No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

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

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

Brief *Amicus Curiae* on Jurisdiction and Standing Questions of Citizens United's National Committee for Family, Faith and Prayer, Citizens United Fdn., U.S. Justice Fdn., Gun Owners of America, Inc., Gun Owners Fdn., The Lincoln Institute, Public Advocate of the U.S., Declaration Alliance, Western Center for Journalism, Institute on the Constitution, Abraham Lincoln Foundation, English First, English First Fdn., CLDEF, Protect Marriage MD PAC, Delegate Bob Marshall, and Senator Dick Black in Support of Resp. Bipartisan Legal Advisory Group

MICHAEL BOOS
General Counsel
CITIZENS UNITED
1006 Pennsylvania Ave. S.E.
Washington, DC 20003
(202) 547-5420
Attorney for Citizens United and Citizens United Foundation

HERBERT W. TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United (including its National Committee for Family, Faith and Prayer), Gun Owners of America, Inc., Public Advocate of the United States, Abraham Lincoln Foundation for Public Policy Research, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC").

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, Declaration Alliance, Western Center for Journalism, English First Foundation, and Conservative Legal Defense and Education Fund ("CLDEF") are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

The Institute on the Constitution is an educational organization. Project Marriage Maryland PAC is a political committee.

Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and the author of the Virginia Marriage Constitutional Amendment.

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[1] It is hereby certified that counsel for petitioner and for respondent Bipartisan Legal Advisory Group filed blanket consents with the Court, and that counsel for respondent Windsor has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Senator Dick Black is a member of the Virginia State Senate.

Most of these *amici* have filed *amicus* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Most of the *amici curiae* herein filed an *amicus* brief in support of the Respondents on the merits of this case.[2] Most of the *amici curiae* herein also filed an *amicus* brief in support of the petition for certiorari in a similar case regarding the constitutionality of the Defense of Marriage Act ("DOMA"). [3]

SUMMARY OF ARGUMENT

In order to have standing to defend DOMA, the Bipartisan Legal Advisory Group ("BLAG") need not meet the standing requirement for a plaintiff. If that were so, even the Executive Branch would fail the test. Rather, as an intervenor-defendant under Rule 24(a)(2) of the Federal Rules of Civil Procedure, BLAG need only demonstrate (i) that it has a cognizable interest in defending DOMA and (ii) that its interest is concrete and particular, not a generalized grievance.

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[2] http://lawandfreedom.com/site/constitutional/CU__DOMA_Amicus_SC.pdf

[3] *See* Brief *Amicus Curiae* of Capitol Hill Prayer Alert Foundation, *et al.*, in Bipartisan Legal Advisory Group v. Gill, No. 12-13 (Aug. 2, 2012). http://www.lawandfreedom.com/site/constitutional/DOMA_amicus.pdf.

BLAG has claimed that it has standing on the ground that its core legislative function would be impaired because the Executive Branch seeks a decision from this Court that would "completely nullify" DOMA. The Court need not reach the question whether a judicial decision of unconstitutionality of DOMA would erase it from the statute books. Rather, Congress as a whole, and the House as one of its parts, have several concrete and particular interests in defending DOMA.

First, Article I of the Constitution gives Congress not only the authority to "lay," but also the power to "collect" taxes, which gives it the right ensure that taxes that are levied will be collected. Second, Congress also has the power to protect the nation's purse, vested with the authority to ensure that federal spending be drawn out of appropriations made by law. Third, as a representative body of with constituencies different from that of the Senate, the House serves as check on the latter's power. And fourth, the House has an interest distinct from the Senate in that all revenue raising bills must originate with it, and the refusal to defend DOMA implicates that power.

The fact that the Executive power is vested in the President, including the duty to "take care that the laws be faithfully executed," does not preclude the House from defending DOMA. The Take Care Clause is not a grant of power, but rather a limitation on it — obliging the President to defend the laws of the United States. The President may not, by refusing to defend a statute, unilaterally decide the constitutionality of that statute.

As an alternative theory, Congress should not be required to establish that it have standing to be a defendant in this suit. Congress is not appearing as a party defending Congressional interests. Rather, Congress is simply attempting to litigate this case on behalf of the United States, after the Executive Branch declined to do so.

Finally, contrary to the argument by the appointed *Amica Curiae*, Chadha and Lovett support jurisdiction in this case. Because the legislative branch appeared as *amicus curiae* in both cases, the Solicitor General contends that the House may participate in this case only in an *amicus* capacity, not as a party representing the United States. The Solicitor General has argued that the United States must speak with one voice — and that voice is the President's — because the Constitution vests in the President the full sovereignty of the nation to enforce the law. But the President's authority is not exclusive. And he certainly does not possess the prerogative power unilaterally to decide the constitutionality of DOMA by refusing to defend it in court.

ARGUMENT

I. BLAG HAS ARTICLE III STANDING.

A. BLAG's Standing is Not Determined as a Party Plaintiff.

The court-appointed *amica curiae* ("Ct. Amica") has recognized that this case was initiated against the United States by an "executor of [an] estate ... seeking

a tax refund...."[4] However, she has addressed the question of Article III standing as if the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") were the plaintiff, seeking a declaratory judgment that Section 3 of the Defense of Marriage Act ("DOMA") is constitutional. Citing four cases, each of which addresses whether a plaintiff has Article III standing, Ct. Amica launches her argument against standing with the statement that:

> An irreducible component of Article III standing is a "concrete," "personal **injury**," "fairly traceable to the **defendant's** allegedly unlawful **conduct** and likely to be redressed by the **requested relief**." [Ct. Amica Br., p. 8 (emphasis added).]

