

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, yeah, I owe them money, but I'm just not gonna pay
8 it, which is the equivalent of the Government saying,
9 yeah, 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 --

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
19 against Indiana, which was discussed by the parties,
20 where 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 against
8 Schmidt case, there was a State court conviction, Ohio
9 State Court overturns it, Princeton University seeks
10 review, because its regulations were at issue. New
11 Jersey joins in seeking review, but does not ask for
12 relief; does not take a position on what relief would
13 be appropriate.

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

25 Now, how is that different from a trustee

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

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

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

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

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

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

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

12 MS. JACKSON: Those are --

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

23 MS. JACKSON: Mr. Chief Justice, I think
24 that's a hard question under Article II. But I think
25 the Article III questions that this Court is facing turn

1 on what the parties in the case have alleged, what
2 relief they're seeking, and what the posture is.

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

6 MS. JACKSON: I am saying primarily --

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

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

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

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

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

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

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

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

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

25 Why isn't it here?

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

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

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

1 times a year in this courtroom.

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

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

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

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

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

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

11 MS. JACKSON: Thank you.

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Mr. Srinivasan?

2 ORAL ARGUMENT OF SRI SRINIVASAN,

3 ON BEHALF OF THE PETITIONER, 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
25 the --

1 CHIEF JUSTICE ROBERTS: No, it's not just --
2 it's not unusual. It's totally unprecedented.

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

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

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

25 The second situation is where no possible

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

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

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

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

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

1 a determination that a statute is unconstitutional, it
2 necessarily follows that he wouldn't enforce it. That's
3 not what happened in 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 view. 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, yeah, 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 III.

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

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

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

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

11 MR. SRINIVASAN: Correct.

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

15 MR. SRINIVASAN: Well --

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

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

1 fairness, do that. But I --

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

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

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

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

25 MR. SRINIVASAN: Yes.

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

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

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

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

24 MR. SRINIVASAN: I'm sorry?

25 JUSTICE SCALIA: In Chadha, there was an

1 argument that Congress had standing, because what was at
2 issue in the case was precisely a prerogative of
3 Congress to exercise the one-house or two-house veto.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: All right. Let's go to

1 the BLAG issue.

2 MR. SRINIVASAN: So -- sure.

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

6 MR. SRINIVASAN: Right. Well --

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

9 MR. SRINIVASAN: I think that --

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

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

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

25 The other aspect of Chadha is the sentence

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

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

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

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

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

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

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

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

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

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

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

19 Here, if I could just finish this --

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

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

24 Here, I don't think the interest that's
25 being asserted is even in the same plane as the one that

1 was asserted and found deficient in *Raines v. Byrd*.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Clement?

4 ORAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL

6 ADVISORY GROUP OF THE UNITED STATES

7 HOUSE OF REPRESENTATIVES

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

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

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

22 MR. CLEMENT: Well, Justice Sotomayor --

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

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

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

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

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

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

23 JUSTICE KENNEDY: We are talking about ex
24 ante, not ex post, what is standing at the outset? And
25 the House says this is constitutional.

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

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

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

18 JUSTICE KENNEDY: That's irrelevant?

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

1 and perhaps the one-house veto going forward.

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

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

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

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

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

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

21 And it's not like the House and the Senate
22 are very anxious to exercise this prerogative. In the
23 30 years since the Chadha decision, there's only been 12
24 instances in which the -- in which the House has come in
25 and intervened as a party. And I think it's very

1 important to recognize that whatever --

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

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

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

16 JUSTICE BREYER: This is what -- we have
17 always had the distinction between the public action and
18 the private action. A public action, which does not
19 exist under the Federal Constitution, is to vindicate
20 the interest in the law being enforced. Now, when the
21 government, State or Federal, in fact has the interest,
22 a special interest in executing the law, here given to
23 the President, and they can delegate that interest to
24 Congress, if they did, which arguably they didn't do
25 here. But to say that any legislator has an interest on

1 his own without that delegation to defend the law is to
2 import in that context the public action into the
3 Federal Government.

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

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

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

17 MR. CLEMENT: Well, if I --

18 JUSTICE BREYER: And that's -- I'm afraid of
19 opening that door.

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

24 JUSTICE BREYER: No, no. But think of
25 another instance where that's happened, where in all of

1 the 12 cases or whatever that what this Court has said,
2 without any special delegation of the power of the State
3 or Federal Government to execute the law, without any
4 special delegation, a legislator simply has the power,
5 which a private citizen wouldn't have, to bring a
6 lawsuit as a party or defend as a party to vindicate the
7 interest in the law being enforced, the law he has voted
8 for?

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

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

20 But in trying to distinguish it, keep in
21 mind that this Court gave those 20 Senators not just
22 standing to make the argument about the role of the
23 lieutenant governor, but also gave them standing to make
24 the separate argument, which is the only one this Court
25 reached, because it was divided four to four on the

1 lieutenant governor's role, the only issue that the
2 Court reached is the issue whether prior ratification
3 disabled them from subsequent legislation action, which
4 is just a way of saying what they did was
5 unconstitutional.

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

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

17 So where -- how does that constitute
18 anything other than a private agreement among some
19 Senators, the House leadership? And where -- from where
20 do they derive the right, the statutory right, to take
21 on the power of representing the House in items outside
22 of the House? I know they control the procedures within
23 the House, but that's a very different step from saying
24 that they can decide who or to create standing in some
25 way, prudential or otherwise, Article III or otherwise.

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

6 JUSTICE SOTOMAYOR: What other House Rule
7 creates the power of the majority leaders to represent
8 the House outside of the functions of the House?

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

12 JUSTICE SOTOMAYOR: This would be, I think,
13 sort of unheard of, that --

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

22 JUSTICE SOTOMAYOR: We don't even have a
23 vote here.

24 MR. CLEMENT: We do. We do have a vote in
25 H. Res. 5. At the beginning of this Congress in

1 January, the House passed a resolution that passed, that
2 authorized the BLAG to continue to represent the
3 interests of the House in this particular litigation.
4 So I think if there was a question before H. Res. 5,
5 there shouldn't be now.

