

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner : No. 12-307

5 v. :

6 EDITH SCHLAIN WINDSOR, IN HER :

7 CAPACITY AS EXECUTOR OF THE ESTATE:

8 OF THEA CLARA SPYER, ET AL. :

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10 Washington, D.C.

11 Wednesday, March 27, 2013

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:18 a.m.

16 APPEARANCES:

17 VICKI C. JACKSON, ESQ., Cambridge, Massachusetts; for
18 Court-appointed amicus curiae.

19 SRI SRINIVASAN, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; for
21 Petitioner, supporting affirmance.

22 PAUL D. CLEMENT, ESQ., Washington, D.C.; for Respondent
23 Bipartisan Legal Advisory Group of the United States
24 House of Representatives.

25 DONALD B. VERRILLI, JR., ESQ., Solicitor General,

Official

1 Department of Justice, Washington, D.C.; for
2 Petitioner, supporting affirmance.

3 ROBERTA A. KAPLAN, ESQ., New York, New York; for
4 Respondent Windsor.

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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 12-307, United States v. Windsor, and we will begin with the jurisdictional discussion.

Ms. Jackson?

ORAL ARGUMENT OF VICKI C. JACKSON
ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

MS. JACKSON: Mr. Chief Justice, and may it please the Court:

There is no justiciable case before this Court. Petitioner, the United States, does not ask this Court to redress the injuries it asserts. The House of Representatives' Bipartisan Legal Advisory Group, the BLAG, which does seek redress in the form of reversal, asserts no judicially cognizable injury.

While it is natural to want to reach the merits of such a significant issue, as in *Raines v. Byrd*, this natural urge must be put aside because however important the constitutional question, Article III prevents its decision here and requires this Court to await another case, another day, to decide the question.

In the district court, Ms. Windsor alleged

1 classical Article III injury for which she sought
2 redress. Other persons injured by DOMA's operation
3 could likewise sue in a first instance court and, if
4 their challenge succeeds, obtain relief. But to
5 exercise jurisdiction on this appeal when the United
6 States asked for the judgment below, fully agrees with
7 it, and --

8 JUSTICE SOTOMAYOR: Who else is going to be
9 aggrieved if she is not? Meaning another person who
10 is -- whose benefits are withheld, tax refund is
11 withheld, is going to be in an identical situation to
12 her? Who else could come in?

13 MS. JACKSON: Your Honor, it is possible
14 that in district courts where other taxpayers sue the
15 United States on similar relief, that the district
16 courts will rule differently. At least one district
17 court that I'm aware of, in a case called
18 Louie v. Holder, ruled against -- upheld DOMA even
19 though the government had switched its position at that
20 time.

21 In addition, the issue of DOMA --

22 JUSTICE SCALIA: Excuse me. If there is no
23 jurisdiction here, why was there jurisdiction at the
24 trial level?

25 MS. JACKSON: Your Honor --

1 JUSTICE SCALIA: I mean, the government
2 comes in and says "I agree" -- or if there was
3 jurisdiction, why did the Court ever have to get to the
4 merits?

5 If you have a, let's say, a lawsuit on an --
6 on an indebtedness and the alleged debtor comes in and
7 says, yes, I owe them money, but I'm just not gonna pay
8 it, which is the equivalent of the government saying,
9 yes, it's unconstitutional but I'm going to enforce it
10 anyway.

11 What would happen in that -- in that
12 indebtedness suit is that the court would enter judgment
13 and say, if you agree that you owe it, by God, you
14 should pay it. And there would be a judgment right
15 there without any consideration of the merits, right?
16 Why didn't that happen here?

17 MS. JACKSON: Your Honor, the -- the two
18 questions that you asked me, why did the district court
19 have jurisdiction, the first answer is that the party
20 invoking the district court's jurisdiction was Ms.
21 Windsor, who did have an injury.

22 As to why the district court didn't enter
23 judgment when the United States switched its position,
24 I -- I imagine that the Court was -- would have wanted
25 to have development of that issue, which was achieved

1 through the intervention of the BLAG in the trial court,
2 so that the judgment of unconstitutionality and of
3 refund would have had a robust hearing as it did.

4 JUSTICE SCALIA: Really, that's very
5 peculiar. When -- when both parties to the case agree
6 on what the law is? What, the -- just for fun, the
7 district judge is -- is going to have a hearing?

8 MS. JACKSON: Well, Your Honor, the
9 jurisdiction of the Court, it seems to me, is not
10 affected by the length of the proceedings it undertook.
11 In Kentucky --

12 JUSTICE SCALIA: I'm not talking about
13 jurisdiction now. I'm talking about why the district
14 court, without getting to the merits, should not have
15 entered judgment against the government.

16 MS. JACKSON: I am not sure I have a
17 wonderful answer to that question, Justice Scalia, but I
18 do think the case bears some similarities to Kentucky v.
19 Indiana, which was discussed by the parties, where
20 Kentucky sued Indiana in this Court's original
21 jurisdiction on a contract. The two States had a
22 contract. Indiana agreed it was obligated to perform,
23 but it wasn't performing. There -- it was worried about
24 a State court lawsuit. This Court exercised original
25 jurisdiction to give Kentucky relief. And I think

1 that's analogous to what the district court did there.

2 The issue before us today, I think, is an
3 issue of appellate jurisdiction. And the U.S. is
4 seeking to invoke the appellate jurisdiction of Article
5 III courts, notwithstanding that it doesn't seek relief,
6 it seeks affirmance.

7 JUSTICE ALITO: Well, the Solicitor
8 General's standing argument is very abstract. But here
9 is one possible way of understanding it, perhaps the
10 Solicitor General will disavow it, but it would go like
11 this. The President's position in this case is that he
12 is going to continue to enforce DOMA, engage in conduct
13 that he believes is unconstitutional, until this Court
14 tells him to stop.

15 The judgment of the Second Circuit told the
16 Executive Branch to comply with the Equal Protection
17 Clause immediately. The President disagrees with the
18 temporal aspect of that, so the Executive is aggrieved
19 in the sense that the Executive is ordered to do
20 something prior to the point when the Executive believes
21 it should do that thing.

22 Now, wouldn't that be sufficient to make --
23 to create injury in the Executive and render the
24 Executive an aggrieved party?

25 MS. JACKSON: I think not, Your Honor. I

1 think not because I don't see how that would be any
2 different from any party saying, well, we really don't
3 want to pay this judgment until we're sure all of the
4 courts agree. And I think this Court's -- this Court
5 doesn't have a lot of case law where a party seeks
6 review to get affirmance.

7 But in the Princeton University v. Schmidt
8 case, there was a State court conviction, high State
9 court overturns it, Princeton University seeks review
10 because its regulations were at issue. New Jersey joins
11 in seeking review, but does not ask for relief, does not
12 take a position on what relief would be appropriate.

13 JUSTICE BREYER: Why -- why wouldn't --
14 imagine -- there in Article II, it says that the
15 President shall take care that the laws be faithfully
16 executed. So the President has worked out -- I,
17 personally, and for reasons in -- in my department,
18 others think that this law is unconstitutional, but I
19 have this obligation. And because I have this
20 obligation, I will not -- I will continue to execute
21 this law. I will continue to execute it though I
22 disagree with it. And I execute it until I have an
23 authoritative determination not to.

24 Now, how is that different from a trustee
25 who believes that he has an obligation to a trust to do

1 something under a certain provision that he thinks
2 doesn't require that, but -- you know, there's a debate
3 about it, but he says, I have the obligation here. I'm
4 going to follow this through.

5 There'd be standing in the second case for
6 any fiduciary, despite his personal beliefs, to
7 continue. We'd understand that and say there was
8 standing. Why don't we here?

9 MS. JACKSON: Well, the trustee, I think,
10 would be able to go to a court of first instance to get
11 an adjudication of the claim. What I'm submitting to
12 you that the trustee could not do, after getting the
13 first -- the judgment in the court of first instance
14 stating what the remedy -- what the liability is, then
15 seek review of that judgment, but ask only for it to be
16 affirmed.

17 JUSTICE BREYER: And that's the part I don't
18 understand. For -- if, in fact, as you agree, the
19 trustee or other fiduciary in my example would indeed
20 have standing to act according to the law, even though
21 he thinks that that law is unconstitutional because of
22 his obligation such as under Section 2. You agree he
23 has the -- he has -- there is standing when he goes into
24 court in the first place, which surely he could
25 interpret Article II as saying and you follow it through

1 as long as you can do it, which includes appeals until
2 the matter is determined finally and authoritatively by
3 a court. If you could do the first, what suddenly stops
4 you from doing the second?

5 MS. JACKSON: In the first instance, the
6 obligations are uncertain the trustee is presumably
7 subject to potentially adverse competing claims on his
8 or her action.

9 CHIEF JUSTICE ROBERTS: Well, I would have
10 thought --

11 MS. JACKSON: Those are --

12 CHIEF JUSTICE ROBERTS: I would have thought
13 your answer would be that the Executive's obligation to
14 execute the law includes the obligation to execute the
15 law consistent with the Constitution. And if he has
16 made a determination that executing the law by enforcing
17 the terms is unconstitutional, I don't see why he
18 doesn't have the courage of his convictions and execute
19 not only the statute, but do it consistent with his view
20 of the Constitution, rather than saying, oh, we'll wait
21 till the Supreme Court tells us we have no choice.

22 MS. JACKSON: Mr. Chief Justice, I think
23 that's a hard question under Article II. But I think
24 the Article III questions that this Court is facing turn
25 on what the parties in the case have alleged, what

1 relief they're seeking, and what the posture is.

2 JUSTICE KENNEDY: In Federal court's
3 jurisprudence, are you saying there's a lack of
4 adversity here?

5 MS. JACKSON: I am saying primarily --

6 JUSTICE KENNEDY: Can you give us a
7 pigeonhole?

8 MS. JACKSON: I -- it's a little difficult
9 because the circumstance is unusual, Justice Kennedy,
10 but I think the most apt of the doctrines, although they
11 are overlapping and reinforce each other, the most apt
12 is standing.

13 This Court has made clear that a party on
14 appeal has to meet the same Article III standing
15 requirements of injury caused by the action complained
16 of and redressable by the relief requested by the
17 parties.

18 JUSTICE KENNEDY: But it seems to me
19 there -- there's injury here.

20 MS. JACKSON: Well, Your Honor, I do not
21 agree that the injuries alleged by the United States
22 should be cognizable by the Article III courts because
23 those injuries are exactly what it asked the courts
24 below to -- to produce. But even if we treat the
25 injuries as sufficiently alleged, Article III requires

1 that the party complaining of injury ask the court to
2 remedy that injury. And that's a very important
3 requirement, I think, under Article III for several
4 reasons.

5 The idea of the case or controversy
6 limitation, as I understand it, is part of a broader
7 separation of powers picture, to make sure the Federal
8 courts perform their proper role. Their proper role is
9 the redress of injury. And it is the need to redress
10 injury in ordinary litigation that justifies judicial
11 review of constitutional issues. But --

12 JUSTICE KAGAN: But, Ms. Jackson, I mean, to
13 go back to Justice Kennedy's point, we have injury here
14 in the most classic, most concrete sense. There's
15 \$300,000 that's going to come out of the government's
16 treasury if this decision is upheld, and it won't if it
17 isn't.

18 Now, the government is willing to pay that
19 \$300,000, would be happy to pay that \$300,000. But
20 whether the government is happy or sad to pay that
21 \$300,000, the government is still paying the \$300,000,
22 which in the usual set of circumstances is the classic
23 Article III injury.

24 Why isn't it here?

25 MS. JACKSON: Justice Kagan, there is a

1 three-prong test. Even if you treat that as injury, it
2 does not meet the requirements for standing on appeal
3 because the government has not asked this Court to
4 remedy that injury. The government has not asked this
5 Court to overturn the rulings below so it doesn't have
6 to pay the \$365,000. It has asked this Court to affirm.
7 And the case or controversy requirements that we're
8 talking about are nested in an adversarial system where
9 we rely on the parties to state their injuries and make
10 their claims for relief.

11 If the government or any party is not bound
12 with respect to standing by its articulated request for
13 a remedy, what that does is it enables the Court to fill
14 in, to reshape. And for a doctrine that is supposed to
15 be limiting the occasions for judicial review of
16 constitutionality, that is troubling.

17 JUSTICE KAGAN: But don't we often separate
18 those two things, ask whether there's injury for Article
19 III purposes and causation and redressability, as you
20 say, but then say, well, sometimes when all of those are
21 met, there's not going to be adequate presentation of
22 the arguments, and so we will appoint an amicus or we'll
23 restructure things? And we do that when the government
24 confesses error often. I mean, we do that several times
25 a year in this courtroom.

1 MS. JACKSON: Yes, Your Honor. But
2 confession of error cases, with respect, are quite
3 different because in confession of error cases typically
4 both parties at the appellate level end up being adverse
5 to the judgment below and they are asking relief from
6 this Court from the judgment below.

7 But here we have a situation where, putting
8 BLAG to one side for the moment, between the United
9 States and Ms. Windsor there is no adversity, they're in
10 agreement, and neither of them is asking this Court to
11 reverse or modify the judgment below. And so I think
12 the confession of error cases are quite different from
13 the perspective of Article III.

14 JUSTICE BREYER: No, they're -- they're not
15 in agreement about whether to pay the money or not.
16 They are in agreement about what arguments are correct
17 legal arguments. And I can't think of a case other than
18 the sham cases which -- which this isn't, where -- where
19 you would find no standing or other obstacle. And I can
20 think of one case, which you haven't mentioned, namely,
21 Chadha, which seems about identical.

22 MS. JACKSON: Your Honor, I don't think that
23 Chadha is identical, with respect. In -- for two main
24 reasons. In Chadha, the Court was, I think, quite
25 careful to avoid deciding whether the United States had

1 Article III standing. It intensively analyzed a
2 statute, since repealed, 1252, which gave this Court
3 mandatory jurisdiction in cases in which a Federal
4 statute was held unconstitutional and the U.S. was a
5 party. And it framed its analysis of whether the
6 statute permitted the appeal. What I think was -- oh,
7 may I reserve my time for rebuttal?

8 CHIEF JUSTICE ROBERTS: You can finish your
9 sentence.

10 MS. JACKSON: Thank you.

11 What was -- what was going on there was the
12 Court said, well, the statute wanted to reach very
13 broadly, perhaps implicit, not stated, perhaps more
14 broadly than Article III.

15 Congress said whenever you have this
16 configuration, you go up to the Supreme Court. Then the
17 Supreme Court in Chadha says, of course, in addition to
18 the statute, there must be Article III case or
19 controversy, the presence of the congressional
20 intervenors here provides it. And that --

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 That was more than a sentence.

