SHAWN K. AIKEN
2390 East Camelback Road
Suite 400
Phoenix, Arizona 85016
Telephone: (602) 248-8203
docket@ashrlaw.com
ska@ashrlaw.com
ham@ashrlaw.com
whk@ashrlaw.com
sml@ashrlaw.com
Shawn K. Aiken - 009002
Heather A. Macre - 026625
William H. Knight - 030514

HERB ELY
3200 North Central Avenue
Suite 1930
Phoenix, Arizona 85012
Telephone: 602-230-2144
HerbEly@eburlaw.com
Herb Ely – 000988

MIKKEL (MIK) JORDAHL P.C.
114 North San Francisco
Suite 206
Flagstaff, Arizona 86001
Telephone: (928) 214-0942
mikkeljordahl@yahoo.com
Mikkel Steen Jordahl - 012211

DILLON LAW OFFICE
PO Box 97517
Phoenix, Arizona 85060
Telephone: (480) 390-7974
dillonlaw97517@gmail.com
Mark Dillon - 014393

GRIFFEN & STEVENS
LAW FIRM, PLLC
609 North Humphreys St.
Flagstaff, Arizona 86001
Telephone: (928) 226-0165
stevens@flagstaff-lawyer.com
Ryan J. Stevens - 026378

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

v.

Chad Roche, In His Official Capacity As Clerk Of The Superior Court Of Pinal County, Arizona; Michael K. Jeanes, In His Official Capacity As Clerk Of The Superior Court Of Maricopa County, Arizona; and Deborah Young, In Her Official Capacity As Clerk Of The Superior Court Of Coconino County, Arizona,

Defendants.

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

PLAINTIFFS' BRIEF RE APPLICATION OF *LATTA v. OTTER*

I.

Eight days ago, the United States Circuit Court of Appeals for the Ninth Circuit overturned the laws of Idaho and Nevada prohibiting same-sex marriage. *See Latta, et al. v. Otter*, *et al.,* ___ F.3d ___, Nos. 14-35420 and 12-17688 (Doc. 180-1) (striking statutes and state constitutional amendments under the Equal Protection Clause).[1] All of the Defendants' arguments concerning Equal Protection were raised in the Idaho and Nevada cases. None withstood scrutiny. And, this Court, like the Ninth Circuit panel, need not reach the question whether the Due Process Clause also prohibits marriage discrimination. *See Latta, et al. v. Otter, et al.*, ___ F.3d ___, Nos. 14-35420 and 12-17688 (Doc. 180-2) at 1 (Oct. 7, 2014) (Reinhardt, J., concurring). After the *Latta* decision, the Court should enter judgment in Plaintiffs' favor.

II.

Like the defendants in *Latta*, the Defendants in this case argued that the Supreme Court's disposition of the appeal in *Baker v. Nelson* precludes review. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972)(no substantial federal question presented). The Ninth Circuit rejected that argument. Finding no bar to consideration of the questions raised here, the Ninth Circuit reasoned that intervening decisions by the Supreme Court, including *Lawrence v. Texas*, 539 U.S. 558 (2003), *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), and three recent federal appellate decisions, confirm that "this case and others like it present not only substantial but pressing federal questions." *Latta* at 11.

Defendants in this case next argued that the "rational basis" standard of review applies to the Equal Protection challenge here. But, in *Latta*, the Ninth Circuit found that the Idaho and Nevada marriage laws unlawfully discriminated on the basis of sexual

[1] In the Nevada case, on October 13, 2014, Intervenor-Defendant-Appellee Coalition for the Protection of Marriage have petitioned for rehearing en banc. *Beverly Sevcik, et al. v. Governor Brian Sandoval*, *et al.,* No. 12-17668 (Doc. 274-1) (9th Cir. 2014).

orientation and reaffirmed its recent holding in *SmithKline Beecham Corp. v. Abbot Labs.*, 740 F.3d 471 (9th Cir. 2014), that sexual orientation discrimination should be examined under the "heightened scrutiny" standard. This Court should therefore review Arizona's nearly identical marriage laws under that same standard, which, as Plaintiffs argued, dooms Arizona's ban on same-sex marriage.