6 I would like to --

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

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

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

21 MR. CLEMENT: It -- because it wouldn't have
22 the authority to do so under Chadha. What -- Chadha
23 makes the critical flipping of the switch that gives the
24 House the ability to intervene as a party is that the
25 Executive Branch declines to defend the statute. So if

1 the Senate wants to come in and basically take -- share
2 argument time or something as an amicus, they can, but
3 there's no need for them to participate as -- as a
4 party.

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

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

17 JUSTICE ALITO: Then why is --

18 MR. CLEMENT: -- but if that's not going to
19 happen --

20 JUSTICE ALITO: Then why is it sufficient
21 for one house to take the position that the statute is
22 constitutional? The enactment of legislation requires
23 both houses, and usually the signature of the President.

24 MR. CLEMENT: Justice Alito, I think it
25 makes perfect sense in this context, because every --

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

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

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

23 And again, I do think that -- I mean, the
24 only alternatives here are really to say that the
25 Executive absolutely must enforce these laws, and if

1 they don't, I mean, because after all -- you know, I --
2 I really don't understand why it's -- if they're not
3 going to -- if they've made a determination that the law
4 is unconstitutional, why it makes any sense for them to
5 continue to enforce the law and put executive officers
6 in the position of doing something that the President
7 has determined is unconstitutional.

8 I mean, think about the qualified immunity
9 implications of that for a minute.

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

19 Because once you recognize that we can
20 participate as an amicus, you've essentially recognized
21 that there's nothing inherently executive about coming
22 in and defending the constitutionality of an act of
23 Congress. Or more to the point, there's nothing
24 inherently unlegislative about coming in and making
25 arguments in defense of the statute.

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

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

20 I mean, that's what you get under their view
21 of the world, and that doesn't serve as separation of
22 powers.

23 JUSTICE KENNEDY: That -- that would give
24 you intellectual whiplash.

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

1 (Laughter.)

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

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Jackson, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF VICKI C. JACKSON

12 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

13 MS. JACKSON: Thank you, Your Honor.

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

15 Just very quickly, Justice Breyer, I only
16 answered part of a question you asked me earlier, and I
17 just want to say, the U.S. is asking this Court to tell
18 it to pay money.

19 It's not asking for relief.

20 Justice Sotomayor, you asked me about how
21 the issue could come up otherwise. I don't think I had
22 a chance to mention, private party litigation, employees
23 against employers, there's an interpleader action right
24 now pending that was cited in the brief of the 287
25 employers -- on page 32 at note 54 -- giving examples of

1 how the issue of DOMA's constitutionality could arise in
2 private litigation.

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

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

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

25 And the rule as Justice Sotomayor observed

1 just doesn't seem to say anything about authority to
2 litigate. I think that in addition, the -- the big
3 problem here is the injury being complained of is
4 inconsistent with the separation of powers.

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

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

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

22 Unless there are other questions, I will sit
23 down.

24 JUSTICE ALITO: Well, could I ask you this
25 question: On the question of the House resolution --

1 MS. JACKSON: Yes, sir.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

25 CHIEF JUSTICE ROBERTS: Ms. Jackson, before

1 you sit down, I would like to note that you briefed and
2 argued this case as amicus curiae at the invitation of
3 the Court, and you have ably discharged the
4 responsibility, for which you have the gratitude of the
5 Court.

6 MS. JACKSON: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 We'll now take a very short break and turn
9 to the merits.

10 (Recess.)

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

14 Mr. Clement?

15 ORAL ARGUMENT OF PAUL D. CLEMENT

16 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL

17 ADVISORY GROUP OF THE UNITED STATES

18 MR. CLEMENT: Mr. Chief Justice, and may it
19 please the Court:

20 The issue of same-sex marriage certainly
21 implicates profound and deeply held views on both sides
22 of the issue, but the legal question on the merits
23 before this Court is actually quite narrow. On the
24 assumption that States have the constitutional option
25 either to define marriage in traditional terms or to

1 recognize same-sex marriages or to adopt a compromise
2 like civil unions, does the Federal Government have the
3 same flexibility or must the Federal Government simply
4 borrow the terms in State law?

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

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

19 MR. CLEMENT: And I think the answer to
20 that, Justice Ginsburg, would be to say that that is a
21 marriage under State law, and I think this Court's cases
22 when it talks about the fundamental right to marriage, I
23 take it to be talking about the State law status of
24 marriage; and the question of what does that mean for
25 purposes of Federal law has always been understood to be

1 a different matter. And that's been true certainly in a
2 number of situations under a number of statutes, so it's
3 simply not the case that as long as you are married
4 under State law you absolutely are going to be treated
5 as married --

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

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

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

22 The Federal treatment, for example,
23 recognizes common law marriages in all States whereas a
24 lot of States don't recognize common law marriages, but
25 Federal law recognizes that for some purposes -- the

1 Social Security Act, I think it's at page 4 of our
2 brief. And --

3 JUSTICE SOTOMAYOR: But only if the State
4 recognizes it.

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

7 JUSTICE SOTOMAYOR: And so there is a common
8 law, Federal common law definition?

9 MR. CLEMENT: That's my understanding,
10 that's -- as discussed --

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

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

25 So the Federal Government has always treated

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

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

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

24 MR. CLEMENT: Well, Justice Kennedy, two
25 points. First of all, the very fact that there are

1 1,100 provisions of Federal law that define the terms
2 "marriage" and "spouse" goes a long way to showing that
3 Federal law has not just stayed completely out of these
4 issues. It's gotten involved in them in a variety of
5 contexts where there is an independent Federal power
6 that supported that.

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

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

19 MR. CLEMENT: Well, that's true but I don't
20 think that's a mark against it for federalism purposes,
21 and it -- it addressed a particular issue at a point,
22 remember in 1996, Congress is addressing this issue
23 because they are thinking that the State of Hawaii
24 through its judicial action is about to change the
25 definition of marriage from a way that it had been

1 defined in every jurisdiction in the United States. And
2 what that meant is that when Congress passed every one
3 of the statutes affected by DOMA's definition, the
4 Congress that was passing that statute had in mind the
5 traditional definition.

