UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as executor of the estate of THEA CLARA SPYER,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 10-CV-8435 (BSJ)(JCF)

MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Plaintiff's Contentions Are Thoroughly Incompatible With the Courts' Consistent Practice in Constitutional Cases 3

II. Legislative Facts are Not Subject to Formal Rules of Evidence 5

III. The House's Citations in Question Go To Classic Issues of Legislative Fact 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Brown v. Bd. of Educ., 347 U.S. 483 (1954)....................3, 8

Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, No. 08-1448 (2011), Slip. Op., http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf 4, 5

Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005)....................6

Central Soya Co., Inc. v. United States, 15 C.I.T. 35 (Ct. Int'l Trade 1991) 10, 11

Charlton Mem'l Hosp. v. Sullivan, 816 F. Supp. 50 (D. Mass. 1993)....................7-8

Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 172 F.3d 104 (1st Cir. 1999) 6

Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm., 578 F. Supp. 797 (E.D. Pa. 1983) 7

Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983)....................3, 4, 8

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 5

Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990)....................6

Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2004) 9

Marshall v. Sawyer, 365 F.2d 105 (9th Cir. 1966) 6

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)....................8

United States v. Gould, 536 F.2d 216 (8th Cir. 1976) 6

United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995) 7

United States v. Virginia, 518 U.S. 515 (1996) 3

Wiesmueller v. Kosobucki, 547 F.3d 740 (7th Cir. 2008)....................7

Statutes & Rules

Fed. R. Evid. 201 ....6, 7, 10

Other Authorities

Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate.com, Mar. 12, 2004, www.slate.com/id/2097048 1

David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (1996) 1

George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting,* ___ Ave Maria L. Rev. ____ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184 1

George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999).......1

Greogory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 Sex. Res. Soc. Pol'y 176 (2010) 2

Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. Family Psych. 526 (2006) 1

Kenneth Culp Davis, *The Requirement of a Trial–Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)...6

Lawrence A. Kurdek*, "What Do We Know About Gay and Lesbian Couples?,"* 14 Current Directions in Psych. Sci. no. 5 (Oct. 2005) 1

Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (2000)...1

Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 297 (2000).........................2

Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. Clinical Child and Adolescent Psych. 490 (2003) 2

Nigel Dickson et al., *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612-13 (2003).......................2

Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 Minn. L. Rev. 1, 29-34 (1988) 8

Susan Golombok & Fiona Tasker, *Gay Fathers*, in *The Role of the Father in Child Development* Ch. 11 (Michael E. Lamb ed. 2010) 1

Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1282-83 (1994).. 9

INTRODUCTION

This Court should deny, as meritless, Plaintiff's motion to strike documents referenced by Intervernor-Defendant the Bipartisan Legal Advisory Group (the "House") in its opposition to Plaintiff's motion for summary judgment and in its Rule 56.1 statement. By failing to account for the distinction between adjudicative and legislative facts, and by asking the Court to apply formal rules of evidence to legislative facts, the motion reflects a fundamental misunderstanding of the nature of constitutional litigation.

Plaintiff seeks to strike the House's references to twelve separate social-science studies, articles, and treatises. Five of these are cited by the House to demonstrate the methodological limitations, flaws, and incompleteness of the social science research used to support Plaintiff's allegations that parenting by same-sex couples is indistinguishable from parenting by opposite-sex couples or a child's biological mother and father.[1] Three items are cited in support of the common-sense conclusion that, other factors being equal, children are better off if raised by a mother and a father.[2] And four articles are cited by the House to illustrate that sexual orientation

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[1] Susan Golombok & Fiona Tasker, *Gay Fathers*, in *The Role of the Father in Child Development* Ch. 11 (Michael E. Lamb ed. 2010); Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. Family Psych. 526 (2006); Lawrence A. Kurdek, "*What Do We Know About Gay and Lesbian Couples?,"* 14 Current Directions in Psych. Sci. no. 5 (Oct. 2005); Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate.com, Mar. 12, 2004, www.slate.com/id/2097048; George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting,* ___ Ave Maria L. Rev. ____ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184. As Plaintiff recognizes, three of these appeared in the report of one of Plaintiff's own experts and were discussed at the expert's deposition, namely: Golombok & Tasker, Wainright & Patterson, and Kurdek. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66).