Defendants here argued at length that the Marriage Discrimination Laws meet the lower "rational basis" standard of review. But, in *Latta*, the Ninth Circuit rejected every such argument. In a lengthy analysis encompassing Part II of its decision, the Ninth Circuit panel found that the arguments advanced by the defendants there—which included all of the bases for state action urged by Defendants here—provided no persuasive ground in support of bans on same-sex marriage. In fact, the Ninth Circuit described defense arguments as "cruel," "repugnant," "impossible to fathom," "an ill-reasoned excuse for unconstitutional discrimination," "illogical and unjust," and a "crass and callous view of parental love and the parental bond that is not worthy of response." *Id*. at 19-28.

The Ninth Circuit also made short work of the Defendants' federalism argument that a state constitutional amendment should stand as the unreviewable will of the People. On that point, the *Latta* court crisply noted, "*Windsor* itself made clear [that] 'state laws defining and regulating marriage, of course, must respect the constitutional rights of persons' (internal citation omitted)." *Id*. at 29. After *Latta*, in other words, nothing remains of Defendants' arguments supporting Arizona's prohibition against same-sex marriage. Under controlling Ninth Circuit authority, the Marriage Discrimination Laws violate the Equal Protection Clause of the Fourteenth Amendment.

III.

The next issue concerns the Defendants' objection to the standing of those Plaintiffs who married outside of Arizona but seek recognition of their marriage in Arizona. On that point, the *Latta* court reasoned that,

> [b]ecause we hold that Idaho and Nevada may not discriminate against same-sex couples in administering their own marriage laws, it follows that they may not discriminate against marriages performed elsewhere. 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.

Latta at 32, n. 19. The court observed that the failure to recognize out-of-state same-sex marriages "imposed profound legal, financial, social and psychic harms" on the gay and lesbian couples of those states. *Id*. at 32-33.

In the present case, the recognition Plaintiffs advanced two arguments concerning standing. *See* Doc. 70, at 14-16. First, the defendant clerks must recognize marriages performed outside of Arizona when marriage partners seek to enter into a covenant marriage.[2] Second, the *Latta* decision confirms that the Court should strike Arizona's ban on same-sex marriage found in Art. 30, Sec. 1 of the state constitution and in A.R.S. §§ 25-101(C) and 25-112(C). As a result, the provisions of A.R.S. §§ 25-112(A) and (B) would then operate to guarantee marriage recognition to those same-sex couples who married outside of Arizona.

IV.

Finally, Defendants requested the Court's stay of any unfavorable ruling, but, after the Ninth Circuit's *Latta* decision, there is little if any reason for this Court to stay its order in favor of the Plaintiffs. Defendants cannot show a strong chance of success on appeal because any appeal would be heard by the Ninth Circuit, which has ruled decisively in favor of same-sex marriage after having reviewed every argument raised by Defendants. Two recent signals from the U.S. Supreme Court underscore the point. On October 6th, the Supreme Court denied petitions for writs of certiorari in five cases,

[2] On June 30, 2014, for example, Plaintiffs Meagan Metz and Natalie Metz, who were married in the State of Washington on May 29, 2013, sought the issuance of a covenant marriage license under A.R.S. § 25-902. Defendant Deborah Young, Clerk of the Superior Court of Coconino County, Arizona, refused the application. *See Supplemental Declaration of Meagan Metz* (6.30.14) (Doc. 62, Ex. 64).

leaving undisturbed the circuit court rulings striking bans against same-sex marriage in Wisconsin, Indiana, Virginia, Oklahoma, and Utah. Second, the Supreme Court recently denied the State of Idaho's application for stay of the *Latta* decision during the pendency of Idaho's petition for writ of certiorari to the Court. With those signals in mind, on October 13, 2014, the Ninth Circuit panel that decided *Latta*—which initially had not stayed its own decision (Doc. 180-1, at 34)—dissolved the brief stay that followed on application from the State of Idaho. *See Latta* (Doc. 196, at 2) ("Plaintiff-Appellees' motion to dissolve the stay is GRANTED, effective at 9 a.m. PDT Wednesday, October 15, 2014.").

