IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

KETCHIKAN GATEWAY BOROUGH, an Alaska municipal corporation and political subdivision; AGNES MORAN, an individual, on her own behalf and on behalf of her minor son; JOHN COSS, a minor; JOHN HARRINGTON, an individual; and DAVID SPOKELY, an individual;

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, in his official capacity;

Defendants.

Case No. 1KE-14-00016CI

FILED in the Trial Courts
State of Alaska First District
at Ketchikan
FEB 23 2015
Clerk of the Trial Courts
By_____Deputy

**RESPONSE TO COURT'S FEBRUARY 22, 2015 ORDER REGARDING EMERGENCY MOTION FOR STAY PENDING APPEAL**

The Court is not required to entertain new arguments made for the first time at oral argument. Additionally, if the Court finds that Plaintiffs cannot be adequately protected, and that Defendants can not show a clear likelihood of success on the merits, Defendants' additional case citations are irrelevant to the Court's final determination as to whether a stay of the Court's Final Judgment is appropriate. Defendants' citations are also irrelevant

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to the Court's determination of whether they suffered irreparable harm, as explained further below.

## I. *Lobato* Does Not Establish Irreparable Harm or Even Concern The Question Before the Court Which Is A Stay Pending Appeal.

In *Lobato, et al. v. State of Colorado, et al.*, 218 P.3d 358 (Colo. 2009), plaintiffs claimed that the Colorado education system was underfunded and disbursed funding on an irrational basis, thereby violating the Colorado Constitution. The merits of this argument had not yet been reached when *Lobato* was decided. Instead, the case concerned plaintiffs' standing to sue and whether their argument was a nonjusticiable political question. The Colorado Supreme Court held that plaintiffs had standing and that the case could go forward.[1] In *dicta*, the Colorado Supreme Court explained that *if* the lower court ultimately found that the "current system of public finance is irrational, then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution."[2]

Here, Defendants have not requested that the legislature be given time to come up with a constitutional system. Instead, they ask the Court to stay its Final Judgment during the pendency of Defendants' appeal to the Alaska Supreme Court. They have expressly argued that the stay is appropriate so that the legislature can put off making any decisions

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[1] *Id.*

[2] *Id.* at 375 (citations omitted).

until after the Alaska Supreme Court rules. Thus, *Lobato* and the cases to which it cites are not relevant to the argument made by Defendants to obtain a stay from this Court.[3]

Not one of these cases involves a stay pending appeal and therefore, they do not stand for the proposition that Defendants are irreparably harmed by the Court's Final Judgment. Additionally, *Lobato* concerned a potential need to completely overhaul the educational system depending on the lower court's ruling.[4] In contrast, this Court has only declared that one aspect of Alaska's education funding (the required local contribution ("RLC")) is unconstitutional under a unique constitutional provision, the Anti-Dedication Clause. The Anti-Dedication Clause provides the legislature complete flexibility to address the RLC if it currently desires, for all of the reasons previously asserted by Plaintiffs in their briefing and at oral argument on the stay motion.[5]

Finally, this Court's Final Judgment did not replace Alaska's educational funding system with a new system. It merely alerted the Legislature to the unconstitutionality of one provision and left it to the legislature to decide what if any changes should be made before the Alaska Supreme Court rules. This is exactly what the Colorado Supreme Court endorsed in *Lobato*: "The court's task is not to determine 'whether a better financing

[3] Moreover, the time period provided to the legislature to act in these cases was much shorter than the time it would take for the Alaska Supreme Court to rule in this case. *See, e.g.*, cases cited at 375 n. 21 of *Lobato*.

[4] *Id.* at 364.

[5] Additionally, our case does not concern the fairness or adequacy of the distribution of educational funding but instead only concerns how revenues are generated to fund education.

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system could be devised,' but merely to determine whether the system passes constitutional muster."[6]

## II. *Maryland v. King* Does Not Involve The Alaska Test For Whether A Stay Pending Appeal Should be Granted, And Therefore, Does Not Have To Be Followed By This Court.