[2] Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (2000); David Popenoe, *Life Without Father:*

(Continued)

is more mutable than the characteristics that define other suspect classifications under equal protection.[3]

Plaintiff essentially offers two related grievances regarding the House's citations to these materials. Both operate on the mistaken assumption that the materials cited by the House must be treated as expert "evidence" for purposes of evidentiary and procedural rules. First, Plaintiff objects that the materials cited are hearsay and otherwise not formally admissible in evidence because the House's attorneys are not qualified as experts on the relevant topics. Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66) at 1-2, 9-14. Second, Plaintiff requests that these same materials be stricken because they are "intended expert or opinion testimony" that was not "disclosed in writing, with notice to the other side, and subject to cross-examination." *Id.* at 2; *see also id.* at 2-3, 14-20.

Plaintiff is tilting at windmills. Plaintiff seems to assume that the federal courts must decide rules of constitutional law, that will be binding on the entire country for the indefinite future, on a record limited to the statements of whatever individuals the parties happen to be able and willing to discover, persuade, and pay to provide expert testimony in cases that often touch on matters of considerable public controversy. That is not how constitutional litigation, at any

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Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999).

[3] Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. Clinical Child and Adolescent Psych. 490 (2003); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 297 (2000); Nigel Dickson et al., *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612-13 (2003); Greogory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 Sex. Res. Soc. Pol'y 176 (2010). Plaintiff again recognizes that the Herek study appeared in one of her expert reports and was discussed at that expert's deposition. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66).

level, works. Every document that Plaintiff seeks to strike—and those that Plaintiff does not seek to strike, but also claims are inadmissible, *see* First Windsor Ltr. to Ct., Aug. 12, 2011, at 3 n.1—is rightly considered by this Court as a legislative fact. In this light, Plaintiff's allegation that the House has attempted to put expert evidence before the Court without naming experts is meritless. The House has done nothing of the sort, but instead has done what any litigant does in constitutional cases: Marshal books, studies, scholarly articles, and other sources in support of *the rule of law* for which the litigant is advocating. Thus, contrary to Plaintiff's claims, the House's attorneys are not holding themselves out to be experts, but rather are citing to material of which this Court may and should take note.[4]

ARGUMENT

I. Plaintiff's Contentions Are Thoroughly Incompatible With the Courts' Consistent Practice in Constitutional Cases.

If Plaintiff's assumption had been the law, many of our nation's most prominent constitutional decisions could not have been decided the way they were. For instance, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court cited directly to "modern authority" consisting of several works of social science. *Id*. at 494 n.11. And in *United States v. Virginia*, 518 U.S. 515 (1996), while the Court discussed the trial below, it proceeded to reject the trial court's conclusion, relying instead on several works of historical scholarship to render its decision. *See id*. at 523-24, 535-40. Such cases are by no means unique. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion) (extensive collection

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[4] Indeed, the plaintiffs in *Pedersen v. Office of Personnel Management*, a related DOMA challenge in the District of Connecticut for which the same experts and depositions are being used, recognized this difference by submitting a Rule 56 statement along with a separate statement of "non-adjudicative facts." *See* Separate Statement of Non-Adjudicative Facts, No. 3:10-cv-01750 (D. Conn.) (July 15, 2011) (ECF No. 62), attached as Ex. A.

of Supreme Court precedents involving consideration of "[t]he writings and studies of social science experts on legislative facts" even "without introduction into the record," on matters including, to give just two examples, "the deterrent effect of capital punishment" and "the relation between obscenity and socially deleterious behavior").

