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. THE UNITED STATES OF AMERICA, Defendant.	10 Civ. 8435 (BSJ) (JCF) ECF Case

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DOCUMENTS REFERENCED BY DEFENDANT-INTERVENOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Defendant-Intervenor, the Bipartisan Legal Advisory Group ("BLAG"), has conceded that the documents it seeks to rely upon in opposition to Plaintiff's motion for summary judgment constitute undisclosed and inadmissible hearsay. It argues instead that this Court should disregard the many time-tested rules cited in Plaintiff's moving brief that have long governed the trial courts when finding facts because this is a constitutional case.

Neither the "legislative facts" doctrine nor the cases that BLAG cites, however, require this Court to dispense with the Federal Rules of Civil Procedure or Evidence, or this Court's Scheduling Order of May 11. Contrary to BLAG's assertion, this is not a case limited to the question of "whether a particular piece of legislation passes rational-basis review." (BLAG Br. at 5.) Plaintiff has put at issue what level of scrutiny applies to her claims (given various *facts* about the relationship of gay men and lesbians to society) and whether, under either heightened scrutiny or rational basis review, DOMA satisfies that scrutiny.

Trial courts hear constitutional cases, including relevant factual disputes like those presented here, in the usual course and, when doing so, follow the same procedures as in any other case. And given the importance of the factual questions at issue here, Plaintiff respectfully submits that this Court should rely on the very rules BLAG seeks to avoid—rules designed to ensure that the materials the Court considers are actually reliable.

Indeed, as explained further below, Plaintiff is in the unique position of being able to demonstrate in this case precisely why the law demands such procedures. Professor Lisa Diamond, the author of two of the academic articles Plaintiff seeks to strike, has submitted an affidavit testifying that BLAG has in fact *distorted* her research and that she never would have agreed to testify to the propositions BLAG has advanced in its papers. It is hard to imagine a more concrete example of why the materials submitted by BLAG are not reliable. Had BLAG

followed the rules and used as expert witnesses any of the authors it cites (as contemplated by the May 11 Scheduling Order), and had Plaintiff's counsel then had the opportunity to depose them, Plaintiff would have been able to obtain similarly damaging testimony from them as well.

I.
The Hearsay At Issue

In its opposition to Plaintiff's summary judgment motion, BLAG relied on dozens of inadmissible hearsay documents. (*See, e.g.*, BLAG 56.1 ¶¶ 30, 32, 61, 64, 65, 66, 68, 70, 79, 81.) Yet, contrary to BLAG's assertion, Plaintiff did not move to strike materials about "the degree of homosexual persons' political power [or] the nature of discrimination that homosexual persons have faced." (BLAG Br. at 10.) This is because Plaintiff did not seek to strike any materials the underlying substance of which might arguably be the type of information of which the Court could take judicial notice (such as the pending repeal of "Don't Ask Don't Tell").

Instead, Plaintiff sought to strike just twelve of BLAG's many hearsay documents, relating only to two discrete subjects:

> 1. The immutability of sexual orientation. For example, BLAG selectively cites certain statistics from a study in support of its assertion that sexual orientation is not an immutable characteristic. *See* Entry 3 of Appendix to Motion to Strike ("App. Entry").
>
> 2. The effect on children of having gay parents. For example, BLAG refers to a 2004 article from Slate.com to establish that studies concerning parenting by lesbians and gay men were flawed. *See* App. Entry 7.

These are paradigmatic examples of matters that not only must be resolved through a tested factual record but, because of their social scientific nature, are within the appropriate purview of expert, not lay, testimony. They are certainly not factual matters that are within the general knowledge of the Court or counsel, so resort to untested sources of information is particularly inappropriate here.

