Nos. 12-15388 & 12-15409 (Consolidated)

United States Court of Appeals for the Ninth Circuit

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the U.S. Office of Personnel Management, in his official capacity,
Defendants

&
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the U.S. Office of Personnel Management, in his official capacity,
Defendants-Appellants,

&
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

On Appeal from the United States District Court
for the Northern District of California

AMICI CURIAE BRIEF OF FORMER ATTORNEYS GENERAL EDWIN MEESE III AND JOHN ASHCROFT IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND REVERSAL

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
American Center for Law & Justice
201 Maryland Ave., NE
Washington, DC 20002
Phone: (202) 546-8890
Fax: (202) 546-9309

CeCe Heil*
Robert W. Ash
Erik Zimmerman*
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, VA 23464
Phone: (757) 226-2489
Fax: (757) 226-2836

Counsel for Amici

* - Not admitted to this Court's bar

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INTEREST OF AMICI

All parties have consented to the filing of this brief.[1]

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.

The amici submit this brief because they are deeply concerned that the precedent that the Department of Justice set by failing to defend the Defense of Marriage Act in this and other litigation may have a negative impact upon the judicial process and the separation of powers set forth in the Constitution.

SUMMARY OF ARGUMENT

> 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. It is generally inconsistent with the Executive's duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions which have the practical effect of nullifying an Act of Congress. It is also generally for the courts, and not the Executive, finally to decide whether a law is constitutional. Any action of the President which precludes, or

[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person, other than amici or their counsel, contributed money that was intended to fund preparing or submitting this brief.

> 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.

Theodore B. Olson, *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 *27-28 (1984).

The decision by President Obama and Attorney General Holder to instruct the Department of Justice ("DOJ") to no longer defend the Defense of Marriage Act ("DOMA") after fifteen years of doing so, and to affirmatively challenge 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 as a class should be subject to strict scrutiny, despite "substantial circuit court authority applying rational basis review" in such situations. Attorney General Eric Holder, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, at 1, Feb. 23, 2011 (hereafter "DOMA letter") (attached as Exhibit A). 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.* at 2. 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. . . . This is the rare case where the proper course is to forgo the defense of this statute.[2]

The administration's change of position marks an unprecedented and ill-advised departure from over two centuries of Executive Branch practice. Historically, the President's constitutional 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 in court. In light of the President's oath to "preserve, protect, and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 7, two narrow exceptions have been recognized for instances in which a federal law either infringes upon the President's constitutional authority or is patently unconstitutional, leaving no room for reasonable arguments. Litigation challenging DOMA does not fall within either of these narrow categories (even under the Attorney General's reading of the statute).

Various Attorney General and Office of Legal Counsel opinions have explained that taking an unduly broad view of the President's limited authority to disregard, challenge, or fail to defend federal statutes—as the Executive Branch has now taken with respect to DOMA—fails to afford due respect to Congress and threatens to undermine the proper functioning of the judicial process. *See also Lear*

[2] *Id.* The letter also relied upon a law review article by former Solicitor General Seth Waxman which is discussed in Section I.E, *infra*.

Siegler, Inc., Energy Prods. Division v. Lehman, 842 F.2d 1102, 1121 (9th Cir. 1988)[3] (concluding that the view that the President may disregard laws that he considers to be constitutional is "utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent"). The anomalous nature of the DOMA letter reflects a transparently political decision in one instance—not an official change in Executive Branch policy that would be constitutionally suspect—and, as such, DOJ's brief carries less persuasive weight than a typical DOJ brief.

ARGUMENT

I. The Longstanding Historical Practice of the Executive Branch Has Been to Defend Federal Laws Against Constitutional Attack Unless They Infringe Upon the President's Constitutional Authority or Are Patently Unconstitutional.

Justice Holmes's observation that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), is particularly relevant in examining the propriety of the Executive Branch decision to challenge DOMA's constitutionality. As the following section explains, history illustrates that an Executive Branch challenge in litigation of a statute that does not raise separation of powers concerns, and for which the Executive Branch admits reasonable arguments may be made, is unprecedented.