Further examples can be had simply by paging through the United States Reports in search of constitutional decisions involving far-reaching social issues. Indeed, just a few weeks ago, the Supreme Court decided a case in which all four opinions—the majority, concurrence, and two dissents—relied heavily on analyses of such topics as literary history, video-game technology, and historical American attitudes toward parental authority, all without the slightest indication that any of the materials considered by the court (including numerous expert articles and books) ever were introduced into evidence below. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. ___, No. 08-1448 (2011), Slip. Op. at 8-11, http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf (Court's analysis of literary and entertainment history); *id.* at 11 ("Justice Alito has done considerable independent research" regarding the level of violence in video games); *id.* at 16 n.9 (relying on "a 2005 study" identified in an *amicus* brief indicating "that about 18% of retailers still sell alcohol to those under the drinking age"); *id.*, Alito, J, concurring in the judgment, at 12-15 (independent research regarding current and likely future state of video-game technology); *id.*, Thomas, J., dissenting, at 3-13 (comprehensive discussion of historical attitudes of parental authority); *id.*, Breyer, J., dissenting, at 11 (citing Census Bureau study for proposition that "5.3 million grade-school age children . . . are routinely home alone"); *id.* at 12-14 (citing numerous studies for proposition that video games cause aggressive behavior, and do so more than violence in other

media); *id.* at 20-35 (appendices describing and documenting Justice Breyer's comprehensive and independent survey of the relevant social-science publications).

These and many other cases are flatly inconsistent with Plaintiff's contention that, in considering rules of constitutional law, courts and parties are subject to formal rules of evidence and procedure, and confined to the formally-produced record, in identifying relevant scholarly works and data.[5] This is particularly true where, as here, one of the main issues being litigated is whether a particular piece of legislation passes rational-basis review. As a matter of law, in such cases the court's inquiry is whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). It would be anomalous indeed, not to mention virtually impossible to perform this inquiry in a meaningful way, if the courts' ability to investigate the universe of "reasonably conceivable state[s] of facts," *id.*, were confined to a consideration of the views of whatever experts the parties have hired. The practice in federal courts in constitutional cases is overwhelmingly against such a rule, and Plaintiff offers no explanation of why this case is so unusual as to require different treatment.

II. Legislative Facts are Not Subject to Formal Rules of Evidence.

Plaintiff's misguided motion stems from her failure to acknowledge the elementary difference between adjudicative and legislative facts. Adjudicative facts "are simply the facts of

[5] Plaintiff may attempt to argue that, although the courts themselves may refer to such materials and data, parties may not do so without formally adducing them as evidence. There is no sensible rationale for such an arrangement, which apparently would have no purpose other than preventing the courts from hearing the views of the parties on materials relevant to legislative fact-finding. Furthermore, the House is aware of no authority in support of such a rule, and it obviously is inconsistent with the Supreme Court's frequent reliance on legislative facts identified in briefs, including those of *amici curiae*, who by definition had no opportunity to introduce evidence in the trial court. *E.g.*, *Brown*, majority opinion, Slip Op. at 9-11.

the particular case." Fed. R. Evid. 201, advisory committee's note. "'Adjudicative facts are facts about parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case . . . .'" *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (quoting Kenneth Culp Davis, *The Requirement of a Trial–Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)); *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (same); *see also Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005) ("Adjudicatory facts are those relevant only to the particular parties involved in the case."), *rev'd on other grounds*, 550 U.S. 124 (2007).

On the other hand, legislative facts are simply "those which have relevance to legal reasoning and the lawmaking process." Fed. R. Evid. 201, advisory committee's note. The relevant "distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which . . . more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires." *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). As Judge Boudin has explained for the First Circuit, "so-called 'legislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts." *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999).