Moreover, the twelve documents that Plaintiff seeks to strike were written either: (1) by non-experts, or (2) by persons who might, in the normal course, be proffered as experts, but for whom there were no expert disclosures or depositions, and who were not subject to cross-examination, in violation of the May 11 Scheduling Order and the Federal Rules. In the first category, BLAG seeks to offer hearsay statements criticizing lesbians and gay men by George W. Dent, who teaches classes at Case Western Reserve University in business law.[1] It also cites to a book co-authored by Maggie Gallagher, co-founder of an organization dedicated to opposing equal marriage rights for same-sex couples. With no apparent qualifications other than an undergraduate degree in religious studies, Gallagher opines that marriage between a man and a woman provides a stable framework for child-rearing.[2]

As for citations to writings by individuals who may well have expertise for purposes of Federal Rule of Evidence 702, many of these individuals' work simply does not support BLAG's position, as one of these authors has now made exceedingly clear. *See* Affidavit of Lisa M. Diamond ¶ 4 ("BLAG misconstrues and distorts my research findings, which do not support the propositions for which BLAG cites them.").[3] And others have made statements contrary to the propositions BLAG advances in the very materials that BLAG cites.[4]

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1 *See* App. Entry 12. To give a flavor of some of what BLAG has submitted, in this article, Professor Dent asserts that "homosexuals have high rates of disease," that their relationships "are often abusive," and that "artificial reproduction should be permitted only to traditional married couples." (*Id.* at 11, 13, 24.) In the other Dent article cited by BLAG, Professor Dent cites the following as reasons not to allow marriage for same-sex couples: "Baby-Selling," "Bestiality," and "Child Marriage." (App. Entry 10 at 599, 637–38.)

2 *See* App. Entry 8.

3 *See also* App. Entry 8 at 200 (noting that one of the co-authors, Waite, "tend[s] to favor . . . extending marriage to same-sex couples").

4 For instance, an article on which BLAG relies concludes that the results of the authors' study "suggest that parental sexual orientation is not a major factor in shaping adolescent development or behavior" (App. Entry 5 at 529), a conclusion that is entirely consistent with the expert opinion offered by Professor Michael Lamb in this case. *See* Lamb Aff. ¶¶ 12–13;

Thus, BLAG's materials are demonstrably unreliable, even given the discretion trial courts traditionally have in admitting hearsay. For example, BLAG's contention that the Court should accept the supposedly "common-sense conclusion that, other factors being equal, children are better off if raised by a mother and a father" (BLAG Br. at 1), demonstrates why actual evidence, not stereotype purportedly substantiated by inadmissible hearsay, must govern.

II.
The Rules Are Not Rendered Inapplicable Because Legislative Facts Are at Issue

Faced with no admissible evidence to back up its claims, BLAG resorts to claiming that it need not submit such evidence because of the doctrines of so-called adjudicative and legislative facts. Loosely defined, because the courts and commentators have reached no consensus as to what these concepts mean, adjudicative facts are those relevant to only the dispute between two adverse parties; legislative facts (sometimes also called constitutional facts) are those which help a court make decisions about the broader application of legal doctrine. As the Second Circuit has observed, "so-called 'constitutional facts,' [are] a concept that has confounded courts and commentators alike." *United States* v. *Cutler*, 58 F.3d 825, 834 (2d Cir. 1995); *see* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985)).[5]

The constitutional facts doctrine, however, does not permit (much less require) trial courts to abandon the Federal Rules or the strictures of adversarial testing in finding disputed facts relevant to constitutional questions. Nor, respectfully, does it permit BLAG to act

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see also App. Entry 4 at 327 ("With respect to psychological well-being, children with lesbian mothers did not show a higher incidence of psychological disorder, or difficulties in peer relationships, than those from heterosexual homes.").

[5] *See also Siderius* v. *M.V. Amilla*, 880 F.2d 662, 666–67 (2d Cir. 1989) ("The federal rules give no guidance on how to distinguish law from adjudicative fact for purposes of judicial notice, and noted commentators have called the question 'baffling.'") (quoting 21 Wright & Miller, *Federal Practice and Procedure* § 5103, at 473 (1977)).

as an appellate court judge, deciding for itself which facts have sufficient reliability to be admissible, unbounded by any limitations or accepted standards. (*See* BLAG Br. at 5 n.5.)

