No. 12-307

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondent.

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

REPLY BRIEF FOR COURT-APPOINTED *AMICA CURIAE* ON JURISDICTION

Patricia A. Millett
Ruthanne M. Deutsch
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
202-887-4000

Vicki C. Jackson
Counsel of Record
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-0555
vjackson@law.harvard.edu

Michael C. Small
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Beth Heifetz
Yaakov M. Roth
Warren D. Postman
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

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INTRODUCTION

"If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Article III's case-or-controversy requirements apply at "'all stages'" of litigation, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (citation omitted), and thus issues decided in the lower courts sometimes cannot be reviewed by this Court, *see, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 63-64 (1986). Here, none of the parties seeking review suffers cognizable "injury" "caused" by the lower court judgments and "redressable" by the relief requested from this Court.

The United States claims injury because the judgments below hold DOMA unconstitutional and require payment to Windsor. Yet the United States does not want—indeed, advocates forcefully against—the only meaningful relief this Court could provide, which is reversal of the judgments below. Like Windsor, it seeks only affirmance. But Article III requires that the party invoking this Court's jurisdiction seek judicial *redress* of the injury it asserts, not validation of the (injury-inflicting) decisions below.

BLAG *has* sought reversal. But neither BLAG nor the institution it claims to represent has suffered a legally cognizable injury. The Constitution assigns the execution of the laws to the Executive. Separation-of-powers principles do not allow subunits of Congress to "pinch hit" whenever they object to the Executive's exercise of his "Take Care" duties.

Article III jurisprudence requires that this Court's decision on DOMA's constitutionality wait until a justiciable case comes before it. Undoubtedly delay may have real consequences. But "[h]owever desirable prompt resolution of the merits *** may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 110-11 (1998), limits intended to endure over time and hard cases.

ARGUMENT

I. BLAG LACKS STANDING.

Like private litigants, Congress, its subparts, and its members may invoke Article III jurisdiction only when injury to their legally cognizable interests is alleged. *Cf. Raines v. Byrd*, 521 U.S. 811, 819 (1997). BLAG asserts no such injury.

1. At least before the House's adoption of revised rules on January 3, 2013, BLAG was not properly authorized to act for the House of Representatives and thus could not assert injury on the House's behalf. Because Article III jurisdiction must exist at all stages of litigation, retroactive "*nunc pro tunc*" authorization cannot suffice. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495, n.* (2009) (respondents "could not remedy [a standing] defect retroactively"). And authorization from one House is not authorization to represent the entire Congress.

2. More importantly, neither all nor part of Congress suffers cognizable "injury" from the Executive's failure to defend the constitutionality of DOMA. Congress' *interest* in how a law is executed does not constitute Article III "*injury*." Once

Congress enacts legislation, its legal role is ordinarily at a constitutional end.

Litigation decisions about federal laws are quintessentially Executive judgments. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). Permitting a congressional body to step in when it disagrees with the Executive would undermine that allocation of power.[1] If BLAG suffers Article III "injury" by Executive failure to defend a statute, then presumably congressional bodies could also intervene when they disagree with the Executive's constitutional theory defending a statute, or even its interpretation of a statute. That cannot be right: Whether the Executive performs its duties well or badly, Congress cannot "second chair" its litigation. Separation of powers would mean little if disagreement with one Branch's exercise or non-exercise of its assigned powers entitled other Branches to intrude into that sphere.

This Court's decisions do not support BLAG's standing. In *INS v. Chadha*, 462 U.S. 919, 931 n.6, 939-40 (1983), the challenged statute provided each House of Congress with a concrete, distinctly legislative veto power. Notwithstanding the Court's broad language, *see id.* at 939, it was the threatened

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[1] *Cf.* Matthew Hall, *Standing of Intervenor-Defendants in Public Law Litigation,* 80 FORDHAM L. REV. 1539, 1568-69 (2012) (allowing intervenors "to assert defenses that the Executive has chosen not to *** necessarily shifts *** power from the Executive to the courts and Congress").

elimination of that statutory power that gave the intervenors standing, not the invalidation of the statute qua statute.[2] Similarly, in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), the State Senate was not defending a statute's constitutionality; it was objecting to a reapportionment order that reduced the Senate's size from 67 to 35 seats, thereby "directly affect[ing]" the Senate itself. *Id.* at 194.