23 MS. JACKSON: Oh, I'm sorry. I'm sorry,
24 Your Honor. Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Srinivasan?

1 ORAL ARGUMENT OF SRI SRINIVASAN
2 ON BEHALF OF THE PETITIONER,
3 SUPPORTING AFFIRMANCE

4 MR. SRINIVASAN: Thank you,
5 Mr. Chief Justice, and may it please the Court:

6 This Court has jurisdiction in this case
7 based on the petition filed by the United States for the
8 same reasons it had jurisdiction in parallel
9 circumstances in Chadha and Lovett. There are two
10 issues that have been -- that have been brought up this
11 morning and I'd like to address each in turn.

12 One is whether there's a concrete case or
13 controversy -- case or controversy in the sense of
14 adversity in this Court. And the second is the question
15 of whether there's Article III standing for the
16 government to bring this case before the Court.

17 CHIEF JUSTICE ROBERTS: On the first one, is
18 there any case where all the parties agreed with the
19 decision below and we upheld appellate jurisdiction?
20 Any case?

21 MR. SRINIVASAN: Where the parties agreed --

22 CHIEF JUSTICE ROBERTS: All the parties
23 agreed with the decision below and we nonetheless upheld
24 appellate jurisdiction.

25 MR. SRINIVASAN: Well, you didn't speak to

1 it in Lovett, Your Honor, but that was the circumstance
2 in Lovett.

3 CHIEF JUSTICE ROBERTS: No, it wasn't
4 raised -- it wasn't raised or addressed, and that had
5 the distinct situation of an appeal, direct appeal from
6 an Article I tribunal.

7 MR. SRINIVASAN: Well, I don't -- I don't
8 know that that matters because you had to satisfy
9 Article III prerequisites to have the case in this
10 Court. Now, Your Honor is, of course, correct that
11 the -- the Court didn't affirmatively engage on the
12 issue of jurisdiction, but that is a scenario --

13 CHIEF JUSTICE ROBERTS: Okay. So putting
14 Lovett aside, since none of this was discussed, is there
15 any -- any case?

16 MR. SRINIVASAN: No, I don't know of one.
17 But these -- but, Mr. Chief Justice, with all due
18 respect --

19 CHIEF JUSTICE ROBERTS: So this is totally
20 unprecedented. You're asking us to do something we have
21 never done before to reach the issue in this case.

22 MR. SRINIVASAN: Let me say two things about
23 that if I might, Your Honor. First is that it's -- it's
24 unusual, but that's not at all surprising because the --

25 CHIEF JUSTICE ROBERTS: No, it's not just --

1 it's not unusual. It's totally unprecedented.

2 MR. SRINIVASAN: Well, it's totally
3 unprecedented in one respect, Your Honor. If you look
4 at Chadha -- okay, the second point I'd make. Let me
5 make one point at the outset, though, which is that
6 whether it's totally unusual or largely unusual, I grant
7 you that it doesn't happen. But the reason it doesn't
8 happen is because -- I wouldn't confuse a numerator with
9 a denominator. This set of circumstances just doesn't
10 arise very often.

11 Now, it's true that when this set of
12 circumstances --

13 JUSTICE SCALIA: It has not arisen very
14 often in the past because in the past, when I was at the
15 Office of Legal Counsel, there was an opinion of the
16 Office of Legal Counsel which says that the Attorney
17 General will defend the laws of the United States,
18 except in two circumstances. Number one, where the
19 basis for the alleged unconstitutionality has to do with
20 presidential powers. When the presidential powers are
21 involved, he's the lawyer for the President. So he can
22 say, we think the statute's unconstitutional, I won't
23 defend it.

24 The second situation is where no possible
25 rational argument could be made in defense of it. Now,

1 neither of those situations exists here. And I'm
2 wondering if we're living in this new world where the
3 Attorney General can simply decide, yes, it's
4 unconstitutional, but it's not so unconstitutional that
5 I'm not willing to enforce it, if we're in this new
6 world, I -- I don't want these cases like this to come
7 before this Court all the time.

8 And I think they will come all the time if
9 that's -- if that's -- if that's the new regime in the
10 Justice Department that we're dealing with.

11 MR. SRINIVASAN: Justice Scalia, one
12 recognized situation in which an act of Congress won't
13 be defended in court is when the President makes a
14 determination that the act is unconstitutional. That's
15 what happened here. The President made an accountable
16 legal determination that this Act of Congress is
17 unconstitutional.

18 JUSTICE KENNEDY: But then why does he
19 enforce the statute?

20 MR. SRINIVASAN: Well, that's an option
21 that's available to him, Justice Kennedy. In certain
22 circumstances, it makes sense not to enforce. But I
23 don't think the take-care responsibility is an all or
24 nothing proposition, such that when the President
25 reaches a determination that a statute is

1 unconstitutional, it necessarily follows that he
2 wouldn't enforce it. That's not what happened in
3 Lovett. That's not --

4 JUSTICE KENNEDY: But let me ask you,
5 suppose that constitutional scholars have grave doubts
6 about the practice of the President signing a bill, but
7 saying that he thinks it's, unconstitutional -- what do
8 you call it, signing statements or something like that.
9 It seems to me that if we adopt your position that that
10 would ratify and confirm and encourage that questionable
11 practice because if the President thinks the law is
12 unconstitutional he shouldn't sign it, according to some
13 views. And that's a lot like what you're arguing here.
14 It's very troubling.

15 MR. SRINIVASAN: I -- in the -- in the
16 signing statement situation, Your Honor, one example in
17 the past is Turner Broadcasting. In Turner
18 Broadcasting, that was a circumstance in which it was --
19 it was a veto, but in the course of the veto the
20 President made the determination that a particular
21 aspect of that statute was unconstitutional.

22 And what happened as a result of that is
23 that the Department of Justice didn't defend that aspect
24 of the statute in litigation. Now, a subsequent
25 President reached a contrary conclusion. But -- but my

1 point is simply that when the President makes a
2 determination that a statute is unconstitutional, it can
3 follow that the Department of Justice won't defend it in
4 litigation.

5 CHIEF JUSTICE ROBERTS: Sometimes you do and
6 sometimes you don't. What is the test for when you
7 think your obligation to take care that the laws be
8 faithfully executed means you'll follow your view about
9 whether it's constitutional or not or you won't follow
10 your view?

11 MR. SRINIVASAN: Mr. Chief Justice, I'd
12 hesitate to give you a black-and-white algorithm. There
13 are -- there are several considerations that would
14 factor into it. One of the considerations --

15 JUSTICE SCALIA: Excuse me. It's not your
16 view. It's the President's. It's only when the
17 President thinks it's unconstitutional that you can
18 decline to defend it? Or what if the Attorney General
19 thinks it's unconstitutional?

20 MR. SRINIVASAN: No, no. Of course --

21 JUSTICE SCALIA: Or the Solicitor General,
22 is that enough?

23 MR. SRINIVASAN: 28 U.S.C. 530(d)
24 presupposes -- Congress presupposes that there are going
25 to be occasions in which a statute is -- is not defended

1 because of a conclusion by the Attorney General that
2 it's unconstitutional.

3 JUSTICE SCALIA: Oh, it can be either the
4 Attorney General or the Solicitor General?

5 MR. SRINIVASAN: It could be, but this is a
6 situation in which the President made the determination.
7 And when the President makes that determination, there
8 are a few considerations that I think would factor into
9 the mix in determining whether enforcement will follow.
10 One of them would be the consequences of enforcement for
11 the individuals who are affected.

12 And so, for example, I would assume that if
13 it's a criminal statute that we're talking about, an
14 enforcement would require criminal enforcement against
15 somebody and -- which would beget criminal sanctions.
16 That may be --

17 JUSTICE SCALIA: So when Congress enacts a
18 statute, it cannot be defended, it has no assurance that
19 that statute will be defended in court, if the Solicitor
20 General, in his view, thinks it's unconstitutional?

21 MR. SRINIVASAN: There have --
22 Justice Scalia --

23 JUSTICE SCALIA: Is that right?

24 MR. SRINIVASAN: -- there have been
25 occasions in the past.

1 JUSTICE SCALIA: Yes or no?

2 MR. SRINIVASAN: Yes. Yes, it's true. And
3 28 U.S.C. 530(d) exactly presupposes that. That's the
4 exact occasion in which that process is -- is
5 occasioned. Congress knew that this would happen. Now,
6 it can happen also when -- in the rare instance in which
7 the President himself makes that determination. And I
8 don't think that the take-care clause responsibility has
9 this all or nothing capacity to it. It can be that the
10 President decides --

11 JUSTICE GINSBURG: Mr. Srinivasan --

12 JUSTICE SCALIA: It's not what the OLC
13 opinion said, by the way.

14 MR. SRINIVASAN: It can be that the
15 President decides to enforce it. That's what happened
16 in Lovett and that's the course of events that was
17 sought -- that happened in Chadha. And there's --

18 JUSTICE GINSBURG: But when the
19 government -- when the -- when the case is adjudicated
20 in the first instance -- we're talking here about
21 appellate authority.

22 MR. SRINIVASAN: Correct.

23 JUSTICE GINSBURG: The government sometimes
24 loses cases in the first instance and then it doesn't
25 appeal. If it agrees with the result that the court

1 reached, it doesn't appeal and then the judgment in the
2 first instance where there was adversity is -- is the
3 last word. So when does the government decide, yes, we
4 agree with the -- the adjudication in the court of first
5 instance and so we'll leave it there? And when does it
6 say, yes, we agree, but we want higher authority to
7 participate?

8 MR. SRINIVASAN: Well, there are -- there
9 are a number of considerations that could factor into
10 it, Justice Ginsburg. You're right that either of those
11 scenarios is possible. The reason that the government
12 appealed in this case is because the President made the
13 determination that this statute would continue to be
14 enforced, and that was out of respect for the Congress
15 that enacted the law and the President who signed it,
16 and out of respect for the role of the judiciary in
17 saying what the law is.

18 The point of taking an appeal here is that
19 the government suffered an injury because a judgment was
20 entered against the government in the court of appeals.
21 That's a classic case for injury.

22 JUSTICE SOTOMAYOR: Counsel, could you not
23 run out of time on the BLAG standing? I know we -- we
24 didn't permit Ms. Jackson to -- to address it. So don't
25 run out of time on that.

1 MR. SRINIVASAN: I -- I won't, Your Honor.
2 I'll be happy to turn -- turn to BLAG standing. I would
3 like to make a couple of points on the question of our
4 own standing to bring the petition before the Court.

5 And I think Justice Breyer was right. The
6 key precedent here is Chadha. Chadha establishes a
7 couple of things. First, Chadha establishes that there
8 is aggrievement in the circumstances of this case. And
9 I don't see what the difference is between aggrievement,
10 for purposes of statutory -- the statutory analysis at
11 issue in Chadha, and injury, for purposes of Article
12 III.

13 JUSTICE ALITO: Well, how are you aggrieved?
14 "Aggrieved" means that you are deprived of your legal
15 rights. And you don't think that you've been deprived
16 of your legal rights because your rights -- your
17 obligations under the Constitution supercede DOMA, and
18 you haven't been deprived of anything that you're
19 entitled to under the Constitution. So how are you
20 aggrieved?

21 MR. SRINIVASAN: I guess we'd -- I'd
22 subscribe to the aggrievement analysis that the Court
23 made in Chadha at pages 929 to 931 of its opinion. And
24 what the Court said is this: "When an agency of the
25 United States is a party to a case in which an act of

1 Congress that it administers is held unconstitutional,
2 it is an aggrieved party. The agency's status as an
3 aggrieved party is not altered by the fact that the
4 Executive may agree with the holding that the statute in
5 question is unconstitutional." That description is on
6 all fours with the circumstances of this case.

7 JUSTICE ALITO: Could I just -- before you
8 go on to the House group, could I just clear up
9 something? In your brief, you argue that you are
10 representing all three branches of the government, is
11 that right?

12 MR. SRINIVASAN: Correct.

13 JUSTICE ALITO: You're -- you're
14 representing the Judiciary as you stand before us here
15 today --

16 MR. SRINIVASAN: Well --

17 JUSTICE ALITO: -- trying to persuade the
18 Court, you're representing the Court?

19 MR. SRINIVASAN: We represent the sovereign
20 interests of the United States. Of course, in a case
21 like this, the -- the -- we're submitting the dispute to
22 the Judiciary for resolution, so in that sense, we --
23 I'm not going to stand here and tell you that I can
24 dictate the -- that the Judiciary comes out in one
25 direction or the other. I certainly would like to be

1 able to do that, but I don't think I can, in all
2 fairness, do that. But I --

3 JUSTICE ALITO: It seems very strange. So
4 in -- in a criminal case where it's the United States v.
5 Smith, appearing before an Article III judge, the United
6 States, the prosecutor is representing the court as
7 well?

8 MR. SRINIVASAN: Well, I think -- I guess
9 what I would say is this, the United -- the United
10 States -- the Executive Branch represents the sovereign
11 interests of the United States before the Court. It's
12 not -- I think the point of this is that it's not that
13 the Executive Branch is representing the Executive
14 Branch alone.

15 The Executive Branch is representing the
16 sovereign interests of the United States. And those
17 interests would include the interests of the Congress
18 that enacted the law, the interests of the President
19 that signed it, and the interests of the Judiciary in
20 pronouncing on what the law is. And the course of
21 action that the President chose to undertake here is in
22 keeping with all of those considerations.

23 JUSTICE KAGAN: Mr. Srinivasan, Chadha says
24 what you said it said about what it means to be
25 aggrieved --

1 MR. SRINIVASAN: Yes.

2 JUSTICE KAGAN: -- but Chadha also left open
3 the Article III question. Why did Chadha leave it open
4 if it's the same thing?

5 MR. SRINIVASAN: I don't -- I don't know why
6 Chadha didn't engage on it in particular. I think part
7 of it, Justice Kagan, is that the Court didn't have the
8 methodology at that point in time that it does now. I
9 don't know that it neatly divided between those
10 questions in the same way. So yes, it left the Article
11 III question open, but I think the question of Article
12 III injury necessarily follows from aggrievement and I
13 haven't -- I haven't heard a persuasive argument to the
14 contrary.

15 If we were aggrieved in the circumstances of
16 Chadha, it seems to me it necessarily follows that we're
17 injured. We're injured in a couple of ways. An act of
18 Congress has been declared unconstitutional, which
19 Chadha itself says constitutes aggrievement and
20 therefore constitutes injury. In this case also, we're
21 required to pay a judgment --

22 JUSTICE SCALIA: Didn't Chadha -- didn't
23 Chadha suggest that Congress could have standing in --
24 in Chadha?

25 MR. SRINIVASAN: I'm sorry?

1 JUSTICE SCALIA: In Chadha, there was an
2 argument that Congress had standing because what was at
3 issue in the case was precisely a prerogative of
4 Congress to exercise the one-house or two-house veto.

5 MR. SRINIVASAN: There wasn't a -- there --
6 that was an issue in Chadha. I don't know that that
7 issue was joined, actually, Justice Scalia. The Court
8 did say, at page 939 of its opinion, that Congress is a
9 proper party to defend the constitutionality of the Act
10 and a proper petitioner, and I think that's the best
11 language for the other side on this issue.

