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 IN SUPPORT OF ITS RENEWED MOTION FOR LEAVE TO FILE SUR-REPLY

Intervenor-Defendant, the Bipartisan Legal Advisory Group of the United States House of Representatives (the "House"), through its undersigned counsel, has moved today for leave to file a sur-reply in opposition to Plaintiff's motion for summary judgment. The reasons for this motion are stated below.

BACKGROUND

On May 11, 2011, the Court issued its Revised Scheduling Order, which imposed a briefing schedule for both any motion for summary judgment that Plaintiff might file and any motion to dismiss that the House might file. *See* Revised Scheduling Order (May 11, 2011) (ECF No. 22). For Plaintiff's potential motion for summary judgment, the Court required Plaintiff to file her motion by June 24, 2011, the House to file any opposition by August 1, 2011, and Plaintiff to file any reply by August 19, 2011. *See id.* ¶¶ 9-11. For the House's potential motion to dismiss, the Court required the House to file its motion by August 1, 2011, Plaintiff to

file any opposition by August 19, 2011, and the House to file any reply by September 9, 2011. *See id.* ¶¶ 10-12.

Plaintiff filed a motion for summary judgment in accordance with the above schedule; in support of that motion, Plaintiff filed a forty-three (43) page memorandum. *See* Notice of Mot. for Summ. J. (June 24, 2011) (ECF No. 28); Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. (June 24, 2011) (ECF No. 29). The House filed an opposition to that motion, also per the above schedule; the House opposition totaled twenty-five (25) pages. *See* Mem. of Law in Supp. of Intervenor-Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("House Summ. J. Opp'n") (Aug. 1, 2011) (ECF No. 50).

On August 10, 2011, however, Plaintiff filed a motion to strike and the next day asked the Court both to suspend the due date for her reply in support of her motion for summary judgment and to grant her up to thirty (30) pages for that reply. *See* Notice of Mot. to Strike Documents Referenced by Def.-Intervenor in Opp'n to Pl.'s Mot. for Summ. J. (Aug. 10, 2011) (ECF No. 65); Letter from Pl. to Ct. (Aug. 11, 2011) (not docketed). On August 15, 2011, the Court suspended Plaintiff's deadline to file her reply brief. *See* Order (Aug. 15, 2011) (ECF No. 68). After denying Plaintiff's motion to strike, the Court, on August 29, 2011, imposed a new, September 16, 2011 deadline for Plaintiff's reply and granted Plaintiff's requested page-limit extension. *See* Order (Aug. 29, 2011) (ECF No. 75).

On September 2, 2011, the House moved for, among other things, leave to file a sur-reply in opposition to Plaintiff's motion for summary judgment in light of the circumstance that Plaintiff now would be responding to the House's twenty-five (25) page opposition with a thirty (30) page reply and would be claiming both the first and last word as to the dispositive motion briefing contemplated by the Court's Revised Scheduling Order, in contrast to the schedule

originally envisioned by the Court. *See* Intervenor-Def.'s Mot. for Clarification, Additional Pages, and Leave to File Sur-Reply (Sept. 2, 2011) (ECF No. 76). On September 6, 2011, the Court denied the House's motion in relevant part, stating as follows:

> As to Defendant's request for leave to file a surreply, the Court denies the request as premature. As the Plaintiff's reply has not yet been filed, the Court cannot now determine whether any "new or unexpected" arguments or issues will be raised that would necessitate a surreply. Defendant may renew its request after the reply brief is submitted if new issues are raised in Plaintiff's reply.

Order (Sept. 6, 2011) (ECF No. 79).

On September 15, 2011, Plaintiff filed her reply. *See* Reply Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. (Sept. 16, 2011) (ECF No. 81) ("Pl.'s SJ Reply"). She used all thirty (30) of her allotted pages. *See id.* Additionally, she filed her own supplemental declaration, a declaration of one of her attorneys (attaching an additional ninety-six (96) pages of material), supplemental declarations from two of her designated expert witnesses, and a further declaration from third party Lisa M. Diamond, Ph.D. *See* Assorted Decls. (Sept. 15, 2011) (ECF Nos. 82-86).