Cases approving judicial notice of legislative facts by the trial court have, as the Second Circuit has noted, been limited to facts (unlike those here) which present little dispute:

> The fact that this Court may ultimately undertake *de novo* review of any legislative facts found by the District Court on remand or that appellate courts take judicial notice of legislative facts under appropriate circumstances . . . does not mean that we must resolve disputed legislative facts—particularly facts that are dispositive of the case before us—on an insufficiently developed record. Nor should we . . . . [T]he types of "legislative facts" that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves.

Landell v. *Sorrell,* 382 F.3d 91, 135 n.24 (2d Cir. 2004), *overruled on other grounds by Randall* v. *Sorrell,* 548 U.S. 230 (2006) (holding statute unconstitutional without need for remand); *accord United States* v. *Hernandez-Fundora*, 58 F.3d 802, 808–10 (2d Cir. 1995) (approving judicial notice of jurisdictional issue); *see also United States* v. *Carr*, 25 F.3d 1194, 1202 n.3 (3d Cir. 1994) (declining to take judicial notice of supposedly legislative fact that is neither "commonly known" nor "readily determinable through unquestionably reliable sources"). The judicial notice of facts such as these is hardly comparable to the type of judicial notice BLAG now proposes, on topics that go to the very core of the dispute in this case.[6]

In support of its position, BLAG relies heavily on Federal Rule of Evidence 201 and its commentary, which describe the difference between *adjudicative* and legislative facts. By its own terms, that Rule "governs only judicial notice of adjudicative facts." Fed. R. Evid. 201(a). It says nothing at all about judicial notice of legislative facts or the application of the

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[6] *See, e.g.*, *Wiesmueller* v. *Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (judicial notice of "the laws and policies of other states relating to qualifications to practice law, accounts of the history of qualifications for the bar, and data on bar exam results"); *Central Soya Co.* v. *United States*, 15 C.I.T. 35 (Ct. Int'l Trade 1991) (judicial notice of affidavit by regulation's drafter as to intent of regulation, noting that it was not necessarily probative or persuasive).

Rules of Evidence to such facts. Had the drafters wished to make clear that the Rules of Evidence do not apply to non-adjudicative facts, they surely could have said so.

While the comments to the Rule do indicate that the drafters did not want to unduly limit the courts' ability to take notice of legislative facts that would inform "questions of law and policy" before them, the drafters specifically note that the Rule "should . . . leave open the possibility of introducing evidence through regular channels in appropriate situations." Fed. R. Evid. 201(a) advisory committee's note. This is just such a case—it puts squarely at issue the factual questions as to which BLAG would prefer simply to not put on evidence through regular channels.[7] *Oneida Indian Nation of NY* v. *New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (district court erred in taking judicial notice of historical materials relevant to interpretation of treaty "without affording an opposing party the opportunity to present information which might challenge the fact or the propriety of noticing it").[8]

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[7] Nor do the cases cited by BLAG offer any support for its argument. *See Indiana Harbor Belt R.R. Co.* v. *Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (observing, as to legislative facts, that "[i]f facts critical to a decision . . . cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held . . . . An evidentiary hearing would be of no use in the present case, however, because the plaintiff has not indicated any facts that it wants to develop through such a hearing"); *United States* v. *$124,570 U.S. Currency*, 873 F.2d 1240, 1244–45 (9th Cir. 1989) (rejecting legislative facts found in prior case and determining on basis of stipulated facts that search at issue was not permissible). BLAG cites *Democratic Party of the U.S.* v. *National Conservative Political Action Committee*, 578 F. Supp. 797, 830 (E.D. Pa. 1983), which was reviewed by *FEC* v. *National Conservative PAC*, 470 U.S. 480 (1985), wherein the Supreme Court affirmed the district court finding that evidence on the point at issue was "evanescent" and stated further that even "[i]f the matter offered by the FEC in the District Court be treated as addressed to what the District Court referred to as 'legislative facts,' we nonetheless agree with the District Court that *the evidence falls far short of being adequate for this purpose*." 470 U.S. at 499–500 (emphasis added).