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

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

23 MR. CLEMENT: Well, I think for these
24 purposes actually, Justice Alito, if you go back to the
25 beginning of the estate tax deduction, what Congress was

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

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

19 So Ms. Windsor wants to point to the
20 unfairness of the differential treatment of treating two
21 New York married couples differently, and of course for
22 purposes of New York law that's exactly the right focus,
23 but for purposes of Federal law it's much more rational
24 for Congress to -- to say, and certainly a rational
25 available choice, for Congress to say, we want to treat

1 the same-sex couple in New York the same way as the
2 committed same-sex couple in Oklahoma and treat them the
3 same. Or even more to the point for purposes --

4 JUSTICE SOTOMAYOR: But that's begging the
5 question, because you are treating the married couples
6 differently.

7 MR. CLEMENT: Well --

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

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

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

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

24 JUSTICE BREYER: You would say it would be
25 the same thing if the State passed a law -- Congress

1 passes a law which says, well, there's some States --
2 they all used to require 18 as the age of consent. Now,
3 a lot of them have gone to 17. So if you're 17 when you
4 get married, then no tax deduction, no medical, no
5 nothing.

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

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

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

21 (Laughter.)

22 JUSTICE BREYER: Differences between States
23 have nothing to do with anything, you know, residence
24 requirements, whether you have a medical exam,
25 whether -- we can think them up all day -- how old you

1 are. And Congress just passes a law which takes about,
2 let's say, 30 percent of the people who are married in
3 the United States and says no tax deduction, no this, no
4 that, no medical -- medical benefits, none much these
5 good things, none of them for about 20, 30 percent of
6 all of the married people.

7 Can they do that?

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

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

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

20 JUSTICE BREYER: All right. So you're
21 saying uniform treatment's good enough no matter how odd
22 it is, no matter how irrational. There is nothing but
23 uniformity. We could take -- no matter. Do you see
24 what I'm -- where I'm going?

25 MR. CLEMENT: No, I see exactly where you're

1 going, Justice Breyer.

2 JUSTICE BREYER: All right.

3 (Laughter.)

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

8 JUSTICE BREYER: Yes, okay. Fine.

9 MR. CLEMENT: There's a powerful interest in
10 treating --

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

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

1 go there.

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

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

19 JUSTICE SOTOMAYOR: But what gives the
20 Federal Government the right to be concerned at all at
21 what the definition of marriage is? Sort of going in a
22 circle. You're saying -- you're saying, we can create
23 this special category -- men and women -- because the
24 States have an interest in traditional marriage that
25 they're trying to protect. How do you get the Federal

1 Government to have the right to create categories of
2 that type based on an interest that's not there, but
3 based on an interest that belongs to the States?

4 MR. CLEMENT: Well, at least two -- two
5 responses to that, Justice Sotomayor. First is that one
6 interest that supports the Federal Government's
7 definition of this term is whatever Federal interest
8 justifies the underlying statute in which it appears.
9 So, in every one of these statutes that affected, by
10 assumption, there's some Article I Section 8
11 authority --

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

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

1 JUSTICE SOTOMAYOR: No, I'm -- I'm
2 assuming --

3 MR. CLEMENT: Okay. So then the question
4 is --

5 JUSTICE SOTOMAYOR: Assuming I assume the
6 States can --

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

8 JUSTICE SOTOMAYOR: -- what creates the
9 right --

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

19 And the best way -- one way to stay out of
20 the debate and let just the -- the States develop this
21 and let the democratic process deal with this is to just
22 say, look, we're going to stick with what we've always
23 had, which is traditional definition. We're not going
24 to create a regime that gives people an incentive and
25 point to Federal law and say, well, another reason you

1 should have same-sex marriage is because then you'll get
2 a State tax deduction. They stayed out of it. They've
3 said, look, we're --

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

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

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

21 MR. CLEMENT: With respect, Justice Kennedy,
22 that's not right. No State loses any benefits by
23 recognizing same-sex marriage. Things stay the same.
24 What they don't do is they don't sort of open up an
25 additional class of beneficiaries under their State law

1 for -- that get additional Federal benefits. But things
2 stay the same. And that's why in this sense --

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

9 It's -- it's -- as Justice Kennedy said,
10 1100 statutes, and it affects every area of life. And
11 so he was really diminishing what the State has said is
12 marriage. You're saying, no, State said two kinds of
13 marriage; the full marriage, and then this sort of skim
14 milk marriage.

15 (Laughter.)

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

24 JUSTICE KAGAN: Mr. Clement, for the most
25 part and historically, the only uniformity that the

1 Federal Government has pursued is that it's uniformly
2 recognized the marriages that are recognized by the
3 State. So, this was a real difference in the uniformity
4 that the Federal Government was pursuing. And it
5 suggests that maybe something -- maybe Congress had
6 something different in mind than uniformity.

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

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

20 MR. CLEMENT: A couple of responses, Justice
21 Kagan. First of all, I think I would take issue with
22 the premise, first of all, that this is such an unusual
23 Federal involvement on an issue like marriage. If you
24 look at historically, not only has the Federal
25 Government defined marriage for its own purposes

1 distinctly in the context of particular -- particular
2 programs, it's also intervened in -- in other areas,
3 including in-state prerogatives. I mean, there's a
4 reason that four state constitutions include a
5 prohibition on polygamy. It's because the Federal
6 Congress insisted on them. There is a reason that, in
7 the wake of the Civil War and in Reconstruction,
8 Congress specifically wanted to provide benefits for
9 spouses of freed slaves who fought for the Union.

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

17 The other point I would make -- but I also
18 eventually want to get around to the animus point -- but
19 the other point I would make is: When you look at
20 Congress doing something that is unusual, that deviates
21 from the way they -- they have proceeded in the past,
22 you have to ask, Well, was there good reason? And in a
23 sense, you have to understand that, in 1996, something's
24 happening that is, in a sense, forcing Congress to
25 choose between its historic practice of deferring to the

1 States and its historic practice of preferring
2 uniformity.

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

7 Okay. 1996 --

8 JUSTICE KAGAN: Well, is what happened in
9 1996 -- and I'm going to quote from the House Report
10 here -- is that "Congress decided to reflect an honor of
11 collective moral judgment and to express moral
12 disapproval of homosexuality."