While true if applied to a plaintiff, this statement makes no sense in the context of this case when applied to BLAG's standing as a defendant. Yet, relying foremost on Raines v. Byrd, 521 U.S. 811 (1997) — in which this Court found that plaintiff members of Congress did not have standing to wage a court battle over the constitutionality of the Line Item Veto Act — Ct. Amica asserts that "BLAG's claim of injury arising from the constitutional challenge to DOMA ... falls short of Article III's particularized injury requirement." *Id.* at 13. By approaching the question of standing from the plaintiff's side, as if BLAG were seeking a ruling that DOMA Section 3 is constitutional in all its applications, Ct. Amica frees

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[4] Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction ("Ct. Amica Br."), p. 2.

herself to argue that "BLAG asserts only a generalized interest in seeing statutes that Congress enacted implemented, an interest that is widely shared by the people at large." *Id.* at 8.

According to Ct. Amica's inverted approach to the standing question, even the Executive Branch would not have standing, since its interest in DOMA Section 3 is no more than what Ct. Amica has characterized BLAG's interest to be — a "generalized interest in seeing [DOMA] implemented, an interest that is widely shared by the people at large." *Id.* It would be unthinkable, however, even to entertain such an argument.[5]

It should be no different here, where the House is defending DOMA. As Ct. Amica has recounted, BLAG sought permission from the district court to intervene

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[5] It is indeed unthinkable that Congress would not have standing. If Congress lacks standing, then no one would have standing to step in for the Executive who has refused to act. If there is no proper defendant, there is no "case or controversy," and thus this Court lacks jurisdiction to entertain an appeal. If that were the case, and the Court of Appeals below was also without jurisdiction, and its opinion should be overturned. The question would then become whether the district court had jurisdiction. Since the government defended DOMA at that stage, presumably the district court's opinion would stand. If the federal district court in this case is the final arbiter of the constitutionality of DOMA, then its opinion presumably would only apply to that district, and every other district court could come to its own conclusion. The IRS could never enforce the tax code if a taxpayer could simply move to another district. If Congress lacks standing, and this court has no jurisdiction, confusion in the lower federal and state courts will reign.

under Rule 24 of the Federal Rules of Civil Procedure ("F.R.Civ.P."), and the "court then allowed BLAG to intervene as of right (and as a 'full party') under Rule 24(a)(2), because [the district court found that] BLAG has a **cognizable interest** in defending the enforceability of statutes the House has passed when the President declines to enforce them...." Ct. Amica Br., pp. 3-4 (emphasis added). Thus, whether BLAG has constitutional standing turns on whether BLAG has a sufficiently protectable interest as a defendant.

B. BLAG's Standing is Determined as a Party Defendant.

In Diamond v. Charles, this Court declined to "decide ... whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Id.*, 476 U.S. 54, 69 (1986). It may be argued, as it was in Diamond, that "[t]o continue this suit" in light of the refusal of the executive department to defend the constitutionality of DOMA Section 3,[6] the respondent "must satisfy the requirements of Art. III." *See id.* Without conceding that point, these amici submit that BLAG both meets the requirements of Rule 24(a)(2), and also has Article III standing.

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[6] In Argument III below, these amici contend that there remains a case or controversy between Windsor and the United States because, as the court of appeals below has explained, "[n]otwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money." *See* Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012).

F.R.Civ.P. Rule 24(a)(2) states that "the court **must** permit anyone to intervene who ... claims an **interest** relating to the **property** ... that is the **subject of the action**, and is so situated that **disposing of the action** may as a practical matter **impair or impede** the movant's ability to protect its **interest**, unless existing parties adequately represent that interest." (Emphasis added.) As noted above, the subject matter of this lawsuit is whether the plaintiff Windsor is entitled to a tax refund of $363,053. If DOMA Section 3's definition of marriage as a union of a man and a woman unconstitutionally discriminates against Windsor, then the United States will be obligated to draw from its treasury and pay $363,503 to Windsor. If, however, Section 3 of DOMA is constitutional, then the money will remain in the United States treasury as a lawfully collected tax.

BLAG's interest as an intervenor-defendant, then, is not just a "general desire to see [DOMA] enforced as written, such as that alleged by the Senate as intervenor-defendant in Newdow v. United States, 313 F.3d 495, 498 (9th Cir. 2002). Rather, BLAG's interest is concrete and particularized.

C. Congress's Standing Need Not Be Based on a Claim of Judicial Nullification.

In its brief on jurisdiction, BLAG claims it has Article III standing because the Executive Branch, "by invoking the powers of the [judicial] branch of government" to declare DOMA Section 3 unconstitutional, has "'completely nullified'" DOMA, thereby undermining Congress's "core lawmaking

function." *See* Brief on Jurisdiction for Respondent BLAG ("BLAG Juris. Br."), p. 13. BLAG argues that it is one thing for the executive simply to choose not to enforce DOMA based solely upon the Obama administration's view that DOMA is unconstitutional. *Id.*, p. 12. But it is quite another thing, BLAG believes, for the Executive Branch to take "the position that it would issue Ms. Windsor a refund only if the district court declared DOMA unconstitutional." *Id.*, p. 12. In the former case, BLAG asserts DOMA "would remain on the books and could be enforced by subsequent administrations." *Id.* But in the latter case, if this Court finds DOMA Section 3 unconstitutional, DOMA Section 3 would be erased from the statute books, "permanently undo[ing] the *House's* constitutionally mandated role in the passage of a law...." *Id.*, pp. 14-15.