ARGUMENT

Plaintiff's reply raises "new or unexpected arguments or issues." Order (Sept. 6, 2011) (ECF No. 79) (quotation marks omitted). It also spans thirty (30) pages and attaches voluminous material, despite responding to a House opposition that used only twenty-five (25) pages, with limited attachments. Moreover, it, for now, provides Plaintiff both the first and last word in the dispositive motion briefing outlined by the Court's Revised Scheduling Order, in contrast to the schedule contemplated by that order. For these reasons, the House seeks leave to file a sur-reply in opposition to Plaintiff's motion for summary judgment.

First, Plaintiff's reply includes new or unexpected arguments or issues—i.e., the type of material about which the Court expressed particular concern in its September 6, 2011 Order. *See* Order (Sept. 6, 2011) (ECF No. 79) ("[T]he Court cannot now determine whether any 'new or unexpected' arguments or issues will be raised that would necessitate a surreply. Defendant may renew its request after the reply brief is submitted if new issues are raised in Plaintiff's reply."). Perhaps most extraordinarily, Plaintiff attaches and dwells on a declaration from Lisa M. Diamond, Ph.D., the author of two articles cited by the House. *See* Pl.'s SJ Reply at 8, 18 & n.12; Suppl. Decl. of Lisa M. Diamond (Sept. 15, 2011) (ECF No. 86) ("Diamond Suppl. Decl."). Plaintiff, through Dr. Diamond's declaration, complains that Dr. Diamond's research does not support the House's legal arguments regarding immutability. *See* Pl.'s SJ Reply at 8, 18 & n.12; Diamond Suppl. Decl. ¶¶ 5-6. In other words, Plaintiff has cited and attached material generated solely for purposes of this litigation, despite having made no effort to comply with the rules regarding expert witnesses. *Cf., e.g.*, Fed. R. Civ. P. 26(a)(2). This is extraordinary enough, but Plaintiff does not stop there. Rather, she next offers Dr. Diamond's views on another article cited by the House, an article as to which Dr. Diamond is not an author but nonetheless on which, just as would a proposed party expert, she is happy to opine. *See* Diamond Suppl. Decl. ¶¶ 7-10. Dr. Diamond may be pained that her research, in the House's estimation, supports the constitutionality of DOMA, and Plaintiff may be all too eager to capitalize on that pain. That, however, does not allow Plaintiff to submit material, authored by an individual never designated as a party expert, *newly created for the sole purpose of furthering Plaintiff's position in this litigation*. And it certainly should not be allowed without permitting the House an opportunity to respond to the material, which the House now seeks leave to do via sur-reply.

Plaintiff's new or unexpected arguments or issues do not end with Dr. Diamond: Rather, Plaintiff also attaches new declarations from two individuals who she did designate as party experts, Letitia Anne Peplau, Ph.D., and Michael Lamb, Ph.D. *See* Suppl. Expert [Decl.] of . . . Peplau (Sept. 15, 2011) (ECF No. 84) ("Peplau Suppl. Decl."); Suppl. Expert [Decl.] of . . . Lamb (Sept. 15, 2011) (ECF No. 85) ("Lamb Suppl. Decl."). Dr. Peplau for the first time offers her critique of an article cited by the House in its opposition brief. *See* Peplau Suppl. Decl. ¶¶ 3-6. Dr. Lamb for the first time takes issue with the Eleventh Circuit's reasoning in a case cited by the House. *See* Lamb Suppl. Decl. ¶¶ 14-18 ("The Eleventh Circuit's characterization of the gay parenting research . . . does not match reality."). The House could not have anticipated this newly created expert testimony; certainly unexpected is Plaintiff's proffer of Dr. Lamb to challenge the reasoning of the Eleventh Circuit. Moreover, other unexpected arguments newly offered by Plaintiff in her reply include:

- Plaintiff's extraordinary (and incorrect) assertion that the House argument regarding the applicability of rational-basis review, rather than heightened scrutiny, "relies entirely on overruled precedent or decisions that do not address the constitutional question presented," Pl.'s SJ Reply at 9; *cf.* House Summ. J. Opp'n (Aug. 1, 2011) (ECF No. 50) at 5-7 (citing numerous authorities, never overruled, that directly address the applicable level of equal protection scrutiny);

- Plaintiff's extraordinary (and incorrect) assertion that the House "concedes the second of the two essential factors of heightened scrutiny analysis," Pl.'s SJ Reply at 16; *cf.* House Summ. J. Opp'n (Aug. 1, 2011) (ECF No. 50) at 9-10 ("[A]ccording to case law that Plaintiff herself cites, the classifications treated as suspect tend to be irrelevant to any proper legislative goal. [¶]That is not the case [here].") (quotation marks, citation, alterations, and emphasis omitted); and