[3] *Withdrawn in part on other grounds by* 893 F.2d 205 (9th Cir. 1989) (en banc).

A. The Founding Era to President Wilson

Loyola Law School Professor Christopher N. May has explained:

> The argument that a President may refuse to enforce laws he believes to be unconstitutional is but a reincarnation of the claimed royal prerogative of suspending the laws which was abolished by England by the Bill of Rights of 1689. . . . *[T]he Founders did not intend the President to possess a power to suspend laws that he might think unconstitutional*.

Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 893, 977 (1994) (citations omitted) (emphasis added).

Although James Wilson, one of the Constitution's authors, once stated 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," Statement of James Wilson on the Adoption of the Federal Constitution (Dec. 1, 1787),[4] the quote does not support a broad Presidential authority to disregard provisions that he believes are unconstitutional in all situations. To the contrary, the quote was 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*, *id.*, and is irrelevant in situations, like the present case, that do not implicate those core constitutional principles.

[4] *Available at* http://www.constitution.org/rc/rat_pa.htm (emphasis added).

Perhaps the earliest example of a President refusing to defend an Act of Congress gave rise to the Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and was based upon the separation of powers.

> President Jefferson was strongly of the view that Congress had no power to give the Supreme Court (or any other court) authority to control executive officers through the issuance of writs of mandamus. When Mr. Marbury and the other "midnight judges" initiated an original action in the Supreme Court to compel delivery of their commissions, President Jefferson's Attorney General, Levi Lincoln, made no appearance in the case except as a reluctant witness. No attorney appeared on behalf of Secretary Madison.

Benjamin R. Civiletti, *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att'y Gen. 275, 4 Op. O.L.C. (Vol. A) 55, 1980 OLC LEXIS 8, at *15-16 (1980) (citations omitted).

In 1838, the Supreme Court rejected the argument that the President has broad authority to direct Executive Branch employees to ignore a federal statute: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838); *see also United States v. Smith*, 27 F. Cas. 1192, 1229-30 (Cir. Ct. D.N.Y. 1806) (reaching a similar conclusion); Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 Ohio St. L.J. 51, 72 (1979) (stating that the

Take Care Clause "does not give the Chief Executive a selective item veto over the laws he is to execute. Execution means enforcement and defense.").

Two of the earliest Attorney General opinions to address the propriety of Executive Branch determinations of a law's constitutionality were issued under President Buchanan. They illustrate the key distinction, recognized to this day, between laws that raise separation of powers concerns and laws that do not. *Compare* Jeremiah S. Black, *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 1860 U.S. AG LEXIS 23, at *12-13 (1860) (concluding that the President may treat a funding condition that interfered with his control of a military officer "as if the paper on which it is written were blank") *with* Jeremiah S. Black, *The Fox and Wisconsin River Reservation*, 9 Op. Att'y Gen. 346, 1859 U.S. AG LEXIS 33, at *4 (1859) (concluding with respect to a statute that did not raise separation of powers concerns that "[a]n executive officer cannot pronounce [it] void").

President Andrew Johnson's impeachment trial reaffirmed the controversial nature of a Presidential decision to treat a federal law as if it were unconstitutional. In 1867, President Johnson removed his Secretary of War in violation of the Tenure in Office Act, which he considered to violate his appointment authority. A House member in favor of impeachment 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."

Theodore B. Olson, *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) (citation omitted).[5]

A 1919 Attorney General opinion emphasized the Attorney General's obligation to defend federal laws that do not implicate the separation of powers:

> Ordinarily, I would be content to say that it 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—and that when an act . . . is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.

A. Mitchell Palmer, *Income Tax: Salaries of President and Federal Judges*, 31 Op. Att'y Gen. 475, 1919 U.S. AG LEXIS 50, at *2, 25-26 (1919).

In sum, the Executive Branch did not affirmatively attack the constitutionality of a federal law in litigation during the first 130 years after the

[5] The Supreme Court eventually held that the Tenure of Office Act was unconstitutional. *Myers v. United States*, 272 U.S. 52, 176 (1926).

ratification of the Constitution, and the rare decisions to not defend or enforce a federal law involved the separation of powers or federalism.