12 CHIEF JUSTICE ROBERTS: So you say we
13 shouldn't be concerned about that part of Chadha because
14 the issue wasn't joined there?

15 MR. SRINIVASAN: Well, I don't -- I don't
16 read the --

17 CHIEF JUSTICE ROBERTS: But we should take
18 Lovett as a binding precedent even though the issue
19 wasn't addressed at all?

20 MR. SRINIVASAN: I didn't -- to be -- to be
21 fair or, as was suggested this morning, to be crickets,
22 I -- I didn't mean to suggest that Lovett is binding
23 precedent, Mr. Chief Justice. What I'm saying is Lovett
24 is a case in which this same scenario as happens here
25 occurred. That's my -- that's my point about Lovett.

1 JUSTICE SOTOMAYOR: All right. Let's go to
2 the BLAG issue.

3 MR. SRINIVASAN: So -- sure.

4 JUSTICE SOTOMAYOR: And the issue wasn't
5 joined. So what do you think we meant? And I know
6 Justice Scalia doesn't care what you think we meant.

7 MR. SRINIVASAN: Right. Well --

8 JUSTICE SOTOMAYOR: But what is your reading
9 of what that means, that Congress can --

10 MR. SRINIVASAN: I think that --

11 JUSTICE SOTOMAYOR: -- intervene in
12 situations in which its interests are injured?

13 MR. SRINIVASAN: Sure. So there are two
14 aspects of Chadha that are relevant on pages 939 and
15 940. The second discussion at page 940, I think, deals
16 with prudential considerations that this Court ought to
17 take into account to make sure that it has a sufficient
18 adverse presentation of the competing arguments before
19 it.

20 And that's accounted for by an amicus type
21 role, and I think that's what the Court had in mind in
22 Chadha because the two cases that are cited in support
23 of that proposition were both cases in which there was
24 an appointed amicus. So that -- that deals with that
25 aspect of Chadha.

1 The other aspect of Chadha is the sentence
2 that I alluded to earlier. And I guess I'm not -- I'm
3 not going to tell you that that sentence doesn't bear on
4 the issue at all, but I will say this, what's cited in
5 that sentence is 28 U.S.C. 1254.

6 So I think the point that was directly --
7 directly being made is that the House and Senate were
8 parties for purposes of the statute and they were
9 parties because they had intervened and so they had
10 party status.

11 JUSTICE SOTOMAYOR: So are you accepting the
12 amici's formulation that somehow the representative has
13 to be of both houses and not just one?

14 MR. SRINIVASAN: No. I guess my -- my point
15 is a little bit different. My point is that this was
16 talking about whether they're a party for statutory
17 purposes under 1254. I don't read this to address the
18 question of Article III standing.

19 On the question of Article III standing, I
20 guess what I would say is this, Chadha at most, if it
21 says anything about Article III standing -- and I don't
22 know that it does with respect to the House or Senate --
23 at most what it would say was in the unique
24 circumstances of that case, where you had a legislative
25 veto that uniquely affected a congressional

1 prerogative --

2 JUSTICE SOTOMAYOR: So you take the position
3 that Congress --

4 MR. SRINIVASAN: -- there might be standing
5 in that situation. Even that I don't want to concede,
6 but --

7 JUSTICE SOTOMAYOR: Well, I want to know
8 what you're conceding.

9 MR. SRINIVASAN: I'm conceding that at
10 most --

11 JUSTICE SOTOMAYOR: Let's assume this very
12 case. Would -- who would ever have standing on behalf
13 of Congress? Anyone? Or are you saying there's never
14 standing?

15 MR. SRINIVASAN: Well, there are two
16 different cases. This case is different because this
17 case doesn't involve the kind of unique congressional
18 prerogative that was at issue in Chadha. Chadha
19 involved a legislative veto.

20 Here, if I could just finish this --

21 CHIEF JUSTICE ROBERTS: You can finish your
22 sentence.

23 MR. SRINIVASAN: -- this thought. Thank
24 you, Mr. Chief Justice.

25 Here, I don't think the interest that's

1 being asserted is even in the same plane as the one that
2 was asserted and found deficient in *Raines v. Byrd*.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Clement?

5 ORAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL

7 ADVISORY GROUP OF THE UNITED STATES

8 HOUSE OF REPRESENTATIVES

9 MR. CLEMENT: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 This Court not only addressed the issue of
12 the House's standing in *Chadha*, it held that the House
13 is the proper party to defend the constitutionality of
14 an Act of Congress when the executive agency charged
15 with its enforcement agrees with plaintiff that the
16 statute is unconstitutional.

17 JUSTICE SOTOMAYOR: Mr. Clement, *Chadha* was
18 somewhat different because there was a unique House
19 prerogative at question. But how is this case any
20 different than enforcing the general laws of the United
21 States? There's no unique House power granted by the
22 legislation.

23 MR. CLEMENT: Well, Justice Sotomayor --

24 JUSTICE SOTOMAYOR: It's a law of the United
25 States and the person who defends it generally is the

1 Solicitor -- Solicitor General.

2 MR. CLEMENT: Sure, generally, unless and
3 until they stop defending it, at which point we
4 submit --

5 JUSTICE SOTOMAYOR: Well, then, why
6 shouldn't -- why shouldn't taxpayers have a right to
7 come in? And we say they don't.

8 MR. CLEMENT: Because the House is very --
9 in a very different position in a case like this and in
10 Chadha from just the general taxpayer. Now, in a case
11 like Chadha, for example, you're right, it was the
12 one-house veto, if you will, that was at issue. But it
13 would be a strange jurisprudence that says that the
14 House has standing to come in and defend an
15 unconstitutional one-house veto, but it doesn't have
16 standing to come in and defend its core Article I
17 prerogative, which is to pass statutes and have those
18 statutes --

19 JUSTICE KENNEDY: Well, that -- that assumes
20 the premise. We didn't -- the House didn't know it was
21 unconstitutional. I mean --

22 MR. CLEMENT: Well, with all due respect,
23 Justice Kennedy, I think the House --

24 JUSTICE KENNEDY: We are talking about ex
25 ante, not ex post, what is standing at the outset? And

1 the House says this is constitutional.

2 MR. CLEMENT: Sure. And it -- there is a
3 presumption that its acts are constitutional. That
4 presumption had real life here because when Congress was
5 considering this statute it asked the Justice Department
6 three times whether DOMA was constitutional, and three
7 times the Justice Department told them that it was in
8 fact constitutional. So I think it's a fair assumption
9 that they at least have standing to have that
10 determination made by the courts, and this Court has
11 held that in the context of State legislatures and the
12 courts have --

13 JUSTICE KENNEDY: So you don't think that
14 there is anything to the argument that in Chadha the
15 House had its own unique institutional responsibilities
16 and prerogatives at stake, either the one-house veto or
17 the legislative veto?

18 MR. CLEMENT: Well, I would say two things.

19 JUSTICE KENNEDY: That's irrelevant?

20 MR. CLEMENT: I don't think -- I don't think
21 it's irrelevant. I would say two things. One is, I
22 don't think there was anything particularized about the
23 fact that it was the House that exercised the one-house
24 veto because the Court allowed the Senate to participate
25 as well. And the Senate's interest in that was really

1 just the constitutionality of the legislation and
2 perhaps the one-house veto going forward.

3 But what I would say is I just -- I would
4 continue to resist the premise, which is that the
5 House's prerogatives aren't at stake here. The House's
6 single most important prerogative, which is to pass
7 legislation and to have that legislation, if it's going to
8 be repealed, only be repealed through a process where
9 the House gets to fully participate.

10 CHIEF JUSTICE ROBERTS: What if you -- what
11 if you disagree with -- the executive is defending one
12 of your laws, if that's the way you insist on viewing
13 it, and you don't like their arguments, you say, they
14 are not making the best argument. Is that a situation
15 in which you have standing to intervene to defend the
16 law in a different way than the executive is?

17 MR. CLEMENT: No, I would say we would not,
18 Mr. Chief Justice. I would say in that circumstance the
19 House would have the prerogative to file an amicus brief
20 if it wanted to. But that's because of a sound
21 prudential reason, which is when the Executive is
22 actually discharging its responsibility, its traditional
23 obligation to defend an Act of Congress, if Congress
24 comes in as a party it has the possibility of
25 second-guessing the way that they are actually defending

1 it.

2 But if the Executive is going to vacate the
3 premises or, in a case like this, not just vacate the
4 premises, but stay in court and attack the statute, you
5 don't have that prudential concern. And that's why what
6 I --

7 JUSTICE KAGAN: How about a couple of cases
8 sort of in the middle of the Chief Justice's and this
9 one? So let's say that the Attorney General decides
10 that a particular application of a statute is
11 unconstitutional and decides to give up on that
12 application. Or even let's say the Attorney General
13 decides that the application of the statute might be
14 unconstitutional, so decides to interpret the statute
15 narrowly in order to avoid that application. Could
16 Congress then come in?

17 MR. CLEMENT: Well, I think -- if in a
18 particular case, which is obviously not this case, the
19 Executive decides, we are not going to defend the
20 statute as applied I think in that situation the House
21 could come in. I think as a matter of practice it
22 probably wouldn't.

23 And it's not like the House and the Senate
24 are very anxious to exercise this prerogative. In the
25 30 years since the Chadha decision, there's only been 12

1 instances in which the -- in which the House has come in
2 and intervened as a party. And I think it's very
3 important to recognize that whatever --

4 JUSTICE GINSBURG: Does that include the --
5 does that include the courts of appeals or just this
6 Court?

7 MR. CLEMENT: That includes all courts, but
8 excluding the DOMA cases. So from the point of Chadha
9 until the DOMA cases, there were a total of 12 cases
10 where the House intervened as a party.

11 And I do think that particularly in the
12 lower court cases, it's very important to understand
13 that party status is critical. I mean, in this case it
14 doesn't make a huge differences if you are an amicus
15 with argument time versus a party. But in the district
16 court that makes all the difference. Only a party can
17 take a deposition.

18 JUSTICE BREYER: This is what -- we have
19 always had the distinction between the public action and
20 the private action. A public action, which does not
21 exist under the Federal Constitution, is to vindicate
22 the interest in the law being enforced. Now, when the
23 government, State or Federal, in fact has the interest,
24 a special interest, in executing the law, here given to
25 the President, and they can delegate that interest to

1 Congress, if they did, which arguably they didn't do
2 here. But to say that any legislator has an interest on
3 his own without that delegation to defend the law is to
4 import in that context the public action into the
5 Federal government.

6 Now, that -- it hasn't been done, I don't
7 think, ever. I can see arguments for and against it,
8 but I can't think of another instance where that's
9 happened.

10 MR. CLEMENT: Well, I would -- a couple of
11 things, Justice Breyer. I mean, I would point you to
12 Chadha and I realize you can distinguish Chadha.

13 JUSTICE BREYER: Chadha is really different
14 because of course there is an interest in the
15 legislature in defending a procedure of the legislature.
16 Now, that's -- that isn't tough. But this is because
17 the only interest I can see here is the interest in the
18 law being enforced.

19 MR. CLEMENT: Well, if I --

20 JUSTICE BREYER: And that's -- I'm afraid of
21 opening that door.

22 MR. CLEMENT: Well, it's understandable. I
23 mean, obviously nobody's suggesting, at least in the
24 Legislative Branch, that this is a best practices
25 situation.

1 JUSTICE BREYER: No, no. But think of
2 another instance where that's happened. Where in all of
3 the 12 cases or whatever that what this Court has said,
4 without any special delegation of the power of the State
5 or Federal government to execute the law, without any
6 special delegation, a legislator simply has the power,
7 which a private citizen wouldn't have, to bring a
8 lawsuit as a party or defend as a party to vindicate the
9 interest in the law being enforced, the law he has voted
10 for?

11 Now I can imagine arguments on both sides,
12 so I'm asking you only, is there any case you can point
13 me to which will help?

14 MR. CLEMENT: I can point to you a couple of
15 cases that will help, but may not be a complete solution
16 for some of the reasons you built into your question.
17 The cases I would point to help are Coleman v. Miller,
18 Karcher v. May, and Arizonans for Official English. And
19 all of those -- I don't think Coleman involved any
20 specific legislative authorization, but you can
21 distinguish it, I suppose.

22 But in trying to distinguish it, keep in
23 mind that this Court gave those 20 Senators not just
24 standing to make the argument about the role of the
25 lieutenant governor, but also gave them standing to make

1 the separate argument, which is the only one this Court
2 reached because it was divided four to four on the
3 lieutenant governor's role, the only issue that the
4 Court reached was the issue whether prior ratification
5 disabled them from subsequent legislation action, which
6 is just a way of saying what they did was
7 unconstitutional.

8 So I think Coleman is quite close. Karcher,
9 Arizonans against English, there was an authorization.
10 We would say H. Res. 5 is enough of authorization for
11 these purposes.

12 JUSTICE SOTOMAYOR: Can you tell me where
13 the authorization is here? I know that there is a
14 statute that gives the Senate specifically authorization
15 to intervene. And there was consideration of extending
16 that right to the House. But the appointment of BLAG is
17 strange to me because it's not in a statute, it's in a
18 House rule.

19 So where -- how does that constitute
20 anything other than a private agreement among some
21 Senators, the Senate -- the House leadership? And where
22 -- from where do they derive the right, the statutory
23 right, to take on the power of representing the House in
24 items outside of the House? I know they control the
25 procedures within the House, but that's a very different

1 step than saying that they can decide who -- or to
2 create standing in some way, prudential or otherwise,
3 Article III or otherwise.

4 MR. CLEMENT: Well, Justice Sotomayor, I can
5 point you to two places. One is the House rules that
6 are pursuant to the rulemaking authority and approved by
7 the institution. They're approved in every Congress.
8 Rule 2.8.

9 JUSTICE SOTOMAYOR: What other House Rule
10 creates the power of the majority leaders to represent
11 the House outside of the functions of the House?

12 MR. CLEMENT: I'm not sure there is another
13 one, but that's the sole purpose of Rule 2.8. It
14 creates the Office of the General Counsel --

15 JUSTICE SOTOMAYOR: This would be, I think,
16 sort of unheard of, that --

17 MR. CLEMENT: I don't think so,
18 Justice Sotomayor. That's the same authority that gave
19 the House, essentially a predecessor to it -- - it would
20 be the same authority that has had the House appear in
21 litigation ever since Chadha. In Chadha, there was a
22 vote that authorized it specifically, but we have that
23 here in H. Res. 5, which is the second place I would
24 point you.

25 JUSTICE SOTOMAYOR: We don't even have a

1 vote here.

2 MR. CLEMENT: We do. We do have a vote in
3 H. Res. 5. At the beginning of this Congress in
4 January, the House passed a resolution that passed, that
5 authorized the BLAG to continue to represent the
6 interests of the House in this particular litigation.
7 So I think if there was a question before H. Res. 5,
8 there shouldn't be now.

