

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

MARY BISHOP and SHARON BALDWIN,	)	
et al.,	)	
	)	
Plaintiffs,	)	No. 4:04-cv-00848-TCK-TLW
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

**RESPONSE BY UNITED STATES OF AMERICA AND ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL, TO PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM  
REGARDING THE EFFECT OF *UNITED STATES V. WINDSOR***

The United States of America and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States (collectively, “United States”), by their undersigned counsel, respond as follows to Plaintiffs’ Supplemental Memorandum Addressing Effect of *United States v. Windsor* Upon Pending Motions and Cross Motions for Summary Judgment (Doc. 262).

1. In light of the Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the only federal claim remaining in this action is plaintiffs’ challenge to Section 2 of the Defense of Marriage Act (“DOMA”).<sup>1</sup> As the United States has demonstrated in prior filings, the plaintiffs lack standing to challenge Section 2, given that the injury of which they complain (inability to marry) is not “fairly traceable” to actions of the United States, nor redressable in an action against the United States. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-04 (1998). Plaintiffs’ claims regarding Section 2 should be dismissed on this basis.

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<sup>1</sup> “Plaintiffs” as used herein refers to Susan Barton and Gay Phillips.

2. In their supplemental memorandum on the effect of the *Windsor* decision, plaintiffs argue that the unconstitutionality of Section 3 of DOMA, established in *Windsor*, necessarily requires holding that Section 2 is also unconstitutional (Doc. 262 at 9-10).<sup>2</sup> This argument does not, however, respond to the United States’ motion to dismiss, as the constitutionality of Section 3 does not affect plaintiffs’ standing to challenge Section 2. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (stating that standing “in no way depends on the merits” of a claim). A plaintiff must establish standing before the Court can reach the merits. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210 (1995) (“Before reaching the merits of Adarand’s challenge, we must consider whether Adarand has standing . . . .”); *In re C.W. Mining Co.*, 636 F.3d 1257, 1260 n.5 (10th Cir. 2011) (“We may not assume that C.W. has Article III standing in order to reach the merits . . . .”). Thus, the Court should dismiss plaintiffs’ Section 2 claims for lack of standing without reaching plaintiffs’ argument regarding the effect of *Windsor* on those claims.

Dated this 23rd day of August, 2013.

Respectfully submitted,

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s/ W. Scott Simpson

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<sup>2</sup> Plaintiffs have made the same argument previously in this case, before the Supreme Court issued its decision in *Windsor* (Doc. 228 at 7-8).

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### **CERTIFICATE OF SERVICE**

I hereby 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 following ECF registrants:

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s/ W. Scott Simpson

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W. SCOTT SIMPSON