BLAG's position — that a judicial ruling of unconstitutionality completely nullifies a federal statute, so that Congress would be required to reenact that statute for it to become law again — is a disputed proposition. While it is "perhaps the dominant view" that a statute found unconstitutional by the courts "is not a law ... as though it had never been passed;" the "opposite position refuses to grant such import to a judicial pronouncement of unconstitutionality in a given case." *See* L. Tribe, American Constitutional Law, § 3.3, p. 27 (Foundation Press: 2d ed. 1988). In support of the latter view, Stanford Law Professor Gerald Gunther has ably stated that "[u]nder the classic Marbury theory, a court confronted with an unconstitutional statute simply refuses enforcement to that law in the case before it." G. Gunther,

Constitutional Law, p. 28 (Foundation Press: 12th ed. 1985). Thus, Professor Gunther has observed:

> [A] law held unconstitutional in an American court is by no means so wholly a nullity, as the Attorney General quite persuasively advised President Roosevelt in 1937[,] "that the courts have no power to repeal or abolish a statute, and notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books." [*Id.*]

Happily, however, BLAG's standing does not turn on whether DOMA Section 3 is rendered a "complete nullity" by a judicial ruling. Even if such a judicial decision does not amount to judicial nullification, and instead binds only the parties to the case, then even so, under the doctrine of stare decisis,[7] that decision would practically nullify the enforcement of DOMA Section 3.

Furthermore, as BLAG has pointed out, if DOMA Section 3 is found unconstitutional under the "heightened standard of review for legislation that classifies on the basis of sexual orientation," it will also "diminish the House's legislative power [to enact] legislation that classifies on the basis of sexual orientation." BLAG Juris. Br., p. 13. Indeed, as these *amici* have pointed out in their merits brief, imposing a heightened standard of review for such classifications would dramatically diminish Congress's

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[7] *See* G. Gunther, Constitutional Law, p. 28

power under the Necessary and Proper Clause, as employed since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).[8] As BLAG has asserted, the "House's interest in the scope of its legislative powers is not widely shared by the populace at large" and, therefore, its "interests in this case are concrete and particularized, not generalized grievances." BLAG Juris. Br., p. 14.

D. Congress Has a Specific Interest in Laying and Collecting Taxes.

Despite the fact that the American people have no enumerated legislative powers in the U.S. Constitution, Ct. Amica insists that the House's interest in the tax refund from the United States treasury is indistinguishable from the "diffuse, generalized interests of all citizens." Ct. Amica Br., p. 7. Indeed, in an effort to distinguish this case from I.N.S. v. Chadha,[9] Ct. Amica asserts that BLAG's interest in the $365,503 is only a "generic, broadly held interest in the constitutionality of laws for their own sake," and not an interest "to defend distinct, statutorily created powers of the Houses of Congress that were specifically, concretely and uniquely tied to the provisions of the particular statute the constitutionality of which was at issue." Ct. Amica

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[8] *See Amicus Curiae* Brief on the Merits of Citizens United's National Committee for Family, Faith and Prayer, *et al* ("C.U. Merits Br."), pp. 16-26.

[9] 462 U.S. 919 (1983).

Br., p. 10. Ct. Amica's claim ignores the congressional role in the levying of taxes.

Article I, Section 8, Clause 1 vests in Congress the enumerated "power to **lay and collect** taxes...." (Emphasis added.) Similarly, the Sixteenth Amendment confers upon Congress "the power to **lay and collect** taxes on incomes, from whatever source derived...." (Emphasis added.) It is no accident that the Constitution explicitly vests Congress with the full power to tax (subject only to a presidential veto), including the authority to specify the means by which such taxes are collected. Under the Articles of Confederation, the Continental Congress found that its essentially voluntary "requisitions" to the States "have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them ... would be dangerous to the welfare and peace of the Union." *See* 30 Journals of the Continental Congress (15 Feb. 1786), reprinted as item 1 in 2 The Founders' Constitution, p. 408 (P. Kurland & R. Lerner, eds.) (Univ. Chi.: 1987) (hereinafter "Founders"). Vesting Congress with a more complete power to both levy and to collect taxes, Alexander Hamilton observed, was essential, because:

> [m]oney is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A **complete power, therefore, to procure** a regular and adequate supply of it ... may be regarded as an indispensable ingredient in every constitution. From a deficiency in this

> particular, one of two evils must ensue; either the people must be subjected to continual plunder ... or the government must sink into a fatal atrophy.... [*Federalist No. 30*, pp. 145-46 (G. Carey and J. McClellan, eds., Liberty Fund: 2001) (emphasis added).]

Thus, to free Congress from depending on the States to raise and collect necessary revenues, Congress was fully empowered to "make all laws which shall be necessary and proper for carrying into execution" its power not only to levy taxes, but also to collect them. Indeed, DOMA Section 3 is a constitutionally "necessary and proper" exercise of congressional power regarding the spousal tax exemption on decedent estates. *See* C.U. Merits Br., pp. 5-13.