13 Is that what happened in 1996?

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

20 This Court, even when it's to find more
21 heightened scrutiny, the O'Brien case we cite, it
22 suggests, Look, we are not going to strike down a
23 statute just because a couple of legislators may have
24 had an improper motive. We're going to look, and under
25 rational basis, we look: Is there any rational basis

1 for the statute?

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

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

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

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

18 JUSTICE KENNEDY: Just to be clear, I think
19 your answer is fair and rational.

20 We've switched now from Federal power to
21 rationality. There is -- there is a difference. We're
22 talking -- I think we are assuming now that there is
23 Federal power and asking about the degree of scrutiny
24 that applies to it. Or are we going back to whether
25 there is a Federal power? They are -- they are

1 intertwined.

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

10 Then the question is --

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

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

23 JUSTICE ALITO: Well, Congress could have
24 achieved exactly what it achieved under Section 3 by
25 excising the term "married" from the United States Code

1 and replacing it with something more neutral. It could
2 have said "certified domestic units," and then defined
3 this in exactly the way that Section 3 -- exactly the
4 way DOMA defines "marriage."

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

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

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

25 So you say, Look at it on the merits. Now

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

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

14 And so far, I've got those two I mentioned.
15 What else?

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

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

24 JUSTICE BREYER: That means courts -- the
25 courts, they do dictate in respect to time. They

1 dictate in respect to age. They dictate in respect to
2 all kinds of things. And what I'm looking for is:
3 What, in your opinion, is special about this homosexual
4 marriage that would justify this, other than this kind
5 of pure uniformity, if there is such a thing?

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

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

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

24 And in this context, in particular, they are
25 thinking about an individual -- I mean, this couple goes

1 to Ontario, they get the -- they get a marriage
2 certificate. A couple could -- from Oklahoma, could
3 have gotten -- gone to Ontario and gotten a marriage
4 certificate that same day and gone back to Oklahoma.
5 And from the Federal law perspective, there is certainly
6 a rational basis in treating those two couples the same
7 way.

8 If I could reserve my time.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Clement.

11 General Verrilli?

12 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

13 ON BEHALF OF THE PETITIONER

14 SUPPORTING AFFIRMANCE

15 GENERAL VERRILLI: Mr. Chief Justice, and
16 may it please the Court:

17 The equal protection analysis in this case
18 should focus on two fundamental points: First, what
19 does Section 3 do; and second, to whom does Section 3 do
20 it?

21 What Section 3 does is exclude from an array
22 of Federal benefits lawfully married couples. That
23 means that the spouse of a soldier killed in the line of
24 duty cannot receive the dignity and solace of an
25 official notification of next of kin.

1 CHIEF JUSTICE ROBERTS: Suppose your -- you
2 agree that Congress could go the other way, right?
3 Congress could pass a new law today that says, We will
4 give Federal benefits. When we say "marriage" in
5 Federal law, we mean committed same-sex couples as well,
6 and that could apply across the board.

7 Or do you think that they couldn't do that?

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

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

14 GENERAL VERRILLI: I don't think it would
15 raise a federalism problem.

16 CHIEF JUSTICE ROBERTS: Okay.

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

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

24 GENERAL VERRILLI: We -- no, we don't,
25 Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Okay.

2 GENERAL VERRILLI: The question is: What is
3 the constitutionality for equal protection purposes, and
4 because it's unconstitutional and it's embedded into
5 numerous Federal statutes, those statutes will have an
6 unconstitutional effect. But it's the equal protection
7 violation from the perspective of the United States
8 that --

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

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

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

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

24 JUSTICE KAGAN: Yes, but, General, surely
25 the question of what the Federal interests are and

1 whether those Federal interests should take account of
2 the historic State prerogatives in this area is relevant
3 to the equal protection inquiry?

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: I know the equal
25 protection argument.

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

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

20 GENERAL VERRILLI: Yeah. We think whatever
21 the outer bounds of the Federal Government's authority,
22 and there certainly are outer bounds, would be, apart
23 from the equal protection violation, we don't think that
24 Section 3 apart from equal protection analysis raises a
25 federalism problem. But we do think the federalism

1 analysis does play into the equal protection analysis
2 because the Federal -- the Federal Government is not the
3 51st state for purposes of --of the interests that Mr.
4 Clement has identified on behalf of BLAG.

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

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

18 GENERAL VERRILLI: The question in the case,
19 Justice Alito is whether Congress has a sufficiently
20 persuasive justification for the exclusion that it has
21 imposed. And it -- and it does not. The only way in
22 which -- that BLAG's arguments for the constitutionality
23 of this statute have any prospect of being upheld is if
24 the Court adopts the minimal rationality standard of Lee
25 Optical.

1 JUSTICE ALITO: Let me take you back to the
2 example. Your -- your position seems to me, yes, one
3 gets in, two stay out, even though your legal arguments
4 would lead to the conclusion that they all should be
5 treated the same.

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

16 JUSTICE SCALIA: But that's -- that's the
17 same in the example that we just gave you, that
18 discrimination would have been visited on the same
19 group, and you say there it's okay.

20 GENERAL VERRILLI: No, I didn't say that. I
21 said it would be subject to equal protection analysis
22 certainly, and there might be a problem.

23 JUSTICE SCALIA: So you think that's bad as
24 well, that all three of those has to be treated the
25 same, despite State law about marriage.

1 GENERAL VERRILLI: They have to be analyzed
2 under equal protections principles, but whatever is true
3 about the other situations, in the situation in which
4 the couple is lawfully married for purposes of State law
5 and the exclusion is a result of DOMA itself, the
6 exclusion has to be justified under this Court's equal
7 protection analysis, and DOMA won't do it.

8 JUSTICE SOTOMAYOR: General Verrilli, I have
9 a question. You think, I think from your brief
10 yesterday and today, that on some level sexual
11 orientation should be looked on an intermediate standard
12 of scrutiny?