B. President Coolidge to President Eisenhower

The Coolidge administration featured the first case in which DOJ attacked the constitutionality of a federal law in court. Olson, 1984 OLC LEXIS 42, at *35-36. *Myers v. United States*, 272 U.S. 52 (1926), arose out of President Wilson's refusal to comply with a 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 United States Senator appeared as an amicus curiae to argue that the statute was constitutional. Civiletti, 1980 OLC LEXIS 8, at *11-12. The Supreme Court held that the provision was unconstitutional. 272 U.S. at 176. *Myers* does not provide support for an Executive Branch challenge to a federal law, like DOMA, that does not implicate the separation of powers. *See, e.g.*, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 977 n.27 (1983) ("Many commentators have expressed the opinion that the Attorney General must assume the constitutionality of all statutes, at least where the separation of powers presents no difficulties.").

Nine years later, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Solicitor General argued, unsuccessfully, that a removal limitation in

the Federal Trade Commission Act violated the President's constitutional authority. That same year, an Attorney General opinion advised that executive officers may not disregard a federal statute based upon a circuit court decision:

> To accept a decision upon a constitutional question in one circuit and give it Nationwide application with the effect of setting aside a congressional enactment of major importance would be without precedent, insofar as I am aware, and might even raise a grave question of possible dereliction of duty on the part of the officers charged with the administration of the statute and the conduct of the litigation involving it.

Homer Cummings, *Duty of Disbursing Officers to Make Disbursements Required Under the Agricultural Adjustment Act*, 38 Op. Att'y Gen. 252, 1935 U.S. AG LEXIS 27, at *8-12 (1935); *see also* Charles Devens, *Military Prisons: Court-Martial Jurisdiction*, 16 Op. Att'y Gen. 292, 1879 U.S. AG LEXIS 57, at *6 (1879) (reaching a similar conclusion). This principle remains important in the many instances in which federal courts of appeal reach different conclusions about the constitutionality of federal laws.

A 1937 Attorney General opinion reiterated that it was rare for the Attorney General to express the view that a federal statute was unconstitutional:

> Save in exceptional cases it has been the practice of Attorneys General to refrain from rendering opinions as to the constitutionality of enactments of the Congress. . . .
>
> 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 . . . while in effect voicing only a personal view that might ultimately be rejected by the courts.

Homer Cummings, *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 *2, 7-9 (1937).

In 1943, President Roosevelt initiated a controversy by raising 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." *United States v. Lovett*, 328 U.S. 303, 313 (1946).

> 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.

Civiletti, 1980 OLC LEXIS 8, at *17-18. The Supreme Court held that the provision was an unconstitutional bill of attainder. 328 U.S. at 318. The Office of Legal Counsel has described *Lovett* as a separation of powers case. *See, e.g.*, Olson, 1984 OLC LEXIS 42, at *37, n.5.

President Truman's seizure of steel plants during the Korean War prompted the Supreme Court to address the President's limited authority to act contrary to a federal statute. Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), explained:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he

> can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (Jackson, J., concurring).

Several years later, President Eisenhower removed a member of the War Claims Commission despite a statutory directive that members would serve as long as the Commission existed. The Solicitor General argued that the provision violated the President's appointment power, but the Court held that the provision was constitutional. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

In sum, from the ratification of the Constitution through the 1950s, DOJ rarely argued in litigation that a federal law was unconstitutional, and never did so in a case that did not involve the separation of powers.

C. President Kennedy to President Carter

The first case in which the Executive Branch argued in litigation that a federal law that did not implicate the separation of powers was unconstitutional was *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963). *See* Olson, 1984 OLC LEXIS 42, at *30, n.2. DOJ intervened in a lawsuit that alleged that hospitals that received federal funding and that provided "separate but equal" services to African-Americans violated equal protection. The previous year, in *Bailey v. Patterson*, 369 U.S. 31 (1962), the Supreme 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 noted that the government's intervention to argue against the constitutionality of a federal statute was "unusual[]," 323 F.2d at 962, and held that the hospitals had violated the Constitution. *Id.* at 967-70. *Simkins*, however, does not support the DOJ 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 at 1-2.

