successive actions before dozens of district judges, none of whom would be bound even by his or her own prior determinations of the statute's validity. No binding precedent could be set unless a judge were to uphold the statute and an aggrieved party were to appeal that judgment, and no national precedent could be set unless

a court of appeals were to follow suit and an aggrieved party were to petition for certiorari.

Here, that would be an unacceptable prospect. Section 3 of DOMA affects many day-to-day operations of the government and the lives of many thousands of people. *See* GAO, *Defense of Marriage Act: Update to Prior Report* 1 (2004) (noting the existence of "1,138 federal statutory provisions … in which marital status is a factor in determining or receiving benefits, rights, and privileges"); U.S. Census Bureau, Press Release, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011) ("According to revised estimates from the 2010 Census, there were 131,729 same-sex married couple households … in the United States."). Under these circumstances, both the orderly resolution of DOMA's constitutionality and the national uniformity of that resolution are essential.

And even aside from these practical problems with piecemeal adjudication in the district courts, a case like this one—involving a constitutional question of inarguable national import—is uniquely fit for resolution by this Court. It is reasonable for the Executive to have concluded that only this Court should finally resolve a question as fundamental as the one presented here.

Of course, the mere fact that the Solicitor General petitions this Court for review in a given case does not compel this Court to grant the petition. This Court remains free, as in any case, to deny certiorari. Such a consideration is not *jurisdictional*, however, and does not prevent this Court from reviewing the merits if it so chooses, particularly where—as here—there is no lack of intervenors and amici to put all of the relevant arguments before the Court.

C. A Holding That The Court Lacks Jurisdiction, Or That Prudence Bars Its Exercise, Would Present Concerns Of Constitutional Structure

Were this Court to rule that it lacks jurisdiction because the Executive agrees with a lower court judgment of a statute's unconstitutionality, even when the Executive continues to enforce the statute, the Executive would effectively be required to abandon the infrequently used but important practice of enforcing a statute but not defending it, and would instead be required to choose between two alternative approaches, each of which would be significantly less respectful of the separation of powers and of the historical relationship among the branches of government.

One approach would be for the Executive to present arguments defending a statute even when the President and Solicitor General believe that such arguments are unreasonable. But this approach would risk undermining the institutional relationship between this Court and the Office of the Solicitor General.

As many who have held that office have observed, the Solicitor General occupies a unique role of fidelity both to the Executive Branch and to this Court. "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case." Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955); *see also FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). In part because of the Solicitor General's institutional interest in seeking "to establish justice" across many cases (Sobeloff, 41 A.B.A. J. at 229), this "Court has come to rely on the Solicitor General to present briefs of the most scrupulous fidelity, and to combine statements of prin-

ciple with strategies by which the Court may rule in a manner most consistent with principles of stability." Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 Ind. L.J. 1297, 1309 (2000). Every member of this Court's bar is obligated to advocate with candor and integrity, but "the Solicitor General is invited by tradition, as well as statute and regulation, to step out from the role of partisan advocate to assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit." Days, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 488 (1995). To require the Solicitor General to present arguments that he or she considered unreasonable in order to preserve this Court's jurisdiction would undermine this longstanding relationship of trust.

Such a requirement could also place the President in the untenable position of taking a position before the Judiciary that the President believes to be fundamentally wrong as a matter of law. Where questions of constitutional law touch on publicly contested issues, the President's ability to communicate with the Nation on matters of consequence—and the ability of the electorate to hold the President accountable for his or her views—would be complicated by a dissonance between the President's considered and strongly held views on the meaning of the Constitution and the positions that the President's administration advances in the courts.

Alternatively, the Executive could adhere to its current practice of declining—in rare instances and after sober consideration—to defend a statute for which it finds no reasonable argument to be made. But it would have to do so with the knowledge that this approach could deprive the appellate courts of jurisdiction

to decide the statute's constitutionality, absent a lower court judgment upholding the statute. Such a result would increase the constitutional significance of the Executive's decision not to defend a statute, as it might interfere with the Judiciary's power to "say what the law is." As a practical matter, it could lead the Executive to stop enforcing constitutionally questionable statutes at all, since the alternative—the litigation of successive individual actions in dozens of district courts, with the possibility of no precedential resolution of the issue—is unsatisfactory. The foreclosure of judicial review on otherwise justiciable questions of constitutional law would significantly intrude on the prerogative that this Court has reaffirmed consistently since *Marbury*, and would undermine Congress's interest in protecting its constitutional and policy judgments from invalidation except where the courts have conclusively decided that those judgments cannot pass constitutional muster.

CONCLUSION

The Court has jurisdiction to decide whether Section 3 of DOMA violates the Constitution.

Respectfully submitted.

MARK C. FLEMING
FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

PAUL R.Q. WOLFSON
Counsel of Record
DANIEL WINIK*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

* *Admitted to practice only in Maryland. Supervised by members of the firm who are members of the District of Columbia bar.*

MARCH 2013

APPENDIX

LIST OF AMICI CURIAE

Gregory B. Craig served as Counsel to the President between 2009 and 2010.

Drew S. Days III served as Solicitor General of the United States between 1993 and 1996.

Arthur B. Culvahouse, Jr. served as Counsel to the President between 1987 and 1989.

Walter E. Dellinger III served as Acting Solicitor General of the United States between 1996 and 1997 and as Assistant Attorney General for the Office of Legal Counsel between 1993 and 1996.

Charles Fried served as Solicitor General of the United States between 1985 and 1989.

Dawn E. Johnsen served as Acting Assistant Attorney General for the Office of Legal Counsel between 1997 and 1998.

Douglas W. Kmiec served as Assistant Attorney General for the Office of Legal Counsel between 1988 and 1989.

Daniel Levin served as Acting Assistant Attorney General for the Office of Legal Counsel between 2004 and 2005.

Randolph D. Moss served as Assistant Attorney General for the Office of Legal Counsel between 2000 and 2001 and as Acting Assistant Attorney General for the Office of Legal Counsel between 1998 and 2000.

Beth Nolan served as Counsel to the President between 1999 and 2001.

Bernard W. Nussbaum served as Counsel to the President between 1993 and 1994.

John M. Quinn served as Counsel to the President between 1995 and 1996.

Seth P. Waxman served as Solicitor General of the United States between 1997 and 2001.