

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKEDITH 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**PLAINTIFF'S RESPONSE TO  
INTERVENOR-DEFENDANT'S  
NOTICE OF RECENT DECISIONS**

Plaintiff Edith Schlain Windsor hereby responds to the Notice of Recent Decisions filed by Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG"), dated October 20, 2011. Neither of the two cases cited by BLAG has any bearing on the issues at bar.

*First, Log Cabin Republicans v. United States* is entirely irrelevant. *Log Cabin* held that a challenge to "Don't Ask, Don't Tell" was moot given the law's repeal. *See Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 WL 4494225, at \*\*2-5 (9th Cir. Sept. 29, 2011) (per curiam). As DOMA remains in effect, there is no issue of mootness here. BLAG also cites dicta from the concurrence. This out-of-circuit dicta, from a concurring opinion in a case dealing with entirely unrelated issues, relies on the same out-of-circuit and outdated pre-*Lawrence* caselaw that BLAG has already briefed at length, *see id.* at \*8, and which Plaintiff has already addressed. (*See* Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 5-7; Reply Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. at 9-13.)

*Second*, in *Lui v. Holder* the district court, without independent analysis of the Equal Protection claim before it, held that it was constrained to dismiss the complaint under Ninth Circuit precedent. *Lui v. Holder*, No. 2:11-cv-01267 (SVW), at 3–5 (C.D. Cal. Sept. 28, 2011). Again, *Lui* was decided on the basis of old Ninth Circuit precedent, which relied on the same cases as the concurrence in *Log Cabin*. *Id.* Additionally, the *Lui* court expressly distinguished cases, like Plaintiff’s here, that are founded on “the basis of denial of certain federal marriage-based benefits.” *See id.* at 5 n.7 (comparing case to *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010)).

For these reasons, this Court should give no weight to BLAG’s notice or the cases appended thereto.

Dated: New York, New York  
October 21, 2011

Respectfully Submitted,

PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP

/s/ Roberta A. Kaplan

Roberta A. Kaplan, Esq.  
Andrew J. Ehrlich, Esq.  
1285 Avenue of the Americas  
New York, New York 10019-6064  
(212) 373-3000  
rkaplan@paulweiss.com  
aehrich@paulweiss.com

– and –

James D. Esseks, Esq.  
Rose A. Saxe, Esq.  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
125 Broad Street  
New York, New York 10004-2400  
(212) 549-2500  
jesseks@aclu.org  
rsaxe@aclu.org

– and –

Melissa Goodman, Esq.  
Alexis Karteron, Esq.  
Arthur Eisenberg, Esq.  
NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION  
125 Broad Street, 19th Floor  
New York, New York 10004  
(212) 607-3300  
mgoodman@nyclu.org  
akarteron@nyclu.org  
aeisenberg@nyclu.org

*Attorneys for Plaintiff Edith Schlain Windsor*