- Plaintiff's extraordinary (and incorrect) assertion that, "[a]part from . . . where the federal government stepped in for absent states, the federal government has always deferred to state decisions about who is married," Pl.'s SJ Reply at 30; *cf.*, *e.g.*, 26 U.S.C. § 7703(b) (excluding, for certain federal tax purposes, certain couples "living apart" from definition of married persons, no matter status of couple's marriage under state law); 42 U.S.C. § 416 (defining, for federal social security law purposes, terms "spouse," "wife," "widow," "divorce," "child," "husband," and "widower," no matter that such definitions inevitably will vary

from state law definitions); *see also* Pl.'s SJ Reply at 29 n.21 (acknowledging these statutes before ignoring them in the statement quoted above).[1]

Second, Plaintiff's reply brief leaves an extraordinary imbalance in the number of pages afforded her arguments as opposed to those of the House—it is that imbalance that has afforded Plaintiff the space to raise new and unexpected issues, to which the House now requests leave to respond. Plaintiff filed not only a forty-three (43) page memorandum in support of her motion for summary judgment, *see* Background, above, but also an additional seven declarations in support (averaging more than fifty-eight numbered paragraphs each, and appending exhibits), *see* Assorted Decls. (June 24, 2011) (ECF Nos. 30-36). Additionally, the United States Department of Justice ("DOJ") weighed in with twenty-eight (28) pages supporting Plaintiff's motion to dismiss and summary judgment positions, and the State of New York provided another twenty-five (25) pages to the same effect. *See* DOJ Brief (Aug. 19, 2011) (ECF Nos. 71 & 72); Brief for the State of New York as Amicus Curiae in Supp. of the Pl. (July 27, 2011) (ECF No. 41). The

[1] In her opposition to the House's initial motion for leave to file a sur-reply, Plaintiff cited three cases. *See* Mem. of Law in Opp'n to [House's] Mot. for . . . Leave to File Sur-Reply (Sept. 6, 2011) (ECF No. 78) ("Pl.'s First Sur-Reply Opp'n") at 5-6. To the extent Plaintiff's cases were or are relevant, the prerequisites (to the grant of leave to file a sur-reply) suggested by those opinions now unquestionably have come to pass. *See Siti-Sites.com, Inc. v. Verizon Commc'ns, Inc.*, No. 10 Civ. 3751(DLC), 2010 WL 5392927, at 3 n.6 (S.D.N.Y. Dec. 29, 2010) ("Siti explained that it did not have any new issues to raise that had not been briefed by the parties but simply wanted a further opportunity to address the defendants' arguments. Siti having failed to identify any issue in the defendant's reply brief which, in fairness, required that Siti be given an opportunity to respond, the request to file a sur-reply is denied."; in contrast, House not only makes no such concession but has explained that Plaintiff in fact has raised issues that, "in fairness, require[] that [the House] be given an opportunity to respond"); *Turley v. ISG Lackawanna, Inc.*, No. 06-cv-794S, 2011 WL 1104270, at *7 (W.D.N.Y. Mar. 23, 2011) ("Plaintiff's request to file a sur-reply is denied. Plaintiff does not specify what he needs to respond to in his sur-reply or what additional investigation is needed."; in contrast, House has done so); *OneBeacon Am. Ins. Co. v. Comsec Ventures Int'l, Inc.*, No. 8:07-cv-900 (GLS*RFT), 2010 WL 114819, at *3 (N.D.N.Y. Jan. 7, 2010) (denying motion to file sur-reply, "which essentially seeks permission to reargue the same points addressed in [party's] previous submissions"; in contrast, House does not seek re-argument but, instead, seeks to respond to "'new or unexpected' arguments or issues," Order (Sept. 6, 2011) (ECF No. 79)).