9 I would like to --

10 JUSTICE KENNEDY: Under your view, would the
11 Senate have the right to have standing to take the other
12 side of this case, so we have the House on one side and
13 the Senate on the other?

14 MR. CLEMENT: No, Justice Kennedy, they
15 wouldn't have the standing to be on the other side of
16 this case. They would have standing to be on the same
17 side of this case, and I think that's essentially what
18 you had happen in the Chadha case.

19 JUSTICE KENNEDY: Well, why not? They're
20 concerned about the argument and you say that the House
21 of Representatives standing alone can come into the
22 court. Why can't the Senate standing alone come into
23 court and intervene on the other side?

24 MR. CLEMENT: It -- because it wouldn't have
25 the authority to do so under Chadha. What -- Chadha

1 makes the critical flipping of the switch that gives the
2 House the ability to intervene as a party is that the
3 Executive Branch declines to defend the statute. So if
4 the Senate wants to come in and basically take -- share
5 argument time or something as an amicus, they can, but
6 there's no need for them to participate as -- as a
7 party.

8 And I would want to emphasize that in the
9 lower courts, participation by a party is absolutely
10 critical. It doesn't make sense to have the party that
11 wants to see the statute invalidated be in charge of the
12 litigation in the district courts. Because whether the
13 statute is going to be invalidated is going to depend on
14 what kind of record there is in the district court.

15 It'd be one thing, Justice Scalia, if all
16 that happened is they entered consent judgment. I
17 suppose then the thing would end, and then in the long
18 run, the Executive would be forced to do their job and
19 actually defend these statutes --

20 JUSTICE ALITO: Then why is --

21 MR. CLEMENT: -- but if that's not going to
22 happen --

23 JUSTICE ALITO: Then why is it sufficient
24 for one house to take the position that the statute is
25 constitutional? The enactment of legislation requires

1 both houses, and usually the signature of the President.

2 MR. CLEMENT: Justice Alito, I think it
3 makes perfect sense in this context because every --
4 each individual house has a constitutional rule before a
5 statute is repealed. And so yes, it takes two of them
6 to make the law. But each of their's participation is
7 necessary to repeal a law. So if the Executive wants to
8 go into court and effectively seek the judicial repeal
9 of a law, it makes sense that one house can essentially
10 vindicate its role in our constitutional scheme by
11 saying, wait a minute, we passed that law, it can't be
12 repealed without our participation.

13 JUSTICE ALITO: Well, if the law is passed
14 by a bare majority of one of the houses, then each
15 member of that -- of that house who was part of the
16 majority has the same interest in defending its
17 constitutionality.

18 MR. CLEMENT: I don't think that's right
19 after Raines, Justice Alito. In Raines, this Court
20 carefully distinguished between the situation of an
21 individual legislator and the situation of one of the
22 houses as a whole. And it specifically said this might
23 be a different case if we had that kind of vote. And
24 that's what you have here. That's what you had in
25 Chadha.

1 And again, I do think that -- I mean, the
2 only alternatives here are really to say that the
3 Executive absolutely must enforce these laws, and if
4 they don't, I mean because after all -- you know, I -- I
5 really don't understand why it's -- if they're not going
6 to -- if they've made a determination that the law is
7 unconstitutional, why it makes any sense for them to
8 continue to enforce the law and put executive officers
9 in the position of doing something that the President
10 has determined is unconstitutional.

11 I mean, think about the qualified immunity
12 implications of that for a minute.

13 So that's problematic enough. But if
14 they're going to be able to do that and get anything
15 more than a consent judgment, then the House is going to
16 have to be able to play its role. And it's going to
17 have to play the role of a party. An amicus just
18 doesn't get it done. And I really think, in a sense,
19 the Executive gives the game away by conceding that our
20 participation as an amicus here is necessary to solve
21 what would otherwise be a glaring adverseness problem.

22 Because once you recognize that we can
23 participate as an amicus, you've essentially recognized
24 that there's nothing inherently executive about coming
25 in and defending the constitutionality of an act of

1 Congress. Or more to the point, there's nothing
2 inherently unlegislative about coming in and making
3 arguments in defense of the statute.

4 And if that's critical, absolutely necessary
5 to ensure there's an adverse presentation of the issues,
6 well, there's no reason the House should have to do that
7 with one hand tied behind its back. If its
8 participation is necessary, it should participate as a
9 full party. And as I say, that's critically important
10 in the lower courts so they can take depositions, build
11 a factual record, and allow for a meaningful defense of
12 the statute.

13 Because the alternative really puts the
14 Executive Branch in an impossible position. It's a
15 conflict of interest. They're the ones that are making
16 litigation decisions to promote the defense of a statute
17 they want to see invalidated. And if you want to see
18 the problems with their position, look at Joint Appendix
19 page 437. You will see the most anomalous motion to
20 dismiss in the history of litigation. A motion to
21 dismiss, filed by the United States, asking the district
22 court not to dismiss the case.

23 I mean, that's what you get under their view
24 of the world, and that doesn't serve as separation of
25 powers.

1 JUSTICE KENNEDY: That -- that would give
2 you intellectual whiplash.

3 I'm going to have to think about that.

4 (Laughter.)

5 MR. CLEMENT: It -- it does. It does. And
6 then -- you know -- and the last thing I'll say is, we
7 saw in this case certain appeals were expedited, certain
8 appeals weren't. They did not serve the interest of
9 defending the statute, they served the distinct interest
10 of the Executive.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Ms. Jackson, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF VICKI C. JACKSON

15 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

16 MS. JACKSON: Thank you, Your Honor.

17 I have five points I'll try to get to.

18 Just very quickly, Justice Breyer, I only
19 answered part of a question you asked me earlier, and I
20 just want to say, the U.S. is asking this Court to tell
21 it to pay money. It's not asking for relief.

22 Justice Sotomayor, you asked me about how
23 the issue could come up otherwise. I don't think I had
24 a chance to mention, private party litigation, employees
25 against employers, there's an interpleader action right

1 now pending that was cited in the brief of the 287
2 employers on page 32 at note 54 giving examples of how
3 the issue of DOMA's constitutionality could arise in
4 private litigation.

5 In addition, State and local government
6 employees might have, for example, FMLA claims in which
7 the issue could arise. So I think that there are a
8 number of ways in which the issue could arise.

9 On the question of what the purpose of 1252
10 could be if it wasn't to coincide with Article III
11 injury that was raised by my -- my friend in his
12 argument, I wonder whether the Court in Chadha wasn't
13 saying something like this, 1252 was Congress's wish
14 list. It was like -- like a citizen suit provision, to
15 be exercised only to the extent that Article III power
16 was there. That's a way to make sense out of what the
17 Court is doing in the text and footnote there.

18 As to the question of BLAG, which has been
19 very fully discussed already, I do want to say that
20 after-the-fact authorization seems to me quite troubling
21 and inconsistent with this Court's approach in Summers
22 v. Earth Institute, and in the -- I think it was in the
23 plurality in Lujan, where you -- you -- if a party has
24 standing, they need to have it in the first court that
25 they're in, either when it starts or certainly before

1 judgment.

2 And the rule as Justice Sotomayor observed
3 just doesn't seem to say anything about authority to
4 litigate. I think that in addition, the -- the big
5 problem here is the injury being complained of is
6 inconsistent with the separation of powers.

7 Bowsher and Buckley make very clear that
8 once the litigation is enacted, Congress's authority to
9 supervise it is at an end. It goes over to the
10 Executive Branch. And whether the Executive Branch does
11 it well or badly, in the view of Congress, it's in its
12 domain. And separation of powers will not be meaningful
13 if all it means is the Congress has to stay out unless
14 it thinks that the President is doing it badly.

15 So I think Article II helps give shape to
16 what kinds of injuries alleged by parts of Congress can
17 be cognizable.

18 Finally, the three -- two or three cases
19 cited by my colleague who last spoke: Coleman, Karcher
20 and Arizona, all involved State level of government,
21 where the Federal separation of powers doctrines
22 articulated in cases like Bowsher and Buckley were not
23 at issue.

24 Unless there are other questions, I will sit
25 down.

1 JUSTICE ALITO: Well, could I ask you this
2 question, on the question of the House resolution --

3 MS. JACKSON: Yes, sir.

4 JUSTICE ALITO: -- if -- if a house -- if
5 one of the houses passes a resolution saying that a
6 particular group was always authorized to represent us,
7 do you think it's consistent with the separation of
8 powers for us to examine whether that's a correct
9 interpretation of the rules of that House of Congress?

10 MS. JACKSON: Yes, I do, Your Honor, because
11 that resolution is not something operating only
12 internally within the House. It is having effect in the
13 world of the Article III courts, which this Court, in
14 proceedings in it, is in charge of.

15 Moreover, in the Smith case, the -- this
16 Court said that when the Senate passed an after-the-fact
17 interpretation of what a prior rule meant,
18 notwithstanding the great respect given to the Senate's
19 interpretation, this Court could reach and did reach an
20 alternative interpretation of the meaning of the Senate
21 rules, and I would urge this Court to do the same thing
22 here.

23 JUSTICE BREYER: Maybe I -- as long as you
24 have a minute, I -- what did you think of Mr. Clement's
25 argument this way, that -- that the execution -- can

1 I --

2 CHIEF JUSTICE ROBERTS: Sure.

3 JUSTICE BREYER: -- to execute the laws is
4 in Article II, but where the President doesn't in a
5 particular law, under those circumstances, a member of
6 the legislature, appropriately authorized, has the
7 constitutional power -- a power that is different than
8 the average person being interested in seeing that the
9 law is carried out, they can represent the power to
10 vindicate the interest in seeing that the law is
11 executed. And that's a special interest, existing only
12 when the Executive declines to do so.

13 MS. JACKSON: Your Honor, I think that when
14 the Executive declines to do so, it is exercising its
15 Take Care Clause authority. The Take Care Clause says
16 that the Executive shall take care that the laws be
17 faithfully executed. I think the laws include the
18 Constitution.

19 So I don't think the distinction offered by
20 my colleague is -- is appropriate. I think it would
21 result in a significant incursion on the separation of
22 powers between the legislature and the Executive Branch,
23 and would bring this -- the Federal courts into more
24 controversies that have characteristics of interbranch
25 confrontation, in which this Court has traditionally

1 been very cautious.

2 CHIEF JUSTICE ROBERTS: Ms. Jackson, before
3 you sit down, I would like to note that you briefed and
4 argued this case as amicus curiae at the invitation of
5 the Court, and you have ably discharged the
6 responsibility, for which you have the gratitude of the
7 Court.

8 MS. JACKSON: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 We'll now take a very short break and turn
11 to the merits.

12 (Recess.)

13 CHIEF JUSTICE ROBERTS: I meant that we
14 would take a break, not that -- we will continue
15 argument in the case on the merits.

16 Mr. Clement?

17 ORAL ARGUMENT OF PAUL D. CLEMENT

18 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL
19 ADVISORY GROUP OF THE UNITED STATES

20 MR. CLEMENT: Mr. Chief Justice, and may it
21 please the Court:

22 The issue of same-sex marriage certainly
23 implicates profound and deeply held views on both sides
24 of the issue. But the legal question on the merits
25 before this Court is actually quite narrow. On the

1 assumption that States have the constitutional option
2 either to define marriage in traditional terms or to
3 recognize same-sex marriages or to adopt a compromise
4 like civil unions, does the Federal government have the
5 same flexibility or must the Federal government simply
6 borrow the terms in State law?

7 I would submit the basic principles of
8 federalism suggest that as long as the Federal
9 government defines those terms solely for purposes of
10 Federal law, that the Federal government has the choice
11 to adopt a constitutionally permissible definition or to
12 borrow the terms of the statute.

13 JUSTICE GINSBURG: Mr. Clement, the problem
14 is that it would totally tort the States' decision that
15 there is a marriage between two people, for the Federal
16 government then to come in to say no joint return; no
17 marital deduction; no Social Security benefits; your
18 spouse is very sick, but you can't get leave; people --
19 if that set of attributes, one might well ask, what kind
20 of marriage is this?

21 MR. CLEMENT: And I think the answer to
22 that, Justice Ginsburg, would be to say that that is a
23 marriage under State law, and I think this Court's cases
24 when it talks about the fundamental right to marriage, I
25 take it to be talking about the State law status of

1 marriage, and the question of what does that mean for
2 purposes of Federal law has always been understood to be
3 a different matter. And that's been true certainly in a
4 number of situations under a number of statutes, so it's
5 simply not the case that as long as you are married
6 under State law you absolutely are going to be treated
7 as married --

8 JUSTICE GINSBURG: How about divorce? Same
9 thing? That you can have a Federal notion of divorce,
10 and that that doesn't relate to what the State statute
11 is?

12 MR. CLEMENT: Well, we've never had that,
13 Your Honor, and I think that there is a difference when
14 it comes to divorce because with divorce uniquely, you
15 could have the -- possibility that somebody's married to
16 two different people for purposes of State law and
17 Federal law.

18 But with the basic question of even whether
19 to recognize the marriage -- or probably the best way to
20 put it is just whether the Federal law treats you as
21 married for a particular purpose or not, there always
22 have been differences between the Federal law treatment
23 and the State law treatment.

24 The Federal treatment, for example,
25 recognizes common law marriages in all States whereas a

1 lot of States don't recognize common law marriages, but
2 Federal law recognizes that for some purposes -- the
3 Social Security Act, I think it's at page 4 of our
4 brief. And --

5 JUSTICE SOTOMAYOR: But only if the State
6 recognizes it.

7 MR. CLEMENT: No, I don't think that is true
8 for purposes of that provision.

9 JUSTICE SOTOMAYOR: There is a common
10 law, Federal common law definition?

11 MR. CLEMENT: That's my understanding,
12 that's -- as discussed --

13 JUSTICE SOTOMAYOR: I thought it was
14 reverse, that if the State law recognized common law
15 marriages, the Federal law --

16 MR. CLEMENT: My understanding is that there
17 is a Federal -- that the Federal law recognizes in -- in
18 the Social Security context even if it doesn't. And in
19 all events, there are other situations -- immigration
20 context, tax consequences. For tax consequences, if you
21 get a divorce every December -- you know, for tax
22 consequences, the State may well recognize that divorce.
23 The Federal government has long said, look, we are not
24 going to allow you get a divorce every December just to
25 get remarried in January so you have a filing tax

1 status that works for you that is more favorable to you.

2 So the Federal government has always treated
3 this somewhat distinctly. It always has its own
4 efforts, and I do think for purposes of the federalism
5 issue, it really matters that all DOMA does is take this
6 term where it appears in Federal law and define it for
7 purposes of Federal law. It would obviously be a
8 radically different case if Congress had, in 1996,
9 decided to try to stop States from defining marriage in
10 a particular way or dictate how they would decide it in
11 that way.

