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10 *Attorneys for Defendants*

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 Joseph Connolly and Terrel L. Pochert;
14 Suzanne Cummins and Holly N.
15 Mitchell; Clark Rowley and David
16 Chaney; R. Mason Hite IV and
17 Christopher L. Devine; Meagan and
Natalie Metz; Renee Kaminski and
Robin Reece; Jeffrey Ferst and Peter
Bramley,

18 Plaintiffs,

19 v.

20 Chad Roche, in His Official Capacity as
21 Clerk of the Superior Court of Pinal
22 County, Arizona; Michael K. Jeanes, in
23 His Official Capacity as Clerk of the
24 Superior Court of Maricopa County,
25 Arizona; and Deborah Young, in Her
Official Capacity as Clerk of the
Superior Court of Coconino County,
Arizona,

26 Defendants.

Case No: 2:14-cv-00024-JWS

**DEFENDANTS' SUPPLEMENTAL
BRIEF ADDRESSING THE
APPLICABILITY OF THE NINTH
CIRCUIT'S *LATTA V. OTTER*
DECISION**

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1 Pursuant to this Court’s October 9, 2014, Order, Defendants Chad Roche, Pinal
2 County Superior Court Clerk; Michael K. Jeanes, Maricopa County Superior Court
3 Clerk; and Deborah Young, Coconino County Superior Court Clerk (collectively,
4 “Defendants”) hereby address the effect of the Ninth Circuit’s decision in *Latta v. Otter*,
5 No. 14-35420 (October 7, 2014). Specifically, the Court has asked the parties to address
6 how *Latta* applies to the cross-motions for summary judgment filed in this case (docket
7 at 47, 58).

8 A. The *Latta* Decision Potentially Controls the Outcome of this Case

9 Setting aside Defendants’ disagreement with the Ninth Circuit panel’s analysis
10 and conclusions in *Latta*, Defendants acknowledge that if and when the mandate issues
11 in *Latta*, that decision would control the outcome in the pending cross-motions for
12 summary judgment as this Court’s order of October 9 suggests. However, the *Latta*
13 decision “is not fixed as settled Ninth Circuit law” until the mandate issues, and reliance
14 upon it before that point is “a gamble.” *Carver v. Lehman*, 558 F.3d 869, 878 n.16 (9th
15 Cir. 2009) (internal quotation marks omitted). Accordingly, this Court should refrain
16 from ruling on the cross-motions for summary judgment in this case unless and until the
17 Ninth Circuit issues the mandate in *Latta*. See *Beardslee v. Brown*, 393 F.3d 1032, 1040
18 n.4 (9th Cir. 2004) (court of appeals usually exercises “prudential caution” and defers
19 consideration of an issue decided in another case in which the mandate has not yet issued
20 and the time to petition for a writ of certiorari has not expired).¹

21 B. Status of the Mandate in *Latta*

22 The Ninth Circuit filed the *Latta* decision on October 7, 2014, and ordered that
23 the mandate issue the same day. However, on October 8, the Idaho defendants in *Latta*
24 petitioned the United States Supreme Court to stay the mandate. *Otter v. Latta*, No.
25 14A374 (U.S. 2014). They also filed an emergency motion in the Ninth Circuit to recall
26

27 ¹ *Beardslee* exemplifies the need for prudential caution: the non-final opinion discussed
28 in *Beardslee* was *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2014), which the
Supreme Court reversed twelve months later in *Brown v. Sanders*, 546 U.S. 212 (2006).

1 the mandate. The Supreme Court issued a stay of the mandate and ordered a response to
2 the stay application. Upon receiving the Supreme Court's order, the Ninth Circuit
3 recalled the mandate pending further order of the Supreme Court or the Ninth Circuit and
4 also ordered responses to the emergency motion to recall the mandate.