Today, the Ninth Circuit panel reconsidered its decision and has given Idaho a brief second opportunity to seek a stay from the Supreme Court, but did so noting that, "we see no possible basis for such a stay." (Doc. 197, at 9)(attached). The Ninth Circuit's decision weighed the factors for issuing a stay and found against Governor Otter on each point, but, in its discretion, allowed Idaho one last chance to appeal to the Supreme Court *Id.* ("we hold that Governor Otter is no longer entitled to a stay of the district court's order and we accordingly dissolve the stay effective October 15, 2014. We decline to deny the plaintiffs their constitutional rights any longer… we have determined to exercise our discretion to afford the state a second opportunity to obtain an emergency stay of our order from the Supreme Court[.]").Thus, with both the Supreme Court and the Ninth Circuit having sent the strongest possible signals that bans against same-sex marriage should be stricken forthwith, this Court should deny Defendants' application for stay.

V.

Plaintiffs respectfully request that the Court grant their motion for summary judgment [Doc. 47]; deny defendants' cross-motion for summary judgment [Doc. 58]; and, immediately enjoin enforcement of Arizona's Marriage Discrimination Laws. After the decision in *Latta*, same-sex marriages are now being performed and recognized in

thirty of the fifty states, including Nevada, Idaho and Alaska. The same should finally come true in Arizona.

DATED: October 15, 2014.

By *s/ Shawn K. Aiken – 009002*
Shawn K. Aiken
Heather A. Macre
William H. Knight
2390 East Camelback Road, Suite 400
Phoenix, Arizona 85016

By *s/ Ryan J. Stevens – 026378*
Ryan J. Stevens
GRIFFEN & STEVENS LAW FIRM, PLLC
609 North Humphreys Street
Flagstaff, Arizona 86001

By *s/ Mikkel Steen Jordahl -- 012211*
Mikkel Steen Jordahl
MIKKEL (MIK) JORDAHL PC
114 North San Francisco, Suite 206
Flagstaff, Arizona 86001

By *s/ Mark Dillon -- 014393*
Mark Dillon
DILLON LAW OFFICE
PO Box 97517
Phoenix, Arizona 85060

By *s/ Herb Ely -- 000988*
Herb Ely
3200 North Central Avenue
Suite 1930
Phoenix, Arizona 85012

Attorneys for Plaintiffs

I certify that on this 15th day of October, 2014 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a copy was electronically transmitted to the following:

Kathleen P. Sweeney
Todd M. Allison
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007-2997
kathleen.sweeney@azag.gov
todd.allison@azag.gov
Attorneys for Defendants

Jonathan Caleb Dalton
Byron J. Babione
Kenneth J. Connelly
James A. Campbell
Special Assistant Attorneys General
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
CDalton@alliancedefendingfreedom.org
BBabione@alliancedefendingfreedom.org
kconnelly@alliancedefendingfreedom.org
jcampbell@alliancedefendingfreedom.org
Attorneys for Defendants

s/ DeAnn M. Buchmeier

FILED

OCT 15 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON, Plaintiffs - Appellees, v. C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity, Defendant - Appellant, And CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity, Defendant, STATE OF IDAHO, Intervenor-Defendant.	No. 14-35420 D.C. No. 1:13-cv-00482-CWD OPINION re Order

SUSAN LATTA; TRACI EHLERS; LORI WATSEN; SHARENE WATSEN; SHELIA ROBERTSON; ANDREA ALTMAYER; AMBER BEIERLE; RACHAEL ROBERTSON,	No. 14-35421 D.C. No. 1:13-cv-00482-CWD

Plaintiffs - Appellees,

v.