The Nixon administration featured a prime example of the Executive Branch defending a federal law despite the President's doubts about its constitutionality. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Solicitor General defended the constitutionality of a provision of the Voting Rights Act Amendments of 1970 that lowered the minimum voting age to eighteen despite previous public statements by President Nixon and the Attorney General questioning its constitutionality. *Executive Discretion*, 92 Yale L.J. at 982, n.40. Two years later, in *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y. 1972), the court stated that a Presidential signing statement that declared that a provision of a statute was not binding upon the

Executive Branch had no effect, as the statute effectively "illegalized the pursuit of an inconsistent executive or administration policy." *Id.* at 146.

The longstanding Executive Branch practice concerning the defense of federal laws was reaffirmed under President Ford. In 1976, Assistant Attorney General Rex Lee stated in Senate testimony:

> The defense of statutes attacked on constitutional grounds is an important part of the Justice Department's work. There are essentially two situations in which the Department will not defend the constitutionality of a statute. The first situation involves those cases in which upholding the statute would have the effect of limiting the President's constitutional powers or prerogatives. . . .
>
> The second situation . . . involves cases where the Attorney General believes . . . that a law is so patently unconstitutional that it cannot be defended. Such a situation is thankfully most rare.

Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 500 (1994) (quoting 94th Cong. 10 (1976)).[6] As noted previously, even under the Attorney General's reading of the law, DOMA is not patently unconstitutional.

In 1979, the Carter administration attacked a patently unconstitutional provision requiring the Army to sell surplus arms at cost only to NRA members as part of a marksmanship program. *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979). Unlike the present litigation, DOJ determined that reasonable arguments

[6] DOJ's argument in *Buckley v. Valeo*, 424 U.S. 1 (1976), that congressional appointments to the FEC violated the Appointments Clause fell within the first category.

could not be advanced to defend the statute, and Congress declined to defend it. The court concluded that the provision was clearly unconstitutional and stated:

> It is reasonable to assume that the Executive Branch and the Congress would not have failed to defend the instant law against constitutional attack without the weightiest of reasons, that is, because they or at a minimum the Executive were convinced that a reasonable argument in support of constitutionality could not be made.

Id. at 1043-44. This gives further support to the longstanding Executive Branch recognition that the failure to defend a federal law should be exceedingly rare.

The following year, an Attorney General opinion highlighted the deleterious effects of executive non-defense of federal laws:

> [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.

Benjamin R. Civiletti, *Constitutionality of Congress' Disapproval of Agency Regulations By Resolutions Not Presented to the President*, 4 Op. O.L.C. (Vol. A) 21, 43 Op. Att'y Gen. 231, 1980 OLC LEXIS 6, at *19-20 (1980).

The decision to challenge DOMA's constitutionality despite the existence of reasonable arguments in its defense, and "substantial circuit court authority" against the government's position, DOMA letter at 1-2, stands in stark contrast to a June 1980 Office of Legal Counsel opinion concerning a law raising Appointments Clause issues that stated, "[w]e think that an additional, plausible argument could

be made that would permit a court to uphold the statute. Given the Department's duty to defend the constitutionality of statutes except in exceptional circumstances, it may well be appropriate to bring this argument to the court's attention." Leon Ulman, *Constitutionality of Legislation Establishing the Cost Accounting Standards Board*, 4 Op. O.L.C. (Vol. B) 697, 1980 OLC LEXIS 75, at *3 (1980).

An additional 1980 Attorney General opinion further reiterated the duty to defend, stating, "when the Attorney General is confronted with [a possibly unconstitutional federal law], it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress." Civiletti, 1980 OLC LEXIS 8, at *2-3. The opinion noted that "almost all of the legal authority dealing with this question . . . deal[s] with separation of powers issues," which "is no accident." *Id.* at *4-5. The opinion also stated, "I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress." *Id.* at *10-11.

