Bancroft PLLC

September 23, 2011

VIA FACSIMILE

Honorable Barbara S. Jones
United States District Court,
Southern District of New York
500 Pearl Street
New York City, New York 10007
Facsimile: (212) 805-6191

Re: ***Windsor v. United States***, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

I write on behalf of the Bipartisan Legal Advisory Group of the United States House of Representatives (the "House") in reference to the House's motion for leave to file a sur-reply in opposition to Plaintiff's motion for summary judgment. *See* Intervenor-Def.'s Renewed Mot. for Leave to File Sur-Reply (Sept. 20, 2011) (ECF No. 87); *see also* Mem. of Law of Intervenor-Def. in Supp. of Its Renewed Mot. for Leave to File Sur-Reply (Sept. 20, 2011) (ECF No. 88) ("House Mem."); Pl.'s Letter to Ct. (Sept. 21, 2011) (not docketed) ("Pl.'s Letter").[1]

The House has explained why a sur-reply is necessary to provide it a fair opportunity to submit its summary judgment arguments, e.g. because:

- Plaintiff has attached newly-created material, including from a third party not designated as an expert witness (Lisa M. Diamond, Ph.D.), to Plaintiff's reply brief, to which material the House necessarily has had no opportunity to respond: The material did not even exist before Plaintiff attached it to her reply.

- Plaintiff has used seventy-three (73) pages in support of her motion for summary judgment, as opposed to twenty-five (25) for the House.

- Plaintiff's reply brief (thirty (30) pages) alone is longer than the House's sole summary judgment submission.

- Plaintiff's position is supported by an additional fifty-three (53) pages from the United States Department of Justice and the State of New York; the House has provided no such additional pages.

[1] The House submits this reply as a letter to the Court, rather than as a publicly-filed docket entry, in light of the Court's invitation to Plaintiff to do the same as to her opposition. *See* Order (Sept. 21, 2011) (ECF No. 89).

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See House Mem. at 2-7. Respectfully, the above-described procedural posture does not constitute a fair opportunity for the House to submit its arguments—and Plaintiff's opposition to any semblance of such a fair opportunity speaks volumes about her own assessment of the strength of her substantive arguments.

Plaintiff repeatedly has suggested that she somehow is entitled to this imbalanced briefing as a matter of law, because, she says, the House relied on "hearsay" documents in its own briefing. *See* Pl.'s Letter at 4-6; Mem. of Law in Opp'n to [House] Mot. for . . . Leave to File Sur-Reply (Sept. 6, 2011) (ECF No. 78) at 4-5. It is the House's understanding that the Court rejected Plaintiff's contentions as to the impropriety of the House's references to scholarly publications in denying Plaintiff's motion to strike those references, *see* Order (Aug. 29, 2011) (ECF No. 75), based on the House's explanation that the materials in question went to legislative and not adjudicative facts, *see* Mem. of Law of Intervenor-Def. . . . in Opp'n to Pl.'s Mot. to Strike (Aug. 19, 2011) (ECF No. 69), and that the Court's grant of additional pages for Plaintiff's reply was simply an exercise of judicial discretion. Due to Plaintiff's pervasive suggestions to the contrary, the House respectfully requests that the Court clarify on the record whether its ruling is that the entirety of the House's briefing is cognizable as a matter of law on this motion. If, as Plaintiff seems to believe, that is not the case and the Court has granted Plaintiff additional pages because it believes the House's briefing may be improper, the House believes this issue should be preserved.

On the other hand, if, as the House understands, the Court has ruled that the House's briefing is entirely proper, then the same discretionary considerations that undoubtedly led the Court to permit Plaintiff to file her voluminous briefing amply justify a brief sur-reply in these circumstances. The Court is of course aware that, in Plaintiff's mind at least, this is landmark litigation that will have a major effect on the law and on society more generally. Having permitted Plaintiff to argue her motion through a megaphone, it would serve the interests of neither inter-Branch comity nor society in general for this Court to rule on the motion while permitting the legislative-branch defendant only a comparative whisper in opposition.

Plaintiff is correct, of course, that briefing must end sometime. *See* Pl.'s Letter at 6. If the Court clarifies that the House's briefing does not amount to evidentiary submissions, however, it will not be the case, as Plaintiff seems to believe, that she is entitled by law to have the last word on her motion for summary judgment. *See id.* The House submits that the proper time for briefing to end is when the length of the respective parties' briefing is roughly proportionate to what it would be in any other litigation, and when both parties have had a chance to review and provide the Court with their views on the opinions of all expert materials created for the litigation. Aside from her legally erroneous contentions that the House's briefing is improper, Plaintiff has identified nothing so extraordinary about her motion that would justify her being permitted nearly triple the length of the House's submissions, or to solicit unrebutted additional declarations by new social-science experts at the reply stage. Accordingly, as a matter of sound judicial discretion and basic fairness, the House should be permitted to file its requested sur-reply.

Plaintiff raises one additional issue, to which the House will dedicate the balance of this reply: A complaint that the House "does not explain anywhere in its moving brief how it intends to respond to Plaintiff's reply or supplemental [declarations]." *Id.* at 6. The House had thought doing so might be presumptuous. Given Plaintiff's challenge, however, the House will answer plainly: It intends, if permitted by the Court, to respond by directly addressing Plaintiff's new and unexpected material.

To take but one example: As to Plaintiff's and Dr. Diamond's impassioned complaint that the House "distort[s]" and "completely misrepresent[s]" Dr. Diamond's research, *see* Reply Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. (Sept. 15, 2011) (ECF No. 81) at 8, 18 & n.12; Suppl. Decl. of Lisa M. Diamond (Sept. 15, 2011) (ECF No. 86) ("Diamond Suppl. Decl.") ¶¶ 5-6, the House will demonstrate that Plaintiff and Dr. Diamond are incorrect. More particularly: The House cited Dr. Diamond with regard to the (im)mutability prong of the "does heightened scrutiny apply" analysis. *See* Mem. of Law in Supp. of Intervenor-Def.'s Opp'n to Pl.'s Mot. for Summ. J. (Aug. 1, 2011) (ECF No. 50) at 10-12. On that point, the House argued, in part (with the Dr. Diamond citations now underlined):

> 3. Immutability
>
> Plaintiff next argues that sexual orientation is immutable. Pl.'s Mem. Summ. J. at 17-18. She states that "the Attorney General has recognized[] a growing scientific consensus [that] accepts that sexual orientation is a characteristic that is immutable.'" *Id.* at 18 (second alteration in original) (quoting Feb. 23, 2011 Letter from Eric A. Holder Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Reps. (Feb. 25, 2011) (ECF No. 10-2)) ("Holder Letter"). Whether a classification is "immutable" is of course a legal conclusion—not a scientific one—and the Attorney General's selective reading of scientific evidence warrants no deference from this Court. His conclusion and the Plaintiff's argument are also both wrong.
>
> Plaintiff's claim runs headlong into the differing definitions of the terms "sexual orientation," "homosexual," "gay," and "lesbian" supplied by Plaintiff's own experts. *See* . . . ; *see also* Lisa Diamond, *New Paradigms for Research on Homosexual & Sexual-Minority Development*, 32 J. of Clinical Child & Adolescent Psychol. 492 (2003) [("Diamond Article No. 1," attached)] ("There is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual."); . . . . These differing definitions show that these terms are amorphous and do not adequately describe a particular class.
>
> Moreover, Plaintiff's argument also conflicts with the admissions by one of her experts that homosexuality cannot be determined at birth, *see* Peplau Dep. at 25:20-23, attached as Ex. B to Dugan Decl.

> ("[L]ooking at a newborn, I would not be able to tell you what that child's sexual orientation is going to be."), and that a significant percentage of gays and lesbians believe they exercise some or a great deal of choice in determining their sexuality, *id.* at 36:24-27:24. Plaintiff's own evidence indicates that more than 12% of self-identified gay men and nearly one out of three lesbians reported that they experienced some or much choice about their sexual orientation. *Id.*, Ex. 4 at 186. This contrasts with actual suspect classes, which involve "immutable characteristic[s]" determined at birth and "determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686 (emphasis added) (plurality op.). Moreover, according to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction. Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 301 (2000) [("Diamond Article No. 2," attached)] ("50% [of respondents] had changed their identity label more than once since first relinquishing their heterosexual identity") . . . .

Id. (underlining added).

As to the House's first citation to Dr. Diamond's work, Plaintiff's newly created declaration from Dr. Diamond states:

> My quoted statement concerns the scientific and popular debates over the defining characteristics of LGBT individuals and it says nothing whatsoever about the immutability of sexual orientation itself. Hence BLAG has incorrectly characterized my research.