13 GENERAL VERRILLI: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: All right, heightened in
15 some way. Going back to the Chief's question about a
16 law that was passed recognizing common law
17 heterosexual -- homosexual marriages. I think even
18 under your theory that might be suspect because -- that
19 law might be suspect under equal protection, because
20 once we say sexual orientation is suspect, it would be
21 suspect whether it's homosexual or heterosexual. The
22 law favors homosexuals; it would be suspect because it's
23 based on sexual orientation.

24 GENERAL VERRILLI: You would have -- you
25 would have to impose the heightened scrutiny equal

1 protection analysis, sure.

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

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

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

9 GENERAL VERRILLI: That is certainly true,
10 Your Honor. If I could turn to the interest that BLAG
11 has actually identified as supporting this statute, I
12 think there are -- there are -- I think that you can see
13 what the problem is here.

14 Now, this statute is not called the Federal
15 Uniform Marriage Benefits Act; it's called the Defense
16 of Marriage Act. And the reason for that is because the
17 statute is not directed at uniformity in the
18 administration of Federal benefits. All -- there is two
19 equally uniform systems, the system of respecting the
20 State choices and the system of -- that BLAG is
21 advocating here.

22 And what BLAG's got to do in order to
23 satisfy equal protection scrutiny is justify the choice
24 between one and the other, and the difference between
25 the two is that the Section 3 choice is a choice that --

1 Section 3 choice is a choice that discriminates. So
2 it's not simply a matter sufficient to say, well,
3 uniformity is enough. Section 3 discriminates.

4 CHIEF JUSTICE ROBERTS: So as soon as one
5 State adopted same sex marriage, the definition of
6 marriage throughout the Federal code had to change?
7 Because there is no doubt that up until that point every
8 time Congress said "marriage" they understood they were
9 acting under the traditional definition of marriage.

10 GENERAL VERRILLI: Well, I don't know,
11 Mr. Chief Justice, why you wouldn't assume that what
12 Congress was doing when it enacted a statute,
13 particularly a statute that had the word "marriage" in
14 it, was assuming that the normal rule that applies in
15 the vast majority of circumstances of deference to the
16 State definition of marriage would be the operative
17 principle.

18 CHIEF JUSTICE ROBERTS: So you don't think
19 that when Congress said "marriage" in every one of these
20 provisions that they had in mind same-sex marriages?

21 GENERAL VERRILLI: No, but they may well
22 have had in mind deferring to the normal State
23 definition of marriage, whatever it is. Not that they
24 were making the specific choice that my friend suggested
25 they were. But whatever is the case, when Congress

1 enacted DOMA that choice of exclusion has to be
2 justified under appropriate equal protection principles.

3 So the issue of uniformity just doesn't get
4 you there, because there is no uniformity advantage to
5 Section 3 of DOMA as opposed to the traditional rule.
6 The issue of administration doesn't get you there. I
7 mean, at a very basic level administrative concerns
8 ought not be an important enough interest to justify
9 this kind of a discrimination under the Equal Protection
10 Clause.

11 But even if you look at them, there are no
12 genuine administrative benefits to DOMA. If anything,
13 Section 3 of DOMA makes Federal administration more
14 difficult, because now the Federal Government has to
15 look behind valid state marriage licenses and see
16 whether they are about State marriages that are out of
17 compliance with DOMA.

18 It's an additional administrative burden.
19 So there is no -- there is no administrative -- there is
20 no administrative advantage to be gained here by what --
21 by what Congress sought to achieve. And the fundamental
22 reality of it is, and I think the House report makes
23 this glaringly clear, is that DOMA was not enacted for
24 any purpose of uniformity, administration, caution,
25 pausing, any of that.

1 It was enacted to exclude same-sex married,
2 lawfully married couples from Federal benefit regimes
3 based on a conclusion that was driven by moral
4 disapproval. It is quite clear in black and white in
5 the pages of the House report which we cite on page 38
6 of our brief --

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

10 GENERAL VERRILLI: No, Mr. Chief Justice.
11 We quoted our -- we quoted the Garrett concurrence in
12 our brief, and I think there is a lot of wisdom there,
13 that it may well not have been animus or hostility. It
14 may well have been what Garrett described as the simple
15 want of careful reflection or an instinctive response to
16 a class of people or a group of people who we perceive
17 as alien or other.

18 But whatever the explanation, whether it's
19 animus, whether it's that -- more subtle, more
20 unthinking, more reflective kind of discrimination,
21 Section 3 is discrimination. And I think it's time for
22 the Court to recognize that this discrimination,
23 excluding lawfully married gay and lesbian couples from
24 Federal benefits, cannot be reconciled with our
25 fundamental commitment to equal treatment under law.

1 This is discrimination in its most very
2 basic aspect, and the House Report, whether -- and I
3 certainly would not suggest that it was universally
4 motivated by something other than goodwill -- but the
5 reality is that it was an expression of moral
6 disapproval of exactly the kind that this Court said in
7 Lawrence would not justify the law that was struck down
8 there.

9 JUSTICE SOTOMAYOR: General, your bottom
10 line is, it's an equal protection violation for the
11 Federal Government, and all States as well?

12 GENERAL VERRILLI: Yes, Your Honor, and
13 that's the -- we took the position we took yesterday
14 with respect to marriage -- the analysis --

15 JUSTICE SOTOMAYOR: Is there any argument
16 you can make to limit this to this case, vis-à-vis the
17 Federal Government and not the States?

18 GENERAL VERRILLI: Well, as we said
19 yesterday, we think it's an open question with respect
20 to State recognition of marriage, and they may well be
21 able to advance interests -- they may be able to advance
22 it. I guess I shouldn't say "may well," because I do
23 think it would be difficult, as we said yesterday. They
24 may be able to advance interests that would satisfy
25 heightened scrutiny and justify non-recognition --

1 JUSTICE BREYER: Then yet -- but here --

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

13 And -- and elimination of Section 3 wouldn't
14 make it any less likely that unmarried men and women are
15 going to get married. It doesn't have any effect at
16 all. It doesn't have any connection at all. So it's
17 not at the margins. There's no interest at all at
18 this -- in DOMA in promoting --

19 JUSTICE BREYER: Or if there's no
20 interest -- I mean, I'm back where we were yesterday.
21 It seems to me, forgetting your -- your preferable
22 argument, it's a violation of equal protection
23 everywhere. Well, if it is, then all States have to
24 have something like pacts. And if they have to have
25 something like pacts, then you say then they also have

1 to allow marriage.