E. Congress Has a Specific Interest in Protecting its Power over the Purse.

DOMA Section 3 is not just a "necessary and proper" means enacted by Congress to carry out its taxing powers. Rather, it is also a constitutionally necessary and proper means enabling Congress to control the nation's purse. Indeed, "the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." *Federalist No. 78*, *supra*, p. 402. A judgment in favor of Windsor could not only "impair or impede [Congress'] ability to protect its interest"[10] in its power to lay and collect taxes, but also it could

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[10] F.R.Civ.P. 24(a)(2).

infringe on its duty "to pay the debts and provide for the common defense and general welfare."[11] BLAG's standing, then, is properly resolved by also addressing Congress' specific interest in the application of DOMA Section 3 to Windsor's claim of entitlement to a tax refund. *See* Brief on the Jurisdictional Questions for Respondent Edith Schlain Windsor ("Windsor Juris. Br."), p. 13.

Indeed, if Ms. Windsor wins, she would be entitled to an order that she be paid out of the Judgment Fund, enacted by Congress pursuant to its appropriations power. *See id.*, pp. 33-34. Article I, Section 9, Clause 7 states that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." Congress's interest, then, is not whether DOMA Section 3 is constitutional in the abstract, as the Ct. Amica presents it to be,[12] but whether DOMA serves as a constitutional means to perform its duty to pay the debts and provide for the common defense and general welfare.

As pointed out in the court of appeals below by dissenting Judge Straub, DOMA Section 3's definition of marriage was designed, in part, to "'preserv[e] scarce government resources.'" Windsor v. United States, 699 F.3d 169, 191 (2d Cir. 2012) (Straub, J., dissenting). In addition to applying the definition of marriage to the federal tax laws generally, DOMA Section 3 applies to a myriad of federal benefits

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[11] Article I, Section 8, Clause 1.

[12] *See* Ct. Amica Br., pp. 7 and 13.

programs (*id.* at 191-92), all of which are supported appropriations by Congress, funded by tax revenues and borrowing.

While Article I, Section 9, Clause 7 appears in a section composed of limits upon Congress, Clause 7 also vests power in Congress, with a concomitant check upon the President and even upon the judiciary. With respect to the power vested in Congress, Joseph Story observed:

> As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. [3 J. Story, Commentaries on the Constitution, §1342 (1833).]

With respect to the check on the President, Story commented:

> If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all of its monied resources at his pleasure. [*Id.*]

And with respect to the check on the judiciary, Story conceded:

> A learned commentator has ... thought that the provision ... is defective in not having

> enabled the creditors of the government, and other persons having vested claims against it, to recover, and be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation. [Otherwise] it might give an opportunity for collusion and corruption in the management of suits between the claimant, and the officers of the government.... [*Id. at* § 1343.]

In short, Article I, Section 9, Clause 7 makes Congress "the guardian of [the United States] treasury" not only against executive "profusion and extravagance," but also from judicial "collusion and corruption." *Id.* at § 1342-43. As an intervening defendant in this case, BLAG has not only a particularized interest in the amount the estate tax contributes to the public fisc, but also in the payment of any judgment out of the nation's purse. *See* Windsor Juris. Br., pp. 33-34.

F. The House of Representatives Serves Different Constituencies than the Senate, and Thus Has a Distinct, Protectable Interest, Separate from Congress as a Whole.

BLAG has plainly demonstrated that "there is a concrete threat to the institutional prerogatives of the legislature," implicating separation of powers — as Ct. Amica has claimed that it must.[13] Nevertheless, Ct.

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[13] *See* Ct. Amica Br., pp. 9, 13.

Amica insists additionally that "there can be no judicially cognizable injury to Congress absent both houses' action...." *Id.* at 16. Rather, according to Ct. Amica, BLAG must also demonstrate that there is a concrete threat to the prerogatives of the House, as distinct from the Senate. *Id.*

There is no doubt that the legislative department of the United States government must act in unity for a bill to become a law. *See* Article I, Section 7, Clause 2. But the very purpose and nature of a bicameral representative body is for each to serve as a check and balance on the other. *See* United States v. Munoz-Flores, 495 U.S. 385, 394 (1990). Indeed, the two houses of Congress represent quite different constituencies. The Senate is composed of 100 senators, two from each state without regard to population, and elected to terms of six years. The House of Representatives is composed of 435 members, apportioned by population of the 50 states, and elected every two years. Each house is governed separately by its own rules of procedure, practices and traditions. Ct. Amica does not — and indeed cannot — point to anything in the Constitution dictating that Article III standing principles require the two houses to act jointly. To the contrary, "the authors of the Constitution divided [certain] functions between the two Houses based in part on their perceptions of the

differing characteristics of the entities."[14] Munoz-Flores, 495 U.S. at 395.

The only reason offered by Ct. Amica in support of its position that the houses must be united before they can defend DOMA is that "[t]o hold otherwise would make congressional interventions far more likely anytime the Executive declines to defend" the constitutionality of a statute, and "thereby [to] increas[e] the risks of federal courts being called on to mediate what might be partisan disagreements between elected public officials." Ct. Amica Br., p. 16. If that were to occur, the federal courts would have any number of weapons in their judicial arsenal to stay above any strictly political fray, not the least of which is the justiciability of the issues presented to it. *See, e.g.,* United States v. Lovett, 328 U.S. 303, 313 (1979).

G. The House of Representatives Has a Specific Interest in Protecting its Power over Origination of Revenue Raising Bills.

