

No. 12-307

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,  
*Petitioner,*

*v.*

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

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On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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**AMICI CURIAE BRIEF OF FORMER  
ATTORNEYS GENERAL EDWIN MEESE III  
AND JOHN ASHCROFT ON JURISDICTION  
AND IN SUPPORT OF NONE OF THE  
PARTIES**

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## INTEREST OF AMICI\*

Amicus, Edwin Meese III, served as the Seventy-Fifth Attorney General of the United States under President Reagan from 1985 to 1988. He previously served as Counsellor to President Reagan.

Amicus, John Ashcroft, served as the Seventy-Ninth Attorney General of the United States under President George W. Bush from 2001 to 2005. He previously served as a United States Senator and as Governor of Missouri.

Amici submit this brief because they wish to highlight the significant separation of powers concerns raised by the posture in which this case comes before the Court.

## SUMMARY OF THE ARGUMENT

If this Court determines that BLAG lacks standing to appeal, it should hold that it lacks jurisdiction. Allowing the case to proceed without adverse *parties* who will sharpen the presentation of issues would violate the case-or-controversy requirement of Article III. Appointing amicus curiae

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\* Counsel for the United States and BLAG have filed with the Court blanket consents to the filing of amicus curiae briefs in this case. Counsel for Edith Windsor has consented to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

to defend DOMA is not appropriate. Because this case involves the constitutionality of a Congressional Act, and also embroils the Court in one of the most politically contentious issues of the day, strict adherence to Article III boundaries is absolutely essential.

The Department of Justice's decision to cease defense of and affirmatively attack DOMA's constitutionality is unprecedented in Executive Branch history. Although the Executive Branch had successfully defended the law for fifteen years, and ample authority supports DOMA's constitutionality, the Department of Justice abruptly reversed course. The Department's attempted nullification of an Act of Congress passed with overwhelming bipartisan support undermines both the Legislative function and the Judiciary's role as final arbiter of a law's constitutionality.

To allow the Executive to nullify an Act of Congress by abdicating its constitutionally-assigned function and then seek this Court's approval in a non-adversarial context would shake the foundations of our tripartite structure.

## ARGUMENT

### **I. THE SEPARATION OF POWERS REQUIRES THE COURT TO HOLD THAT IT LACKS JURISDICTION IF IT DETERMINES THAT BLAG IS NOT PROPERLY BEFORE THE COURT.**

If this Court determines that BLAG lacks standing to appeal, the Court would be deprived of jurisdiction because what would remain is a friendly suit between Windsor and the government.

The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the Constitution. Under Article III, the Federal Judiciary is vested with the “Power” to resolve not questions and issues but “Cases” or “Controversies.” This language restricts the federal judicial power “to the traditional role of the Anglo–American courts.”

*Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441 (2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009)).

Where Article III’s requirements are not met, the court lacks jurisdiction. A “bedrock requirement” of Article III, Section 2 of the Constitution is that federal courts only have jurisdiction over disputes that qualify as a “case” or “controversy.” *Valley Forge Christian Coll. v. Americans United for Separation of*



*Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–41 (1937).

**A. Concrete Adversity Between the *Parties*  
Is Especially Essential in Cases Involving  
the Constitutionality of an Act of  
Congress.**

The separation of powers requires the federal judiciary to act with “great gravity and delicacy” when judging the constitutionality of a coequal Branch’s action. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 544 (1923); *see also Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring). DOMA “has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity.” *Adkins*, 261 U.S. at 544; *see also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (“The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.”). DOMA is therefore entitled to “[e]very possible presumption” in favor of its validity. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (quoting *Sinking-Fund Cases*, 99 U.S. 700, 718