2 So then are you not arguing they all have to
3 allow marriage? And then you say no. So with that
4 point --

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

7 Thank you.

8 Whatever the issue is, with -- whatever the
9 outcome is with respect to States and marriage, that the
10 Federal Government's interest in advancing those
11 justifications through Section 3 of DOMA is so
12 attenuated that two Federal courts of appeals have seen
13 it as non-existent, and it cannot justify Section 3.

14 CHIEF JUSTICE ROBERTS: Thank you, General.
15 Ms. Kaplan?

16 ORAL ARGUMENT OF ROBERTA A. KAPLAN
17 ON BEHALF OF THE RESPONDENT WINDSOR

18 MS. KAPLAN: Mr. Chief Justice, and may it
19 please the Court:

20 I'd like to focus on why DOMA fails even
21 under rationality review. Because of DOMA, many
22 thousands of people who are legally married under the
23 laws of nine sovereign States and the District of
24 Columbia are being treated as unmarried by the Federal
25 Government solely because they are gay.

1 These couples are being treated as unmarried
2 with respect to programs that affect family stability,
3 such as the Family Leave Act, referred to by Justice
4 Ginsburg. These couples are being treated as unmarried
5 for purposes of Federal conflict of interest rules,
6 election laws and anti-nepotism and judicial recusal
7 statutes.

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

12 CHIEF JUSTICE ROBERTS: Could I ask you the
13 same question I asked the Solicitor General?

14 Do you think there would be a problem if
15 Congress went the other way, the federalism problem?
16 Obviously, you don't think there's an equal protection
17 problem --

18 MS. KAPLAN: Right.

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

23 MS. KAPLAN: Obviously, with respect to
24 marriage, the Federal Government has always used the
25 State definitions. And I think what you're --

1 Mr. Chief Justice, what you're proposing is to extend --
2 the Federal Government extend additional benefits to gay
3 couples in States that do not allow marriage, to
4 equalize the system.

5 CHIEF JUSTICE ROBERTS: I just am asking
6 whether you think Congress has the power to interfere
7 with the -- to not adopt the State definition if they're
8 extending benefits.

9 Do they have that authority?

10 MS. KAPLAN: I think the question under the
11 Equal Protection Clause is what -- is what the
12 distinction is.

13 CHIEF JUSTICE ROBERTS: No, no. I know
14 that.

15 You're following the lead of the Solicitor
16 General and returning to the Equal Protection Clause
17 every time I ask a federalism question.

18 Is there any problem under federalism
19 principles?

20 MS. KAPLAN: With the Federal Government --

21 CHIEF JUSTICE ROBERTS: With Congress
22 passing a law saying, we are going to adopt a different
23 definition of marriage than those States that don't
24 recognize same-sex marriage. We don't care whether you
25 do as a matter of State law, when it comes to Federal

1 benefits, same-sex marriage will be recognized.

2 MS. KAPLAN: It has certainly been argued in
3 this case by others that -- whether or not that's in any
4 way the powers of the Federal Government. For the
5 reasons Justice Kagan mentioned, we think the federalism
6 principles go forward a novelty question. I think
7 whether or not the Federal Government could have its own
8 definition of marriage for all purposes would be a very
9 closely argued question.

10 JUSTICE SCALIA: I don't understand your
11 answer. Is your answer yes or no? Is there a
12 federalism problem with that, or isn't there a
13 federalism problem?

14 MS. KAPLAN: I -- I think the Federal
15 Government could extend benefits to gay couples to
16 equalize things on a programmatic basis to make things
17 more equal. Whether the Federal Government can have its
18 own definition of marriage, I think, would be -- there's
19 a -- it'd be very closely argued whether that's outside
20 the enumerated approach.

21 JUSTICE SCALIA: Well, it's just -- all
22 these statutes use the term "marriage," and the Federal
23 Government says in all these statutes when it says
24 marriage, it includes same-sex couples, whether the
25 State acknowledges them to be married or not.

1 MS. KAPLAN: But that -- I don't know if
2 that would work, because they wouldn't --

3 JUSTICE SCALIA: What do you mean whether or
4 not it would work? I don't care if it works.

5 (Laughter.)

6 JUSTICE SCALIA: Does it -- does it create a
7 federalism problem?

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

10 JUSTICE SCALIA: Yes.

11 MS. KAPLAN: The Federal Government doesn't
12 issue marriage licenses. It never has.

13 JUSTICE SCALIA: Well, it's not doing that,
14 it's just saying for purposes -- just what it's doing
15 here. It says, for purposes of all these Federal
16 statutes, when we say marriage, we mean -- instead of
17 saying we mean heterosexual marriage, we mean, whenever
18 we use it, heterosexual and homosexual marriage.

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

20 MS. KAPLAN: As long as the people were
21 validly married under State law, and met the
22 requirements of State law to get married --

23 JUSTICE SCALIA: No, no, no, no. It
24 includes --

25 MS. KAPLAN: I'm not sure that the Federal

1 Government -- this answers your question,
2 Justice Scalia -- I'm not sure the Federal Government
3 can create a new Federal marriage that would be some
4 kind of marriage that States don't permit.

5 JUSTICE ALITO: Well, let me get to the
6 question I asked Mr. Clement. It just gets rid of the
7 word "marriage," takes it out of the U.S. Code
8 completely. Substitutes something else, and defines it
9 as same-sex -- to include same-sex couples. Surely it
10 could do that.