Additionally, the House of Representatives has a particular institutional interest, distinct from the

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[14] Additionally, the House and the Senate have different roles in checking and balancing the exercise of executive power. While the Senate has the power to withhold its consent from a presidential appointment, the House plays no role in the appointment process. *See* Article II, Section 2, Clause 2. While the Senate gave its consent to President Obama's appointment of Eric Holder as Attorney General, the House had no similar opportunity to assess Mr. Holder's suitability to the office. The House, therefore, may have less inhibition to check the Attorney General's decision not to defend the constitutionality of DOMA.

Senate, that provides an additional reason for finding that BLAG has Article III standing in this case. Windsor seeks a refund of estate taxes paid, based upon a claim of unconstitutionality that, if sustained, would have a substantial impact not only upon the revenues raised from taxable decedent estates, but also on other taxes levied according to the Internal Revenue Code. Not only does Article 1, Section 7, Clause 1 require that "[a]ll bills for raising revenue shall originate in the House of Representatives," but it is the prerogative of the House to "refus[e] to pass a bill if it believes that the Origination Clause has been violated." *See* Munoz-Flores, 495 U.S. at 392. And it is also the House's prerogative to decide whether a bill that raises revenue is of the kind that must originate in the House. *See id.* at 395-401. Thus, the application of DOMA Section 3 in this case, and in the array of tax and benefit programs, will impact the House of Representatives in a way different from the Senate, the House being "more accountable to the people [in performing its] primary role in raising revenue." *Id.* at 395.

II. THE VESTING OF THE EXECUTIVE POWER IN THE PRESIDENT DOES NOT PRECLUDE BLAG FROM HAVING ARTICLE III STANDING.

Notwithstanding these Article I interests, implicating separation of powers among the three branches and within the legislative branch, itself, Ct. Amica insists that it would be a usurpation of "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'" if

this Court holds that BLAG has Article III standing. Ct. Amica Br., p. 15 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992). Ct. Amica argues that Article II, Section 3 of the Constitution vests solely in the President the "decision[] not to defend a law based on determinations of its unconstitutionality." *Id.*, p. 15. If true, then neither the House, nor the Senate, nor both together, could ever have Article III standing to defend the constitutionality of a statute that, in his unlimited discretion, the President deems to be unconstitutional. Ct. Amica misconstrues the Take Care Clause.

First, Ct. Amica implicitly assumes that the Take Care Clause is a grant of all of the power that the executive has to enforce the law. It is not. After all, Article II, Section 1 vests in the President alone "the executive Power," which standing alone would have conferred upon the President the complete power over the execution of the law. Instead, the Take Care Clause operates as a limitation on the President's discretionary executive power, imposing upon him a specific and concrete duty to "take Care that the Laws be faithfully executed." Indeed, the Take Care Clause appears in Section 3 of Article II, which specifies a number of duties of the presidential office that would otherwise have been left to his sole discretion as the Constitution's single executive officer.

Second, "[t]he history of the clause in the Constitutional Convention reinforces the conclusion that [the Take Care Clause] was designed to serve as a limitation on executive power." *See* Christopher N. May, Presidential Defiance of "Unconstitutional"

Laws, p. 17 (Greenwood Press: 1998) (hereinafter "May, Defiance"). Prompted by James Madison's observation that, whether the executive be "a unity or a plurality," it was necessary to "fix the extent of the Executive authority,"[15] the convention approved the Take Care Clause in its present form. *See* May, Defiance, p. 17.

Third, the Take Care Clause cannot be understood without reference to the 1689 English Bill of Rights, which proclaimed that "the pretended power of suspending of laws [and] dispensing with laws ... by regal authority ... is illegal." English Bill of Rights, Sections 1 and 2, reprinted in 4 Founders', Item 1, p. 123. Thus, the first two factual findings in the Declaration of Independence charged King George III with illegally interfering in the legislative process by withholding "his assent to laws most wholesome and necessary for the public good" and "suspend[ing] their operation till his assent should be obtained...." Declaration of Independence, reprinted in Sources of Our Liberties, pp. 319-320 (R. Perry & J. Cooper, eds., ABA Found., Rev. Ed.: 1978).

Fourth, the Take Care Clause must be read in conjunction with Article I, Section 7, Clause 2, which vests in the President a circumscribed veto power, which can only be exercised within a 10 day period (Sundays excepted) after presentment of a bill passed by both houses for the President's signature. It was only within that window of time that the President

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[15] Records of the Federal Convention, reprinted in 4 The Founders' Constitution, Item 5, p. 124.

was authorized to object to a law on constitutional grounds. Otherwise, he would violate his duty to take care that the laws be faithfully executed:

> No one [at the constitutional convention] proposed giving the president a suspending power in *addition* to the qualified veto, for this would have rendered the veto utterly superfluous. As the framers well knew, the royal prerogative of suspending the laws closely resembled an absolute veto. If they understood the executive to possess a suspending power, there would have been no point in giving a qualified veto; for if Congress passed a law over the president's veto, he would then be free to suspend the measure. [May, Defiance, pp. 12-13.]

Instead of usurping the President's executive powers, BLAG is exercising its authority to check the Executive Branch's effort to, in effect, exercise legislative power to repeal DOMA Section 3. Under Article II, Section 3, the President may only "recommend[] to [Congress'] Consideration such Measures as he shall judge necessary and expedient." As St. George Tucker has so acutely observed, "this power of recommending any subject to the consideration of congress, carries no obligation with it":

> It stands precisely on the same footing, as a message from the king of England to parliament; proposing a subject for deliberation, not pointing out the mode of

> doing the thing which it recommends. [St. George Tucker, View of the Constitution of the United States, p. 281 (Liberty Fund: 1999).]