(1878)); *see also United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

The constitutional corollary to the high degree of deference owed to Congressional Acts is a “rigid insistence” that Article III’s boundaries be observed. *Ashwander*, 297 U.S. at 346. The Court has jurisdiction only over actual cases and controversies between adverse parties and may not give advisory opinions. *United States v. Johnson*, 319 U.S. 302, 303–04 (1943); *Muskrat v. United States*, 219 U.S. 346, 361–63 (1911). To be a true Article III case or controversy, the parties must have *adverse legal interests*. *Muskrat*, 219 U.S. at 361–63. In *Chicago & Grand Trunk Railway Co. v. Wellman*, the Court defined adverse parties as those who pursue “an honest and actual antagonistic assertion of rights” against each other. 143 U.S. 339, 345 (1892). The controversy between them must be “real, earnest, and vital.” *Id.* Moreover, “by means of a friendly suit, a party beaten in the legislature [cannot] transfer to the courts an inquiry as to the constitutionality of the legislative act.” *Id.*

In the absence of BLAG, there is no case or controversy. Windsor and the Department both assert that DOMA is unconstitutional. They therefore cannot allege honest, antagonistic differences for this Court to resolve in the context of an adversarial presentation of the issues. Rather, the Department is attempting to use the judiciary to achieve what it cannot achieve through proper legislative channels. The government’s refusal to

defend DOMA is fundamentally a policy disagreement with the Congress that passed the law and the President who signed it. As the Attorney General acknowledged in his letter notifying Congress that he would no longer defend DOMA, there is ample authority supporting its constitutionality. Without BLAG, this is a friendly case in which the remaining parties are aligned in pursuing the same result and the Court would accordingly be deprived of Article III jurisdiction. See *Johnson*, 319 U.S. at 303–04 (finding that the parties arranged to bring a nonadversarial case to the court to further the defendant’s objectives); *Muskral*, 219 U.S. at 361–63; *S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (noting, where control of both party-companies had come into the hands of the same individuals, that “the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one”); see also *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam) (holding that, when both parties seek the same result, there is no case or controversy).

The fact that it may be convenient and promote judicial economy for the government to have a final determination from this Court on the constitutionality of DOMA cannot justify circumvention of Article III’s requirements. “Article III is not a rule always consistent with judicial economy.” *Sosna v. Iowa*, 419 U.S. 393, 418 (1975) (White, J., dissenting).

Article III's separation of powers concerns should be at their apex where the Executive Branch has abandoned its responsibility to defend an Act of Congress.<sup>1</sup>

**B. Appointing an Amicus Curiae to Defend the Constitutionality of DOMA Is Not Appropriate.**

While this Court has routinely appointed amici curiae to brief issues and defend judgments, it has not appointed amici to defend the constitutionality of Acts of Congress. *See generally* Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011) (cataloging all of the Court's appointments of amici curiae). It would be inappropriate to do so here. Adherence to Article III's requirement that adverse *parties* brief and argue the core issues is most necessary when passing on an act of a coordinate branch of government which has conducted its own evaluation of the act's constitutionality. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that Article III is satisfied only when "the appellants [have] alleged such a personal stake in the outcome of the

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<sup>1</sup> For the reasons set forth in the Court-appointed Amica Curiae's brief, Br. Ct.-Appointed Amica Curiae Addressing Jurisdiction 24-27, Amici agree that the Court's decisions in *INS v. Chadha*, 462 U.S. 919 (1983), and *United States v. Lovett*, 328 U.S. 303 (1946), do not control the jurisdictional question in the case.

controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”).

The cases in which this Court has appointed an amicus curiae generally fall into several categories. First, as in this case, the Court has appointed an amicus curiae to address questions of either its own jurisdiction or the jurisdiction of the court below. *See, e.g., Kucana v. Holder*, 130 S. Ct. 30 (2009) (mem. decision); *Hohn v. United States*, 522 U.S. 944 (1997) (mem. decision).