12 JUSTICE KENNEDY: Well, it applies to over
13 what, 1,100 Federal laws, I think we are saying. So
14 it's not -- it's -- it's -- I think there is quite a bit
15 to your argument that if it's a tax deduction case, which
16 is specific, whether or not if Congress has the power it
17 can exercise it for the reason that it wants, that it
18 likes some marriage it does like, I suppose it can do
19 that.

20 But when it has 1,100 laws, which in our
21 society means that the Federal government is intertwined
22 with the citizens' day-to-day life, you are at -- at
23 real risk of running in conflict with what has always
24 been thought to be the essence of the State police
25 power, which is to regulate marriage, divorce, custody.

1 MR. CLEMENT: Well, Justice Kennedy, two
2 points. First of all, the very fact that there are
3 1,100 provisions of Federal law that define the terms
4 "marriage" and "spouse" goes a long way to showing that
5 Federal law has not just stayed completely out of these
6 issues. It's gotten involved in them in a variety of
7 contexts where there is an independent Federal power
8 that supported that.

9 Now, the second thing is the fact that DOMA
10 affects all 1,100 statutes at once is not really a sign
11 of its irrationality. It is a sign that what it is, and
12 all it has ever purported to be, is a definitional
13 provision. And like every other provision in the
14 Dictionary Act, what it does is it defines the term
15 wherever it appears in Federal law in a consistent way.
16 And that was part and parcel of what Congress was trying
17 to accomplish with DOMA in 1996.

18 JUSTICE KENNEDY: Well, but it's not really
19 uniformity because it regulates only one aspect of
20 marriage. It doesn't regulate all of marriage.

21 MR. CLEMENT: Well, that's true but I don't
22 think that's a mark against it for federalism purposes.
23 And it -- it addressed a particular issue at a point,
24 remember in 1996, Congress is addressing this issue
25 because they are thinking that the State of Hawaii,

1 through its judicial action, is about to change the
2 definition of marriage from a way that it had been
3 defined in every jurisdiction in the United States. And
4 what that meant is that when Congress passed every one
5 of the statutes affected by DOMA's definition, the
6 Congress that was passing that statute had in mind the
7 traditional definition.

8 And so Congress, in 1996, at that point
9 says, the States are about to experiment with changing
10 this, but the one thing we know is all these Federal
11 statutes were passed with the traditional definition in
12 mind. And if rational basis is the test, it has to be
13 rational for Congress then to say, well, we are going to
14 reaffirm what this word has always meant for purposes of
15 Federal law.

16 JUSTICE ALITO: Suppose we look just at the
17 estate tax provision that's at issue in this case, which
18 provides specially favorable treatment to a married
19 couple as opposed to any other individual or economic
20 unit. What was the purpose of that? Was the purpose of
21 that really to foster traditional marriage, or was
22 Congress just looking for a convenient category to
23 capture households that function as a unified economic
24 unit?

25 MR. CLEMENT: Well, I think for these

1 purposes actually, Justice Alito, if you go back to the
2 beginning of the estate tax deduction, what Congress was
3 trying to do was trying to provide uniform treatment of
4 taxpayers across jurisdictions, and if you look at the
5 brief that Senator Hatch and some other Senators filed,
6 they discussed this history because what was happening,
7 in 1948 when this provision was initially put into
8 Federal law, was you had community property States and
9 common law States, and actually there was much more
10 favorable tax treatment if you were in a community law
11 State than a common law State.

12 And Congress didn't want to have an
13 artificial incentive for States to move from common law
14 to community property. It wanted to treat citizens the
15 same way no matter what State they were in. So it said,
16 we will give a uniform Federal deduction based on
17 marriage, and I think what that shows is that when the
18 Federal government gets involved in the issue of
19 marriage, it has a particularly acute interest in
20 uniform treatment of people across State lines.

21 So Ms. Windsor wants to point to the
22 unfairness of the differential treatment of treating two
23 New York married couples differently, and of course for
24 purposes of New York law that's exactly the right focus,
25 but for purposes of Federal law it's much more rational

1 for Congress to -- to say, and certainly a rational
2 available choice, for Congress to say, we want to treat
3 the same-sex couple in New York the same way as the
4 committed same-sex couple in Oklahoma and treat them the
5 same. Or even more to the point for purposes --

6 JUSTICE SOTOMAYOR: But that's begging the
7 question because you are treating the married couples
8 differently.

9 MR. CLEMENT: Well --

10 JUSTICE SOTOMAYOR: You are saying that New
11 York's married couples are different than Nebraska's.

12 MR. CLEMENT: But -- but the only way --

13 JUSTICE SOTOMAYOR: I picked that out of a
14 hat. But the point is that there is a difference.

15 MR. CLEMENT: But the -- the only way they
16 are different is because of the way the State law treats
17 them. And just to be clear how -- you know, what this
18 case is about, and how sort of anomalous the -- the
19 treatment, the differential treatment in two States is,
20 is this is not a case that is based on a marriage
21 license issued directly by the State of New York after
22 2011 when New York recognized same-sex marriage. This
23 is -- the status of Ms. Windsor as married depends on
24 New York's recognition of an Ontario marriage
25 certificate issued in 2007.

1 JUSTICE BREYER: You would say it would be
2 the same thing if the State passed a law -- Congress
3 passes a law which says, well, there's some States --
4 they all used to require 18 as the age of consent. Now,
5 a lot of them have gone to 17. So if you're 17 when you
6 get married, then no tax deduction, no medical, no
7 nothing.

8 Or some States had a residence requirement
9 of a year, some have six months, some have four months.
10 So Congress passes a law that says, well unless you're
11 there for a year, no medical deduction, no tax thing, no
12 benefits of any kind, that that would be perfectly
13 constitutional. It wouldn't be arbitrary, it wouldn't
14 be random, it wouldn't be capricious.

15 MR. CLEMENT: Well, I guess I would -- I
16 would say two things. I would say that the first
17 question would be what's the relevant level of scrutiny
18 and I assume the level of scrutiny for the things --

19 JUSTICE BREYER: No, I just want your bottom
20 line. The bottom line here is we can imagine -- you
21 know, I can make them up all day. So can you --
22 differences between --

23 (Laughter.)

24 JUSTICE BREYER: Differences between States
25 have nothing to do with anything -- you know, residence

1 requirements, whether you have a medical exam,
2 whether -- we can think them up all day -- how old you
3 are. And Congress just passes a law which takes about,
4 let's say, 30 percent of the people who are married in
5 the United States and says no tax deduction, no this, no
6 that, no medical -- medical benefits, none of these
7 good things, none of them for about 20, 30 percent of
8 all of the married people.

9 Can they do that?

10 MR. CLEMENT: Again, I think the right way
11 to analyze it would be -- you know, is -- is there any
12 distinction drawn that implicates what level of scrutiny
13 is implicated. If the level of scrutiny is rational
14 basis, then my answer to you would be, yes, they can do
15 that. I mean, we'd have to talk about what the rational
16 basis would be --

17 JUSTICE BREYER: No, there isn't any. I'm
18 trying to think of examples, where I just can't imagine
19 what it is.

20 MR. CLEMENT: Well, I -- I think the uniform
21 treatment of individuals across State lines --

22 JUSTICE BREYER: All right. So you're
23 saying uniform treatment's good enough no matter how odd
24 it is, no matter how irrational. There is nothing but
25 uniformity. We could take -- no matter. You see what

1 I'm -- where I'm going?

2 MR. CLEMENT: No, I see exactly where you're
3 going, Justice Breyer.

4 JUSTICE BREYER: All right.

5 (Laughter.)

6 MR. CLEMENT: And -- and obviously, every
7 one of those cases would have to be decided on its own.
8 But I do think there is a powerful interest when the
9 Federal government classifies people --

10 JUSTICE BREYER: Yes, okay. Fine.

11 MR. CLEMENT: -- there's a powerful interest
12 in treating --

13 JUSTICE BREYER: Fine, but once -- the first
14 part. Every one of those cases has to be decided on its
15 own, okay? Now, what's special or on its own that
16 distinguishes and thus makes rational, or whatever basis
17 you're going to have here, treating the gay marriage
18 differently?

19 MR. CLEMENT: Well, again, if we're -- if
20 we're coming at this from the premise that the States
21 have the option to choose, and then we come at this from
22 the perspective that Congress is passing this not in a
23 vacuum, they're passing this in 1996. And what they're
24 confronting in 1996 is the prospect that one State,
25 through its judiciary, will adopt same-sex marriage, and

1 then by operation of the full faith and credit
2 law, that will apply to any -- any couple that wants to
3 go there.

4 And the State that's thinking about doing
5 this is, Hawaii, it's a very nice place to go and get
6 married. And so Congress is worried that people are
7 going to go there, go back to their home jurisdictions,
8 insist on the recognition in their home jurisdictions of
9 their same-sex marriage in Hawaii, and then the Federal
10 government will borrow that definition, and therefore,
11 by the operation of one State's State judiciary,
12 same-sex marriage is basically going to be recognized
13 throughout the country.

14 And what Congress says is, wait a minute.
15 Let's take a timeout here. This is a redefinition of an
16 age-old institution. Let's take a more cautious
17 approach where every sovereign gets to do this for
18 themselves. And so Section 2 of DOMA says we're going
19 to make sure that on full faith and credit principles
20 that a decision of one State --

21 JUSTICE SOTOMAYOR: But what gives the
22 Federal government the right to be concerned at all at
23 what the definition of marriage is? Sort of going in a
24 circle. You're saying -- you're saying, we can create
25 this special category -- men and women -- because the

1 States have an interest in traditional marriage that
2 they're trying to protect. How do you get the Federal
3 government to have the right to create categories of
4 that type, based on an interest that's not there, but
5 based on an interest that belongs to the States?

6 MR. CLEMENT: Well, at least two -- two
7 responses to that, Justice Sotomayor. First is that one
8 interest that supports the Federal government's
9 definition of this term is whatever Federal interest
10 justifies the underlying statute in which it appears.

11 So in every one of these statutes that
12 affected, by assumption, there's some Article I Section
13 8 authority --

14 JUSTICE SOTOMAYOR: So they can create a
15 class they don't like -- here, homosexuals, or a class
16 that they consider is suspect in the marriage category,
17 and they can create that class and decide benefits on
18 that basis when they themselves have no interest in the
19 actual institution of marriage as marriage. The State's
20 control that.

21 MR. CLEMENT: Just to clarify, Justice
22 Sotomayor, I'm not suggesting that the Federal
23 government has any special authority to recognize
24 traditional marriage. So if -- the assumption is that
25 nobody can do it. If the States can't do it either,

1 then the Federal government can't do it. So the Federal
2 government --

3 JUSTICE SOTOMAYOR: No, I'm -- I'm
4 assuming --

5 MR. CLEMENT: Okay. So then the question
6 is --

7 JUSTICE SOTOMAYOR: Assuming I assume the
8 States can --

9 MR. CLEMENT: So then, if the States can --

10 JUSTICE SOTOMAYOR: -- what creates the
11 right --

12 MR. CLEMENT: -- the Federal government has
13 sort of two sets of authorities that give it sort of a
14 legitimate interest to wade into this debate. Now, one
15 is whatever authority gives rise to the underlying
16 statute. The second and complementary authority is
17 that -- you know, the Federal government recognizes that
18 it's a big player in the world, that it has a lot of
19 programs that might give States incentives to change the
20 rules one way or another.

21 And the best way -- one way to stay out of
22 the debate and let just the -- the States develop this
23 and let the democratic process deal with this is to just
24 say, look, we're going to stick with what we've always
25 had, which is traditional definition. We're not going

1 to create a regime that gives people an incentive and
2 point to Federal law and say, well, another reason you
3 should have same-sex marriage is because then you'll get
4 a State tax deduction. They just stayed out of it. They've
5 said, look, we're --

6 JUSTICE KENNEDY: But I - I see an illogic
7 in your argument. I -- I hadn't thought of the
8 relation between Section 2 and Section 3 in the way you
9 just said. You said, now Section 2 was in order to help
10 the States. Congress wanted to help the States. But
11 then Section 3, that Congress doesn't help the States,
12 which have come to the conclusion that gay marriage is
13 lawful. So that's inconsistent.

14 MR. CLEMENT: No, no. They treat them --
15 which is to say they -- they are preserving, they are
16 helping the States in the sense of having each sovereign
17 make this decision for themselves.

18 JUSTICE KENNEDY: We're helping the States
19 do -- if they do what we want them to, which is -- which
20 is not consistent with the historic commitment of
21 marriage and -- and of questions of -- of the rights of
22 children to the State.

23 MR. CLEMENT: With respect, Justice Kennedy,
24 that's not right. No State loses any benefits by
25 recognizing same-sex marriage. Things stay the same.

1 What they don't do is they don't sort of open up an
2 additional class of beneficiaries under their State law
3 for -- that get additional Federal benefits. But things
4 stay the same. And that's why in this sense --

5 JUSTICE GINSBURG: They're not -- they're
6 not a question of additional benefits. I mean, they
7 touch every aspect of life. Your partner is sick.
8 Social Security -- I mean, it's pervasive. It's not as
9 though, well, there's this little Federal sphere and
10 it's only a tax question.

11 It's -- it's -- as Justice Kennedy said,
12 1,100 statutes, and it affects every area of life. And
13 so you are really diminishing what the State has said is
14 marriage. You're saying, no, State did two kinds of
15 marriage, the full marriage, and then this sort of skim
16 milk marriage.

17 (Laughter.)

18 MR. CLEMENT: With respect, Justice
19 Ginsburg, that's not what the Federal government is
20 saying. The Federal government is saying that within
21 its own realm in Federal policies, where we assume that
22 the Federal government has the authority to define the
23 terms that appear in their own statutes, that in those
24 areas, they are going to have their own definition. And
25 that's --

1 JUSTICE KAGAN: Mr. Clement, for the most
2 part and historically, the only uniformity that the
3 Federal government has pursued is that it's uniformly
4 recognized the marriages that are recognized by the
5 State. So this was a real difference in the uniformity
6 that the Federal government was pursuing. And it
7 suggests that maybe something -- maybe Congress had
8 something different in mind than uniformity.

9 So we have a whole series of cases which
10 suggest the following -- which suggest that when
11 Congress targets a group that is not everybody's
12 favorite group in the world, that we look at those cases
13 with some -- even if they're not suspect -- with some
14 rigor to say, do we really think that Congress was doing
15 this for uniformity reasons, or do we think that
16 Congress's judgment was infected by dislike, by fear, by
17 animus, and so forth?

18 I guess the question that this statute
19 raises, this statute that does something that's really
20 never been done before, is whether that sends up a
21 pretty good red flag that that's what was going on.