Under President Carter, DOJ declined to defend a provision of the Public Broadcasting Act of 1967 that prohibited noncommercial television stations from editorializing, endorsing, or opposing candidates for public office, asserting that no reasonable arguments could be advanced despite the "strong objection" of the

Office of Legal Counsel. Olson, 1984 OLC LEXIS 42, at *30, n.2. This drew criticism as reflecting an improper political decision:

> [T]he Executive clearly expanded the scope of his authority not to defend federal laws on constitutional grounds by declining to defend the statute. . . .
>
> This was . . . not a "clearly unconstitutional" statute for which a defense would conflict with the President's oath of office. Instead, the executive branch made a political decision and invited the court to invalidate the statute by presenting no arguments in its defense.

Executive Discretion, 92 Yale L.J. at 974-76. Under President Reagan, DOJ defended the provision, which the Supreme Court ultimately invalidated by a 5-4 vote. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

The Carter administration's conclusion that no reasonable arguments could be advanced in *League of Women Voters* is markedly different than Attorney General Holder's admission that reasonable arguments supporting DOMA can be offered, and that "there is substantial circuit court authority applying rational basis review to sexual-orientation classifications." *See* DOMA letter at 1-2. *League of Women Voters* also demonstrates that shifting positions from one administration to the next (or during one administration) concerning the defense of federal laws that do not implicate the separation of powers undermines DOJ's credibility and

illustrates the wisdom of the longstanding practice of defending laws, such as DOMA, for which reasonable arguments can be made.[7]

In sum, "[f]rom 1787 to 1974, the Department of Justice failed to defend the constitutionality of a statute in only four instances." Miller & Bowman, 40 Ohio St. L.J. at 55. Executive Branch policy and practice in the 1960s and 1970s recognized two rare exceptions to the general rule that federal laws should be defended in court, neither of which applies to litigation concerning DOMA.

D. President Reagan

The Reagan administration further reaffirmed the duty of the Executive Branch to defend laws for which reasonable arguments can be made, at least when the separation of powers is not implicated. In April 1981, Attorney General William Smith stated, "the Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts." Letter from Attorney General Smith to Senators Thurmond and Biden (Apr. 6, 1981), *quoted in Executive Discretion*, 92 Yale L.J. at 976, n.21.

[7] *See also Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (DOJ asserted that liquor labeling and advertising provisions violated the First Amendment but later changed course and argued in favor of the provisions' constitutionality).

A 1984 Office of Legal Counsel opinion stated that "Attorneys General have generally construed [the obligation imposed by the Take Care Clause] to include the enforcement and the defense in court of laws enacted by Congress irrespective of questions which have been or might be raised regarding their constitutionality." Olson, 1984 OLC LEXIS 42, at *26. As such, "[t]he Executive's duty faithfully to execute the law . . . result[s] in all but the rarest of situations in the Executive's enforcing and defending laws enacted by Congress." *Id.* at *27-28. The opinion discussed the two exceptions to this general rule noted above. *Id.* at *29-31.

First, most instances in which the Executive Branch has declined to enforce (or has affirmatively challenged) federal statutes involved provisions that "usurp executive authority and therefore weaken the President's constitutional role." *Id.* at *31. Second, there is a "category of cases involv[ing] statutes believed by the Executive to be so clearly unconstitutional as to be indefensible but which do not trench on separation of powers. Refusals to execute or defend statutes based upon a determination that they meet these criteria are exceedingly rare." *Id.* at *29-30. The opinion's research "uncovered only three documented situations of this nature" in the previous two centuries of constitutional history: *Simkins*, *League of Women Voters*, and DOJ's decision in 1981 to not prosecute the mailing of non-deceptive

abortion advertisements. *Id.* at *30, n.2. As explained previously, this limited historical precedent does not support DOJ's decision to challenge DOMA.[8]

Consistent with past practice, President Reagan's DOJ attacked the constitutionality of provisions that were considered to violate the separation of powers. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986); *In re Benny*, 812 F.2d 1133 (9th Cir. 1986).

