

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,  
Plaintiffs,

v.

KENNETH L. MILLER, et al.,  
Defendants.

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Civil Action No. 2:12-cv-00184-WKS

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**RESPONSE OF DEFENDANTS LIBERTY UNIVERSITY, INC.,  
THOMAS ROAD BAPTIST CHURCH, INC. AND VICTORIA HYDEN TO  
PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING U.S. v. WINDSOR**

Plaintiff's Supplemental Memorandum (dkt. 111) regarding the Supreme Court's recent decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), adds nothing to the Court's consideration of the pending motions to dismiss, because nothing in *Windsor* can be construed to revive Plaintiff's defunct claims.

Plaintiff asserts that *Windsor* "is highly relevant" to her § 1985(3) claim for conspiracy to violate civil rights, because "*Windsor* strongly supports [her] argument that Defendants acted with actionable discriminatory animus against her **on the basis of her homosexuality.**" (Dkt. 111, p. 2) (emphasis added). This eleventh-hour argument fails for three reasons:

First, Plaintiff's Amended Complaint does not plead any conspiracy to deprive Plaintiff of her civil rights "on the basis of her homosexuality." (Dkt. 59, ¶ 75). On the contrary, Plaintiff **only** pleads (even after amending her Complaint) that the alleged § 1985 conspiracy against her was "on account of **gender.**" (*Id.*) (emphasis added). Plaintiff cannot "plead" a brand new claim in a "supplemental memorandum" to survive dismissal. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) ("party may not amend pleading through statements in briefs"); *Lerner v. Forster*, 240 F. Supp. 2d 233, 241 (E.D.N.Y. 2003) ("New claims not specifically asserted in the

complaint may not be considered by courts when deciding a motion to dismiss"). As *Windsor* says nothing about conspiracies to deprive someone of civil rights "on account of gender," *Windsor* is therefore inapposite to the only § 1985 claim Plaintiff has pled.

Second, even if the Court were to allow Plaintiff to plead new claims through a supplemental memorandum, *Windsor* would not benefit Plaintiff because *Windsor* says nothing about conspiracies to violate civil rights "on the basis of homosexuality" (or any other basis, for that matter). Instead, *Windsor* holds only that the federal government may not refuse to recognize a same-sex "marriage" officiated in a State where such "marriages" are lawful. 133 S.Ct. at 2695-96. In so doing, the Supreme Court did **not** hold that homosexuals are part of a suspect or quasi-suspect class entitled to intermediate or heightened scrutiny. *Id.* On the contrary, the Court invalidated the federal statute at issue, the Defense of Marriage Act ("DOMA"), under a **rational basis** review, concluding that Congress has "**no legitimate purpose**" in refusing to recognize same-sex "marriages" that were valid where officiated. *Id.* at 2696 (emphasis added).<sup>1</sup> Thus, by applying rational basis, rather than intermediate or heightened scrutiny review, the Supreme Court implicitly reached exactly the opposite conclusion advanced here by Plaintiff – that sexual orientation does **not** belong in a suspect class. *Id.* *Windsor*, of course, never involved a civil conspiracy claim under § 1985. Consequently, no court before, in or after *Windsor* has ever held that a § 1985 claim can be premised upon an alleged discriminatory animus against homosexuality.

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<sup>1</sup> Although the Supreme Court in *Windsor* never expressly identified the type of review it was applying to DOMA, we know it was rational basis because that is the only type of review which asks "whether a challenged classification is rationally related to achievement of a **legitimate state purpose**." *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668 (1981) (emphasis added). In contrast, the intermediate or heightened scrutiny analysis holds that "a statutory classification must be substantially related to an **important governmental objective**." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added). And, strict scrutiny requires that the challenged classification "furthers a **compelling government purpose**." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (emphasis added).

Moreover, even if the Supreme Court did somehow confer a suspect or quasi-suspect status upon a certain class of individuals, which it did not, such holding would be irrelevant here because Plaintiff indisputably does not belong in that class. The *Windsor* Court repeatedly emphasized that "the class" of individuals with which it was concerned "are those persons who are joined in same-sex **marriages** made lawful by the State." *Id.* at 2695 (emphasis added). The Court went further and expressly stated that "[t]his opinion and its holding are confined to those **lawful marriages.**" *Id.* at 2696 (emphasis added). It is undisputed that Plaintiff was never married to Lisa Miller, and that even their civil union was lawfully dissolved many years before the inception of this litigation. *Windsor* is therefore inapposite in all respects.

Third, even if *Windsor* somehow establishes a claim for § 1985 conspiracies against homosexuals, which it does not, and even if Plaintiff could somehow assert that claim for the first time in a brief, which she cannot, that claim would still fail as a matter of law because Plaintiff has failed to plead the state action required for equal protection violations.<sup>2</sup> (*See Reply of Defendants Liberty University, Inc., Thomas Road Baptist Church, Inc. and Victoria Hyden in Support of their Motion to Dismiss Plaintiff's Amended Complaint*, dkt. 94, pp. 31-33). Nothing in *Windsor* purports to dispense with that threshold requirement, and Plaintiff does not contend otherwise.

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<sup>2</sup> The only civil right of which Plaintiff alleges to have been deprived in her § 1985 claim is "equal protection" (dkt. 59, ¶¶ 74-75), which indisputably requires state action. (Dkt. 94, pp. 31-32). To circumvent the state action requirement, Plaintiff attempted to assert a new civil right – the right to interstate travel – in an earlier memorandum (though, fatally, not in her Amended Complaint). (Dkt. 75, pp. 51-52). But Plaintiff purported to assert the interstate travel claim only on behalf of Isabella Miller, and not Plaintiff's own behalf. (*Id.* at 51) (claiming that "Plaintiffs have alleged a conspiracy to infringe **upon Isabella's** right to interstate travel") (emphasis added). Thus, even if Plaintiff could somehow avoid the state action requirement as to the belated claim she purports to advance on behalf of Isabella Miller, which, as shown at dkt. 94, pp. 32-33 she cannot do, *Windsor* would still be of no benefit because Plaintiff does not and cannot allege that Isabella, a child, is homosexual.

Finally, in addition to claiming specific support for her § 1985 claim, Plaintiff also makes the vague assertion that *Windsor* somehow "is highly relevant ... to the Amended Complaint overall." (Dkt. 111, p. 2). Plaintiff offers no explanation as to how *Windsor* could revive her non-existent "intentional tort of kidnapping claim," nor her creative RICO conspiracy claims. (*Id.*) Nor does *Windsor* permit the exercise of personal jurisdiction over foreign defendants who have no minimum contacts with Vermont. (*Id.*) In short, *Windsor* does not address any of these incurable defects in Plaintiff's Amended Complaint.

At bottom, the Supreme Court's conclusion in *Windsor* that the federal government must recognize same-sex "**marriages**" originating in states that recognize them has no import here, because Plaintiff and Lisa Miller were never married, and because Plaintiff is not suing the federal government (or any government for that matter) to secure the benefits of any lawful marriage. The Court should therefore reject Plaintiff's new arguments, and should dismiss her Amended Complaint with prejudice.

Respectfully submitted,

DINSE, KNAPP & McANDREW, P.C.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on July 29, 2013. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

DINSE, KNAPP & McANDREW, P.C.

/s/ Ritchie E. Berger  
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