For purposes of the application of formal rules of evidence, the difference between adjudicative and legislative facts is simple and stark. As stated by Judge Posner for the Seventh Circuit, "besides facts in that sense—the kind of facts that a trier of fact determines—there are

background facts (sometimes called ‘legislative’ facts) that *lie outside the domain of rules of evidence* yet are often essential to the decision of a case.” *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (emphasis added). In *Wiesmueller*, Judge Posner noted without disapproval that the legislative facts did not appear “in the record compiled in summary judgment or trial proceedings,” and that they “could be incorporated in the argument section of the brief.” *Id.* Consistent with that analysis, the advisory committee’s notes to Federal Rule of Evidence 201 make clear that, in examining legislative facts:

> [T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.

Fed. R. Evid. 201, advisory committee’s note (quotation marks omitted). “This . . . view . . . renders inappropriate . . . *any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs*, and any requirement of formal findings at any level.” *Id.* (emphasis added). As one district court has noted:

> In constitutional litigation . . . , appellate courts and courts of first instance have the ability to go beyond the formal rules of evidence and examine what may be described as “legislative facts.” In seeking to determine the rationality of a given measure in meeting permissible goals, the court may examine scholarly articles not formally submitted or may guide its conclusions by reasonable exercise of its deductive powers.

Democratic Party of the U.S. v. Nat’l Conservative Political Action Comm., 578 F. Supp. 797, 830 (E.D. Pa. 1983), *aff’d in part and rev’d in part sub nom. Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480 (1985); *see also United States v. Hernandez-Fundora*, 58 F.3d 802, 811 (2d Cir. 1995) (“The omission of any treatment of legislative facts [in Fed. R. Evid. 201] results from fundamental differences between adjudicative facts and legislative facts.”) (citing Fed. R. Evid. 201, advisory committee’s note); *Charlton Mem’l Hosp.*

v. Sullivan, 816 F. Supp. 50, 53 (D. Mass. 1993) ("Rules of evidence and procedure, including Federal Rule of Civil Procedure 56, may thus be inapplicable because they are designed for determining 'adjudicative' rather than 'premise' facts.") (citing Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 Minn. L. Rev. 1, 29-34 (1988)).

And the rule could not sensibly be otherwise. As the Fifth Circuit has explained, specifically in the context of holding that a trial court determination of "legislative fact" is not entitled to deferential review:

> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence?

Dunagin, 718 F.2d at 748 n.8 (answering these rhetorical questions by rejecting trial court determination of legislative fact, notwithstanding its adoption based on trial court's consideration of expert testimony); *see also id.* ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.").

III. The House's Citations in Question Go To Classic Issues of Legislative Fact.

Apparently unaware of this distinction, Plaintiff makes no mention of it in her memorandum in support of her motion to strike.[6] Even if she had, it is beyond reasonable dispute that the citations and references Plaintiff seeks to strike go to issues of legislative fact, and thus are not subject to the evidentiary and procedural rules she attempts to invoke. Plainly the adjudicative facts in this case are matters such as who Plaintiff is, whether she in fact purported to marry another woman in Canada and remained in that relationship until the decedent's death, whether Plaintiff is in fact the executor of the estate of her late state-law

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[6] In her second letter to this Court dated August 12, 2011, Plaintiff states that the Second Circuit has rejected the sort of argument raised by the House. Second Windsor Ltr. to Ct., Aug. 12, 2011 at 1-2 (quoting *Landell v. Sorrell*, 382 F.3d 91, 136 n.24 (2d Cir. 2004), *rev'd and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006)). To the contrary, the issue in *Landell* was not remotely similar to the one here. The footnote relied upon by Plaintiff merely reflects the Second Circuit's decision to remand to give the district court a first chance at finding and considering legislative facts that the district court had not reached in its previous decision. *Landell*, 382 F.3d at 136 n.24. Most importantly, although the *Landell* court decided to remand rather than attempt to "resolve disputed legislative facts . . . on an insufficiently developed record," preferring to engage in first-instance legislative fact finding on appeal only in simpler matters, *id.*, it did absolutely nothing to suggest that on remand either the parties or the district court were required to adduce evidence through cross-examined testimony, rather than by simply identifying sources of data in their briefing as the House has done here. *See id.* at 135 & 136 n.24, 148.