House, for its part, used only twenty-five (25) pages in opposing Plaintiff's motion for summary judgment, *see* House Summ. J. Opp'n (Aug. 1, 2011) (ECF No. 50), which it supported with a single eight (8) numbered paragraph declaration, *see* Decl. (Aug. 1, 2011) (ECF No. 54). And, now, Plaintiff has added to her pile a thirty (30) page reply and a further stack of declarations and exhibits. *See* Pl.'s SJ Reply; Assorted Decls. (Sept. 15, 2011) (ECF Nos. 82-86). Accordingly, the House seeks leave to file a sur-reply of moderate length, fifteen (15) pages. Even if the House were to use all of those requested pages, it will have responded to Plaintiff's extensive briefing with just over half of the pages expended by Plaintiff (*not* counting Plaintiff's voluminous declarations and exhibits and not taxing against Plaintiff the considerable number of pages expended on her behalf by DOJ and the State of New York).[2]

[2] In her opposition to the House's original motion for leave to file a sur-reply, Plaintiff offered two responses to this argument.

First, Plaintiff proffered the following non-sequitor: "The Court's rules provide that a moving party *always* has more pages in support of her motion than the non-moving party." Pl.'s First Sur-Reply Opp'n at 3-4 (emphasis in original). The issue here is not that Plaintiff has expended more pages that the House: It is the magnitude of the imbalance, as outlined above. The House does not seek more pages than Plaintiff, an equal number of pages, or even a substantially similar number of pages. (Plaintiff appears blind to the fact that she requested (and obtained, and used) not only additional pages for her reply brief but more pages than the opposition itself—despite the baseline rule that a reply brief "*always*" is limited to fewer pages than the opposition to which it responds, *see, e.g.*, Individual Practices of Judge Barbara S. Jones (effective Feb. 8, 2011) at 2(B); Individual Practices of Judge Francis at 2(C)).

Second, Plaintiff argued that her use of excess pages constituted "a problem entirely of [the House]'s own making" because the House "chose to insert a host of new evidentiary materials at that point in the proceedings [i.e., in its opposition to her motion for summary judgment]." Pl.'s First Sur-Reply Opp'n at 4. Plaintiff is re-litigating an issue that she already has lost: On August 29, 2011, the Court denied her motion to strike. Order (Aug. 29, 2011) (ECF No. 75). The Court thereby rejected Plaintiff's argument that certain of the books, studies, scholarly articles, and other materials cited by the House in opposition to Plaintiff's motion for summary judgment are evidentiary materials subject to Plaintiff's proposed limitations. *See id.* Indeed, all of the materials cited by the House were pre-existing and publicly available (i.e., equally accessible to Plaintiff as to the House) and, in any event, it is not at all clear at what possible earlier time the House was supposed, in Plaintiff's view, to have presented those materials to the Court: There was no opportunity for the House to do so before the precise time at which it acted, the filing of its opposition to Plaintiff's motion for summary judgment.

Third, the Court's original scheduling order contemplated that briefing on Plaintiff's motion for summary judgment should begin before the House's motion to dismiss, overlap with briefing on the motion to dismiss for a period, and then conclude before the completion of briefing on the House's motion. *See* Revised Scheduling Order (May 11, 2011) (ECF No. 22) ¶¶ 9-12. The effect of the extension of time occasioned by Plaintiff's failed motion to strike, however, has been that, absent a House sur-reply, Plaintiff would have both the first and the last word in briefing dispositive motions in this case. Permitting a sur-reply by the House thus would restore the balance contemplated in the original scheduling order not only in terms of the number of pages for each side's briefing, but also in the timing of that briefing.[3]

CONCLUSION

Accordingly, the House respectfully requests that the Court grant the House leave to file a sur-reply in opposition to Plaintiff's motion for summary judgment, which sur-reply shall be no more than fifteen (15) pages in length and shall be filed within ten (10) business days of the Court's Order granting the House leave to file.

[3] In her opposition to the House's original motion for leave to file a sur-reply, Plaintiff did not contest this factual reality (because she could not, and cannot) but, instead, tried to sweep it under the rug: "Thus, all that is really different is that Plaintiff received an extension of time to submit her reply brief . . . ." Pl.'s First Sur-Reply Opp'n at 4. Plaintiff's response does not change the reality that she now seeks to capitalize on her failed motion to strike to alter, to her advantage, the nature of the dispositive motion briefing schedule.

Respectfully submitted,

/s/ Paul D. Clement

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September 20, 2011

CERTIFICATE OF SERVICE

I certify that on September 20, 2011, I served one copy of the Memorandum of Law of Intervenor-Defendant in Support of Its Renewed Motion for Leave To File Sur-Reply by CM/ECF and by electronic mail (.pdf format) on the following:

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