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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 GOUBEAUX and NICOLE GOUBEAUX,

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' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In an opinion issued last week, the Ninth Circuit struck down the Idaho and Nevada constitutional amendments and statutes that barred same-sex couples from marrying and precluded recognition of the valid marriages that same-sex couples entered into in other jurisdictions. The Court held that the challenged provisions violate the Equal Protection Clause of the Fourteenth Amendment because "they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard" articulated in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014), as applying to classifications based on sexual orientation. *Latta v. Otter*, No. 14-35420, slip op. at 2 (9th Cir. Oct. 7, 2014) (attached as Exhibit A).[1]

The Ninth Circuit's holding applies with equal force to the Montana constitutional amendment and statutes that Plaintiffs challenge in this lawsuit. Like the invalid laws in Idaho and Nevada, the challenged Montana provisions

[1] The Ninth Circuit's opinion addressed two appeals arising from a challenge to Idaho's laws, *Latta v. Otter*, Nos. 14-35420, 14-35421, and one appeal arising from a challenge to Nevada's laws, *Sevcik v. Sandoval*, No. 12-17668. The appeals are referred to herein collectively as "*Latta*." The Supreme Court has lifted the stays of the mandate initially entered in each appeal. *See Otter v. Latta*, No. 14A374 (U.S. Oct. 8, 2014) (lifting stay as to Nevada); *id.* (U.S. Oct. 10, 2014) (lifting stay as to Idaho).

prohibit same-sex couples from marrying in Montana and preclude recognition of their valid marriages performed elsewhere. Like the plaintiffs in the Idaho and Nevada actions, Plaintiffs here are loving, committed, same-sex couples who wish to marry in Montana, or who seek to have the State of Montana recognize marriages that were legally contracted in another jurisdiction. Like the challenges in Idaho and Nevada, Plaintiffs claim that the Montana provisions impermissibly discriminate on the basis of sexual orientation in violation of the Equal Protection Clause. And Defendants here rely on the same justifications for Montana's challenged provisions that the Idaho and Nevada defendants raised, which the court held insufficient to meet the standard of heightened scrutiny already the law in the Ninth Circuit for discrimination based on sexual orientation. Indeed, Montana participated as an *amicus curiae* in the Ninth Circuit, advancing rationales for the Nevada marriage ban that the court specifically rejected. *See* Brief of the States of Indiana, et al. as Amici Curiae in Support of Affirmance [hereafter "States' Amicus Brief"] at 16-29, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Jan. 28, 2014) (attached as Exhibit B); *Latta*, slip op. at 15-32.

In the past few days, two district courts in the Ninth Circuit have already recognized *Latta* as binding authority. *See Hamby v. Parnell*, No. 3:14-cv-00089-TMB, 2014 WL 5089399, at *12 (D. Alaska Oct. 12, 2014) (applying *Latta* and holding that Alaska's ban on marriage for same-sex couples and refusal to

recognize marriages lawfully entered in other states "violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment because no state interest provides 'exceedingly persuasive justification' for the significant infringement of rights that they inflict upon homosexual individuals" (footnote omitted)); Text Order, *Connolly v. Brewer*, No. 2:14-cv-00024-JWS (D. Ariz. Oct. 9, 2014), ECF No. 85 (attached as Exhibit C) (requesting supplemental briefing because "[i]t appears that the *Latta* decision controls the outcome of the cross-motions for summary judgment" and requires ruling in favor of plaintiffs—seven same-sex couples who wish to marry or gain the State of Arizona's recognition of their marriages elsewhere).

In short, *Latta*'s application of *SmithKline Beecham* establishes that Plaintiffs are entitled to judgment on their equal protection claim as a matter of law. Accordingly, Plaintiffs respectfully request that the Court grant this motion for summary judgment.

NATURE OF THE CASE

Plaintiffs filed the Complaint on May 21, 2014. The action is brought under 42 U.S.C. §§ 1983 and 1988, and challenges the validity of Article XIII, Section 7 of the Montana Constitution and related statutory provisions that bar marriage between two people of the same sex and preclude recognition of such marriages validly entered into in another jurisdiction (collectively, "Montana's marriage

ban"). Compl. ¶¶ 1, 8, ECF No. 1. The Complaint asserts three causes of action, all pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution: Count I for Deprivation of the Fundamental Right to Marry in Violation of the Due Process Clause; Count II for Discrimination on the Basis of Sexual Orientation in Violation of the Equal Protection Clause; and Count III for Discrimination on the Basis of Sex in Violation of the Equal Protection Clause. *Id.* ¶¶ 54-72.