The Court has also assigned an amicus curiae to brief specific issues upon which the Solicitor General has confessed error. This most frequently occurs because the federal government employs thousands of attorneys who litigate their caseloads without direct oversight from the Solicitor General. The Solicitor General often does not become involved until a case reaches this Court,<sup>2</sup> and at that point he or she may determine that the government’s position in the lower courts was in error. *See, e.g., Pepper v. United States*, 131 S. Ct. 32 (2010) (mem. decision); *Gutierrez de Martinez v. Lamagno*, 513 U.S. 1010

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<sup>2</sup> While the Solicitor General must approve all appeals taken by the federal government, in the many cases where the government has prevailed in the lower court and the other party appeals, the Solicitor General need not play a role. And even where the Solicitor General has approved an appeal, the level of attention given a case will presumably be much less than when this Court’s review is at stake.

(1994) (mem. decision); *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (mem. decision); Note, 63 Stan. L. Rev., *supra*, at 920.

Additionally, the Court has appointed amici in a large number of cases in which, for various reasons, the Respondent chose either not to appear at all or changed its mind about defending its victory below. *See, e.g., Thigpen v. Roberts*, 464 U.S. 1006 (1983) (mem. decision) (finding the Respondent not represented by a member of the Bar of the Court); *see generally* Note, 63 Stan. L. Rev., *supra*, at 933–39.

Appointing an amicus curiae to defend DOMA would mark an unprecedented expansion of the Court’s amicus curiae appointment practice and would largely eviscerate Article III’s adverse party requirement.

Article III’s case or controversy requirement assures that “federal courts will not intrude into areas committed to the other branches of government.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968). And a restrained judiciary promotes the public’s confidence in the unelected Third Branch, *Ariz. Christian Sch.*, 131 S. Ct. at 1442, especially in cases that involve emotionally charged political issues, as this one does. For the Court to decide the case without benefit of a concrete dispute between

adversaries would not only violate Article III, but also would cast doubt on the decision's legitimacy.<sup>3</sup>

The Executive Branch's unprecedented decision to attack DOMA after fifteen years of successfully defending it—discussed in the next section—weighs further against the exercise of jurisdiction in this case (in the absence of BLAG). The Executive Branch's attempted nullification of DOMA warrants heightened vigilance against even the appearance of issuing an advisory opinion.

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<sup>3</sup> As this Court stated in *Arizona Christian School*:

If the judicial power were “extended to every *question* under the constitution,” Chief Justice Marshall once explained, federal courts might take possession of “almost every subject proper for legislative discussion and decision.” The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution. See U.S. Const. art. VI, cl. 3. That shared obligation is incompatible with the suggestion that federal courts might wield an “unconditioned authority to determine the constitutionality of legislative or executive acts.” For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, “in the long run, be beneficial to either.” Instructed by Chief Justice Marshall's admonition, this Court takes care to observe the “role assigned to the judiciary” within the Constitution's “tripartite allocation of power.”

131 S. Ct. at 1442 (citations omitted).

**II. THE EXECUTIVE BRANCH'S DECISION TO  
ATTACK DOMA'S CONSTITUTIONALITY  
AFTER FIFTEEN YEARS OF DEFENDING  
IT REFLECTS AN UNPRECEDENTED  
READING OF THE PRESIDENT'S TAKE  
CARE OBLIGATION, AND UNDERMINES  
THE SEPARATION OF POWERS.**

The decision by President Obama and Attorney General Holder to instruct the Department of Justice ("DOJ") to no longer defend DOMA after fifteen years of doing so, and to affirmatively attack its constitutionality in court, is unprecedented in the nation's history. The Attorney General's February 2011 letter explaining why DOJ would no longer defend DOMA stated that he and the President had concluded that laws implicating sexual orientation should be subject to strict scrutiny, despite "substantial circuit court authority applying rational basis review" in such situations. Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter "DOMA letter"]. Attorney General Holder also acknowledged that, "consistent with the position [DOJ] has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.* In addition, the letter stated, "[DOJ] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect



appropriately due to a coequal branch of government.” *Id.*

The administration’s change of position marks a significant departure from over two centuries of Executive Branch practice. Historically, the President’s obligation to “take care that the laws be faithfully executed,” U.S. Const. art. II, § 3, has been understood to include the vigorous defense of Acts of Congress when they are challenged. Executive Branch practice has consistently recognized that the Constitution requires the President to, in all but rare circumstances, faithfully enforce and defend federal laws. As one Office of Legal Counsel opinion explains:

Any decision by the Executive that a law is not constitutional and that it will not be enforced or defended tends on the one hand to undermine the function of the Legislature and, on the other, to usurp the function of the Judiciary. . . . Any action of the President which precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts.