22 MR. CLEMENT: A couple of responses, Justice
23 Kagan. First of all, I think I would take issue with
24 the premise, first of all, that this is such an unusual
25 Federal involvement on an issue like marriage. If you

1 look at historically, not only has the Federal
2 government defined marriage for its own purposes
3 distinctly in the context of particular -- particular
4 programs, it's also intervened in -- in other areas,
5 including in-State prerogatives. I mean, there's a
6 reason that 4 State constitutions include a prohibition
7 on polygamy. It's because the Federal Congress insisted
8 on them. There is a reason that, in the wake of the
9 Civil War and in Reconstruction, Congress specifically
10 wanted to provide benefits for spouses of freed slaves
11 who fought for the Union.

12 In order to do it, it essentially had to
13 create State law marriages because in the Confederacy,
14 the slaves couldn't get married. So they developed
15 their own State -- essentially, a Federal, sort of,
16 condition to define who was married under those laws.
17 So where there have been needs in the past to get
18 involved, the Federal government has gotten involved.

19 The other point I would make -- but I also
20 eventually want to get around to the animus point -- but
21 the other point I would make is, when you look at
22 Congress doing something that is unusual, that deviates
23 from the way they -- they proceeded in the past,
24 you have to ask, well, was there a good reason? And in a
25 sense, you have to understand that, in 1996, something's

1 happening that is, in a sense, forcing Congress to
2 choose between its historic practice of deferring to the
3 States and its historic practice of preferring
4 uniformity.

5 Up until 1996, it essentially has it both
6 ways, every State has the traditional definition.
7 Congress knows that's the definition that's embedded in
8 every Federal law. So that's fine. We can defer.

9 Okay. 1996 --

10 JUSTICE KAGAN: Well, is what happened in
11 1996 -- and I'm going to quote from the House Report
12 here -- is that "Congress decided to reflect an honor of
13 collective moral judgment and to express moral
14 disapproval of homosexuality."

15 Is that what happened in 1996?

16 MR. CLEMENT: Does the House Report say
17 that? Of course, the House Report says that. And if
18 that's enough to invalidate the statute, then you should
19 invalidate the statute. But that has never been your
20 approach, especially under rational basis or even
21 rational basis-plus, if that is what you are suggesting.

22 This Court, even when it's applied more
23 heightened scrutiny, the O'Brien case we cite, it
24 suggests, look, we are not going to strike down a
25 statute just because a couple of legislators may have

1 had an improper motive. We're going to look, and under
2 rational basis, we look, is there any rational basis for
3 the statute?

4 And so sure, the House Report says some
5 things that we are not -- we've never invoked in trying
6 to defend the statute.

7 But the House Report says other things, like
8 Congress was trying to promote democratic
9 self-governance. And in a situation where an unelected
10 State judiciary in Hawaii is on the verge of deciding
11 this highly contentious, highly divisive issue for
12 everybody, for the States -- for the other States and
13 for the Federal government by borrowing principles, it
14 makes sense for Congress --

15 JUSTICE KENNEDY: Well, but your statute
16 applies also to States where the voters have decided it.

17 MR. CLEMENT: That's true. I -- but again,
18 I don't know that that fact alone makes it irrational.
19 And I suppose if that's what you think --

20 JUSTICE KENNEDY: Well -- just to be clear,
21 I think your answer is fair and rational.

22 We've switched now from Federal power to
23 rationality. There is -- there is a difference. We're
24 talking -- I think we are assuming now that there is
25 Federal power and asking about the -- the degree of

1 scrutiny that applies to it. Or are we going back to
2 whether there is a Federal power? They are -- they are
3 intertwined.

4 MR. CLEMENT: I think -- I think there is so
5 clearly is a Federal power because DOMA doesn't define
6 any term that appears anywhere other than in a Federal
7 statute that we assume that there is Federal power for.
8 And if there is not Federal power for the statutes in
9 which these terms appear, that is a problem independent
10 of DOMA, but it is not a DOMA problem. So I will assume
11 we have Federal power.

12 Then the question is --

13 JUSTICE KENNEDY: Well, I think -- I think
14 it is a DOMA problem. The question is whether or not
15 the Federal government, under our federalism scheme, has
16 the authority to regulate marriage.

17 MR. CLEMENT: And -- and it doesn't have the
18 authority to regulate marriages, as such, but that's not
19 what DOMA does. DOMA provides certain -- DOMA defines a
20 term as it appears in Federal statutes, many of those
21 Federal statutes provide benefits. Some of those
22 Federal statutes provide burdens. Some of those Federal
23 statutes provide disclosure obligations. It appears in
24 lots of places, and if any one of --

25 JUSTICE ALITO: Well, Congress could have

1 achieved exactly what it achieved under Section 3 by
2 excising the term "married" from the United States Code
3 and replacing it with something more neutral. It could
4 have said "certified domestic units," and then defined
5 this in exactly the way that Section 3 -- exactly the
6 way DOMA defines "marriage."

7 Would that make a difference? In that
8 instance, the Federal government wouldn't be purporting
9 to say who is married and who is not married, it would
10 be saying who is entitled to various Federal benefits
11 and burdens based on a Federal definition?

12 MR. CLEMENT: That would make no difference,
13 Justice Alito. It does -- the hypothetical helpfully
14 demonstrates, though, that when the Federal government
15 is defining this term as it appears in the Federal Code,
16 it is not regulating marriage as such. And it is
17 important to recognize that people that are married in
18 their State, based on either the legislative acts or by
19 judicial recognition, remain married for purposes of
20 State law.

21 JUSTICE BREYER: You started, you
22 started by, I think, agreeing -- maybe not -- that
23 uniformity in and of itself with nothing else is not
24 likely to prove sufficient, at least if it's rational
25 basis-plus. And -- and why? Because we can think of

1 weird categories that are uniform.

2 So you say, look at it on the merits. Now
3 that's where you are beginning to get. But so far, what
4 I've heard is, well, looking at it on the merits, there
5 is certainly a lot of harms. And on the plus side what
6 there is, is one, we don't want courts deciding this. But
7 of course, as was just pointed out, in some States it's
8 not courts, it's the voters.

9 Then you say, ah, but we want -- there are
10 too many courts deciding it. Now, is -- too many courts
11 might decide it. Now what else is there? What else? I
12 want to -- I want to be able to have a list -- you know,
13 of really specific things that you are saying justify
14 this particular effort to achieve uniformity. And I
15 want to be sure I'm not missing any.

16 And so far, I've got those two I mentioned.
17 What else?

18 JUSTICE SCALIA: I didn't understand that
19 courts were so central to your position. I -- I thought
20 you didn't want the voters in one State to dictate to
21 other States any more than you would want the courts in
22 one State to dictate to other States.

23 MR. CLEMENT: Well, I -- I think that's
24 true, Justice Scalia. The point about the courts,
25 though, is -- I mean, it's particularly relevant here.

1 JUSTICE BREYER: That means courts -- the
2 courts, they do dictate in respect to time. They
3 dictate in respect to age. They dictate in respect to
4 all kinds of things. And what I'm looking for is what,
5 in your opinion, is special about this homosexual
6 marriage that would justify this, other than this kind
7 of pure uniformity, if there is such a thing?

8 MR. CLEMENT: Well, let me -- let me just
9 get on record that -- to take issue with one of the
10 premises of this, which is we are at somehow rational
11 basis-plus land because I would suggest strongly that
12 three levels of scrutiny are enough.

13 But in all events, if you are thinking about
14 the justifications that defend this statute, that
15 justify the statute, they are obviously in the brief.
16 But it's uniformity -- but it's not -- it's not just
17 that Congress picked this -- you know, we need a uniform
18 term, let's pick this out of the air.

19 They picked the traditional definition that
20 they knew reflected the underlying judgments of every
21 Federal statute on the books at that point. They knew
22 it was the definition that had been tried in every
23 jurisdiction in the United States and hadn't been tried
24 anywhere until 2004. And then, of course, it was, as
25 they correctly predicted, a judicial decision.

1 And in this context, in particular, they are
2 thinking about an individual -- I mean, this couple goes
3 to Ontario, they get the -- they get a marriage
4 certificate. A couple could -- from Oklahoma, could
5 have gotten -- gone to Ontario and gotten a marriage
6 certificate that same day and gone back to Oklahoma.
7 And from the Federal law perspective, there is certainly
8 a rational basis in treating those two couples the same
9 way.

10 If I may reserve my time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Clement.

13 General Verrilli?

14 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
15 ON BEHALF OF THE PETITIONER,
16 SUPPORTING AFFIRMANCE

17 GENERAL VERRILLI: Mr. Chief Justice, and
18 may it please the Court:

19 The equal protection analysis in this case
20 should focus on two fundamental points. First, what
21 does Section 3 do. And second, to whom does Section 3
22 do it?

23 What Section 3 does is exclude from an array
24 of Federal benefits lawfully married couples. That
25 means that the spouse of a soldier killed in the line of

1 duty cannot receive the dignity and solace of an
2 official notification of next of kin.

3 CHIEF JUSTICE ROBERTS: I suppose your --
4 you agree that Congress could go the other way, right?
5 Congress could pass a new law today that says, we will
6 give Federal benefits. When we say "marriage" in
7 Federal law, we mean same -- committed same-sex couples
8 as well, and that could apply across the board? Or do
9 you think that they couldn't do that?

10 GENERAL VERRILLI: We think that wouldn't
11 raise an equal protection problem like this statute
12 does, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Well, no, my point
14 is it wouldn't -- you don't think it would raise a
15 federalism problem either, do you?

16 GENERAL VERRILLI: I don't think it would
17 raise a federalism problem.

18 CHIEF JUSTICE ROBERTS: Okay.

19 GENERAL VERRILLI: And I -- but the key for
20 the -- for the -- our purposes is that, in addition to
21 denying these fundamental important -- fundamentally
22 important benefits, is who they are being denied to.

23 CHIEF JUSTICE ROBERTS: So just to be clear,
24 you don't think there is a federalism problem with what
25 Congress has done in DOMA?

1 GENERAL VERRILLI: We -- no, we don't,
2 Mr. Chief Justice. The question is what is
3 the constitutionality for equal protection purposes,
4 and because it's unconstitutional and it's embedded
5 into numerous Federal statutes, those statutes will
6 have an unconstitutional effect. But it's the equal
7 protection violation from -- from the perspective of
8 the United States that --

9 JUSTICE KENNEDY: You think Congress can
10 use its powers to supercede the traditional authority
11 and prerogative of the States to regulate marriage in
12 all respects? Congress could have a uniform definition
13 of marriage that includes age, consanguinity, et cetera,
14 et cetera?

15 GENERAL VERRILLI: No, I'm not saying that,
16 Your Honor. I think if Congress passed such a statute,
17 then we would have to consider how to defend it. But
18 that's not --

19 JUSTICE KENNEDY: Well, but then there is
20 a federalism interest at stake here. And I thought you
21 told the Chief Justice there was not.

22 GENERAL VERRILLI: Well, with respect
23 to Section 3 of DOMA, the problem is an equal
24 protection problem from the point of view of the
25 United States.

1 JUSTICE KAGAN: Yes, but General, surely the
2 question of what the Federal interests are and whether
3 those Federal interests should take account of the
4 historic State prerogatives in this area is relevant to
5 the equal protection inquiry?

6 GENERAL VERRILLI: It's central to the
7 inquiry, Justice Kagan. I completely agree with that
8 point.

9 CHIEF JUSTICE ROBERTS: Oh, so it would be
10 central to the inquiry if Congress went the other way,
11 too?

12 GENERAL VERRILLI: Well, the difference is
13 what Section 3 does is impose this exclusion from
14 Federal benefits on a class that has undeniably been
15 subject to a history of terrible discrimination on the
16 basis of character --

17 CHIEF JUSTICE ROBERTS: I understand that.
18 That's your equal protection argument. It's not very
19 responsive to my concern that I'm trying to get an
20 answer to. You don't think federalism concerns come
21 into play at all in this, right?

22 GENERAL VERRILLI: Well, I think --
23 I want -- I just want to clarify. The equal
24 protection question would be different than the other
25 circumstance. That's a matter of --

1 CHIEF JUSTICE ROBERTS: I know the equal
2 protection argument would be different.

3 GENERAL VERRILLI: But the federalism
4 concerns come into play in the following way in
5 that Mr. Clement has made the argument that, look,
6 whatever States can do in terms of recognizing
7 marriage or not recognizing marriage, the Federal
8 government has commensurate authority to do or not do.
9 We don't think that's right as a matter of our equal
10 protection analysis because we don't think the Federal
11 government should be thought of as the 51st State.
12 States, as we told the Court, yesterday we believe
13 heightened scrutiny ought to apply even to the State
14 decisions --

15 JUSTICE KENNEDY: But you're -- you are
16 insisting that we get to a very fundamental question
17 about equal protection, but we don't do that unless we
18 assume that the law is valid otherwise to begin with. And
19 we are asking is it valid otherwise. Is -- what is the
20 Federal interest in enacting this statute and is it a
21 valid Federal interest assuming -- before we get to the
22 equal protection analysis?

23 GENERAL VERRILLI: Yes. We think whatever
24 the outer bounds of the Federal government's authority,
25 and there certainly are outer bounds, would be, apart

1 from the equal protection violation, we don't think that
2 Section 3 apart from equal protection analysis raises a
3 federalism problem. But we do think the federalism
4 analysis does play into the equal protection analysis
5 because the Federal -- the Federal government is not the
6 51st state for purposes of -- of the interests that Mr.
7 Clement has identified on behalf of BLAG.

8 JUSTICE ALITO: Can I take you back to the
9 example that you began with where a member of the
10 military is injured. So let's say three soldiers are
11 injured and they are all in same-sex relationships, and
12 in each instance the other partner in this relationship
13 wants to visit the soldier in -- in a hospital.

14 The first is a spouse in a State that allows
15 same-sex marriage, the second is a domestic partner in a
16 State that allows that, but not same-sex marriage,
17 the third is in an equally committed loving relationship
18 in a State that doesn't involve either. Now, your
19 argument is that, under Federal law, the first would be
20 admitted -- should be admitted, but the other two would
21 be kept out?

22 GENERAL VERRILLI: The question in the case,
23 Justice Alito is whether Congress has a sufficiently
24 persuasive justification for the exclusion that it has
25 imposed. And it -- and it does not. The only way in

1 which -- that BLAG's arguments for its -- for the
2 constitutionality of this statute have any prospect of
3 being upheld is if the Court adopts the minimal
4 rationality standard of Lee Optical. But the
5 fundamental --

6 JUSTICE ALITO: But if I could just take you
7 back to the example. Your -- your position seems to me,
8 yes, one gets in, two stay out, even though your legal
9 arguments would lead to the conclusion that they all
10 should be treated the same.

11 GENERAL VERRILLI: Well, the question before
12 the Court is whether the exclusion that DOMA imposes
13 violates equal protection, and it does violate equal
14 protection because you can't treat this as though it
15 were just a distinction between optometrists and
16 ophthalmologists, as the Lee Optical case did. This is
17 a different kind of a situation because the
18 discrimination here is being visited on a group that has
19 historically been subject to terrible discrimination on
20 the basis of personal --

21 JUSTICE SCALIA: But that's -- that's the
22 same in the example that he just gave you, that
23 discrimination would have been visited on the same
24 group, and you say there it's okay.