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

13 JUSTICE ALITO: So it's just the word
14 "marriage"? And it's just the fact that they use this
15 term "marriage"?

16 MS. KAPLAN: Well, that's what the Federal
17 Government has always chosen to do. And that's the way
18 the Federal law is structured, and it's always been
19 structured for 200 years based on the State police power
20 to define who's married. The Federal Government I
21 presume could decide to change that if it wanted, and
22 somehow, it would be very strange for all 1,100 laws,
23 but for certain programs -- you have different
24 requirements other than marriage, and that would be
25 constitutional or unconstitutional depending on the

1 distinction.

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

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

13 MS. KAPLAN: Well, let me -- let me answer
14 that question very clearly. Our position is only with
15 respect to the nine States -- and I think there are two
16 others that recognize these marriages. So if my
17 client -- if a New York couple today marries and moves
18 to North Carolina, one of which has a constitutional
19 amendment, a State constitutional amendment -- and one
20 of the spouses dies, they would not -- and estate taxes
21 determine where the person dies, they would not be
22 entitled to the deduction.

23 That is not our claim here.

24 Moreover, Justice Alito, in connection with
25 a whole host of Federal litigation, there has been

1 Federal litigation for hundreds of years with respect to
2 the residency of where people live or don't live, or
3 whether they are divorced or not divorced throughout the
4 Federal system. And the Federal Government has always
5 handled that and has never before -- and we believe this
6 is why it's unconstitutional -- separated out a class of
7 married gay couples solely because they were gay.

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

18 MS. KAPLAN: That would be certainly a
19 different case. It'd be more similar to the case I
20 think you heard yesterday than the case that we have
21 today. We certainly believe that sexual-orientation
22 discrimination should get heightened scrutiny. If it
23 doesn't get heightened scrutiny, obviously, it'd be
24 rational basis, and the question would be what the State
25 interests were in not allowing couples, for example, in

1 North Carolina who are gay to get married.

2 No one has identified in this case, and I
3 don't think we've heard it in the argument from my
4 friend, any legitimate difference between married gay
5 couples on the one hand and straight married couples on
6 the other that can possibly explain the sweeping,
7 undifferentiated and categorical discrimination of DOMA,
8 Section 3 of DOMA.

9 And no one has identified any legitimate
10 Federal interest that is being served by Congress's
11 decision, for the first time in our nation's history to
12 undermine the determinations of the sovereign States
13 with respect to eligibility for marriage. I would
14 respectfully contend that this is because there is none.

15 Rather, as the title of the statute makes
16 clear, DOMA was enacted to defend against the marriages
17 of gay people. This discriminatory purpose was rooted
18 in moral disapproval as Justice Kagan pointed out.

19 JUSTICE BREYER: What -- what do you think
20 of his -- the argument that I heard was, to put the
21 other side, at least one part of it as I understand it
22 said: Look, the Federal Government needs a uniform
23 rule. There has been this uniform one man - one woman
24 rule for several hundred years or whatever, and there's
25 a revolution going on in the States. We either adopt

1 the resolution -- the revolution or push it along a
2 little, or we stay out of it. And I think Mr. Clement
3 was saying, well, we've decided to stay out of it --

4 MS. KAPLAN: I don't --

5 JUSTICE BREYER: -- and the way to stay out
6 of it is to go with the traditional thing. I mean, that
7 -- that's an argument. So your answer to that argument
8 is what?

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

11 JUSTICE BREYER: I understand you do; I'd
12 like to know the reason.

13 (Laughter.)

14 MS. KAPLAN: Of course. Congress did not
15 stay out of it. Section 3 of DOMA is not staying out of
16 it. Section 3 of DOMA is stopping the recognition by
17 the Federal Government of couples who are already
18 married, solely based on their sexual orientation, and
19 what it's doing is undermining, as you can see in the
20 briefs of the States of New York and others, it's
21 undermining the policy decisions made by those States
22 that have permitted gay couples to marry.

23 States that have already resolved the
24 cultural, the political, the moral -- whatever other
25 controversies, they're resolved in those States. And by

1 fencing those couples off, couples who are already
2 married, and treating them as unmarried for purposes of
3 Federal law, you're not -- you're not taking it one step
4 at a time, you're not promoting caution, you're putting
5 a stop button on it, and you're having discrimination
6 for the first time in our country's history against a
7 class of married couples.

8 CHIEF JUSTICE ROBERTS: Is the --

9 JUSTICE SOTOMAYOR: Now, the -- the
10 discriminations are not the sexual orientation, but on a
11 class of marriage; is that what you're --

12 MS. KAPLAN: It's a class of married couples
13 who are gay.

14 JUSTICE SOTOMAYOR: So I pose the same
15 question I posed to the General to you. Do you think
16 there's a difference between that discrimination and --
17 and the discrimination of States who say homosexuals
18 can't get married?

19 MS. KAPLAN: I think that it's -- they're
20 different cases. I think when you have couples who are
21 gay who are already married, you have to distinguish
22 between those classes. Again, the Federal Government
23 doesn't give marriage licenses, States do, and whatever
24 the issues would be in those States would be what
25 interest the States have, as opposed to here, what

1 interest -- and we think there is none -- the Federal
2 Government has.

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

13 The only -- the only conclusion that can be
14 drawn is what was in the House Report, which is moral
15 disapproval of gay people, which the Congress thought
16 was permissible in 1996 because it relied on the Court's
17 Bowers decision, which this Court has said was wrong,
18 not only at the time it was overruled in Lawrence, but
19 was wrong when it was decided.

20 CHIEF JUSTICE ROBERTS: So 84 Senators --
21 it's the same question I asked before; 84 Senators based
22 their vote on moral disapproval of gay people?

23 MS. KAPLAN: No, I think -- I think what is
24 true, Mr. Chief Justice, is that times can blind, and
25 that back in 1996 people did not have the understanding

1 that they have today, that there is no distinction,
2 there is no constitutionally permissible distinction --

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

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

17 JUSTICE SCALIA: Why -- why are you so
18 confident in that -- in that judgment? How many -- how
19 many States permit gay -- gay couples to marry?