[8] Significantly, the doctrine of "legislative facts" developed in the context of judicial review of administrative action. *See, e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 51–52 (1932) (holding that as to constitutional rights "the federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it"); Monaghan, *supra*, at 247–63 (summarizing development of doctrine). The Court sought to ensure that courts reviewing

To be sure, there are cases in which the United States Supreme Court has relied on evidence outside of the record to support its decision on constitutional matters.[9] *See* Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 95 (describing Supreme Court's deciding of cases "on the basis of its own research" as "unhappily typical," and noting preferred approach of "remand for further consideration of the legislative facts in the lower courts"). But such decisions say nothing about the proper finding of fact at the trial court level.[10] Nor is there any reason to conclude that in assessing constitutional questions, a trial court, which, after all, serves the function as the fact finder in our judicial system, should consider materials that plainly lack any indicia of reliability any more than it should do so in a non-constitutional dispute.

There are also cases, as BLAG notes, holding that, in the *appellate context*, legislative facts found by the district court are not subject to the same deference as non-legislative facts. But again, none of these cases suggest that a *trial court* should abrogate its

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agency action could go beyond the agency record so as to satisfy Article III. *Charlton Memorial Hospital* v. *Sullivan*, 816 F. Supp. 50, 53 (D. Mass. 1993), cited by BLAG, is similarly about the power of a district court reviewing agency action to create its own record. These cases do not suggest that the federal court was freed from the traditional rules that would govern its own record. And even as to the review of agency fact-finding, the doctrine of legislative and constitutional facts has been largely abrogated. *See N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 82 n.34 (1982) ("*Crowell*'s precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases.").

[9] Although it is worth noting that several of the cases BLAG cites do not actually fall into this category. For instance, though *Brown* v. *Board of Education* is cited as relying on statements of experts outside the record, in fact it cites to a compendium of expert opinion which covers little if any new ground not addressed in the expert opinion presented at trial below and subject to full adversarial testing. *See* Carl A. Auerbach, *Legislative Facts in* Grutter *v.* Bollinger, 45 San Diego L. Rev. 33, 36–37 (2008).

[10] *See* Karst, *supra*, at 96, 102 (noting that Supreme Court reluctance to remand may stem from "assumption that the trial of legislative facts will be hedged in by restrictive rules of evidence and procedure which would not hamper its own investigation" and concluding such assumption is "unfounded" in part because of "obvious value of cross-examination" of "live testimony by [an] expert").

traditional fact-finding function, or abandon the Rules of Evidence or Civil Procedure.[11] Indeed, to the extent those cases stand broadly for the proposition that appellate courts look more closely at the factual record in constitutional cases because of the importance of the issues involved, this again counsels greater attention to process at the district court level, not less.

BLAG is simply incorrect that facts relevant to questions of constitutional law are not subject at the trial level to the same procedures as any other factual issues. Trial courts as a matter of course do in constitutional cases what they always do—find facts—by hearing witnesses, admitting documents, and applying the rules of Evidence and Civil Procedure. For instance, in *Romer* v. *Evans*, the Supreme Court affirmed the lower court's holding that an amendment which prohibited any governmental action taken to protect individuals on the basis of their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" was unconstitutional. 517 U.S. 620, 635–36 (1996). Specifically, the Court held that the law was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* at 635. This was based on an extensive record below. The trial court heard numerous witnesses as to the question of whether the amendment served a compelling state interest, including testimony as to "the 'homosexual agenda' and the homosexual push for 'protected status'" who "urged that this Amendment protected Colorado's political functions from being overrun by such groups." *Evans* v. *Romer*, No. 92-7223, 1993 WL 518586, at *4 (Colo. Dist. Ct. Dec. 14, 1993). Similarly, witnesses testified as to whether the amendment would lead to "dilution of protections afforded to existing suspect classes," whether

[11] *Dunagin* v. *City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983), cited by BLAG, by its own terms addresses only "[t]he degree to which an appellate court should defer to the 'fact' findings of a trial judge as to the latest truths in the social sciences." *Id.* at 748 n.8 It thus says nothing about what evidence is properly considered in a trial court, and indeed makes no suggestion that anything other than the traditional rules would apply.

the amendment furthered "the prevention of governmental interference with personal, familial and religious privacy," and whether the amendment would promote "the physical and psychological well-being of children." *Id.* at *5–6, 9. As to each of these, the court heard competing (admissible) evidence and found that the government could not meet its burden.

