IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, SHARON BALDWIN, SUSAN G. BARTON, and GAY E. PHILLIPS, Plaintiffs, v. UNITED STATES OF AMERICA, *ex rel.*, ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States of America; and SALLY HOWE-SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma, Defendants.	)	No. 04-CV-848-TCK-TLW

REPLY IN SUPPORT OF MOTION FOR ENTRY OF FINAL JUDGMENT ON CHALLENGE TO SECTION 3 OF THE DEFENSE OF MARRIAGE ACT AND BRIEF IN SUPPORT

Plaintiffs Susan Barton and Gay Phillips ("Plaintiffs") submit the following reply in support of their pending motion for entry of final judgment on their claims against Section 3 of the Defense of Marriage Act ("DOMA") (docket no. 257):

PRELIMINARY STATEMENT

Plaintiffs have pursued this case for nearly a decade, seeking vindication of their constitutional right to be recognized as a lawfully married couple, along with the appurtenant entitlements and benefits. Plaintiffs challenged the constitutionality of Section 3 of DOMA, which prohibited recognition of their lawful marriage conducted in California. Plaintiffs sought, *inter alia*, declaratory relief which stated DOMA violated

their rights to due process and equal protection under law and such other appropriate relief to remedy Plaintiffs' inability to file a joint federal tax return and obtain certain social security benefits. Indeed, Section 3 impacted and re-wrote over 1,000 federal laws dealing with those federal benefits potentially available to a "married" individual.[1] During most of this time, the United States vigorously defended Section 3 and questioned Plaintiff's standing to even bring such a claim. The parties filed numerous briefs litigating the issues surrounding Plaintiffs' challenge; this case was appealed to the Tenth Circuit and remanded back for further proceedings. Such time and effort has taken an emotional toll on Plaintiffs, who only wanted their marriage to be treated equally and with the same respect and dignity as the marriages of opposite-sex couples.

The United States does not refute that any judgment as to Section 3 would be final or there is no just reason for delay. Rather, it chooses to play procedural parlor games, blithely contending that final judgment is not necessary and this claim be dismissed as merely moot, although no motion to dismiss is at issue, and despite the current administration's agreement that Section 3 was unconstitutional and deserved to be struck down. Plaintiffs do not have a judgment of the type issued in *Windsor*. Despite its relevance, *Windsor* is not a declaration in favor of Plaintiffs *in this case*. Plaintiffs' rights have not been declared and there remains a live controversy as to the declaration of such rights and the nature and scope of appropriate relief, both equitable and monetary. Moreover, *Windsor* is not tailored to Plaintiffs' specific injuries and needs nor is it a

[1] *See* U.S General Accounting Office, Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Washington, D.C.: Jan. 23, 2004).

declaration that their marriage must be respected under federal law. It has not mooted their entitlement to the relief they seek as to Section 3's application to their marriage and the entitlements that flow therefrom.

The Government's attitude appears to be that simply because plans "are in the works" that may or may not alleviate Plaintiffs' injuries (Response at 3) (docket no. 264), this Court should simply accept this promise and deny Plaintiffs' entitlement to judgment as if nothing has transpired the last decade. However, the mere possibility of future relief does not moot a claim; Plaintiff's entitlement to a judgment has not disappeared because the Government *may* take responsive action. Indeed, the Government may switch course and find such proposals unworkable or unfeasible. In any event, only a *judgment* would protect Plaintiffs' challenge that Section 3 of DOMA is unconstitutional as applied to their marriage.[2] The unilateral speculative remedies offered by the Government do not adequately protect Plaintiffs' rights. As shown below, the notion that entry of judgment should be denied because there is no live case or controversy with respect to any form of relief is patently untrue and Plaintiffs' motion for entry of judgment should be granted.

ARGUMENT AND AUTHORITIES

The mootness doctrine is inapplicable. A case may become moot "when it is ***impossible*** for the court to grant any effectual relief whatsoever to a prevailing party."

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[2] Plaintiffs respectfully submit that a comprehensive order disposing of all claims would be suitable. The parties have agreed this case, in its entirety, is ripe for summary adjudication. Each of the plaintiffs contend in their supplemental memorandum that *Windsor* is conclusive and dispositive as to all claims arising in these proceedings. However, with the Court Clerk's stated intention of responding to *Windsor*'s application, Plaintiffs Barton and Phillips have moved for entry of judgment now.

Colorado Off-Highway Vehicle Coalition v. United States Forest Serv., 357 F.3d 1130, 1133 (10th Cir. 2004) (emphasis added). The burden of demonstrating mootness is a "heavy one" and a case is not moot unless "(1) it can be said with assurance that there is no reasonable expectation … that the alleged violation will recur … and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (citations and internal quotations omitted). "[E]ven 'a partial remedy is sufficient to prevent a case from being moot.' " *Rajala v. Gardner*, 709 F.3d 1031, 1036 (10th Cir. 2013) (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)).

