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 09 2015
Clerk of the Trial Courts
By_____Deputy

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Introduction and Summary of Plaintiffs' Arguments

To obtain a stay of a non-monetary judgment, the moving party needs to show that it will be irreparably harmed if a stay is not granted, and that the non-moving party can be adequately protected from harm, or, in the absence of adequate protection, that the moving party has a clear likelihood of success on the merits. Defendants' ("State's") Emergency Motion For Stay Pending Appeal ("Motion") does not make the required showing. Instead, the State mischaracterizes the balance of hardships, ignores the fact

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that Plaintiffs cannot be adequately protected from harm if the stay is granted, and does not demonstrate a clear likelihood of prevailing on the merits before the Alaska Supreme Court.

The State will not be irreparably harmed for a host of reasons. First, AS 14.17.610(b) provides that any overpayments of State aid to school districts can be adjusted in future fiscal years, there is no requirement that the legislature make up for the lack of RLC payments in future appropriations, and AS 14.17.300 expressly provides that the State can fund education at less than 100% of basic need. Second, the State argued and the Court concluded that the State receives no benefit from the RLC payments. The State is not irreparably harmed by the absence of a payment from which it receives no benefit. Third, Defendants' irreparable harm arguments rely on rank speculation about what might happen this legislative session in the absence of a stay and/or how nonparties to the case might be impacted by the Final Judgment. Such speculation does not establish irreparable harm. Fourth, the Final Judgment continues to have preclusive effect even if it is stayed. Fifth, despite its present budget woes, the State has adequate resources to address the absence of an RLC if the Governor and the legislature choose to do so. Sixth, the State's mootness argument is not supported by the case upon which it relies and does not comport with Alaska law holding that a legislative change in a statute does not moot a challenge to the previous version of the law. Finally, the uncertainty in school funding that the State claims is created by the Final Judgment for school districts is greatly exaggerated, and in any event, is not harm to the State.

In contrast, Plaintiffs are harmed and cannot be adequately protected from harm

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because the Court has ruled that once the RLC is paid, Plaintiff Ketchikan Gateway Borough ("Borough") is not entitled to a refund. Furthermore, even if a refund were to be available, the private party plaintiffs would still be harmed without adequate protection because the Borough has no mechanism to refund them their taxes paid towards the RLC. Therefore, the Court must find that Plaintiffs cannot be adequately protected if the Final Judgment is stayed pending appeal.

Given that the Court has concluded that the RLC funding scheme is an unconstitutional violation of the Anti-Dedication Clause, the State cannot make a showing of clear likelihood of success on the merits because the Court's decision follows longstanding Alaska Supreme Court precedent interpreting the Anti-Dedication Clause. This is not a case of first impression but instead applies settled law which has broadly construed the Anti-Dedication clause over many years. Accordingly, the State has not met its burden of proving its entitlement to a stay, and its Motion must be denied.

Finally, it is notable that the State has concocted an "emergency" out of whole cloth in an effort to rush the Court's decision on whether to grant a stay.[1] The State claims that the February 18 deadline for the Governor to submit his amended budget is the source of the emergency. Yet the Governor has already submitted his amended budget to the legislature, and apparently did not feel compelled to wait for the Court's ruling before doing so. Additionally, the Attorney General long ago concluded that the deadlines provided for in the Executive Budget Act are directory instead of mandatory

[1] The State has used the same emergency excuse with the Supreme Court, simultaneously providing the State with two bites at the apple for its stay motion .

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because of the Governor's constitutional authority over budget preparation. The so-called "emergency" created by the February 18 deadline is nonexistent.

Argument

I. THE CORRECT STANDARD FOR GRANTING A STAY OF A NON-MONEY JUDGMENT IN THIS CASE.

The standard for obtaining a stay of a nonmonetary judgment is the same as is required for obtaining a preliminary injunction. First, the moving party must face irreparable harm if the Court denies the Motion. Second, if the opposing party can be adequately protected, there must either be serious and substantial questions going to the merits of the case or, if the opposing party cannot be adequately protected, the moving party must show a clear likelihood of prevailing on the merits.[2] The State argues that it faces irreparable harm if a stay is denied, while Plaintiffs will not suffer any "cognizable legal harm" if the stay is granted, and that therefore all the State has to show is serious and substantial questions going to the merits of the Court's decision that the RLC is unconstitutional under the Anti-Dedication Clause.[3]

As discussed below, the State will not suffer irreparable harm. Moreover, Plaintiffs cannot be adequately protected, and therefore, the State must meet the higher standard of showing a clear likelihood of success on the merits in order to obtain a stay. That showing has not been made.