One of the strongest rebukes of an Executive Branch assertion of the authority to disregard a federal statute based on constitutional concerns comes from a 1988 panel decision from this Court. President Reagan signed the Competition in Contracting Act but objected to provisions that he believed gave a legislative officer executive power, and the Attorney General informed Congress that the Executive Branch would not implement the provisions. The panel opinion explained:

> [T]he government reasserts the position . . . [that] the President's duty to uphold the constitution and faithfully execute the laws empowers the President to *interpret* the Constitution and *disregard* laws he deems unconstitutional. Because we regard this position as utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent, we must reject the government's contention. . . .

[8] The exercise of prosecutorial discretion in criminal cases is not analogous to the non-defense of DOMA. In addition, *Gavett* appears to fall within this category as well but, as noted previously, provides no support for the DOMA letter.

> A more established practice of the executive branch is to decline to defend a challenged statute in court, although this, too, raises a constitutional issue. . . .
>
> To construe [the] duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the "take care" clause: "To 'execute' a statute . . . emphatically does not mean to kill it."

Lear Siegler, 842 F.2d at 1118-25;[9] *see also Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986) (similar litigation).

E. Presidents Bush, Clinton, and Bush

The three administrations that preceded the Obama administration continued to reaffirm DOJ's obligation to defend federal laws in circumstances like the present case. Concerning the proposition that the President may refuse to enforce a provision that he considers to be unconstitutional, a 1990 Office of Legal Counsel opinion "emphasize[d] . . . that there is little judicial authority concerning this question, and the position remains controversial." William P. Barr, *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 1990 OLC LEXIS 51, at *20 (1990). The opinion stated that, "at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws." *Id.* at *29-30; *see also Metro Broad., Inc.*

[9] This Court later concluded that the plaintiff was not a "prevailing party" and withdrew the section of the panel opinion dealing with attorneys fees, 893 F.2d 205, 208 (9th Cir. 1989) (en banc), but the panel's discussion of the Executive Branch's constitutional obligations maintains strong persuasive weight.

v. FCC, 497 U.S. 547 (1990) (the Solicitor General asserted that FCC minority ownership policies, which were insulated from Presidential amendment by statute, violated the Equal Protection Clause; there were separation of powers implications because Congress intended to make an agency independent of Presidential control); *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (DOJ argued that a law restricting the President's ability to keep national security information confidential violated the President's constitutional authority). Those instances are far different than the present litigation, which does not involve separation of powers concerns.

Additionally, a concurring opinion in *Freytag v. Commissioner*, 501 U.S. 868 (1991)—a case that considered whether a federal law violated the separation of powers—stated 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." *Id.* at 906 (Scalia, J., concurring). This quote provides no support for an Executive decision to fail to defend federal statutes where, as here, separation of powers concerns are not involved.

President George H.W. Bush refused to defend cable "must carry" provisions enacted over his veto, *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), but the Clinton administration defended the provisions.

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997). In 1994, Solicitor General Drew S. Days III explained that Executive Branch defense of federal laws for which reasonable arguments can be made serves important interests:

> Solicitors General have not risen to the defense of the acts of Congress in two situations. First, Solicitors General have always sided with the President in disputes over the constitutionality of congressional attempts to circumscribe presidential power. . . .
>
> Second, Solicitors General have not attempted to defend patently unconstitutional laws. . . . "The constitutionality of acts of Congress is to be defended in all cases, unless no professionally respectable argument can be made in defense of the statute." . . .
>
> [The traditional practice] fosters comity between the Executive and Legislative Branches in two important ways. First, . . . [it] ensures that the government speaks with one voice in the Supreme Court while at the same time reinforcing the Executive Branch's status as the litigating arm of the government. Second, the policy prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes.

Days, 83 Ky. L.J. at 499-500 & n.71, 502.

Consistent with past practice, the Clinton administration disregarded or failed to defend provisions that raised separation of powers concerns or were patently unconstitutional. *See, e.g., Dickerson v. United States*, 530 U.S. 428 (2000) (DOJ refused to defend a law that it believed was a patently unconstitutional attempt to legislatively overturn *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Hechinger v. Metro Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994) (DOJ argued that a provision violated the Appointments Clause). The

decision to challenge DOMA's constitutionality does not fit within either of these categories.