The test at issue in *Maryland v. King*, 133 S.Ct. 1, 183 L.Ed.2d 67 (2012) (Roberts, C.J. in chambers) concerned whether a stay of a court's decision should be granted while the U.S. Supreme Court decided whether to take cert. Therefore, this case is not authority for whether a stay should be granted pending appeal under Alaska law.[7]

The test regarding a stay pending a decision whether to grant cert includes three elements: (1) a reasonable probability that the Supreme Court would grant cert; (2) a fair prospect that the Supreme Court would reverse; and (3) a likelihood that irreparable harm will result from the denial of a stay.[8] Thus, it does not address whether Plaintiffs can be adequately protected.

Since lower courts were split on whether the DNA testing statute at issue in *King* was constitutional, Justice Roberts held that there was a reasonable probability that the Supreme Court would grant cert.[9] Furthermore, "given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision

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[6] *Id.* at 363 (citation omitted); *see also id.* at 374.

[7] Instead, the U.S. Supreme Court and Ninth Circuit case law discussed by plaintiffs at 14 of their Opposition are relevant because they stand for the proposition that irreparable harm may not be established by mere speculation and the possibility of irreparable harm.

[8] *King*, 133 S.Ct. at 2 (citations omitted).

[9] *Id.*

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below."[10] Clearly, neither of those circumstances exists in this proceeding where this Court merely applied longstanding Alaska Supreme Court precedent.

Moreover, the Court held that DNA sampling was a valuable tool to Maryland law enforcement authorities and that being deprived of it constituted irreparable harm in part because it had been upheld by three other courts.[11] Since the legislature has complete flexibility to react to this Court's ruling however it chooses, even if this test of irreparable harm applied here, it would not be met because this Court ruled on the basis of longstanding precedent as opposed to a split in decisions and Justice Roberts' apparent view that the other courts' decisions were persuasive.

Thus, Defendants read too broadly reliance in *King* on the phrase: "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Additionally, because (1) if a statute is unconstitutional, it should not continue to be enforced, and (2) if parties cannot show that this holding from *King* is the law in their state, other courts have chosen not to rely upon *King* for this proposition.[12] This Court should reach a similar conclusion for the reasons stated above.

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[10] *Id.* at 3.

[11] *Id.*

[12] *See Garden State Equality v. Dow*, 216 N.J. 314, 323-24 (N. J. 2013) (emphasis added) ("The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it? *See Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir.2004) ("*[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute [.]*")

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Dated this 23rd day of February, 2015.

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(citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)). . . . The State relies on other federal cases for the broad proposition it advances. *See Maryland v. King*, ——— U.S. ——, ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667, 670 (2012) (Roberts, C.J., in chambers) ("[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.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 363, 54 L.Ed.2d 439, 445 (1977) (Rehnquist, J., in chambers)). *But the State cites no New Jersey case law for the principle that enjoining a statute's enforcement always amounts to irreparable harm.*"); *De Leon v. Perry*, 975 F. Supp.2d 632, 664 (W.D. Tex. 2014) ("Defendants argue that a preliminary injunction would irreparably harm the State. Defendants argue that enjoining democratically enacted legislation harms state officials by restraining them from implementing the will of the people that they represent. [Citing *King* and a case citing *King*.] However, this Court disagrees with Defendants. As noted by Plaintiffs during oral argument, 'the Fourteenth Amendment—[including] the Equal Protection Clause and the Due Process Clause [found within]—was ratified by the American people and made law. That is a protection that was voted upon. And a citizen in the United States does not have to go to the ballot box to secure equal protection of the laws.' Oral Arg. Tr. p. 50. That is, an individual's federal constitutional rights are not submitted to state vote and may not depend on the outcome of state legislation or a state constitution. [citation omitted] Therefore, Defendants' first argument fails.")

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I certify that a true and correct copy of the foregoing was delivered this 23rd day of February, 2015, via e-mail to the email addresses of record in this case:

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