

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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 - Appellees,

vs.

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 - Appellants.

No. 14-35856

D.C. No. 3:14-cv-00089-TMB
U.S. District Court for Alaska,
Anchorage

Appeal from the United State District Court for the District of Alaska
(Timothy M. Burgess Presiding)

**OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY PENDING APPEAL**

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October 15, 2014

OPPOSITION TO EMERGENCY MOTION FOR STAY

The District Court enjoined State Defendants from enforcing its laws barring same-sex couples from marrying on Sunday, October 12, 2014.¹ Defendants filed a Notice of Appeal with this Court and moved for a stay pending appeal in the District Court on October 13.² After the District Court denied Defendants' motion, Defendants filed an Emergency Motion for a Stay of the District Court's ruling with this Court on October 14, 2014, shortly after 6:00 pm Alaska time.³ This Court ordered Plaintiffs to respond by 11:00 am Alaska time on October 15. Defendants' motion should be denied because they have not made a strong showing of likelihood of success on the merits and have not shown irreparable injury absent a stay. Furthermore, the issuance of a stay will substantially injure other parties and it is not in the public interest.

“A stay is not a matter of right.”⁴ To justify a stay, the party seeking the stay must satisfy a four-factor test. In determining whether the moving party has met that exacting burden, courts consider “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure

¹ District Court Order at 25.

² Notice of Appeal at 1.

³ Emergency Mot. for Stay at 1.

⁴ *Nken v. Holder*, 556 U.S. 418, 433 (2009).

the other parties interested in the proceeding; and (4) where the public interest lies.”⁵ None of the four factors support Defendants’ motion for a stay, and accordingly, the Court should deny Defendants’ motion.

Defendants cannot make a “strong showing” that they are likely to prevail on the merits. In fact, in light of the clear binding precedent in this Circuit, Defendants’ likelihood of success is virtually nonexistent. *SmithKline Beecham v. Abbott Laboratories* holds that heightened scrutiny applies to Equal Protection claims based on sexual orientation.⁶ And *Latta v. Otter* holds that the marriage laws of Idaho and Nevada denying same-sex couples the right to marry or to remain married violate equal protection.⁷ As State Defendants note, “[t]he same issues presented in this case were at issue in *Latta*.”⁸ Defendants have not shown a likelihood of success on the merits. They have shown that they are very unlikely to succeed on the merits.

Defendants claim that a stay should issue because “there is a reasonable likelihood this Circuit will rehear *Latta v. Otter* en banc” and because “there is a reasonable likelihood that a circuit split will develop in the very near future, leading to review by the Supreme Court.”⁹ But Defendants do not demonstrate any likelihood that this Circuit will rehear *Latta*. *Latta* applied heightened scrutiny as required by this

⁵ *Id.* at 434 (citation and internal quotation marks omitted).

⁶ 740 F.3d 471, 481 (9th Cir. 2014) (rehearing en banc denied, 759 F.3d 990).

⁷ *Latta v. Otter*, Nos. 12-17668, 14-35420, 14-35421, ---F.3d---, 2014 WL 4977682, *1 (9th Cir. Oct. 7, 2014).

⁸ Emergency Mot. for Stay at 2.

⁹ *Id.* at 1.

Circuit's holding in *SmithKline*—the law in this circuit. A request for en banc rehearing in *SmithKline* was denied.¹⁰ Defendants' claim that the "conditions for en banc hearing are so clear Alaska intends to request that its appeal ... be heard en banc in the first instance" is belied by this Court's denial of State Defendants' request for initial hearing en banc in *Latta*.¹¹ Conditions for en banc hearing are far from clear.

Moreover, even if this Court *had* granted a petition for rehearing en banc in *Latta*, this would not mandate the issuance of a stay of these proceedings. "It is fundamental that the mere pendency of an appeal does not, in itself, destroy the finality of an appellate court's judgment. Similarly, the pendency of a petition for rehearing does not, in itself, destroy the finality of an appellate court's judgment."¹² A Ninth Circuit panel's judgment in this circuit is "final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court."¹³ A petition for certiorari to the Supreme Court likewise does not strip a panel's judgment of its binding force.¹⁴ And Defendants' reference to "a clear circuit split" in the marriage cases is misplaced.¹⁵ All four circuits to consider the issue have found State laws barring same-sex couples from marriage or

¹⁰ *SmithKline Beecham v. Abbott Laboratories*, 759 F.3d 990 (9th Cir. 2014).

¹¹ Emergency Mot. for Stay at 5.

¹² *Wedbush, Noble, Cook v. SEC*, 714 F.3d 923, 924 (9th Cir. 1983).

¹³ *Id.* (citations omitted).

¹⁴ *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000).

¹⁵ Emergency Mot. for Stay at 5.

marriage recognition to be unconstitutional.¹⁶ But most important for the issue of the day in this case, this Court's decisions in *Latta* and *SmithKline* are binding precedent, regardless of possible, or even pending, Supreme Court review.¹⁷

Defendants do not establish that they will suffer irreparable harm if a stay is not issued.¹⁸ Defendants make the same argument that Defendant Idaho made to the Supreme Court in its memorandum in support of a stay in *Latta*, to no avail.¹⁹ The Supreme Court was unconvinced.²⁰ The Ninth Circuit has ordered the stay in *Latta* dissolved, “declin[ing] to deny the plaintiffs their constitutional rights any longer,” seeing “no possible basis for such a stay.”²¹ A State has no legitimate interest in enforcing an unconstitutional law. Defendants' emergency motion for a stay should be denied.

Defendants contend that Plaintiffs and other parties will not be harmed by a stay because, “in all likelihood, the requested stay in this case will not need to be lengthy.”²² But Supreme Court review is not generally a speedy process. As this Court

¹⁶ See *Bostic v. Schaeffer*, 760 F.3d 352 (4th Cir. 2014), *Baskin v. Bogan*, ---F.3d---, 2014 WL 4359059 (7th Cir. 2014), *Latta v. Otter*, ---F.3d---, 2014 WL 4977682, *1 (9th Cir. Oct. 7, 2014), *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014),

¹⁷ See *Latta*, ---F.3d---, 2014 WL 4977682, *SmithKline*, 740 F.3d 471.

¹⁸ See *Nken*, 556 U.S. at 443.

¹⁹ Supreme Court Brief of Governor Otter Supporting Stay Request at 11, available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000740.

²⁰ See U.S. Supreme Court Order denying Stay, available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000740.

²¹ Oct. 13, 2014 Order Dissolving Stay at 9, available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000740.

²² Emergency Mot. for Stay at 7.

has remarked, the Supreme Court’s grant of certiorari may cause a stay to “remain in effect for a lengthy period of time.”²³

Finally, the public interest is not served by a stay. Both sides do “have an interest in the orderly resolution of the ultimate issue.”²⁴ This interest has been served. The ultimate issue was resolved, in an orderly fashion, when Judge Burgess issued his order, based on the clear and binding law of the Ninth Circuit, on October 12.

CONCLUSION

Plaintiffs respectfully ask this Court to DENY Defendants’ Emergency Motion for Stay Pending Appeal.

By:

_____/s/_____

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²³ *Yong*, 208 F.3d at 1119.

²⁴ Emergency Mot. for Stay at 7.