Instead of bringing his views about the constitutionality of DOMA Section 3 to Congress, as provided in the Constitution, the President has bypassed the legislative branch, confessing constitutional error in the courts. *See* Statement of the Attorney General on Litigation Involving the Defense of Marriage Act ("A.G. DOMA Statement") (Feb. 23, 2011).[16] And now, should this Court find that there is no case or controversy and no Article III standing, the President would bypass the judicial branch, deciding for himself that DOMA Section 3 is not the Supreme law of the land because it is not, in his unilateral opinion, enacted pursuant to the Constitution.

But the American constitutional republic is founded on a tripartite system of separated powers, and checks and balances. The Executive Branch may not unilaterally and exclusively decide the constitutionality of a statute after it has become law, to circumvent the Supreme Court passing judgment on that law in accordance with the powers vested in it by Article III, Section 2. It is not for the President to "say what the law is." Rather, that is the province of the judicial branch. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803). While the judiciary may be dependent upon the "executive arm ... for the efficacy of its

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[16] http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

judgments" (Federalist No. 78), it is not within the scope of executive power to evade altogether the judiciary's judgment by refusing to defend DOMA Section 3.

III. THE UNITED STATES IS THE REAL DEFENDANT PARTY IN INTEREST, PRESENTING A GENUINE CASE OR CONTROVERSY.

Ct. Amica argues that "[t]he United States' effort to obtain review of a decision with which it agrees presents no case or controversy." Ct. Amica Br., p. 28. But it is not the United States which has refused to defend DOMA, and it is not the United States which agrees with the decision of the Court of Appeals, as Ct. Amica asserts. *Id.*, pp. 23-24. Rather, it is simply the Executive Branch, as an agent of the United States, which has done so. The Executive Branch, by refusing to defend DOMA, is not speaking for the United States — which clearly has an interest in the validity of its statutes. Rather, the Executive Branch is stating that it declines to speak for the United States, requiring someone else to do so. *See* A.G. DOMA Statement.

To that end, the clear second choice to defend DOMA is the lawmaking branch — Congress — also an agent of the United States. *See id.* Ct. Amica argues that Congress must possess a "'concrete,' 'personal injury.'" Ct. Amica Br., p. 8. However, in this case, the House need not demonstrate that it has any special interest, or Article III standing. By defending DOMA, Congress is not seeking to vindicate its interests, but rather is advocating the interests of

the United States, just as the Executive Branch had done previously. The House is not acting on its own as an intervenor-defendant, but rather as the defendant, for the United States. The House is not seeking to add or interject its own interests into the case, but rather to step into the shoes of the Executive Branch and defend the United States' interests which are already involved in the case.

The United States of America is still the defendant in this case in both name and reality. The principal change is which lawyers are representing the United States — those of the House of Representatives' or those of the Executive Branch. There is no need to show any special or additional interest in the case, since the United States' interest in the case is obvious.

Ct. Amica argues that the executive's only reason for continuing to litigate the case is to "obtain[] a precedent from a higher court." Ct. Amica Br., p. 29. Nothing could be further from the truth. While the Executive was victorious on the merits in both courts below, it retained its position as the attorney of record to ensure BLAG's continued position as intervenor-defendant, as the Attorney General had represented that he would do.[17] *See* A.G. DOMA Statement, *supra.*

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[17] A more appropriate method to ensure that the interests of the United States were protected in such a circumstance is specifically authorized by law. Pursuant to 28 U.S.C. Section 515, the Attorney General should have appointed a special counsel to represent the United States, instructing him to defend the constitutionality of DOMA Section 3, in recognition that there were reasonable arguments to be made in support of its constitutionality.

Both the Executive Branch and the House agree that Congress is competent, and the House is willing, to step into the shoes of the Executive and defend DOMA and the interests of the United States.

Even though the Executive Branch in essence confessed error on the merits, it continued to contest the payment of any judgment. This is not, therefore, a case where the Executive Branch has "settled" a case to the satisfaction of both parties, as Ct. Amica contends. Ct. Amica Br., pp. 31-32. Indeed, Ms. Windsor has asserted that, until she is paid the tax refund for which she has sued, she will not be satisfied. Windsor Juris. Br., pp. 10, 13. As Ct. Amica points out, the Attorney General's notification to Congress that the President would no longer defend DOMA Section 3 in court also advised "'that the Executive Branch would continue to enforce DOMA ... unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality.'" Ct. Amica Br., p. 2. More remarkably, Ct. Amica noted that the Government's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), to enforce a regulation that the Government agreed to be invalid did not divest this Court of jurisdiction. *See id.* at 28, n.16. As the Court explained in I.N.S. v. Chadha, 462 U.S. 919 (1983):

> Even though the Government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party. [*Id.* at 939, n. 12.]

IV. BOTH CHADHA AND LOVETT SUPPORT JURISDICTION IN THIS CASE.

Ct. Amica has acknowledged that there are two cases in which this Court "exercised jurisdiction to decide the constitutionality of a federal statute that the Executive refused to defend, where that Branch appealed from a lower court judgment with which it agreed." Ct. Amica Br., p. 25. Ct. Amica argues that neither decision supports court jurisdiction here. *Id.*, p. 24.