In *Raines*, 521 U.S. at 823, this Court suggested that injury might exist if legislators' votes were "completely nullified" –*e.g.*, not counted properly in determining whether a statute has been enacted, or an amendment ratified (as in *Coleman v. Miller*, 307 U.S. 433 (1939)). But nothing like that happened here. Legislative votes in DOMA's favor were plainly counted; DOMA went "into effect," see *Raines* at 823, and has been enforced for nearly two decades. BLAG's complaint is not about recognizing votes but about the defense and enforcement of enacted law, which is committed to the Executive.

3. Treating BLAG's claimed interest in the standard of review that might be adopted (BLAG Br. 13-15) as "injury" would drive a large hole through Article III. It would allow speculation about the effect of case outcomes on future legislation to open the door to standing in countless cases involving state, local and federal lawmakers. Moreover, *Raines,* 521 U.S. at 825-26, rejected standing for

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[2] In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court did not address any appellant's standing, and the challenged statute's empowerment of the Comptroller-General, *see id.* at 717-719, gave him standing to appeal a judgment stripping him of those new powers.

legislators who challenged the possible diminution of their authority by operation of the Line Item Veto Act. BLAG's claim of injury here is far more remote.

4. Finally, BLAG's participation is not necessary to bring DOMA's constitutionality before this Court. *See* Part II.D, *infra*. But even if it were, the desire for a ruling cannot alter the requirements of Article III. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Muskrat v. United States*, 219 U.S. 346 (1911).

Congress has many constitutional mechanisms to express disagreement with the President. Congress famously disagreed with President Andrew Johnson's refusal to comply with a Tenure of Office Act.[3] When another President ignored a similar Act and the removed official sued, a member of Congress filed as *amicus* to defend the constitutionality of the law. *Myers v. United States*, 272 U.S. 52 (1926). When the Reagan Administration refused to enforce a government contracting law as unconstitutional, Congress responded politically by threatening appropriations and forcing concessions from the Administration, and then later modifying the law itself.[4] When the Clinton Administration decided to enforce but not defend a requirement that the military discharge HIV-positive personnel, Congress

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[3] *See* Daniel Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1192-93 (2012).

[4] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217, 328-29 (1994); Douglas Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive For A Unitary Executive*, 15 CARDOZO L. REV. 337, 349 (1993).

changed the law.[5] Recognizing congressional "injury" from Executive decisions not to defend, when the statute implicates no special legislative prerogative, is inconsistent with this tradition and with the separation of powers.

II. THE EXECUTIVE BRANCH'S AGREEMENT WITH THE COURTS BELOW DEPRIVES THIS COURT OF JURISDICTION.

This case concerns appellate justiciability. The case before the district court was clearly justiciable: it would be unacceptable if "a person could be denied access to the courts because the Attorney General of the United States agreed with [the person's] legal arguments," but did not provide relief. *Chadha*, 462 U.S. at 939. But in those rare situations in which the Executive agrees that a challenged statute is unconstitutional, an Article III court's judgment in favor of the challenge will ordinarily end the case or controversy.

The United States and Windsor have obtained the judgment for which they argued; they seek no change in that judgment from this Court. Moreover, the injuries the Executive claims from that judgment are not redressable by the appellate relief it seeks: that the "judgment of the court of appeals should be affirmed" (U.S. Merits Br. 54).[6]

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[5] *See* Meltzer, *supra* note 3, at 1203-04.

[6] Windsor (Br. 29 n.8) mistakenly suggests that standing requirements do not apply where the appellate jurisdiction of Article III courts is invoked. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989); *Diamond*, 476 U.S. at 62-64, 68-69.

A. The United States Lacks Appellate Standing; It Is Adverse Neither To Windsor Nor The Judgment Below.

Although the United States has sought *review*, it has sought no *relief* from this Court to remediate its asserted injury from the lower court judgment. The redressability component of standing requires a direct correspondence between the injury alleged and the judicial remedy sought by the party invoking Article III jurisdiction; it presupposes that the party is actually seeking redress. *See, e.g.*, *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (redressability is "a 'substantial likelihood' that the requested relief will remedy the alleged injury"); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (as part of standing, petitioners must show "that, if the court affords the relief requested, the asserted inability of petitioners will be removed"). But here, the "requested relief"—affirmance—will not redress or remove the injury alleged.