Plaintiffs seek summary judgment on Count II.[2] Specifically, plaintiffs seek a judgment (1) declaring that Article XIII, Section 7 of the Montana Constitution and all provisions of Montana statutes that ban marriage for same-sex couples or refer to marriage as a relationship between a "husband" and "wife" or a "man" and "woman," and operate as a statutory ban on marriage for same-sex couples, violate the Equal Protection Clause of the United States Constitution; (2) permanently enjoining Defendants from enforcing Article XIII, Section 7 and any other sources of state law that operate to exclude same-sex couples from marriage or to deny recognition of marriages of same-sex couples validly contracted in another jurisdiction; and (3) awarding them the costs of this action and reasonable attorneys' fees. *Id.* ¶ 73.

Defendants filed their answer on July 17, 2014.

[2] Judgment for Plaintiffs on Count II would moot Counts I and III.

UNDISPUTED FACTS

The parties have stipulated to the following material facts, which are also set forth in Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment:

1. Plaintiffs Angela Rolando and Tonya Rolando are a lesbian couple residing in Montana. They wish to be married in Montana. On May 19, 2014, they went to the office of the Cascade County Clerk of Court, which Defendant Faye McWilliams oversees. They asked to apply for a marriage license, but were politely denied a license because as a same-sex couple they are not permitted to marry under Montana law. Statement of Stipulated Facts ¶¶ 1, 8, ECF No. 24.

2. Plaintiffs Chase Weinhandl and Benjamin Milano, Susan Hawthorne and Adel Johnson, and Shauna Goubeaux and Nicole Goubeaux are gay and lesbian couples residing in Montana. Each couple, while living in Montana, married as the result of weddings performed in other states pursuant to the laws of Hawaii, Washington, and Iowa, respectively. They wish to have their marriages recognized in Montana. *Id.* ¶ 2.

3. Defendant Tim Fox is Attorney General of the State of Montana. He is the chief legal officer of the State. Upon request of state agencies under the supervision of the Governor, the Attorney General's Office on occasion provides legal advice to state agencies. *Id.* ¶ 3.

4. Defendant Michael Kadas is the Director of the Montana Department of Revenue. The Montana Department of Revenue has general supervision over the administration of the assessment and tax laws of the state, and the Department makes rules to supervise the administration of all revenue laws of the state and assists in their enforcement. *See, e.g.*, Mont. Code Ann. § 15-l-201 (2013). The individual income tax return forms set forth by the Montana Department of Revenue (i.e., Forms 2M and 2EZ) allow a current resident filer to check a box and declare his or her filing status as "Single" or "Married filing jointly." Statement of Stipulated Facts ¶¶ 4-6.

5. Defendant Faye McWilliams is the Clerk of Court of Cascade County. She has the authority to issue or withhold a marriage license, and to comply with Montana law prohibiting the issuance of a marriage license to a same-sex couple. *Id.* ¶ 7.

6. Article XIII, Section 7 of Montana's constitution provides that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Montana Code Annotated § 40-1-401(1)(d) also prohibits "marriage between persons of the same sex," and Montana Code Annotated § 40-1-103 defines marriage in Montana as "a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential." Statement of Stipulated Facts ¶ 9.

JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Defendants have raised a jurisdictional objection based on *Baker v. Nelson*, 409 U.S. 810 (1972), which dismissed an appeal from a federal constitutional challenge to Minnesota's then-existing refusal to allow same-sex couples to marry for lack of a substantial federal question. *See* Defs.' Preliminary Pretrial Statement at 5, ECF No. 26. The Ninth Circuit rejected this same argument in *Latta*, holding that "this case and others like it present not only substantial but pressing federal questions." *Latta*, slip op. at 9-11.

As Defendants have conceded, venue is proper in this Court under 28 U.S.C. § 1391(b). Statement of Stipulated Facts ¶ 11. Defendants reside and have offices within the district, and all Defendants reside in the State of Montana. Also, events giving rise to Plaintiffs' claims occurred, and will occur, in this district. This case is appropriately filed in the Great Falls Division because two of the Plaintiffs reside in, and events giving rise to their claims occurred in, Cascade County, such that venue would be proper in Cascade County.