Ct. Amica argues that Chadha is inapplicable here because the Court's determination of jurisdiction in that case was based solely on 28 U.S.C. Section 1252, which provided for mandatory jurisdiction when the requirements of the statute were met. Ct. Amica Br., p. 36.[18]

However, Ct. Amica appears to recognize that "'[even if a party] has statutory authority to seek review in this Court, [it] may not have Art. III standing,'" meaning that a party must have both statutory and constitutional authority to appeal. Ct. Amica Br., p. 26, n.13. Of course this is so, since Congress does not have the prerogative to override Article III's standing requirements. Review can be mandatory, such as the former 28 U.S.C. Section 1252, or review can be discretionary, such as provided by 28 U.S.C. Section 1254. However, a court must still make

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[18] Ct. Amica notes that, in 1988, Congress repealed Section 1252, leaving only 28 U.S.C. Section 1254, which provides for discretionary jurisdiction. *Id.*

the determination that a case presents a genuine Article III case or controversy. Otherwise, a court would be issuing nothing more than an advisory opinion.

Ct. Amica argues that, in Chadha, "the Court spoke only in statutory terms" and that "the Court carefully avoided addressing ... Article III standing...." Ct. Amica Br., p. 26. Thus, Ct. Amica's argument appears to dismiss Chadha, arguing that it stands for the improper rule that if a party has "statutory authority" to bring a petition, it need not have Article III standing. Yet Ct. Amica never bothers to say that Chadha was wrongly decided, and that it should be ignored or overruled.

On the contrary, the Chadha Court clearly considered Article III requirements independent of Section 1252, and determined that the dispute therein presented a case or controversy. In Chadha, the Court recognized the necessity of statutory and constitutional authority, stating that "[i]n addition to meeting the statutory requisites ... an appeal must present a justiciable case or controversy under Art. III." *Id.* at 931 n.6. The Court found that "[s]uch a controversy clearly exists ... because of the presence of the two Houses of Congress as adverse parties." *Id.* at 939. The Court held that Congress "is both a proper party [under Article III] and a proper petitioner under [Section] 1254." The Court then stated that "[w]e have long held that Congress is the proper party to defend the validity of a statute when [the executive] agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940.

United States v. Lovett, 328 U.S. 303 (1946), is almost procedurally identical to this case. In Lovett, "President Roosevelt signed the Act ... but ... he had done so reluctantly because he believed Section 304 to be 'not only unwise and discriminatory, but unconstitutional....'" Lovett Petition for Certiorari (Supreme Court Docket No. 809), p. 5. Then, "the Attorney General advised Congress that he concurred in the President's opinion ... that Section 304 ... was unconstitutional, that he found it 'impossible to advocate with conviction the views of the Congress', and that in the circumstances he felt 'that the Congress should be afforded an opportunity to be represented by their own counsel.'" *Id.* at 6. Counsel was then appointed, and "appeared in the Court of Claims as amici curiae...." *Id.* After the Court of Claims found Section 304 unconstitutional, the United States filed a petition for certiorari in the Supreme Court. The petition stated "we have been requested by the Special Counsel appointed by the subcommittee ... to file this petition for certiorari so that the question ... may be brought to this Court." *Id.* at 9.

Ct. Amica would have this Court ignore Lovett on the ground that the "question of justiciability relating to the parties" was not addressed, and because the issue is one of jurisdiction, Lovett has no "'precedential effect.'" Ct. Amica Br., p. 25. However, the Lovett Court addressed the question of the justiciability of the core issue whether the challenged statute was "simply an exercise of congressional powers over appropriations, ... not subject to judicial review," or "a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process"

punitively terminating three individuals of "continued employment" by the United States government. *Id.* at 306-07. By implication, resolving the justiciability of the issues was tantamount to resolving whether the plaintiffs had presented an individual grievance redressable by a court in a concrete case or controversy. Had there been a serious question of party standing independent of the jusiticiability of the issue, dissenting Justice Frankfurter would surely have raised it. *See* Windsor Juris. Br., p. 18, n.6.

V. VESTING LEGISLATIVE POWERS IN CONGRESS DOES NOT FORECLOSE BLAG FROM HAVING ARTICLE III STANDING.

While both BLAG and the Solicitor General agree that both Chadha and Lovett support BLAG's participation in this case, the Solicitor General contends that neither case supports BLAG's intervention as a party representing the United States. Indeed, Solicitor General devotes his entire Argument II.C. to persuade this Court that Chadha does not establish BLAG's standing to appeal. *See* Brief of the United States on the Jurisdictional Questions ("S.G. Br."), pp. 34-37. Rather, as was true in Chadha so here, the Solicitor General maintains that BLAG may participate in defending a statute which the Executive Branch "has declined to defend," but only in "an amicus-type role [to ensure] that both sides of the constitutional questions will be before the court." S.G. Br. at 34. According to the Solicitor General, BLAG must be relegated to amicus status because "[i]n the federal system, the authority to assert in litigation the sovereign's interest in the constitutionality of its laws

belongs to the Executive Branch alone." S.G. Br. at 8. Because the Solicitor General's constitutional premise is wrong, so is his objection to BLAG's Article III standing.