C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity,

Defendant,

And

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant - Appellant,

STATE OF IDAHO,

Intervenor-Defendant - Appellant.

Appeal from the United States District Court
for the District of Idaho
Candy W. Dale, Magistrate Judge, Presiding

Argued and Submitted September 8, 2014
San Francisco, California

Before: REINHARDT, GOULD, and BERZON, Circuit Judges.

PER CURIAM:

On October 10, 2014, the plaintiffs moved for dissolution of the stay of the district court's order enjoining the enforcement of Idaho's laws prohibiting same-sex marriage. In *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir.

Oct. 7, 2014), we decided the appeal, and held unconstitutional Idaho's statutes and constitutional amendments preventing same-sex couples from marrying and refusing to recognize same-sex marriages performed elsewhere. The stay pending appeal was issued a number of months ago, before the relevant factual and legal developments that dictate the outcome of the present motion. In light of our decision in *Latta* and the other recent decisions by circuit courts across the country in essentially identical cases, as well as the Supreme Court's decisions on October 6, 2014 to deny certiorari in all pending same-sex marriage cases and thus to permit same-sex marriages in all affected states notwithstanding any state statute or constitutional provisions to the contrary, Governor Otter can no longer meet the test for the grant or continuation of a stay. We therefore granted the plaintiffs' motion for dissolution of the stay of the district court's order on October 13, 2014, effective October 15, 2014.

The party seeking a stay—or continuation of a stay—bears the burden of showing his entitlement to a stay. *See Nken v. Holder*, 556 U.S. 418, 433–44 (2009). In ruling on the propriety of a stay, we consider four factors: "(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 the other parties interested in

the proceeding; and (4) where the public interest lies." *Id.* at 434.

Governor Otter cannot make a strong showing that he is likely to succeed on the merits. *See id.* We have now held that the plaintiffs have in fact succeeded on the merits of the case, agreeing with every court of appeals to address same-sex marriage bans subsequent to *United States v. Windsor*, 133 S. Ct. 2675 (2013). Governor Otter argues that reversal of this case—either via certiorari review or en banc proceedings—remains likely because we applied heightened scrutiny to the laws at issue, whereas nine other circuits have declined to hold that gays and lesbians constitute a suspect class. Governor Otter is wrong. The cases he cites all predate *Windsor*. The post-*Windsor* cases either do not reach the question of whether heightened scrutiny under the Equal Protection Clause applies (while applying strict scrutiny under a fundamental rights analysis) or suggest that heightened scrutiny review under the Equal Protection Clause may be applicable. *See Baskin v. Bogan*, No. 14-2386, 2014 WL 4359059, *1–3 (7th Cir. Sept. 4, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 375 n.6 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014).

The panel's decision in this case was dictated by *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), which held that heightened scrutiny

applies to classifications on the basis of sexual orientation. This court voted not to rehear *SmithKline* en banc only a short time ago, and we are bound by its actions. Specifically, *SmithKline* is the binding law of the circuit. Moreover, the various courts of appeals to have considered the issue of same-sex marriage post-*Windsor* have all reached the same result—the invalidation of same-sex marriage bans. These courts have applied varying types of scrutiny or have failed to identify clearly any applicable level, but irrespective of the standard have all reached the same result. Finally, the fact that we applied heightened scrutiny is irrelevant to whether the Supreme Court is likely to grant certiorari to review our decision. The Court is free to review—or not review—the type of scrutiny applied to classifications based on sexual orientation in *any* case challenging a ban on same-sex marriage. The level of scrutiny applied in a particular case is not likely to affect its decision as to which, if any, same-sex marriage case it may ultimately review. Governor Otter's arguments that are based on *SmithKline* or the level of scrutiny applied are thus unpersuasive.