5 On October 10, the Supreme Court denied the stay application and vacated its
6 October 8 stay order. The Ninth Circuit, however, did not reissue its mandate. The same
7 day, in light of the Ninth Circuit's decision not to reissue its mandate, the *Latta* plaintiffs
8 filed a motion to dissolve the stay of the district court's order and injunction. Following
9 briefing, the Ninth Circuit granted the motion to dissolve the stay of the district court's
10 order and injunction on October 13. On October 15, the Ninth Circuit issued an order
11 stating that it was exercising its discretion to afford the State a second opportunity to
12 obtain an emergency stay of its October 13 order from the Supreme Court and that its
13 October 13 order would not be effective until 9 a.m. PDT on October 15.

14 C. Conclusion

15 Because the Ninth Circuit recalled its mandate in *Latta* and has not yet reissued it,
16 *Latta* is not yet final, binding authority in this case. See *Natural Res. Def. Council, Inc.*
17 *v. Cnty. of L.A.*, 725 F.3d 1194, 1203 (9th Cir. 2013) (stating that no Ninth Circuit
18 opinion "becomes final until the mandate issues") (internal quotation marks omitted);
19 *Carver*, 558 F.3d at 878 n.16 ("[N]o expectation of finality can attach during the period
20 in which either party may petition for rehearing.") (internal quotation marks omitted).
21 Indeed, in the Nevada case that was consolidated with the Idaho case in *Latta*,
22 Intervenor-Defendant-Appellee Coalition for the Protection of Marriage filed a petition
23 for rehearing en banc on October 13. *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. 2014).
24 Defendants therefore ask the Court not to issue any order relying on *Latta* unless and
25 until the Ninth Circuit reissues its mandate in that case.²

26 ² Plaintiffs contend that they have standing to raise claims concerning Arizona's
27 refusal to recognize their same-sex marriages conducted in other states. (Pls.' Brief
28 Re Application of *Latta v. Otter* at 3-4.) In their Amended Answer, Defendants
established that Plaintiffs lacked standing to raise any nonrecognition claims because

1 Dated: October 16, 2014

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14 they had neither alleged that they had sought to have any Arizona official recognize
15 their same-sex marriages conducted in other States nor identified any Arizona
16 officials who had refused to do so. *See* Am. Answer (Doc. 20) ¶¶ 5, 9-11, 22-23, 39,
17 66, 68, 75, 98, 110-14, 119, 122, 124, 128-29, 132, 134-36, 139-41, 144. In their
18 Response to Cross-Motion for Summary Judgment and Reply in Support of Motion
19 for Summary Judgment, Plaintiffs argued that even the Plaintiffs who had not sought
20 to convert their out-of-state marriages into Arizona covenant marriages had standing
21 to raise nonrecognition claims and alleged that Plaintiffs Megan and Natalie Metz
22 had applied to convert their out-of-state marriage into an Arizona covenant marriage
23 on June 30, 2014, but that Defendant Young had refused to allow them to do so. Pls.’
24 Response (Doc. 70) at 14-15; *see also* Pls.’ Response to Defendants’ Statement of
25 Facts in Support of Cross-Motion for Summary Judgment (Doc. 62) ¶ 13. In their
26 Reply in Support of Cross-Motion for Summary Judgment, Defendants noted that
27 Plaintiffs’ newly asserted injury concerning their inability to convert their out-of-state
28 marriages into Arizona covenant marriages was not properly before the Court
because their Amended Complaint did not assert this injury or otherwise challenge
Arizona’s covenant-marriage laws. Defs.’ Reply (Doc. 80) at 14-15. Because
Plaintiffs’ purported new injury was not properly before the Court, Plaintiffs could
not use it to remedy their standing deficiencies. *See Bishop v. Smith*, 760 F.3d 1070,
1092-93 & n.15 (10th Cir. 2014) (concluding that plaintiffs could not remedy their
inability to satisfy the redressability prong of standing by “rely[ing] upon a different
injury” not alleged in their pleadings). Because Plaintiffs did not properly allege any
nonrecognition claim in their Amended Complaint, *Latta*’s holding concerning
nonrecognition provisions has no application in this case.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following, if CM/ECF registrants, and mailed a copy of same if non-registrants, this 16th day of October, 2014.

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