25 GENERAL VERRILLI: No, I didn't say that. I

1 said it would be subject to equal protection analysis,
2 certainly, and there might be a problem.

3 JUSTICE SCALIA: So you think that's bad as
4 well, that all three of those have to be treated the
5 same, despite State law about marriage.

6 GENERAL VERRILLI: But the issue -- they
7 have to be analyzed under equal protections principles,
8 but whatever is true about the other situations. In the
9 situation in which the couple is lawfully married for
10 purposes of State law and the exclusion is a result of
11 DOMA itself, the exclusion has to be justified under
12 this Court's equal protection analysis, and DOMA doesn't
13 do it.

14 JUSTICE SOTOMAYOR: General, I have
15 a question. You think, I think from your brief
16 yesterday and today, that on some level sexual
17 orientation should be looked at on an intermediate
18 standard of scrutiny?

19 GENERAL VERRILLI: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: All right, heightened in
21 some way. Going back to the Chief's question about a
22 law that was passed recognizing common law
23 heterosexual -- homosexual marriages. I think even
24 under your theory that might be suspect because -- that
25 law might be suspect under equal protection because once

1 we say sexual orientation is suspect, it would be
2 suspect whether it's homosexual or heterosexual. The
3 law favors homosexuals, it would be suspect because it's
4 based on sexual orientation.

5 GENERAL VERRILLI: You would have -- you
6 would have to impose the -- the heightened scrutiny
7 equal protection analysis, sure.

8 JUSTICE SOTOMAYOR: Exactly. And so when we
9 decided race was a suspect class, people who are not
10 blacks have received --

11 GENERAL VERRILLI: Yes, that's certainly --

12 JUSTICE SOTOMAYOR: -- strict scrutiny on
13 whether the use of race as a class, whether they are
14 white or a black, is justified by a compelling interest.

15 GENERAL VERRILLI: That -- that is certainly
16 true, Your Honor. If I could turn to the interest that
17 BLAG has actually identified as supporting this statute,
18 I think there are -- there are -- I think that you can
19 see what the problem is here.

20 Now, this statute is not called the Federal
21 Uniform Marriage Benefits Act; it's called the Defense
22 of Marriage Act. And the reason for that is because the
23 statute is not directed at uniformity in the
24 administration of Federal benefits. All -- there is two
25 equally uniform systems, the system of respecting the

1 State choices and the system of -- that BLAG is
2 advocating here.

3 And what BLAG's got to do in order to
4 satisfy equal protection scrutiny is justify the choice
5 between one and the other. And the difference between
6 the two is that the Section 3 choice is a choice that --
7 Section 3 choice is a choice that discriminates. And so
8 it's not simply a matter sufficient to say, well,
9 uniformity is enough. Section 3 discriminates. And
10 with respect --

11 CHIEF JUSTICE ROBERTS: So as soon as one
12 State adopted same sex marriage, the definition of
13 marriage throughout the Federal code had to change?
14 Because there is no doubt that up until that point every
15 time Congress said "marriage" they understood they were
16 acting under the traditional definition of marriage.

17 GENERAL VERRILLI: Well, I don't know,
18 Mr. Chief Justice, why you wouldn't assume that what
19 Congress was doing when it enacted a statute,
20 particularly a statute that had the word "marriage" in
21 it, was assuming that the normal rule that applies in
22 the vast majority of circumstances of deference to the
23 State definition of marriage would be the operative
24 principle.

25 CHIEF JUSTICE ROBERTS: So you don't think

1 that when Congress said "marriage" in every one of these
2 provisions that they had in mind same-sex marriages?

3 GENERAL VERRILLI: No, but they may well
4 have had in mind deferring to the normal State
5 definition of marriage, whatever it is. Not that they
6 were making the specific choice that my friend suggested
7 they were. But whatever is the case, when Congress
8 enacted DOMA that choice of exclusion has to be
9 justified under appropriate equal protection principles.

10 And so the issue of uniformity just doesn't
11 get you there because there is no uniformity advantage
12 to Section 3 of DOMA as opposed to the traditional rule.
13 The issue of administration doesn't get you there. I
14 mean, at a very basic level administrative concerns
15 ought not be an important enough interest to justify
16 this kind of a discrimination under the Equal Protection
17 Clause.

18 But even if you look at them, there are no
19 genuine administrative benefits to DOMA. If anything,
20 DOMA -- Section 3 of DOMA makes Federal administration
21 more difficult because now the Federal government has to
22 look behind valid State marriage licenses and see
23 whether they are about State marriages that are out of
24 compliance with DOMA.

25 It's an additional administrative burden.

1 So there is no administrative -- there is no
2 administrative advantage to be gained here by what -- by
3 what Congress sought to achieve. And the fundamental
4 reality of it is, and I think the House report makes
5 this glaringly clear, is that DOMA was not enacted for
6 any purpose of uniformity, administration, caution,
7 pausing, any of that.

8 It was enacted to exclude same-sex married
9 -- lawfully married couples from Federal benefit regimes
10 based on a conclusion that was driven by moral
11 disapproval. It is quite clear in black and white in
12 the pages of the House report which we cite on page 38
13 of our brief --

14 CHIEF JUSTICE ROBERTS: So that was the view
15 of the 84 Senators who voted in favor of it and the
16 President who signed it? They were motivated by animus?

17 GENERAL VERRILLI: No, Mr. Chief Justice.
18 We quoted our -- we quoted the Garrett concurrence in
19 our brief. And I think there is a lot of wisdom there,
20 that it may well not have been animus or hostility. It
21 may well have been what Garrett described as the simple
22 want of careful reflection or an instinctive response to
23 a class of people, or a group of people who we perceive
24 as alien or other.

25 But whatever the explanation, whether it's

1 animus, whether it's that -- more subtle, more
2 unthinking, more reflective kind of discrimination,
3 Section 3 is discrimination. And I think it's time for
4 the Court to recognize that this discrimination,
5 excluding lawfully married gay and lesbian couples from
6 Federal benefits, cannot be reconciled with our
7 fundamental commitment to equal treatment under law.

8 This is discrimination in its most very
9 basic aspect and the House Report, whether -- and I
10 certainly would not suggest that it was universally
11 motivated by something other than goodwill -- but the
12 reality is that it was an expression of moral
13 disapproval of exactly the kind that this Court said in
14 Lawrence would not justify the law that was struck down
15 there.

16 JUSTICE SOTOMAYOR: General, your bottom
17 line is, it's an equal protection violation for the
18 Federal government, and all States as well?

19 GENERAL VERRILLI: Yes, Your Honor, and
20 that's the -- we took the position we took yesterday
21 with respect to marriage -- the analysis --

22 JUSTICE SOTOMAYOR: Is there any argument
23 you can make to limit this to this case, vis-à-vis the
24 Federal government and not the States?

25 GENERAL VERRILLI: Well, as we said

1 yesterday, we think it's an open question with respect
2 to State recognition of marriage, and they may well be
3 able to advance interests -- they may be able to advance
4 it. I guess I shouldn't say "may well," because I do
5 think it would be difficult, as we said yesterday. They
6 may be able to advance interests that would satisfy
7 heightened scrutiny and justify non-recognition --

8 JUSTICE BREYER: Then yet --

9 GENERAL VERRILLI: But -- but here, the
10 Federal government's not in the same position because as
11 BLAG concedes, the Federal government at the most can
12 act at the margins in influencing these decisions about
13 marriage and child rearing at the State level. And the
14 Second Circuit and the First Circuit both concluded that
15 there's no connection at all, and that's of course
16 because Section 3 doesn't make it any more likely that
17 unmarried men and women in States that -- unmarried men
18 and women who confront an unplanned pregnancy are going
19 to get married.

20 And -- and elimination of Section 3 wouldn't
21 make it any less likely that unmarried men and women are
22 going to get married. It doesn't have any effect at
23 all. It doesn't have any connection at all. So it's
24 not at the margins. There's no interest at all at
25 this -- in DOMA in promoting --

1 JUSTICE BREYER: Or if there's no
2 interest -- I mean, I'm back where we were yesterday.
3 It seems to me, forgetting your -- your preferable
4 argument, it's a violation of equal protection
5 everywhere. Well, if it is, then all States have to
6 have something like pacts. And if they have to have
7 something like pacts, then you say then they also have
8 to allow marriage.

9 So then are you not arguing they all have to
10 allow marriage? And then you say no. All right, so
11 with that point --

12 GENERAL VERRILLI: But our point here,
13 Justice Breyer, is that whatever -- may I finish?

14 Thank you.

15 Whatever the issue is, with -- whatever the
16 outcome is with respect to States and marriage, that the
17 Federal government's interest in advancing those
18 justifications through Section 3 of DOMA is so
19 attenuated that two Federal courts of appeals have seen
20 it as non-existent, and it cannot justify Section 3.

21 CHIEF JUSTICE ROBERTS: Thank you, General.
22 Ms. Kaplan?

23 ORAL ARGUMENT OF ROBERTA A. KAPLAN
24 ON BEHALF OF THE RESPONDENT WINDSOR

25 MS. KAPLAN: Mr. Chief Justice, and may it

1 please the Court:

2 I'd like to focus on why DOMA fails even
3 under rationality review. Because of DOMA, many
4 thousands of people who are legally married under the
5 laws of nine sovereign States and the District of
6 Columbia are being treated as unmarried by the Federal
7 government solely because they are gay.

8 These couples are being treated as unmarried
9 with respect to programs that affect family stability,
10 such as the Family Leave Act, referred to by Justice
11 Ginsburg. These couples are being treated as unmarried
12 for purposes of Federal conflict of interest rules,
13 election laws, and anti-nepotism and judicial recusal
14 statutes.

15 And my client was treated as unmarried when
16 her spouse passed away, so that she had to pay \$363,000
17 in estate taxes on the property that they had
18 accumulated during their 44 years together.

19 CHIEF JUSTICE ROBERTS: Could I ask you the
20 same question I asked the Solicitor General?

21 Do you think there would be a problem if
22 Congress went the other way, the federalism problem?
23 Obviously, you don't think there's an equal protection
24 problem --

25 MS. KAPLAN: Right.

1 CHIEF JUSTICE ROBERTS: -- but a federalism
2 issue, Congress said, we're going to recognize same-sex
3 couples -- committed same-sex couples -- even if the
4 State doesn't, for purposes of Federal law?

5 MS. KAPLAN: Obviously, with respect to
6 marriage, the Federal government has always used the
7 State definitions. And I think what you're --
8 Mr. Chief Justice, what you're proposing is to extend --
9 the Federal government extend additional benefits to gay
10 couples in States that do not allow marriage, to
11 equalize the system.

12 CHIEF JUSTICE ROBERTS: I just am asking
13 whether you think Congress has the power to interfere
14 with the -- to not adopt the State definition, if
15 they're extending benefits. Do they have that
16 authority?

17 MS. KAPLAN: I think the question under the
18 Equal Protection Clause is what -- is what the
19 distinction is.

20 CHIEF JUSTICE ROBERTS: No, no. I know
21 that.

22 You're following the lead of the Solicitor
23 General and returning to the Equal Protection Clause
24 every time I ask a federalism question.

25 Is there any problem under federalism

1 principles?

2 MS. KAPLAN: With the Federal government --

3 CHIEF JUSTICE ROBERTS: With Congress
4 passing a law saying, we are going to adopt a different
5 definition of marriage than those States that don't
6 recognize same-sex marriage. We don't care whether you
7 do as a matter of State law, when it comes to Federal
8 benefits, same-sex marriage will be recognized.

9 MS. KAPLAN: It has certainly been argued in
10 this case by others that -- whether or not that's in the
11 enumerated powers of the Federal government. For the
12 reasons Justice Kagan mentioned, we think the federalism
13 principles go toward a novelty question. I think
14 whether or not the Federal government could have its own
15 definition of marriage for all purposes would be a very
16 closely argued question.

17 JUSTICE SCALIA: I don't understand your
18 answer. Is your answer yes or no? Is there a
19 federalism problem with that or isn't there a federalism
20 problem?

21 MS. KAPLAN: I -- I think the Federal
22 government could extend benefits to gay couples to
23 equalize things on a programmatic basis to make things
24 more equal. Whether the Federal government can have its
25 own definition of marriage, I think, would be -- there's

1 a -- it'd be very closely argued whether that's outside
2 the enumerated approach.

3 JUSTICE SCALIA: Well, it's just -- all
4 these statutes use the term "marriage," and the Federal
5 government says in all of these statutes when it says
6 marriage, it includes same-sex couples, whether the
7 State acknowledges them to be married or not.

8 MS. KAPLAN: But that -- I don't know if
9 that would work because they wouldn't --

10 JUSTICE SCALIA: Never mind whether or
11 not it would work? I don't care if it works.

12 (Laughter.)

13 JUSTICE SCALIA: Does it -- does it create a
14 federalism problem?

15 MS. KAPLAN: The power to marry people is a
16 power that rests with the States.

17 JUSTICE SCALIA: Yes.

18 MS. KAPLAN: The Federal government doesn't
19 issue marriage licenses. It never has.

20 JUSTICE SCALIA: Well, it's not doing that,
21 it's just saying for purposes -- just what it's doing
22 here. It says, for purposes of all these Federal
23 statutes, when we say marriage, we mean -- instead of
24 saying we mean heterosexual marriage, we mean, whenever
25 we use it, heterosexual and homosexual marriage.

1 If that's what it says, can it do that?

2 MS. KAPLAN: As long as the people were
3 validly married under State law, and met the
4 requirements of State law to get married --

5 JUSTICE SCALIA: No, no, no, no. It
6 includes --

7 MS. KAPLAN: I'm not sure that the Federal
8 government -- this answers your question,
9 Justice Scalia -- I'm not sure the Federal government
10 can create a new Federal marriage that would be some
11 kind of marriage that States don't permit.

12 JUSTICE ALITO: Well, let me get to the
13 question I asked Mr. Clement. It just gets rid of the
14 word "marriage," takes it out of the U.S. Code
15 completely. Substitutes something else, and defines it
16 as same-sex -- to include same-sex couples. Surely it
17 could do that.

18 MS. KAPLAN: Yes. That would not be based
19 on the State's --

20 JUSTICE ALITO: So it's just the word
21 "marriage"? And it's just the fact that they use this
22 term "marriage"?

23 MS. KAPLAN: Well, that's what the Federal
24 government has always chosen to do. And that's the way
25 the Federal law is structured, and it's always been

1 structured for 200 years based on the State police power
2 to define who's married. The Federal government, I
3 presume, could decide to change that if it wanted, and
4 somehow, it would be very strange for all 1,100 laws,
5 but for certain programs -- you have different
6 requirements other than marriage, and that would be
7 constitutional or unconstitutional depending on the
8 distinction.

