

[Attorneys listed on signature page]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

ANGELA ROLANDO and TONYA
ROLANDO; CHASE WEINHANDL and
BENJAMIN MILANO; SUSAN
HAWTHORNE and ADEL JOHNSON; and
SHAUNA GOUBEUX and NICOLE
GOUBEUX,

Plaintiffs,

v.

TIM FOX, in his official capacity as Attorney
General of the State of Montana; MICHAEL
KADAS, in his official capacity as the Director
of the Montana Department of Revenue; and
FAYE MCWILLIAMS, in her official capacity
as Clerk of Court of Cascade County.

Defendants.

CV-14-40-GF-BMM

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

The State does not contest that Plaintiffs are entitled to summary judgment under the Ninth Circuit's binding opinion in *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014). The State also fails to contest Plaintiffs' request that the Court act promptly to resolve Plaintiffs' Motion, and it does not argue that the Court should stay any order or judgment in Plaintiffs' favor. Given that the Motion is effectively uncontested, and although Plaintiffs would be prepared to discuss these issues at the hearing set for November 20, 2014 (*see* Text Order, ECF No. 39), Plaintiffs respectfully submit that no hearing is necessary. Accordingly, Plaintiffs respectfully request that the Court review and grant summary judgment in their favor at the Court's earliest convenience.

Specifically, as to the merits of Plaintiffs' Motion, Defendants' Brief in Response:

- Does not assert that the Motion should be denied;
- Repeatedly "concede[s] that *Latta* is binding authority in the Ninth Circuit at the present time" (Defs.' Br. at 2, ECF No. 40; *see id.* at 4, 7, 11);
- Does not identify any disputed material fact (*id.* at 6); and
- Makes no attempt to refute Plaintiffs' argument that the *Latta* "holding and reasoning apply with equal force to Plaintiffs' claim asserting that the challenged provisions of Montana's constitution and statutes likewise unjustifiably discriminate on the basis of sexual orientation in violation of the Equal Protection Clause" (Pls.' Br. at 9-10, ECF No. 38).

Although the State expresses its disagreement with the Ninth Circuit's opinion, it acknowledges that its arguments (which the Ninth Circuit rejected) cannot overcome the opinion's binding effect on all district courts within this Circuit. Thus, Plaintiffs' entitlement to summary judgment is effectively unopposed.

The State likewise fails to contest Plaintiffs' arguments seeking a prompt resolution to their motion. (*See* Pls.' Br. at 13-16, ECF No. 38.) As the State thereby concedes, and as other courts have concluded, there are no valid grounds to continue the enforcement of state marriage bans that the Ninth Circuit has held unconstitutional. As explained in Plaintiffs' Motion, the Ninth Circuit and the Supreme Court have lifted stays of all orders enjoining enforcement of Idaho's and Nevada's marriage bans, notwithstanding that the mandate had been recalled. (*See id.* at 1 n.1, 15.) In addition, recognizing the binding effect of *Latta*, district courts in Arizona and Alaska have permanently enjoined enforcement of the same-sex marriage bans in those states, effective immediately. *See Connolly v. Jeanes*, No. 2:14-cv-00024, 2014 WL 5320642, at *1 (D. Ariz. Oct. 17, 2014) ("This court is bound by the precedent set by the Court of Appeals for the Ninth Circuit. For that reason, the plaintiffs are entitled to a declaration that the challenged laws are unconstitutional and a permanent injunction prohibiting their enforcement." (footnote omitted)); *Hamby v. Parnell*, No. 3:14-cv-00089, 2014 WL 5089399, at *12 (D. Ala. Oct. 12, 2014) (applying *Latta*, "[t]he Court immediately enjoins the state of Alaska . . . from enforcing" Alaska's marriage ban). The Supreme Court denied an application to stay the Alaska ruling pending appeal (*see Parnell v. Hamby*, No. 14A413, 2014 WL 5311581, at *1 (U.S. Oct. 17, 2014)), and no appeal has been filed in Arizona. Thus, those two states also now permit same-sex couples to marry, leaving Montana as the sole state in this Circuit to prohibit same-sex couples from marrying, or to preclude recognition of valid marriages entered into elsewhere.¹