Recommendation That the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*28 (1984).

Another opinion notes:

[T]he Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. Any claim by the Executive to a power of nullification, even a qualified power, can jeopardize the equilibrium established by our constitutional system.

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 43 Op. Att'y Gen. 231, 1980 OLC LEXIS 6, at \*19–20 (1980); *see also* Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act, 39 Op. Att'y Gen. 11, 1937 U.S. AG LEXIS 31, at \*8 (1937) (“Should the Attorney General . . . vouchsafe his opinion holding the legislation unconstitutional, he would set himself up as a judge of the acts of the Congress and of the President.”); *id.* at \*2, \*7–9; Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 502 (1995) (arguing that Executive Branch practice and policy “prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes”).

Two narrow exceptions to the Executive Branch's duty to defend have been recognized where a federal law 1) arguably infringes upon the President's constitutional authority (implicating the separation

of powers), or 2) is patently unconstitutional, leaving no room for reasonable arguments. *See, e.g.*, 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*29–31. As Justice Kagan explained during her hearing to become the Solicitor General:

[T]he Solicitor General has . . . critical responsibilities to Congress—most notably, the vigorous defense of the statutes of this country against constitutional attack. Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made.<sup>4</sup>

The Defense of Marriage Act does not fall within either of these narrow categories, and the Attorney General's refusal to defend the law represents an abdication of his constitutionally assigned role and threatens the separation of powers.<sup>5</sup>

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<sup>4</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States, and Elena Kagan Nominee to Be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55828/pdf/CHRG-111shrg55828.pdf>; see also *id.* at 95, 102, 175–76.

<sup>5</sup> Although the Administration has stated that it will continue to enforce DOMA, there is no historical precedent for its decision to attack DOMA in litigation regardless of whether one looks to past examples of refusals to enforce laws or decisions to affirmatively attack them in court. Also, cases in which the Executive Branch changed its position concerning a matter of statutory interpretation are not relevant where, as here, the government has declined to defend a law against constitutional

**A. In Most Non-Defense Cases, Presidential Authority Was Implicated.**

James Wilson, one of the Constitution’s authors, once stated—as part of an argument that the Constitution includes several means for the President, the federal courts, and the States to shield themselves from Congressional acts that violate the separation of powers or federalism—that, if Congress exceeded the bounds of its constitutional authority, the President “could shield himself, and refuse to carry into effect an act that *violates* the Constitution.” James Wilson, *The Convention of the State of Pennsylvania on the Adoption of the Federal Constitution* (Dec. 1, 1787), *available at* [http://www.constitution.org/rc/rat\\_pa.htm](http://www.constitution.org/rc/rat_pa.htm); *see also* *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (noting in a separation of powers case that “the means to resist legislative encroachment upon [Executive Branch] power” provided by the Constitution include “the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional” (citation omitted)). This presidential authority does not, however, give rise to a broad authority to decline to defend laws that do not implicate the President’s power. *See, e.g.,*

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challenge. *See* Letter from Donald B. Verrilli, Jr., U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States, *Millbrook v. United States*, No. 11-10362 (U.S. Nov. 9, 2012); Transcript of Oral Argument, *Bob Jones University v. United States*, 461 U.S. 574 (1983), 1982 U.S. Trans. LEXIS 15, at \*22, \*26 (Oct. 12, 1982).

Income Tax—Salaries of President and Federal Judges, 31 Op. Att’y Gen. 475, 1919 U.S. AG LEXIS 50, at \*2 (1919) (“[I]t is not within the province of the Attorney General to declare an Act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department . . . .”); *id.* at \*25–26.

