

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

ment in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.”³⁵⁹

Concerns regarding adversity are also raised when the Executive Branch chooses to enforce, but not defend, federal statutes which it has concluded are unconstitutional. In *United States v. Windsor*,³⁶⁰ the Court considered the Defense of Marriage Act (DOMA), which excludes same-sex partners from the definition of “spouse” as used in federal statutes.³⁶¹ DOMA was challenged by the surviving member of a same-sex couple (married in Canada) who was seeking to claim a spousal federal estate tax exemption. Although the Executive Branch continued to deny the exemption, it also declined to defend the statute based on doubts as to whether it would survive scrutiny under the equal protection component of the Fifth Amendment. Consequently, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG)³⁶² intervened to defend the statute. The Court noted that despite the decision not to defend, the failure of the United States to provide a refund to the taxpayer constituted an injury sufficient to establish standing, leaving only “prudential” limitations on judicial review at issue.³⁶³ Here, the Court found that the “prudential” concerns were outweighed by the presence of BLAG to offer an adversarial presentation of the issue, the legal uncertainty that would be caused by dismissing the case, and concern that the Executive Branch would otherwise be given a route to evade review of allegedly unconstitutional statutes by the Court.

Collusive and Feigned Suits.—Adverse litigants are lacking in those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord v. Veazie*,³⁶⁴ the latter had executed a deed to the former warranting that he had certain rights claimed by a third person, and suit

³⁵⁹ 219 U.S. at 361–62. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. *Gritts v. Fisher*, 224 U.S. 640 (1912). Other cases have involved similar problems, but they resulted in decisions on the merits. *E.g.*, *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455–463 (1899); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *but see id.* at 357 (Justice Black dissenting). The principal effect of *Musk-rat* was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law.

³⁶⁰ 570 U.S. ___, No. 12–307, slip op. (2013).

³⁶¹ Pub. L. 104–199 § 3, 110 Stat. 2419, 1 U.S.C. § 7.

³⁶² The Bipartisan Legal Advisory Group is a standing body of the House, created by rule, consisting of members of the House Leadership and authorized to direct the House Office of the General Counsel to file suit on its behalf in state or federal court.

³⁶³ 570 U.S. ___, No. 12–307, slip op. at 6–7.

³⁶⁴ 49 U.S. (8 How.) 251 (1850).