I. DEFENDANT HAS FAILED TO MEET ITS HEAVY BURDEN OF SHOWING THIS CASE IS MOOT

The Obama Administration argues Plaintiffs' claims are moot because "[b]oth the Internal Revenue Service and the Social Security Administration … are working to implement the Supreme Court's decision in *Windsor*, such that same-sex married couples will receive benefits previously unavailable because of Section 3, if they are otherwise eligible." (Response at 3) (docket no. 264). In light of these developments, it contends, "plaintiffs will no longer suffer the injuries caused by Section 3 of DOMA on which they relied to establish their standing to challenge that provision." *Id.*

As an initial matter, there exists only a presumption that the IRS and SSA will in fact do as their respective statements provide. Neither statement has the force and effect of law, nor does the Government offer any reason to conclude they are binding in these proceedings. To this end, it is well recognized that, as a general matter of law, voluntary

action is not enough to render a controversy moot. *Davis*, 440 U.S. at 631. It is thus far from clear that the aforementioned agencies will actually and uniformly do as much for Plaintiffs as their respective statements represent. The Government has not offered any evidence as to the proposed regulations' substance or whether the injury to Plaintiffs, caused by the implementation of Section 3, will be alleviated. In essence, its contention that Plaintiffs' injuries will be remedied is pure speculation and insufficient to warrant a finding of mootness. *Compare Frazier v. Ward*, 426 F.Supp. 1354, 1361 (N.D.N.Y. 1977) (inmates' suit for declaratory judgment concerning legality of prison regulations relating to strip searches was not mooted by change in such regulations where it appeared that, even under new regulations, searches were routinely permitted without any justification and despite lack of real suspicion that such searches were justified.). To this end, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010) is distinguishable because the challenged orders in those cases *no longer existed*. *Id*. at 1111.

Also, in *GF Gaming Corp. v. City of Black Hawk, Colo*., 405 F.3d 876 (10th Cir. 2005), also cited by Defendant, the defendants there had completed the challenged construction project. *Id*. at 882. Here, the adverse rules and regulations affected by DOMA are in still place and remain in effect. Despite what the Government may or may not do about Section 3's adverse impact, the fact remains Plaintiffs suffered constitutional injury by its application. Without a determination as to the validity of Section 3, as applied to Plaintiffs, there continues to be a real and present danger to Plaintiff's constitutional rights. *Zichy v. City of Philadelphia*, 590 F.2d 503, 509 (3d Cir.

1975) (fact that city changed its challenged maternity leave policy did not moot issues raised in suit since even with policy change; there remained issue of relief for those employees whose rights were violated while the challenged policy was in effect.)

Moreover, the Government's claim of *possible* relief does not render Plaintiff's claim moot. As stated above, a case is not moot unless it can be said ***with assurance*** there is no reasonable expectation the alleged violation will recur and interim relief or events have ***completely and irrevocably eradicated*** the effects of the alleged violation, rendering it ***impossible*** for the district court to grant any effectual relief whatsoever. *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979); *Colorado Off-Highway Vehicle Coalition v. United States Forest Serv.*, 357 F.3d 1130, 1133 (10th Cir. 2004). In this regard, the Government has only presented this Court with speculation of what certain agencies may do; this does not satisfy its heavy burden of showing such speculative plans "completely and irrevocably" eradicate the effects of Section 3, thereby rendering it "impossible" for this Court to grant any effective relief whatsoever. The Court and the parties should not be bound by Defendant's good word that such "relief," in whatever form it takes, will be forthcoming, complete and adequate.

Defendant offers only unenforceable generalities about what it may or may not do at its leisure at some unknown time in the future in order to avoid judgment based solely on claimed "mootness." Defendant has not come close to meeting its heavy burden of showing that the Court could grant no relief in this case because no live controversy exists. Accordingly, the Court should grant Plaintiffs' motion for entry of judgment.

II. PLAINTIFF'S CLAIMS ARE NOT MOOT BECAUSE A LIVE CONTROVERSY EXISTS REGARDING THE NATURE AND SCOPE OF RELIEF TO BE AFFORDED

Contrary to Defendant's position (Response at 3), this Court could provide Plaintiffs with effective relief. Plaintiffs' Complaint requested "[s]uch other relief deemed proper," including an award of attorney's fees and costs, to remedy the negative effects of Section 3. (Amended Compl., p. 10) (docket no. 122). This Court has broad equitable powers to remedy constitutional violations and fashion the appropriate relief. "Assuming a determination of constitutional violations, it is undeniable that the Federal courts having subject matter jurisdiction also have broad equitable power to remedy and obviate all traces of the constitutional wrong. … Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Sullivan v. Murphy*, 478 F.2d 938, 966 (D.C. Cir. 1973) (citing *Swann v. Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971)), *cert. denied*, 414 U.S. 880. 94 S.Ct. 162, 38 L.Ed.2d 125 (1973).