Princeton University v. Schmid, 455 U.S. 100 (1982), underscores this point. The Court there found New Jersey's appeal nonjusticiable because "simply ask[ing] for review [of a state court judgment] and declin[ing] to take a position on the merits" does not create any "case or controversy." *Id.* at 102. Had New Jersey urged "reversal," the Court elaborated, its appeal would have been justiciable. *Id.* In this case, the United States has advocated *both* for the judgment below and for its affirmance here, which compounds this justiciability problem. [7]

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[7] The United States' suggestion (Br. 24) that the Court treated New Jersey as not having appealed at all is mistaken. *See*

Moreover, the notion that the United States suffers "injury" from the invalidation of a statute the Executive has concluded is unconstitutional is difficult to reconcile with the Justice Department's statutory role as the United States' sole representative in this litigation. In *Morrison v. Olson*, 487 U.S. 654 (1988), and *United States v. Nixon*, 418 U.S. 683 (1974), an independent counsel and special prosecutor, respectively, were appointed, under different statutory authorities, to litigate on behalf of the United States and took positions at odds with the President's view.[8] But here it is the Justice Department that speaks for the United States. And given its constitutional view, the United States suffers no injury from a district court judgment it sought and of which it seeks affirmance.

B. *Lovett* and *Chadha* Are Distinguishable

Contrary to the opposing arguments, neither *United States v. Lovett*, 328 U.S. 303 (1946), nor *Chadha* resolve the question here.

1. In *Lovett*, 328 U.S. 303, no party, amicus or Justice raised any question relating to the United States' agreement with the judgment from which it appealed; the issue was neither discussed nor decided. Instead, Congress argued that the constitutionality of a limit on appropriated funds was

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Schmid, 455 U.S. at 102 ("The State of New Jersey did not file a separate jurisdictional statement but joined in that of the University."). Windsor suggests (Br. 22) that *Schmid* concerned only hypothetical or advisory opinions; yet court review of a judgment at the behest of a party who agrees with it surely has "advisory" elements.

[8] The Attorney General continues to have statutory authority to appoint special counsel. 28 U.S.C. § 515.

a political question, Congress Br. 26, *Lovett*, *supra* (No. 45-809). This Court disagreed and held the statute unconstitutional. 328 U.S. at 313, 315. Justice Frankfurter concurred, *id*. at 318-330, invoking *Ashwander v. TVA*, 297 U.S. 288, 341, 338, 348 (1936) (Brandeis, J., concurring), to explain why he rested only on statutory grounds. Thus, contrary to Windsor's suggestion, *Lovett* did not decide the justiciability question presented here. And "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).[9]

2. In *Chadha*, this Court deliberately did not decide whether the case before it would have been justiciable without the congressional intervenors. Although *Chadha* found the United States to be a "party" for purposes of *statutory* appellate jurisdiction, 462 U.S. at 930-31, the Court distinguished that statutory issue from the Article III question. *Id.* at 931 n.6 ("In addition to meeting the statutory requisites of Section 1252 *** an appeal must present a justiciable case or controversy under Art. III."). The Court then *refrained* from

[9] Moreover, in *Lovett*, there was a real risk that the Court of Claims judgment would not be enforced unless reviewed by this Court. There was no established judgment fund to pay money judgments against the United States then, and the Solicitor General specifically noted the expressed "reluctan[ce]" of the relevant House Appropriations subcommittee to recommend appropriations to pay the judgment below, "in the absence of a clear ruling on the question of constitutionality." U.S. Pet. for Writ of Cert. at 15, *Lovett*, *supra* (No. 45-809). Here, by contrast, there is no similar risk that Windsor's judgment would not be paid because there is today a permanent, indefinite appropriation to assure payment of tax refunds. *See* 31 U.S.C. § 1324 (2010).

holding that Article III would have been satisfied had the United States been the only appellant.[10] Instead, the Court expressly held that a "justiciable case or controversy *** clearly exists in No. 80-1832, as in the other two cases, because of the presence of the two Houses of Congress as adverse parties." *Id.* at 931 n.6.[11]

The Court then referenced "*infra* at 939," *id.*, where it discussed Article III in more detail, covering two different periods in the litigation—in the Ninth Circuit before Congress had intervened, and in this Court after congressional intervention. As to the latter, the Court repeated that the presence of the congressional intervenors, whose own one-house veto right was at stake, provided justiciability: "[F]rom the time of Congress' formal intervention, *** the concrete adverseness is beyond doubt." *Id.* at 939.