A 2001 article by former Solicitor General Seth Waxman—upon which Attorney General Holder's letter concerning DOMA relied—explains the importance of the DOJ's longstanding practice of defending federal statutes that do not raise separation of powers concerns:

> [T]he Department of Justice defends Acts of Congress in all but the rarest of cases. . . . [T]he Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality. . . .
>
> Vigorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. It ensures that proper respect is given to Congress's policy choices. It preserves for the courts their historic function of judicial review. . . . Solicitors General . . . do not attempt to reach our own best view of a statute's constitutionality; rather, they try to craft a defense of the law in a manner that can best explain the basis on which the political branches' presumed constitutional judgment must have been predicated.

Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1078, 1084-86 (2001).[10]

The Presidency of George W. Bush featured a prominent example of the Executive Branch defending an Act of Congress that did not impose separation of

[10] The article asserted that DOJ's arguments in *Metro Broadcasting* and *Turner Broadcasting* created a new exception for "cases in which it is manifest that the President has concluded that the statute is unconstitutional," *id.* at 1083-84, but those cases were part of the larger struggle between Congress and the President over control of "independent" agencies and, in any event, the relevant Attorney General and Office of Legal Counsel opinions do not recognize such an exception.

powers concerns despite the President's own misgivings about its constitutionality. In *McConnell v. FEC*, 540 U.S. 93 (2003), DOJ defended the Bipartisan Campaign Reform Act of 2002 despite the fact that President Bush's signing statement stated that "[c]ertain provisions present serious constitutional concerns." President George W. Bush, *Statement on Signing the Bipartisan Campaign Reform Act of 2002* (Mar. 27, 2002).

One article summarized the past half century of Executive Branch practice by stating:

> [F]rom the start of the Nixon administration to the end of the George W. Bush administration, the Supreme Court invalidated roughly eighty federal statutes. . . . There can be little question that executive lawyers seriously doubted the constitutionality of a good number of these statutes—or that the president would have too had he been consulted. But several presidents and their administrations nonetheless enforced and defended the statutes in question.

Meltzer, 61 Duke L.J. at 1198.

II. The Executive Branch Decision to Challenge DOMA's Constitutionality After Fifteen Years of Defending It Reflects an Unprecedented Reading of the President's Take Care Obligation.

Attorney General Holder's letter explaining why DOJ would no longer defend DOMA breaks from the historical precedent outlined above. First and foremost, unlike the vast majority of instances in which the President has defied, challenged, or failed to defend a federal law, DOMA raises no separation of powers concerns. In addition, the Attorney General's letter admits that, even under

the Attorney General's view of DOMA, "a reasonable argument for Section 3's constitutionality may be proffered" along the lines of what the DOJ had set forth in prior cases. DOMA letter at 2. For example, in April 2010, DOJ filed a brief arguing that DOMA is constitutional under the rational basis standard applied by the First Circuit. Memorandum Supporting Motion to Dismiss, at 12-15, *Massachusetts v. U.S. Dept. of Health & Human Servs.*, Case No. 1:09-cv-11156-JLT, Doc. 47 (D. Mass. Apr. 30, 2010). The Attorney General's letter did not refute the historical fact that there is no tradition of Presidents failing to defend any and every law they believe contains unconstitutional provisions when reasonable arguments can be made in their defense.

Additionally, the reference in the Attorney General's letter to "substantial circuit court authority applying rational basis review" in cases where sexual orientation discrimination is alleged is an understatement. *See* DOMA letter at 1. Numerous courts of appeal have repeatedly rejected the argument upon which the Executive Branch based its decision to no longer defend DOMA's constitutionality (that sexual orientation should be considered a suspect class). *See* Brief of Intervenor-Defendant-Appellant at 26, n.6, and cases cited therein.