LEGAL STANDARD

Summary judgment is proper when there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which could affect the outcome of a case.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). Once the moving party meets its initial burden, the nonmoving party must set out "'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citing Fed. R. Civ. P. 56(e)). If the nonmoving party fails to make this showing, "the moving party is 'entitled to judgment as a matter of law.'" *Celotex Corp.*, 477 U.S. at 323. Here, there is no dispute about Plaintiffs' factual allegations, and the Ninth Circuit's clear holding in *Latta* controls the legal analysis of Plaintiffs' challenge to Montana's marriage ban.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION IN *LATTA* ESTABLISHES THAT MONTANA'S MARRIAGE BAN IS UNCONSTITUTIONAL

In *Latta*, the Ninth Circuit concluded that Idaho's and Nevada's laws excluding same-sex couples from marriage discriminate on the basis of sexual orientation and therefore were subject to heightened scrutiny under the court's decision in *SmithKline Beecham*, 740 F.3d at 474. *Latta*, slip op. at 11-15. The defendants and intervenors in *Latta* argued that the challenged provisions survived

heightened scrutiny because, as summarized by the court: "[T]he states have a compelling interest in sending a message of support for the institution of opposite-sex marriage"; "permitting same-sex marriage will seriously undermine this message"; and "the institution of opposite-sex marriage is important because it encourages people who procreate to be responsible parents, and because opposite-sex parents are better for children than same-sex parents." *Id*. at 5. The court analyzed those proffered justifications in detail and held none was sufficient. *Id*. at 15-32. Indeed, the Ninth Circuit concluded that proponents of the Idaho and Nevada marriage bans offered only "speculation and conclusory assertions" of "little merit." *Id*. at 33. The court also considered "the arguments advanced by other states in defense of their bans," and concluded that "none . . . is any more persuasive." *Id*. at 29 n.16.[3]

Having concluded that Idaho and Nevada "failed to demonstrate" that their marriage bans "further any legitimate purpose," the Ninth Circuit held that such bans "unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause." *Id*. at 33.

The Ninth Circuit's holding and reasoning apply with equal force to

[3] For the same reasons, the Ninth Circuit further concluded that Idaho and Nevada also "may not discriminate with respect to marriages entered into elsewhere." *Latta*, slip op. at 32 n.19 ("Neither state advances, nor can we imagine, any different—much less more persuasive—justification for refusing to recognize same-sex marriages performed in other states or countries.").

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. A side-by-side comparison of the relevant portion of Idaho's, Nevada's, and Montana's laws demonstrates that they are identical in all material respects:

Idaho	Nevada	Montana
"A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28.	"Only a marriage between a male and female person shall be recognized and given effect in this state." Nev. Const. art. 1, § 21.	"Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Mont. Const. art. XIII, § 7.
"Marriage is a personal relationship arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making it is necessary." Idaho Code Ann. § 32-201 (2014). "Persons qualified to marry" are "[a]ny unmarried male . . . and unmarried female" of a certain age and "not otherwise disqualified." Idaho Code Ann. § 32-202 (2014).	"[A] male and female person . . . may be joined in marriage." Nev. Rev. Stat. Ann. § 122.020(1) (2014).	"Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential." Mont. Code Ann. § 40-1-103 (2013).

Idaho	Nevada	Montana
"All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages[.]" Idaho Code Ann. § 32-209 (2014).		Any "contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited," including "a marriage between persons of the same sex," is "void as against public policy." Mont. Code Ann. §§ 40-1-401(4), (1)(d) (2013).

The Montana provisions, like the invalid laws in Idaho and Nevada, "distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized," and therefore "discriminate on the basis of sexual orientation." *See Latta*, slip op. at 13. Accordingly, as in *Latta*, the standard of heightened scrutiny articulated in *SmithKline Beecham* applies to Plaintiffs' claims in this case. *Id.*, slip op. at 13-15 (applying heightened scrutiny pursuant to Ninth Circuit precedent in *SmithKline Beecham*, because Idaho's "laws discriminate on the basis of sexual orientation.").

As in *Latta*, there is no merit to any conceivable justification for Montana's challenged provisions. The States' Amicus Brief that Montana joined in the Ninth

Circuit argued in part that Nevada's laws were justified by the long history of "traditional marriage." States' Amicus Brief at 16-18. The Ninth Circuit explicitly rejected that argument, concluding that Nevada's interest in protecting the "'traditional institution of marriage'" was insufficient because "neither history nor tradition [can] save [the laws] from constitutional attack." *Latta*, slip op. at 30-32 (alteration in original, internal quotation marks omitted). The States' Amicus Brief also attempted to justify Nevada's marriage ban as encouraging "responsible procreation." States' Amicus Brief at 19-29. The Ninth Circuit rejected all "'procreative channeling'" arguments offered in support of the Idaho and Nevada laws. *Latta*, slip op. at 15-25.[4] Defendants in this action have advanced similar justifications, as well as Montana's interests in "pursuing ongoing and beneficial political debates rather than being forced to experiment with a policy of genderless marriage" and "pursuing a child-centric vision of marriage rather than an adult-centric one." Defs.' Preliminary Pretrial Statement at 9 ¶¶ 6(a) & (c). Again, the

[4] The Ninth Circuit concluded that the proffered justification that "children raised by opposite-sex couples receive a better upbringing," *Latta*, slip op. at 16, was "simply an ill-reasoned excuse for unconstitutional discrimination [as evidenced] from the fact that Idaho and Nevada already allow adoption by lesbians and gays." *Id.* at 27 (citing Idaho and Nevada Supreme Court cases indicating that "no harm will come of treating same-sex couples the same as opposite-sex couples with regard to parenting"). Similarly, the Montana Supreme Court has recognized that a lesbian parent has the same parenting interest vis-à-vis her children as a similarly situated heterosexual parent. *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009) (affirming the grant of parental interest rights of a mother who co-parented two children legally adopted only by her same-sex partner).