A case is not moot so long as a claim for monetary relief survives; "[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable." 13C Wright, Miller & Kane, *Federal Practice and Procedure* § 3533.3 at 2 (3d ed. 2008); *compare Wirsching v. Colorado*, 360 F.3d 1191, 1196 (10th Cir. 2004) (even though plaintiff's claims for declaratory and injunctive relief were moot, court found plaintiff's request for damages was not: "[i]n contrast, [plaintiff's] damages claims are not moot. Despite [his] release from prison, those claims 'remain viable

because a judgment for damages in his favor would alter the defendants' behavior by forcing them to pay an amount of money they otherwise would not have paid.' ... Because we read [plaintiff's] complaint as seeking damages for all of the constitutional violations he has alleged, there is a case or controversy regarding all of those alleged violations."); *Rein v. Providian Financial Corp.*, 270 F.3d 895, 898 (9th Cir. 2001) (even a generalized claim for monetary damages is sufficient to maintain justiciability).

See also Wernsing v. Thompson, 423 F.3d 732, 745 (7th Cir. 2005) (plaintiffs also seek monetary damages for humiliation, stress and emotional anguish resulting from the imposition of the directive. Such claims are not moot, even if the underlying misconduct which caused the injury has ended.") (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 271 n. 12 (3d Cir. 2002) (plaintiff's appeal based on agreement to voluntarily dismiss claims challenging constitutionality of Coal Industry Retiree Health Benefit Act was not moot, even though intervening Supreme Court decision found Act unconstitutional, and government had declared assignments to corporation under Act void and agreed further assessments would be inappropriate, where grant of relief could affect plaintiff's right to premium payments); *Khodara Environmental, Inc. ex rel. Eagle Environmental L.P. v. Beckman*, 237 F.3d 186, 195-96 (3d Cir. 2001) (amendment of federal statute to eliminate features held facially invalid did not moot claims for damages arising from application of the former statute).

Although Defendant continues to attempt to frame Plaintiffs' entitlement to relief as a "tax refund," it has presented no compelling evidence or authority in support of this

contention. Tax refund suits are governed by 26 U.S.C. § 7422(a) and ***preclude*** the filing of any civil suit "until a claim for refund or credit has been duly filed with the Secretary." *Id.* A review of the pleadings and briefs filed in this Court for the past nine years shows Plaintiffs are not seeking a refund of taxes nor challenging a provision of the tax code, thus this case is not a "tax refund suit" within the meaning § 7422(a). *McMaster v. Coca-Cola Bottling Co. of California*, 392 F. Supp. 2d 1107, 1113 (N.D. Cal. 2005). Accordingly, at the very least, there remains a live case or controversy as to (1) the nature/character of equitable and monetary relief, (2) its availability and (3) the amount.

In addition to the availability of monetary relief, the fact it has yet to be determined whether Plaintiffs are entitled to an award of attorney's fees, and the amount of such fees, precludes this action from being declared moot. *Lupiani v. Wal-Mart Stores, Inc.*, 435 F.3d 842, 847 (8th Cir. 2006) ("Wal-Mart argued that this case is moot because it altered the [summary plan description] such that the plaintiffs' concerns have been addressed. This case is not moot and remains live, however, because the issues of damages and attorneys' fees sought by the plaintiffs remain unaddressed."); *Donovan ex rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 218 (3d Cir. 2003) ("[a]lthough [plaintiff's] claim for declaratory and injunctive relief is moot, her damages and attorney's fees claims continue to present a live controversy."). Likewise, pursuant to 28 U.S.C. § 1920, Plaintiffs are entitled to reimbursement of their costs and such determination may only be made upon entry of judgment.

Accordingly, Plaintiffs' claim is not moot because a live controversy exists regarding the nature and scope of relief to afforded Plaintiffs as a result of Section 3's application.

CONCLUSION

The United States has failed to show it is impossible for the court to grant any form of effectual relief to Plaintiffs as a result of Section 3's application or that its planned response will completely and irrevocably eradicate the effects of the alleged violation. Accordingly, this case is not moot and Plaintiffs request that the Court enter a final judgment against Defendant as to Plaintiffs Susan Barton and Gay Phillips' challenge to Section 3 of DOMA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 23, 2013, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the current parties of record.

s/Don G. Holladay