II. THE STATE IS NOT FACED WITH IRREPARABLE HARM.

The State argued successfully to this Court that it receives *no* benefit from the

[2] *See Keane v. Local Boundary Com'n,* 893 P.2d 1239, 1249-50 (Alaska 1995).

[3] Motion at 3.

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Borough's RLC payment.[4] The Court accepted this argument, and used it as the basis for denying the Borough's claim to a refund for the RLC previously paid under protest.[5] Since the State receives no benefit from the RLC, it is not irreparably harmed by the Final Judgment stating that the RLC is unconstitutional and that it no longer has to be paid by the Borough. The State's demand for a stay must be rejected on this basis alone.[6]

The State alleges amorphous and speculative harm that it or third parties might suffer if the stay is not issued when it claims:

1) The absence of a stay allegedly creates "uncertainty" about funds available for school district budget preparation;

2) The legislature may have to make difficult funding decisions and will be

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[4] *See* November 21, 2014 Order on Motion and Cross Motion for Summary Judgment ("Order") at 23-25; January 21, 2015 Order On Motion To Reconsider ("Reconsideration Order") at 2.

[5] *See id.*

[6] In fact, Defendant should be judicially or otherwise estopped from changing its position and arguing that it would be irreparably harmed if the Borough ceased paying an RLC when it previously successfully argued that it receives no benefit from the RLC. Alaska's quasi-estoppel doctrine is similar to what other jurisdictions call "judicial estoppel." *See Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990) (implicitly equating quasi-estoppel and judicial estoppel). Alaska law recognizes both quasi estoppel and equitable estoppel, either of which could apply here. The elements of equitable estoppel are "the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice." *Wright v. State*, 824 P.2d 718, 721 (Alaska 1992) (citing *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978)). Quasi estoppel appeals to the conscience of the court and applies where "the existence of facts and circumstances mak[es] the assertion of an inconsistent position unconscionable." *Id.* Unlike equitable estoppel, ignorance and reliance are not essential elements of quasi estoppel. *Dressel v. Weeks*, 779 P.2d 324, 331 (Alaska 1989). In determining if quasi estoppel applies a court examines: "whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and, whether the first assertion was based on full knowledge of the facts." *Wright*, 824 P.2d at 721 (citing *Jamison*, 576 P.2d at 103)).

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harmed if required to make them under a shortened timetable, before the Supreme Court confirms that the changes are necessary; and

3) The appeal may be mooted if the legislature amends the statutes, which the State argues is an irreparable harm because it will eliminate the possibility for review.

None of these arguments withstand scrutiny for the reasons explained below.

A. The State Has the Right to Recover Overpayments of State Aid, but the Plaintiffs Have No Refund Rights Under the Court's Order.

The State's arguments about the damage that could *potentially* be caused if the State goes without RLC payments that the Court has declared to be unconstitutional ignores several basic facts about the relative positions of the State and the Plaintiffs.

In the first place, the "enormous gap"[7] the State claims is created by the Final Judgment is exaggerated since the relevant number for determining whether to grant the stay is not the hundreds of millions of dollars that the State would have the Court worry about (*e.g.* the total amount of RLCs paid by municipalities throughout the State in FY 2015), but is instead only the roughly four to five million dollar RLC that would be paid by the Borough annually beginning in FY 2016 and continuing during the pendency of the State's appeal. The immediate impact of granting the stay will be to require the Borough and its taxpayers to continue paying RLCs that the Court has found to be unconstitutional, but such a stay will not directly impact other municipalities or taxpayers who are not parties to this case and therefore, not bound by any stay that might be issued

[7] Motion at 3.