The Court then separately analyzed justiciability before the Ninth Circuit, explaining that, "prior to Congress' intervention, there was adequate Art. III adverseness" because, notwithstanding "the INS's agreement with Chadha's position[,] *** the INS would have deported Chadha absent the Court of Appeals' judgment." 462 U.S. at 939. Thus, *Chadha*

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[10] Although the United States suggests (Br. 18) that there would be no point to a statutory rule less rigorous than Article III, at the time of *Chadha*, a party whose standing was unclear could invoke statutory appellate jurisdiction if another party who had not filed its own petition had standing. *See Director, OWCP v. Perini N. River Associates*, 459 U.S. 297, 302-05 (1983).

[11] *Perini N. River Associates,* cited by *Chadha*, 462 U.S. at 931 n.6, similarly avoided deciding whether the OWCP's Director had standing to appeal because the presence of another party satisfied justiciability requirements.

held that an Article III court—the Ninth Circuit there, like the District Court here—can grant relief at the behest of a person claiming injury from an unconstitutional law the Executive was enforcing, notwithstanding the Executive's agreement that the challenged law is unconstitutional.[12] But the Court did *not* hold that an Article III court would have jurisdiction over *an appeal* by the Executive once an Article III court gave the government, and the challenger, the judgment they sought.

C. Non-Justiciability Here Comports With Other Precedent

Aside from *Chadha* and *Lovett*, in several other cases before this Court the United States has argued that a statute was unconstitutional, *e.g*, *Myers*, or has agreed with an opposing party on a legal issue, *e.g.*, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). But in all such cases of which counsel is aware, some party invoking this Court's jurisdiction sought *reversal* or *modification* of the judgment below. In no such case has this Court affirmatively held justiciable an appeal or petition where no party properly before the Court was adverse to another and no party sought modification of the decision below.

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[12] The statement in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 88-89 n.9 (1993), noted by Windsor Br. 21, noting that *Chadha* found adverseness even though "the two parties agreed" on the law's unconstitutionality, is correct insofar as it refers to Chadha's analysis of the Ninth Circuit, where there were only two parties. Once the Ninth Circuit ruled in Chadha's favor, and it was the INS seeking to invoke Article III jurisdiction, the Court is best understood to have rested justiciability on the presence of the intervenors.

Sometimes, the United States has agreed that a lower court judgment in its favor is wrong; but confession of error does not itself undo the judgment. In such appellate cases, the parties may both be adverse to the judgment below (and the Court not uncommonly asks an amicus to defend it). *See, e.g., Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 n.24 (1983). But neither the United States nor Windsor disagrees with the judgment below.

Other times, the United States has agreed with another litigant that a lower court judgment was correct (as here), but a third party, such as an independent agency or officer authorized to litigate on its own, seeks modification of the decision below. *See, e.g., Morrison*, 487 U.S. 654 (review sought by independent counsel); *Bowsher*, 478 U.S. 714 (review sought by Comptroller-General).[13] Here, however, BLAG lacks standing, and so no proper party is adverse to the judgment below.[14]

The parties cite other cases to show that litigants' agreement on a legal claim does not

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[13] *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (appeal by plaintiffs challenging statute; United States files two separate briefs, one challenging some aspects of decision below); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (review sought by would-be licensees challenging agency rules; United States as amicus and FCC as party filed briefs taking different positions).

[14] The United States (Br. 18-19) notes that lower court decisions invalidating statutes or requiring governments to pay money or take other action can create "injury" sufficient for standing on appeal. *See, e.g., Horne v. Flores*, 557 U.S. 433 (2009); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). But in these cases, the appealing party asked for reversal or modification of the judgment. Here, the United States does not.

necessarily deprive a court of jurisdiction. U.S. Br. 26; Windsor Br. 19. For example, in *Kentucky v. Indiana*, 281 U.S. 163 (1930), an original jurisdiction case, Indiana agreed that it was bound by a contract but refused to perform. Kentucky thus sought redress for its injury from a court of first instance (as Windsor did in this case). Likewise, courts may exercise jurisdiction over receivership proceedings, where a debtor may agree it is liable, but be unable to pay, *see In re Metro. Ry. Receivership*, 208 U.S. 90 (1908), or over entry of consent judgments, *see Pope v. United States*, 323 U.S. 1, 11-12 (1944), where entry of the judgment redresses the injury alleged. But none of those cases suggest that a party may ask an appellate court to "review" a judgment in order to affirm it.

