MICHAEL C. GERAGHTY
ATTORNEY GENERAL

William Milks (Alaska Bar No. 0411094)
Kevin Wakley (Alaska Bar No. 1405019)
Assistant Attorneys General
P.O. Box 110300
Juneau, AK 99811
Phone: 907.465.3600
Fax: 907.465.2520
Email: bill.milks@alaska.gov
kevin.wakley@alaska.gov

Attorneys for all Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MATTHEW HAMBY and CHRISTOPHER SHELDEN, a married couple, CHRISTINA LABORDE and SUSAN TOW, a married couple, SEAN EGAN and DAVID ROBINSON, a married couple, TRACEY WIESE and KATRINA CORTEZ, a married couple, and COURTNEY LAMB and STEPHANIE PEARSON, unmarried persons, Plaintiffs, v. SEAN C. PARNELL, in his official capacity as Governor of Alaska, MICHAEL GERAGHTY, in his official capacity as Attorney General of the State of Alaska, WILLIAM J. STREUR, in his official capacity as Commissioner of the State of Alaska, Department of Health and Social Services, and PHILLIP MITCHELL, in his official capacity as State Registrar and Licensing Officer, Alaska Bureau of Vital Statistics, Defendants.	Case No. 3:14-cv-00089-TMB **EMERGENCY MOTION FOR STAY PENDING APPEAL**

State Defendants seek a stay of this Court's decision and injunction order finding certain Alaska laws regarding marriage to be unconstitutional under the Fourteenth Amendment. A stay should be issued because: (a) there is a reasonable likelihood the Ninth Circuit will rehear *Latta v. Otter*[1] en banc, the decision of which this Court relied upon heavily in its application of heightened scrutiny to Alaska's marriage laws;[2] (b) there is a reasonable likelihood that a circuit split will develop in the very near future, leading to review by the Supreme Court of the important issue of whether state traditional marriage laws violate the Constitution. For these reasons, the law on which the district court grounded its opinion could continue to be in rapid flux over the next several months, and thus the Court should stay its decision to avoid chaos in the administration of Alaska's marriage laws pending ultimate resolution of this fundamental issue.

On Sunday afternoon, October 12, 2014, the district court issued its decision and order immediately enjoining the state of Alaska from enforcing Alaska Constitution Article 1, Section 25 and Alaska statute sections 25.05.011 and 25.05.013 to the extent they prohibit same-sex couples from marriage and refuse to recognize lawful same-sex marriages entered in other states.[3] The basis for the court's decision was that these state laws violate the Equal Protection

---

1 *Latta v. Otter*, Nos. 12-17668, 14-35420, 14-35421 (9th Cir. Oct. 7, 2014).

2 The stay in *Latta v. Otter* has been lifted effective Wednesday, October 15. *Latta v. Otter*, No. 14-35420 (9th Cir. October 13, 2014).

3 Under Alaska law, individuals seeking a marriage license must apply for such a license and the state Bureau of Vital Statistics then reviews the application and if the application is legally sufficient will issue a license after a three day period. AS 25.05.091**.** Thus, in accordance with the court's injunction order, individuals may apply for and submit an application for a marriage license. A license will not be issued until after the three day waiting period.

and Due Process Clauses of the Fourteenth Amendment. The same issues presented in this case are currently being considered by the Ninth Circuit. As the Court is aware, after briefing was completed in this case, the Ninth Circuit issued its decision in *Latta v. Otter*, a challenge to the traditional marriage laws of Idaho and Nevada. The basic issue in those cases and the instant matter is the same: whether the Fourteenth Amendment prohibits a state from maintaining marriage laws that do not provide for same-sex marriage.

A motion for stay pending appeal is generally considered by assessing the following factors: (1) whether the movant is likely to succeed on the merits; (2) whether the movant will suffer irreparable harm if a stay is not issued; (3) whether a stay will substantially injure other parties; and (4) whether the public interest supports a stay.[4]

First, there is a reasonable likelihood the Ninth Circuit will rehear *Latta* en banc and thus vacate the panel's decision.[5] Three Ninth Circuit judges have already written that applying heightened scrutiny to sexual-orientation classification places the Ninth Circuit in direct conflict with ten other circuits,[6] and with the Supreme Court's *United States v. Windsor*.[7]

---

[4] Fed.R.Civ.P. 62(c); *Nken v. Holder*, 556 U.S. 418, 434 (2009).