Similarly, in *Perry* v. *Schwarzenegger*, "[t]he parties were given a full opportunity to present evidence in support of their positions" and "engaged in significant discovery, including third-party discovery, to build an evidentiary record." 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010); *see also id.*, Trans. of Oral Arg. at 81 (No. 09-2292) (Oct. 14, 2009) ("[E]mbedded within such a legislative fact are certain assumptions about human behavior and relationships" and "the presentation of evidence . . . is essential to the resolution of the issues").[12]

Across the spectrum of constitutional law cases, trial courts hear evidence in the usual course as to disputed issues of constitutional law of broad application.[13] For instance, in an

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[12] The court noted that "Plaintiffs presented eight lay witnesses . . . and nine expert witnesses. . . . Proponents presented two expert witnesses and conducted lengthy and thorough cross-examinations of plaintiffs' expert witnesses but failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." *Id.* at 932.

[13] *See, e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 671 (2004) (remanding to trial court for fact finding on constitutional fact of whether law was least restrictive alternative under First Amendment, noting that by "remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so"); *Rogers* v. *Lodge*, 458 US 613, 625 (1982) ("Extensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community, which increases the likelihood that the political process was not equally open to blacks."); *Grutter* v. *Bollinger,* 137 F. Supp. 2d 821, 835–36 (E.D. Mich. 2001) (parties "submitted expert reports on the educational benefits of diversity" and "[i]n an attempt to quantify the extent to which race actually has been considered during the years in question, the parties presented expert testimony, and expert reports, from two statisticians"), *rev'd*, 539 U.S. 306 (2003); *McConnell* v. *Fed. Election Comm'n.*, 251 F. Supp. 2d 176, 208–09, 209 n.4 (D.D.C. 2003) (observing that "evidentiary submissions . . . comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages of material" and noting court's agreement with attorney in case who said, "I think it's very, very important for the court to look carefully at the record"), *rev'd in part*, 540 U.S. 93 (2003).

analogous First Amendment context, trial courts routinely hear evidence about the impact of a given type of speech on children to determine whether a restriction on that speech will be upheld. *See, e.g.*, *Aschcroft* v. *Free Speech Coalition*, 535 U.S. 234, 253–54 (2002) (finding as to virtual child pornography, government had failed to prove anything "more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse").[14]

Here, Plaintiff respectfully submits, the reasons for applying the Rules of Evidence and Civil Procedure are even stronger. BLAG has offered not one word as to why any of the twelve documents Plaintiff has moved to strike should be considered by this Court to be reliable. And Plaintiff has now demonstrated that two of the documents are plainly not what BLAG says they are. As this example so vividly reinforces, the reason for the longstanding practice of the trial courts is obvious—where disputed facts can be tested through the evidentiary process, they should be. *See* John F. Jackson, *The Brandeis Brief—Too Little Too Late: The Trial Court As a Superior Forum for Presenting Legislative Facts*, 17 Am. J. Trial Advoc. 1 (1993).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion to strike. While Plaintiff submits that the materials at issue should be excluded, should the Court admit any of the materials, Plaintiff respectfully submits that she should be entitled to test such materials through the submission of additional affidavits and rebuttal evidence. *Oneida Indian Nation*, 691 F.2d at 1086.

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[14] *See also Playboy Entertainment Group, Inc.* v. *United States*, 30 F. Supp. 2d 702, 715–16 (D. Del. 1998) ("[T]o justify content-based restrictions on constitutionally protected speech when children are involved, [. . .] some evidence of harm must be presented."), *aff'd*, 529 U.S. 803 (2000); *Eclipse Enterprises, Inc.* v. *Gulotta*, 134 F.3d 63, 68 (2d Cir. 1997) (discussing testimony of expert witness psychiatrists and striking down ordinance banning sale of trading cards depicting criminal activity to minors because government "did not provide any support for its contention that the crime trading cards are either harmful to minors or contribute to juvenile crime").

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August 22, 2011

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