D. Article III's Consequences Considered

The parties' desire to secure a ruling from this Court is understandable. But the burdens of adhering to Article III's justiciability limits should not be overstated. While this particular case is not justiciable in this Court, Article III does not preclude resolution of this important constitutional question in other cases.

When the Executive decides to enforce but not defend a statute, and its "nondefense" position prevails in the lower courts, Article III (in the absence of another party suffering cognizable injury from the judgment) forecloses appellate review at the United States' behest. But DOMA's constitutionality may well come before this Court in justiciable form in another case. *Compare Raines*, 521 U.S. at 813-14 (justiciability barrier prevents review of Line Item

Veto Act), *with Clinton v. New York*, 524 U.S. 417, 421 (1998) (review undertaken).

For example, the issue could arise in litigation in which the United States is not the principal defendant, such as suits against employers for failing to provide ERISA-mandated annuities to a same-sex spouse or FMLA leave to care for an ill, same-sex spouse.[15] Indeed, many important constitutional challenges involving federal statutes have arisen in suits by one nonfederal party against another. *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *cf. Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).[16] And if a lower court were to *uphold* DOMA in litigation against the federal government, the issue could be brought before this Court by the challenger, perhaps even seeking certiorari before judgment by the court of appeals.[17]

Other developments, moreover, could moot the need for resolution by this Court. The Executive has said it will continue to enforce DOMA until either Congress repeals it or "the judicial branch renders a definitive verdict against the law's constitutionality."

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[15] *See* 29 U.S.C. §§ 1055, 1132, 2617(a)(2); Empire State Pride Br. 28-29 (private employer's denial of annuity to same-sex surviving spouse), 32-33 (employer's denial of FMLA leave to same-sex spouse).

[16] In *Bartnicki,* the United States intervened under 28 U.S.C. § 2403; in *Stern*, the United States filed an amicus brief; in *Katz*, the United States did not participate in briefing or argument.

[17] One district court recently upheld DOMA in litigation against the Attorney General, notwithstanding the United States' position on DOMA's unconstitutionality. *See Lui v. Holder*, No. 2:11-CV-01267-SVW-JCG (C.D. Cal. Sept. 28, 2011).

JA 192. If additional courts rule against DOMA, the Executive might conclude that the judicial branch had spoken with sufficient definitiveness and halt its enforcement. [18] Congressional repeal is also possible.[19]

Beyond that, having to litigate one's claim is not ordinarily an "injury" for standing purposes; otherwise, Article III's limitation on standing would collapse on itself. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (incurring expenses to avoid eavesdropping does not constitute injury); *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (noting "the usual rule that litigation is conducted by and on behalf of the individual named parties only"). While a system permitting abstract review or advisory opinions could avoid delays in judicial resolution of important questions, and would not be "irrational," "it is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828.

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[18] The Executive Branch previously has modified its administration of a federal-benefits statute after conceding the unconstitutionality of a provision. *See Heckler v. Edwards*, 465 U.S. 870, 873 nn. 2 & 3 (1984) (Executive determination that gender-discriminatory presumption in Social Security Act is unconstitutional published as Social Security Ruling 81-17c (C. E. 1981)).

[19] In the 112th Congress, Senator Feinstein's bill to repeal DOMA, The Respect for Marriage Act, S. 598, 112th Cong., 1st Sess. (2011), was favorably reported out of the Senate Judiciary Committee. *See* Carolyn Lochhead, *Feinstein's Bill to Repeal DOMA Clears Committee*, SFGATE, Nov. 11, 2011.

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, the United States' petition is not justiciable and BLAG lacks standing.

Respectfully submitted,

Vicki C. Jackson
Counsel of Record

Beth Heifetz
Yaakov M. Roth
Warren D. Postman
Jones Day

Patricia A. Millett
Ruthanne M. Deutsch
Michael C. Small
Akin Gump Strauss
Hauer & Feld LLP

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