**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 DAVID ROBINSON, a married couple, TRACEY WIESE and KATRINA CORTEZ, a married couple; and COURTNEY LAMB; STEPHANIE PEARSON, unmarried persons,

Plaintiffs – Appellees,

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; 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)

---

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

---

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

William E. Milks (Alaska Bar No. 0411094)
Kevin T. 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 Appellants*

October 14, 2014

## CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Ninth Circuit Rule 27-3, counsel for movants state:

1. The telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties are:

MICHAEL C. GERAGHTY
ATTORNEY GENERAL
William E. Milks (ABA 0411094)
Kevin T. Wakley (ABA 1405019)
Assistant Attorneys General
P.O. Box 110300
Juneau, AK 99811
Phone: (907) 465-3600
Fax: (907) 465-2520
bill.milks@alaska.gov
kevin.wakley@alaska.gov
*Counsel for all Appellants*

Heather L. Gardner (ABA 0111079)
Caitlin Shortell (ABA 0405027)
Shortell Gardner
645 G Street, Suite 100-807
Anchorage, AK 99501
Phone: (907) 272-8181
Fax: (888) 526-6608
hgardnerlaw@yahoo.com
caitlin@shortellgardner.com

Allison E. Mendel (ABA 8310136)
Mendel & Associates
1215 W. 8th Avenue
Anchorage, Alaska 99501
Phone: (907) 279-5001
Fax: (907) 279-5437
amendel@mendelandassociates.com
*Counsel for all Appellees*

Joshua A. Decker (ABA 8106042)
Thomas W. Stenson (ABA 0808054)
ACLU of Alaska Foundation
1057 W. Fireweed Lane, Suite 207
Anchorage, AK 99503
Phone: (907) 258-0044
Fax: (907) 258-0288
jdecker@acluak.org
tstenson@akclu.org

Amanda Goad (*Pro Hac Vice*)
American Civil Liberties Union
1313 West 8th Street
Los Angeles, CA 90017
Phone: (213) 977-5244
Fax: (213) 977-5273
agoad@aclu.org

Susan Orlansky (ABA 8106042)
Susan Orlansky LLC
500 L Street, Suite 300
Anchorage, AK 99501
Phone: (907) 222-7117
Fax: (907) 222-7199
orlansky@frozenlaw.com
*Amicus counsel for American Civil Liberties Union of Alaska*

2. On October 12, 2014, the United States District Court for the District of Alaska entered an Order declaring unconstitutional Alaska's laws that define marriage as between one man and one woman. The District Court's Order immediately enjoined the state of Alaska from enforcing its laws, to the extent they prohibit otherwise qualified same-sex couples from marrying.

On October 14, 2014, the District Court denied the State Defendants' motion for stay of the decision and injunction. State Defendants now move this Court for an immediate stay of the District Court's decision and injunction.

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. If the application is legally sufficient, a license will issue after a three day period.[1] Thus, pursuant to the District Court's Order, same sex couples in Alaska were able to begin submitting applications for a marriage license as of Monday morning, October 13, 2014. Licenses will then begin to issue to these couples on Thursday, October 15, 2014.

Changes to the law across the nation on the subject of same-sex marriage is occurring at an unprecedentedly rapid pace. This motion presents an emergency, because it is in the public's interest that it be resolved prior to Thursday, October 15, 2014. That way, should a stay be issued, it does not result

[1] AS 25.05.091.

in the difficult issues that would arise should there be a small window in which marriages occur, only to later be stopped as a result of a stay or other change in the law.

3. This motion is being served via email on all counsel listed above simultaneously with its filing.

DATED October 14, 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

## MOTION FOR STAY

State Defendants seek a stay of the District Court's decision and injunction order finding certain Alaska laws regarding marriage to be unconstitutional under the Fourteenth Amendment. Because of the exceptional importance of this matter, the State Defendants filed an immediate appeal and intend to petition for initial en banc hearing.[2]

A stay should be issued because: (a) there is a reasonable likelihood this Circuit will rehear *Latta v. Otter*[3] en banc, the decision of which the district Court relied upon heavily in its application of heightened scrutiny to Alaska's marriage laws; (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

---

2 *See* FRAP 35(b).

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

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.[4] The basis for the court's decision was that these laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The same issues presented in this case were at issue in *Latta v. Otter*, a challenge to the traditional marriage laws of Idaho and Nevada. The basic issue in *Latta v. Otter* 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.[5]

---

[4] 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.

[5] Appellate Rule 8; *Nken v. Holder*, 556 U.S. 418, 434 (2009).

First, there is a reasonable likelihood that this Circuit will rehear *Latta* en banc and thus vacate the panel's decision.[6] 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,[7] and with the Supreme Court's *United States v. Windsor*.[8] Dissenting from the denial of en banc rehearing in *SmithKline Beecham v. Abbott Laboratories*[9], 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."[10] Judge O'Scannlain explained further that "nothing in

---

[6] An en banc petition was filed yesterday 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. And as noted above, Alaska intends to petition for initial hearing en banc.

[7] 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).

[8] 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).

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

[10] *Id.* at 991-92.[10] *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*

*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."[11] Although this 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,[12] the need for en banc review of the heightened scrutiny issue is that much more pressing.[13] As set forth above,

---

*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).

[11] *Id.* at 993.

[12] *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)).

[13] The ruling from the U.S. District Court of Alaska in this case further supports the need for en banc review. In contrast to the ruling in *Latta*, the District Court in this case found that Alaska's same-sex marriage laws failed to pass constitutional muster under both due process and equal protection. This Court's *Latta* decision solely relied on equal protection. This inconsistency further supports the need and likelihood for en banc review.

because the conditions for en banc hearing are so clear Alaska intends to request that its appeal (filed yesterday) be heard en banc in the first instance.[14]

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;[15] a clear circuit split, however, is likely to rapidly develop. The Sixth Circuit heard argument in early August regarding cases[16] 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[17] and could issue a decision by end of this year. Accordingly, circumstances are likely to develop in which the

---

[14] 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").

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

[16] *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.

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

Supreme Court is virtually obligated to review the issue.[18] 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 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."[19] 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."[20]

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

---

[18] S.Ct. R. 10.

[19] *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)).

[20] *Id.*

length of the stay.[21] 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 as will Alaska. 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 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 the District Court order and decision pending appeal.

DATED October 14, 2014.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: s/William Milks
William Milks

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

Assistant Attorney General
Alaska Bar No. 0411094

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

*Attorneys for all Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 14, 2014.

I certify that not all participants in the case are registered CM/ECF users, therefore I served via electronic mail and that service will be accomplished by the appellate CM/ECF system.

DATED October 14, 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

*Attorneys for all Appellants*