[5] An en banc petition was filed today in the Nevada case which was decided along with *Latta*. *Sevcik v. Sandoval*, Case No. 12-17668. It appears likely that Idaho will also file an en banc petition.

[6] Although the Seventh Circuit in *Baskin v. Bogan* appeared to signal that sexual-orientation discrimination might warrant heightened scrutiny, 2104 WL 4359059, even if it did, nine other circuits would be contrary to *Latta* and *SmithKline*. *See SmithKline Beecham v. Abbott Laboratories*, 2014 WL 2862588 at 2 and note 2 (9th Cir. 2014).

[7] 133 S.Ct. 2675 (2013). *See SmithKline Beecham v. Abbott Laboratories*, 759 F.3d 990, 991-92 & n.2 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of en banc rehearing).

Dissenting from the denial of en banc rehearing in *SmithKline Beecham v. Abbott Laboratories*[8], Judge O'Scannlain (joined by Judges Bea and Bybee) objected that applying heightened scrutiny to sexual-orientation classifications places the Ninth Circuit "on the short end of a 10-2 split among our sister circuits."[9] Judge O'Scannlain explained further that "nothing in *Windsor* compels the application of heightened scrutiny" and that "(e)ven the majority in *Windsor* declined to adopt the reasoning of the Second Circuit, which had expressly applied heightened scrutiny to the equal protection claim in the case."[10] Although the Ninth Circuit voted not to rehear *SmithKline Beecham* (which involved juror challenges in an antitrust case), the heightened scrutiny issue is now presented in a vastly more important setting—whether State marriage laws are constitutional. And because the Supreme Court has signaled that it is not immediately involving itself in the issue,[11] the need for en banc review of the heightened scrutiny issue in the Ninth Circuit is that much more pressing. Because the conditions for en banc hearing are so

---

8 740 F.3d 471 (9th Cir. 2014).

9 *Id.* at 991-92.[9] *Citing Massachusetts v. Dep't of Health and Human Servs.*, 682 F.3d 1, 9–10 (1st Cir.2012) (applying rational basis review); *Price–Cornelison v. Brooks*, 524 F.3d 1103, 1113 n. 9 (10th Cir.2008) (same); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.2006) (same); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir.2006) (same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.2004) (same); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir.2004) (en banc) (same); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir.1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.1996) (same); *Steffan v. Perry*, 41 F.3d 677, 684–85 (D.C.Cir.1994) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989) (same).

10 *Id.* at 993.

11 *See, e.g., Rainey v. Bostic*, 2014 WL 3924685 (U.S. Oct. 6, 2014) (No. 14-153) (denying cert in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)).

clear, Alaska intends to request that its appeal (filed today) be heard en banc in the first instance.[12]

Furthermore, conditions compelling Supreme Court review of this issue could easily develop very soon. An obvious interpretation of the Supreme Court's recent certiorari denials is that no clear post-*Windsor* split on the issue of the constitutionality of state traditional marriage laws has arisen;[13] a clear circuit split, however, is likely to rapidly develop. The Sixth Circuit heard argument in early August regarding cases[14] from four states (Michigan, Kentucky, Tennessee, and Ohio) and could issue a decision at any time, and the Fifth Circuit has expedited argument of Louisiana and Texas cases[15] and could issue a decision by end of this year. Accordingly, circumstances are likely to develop in which the Supreme Court is virtually obligated to review the issue.[16] This would leave the correctness of the Ninth Circuit's *Latta* decision—and hence the district court decision here—in limbo. In other words, there is a real probability that—in the upcoming months—the Supreme Court will be called upon to settle this

---

[12] The Federal Rules of Appellate Procedure permit appellants to petition for initial en banc hearing. *See* FRAP 35(b) (permitting petition for "*hearing* or rehearing en banc"); *see also, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125 (10th Cir. 2013) (en banc) (noting that appellate court granted appellants' motion for "initial en banc consideration" because of "the exceptional importance of the questions presented").