Relying almost entirely upon phrases cherry-picked from Buckley v. Valeo, 424 U.S. 1 (1976), the Solicitor General correctly points out that the legislative power vested in Congress by Article I, Section 1 does not include the power "to enforce [laws made by Congress] or appoint the agents charged with the duty of such enforcement." S.G. Br., p. 28. But BLAG's entry into this litigation is not pursuant to any law creating an agency of enforcement populated by officers appointed by Congress, such as in Buckley. Therefore, unlike Buckley, there is no question whether the members of BLAG have been appointed by the House "enforce" DOMA Section 3 in violation of Article II, Section 2, Clause 2, the president's appointment power. To the contrary, the Attorney General announced on February 23, 2011, before BLAG intervened in the district court below, that he had "informed Members of Congress of [the Obama administration's] decision, so Members who wish to **defend** the statute may pursue that option." A.G. DOMA Statement, *supra* (emphasis added).

By its entry, pursuant to F.R.Civ.P. Rule 24((a)(2), BLAG did not seek to take over the enforcement of DOMA Section 3, but intervened "to protect its interest" in maintaining the constitutionality of that statute that, without question, was being impaired and impeded by the failure of the Department of Justice to "adequately represent that interest." As BLAG's Brief

on Jurisdiction states, "[t]he House is not asking this Court to compel the executive to enforce DOMA Section 3." BLAG Juris. Br., p. 23. Rather, it is utilizing the rules of judicial procedure available to it to defend the interests of the United States in upholding the constitutionality of a federal statute governing the laying and collecting of taxes, in which, and among other matters, Congress and the House have an interest. *See* Arguments I.D through I.G. *supra*.

The Solicitor General, however, insists that the "full sovereign interests" of the United States are being protected by the Department of Justice which has "invoked both the court of appeals' and this Court's jurisdiction." S.G. Br. at 7. It is difficult to believe that the "full sovereign interests" of the United States are being protected by an Attorney General who has publically announced that the Department of Justice has decided not only to cease defending the constitutionality of DOMA Section 3, but to wage a relentless attack upon it on the ground that no "reasonable arguments can be made in its defense." *See* A.G. DOMA Statement. As BLAG highlights in its brief, "the Department did not merely bow out of DOMA litigation[,] it immediately and consistently attacked DOMA in court." BLAG Juris. Br., p. 4.

The Solicitor General, nevertheless, now argues that only the Department of Justice is ensconced by the Constitution in the "exclusive role in representing the United States' interests." S.G. Br. at 8. He urges that BLAG can only participate as *amicus curiae*, whose role, as defined by Rule 37.1 of the Rules of this

Court, to submit a "brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties." Additionally, Rule 37.1 provides that an amicus brief that "does not serve this purpose burdens the Court, and its filing is not favored." Relegating BLAG to amicus status would send the message that BLAG's interest is no different from the thirty other "interest groups"[19] which have filed such briefs in this case.

But BLAG's participation in this litigation is not that of an interest group, nor did it enter in this litigation on an *amicus curiae* basis. Rather, it qualified as an intervenor defendant of right under F.R.Civ.P. Rule 24(a)(2). Thus, its interests as one of the three branches of government in the constitutionality of DOMA Section 3 are not comparable to those of an *amicus*. While the Solicitor General places the Legislative and the Executive Branches into two tightly closed categories, the Constitution does not. Rather, as this Court recognized in Buckley, "[t]he men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics who ... saw that a hermetic sealing off of the three branches ... would preclude the establishment of a Nation capable of governing itself effectively." *Id.*, 424 U.S. at 121.

Thus, the framers set up a system of "checks and balances ... as a self-executing safeguard against the

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[19] *See* J. Kearner and T. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," 148 *U. Pa. L. Rev.* 743, 746-47 (1999-2000).

encroachment or aggrandizement of one branch at the expense of the other." *Id.*, 424 U.S. at 122. To be sure, as the Solicitor General has asserted, this Court once stated that "'no counsel will be heard for the United States in opposition to the views of the Attorney General,'"[20] but the Solicitor General failed to acknowledge that the Court reached that conclusion only "in pursuance of an act of Congress,"[21] not pursuant to the Take Care Clause upon which the Solicitor General has relied.[22] As established in Section II above, the Take Care Clause is a limit on the Executive power that would otherwise have been vested in the President by Article II, Section 1.

What the Solicitor General is really seeking is a return to an Executive department clothed with the "formidable prerogative powers once wielded by the British Crown ... whereunder the kings and queens of England routinely suspended or dispensed with laws, often on the ground that a law was unconstitutional." May, Defiance, p. 3. Unlike 17th century England, the "full sovereignty" of the United States is not wrapped up in the person of the President. Nor is the constitutionality of DOMA Section 3 to be determined solely by him through confession of error. Rather, it is a matter requiring the attention of all three branches of the federal government, including the United States House of Representatives. The President certainly has

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[20] *See* S.G. Br. at 29.

[21] *See* Confiscation Cases, 74 U.S. 454, 458 (1868).

[22] *See* S.G. Br. at 28.

no prerogative power to claim that he is the sole repository of the nation's sovereignty.

CONCLUSION

For the reasons stated, this Court should recognize that BLAG has standing to defend the United States and DOMA Section 3, and that this Court has jurisdiction because there is a genuine case or controversy.

Respectfully submitted,

MICHAEL BOOS
General Counsel
CITIZENS UNITED
1006 Penn. Ave., S.E.
Washington, DC 20003
(202) 547-5420
Attorney for Citizens United and Citizens United Foundation
**Counsel of Record*
March 1, 2013

HERBERT W. TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae