Bancroft PLLC

August 12, 2011

BY FASCIMILE

The Honorable Barbara S. Jones
United States District Judge
The Honorable James C. Francis
United States Magistrate Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

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

Dear Judge Jones and Judge Francis:

We regret the clutter to your Honors' in-boxes, but feel constrained to reply to plaintiff's letter of earlier today. In support of plaintiff's request to ignore major portions of our briefing, while receiving extra pages to do so plus the right to supplement later, her letter essentially attempts to argue the merits of her motion to strike, and concludes that her requests should be granted because our submissions were improper. This is a patently unfair attempt to litigate the merits of the motion to strike by letter and on the schedule preferred by plaintiff, rather than in the format and on the schedule required by the Local Rules. Plaintiff's urgency now is particularly unfair because, despite her attorneys' apparent belief that our briefing was obviously improper, she waited for more than nine full days before moving to strike.

We continue strongly to believe that plaintiff's motion to strike is entirely meritless. The motion is based on a fundamental misunderstanding of the basic distinction between adjudicative facts, which are submitted to the trier of fact and as to which there must be no genuine issue in order to grant summary judgment; and legislative facts, which are the facts that courts necessarily must consider in order to formulate rules of law, such as whether a general class of persons is entitled to protected-class status for equal protection purposes, or whether a statute passes a given level of constitutional scrutiny. *See, e.g.*, Fed. R. Evid. 201, Advisory Committee Note; *Indiana H.B. R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.); *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) (Kozinski, J.). In inquiring into legislative facts the courts must be, and are, free to consider the entire body of applicable knowledge, without regard to formal admissibility and without subjecting each and every expert on the subject to the extensive requirements of the rules of discovery. *See, e.g.*, Fed. R. Evid. 201, Advisory Committee Note (legislative facts not subject even to rules governing judicial notice); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (extensive collection of Supreme Court precedents involving consideration of "[t]he

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writings and studies of social science experts on legislative facts" even "without introduction into the record," on matters including "the deterrent effect of capital punishment," "the relation between obscenity and socially deleterious behavior," and "the effect of segregation upon minority children"). None of the materials that the plaintiff seeks to strike are directed at adjudicative facts pertaining directly to plaintiff or the estate in question in this litigation. Rather, they self-evidently are quintessential legislative facts as to which no formal discovery process is required.

We will demonstrate these points in a comprehensive fashion in our memorandum opposing plaintiff's motion to strike. In the meantime, we submit that the Court's decision as to plaintiff's scheduling and page-limit requests should not turn on the outcome of a motion as to which we have not yet responded.

In response to our submission of legislative facts for the Court's consideration, plaintiff's attorneys protest that the briefing schedule does not provide them with sufficient time to consider and rebut these materials. This contention only makes sense if one assumes the correctness of plaintiff's motion to strike, which as we have explained would be inappropriate before our response is due. We contend that our briefing is quite ordinary and entirely to be expected in constitutional litigation, and if plaintiff's attorneys felt they needed an extended period to respond to materials of this nature, the time to say so was months ago when the scheduling in this case was under discussion. Of course, at that point plaintiff's attorneys advocated—and largely received, over our objections—an accelerated schedule, with the result that any difficulty they are now experiencing is entirely self-made.

Finally, as we noted in our previous letter, despite her attempt to ignore much of our briefing, plaintiff is requesting to file a reply in support of her motion for summary judgment that exceeds the length of our opposition thereto, and is triple the length ordinarily permitted by your Honors. Her most recent letter attempts to justify this by arguing that even some of the documents she has *not* moved to strike are "inadmissible hearsay." Plaintiff should not be permitted to have her cake and eat it too in this fashion—if plaintiff has made a tactical decision not to formally challenge certain documents, she should not then be permitted to assert their "inadmissibility" through the backdoor of requesting an extraordinary number of additional pages to respond to them.

We therefore respectfully request that plaintiff be required to file, on or before August 19, (1) a reply in support of her motion for summary judgment of no more than 10 pages containing her complete response to the contentions in our opposition, and (2) an opposition to our motion to dismiss of no more than 35 pages.

Respectfully submitted,

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