

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EDITH SCHLAIN WINDSOR, in her)
capacity as Executor of the estate of)
THEA CLARA SPYER,)
Plaintiff,)
v.) Civil Action No. 10-CV-8435 (BSJ)(JCF)
THE UNITED STATES OF AMERICA,) ECF CASE
Defendant.)

)

DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

PLEASE TAKE NOTICE that Defendant the United States of America, through undersigned counsel, respectfully submits this Motion to Dismiss Plaintiff's Amended Complaint to request that the Court rule on Plaintiff's challenge to the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. As the President and the Attorney General have stated, the Department of Justice will no longer defend the constitutionality of Section 3 of DOMA as applied to legally married same-sex couples. Pursuant to the President's direction, however, Executive departments and agencies will continue to comply with Section 3 unless and until it is repealed by Congress or there is a definitive ruling by the Judicial Branch that Section 3 is unconstitutional. The Department of Justice represents the only defendant, the United States, in this litigation. Only a judgment against the United States could afford Plaintiff the relief she seeks, and only a judgment for or against the United States can definitively resolve the case or controversy between Plaintiff and the United States.

The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has moved to intervene in this case for the limited purpose of defending the constitutionality of Section 3 of DOMA, ECF No. 12, and the Court granted that motion on June

3, 2011. ECF No. 26. We understand that on August 1, 2011, BLAG plans to move as an intervenor to dismiss Plaintiff's constitutional challenge to Section 3. Nevertheless, as Defendant previously explained in response to BLAG's motion to intervene, ECF No. 20, Congress's interest in the constitutional validity of a law does not itself confer standing to enter an action as a party. The Attorney General, however, is committed to providing Congress a full and fair opportunity to participate in this litigation. The continuing role of the Executive Branch in this litigation ensures the existence of a justiciable case or controversy. In addition, the Department of Justice will take the procedural steps necessary to enable BLAG to present arguments in support of the constitutionality of Section 3. Accordingly, although pursuant to this Court's Scheduling Order the Department intends to file a brief on August 19, 2011 that presents the government's position on Plaintiff's equal protection challenge, Defendant submits this motion as a procedural matter, to ensure that this Court can consider arguments on both sides of the constitutional issue and to ensure that this Court has jurisdiction to enter judgment on the basis of those arguments.

If this Court agrees with BLAG on the constitutionality of Section 3 of DOMA, it should dismiss Plaintiff's Amended Complaint and enter judgment for Defendants. If this Court agrees with Plaintiff and the United States as to the constitutionality of Section 3 of DOMA, it should not dismiss the First Amended Complaint, but rather should enter such relief as is appropriate given the procedural posture of this action at the time of such determination.

Dated: August 1, 2011

Respectfully submitted,

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/s/ Jean Lin

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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