The anomalous nature of DOJ's challenge to DOMA's constitutionality is further underscored by the fact that the Obama administration has not sought to broaden or alter the historically established standards for failing to defend a federal

law, but rather has professed adherence to the historical practice of past administrations. For example, a June 2009 Office of Legal Counsel opinion explained that "a determination that a duly enacted statute unconstitutionally infringes on Executive authority must be 'well-founded.'" David J. Barron, *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 2009 OLC LEXIS 6, at *8 (2009) (quoting 74 Fed. Reg. 10669 (Mar. 9, 2009)). In addition, Attorney General Holder stated during his confirmation hearing that "[t]he duty of the Justice Department is to defend statutes that have been passed by Congress, unless there is some very compelling reason not to." *Transcript, Senate Confirmation Hearings: Eric Holder, Day One*, Jan. 16, 2009.[11]

Similarly, Elena Kagan (now a Supreme Court Justice) stated 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, the Solicitor General has defended any federal statute in whose support any reasonable argument can be made, outside of a very narrow band of cases involving the separation of powers. I pledge to continue this strong presumption that the Solicitor General's office will defend each and every statute enacted by this body.[12]

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[11] *Available at* http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r=1&pagewanted=all.

[12] *Testimony of Elena Kagan: Opening Statement*, Feb. 10, 2009, *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14362b2&wit_id=e655f9e2809e5476862f735da14362b2-1-2.

More recently, in *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the Supreme Court concluded that the political question doctrine did not bar litigation in which the Solicitor General argued that a federal statute violated the President's constitutional authority to recognize foreign governments. *See also* Virginia A. Seitz, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 2011 OLC LEXIS 3, at *1-2, 8 (2011) (concluding that a statutory section was unconstitutional to the extent that it limited the President's authority to conduct foreign relations). This type of executive action protecting President Obama's assertion of constitutional authority falls within the historical practice outlined above (unlike the decision to challenge DOMA) and does not signal a broader move to expand executive authority beyond its historically recognized boundaries.

CONCLUSION

Due to the historical landscape addressed above, and the fifteen year history of DOJ's defense of DOMA, the decision to change course and challenge DOMA's constitutionality should be viewed as an extreme and unprecedented deviation from the historical norm and, as such, the persuasive weight afforded to DOJ's brief should be less than in the typical case.

Respectfully Submitted on June 11, 2012,

/s/ Jay Alan Sekulow
Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
American Center for Law & Justice
201 Maryland Ave., NE
Washington, DC 20002
Phone: (202) 546-8890
Fax: (202) 546-9309

CeCe Heil*
Robert W. Ash
Erik Zimmerman*
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, VA 23464
Phone: (757) 226-2489
Fax: (757) 226-2836

Counsel for Amici

* - Not admitted to this Court's bar

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

/s/ Jay Alan Sekulow
Jay Alan Sekulow
American Center for Law & Justice
201 Maryland Ave., NE
Washington, DC 20002
Phone: (202) 546-8890
Fax: (202) 546-9309

Counsel for Amici

June 11, 2012.

CERTIFICATE OF SERVICE

I hereby certify that, on June 11, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I also certify that all other participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jay Alan Sekulow
Jay Alan Sekulow
American Center for Law & Justice
201 Maryland Ave., NE
Washington, DC 20002
Phone: (202) 546-8890
Fax: (202) 546-9309

Counsel for Amici

June 11, 2012.

Exhibit A

Attorney General Eric Holder, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, Feb. 23, 2011

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, February 23, 2011

Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act

WASHINGTON – The Attorney General sent the following letter today to Congressional leadership to inform them of the Department's course of action in two lawsuits, *Pedersen v. OPM* and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman. A copy of the letter is also attached.

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, [i] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2010, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases. [ii]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). [iii]

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003). [iv] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings. [v] And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*. [vi] But neither of those decisions reached, let alone resolved, the

level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id*. at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against. [vii] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department 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. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.
Attorney General

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[i] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

[ii] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[iii] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

[iv] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[v] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale *); High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[vi] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[vii] *See, e.g.,*H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id*. at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id*. at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id*. (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id*. at 31 (favorably citing the holding in *Bowers*that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id*. at 17 n.56 (favorably citing statement in dissenting opinion in *Romer*that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").