Ninth Circuit rejected similar arguments. *Latta*, slip op. at 29 (argument that "the population of each state is entitled to exercise its democratic will in regulating marriage as it sees fit" failed because such regulation "must respect the constitutional rights of persons" (internal quotation marks omitted)); *id.* at 21 (rejecting argument that "[s]ame-sex marriage . . . is part of a shift towards a consent-based, personal relationship model of marriage, which is more-adult-centric and less child-centric").

The Ninth Circuit's conclusions in *Latta* therefore apply in all respects to Plaintiffs' claim that the challenged provisions of Montana's constitution and statutes impermissibly discriminate on the basis of sexual orientation. Under this controlling authority, just like the laws struck down in Idaho and Nevada, Montana's laws "violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny" that this Court must apply. *Latta*, slip op. at 6 (footnote omitted).

II. THE COURT SHOULD ACT NOW AND NOT AWAIT ANY ADDITIONAL PROCEEDINGS THAT MAY TAKE PLACE IN *LATTA*

As the Ninth Circuit recognized, "Idaho and Nevada's marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex

marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms on numerous citizens of those states." *Latta*, slip op. at 32 (footnote omitted). The same is true in Montana. Plaintiffs respectfully request that the Court act promptly to resolve their motion for summary judgment based on the Ninth Circuit's controlling authority in *Latta*.

Ninth Circuit law is clear that the *Latta* opinion is binding authority within the Circuit, regardless of any petitions for rehearing or certiorari that may be filed.[5] "In this circuit, once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court." *Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995); *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983) ("even though the mandate has not yet issued in [the stayed case], the judgment . . . in that case [] is nevertheless final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court").

Latta unquestionably controls the outcome of this case, just as it has already been held to control the outcome in similar cases in Alaska and Arizona, as noted above. *See Hamby*, 2014 WL 5089399, at *12; Text Order, *Connolly v. Brewer* (attached as Exhibit C).

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[5] The Ninth Circuit granted Plaintiff-Appellees' motion to dissolve the stay pending appeal of the district court's judgment and injunction in the Idaho cases, effective as of October 15, 2014. Opinion re Order, *Latta v. Otter*, No. 14-35420 (9th Cir. Oct. 15, 2014) (attached as Exhibit D)

Moreover, on October 6, 2014, the Supreme Court denied seven petitions for writs of certiorari seeking review of judgments from three other courts of appeals that in combination held that five States' prohibitions on marriages by same-sex couples violate those couples' Fourteenth Amendment rights.[1] The Court thereby allowed same-sex couples in those states to marry. As the Ninth Circuit stated in dissolving the stay of the district court's order enjoining enforcement of Idaho's discriminatory marriage laws:

> [B]y denying certiorari on October 6, 2014, the Supreme Court has allowed marriages to proceed in fourteen states across the nation; all circuit courts of appeals to consider same-sex marriage bans have invalidated those prohibitions as unconstitutional; and this court has held that same-sex marriage bans deprive gays and lesbians of their constitutional rights. The public's interest in equality of treatment of persons deprived of important constitutional rights thus also supports dissolution of the stay of the district court's order.

Opinion re Order at 8-9, *Latta v. Otter*, No. 14-35420 (9th Cir. Oct. 15, 2014) (attached as Exhibit D) (footnote omitted); *see id.* at 8 n.2 (explaining that 14 states are in circuits "directly affected" by the Supreme Court's denial of the petitions).

Montanans deserve the same "equality of treatment" now enjoyed in Idaho and other states in this Circuit. Now that the Ninth Circuit joined those three other courts of appeals in striking down discriminatory marriage bans, same-sex couples in Montana—like those in the five states at issue in the certiorari petitions that the Supreme Court so recently denied—should also be afforded their constitutional

rights without delay.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment.

Dated: October 15, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the Local Rules of Procedure of the United States District Court, for the District of Montana, the undersigned certifies that the word count is 3846 words (including footnotes and excluding the caption, Certificate of Compliance, and Certificate of Service)

DATED this 15th day of October, 2014.

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CERTIFICATE OF SERVICE

I certify that, on October 15, 2014, a copy of the foregoing document was served on the following persons by the following means:

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