Perhaps the earliest example of a President refusing to defend an Act of Congress gave rise to this Court’s decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and was based upon the separation of powers. The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att’y Gen. 275, 1980 OLC LEXIS 8, at \*15–16 (1980). Also, after President Andrew Johnson removed his Secretary of War in violation of the Tenure of Office Act, which he considered to violate his appointment authority, a House member in favor of impeaching Johnson argued that presidents must execute and defend all federal laws, even those the president believes are unconstitutional. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 Duke L.J. 1183, 1192–93 (2012). Chief Justice Chase, who presided over the impeachment trial, stated that

the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional “precisely as if he held it to be constitutional.” However, . . . in the case of a statute which “directly attacks and impairs the

executive power confided to him by the Constitution . . . the clear duty of the President [is] to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.”

Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 1984 OLC LEXIS 50, at \*104–05 (1984).

Similarly, *Myers v. United States*, 272 U.S. 52 (1926), arose out of President Wilson’s refusal to comply with a similar tenure law prohibiting him from removing postmasters without the approval of the Senate. The Solicitor General argued that the law unconstitutionally limited the President’s appointment and removal authority, while a senator argued that the statute was constitutional. 43 Op. Att’y Gen. 275, 1980 OLC LEXIS 8, at \*11–12. This was the first case in which DOJ attacked the constitutionality of a federal law in court. 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*35–36. This Court held that the statute was unconstitutional, as was the Tenure of Office Act of 1867. *Myers*, 272 U.S. at 176. Since *Myers*, Presidents have attacked and/or failed to defend other laws that they believed infringed upon their appointment authority.<sup>6</sup> More broadly, in most instances in which a President has attacked, failed to defend, or failed to enforce a law,

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<sup>6</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Wiener v. United States*, 357 U.S. 349 (1958); *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994).

the President asserted that Congress had infringed upon his authority or otherwise violated the separation of powers.<sup>7</sup>

Two cases that have been cited as providing historical precedent for DOJ's non-defense of DOMA—*United States v. Lovett*, 328 U.S. 303 (1946), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)—are distinguishable. In 1943, President Franklin D. Roosevelt raised constitutional objections upon signing an appropriations provision prohibiting the payment of salaries to specific named employees of federal agencies who had been deemed to be “subversive.” *Lovett*, 328 U.S. at 313–14.

The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as *amicus curiae*, to defend the statute against the combined assault.

43 Op. Att’y Gen. 275, 1980 OLC LEXIS 8, at \*17.

The Office of Legal Counsel has characterized *Lovett* as a separation of powers case:

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<sup>7</sup> See, e.g., *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. 919; *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

[In *Lovett*], [t]he Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees.

8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*37 n.5.

Similarly, *Metro Broadcasting* was part of a larger struggle between Congress and the President for control over agency policy and leadership. The FCC adopted minority preference policies but indicated that it was going to reconsider them. In response, Congress passed an appropriations rider that prohibited the FCC from using any appropriated funds to review or alter its policy. Although the Solicitor General presented arguments against the FCC's policy, neither the President nor the Solicitor General prohibited the FCC from defending its policy through the FCC's own counsel. Moreover, an Office of Legal Counsel opinion explained that Congress had not attempted to



prohibit DOJ from filing an amicus brief with this Court in *Metro Broadcasting*, stating:

A statute that purported to prohibit the Executive from filing an amicus or other brief on the constitutionality of federal agency action or policy would raise the most serious constitutional concerns.

. . . The filing of briefs in courts of law through his subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed.

The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief, 14 Op. O.L.C. 13, 1990 OLC LEXIS 60, at \*13–14 (1990).