¹ *See Perry v. Brown*, 725 F.3d 968, 970 (9th Cir. 2013) (dissolving stay of order enjoining California marriage ban); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147-48 (D. Or. 2014) (overturning Oregon marriage ban); Haw. Rev. Stat. § 572-1 (West, Westlaw through 2014 Reg. Sess.) (marriage "shall be permitted between two individuals without regard to gender"); Wash. Rev. Code § 26.04.010(1) (West, Westlaw through 2014 legislation) ("[m]arriage is a civil contract between two persons").

District courts in other circuits in which courts of appeals have issued opinions similar to *Latta* have similarly acted promptly to apply their circuits' binding precedent to prohibit enforcement of unconstitutional marriage bans.²

The State raises no issues of material fact, offers no real opposition to summary judgment, concedes *Latta* is binding, does not request a stay, and offers no reason for this Court to delay resolution of Plaintiffs' Motion. The Ninth Circuit and the Supreme Court have denied requests to stay orders and judgments in comparable cases. Plaintiffs are therefore entitled to marry, or to have their out-of-state marriages recognized. In these circumstances, Plaintiffs respectfully submit that there is no need for a hearing to resolve this Motion and respectfully request that the Court grant summary judgment in their favor at the Court's earliest convenience.

Dated: November 6, 2014

MORRISON & FOERSTER LLP

By: /s/ Ruth N. Borenstein
Ruth N. Borenstein,
Admitted *pro hac vice*

GOETZ, BALDWIN & GEDDES, P.C.

By: /s/ Benjamin J. Alke
Benjamin J. Alke

Attorneys for Plaintiffs

² See, e.g., *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797, at *1 (D. Wyo. Oct. 17, 2014) (enjoining Wyoming marriage ban, finding it "undebatable" that district court is bound by Tenth Circuit opinions in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014)). Plaintiffs note that, as of the date of this filing, the Sixth Circuit Court of Appeals issued an opinion upholding state marriage bans in several states. *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Nov. 6, 2014). That opinion has no bearing on Plaintiffs' Motion, which is based on authority that is binding on all district courts in this Circuit.

James H. Goetz
Benjamin J. Alke
Goetz, Baldwin & Geddes, P.C.
35 North Grand (zip code 59715)
P.O. Box 6580
Bozeman, Montana 59771
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: goetzlawfirm@goetzlawfirm.com

Jim Taylor, Legal Director
American Civil Liberties Union of Montana
Foundation
241 E. Alder (zip code 59802)
P. O. Box 9138
Missoula, MT 59807
Ph: (406) 880-6159
Email: JimT@aclumontana.org

Ruth N. Borenstein, Admitted *pro hac vice*
Stuart C. Plunkett, Admitted *pro hac vice*
Emily F. Regier, Admitted *pro hac vice*
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
Ph: (415) 268-7000
Fax: (415) 268-7522
Email: RBorenstein@mofo.com;
SPlunkett@mofo.com;
ERegier@mofo.com

Ariel F. Ruiz, Admitted *pro hac vice*
Morrison & Foerster LLP
250 West 55th Street
New York, New York 10019
Ph: (212) 468-8000
Fax: (212) 468-7900
Email: ARuiz@mofo.com

Elizabeth O. Gill, Admitted *pro hac vice*
LGBT & AIDS Project
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Ph: (415) 621-2493, Ext. 437
Fax: (415) 255-8437
Email: Egill@aclunc.org

ECF ATTESTATION

I, RUTH N. BORENSTEIN, am the ECF User whose ID and password are being used to file this document. I hereby attest that Benjamin J. Alke has concurred in this filing.

Dated: November 6, 2014

/s/ Ruth N. Borenstein

Ruth N. Borenstein