Diamond Suppl. Decl. ¶ 5. But the House did not characterize Dr. Diamond's work; rather, it used a direct quotation (re: the current scientific and popular uncertainty as to what exactly constitutes homosexuality). Neither Plaintiff nor Dr. Diamond disputes the accuracy of that quotation or that it fairly states her summary of the current scientific and popular understanding of what constitutes homosexuality. *See also* Diamond Article No. 1 at 491 ("Different individuals have remarkably different interpretations of the categories 'heterosexual,' 'lesbian/gay,' and 'bisexual' . . . ."). Rather, Plaintiff's and Dr. Diamond's objection is simply that, in Dr. Diamond's opinion, that uncertainty does not impact the immutability analysis. That may or may not be correct, but that decidedly is the business of lawyers and courts: Taking a "fact" and arguing its legal implications. The House correctly stated (and did not characterize one way or the other) the underlying fact: That academics and the populace at large, as noted by Dr. Diamond herself, have expressed conflicting opinions as to what constitutes homosexuality. Whether, as the House argues, that fact undermines Plaintiff's claim that homosexuality is immutable for purposes of the "does heightened scrutiny apply" analysis is fair game for argument—and, respectfully, a strong point for the House.

As to the House's second citation to Dr. Diamond's work, Plaintiff's supplemental declaration from Dr. Diamond states:

> This quoted statement refers to sexual identity labels (*i.e.*, how individuals describe and interpret their sexuality), not to sexual orientation. Neither this article nor any of my other published work supports BLAG's claim that "a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction." *See* BLAG Opp. Br. at 11-12. Hence, BLAG has completely misrepresented my research.

Diamond Suppl. Decl. ¶ 6. Again, Plaintiff and Dr. Diamond are incorrect. The House has not characterized Dr. Diamond's work, but has used a direct quotation (re: the percentage of study participants who had changed their sexual identity label in a particular manner). Neither Plaintiff nor Dr. Diamond disputes either the accuracy of the quotation or that it fairly summarizes Dr. Diamond's conclusions. Plaintiff and Dr. Diamond dispute only whether those conclusions support (i) the House's statement regarding individuals who cease experiencing same-sex attraction after initially experiencing such attraction and (ii) the House's argument regarding the (im)mutability of homosexuality. As to the first aspect of this dispute, it is eminently fair for the House to suggest that Dr. Diamond's research (finding that many study participants who previously had relinquished their heterosexual identity subsequently changed their sexual identity label, e.g., back to heterosexual) supports the House's statement that many individuals who initially experience same-sex attraction subsequently cease experiencing such attraction.[2] As to the second aspect of the dispute (application of Dr. Diamond's research to the (im)mutability prong of the "does heightened scrutiny apply" analysis), this, as noted above, is the province of lawyers and the courts. (And again, respectfully, the fluidity of non-heterosexuals' same-sex / opposite-sex attraction is a strong point for the House on the (im)mutability issue).

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[2] *See also* Diamond Article No. 2 at 300 ("[E]xclusive same-sex attractions are the exception rather than the norm among sexual minority [i.e., non-heterosexual] women."); *id.* at 300-01 ("The prevalence of nonexclusivity in sexual-minority women's attractions suggests that other-sex attractions and relationships remain an ever-present possibility for most sexual-minority women, a fact that creates multiple opportunities for discontinuity and inconsistency in the female sexual-minority life course."); *id.* at 302 ("How should we distinguish a latent bisexual from a curious homosexual? At what point in a woman's development can we reliably sort her into one of these categories. [¶]In truth, the answer may be 'never.' One of the unavoidable implications of nonexclusivity and sexual fluidity is that no heterosexual woman can be unequivocally assured that she will never desire same-sex contact, just as no lesbian woman can be unequivocally assured that she will never desire other-sex contact."); *id.* at 310 ("Rich's notion of a lesbian continuum has been most influential as an ideological vision, yet our research demonstrates that it is also an empirical reality with substantive implications for understanding the course of female sexual development.").

In sum, contrary to Plaintiff's and Dr. Diamond's assertions, the House neither has misconstrued nor distorted Dr. Diamond's research: That research supports the constitutionality of DOMA in just the ways previously identified by the House.

Accordingly, this is an example of how the House would respond, if permitted, to Plaintiff's new and unexpected material. For all of the reasons stated in the House's motion and this reply letter, the House respectfully requests leave to file a sur-reply.

Respectfully submitted,

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