9 JUSTICE ALITO: But if the estate tax
10 follows State law, would not that create an equal
11 protection problem similar to the one that exists here?
12 Suppose there were a dispute about the -- the State of
13 residence of your client and her partner spouse. Was
14 it New York, was it some other State where same-sex
15 marriage would not have been recognized? And suppose
16 there was -- the State court said the State of residence
17 is a State where it's not recognized.

18 Would -- would you not have essentially the
19 same equal protection argument there that you have now?

20 MS. KAPLAN: Well, let me -- let me answer
21 that question very clearly. Our position is only with
22 respect to the nine States -- and I think there are two
23 others that recognize these marriages. So if my
24 client -- if a New York couple today marries and moves
25 to North Carolina, one of which has a constitutional

1 amendment, a State constitutional amendment -- and one
2 of the spouses dies, they would not -- since estate
3 taxes determine where the person dies, they would not be
4 entitled to the deduction.

5 That is not our claim here.

6 Moreover, Justice Alito, in connection with
7 a whole host of Federal litigation, there has been
8 Federal litigation for hundreds of years with respect to
9 the residency of where people live or don't live, or
10 whether they are divorced or not divorced throughout the
11 Federal system. And the Federal government has always
12 handled that and has never before -- and we believe this
13 is why it's unconstitutional -- separated out a class of
14 married gay couples solely because they were gay.

15 JUSTICE ALITO: Just -- if I could follow up
16 with one -- one question. What if the -- the
17 hypothetical surviving spouse, partner in North
18 Carolina, brought an equal protection argument, saying
19 that there is no -- it is unconstitutional to treat me
20 differently because I am a resident of North Carolina
21 rather than a resident of New York. What would be --
22 would that be discrimination on the basis of sexual
23 orientation? What would be the level of scrutiny?
24 Would it survive?

25 MS. KAPLAN: That would be certainly a

1 different case. It'd be more similar to the case I
2 think you heard yesterday than the case that we have
3 today. We certainly believe that sexual-orientation
4 discrimination should get heightened scrutiny. If it
5 doesn't get heightened scrutiny, obviously, it'd be
6 rational basis, and the question would be what the State
7 interests were in not allowing couples, for example, in
8 North Carolina who are gay to get married.

9 No one has identified in this case, and I
10 don't think we've heard it in the argument from my
11 friend, any legitimate difference between married gay
12 couples on the one hand and straight married couples on
13 the other that can possibly explain the sweeping,
14 undifferentiated, and categorical discrimination of
15 DOMA, Section 3 of DOMA.

16 And no one has identified any legitimate
17 Federal interest that is being served by Congress's
18 decision, for the first time in our nation's history to
19 undermine the determinations of the sovereign States
20 with respect to eligibility for marriage. I would
21 respectfully contend that this is because there is none.

22 Rather, as the title of the statute makes
23 clear, DOMA was enacted to defend against the marriages
24 of gay people. This discriminatory purpose was rooted
25 in moral disapproval as Justice Kagan pointed out.

1 JUSTICE BREYER: What -- what do you think
2 of his -- the argument that I heard was, to put the
3 other side, at least one part of it as I understand it
4 said, look, the Federal government needs a uniform rule.
5 There has been this uniform one man, one woman rule for
6 several hundred years or whatever, and there's a
7 revolution going on in the States. We either adopt the
8 resolution -- the revolution or push it along a little,
9 or we stay out of it. And I think Mr. Clement was
10 saying, well, we've decided to stay out of it.

11 MS. KAPLAN: I don't --

12 JUSTICE BREYER: And the way to stay out of
13 it is to go with the traditional thing. I mean, that --
14 that's an argument. So your answer to that argument is
15 what?

16 MS. KAPLAN: I think it's an incorrect
17 argument, Justice Breyer, for the --

18 JUSTICE BREYER: I understand you do, I'd
19 like to know the reason.

20 (Laughter.)

21 MS. KAPLAN: Of course. Congress did not
22 stay out of it. Section 3 of DOMA is not staying out of
23 it. Section 3 of DOMA is stopping the recognition by
24 the Federal government of couples who are already
25 married, solely based on their sexual orientation, and

1 what it's doing is undermining, as you can see in the
2 briefs of the States of New York and others, it's
3 undermining the policy decisions made by those States
4 that have permitted gay couples to marry.

5 States that have already resolved the
6 cultural, the political, the moral -- whatever other
7 controversies, they're resolved in those States. And by
8 fencing those couples off, couples who are already
9 married, and treating them as unmarried for purposes of
10 Federal law, you're not -- you're not taking it one step
11 at a time, you're not promoting caution, you're putting
12 a stop button on it, and you're having discrimination
13 for the first time in our country's history against a
14 class of married couples.

15 CHIEF JUSTICE ROBERTS: Is the --

16 JUSTICE SOTOMAYOR: Now, the -- the
17 discriminations are not the sexual orientation, but on a
18 class of marriage, is that what you're --

19 MS. KAPLAN: It's a class of married couples
20 who are gay.

21 JUSTICE SOTOMAYOR: So I pose the same
22 question I posed to the General to you. Do you think
23 there's a difference between that discrimination and
24 this -- and the discrimination of States who say
25 homosexuals can't get married?

1 MS. KAPLAN: I think that it's -- they're
2 different cases. I think when you have couples who are
3 gay who are already married, you have to distinguish
4 between those classes. Again, the Federal government
5 doesn't give marriage licenses, States do. And whatever
6 the issues would be in those States would be what
7 interest the States have, as opposed to here, what
8 interest -- and we think there is none -- the Federal
9 government has.

10 There is little doubt that the answer to the
11 question of why Congress singled out gay people's
12 marriages for disrespect through DOMA. The answer can't
13 be uniformity as we've discussed. It can't be cost
14 savings because you still have to explain then why the
15 cost savings is being wrought at the expense of married
16 couples who are gay. And it can't be any of the State
17 interests that weren't discussed, but questions of
18 family law in parenting and marriage are done by the
19 States, not by the Federal government.

20 The only -- the only conclusion that can be
21 drawn is what was in the House Report, which is moral
22 disapproval of gay people, which the -- Congress thought
23 was permissible in 1996 because it relied on the Court's
24 Bowers decision, which this Court has said was wrong,
25 not only at the time it was overruled in Lawrence, but

1 was wrong when it was decided.

2 CHIEF JUSTICE ROBERTS: So 84 Senators --
3 it's the same question I asked before. 84 Senators
4 based their vote on moral disapproval of gay people?

5 MS. KAPLAN: No, I think -- I think what is
6 true, Mr. Chief Justice, is that times can blind, and
7 that back in 1996 people did not have the understanding
8 that they have today. That there is no distinction,
9 there is no constitutionally permissible distinction --

10 CHIEF JUSTICE ROBERTS: Well, does that
11 mean -- times can blind. Does that mean they did not
12 base their votes on moral disapproval?

13 MS. KAPLAN: No, some clearly did. I think
14 it was based on an understanding that gay -- an
15 incorrect understanding that gay couples were
16 fundamentally different than straight couples, an
17 understanding that I don't think exists today. And
18 that's the sense I'm using that times can blind. I
19 think there was -- we all can understand that people
20 have moved on this, and now understand that there is no
21 such distinction. So I'm not saying it was animus or
22 bigotry, I think it was based on a misunderstanding on
23 gay people and their --

24 JUSTICE SCALIA: Why -- why are you so
25 confident in that -- in that judgment? How many -- how

1 many States permit gay -- gay couples to marry?

2 MS. KAPLAN: Today? Nine, Your Honor.

3 JUSTICE SCALIA: Nine. And -- and so there
4 has been this sea change between now and 1996.

5 MS. KAPLAN: I think with respect to the
6 understanding of gay people and their relationships
7 there has been a sea change, Your Honor.

8 JUSTICE GINSBURG: How many States have
9 civil unions now?

10 MS. KAPLAN: I believe -- that was discussed
11 in the arguments, eight or nine, I believe.

12 JUSTICE GINSBURG: And how many had it in
13 1996?

14 MS. KAPLAN: I -- yes, it was much, much
15 fewer at the time. I don't have that number, Justice
16 Ginsburg, I apologize.

17 CHIEF JUSTICE ROBERTS: I suppose the sea
18 change has a lot to do with the political force and
19 effectiveness of people representing, supporting your
20 side of the case?

21 MS. KAPLAN: I disagree with that,
22 Mr. Chief Justice, I think the sea change has to do,
23 just as was discussed in Bowers and Lawrence, with an
24 understanding that there is no difference -- there was
25 fundamental difference that could justify this kind of

1 -- categorical discrimination between gay couples and
2 straight couples.

3 CHIEF JUSTICE ROBERTS: You don't doubt that
4 the lobby supporting the enactment of same sex-marriage
5 laws in different States is politically powerful, do
6 you?

7 MS. KAPLAN: With respect to that category,
8 that categorization of the term for purposes of
9 heightened scrutiny, I would, Your Honor. I don't --

10 CHIEF JUSTICE ROBERTS: Really?

11 MS. KAPLAN: Yes.

12 CHIEF JUSTICE ROBERTS: As far as I can
13 tell, political figures are falling over themselves to
14 endorse your side of the case.

15 MS. KAPLAN: The fact of the matter is,
16 Mr. Chief Justice, is that no other group in recent
17 history has been subjected to popular referenda to take
18 away rights that have already been given or exclude
19 those rights, the way gay people have. And only two of
20 those referenda have ever lost. One was in Arizona, it
21 then passed a couple years later. One was in Minnesota
22 where they already have a statute on the books that
23 prohibits marriages between gay people.

24 So I don't think -- and until 1990 gay
25 people were not allowed to enter this country. So I

1 don't think that the political power of gay people today
2 could possibly be seen within that framework, and
3 certainly is analogous -- I think gay people are far
4 weaker than the women were at the time of Frontiero.

5 CHIEF JUSTICE ROBERTS: Well, but you just
6 referred to a sea change in people's understandings and
7 values from 1996, when DOMA was enacted. And I'm just
8 trying to see where that comes from, if not from the
9 political effectiveness of -- of groups on your side of
10 the case.

11 MS. KAPLAN: To flip the language of the
12 House Report, Mr. Chief Justice, I think it comes from a
13 moral understanding today that gay people are no
14 different, and that gay married couples' relationships
15 are not significantly different from the relationships
16 of straight married couples. I don't think --

17 CHIEF JUSTICE ROBERTS: I understand that.
18 I am just trying to see how -- where that that moral
19 understanding came from, if not the political
20 effectiveness of a particular group.

21 MS. KAPLAN: I -- I think it came -- is,
22 again is very similar to the, what you saw between
23 Bowers and Lawrence. I think it came to a societal
24 understanding.

25 I don't believe that societal understanding

1 came strictly through political power. And I don't
2 think that gay people today have political power as that
3 -- this Court has used that term with -- in connection
4 with the heightened scrutiny analysis.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Ms. Kaplan.

7 Mr. Clement, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
9 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL
10 ADVISORY GROUP OF THE UNITED STATES

11 MR. CLEMENT: Thank you, Mr. Chief Justice,
12 just three points in rebuttal.

13 First of all, I was not surprised to hear
14 the Solicitor General concede that there is no unique
15 federalism problem with DOMA because in the Gill
16 litigation in the First Circuit, the State of
17 Massachusetts -- the Commonwealth of Massachusetts
18 invoked the Tenth Amendment, and on that issue the
19 United States continued to defend DOMA because there is
20 no unique federalism problem with it, as the Chief
21 Justice's question suggested. If 10 years from now
22 there are only 9 States left and Congress wants to adopt
23 a uniform Federal law solely for Federal law purposes to
24 going the other way, it is fully entitled to do that.
25 It has the power to do that.

1 I would say also the Federal government has
2 conceded in this litigation that there is a rational
3 basis for this statute, something else to keep in mind.

4 I would also say that this provision is not
5 so unique. The very next provision in the Dictionary
6 Act --

7 JUSTICE GINSBURG: Rational basis,
8 Mr. Clement -- is a problem in your briefing. You seem
9 to say and you repeat it today that there is three
10 tiers, and if you get into rational basis, then it's
11 anything goes. But the history of this Court is, in the
12 very first gender discrimination case, Reed v. Reed, the
13 Court did something it had never done in the history of
14 the country under rational basis. There was no
15 intermediate tier then. It was rational basis.

16 MR. CLEMENT: Well --

17 JUSTICE GINSBURG: And yet the Court said
18 this is rank discrimination and it failed.

19 MR. CLEMENT: And, Justice Ginsburg,
20 applying rational basis to DOMA, I think that there are
21 many rational bases that support it. And the Solicitor
22 General says, well -- you know, the United States is not
23 the 51st State to be sure, but the Federal government
24 has interests in uniformity that no other entity has.

25 And we heard today that there's a problem

1 when somebody moves from New York to North Carolina,
2 they can lose their benefits. The Federal government
3 uniquely, unlike the 50 States, can say, well, that
4 doesn't make any sense, we are going to have the same
5 rule. We don't want somebody, if they are going to be
6 transferred in the military from West Point to Fort Sill
7 in Oklahoma, to resist the transfer because they are
8 going to lose some benefits.

9 It makes sense to have a uniform Federal
10 rule for the Federal government. It is not so anomalous
11 that the term "marriage" is defined in the U.S. Code.
12 The very next provision of the Dictionary Act defines
13 "child." These terms, although they are the primary
14 province of State governments, do appear in multiple
15 Federal statutes and it's a Federal role to define those
16 terms.

17 The last point I would simply make is in
18 thinking about animus, think about the fact that
19 Congress asked the Justice Department three times about
20 the constitutionality of the statute. That's not what
21 you do when you are motivated by animus. The first two
22 times they got back the answer it was constitutional.
23 The third time, they asked again in the wake of Romer,
24 and they got the same answer, it's constitutional.

25 Now the Solicitor General wants to say,

1 well, it was want of careful reflection. Well, where do
2 we get careful reflection in our system? Generally,
3 careful reflection comes in the democratic process. The
4 democratic process requires people to persuade people.

5 The reason there has been a sea change is a
6 combination of political power, as defined by this
7 Court's cases as getting the attention of lawmakers,
8 certainly they have that. But it's also persuasion.
9 That's what the democratic process requires. You have
10 to persuade somebody you're right. You don't label them
11 a bigot. You don't label them as motivated by animus.
12 You persuade them you are right.

13 That's going on across the country.
14 Colorado, the State that brought you Amendment 2, has
15 just recognized civil unions. Maine, that was pointed
16 to in the record in this case as being evidence of the
17 persistence of discrimination because they voted down a
18 statewide referendum, the next election cycle it came
19 out the other way.

20 And the Federal Congress is not immune.
21 They repealed "Don't Ask, Don't Tell." Allow the
22 democratic process to continue.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel,
25 counsel.

1 The case is submitted.

2 (Whereupon, at 12:13 p.m., the case in the
3 above-entitled matter was submitted.)

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