20 MS. KAPLAN: Today? 9, Your Honor.

21 JUSTICE SCALIA: 9. And -- and so there has
22 been this sea change between now and 1996.

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

1 JUSTICE GINSBURG: How many States have
2 civil unions now?

3 MS. KAPLAN: I believe -- that was discussed
4 in the arguments, 8 or 9, I believe.

5 JUSTICE GINSBURG: And how many had it in
6 1996?

7 MS. KAPLAN: I -- yes, it was much, much
8 fewer at the time. I don't have that number, Justice
9 Ginsburg; I apologize.

10 CHIEF JUSTICE ROBERTS: I suppose the sea
11 change has a lot to do with the political force and
12 effectiveness of people representing, supporting your
13 side of the case?

14 MS. KAPLAN: I disagree with that,
15 Mr. Chief Justice, I think the sea change has to do,
16 just as discussed was Bowers and Lawrence, was an
17 understanding that there is no difference -- there was
18 fundamental difference that could justify this kind of
19 categorical discrimination between gay couples and
20 straight couples.

21 CHIEF JUSTICE ROBERTS: You don't doubt that
22 the lobby supporting the enactment of same sex-marriage
23 laws in different States is politically powerful, do
24 you?

25 MS. KAPLAN: With respect to that category,

1 that categorization of the term for purposes of
2 heightened scrutiny, I would, Your Honor. I don't --

3 CHIEF JUSTICE ROBERTS: Really?

4 MS. KAPLAN: Yes.

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

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

17 So I don't think -- and until 1990 gay
18 people were not allowed to enter this country. So I
19 don't think that the political power of gay people today
20 could possibly be seen within that framework, and
21 certainly is analogous -- I think gay people are far
22 weaker than the women were at the time of Frontiero.

23 CHIEF JUSTICE ROBERTS: Well, but you just
24 referred to a sea change in people's understandings and
25 values from 1996, when DOMA was enacted, and I'm just

1 trying to see where that comes from, if not from the
2 political effectiveness of -- of groups on your side of
3 the case.

4 MS. KAPLAN: To flip the language of the
5 House Report, Mr. Chief Justice, I think it comes from a
6 moral understanding today that gay people are no
7 different, and that gay married couples' relationships
8 are not significantly different from the relationships
9 of straight married people. I don't think --

10 CHIEF JUSTICE ROBERTS: I understand that.
11 I am just trying to see how -- where that that moral
12 understanding came from, if not the political
13 effectiveness of a particular group.

14 MS. KAPLAN: I -- I think it came -- is,
15 again is very similar to the, what you saw between
16 Bowers and Lawrence. I think it came to a societal
17 understanding.

18 I don't believe that societal understanding
19 came strictly through political power; and I don't think
20 that gay people today have political power as that --
21 this Court has used that term with -- in connection with
22 the heightened scrutiny analysis.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Kaplan.

25 Mr. Clement, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
2 ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL
3 ADVISORY GROUP OF THE UNITED STATES

4 MR. CLEMENT: Thank you, Mr. Chief Justice,
5 just three points in rebuttal.

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

19 I would say also the Federal Government has
20 conceded in this litigation that there is a rational
21 basis for this statute, something else to keep in mind.

22 I would also say that this provision is not
23 so unique. The very next provision in the Dictionary
24 Act --

25 JUSTICE GINSBURG: Rational basis,

1 Mr. Clement -- is a problem in your briefing. You seem
2 to say and you repeat it today that there is three
3 tiers, and if you get into rational basis then it's
4 anything goes. But the history of this Court is, in the
5 very first gender discrimination case, Reed v. Reed, the
6 Court did something it had never done in the history of
7 the country under rational basis. There was no
8 intermediate tier then. It was rational basis.

9 MR. CLEMENT: Well --

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

12 MR. CLEMENT: And, Justice Ginsburg,
13 applying rational basis to DOMA, I think that there are
14 many rational bases that support it. And the Solicitor
15 General says, well, you know, the United States is not
16 the 51st State to be sure, but the Federal Government
17 has interests in uniformity that no other entity has.

18 And we heard today that there's a problem;
19 when somebody moves from New York to North Carolina,
20 they can lose their benefits. The Federal Government
21 uniquely, unlike the 50 States, can say, well, that
22 doesn't make any sense, we are going to have the same
23 rule. We don't want somebody, if they are going to be
24 transferred in the military from West Point to Fort Sill
25 in Oklahoma, to resist the transfer because they are

1 going to lose some benefits.

2 It makes sense to have a uniform Federal
3 rule for the Federal Government. It is not so anomalous
4 that the term "marriage" is defined in the U.S. Code.
5 The very next provision of the Dictionary Act defines
6 "child." These terms, although they are the primary
7 province of State governments, do appear in multiple
8 Federal statutes and it's a Federal role to define those
9 terms.

10 The last point I would simply make is in
11 thinking about animus, think about the fact that
12 Congress asked the Justice Department three times about
13 the constitutionality of the statute. That's not what
14 you do when you are motivated by animus. The first two
15 times they got back the answer it was constitutional.
16 The third time, they asked again in the wake of Romer,
17 and they got the same answer: It's constitutional.

18 Now the Solicitor General wants to say:
19 Well, it was want of careful reflection? Well, where do
20 we get careful reflection in our system? Generally,
21 careful reflection comes in the democratic process. The
22 democratic process requires people to persuade people.

23 The reason there has been a sea change is a
24 combination of political power, as defined by this
25 Court's cases as getting the attention of lawmakers;

1 certainly they have that. But it's also persuasion.
2 That's what the democratic process requires. You have
3 to persuade somebody you're right. You don't label them
4 a bigot. You don't label them as motivated by animus.
5 You persuade them you are right.

6 That's going on across the country.
7 Colorado, the State that brought you Amendment 2, has
8 just recognized civil unions. Maine, that was pointed
9 to in the record in this case as being evidence of the
10 persistence of discrimination because they voted down a
11 statewide referendum, the next election cycle it came
12 out the other way. And the Federal Congress is not
13 immune. They repealed "Don't Ask, Don't Tell." Allow
14 the democratic process to continue.

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel,
17 counsel.

18 The case is submitted.

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

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