Indeed, the *Landell* majority said nothing to contradict the dissenting judge's "assum[ption]" that on remand the majority did *not* contemplate "that the district court will take testimony on the state of mind of the then-legislators, resolve credibility issues, and find facts on these issues." *Id.* at 205 (Winter, J., dissenting). If the *Landell* court had intended to create such a sharp break from the long-standing and uniform practice of other Courts of Appeals and of the Supreme Court, as described above, it surely would not have done so *sub silentio* and by implication in the manner that Plaintiff seems to contend it did.

Moreover, and perhaps most tellingly, the *Landell* majority itself relied on at least one law review article not for a conclusion of law but for an assessment of the effects of campaign-fundraising pressures on "the quality of democratic representation," despite the absence of any indication that the article had been adduced in evidence below or its author formally identified as an expert witness or subjected to cross-examination. *See id.* at 123 (majority opinion) (quoting Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1282-83 (1994)).

spouse, and whether the estate in fact paid federal estate tax.[7] None of the materials that Plaintiff claims are inadmissible go to any of these questions. Instead, they relate to paradigmatic issues of pure legislative fact—issues such as the degree of homosexual persons' political power, the nature of discrimination that homosexual persons have faced, the relative merits of parenting by same-sex and opposite-sex couples, and the relative mutability of sexual orientation. Plaintiff's own descriptions of the materials she seeks to have stricken, and the purposes for which the House cites them, illustrate this fact clearly. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66), column titled "Proposition BLAG Attempts to Support."

Legislative facts are so commonly relied on by courts in constitutional litigation, and the propriety of this is so generally acknowledged, that the issue is not among those more frequently litigated. However, an example of the rules regarding legislative facts is supplied by *Central Soya Co., Inc. v. United States*, 15 C.I.T. 35 (Ct. Int'l Trade 1991). There the court addressed an objection similar to that raised by Plaintiff in the instant matter. The court considered the admissibility of a particular affidavit, where that affidavit allegedly was not submitted in compliance with local rule 56 (because the affiant allegedly could not have testified "as to the facts contained in his affidavit"). *Id.* at 36, 39. The court concluded that, because the "affidavit presents legislative facts of which the court may take judicial notice,[[8]] the affidavit is admissible

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[7] These are precisely the types of facts that the plaintiffs in the parallel *Pedersen* case included in their Rule 56 statement, to the exclusion of legislative facts that do not deal directly with the plaintiffs and the relevant events in their lives. *See* Pls.' Local Rule 56(a)1 Statement in Supp. of Pls.' Mot. for Summ. J., No. 3:10-cv-01750 (D. Conn.) (July 15, 2011) (ECF No. 61), attached hereto as Ex. B.

[8] In light of Federal Rule of Evidence 201's limitation of its rule to "Judicial Notice of Adjudicative Facts," and the rule reflected in the advisory committee's note that legislative facts are not "appropriate subjects for any formalized treatment of judicial notice of facts," the *Soya*

(Continued)

and the defendant's motion to strike is denied." *Id*. This Court should take the same approach as to the materials challenged here.

CONCLUSION

In sum, Plaintiff's motion to strike must fail because it does not acknowledge or reflect an appreciation of the distinction between adjudicative and legislative facts, and improperly seeks to hold materials obviously directed to legislative facts to the same formal evidentiary and procedural standards as those directed to adjudicative ones. Plaintiff approaches this case as one would approach a dispute concerning a contract or an automobile accident. But, as explained thoroughly above, this is constitutional litigation subject to legislative fact-finding on the part of the district court, and Plaintiff's arguments therefore are entirely beside the point. Accordingly, this Court should deny her motion to strike.

Co. court must be understood as using the phrase "judicial notice" in a broad, but not incorrect, sense.

Respectfully submitted,

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August 19, 2011

CERTIFICATE OF SERVICE

I certify that on August 19, 2011, I served one copy of the Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Opposition to Plaintiff's Motion to Strike by CM/ECF and by electronic mail (.pdf format) on the following:

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