[13] *See* S.Ct. R. 10.

[14] *DeBoer et.al. v. Snyder, et.al., Case No. 14-1341; Obergefell, et.al. v. Himes, et.al.*, Case No. 14-3057; *Henry, et al. v. Himes*, Case No. 14-3464; *Bourke, et.al. v. Beshear, et al.*, Case No. 14-5291; *Tanco,et al. v. Haslam,et.al.*, Case NO. 14-5297.

[15] *Deleon et. al. v. Perry et. al.*, Case No. 14-50196; *Robicheau et. al. v. Caldwell et. al.*, Case No. 14-31037.

[16] S.Ct. R. 10.

issue nationally during the current term. The result of that proceeding could change the basic jurisprudence on which this Court based its decision to overturn Alaska's marriage laws.

Second, the State will suffer irreparable harm if a stay is denied. On this point, the Supreme Court has recognized that "(a)ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[17] Here, plaintiffs seek the extraordinary remedy of vacating a constitutional amendment passed by the people of the state. This is "a form of irreparable injury."[18]

Finally, the plaintiffs will not suffer irreparable harm from a delay and the public interest is served by a stay. Important in analyzing this factor is the potential length of the stay.[19] In all likelihood the requested stay in this case will not need to be lengthy. As the court is aware, the decision in *Latta* was just issued and Idaho appears likely to seek en banc review. Alaska has also just filed its notice of appeal in this case. In addition, opinions on the subject of this litigation are expected to be issued promptly from the Fifth and Sixth Circuits creating a reasonable likelihood that a split among the circuits could arise as a result of upcoming rulings, and that the Supreme Court will take up one of these decisions on certiorari. This is all taking place at an unprecedentedly rapid pace. Moreover, the public interest is served by a stay. Both sides have an interest in the orderly resolution of the ultimate issue. If marriages are contracted now in Alaska, and the result of the legal issues presented in this case comes out

---

17 *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers)).

18 *Id.*

19 *See Yong v. Immigration and Naturalization*, 208 F.3d 1116 (9th Cir. 2000).

differently in the Ninth Circuit on rehearing or at the Supreme Court, extremely difficult issues as to the status of those marriages will arise.

For all of these reasons, the State Defendants request that the court stay its order and decision pending appeal.

DATED October 13, 2014.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: s/William Milks
William Milks
Assistant Attorney General
Alaska Bar No. 0411094

s/Kevin Wakley
Kevin Wakley
Assistant Attorney General
Alaska Bar No. 1405019

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2014, true and correct copies of the foregoing, **EMERGENCY MOTION FOR STAY PENDING APPEAL** were served electronically on the following parties of record pursuant to the Court's electronic filing procedures:

Heather L. Gradner
Shortell Gardner
645 G Street, Suite 100-807
Anchorage, AK 99501
hgardnerlaw@yahoo.com

Joshua A. Decker
ACLU of Alaska Foundation
1057 W. Fireweed Lane, Suite 207
Anchorage, AK 99503
jdecker@acluak.org

Allison E. Mendel
Mendel & Associates
1215 W. 8th Avenue
Anchorage, Alaska 99501
amendel@mendelandassociates.com

Thomas W. Stenson
ACLU of Alaska Foundation
1057 W. Fireweed Lane, Suite 207
Anchorage, AK 99503
tstenson@akclu.org

Caitlin Shortell
Shortell Gardner
645 G Street, Suite 100-807
Anchorage, AK 99501
caitlin@shortellgardner.com

Amanda Goad
American Civil Liberties Union
1313 West 8th Street
Los Angeles, CA 90017
agoad@aclu.org

Susan Orlansky
Susan Orlansky LLC
500 L Street, Suite 300
Anchorage, AK 99501
orlansky@frozenlaw.com

s/Kayla Wilke
Kayla Wilke
Law Office Assistant