Moreover, when a motions panel of this court originally entered the stay of the district court's order, it did so based on the Supreme Court's stay in *Herbert v. Kitchen*, 143 S. Ct. 893 (2014), the Utah same-sex marriage case. However, on Monday, October 6, the Supreme Court denied certiorari and vacated stays in all

seven of the same-sex marriage cases that were pending before it, including *Herbert*. As a result of the Supreme Court's action, marriages have begun in those states. At the time the Supreme Court denied certiorari in all the pending cases, it was aware that there were cases pending in other circuit courts that had not yet been decided but that might subsequently create a conflict. The existence of those pending cases, and the possibility of a future conflict, did not affect the Court's decision to permit the marriages to proceed, and thus, Governor Otter's argument that we should maintain the stay in order to await the results of cases pending in other circuits is unavailing.

Additionally, after the panel's issuance of the merits decision in this case affirming the district court's injunction, the Supreme Court denied Idaho's application for a stay of this court's mandate without published dissent, and vacated Justice Kennedy's temporary stay entered two days earlier. It did so despite Idaho's representation to the Court that granting its application was necessary to allow the Court to exercise its "unique role as final arbiter of the profoundly important constitutional questions surrounding the constitutionality of State marriage laws." Because the Supreme Court has thus rejected the argument that a stay was necessary to any potential exercise of its jurisdiction to review this case, we decline to second-guess that decision. The first *Nken* factor strongly

supports dissolution of the stay.

We now turn to the second and third factors governing the propriety of a stay: whether irreparable injury to the applicant will result absent a stay and whether continuance of the stay will injure other parties interested in the proceeding. On the one hand, there is some authority suggesting that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *but see Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (characterizing this statement in *Coal. for Econ. Equity* as dicta, and explaining that while "a state may suffer an abstract form of harm whenever one of its acts is enjoined . . . [t]o the extent that is true . . . it is not dispositive of the balance of harms analysis."), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of So. Cal, Inc.*, 132 S. Ct. 1204 (2012).[1] On the other hand, the plaintiffs and countless gay and lesbian Idahoans would face irreparable injury were we to permit the stay to continue in effect. "Idaho['s] . . . marriage laws, by preventing same-sex couples from marrying and

[1]Individual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined. *See Maryland v. King,* 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). No opinion for the Court adopts this view.

refusing to recognize same-sex marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms on numerous citizens of those states." *Latta*, 2014 WL 4977682 at *11; *see also Baskin v. Bogan*, 14-2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014) ("The harm to homosexuals (and . . . to their adopted children) of being denied the right to marry is considerable."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that a deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury"). Additionally, were this case to be reversed, notwithstanding our firm belief that such an outcome is unlikely, the harm caused by the invalidation of marriages that take place in the interim would primarily be suffered by the couples whose marriages might be rendered of uncertain legality and by their children—not by the state. On balance, we conclude that the second and third *Nken* factors also support dissolution of the stay.

Finally, we hold that the fourth factor governing issuance or continuance of a stay—the public interest—militates strongly in favor of dissolution of the stay. We repeat: by denying certiorari on October 6, 2014, the Supreme Court has allowed marriages to proceed in fourteen[2] states across the nation; all circuit courts

[2]This figure represents the number of states in circuits directly affected by the Supreme Court's denial on October 6, 2014 of petitions arising from challenges (continued...)

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.

Applying the four *Nken* factors discussed above, we hold that Governor Otter is no longer entitled to a stay of the district court's order and we accordingly dissolve the stay effective October 15, 2014. We decline to deny the plaintiffs their constitutional rights any longer.

Notwithstanding the above, we have determined to exercise our discretion to afford the state a second opportunity to obtain an emergency stay of our order from the Supreme Court, even though we see no possible basis for such a stay. For that reason, our order of October 13, 2014 is not made effective until 9 a.m. PDT (noon EST) on October 15, 2014. Otherwise we have determined that the stay of the district court's order enjoining enforcement of Idaho's same-sex marriage bans shall be dissolved and have entered the order of this court to that effect.

---

[2](...continued)
to state bans on same-sex marriage. We note that thirty-three states as well as the District of Columbia either presently allow same-sex marriages or are located in circuits affected by the Supreme Court's denials. This figure includes Idaho and Alaska.