**B. Other Non-Defense Examples Are Distinguishable.**

During the first 174 years after the Constitution was ratified, the Executive Branch never argued in litigation that a federal law that did not implicate the separation of powers was unconstitutional. *See* 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*30 n.2. The first case in which this occurred was *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963). DOJ intervened in a lawsuit that alleged that hospitals that received federal funding and that

provided “separate but equal” services to African-Americans violated their equal protection rights. The previous year, in *Bailey v. Patterson*, 369 U.S. 31 (1962), this Court stated that state-sponsored racial discrimination was not only unconstitutional but was “foreclosed as a litigable issue.” *Id.* at 33. The court of appeals held that the hospitals had violated the Constitution. 323 F.2d at 967–70.

*Simkins* does not support DOJ’s decision to challenge DOMA because it involved a patently unconstitutional provision, whereas Attorney General Holder has acknowledged that the arguments that DOJ made in defense of DOMA for over a decade are reasonable, and that “there is substantial circuit court authority applying rational basis review to sexual-orientation classifications.” DOMA letter; *see also Dickerson v. United States*, 530 U.S. 428 (2000) (DOJ declined to defend a law that it believed was patently unconstitutional); *Gavett v. Alexander*, 477 F. Supp. 1035, 1043–44 (D.D.C. 1979) (same); Letter from Paul D. Clement, Acting U.S. Solicitor General, to Patricia Mack Bryant, U.S. Senate Legal Counsel, Office of the Solicitor General, Regarding *ACLU v. Mineta*, No. 04-0262 (Dec. 23, 2004), *available at* [https://www.aclu.org/files/FilesPDFs/mineta\\_letter.pdf](https://www.aclu.org/files/FilesPDFs/mineta_letter.pdf) (“I have therefore determined that the government does not have a viable argument to advance in the statute’s defense . . .”).<sup>8</sup>

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<sup>8</sup> At times, DOJ has changed positions on the issue of whether reasonable arguments could be made in defense of a law. *See* Charles Tiefer, *The Senate and House Counsel Offices*:

Cases of this nature are rare; in fact, the Executive Branch has routinely defended laws despite doubts about the law's constitutionality. For example, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Solicitor General defended a provision of a statute despite previous public statements by President Nixon and the Attorney General questioning its constitutionality. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 981 n.40 (1983). Similarly, in *McConnell v. FEC*, 540 U.S. 93 (2003), DOJ defended the Bipartisan Campaign Reform Act of 2002 despite President Bush's signing statement declaring that "[c]ertain provisions present serious constitutional concerns." Statement on Signing the Bipartisan

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*Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemp. Probs. 47, 54 & n.35 (1998) (noting that DOJ has, on occasion, "refus[ed] to defend a statute when it deemed the arguments for the statute's constitutionality unreasonable," and citing *Adolph Coors Co. v. Brady*, 944 F.2d 1543 (10th Cir. 1991), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *League of Women Voters v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980), *aff'd* 468 U.S. 364 (1984), cases in which the government changed positions by the time the cases reached this Court); 8 Op. O.L.C. 183, 1984 OLC LEXIS 42, at \*30 & n.2; Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992) (stating in veto message that a cable must-carry provision "is unconstitutional," though the provision was later enacted over veto, and the DOJ initially declined to defend it but eventually did in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997)).

Campaign Reform Act of 2002, 1 Pub. Papers 503 (Mar. 27, 2002).

In sum, there is no historical precedent for a decision to decline to defend a federal law where, as here: 1) fifteen previous years of defense had occurred, 2) no intervening constitutional amendment or change in controlling case law dictates a different result, 3) there are reasonable arguments to be made in defense of the law, and 4) the separation of powers is not implicated. In light of the longstanding constitutional tradition addressed above, the Executive Branch's decision to change course and challenge DOMA's constitutionality represents an unjustified abdication of the President's constitutional duty to defend Acts of Congress and thereby "jeopardizes the equilibrium established by our constitutional system." *See* 43 Op. Att'y Gen. 231, 1980 OLC LEXIS 6, at \*20.

## CONCLUSION

For the foregoing reasons, Amici urge this Court to hold that it lacks jurisdiction if it determines that BLAG lacks standing to appeal.

Respectfully submitted,

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