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in this case.[8]

Furthermore, a stay will not relieve the Governor and the legislature from the need to reconsider reliance on the RLC for school funding before the Supreme Court issues a decision. This is because the stay would bar active enforcement of the Final Judgment but would not render it non-binding. As the U.S. Supreme Court held in *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 85 L.Ed. 725 (1941), the fact that a stay has been granted while a trial court decision is on appeal does not reduce the preclusive effect of that decision:

> . . . [I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness. [9]

Second, regardless of whether the Court accepts Defendant's argument that this is

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[8] Additionally, these other municipalities and/or taxpayers will still have the ability to file their own independent lawsuits, and use this Court's decision as authority to get judgments of their own while the appeal is pending, regardless of whether a stay is in place, in accordance with the doctrine of offensive collateral estoppel. *See, e.g., State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951 (Alaska 1995) (holding that non-mutual offensive collateral estoppel may be used against the State).

[9] *See also* Restatement (Second) of Judgments § 13, comment f (1982) ("The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.").

Similarly misplaced is Defendant's argument that a stay is necessary to eliminate "uncertainty" with respect to school funding. A stay only prevents the prevailing party from seeking immediate enforcement, but does not repeal the decision or prevent the legislature from considering revisions to school funding which would eliminate the constitutional infirmity identified by the Plaintiffs and confirmed by this Court, based on well-established Supreme Court precedent.

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an issue concerning hundreds of millions of dollars this fiscal year instead of the much smaller amount of the Borough's RLC while the Supreme Court appeal is pending, the State's claim that it will be without a remedy if the Supreme Court reverses the decision is unpersuasive. For example, if the State decides to provide State funding equal to the amount determined to be the total basic need inclusive of RLC payments while the appeal is pending, the State already has a statutory mechanism in place that would make the State whole if the Supreme Court reverses this Court's decision that the RLC is unconstitutional. AS 14.17.610(b) allows the State to recover overpayments of State aid made to support education funding:

> Distribution of state aid under (a) of this section shall be made as required under AS 14.17.410. If a district receives more state aid than it is entitled to receive under this chapter, the district shall immediately remit the amount of overpayment to the commissioner, to be returned to the public education fund. The department may make adjustments to a district's state aid to correct underpayments made in previous fiscal years.

Consequently, any excess payments of State aid under AS 14.17.410 would be more than a district would be entitled to receive, and thus recoverable under the State's authority to make itself whole if the Alaska Supreme Court were to reverse this Court's decision.

Third, if the Governor and legislature choose not to make up the difference, the State's irreparable harm argument is even less convincing since the legislature does not have to fully fund basic need or any other funding for education. [10] Given this fundamental fact of fiscal life, the State is crying wolf when it asserts that it will be

[10] Indeed, the State has vigorously asserted this point throughout this proceeding. *See, e.g.*, State's Opposition to Plaintiffs' Partial Motion to Reconsider at 1-2; State's Reply Brief in Further Support of Its Cross Motion For Summary Judgment at 2; State's Emergency Motion For Stay Pending Appeal at 5.

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irreparably harmed if the Court does not stay its Final Judgment. This is especially true given AS 14.17.300 which provides that the State may fund education at less than 100% of basic need, triggering a prorated reduction in aid to all school districts.[11]

Fourth, in applying the legal standard for a stay to the facts of this case, Plaintiffs respectfully urge the Court to resist the State's attempt to make the Court feel responsible for the State's current budget woes. The State dramatically characterizes the Final Judgment as creating an "emergency" because the Governor's amended budget is due February 18 under AS 37.07.070.[12] Clearly, the Governor himself did not view the Final Judgment as creating an emergency because he has already submitted his amended budget to the Legislature without the benefit of the Court's ruling on the stay.[13]

Furthermore, the Attorney General long ago issued an opinion stating that a former version of this statute is directory not mandatory.[14] The Attorney General stated that "*any statutory restriction*" on the Governor's power to recommend appropriations would be a violation of the separation of powers doctrine since the source of the

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[11] These funding choices also dispense with Commissioner Hanley's statement in paragraph 8 of his affidavit that Federal Impact Aid is also in jeopardy as a result of the Final Judgment. Further, payment of the RLC is only one of many ways available to the State to equalize education funding in order to be eligible for Federal Impact Aid, as explained further in the 1987 House Research Agency report entitled "Public Financing In Alaska", an excerpt of which is attached as Exhibit A to the February 6, 2015 Affidavit of Louisiana Cutler ("Cutler Aff"). The full report is 150 pages but will be provided to the Court upon request.

[12] Motion at 1.

[13] "Governor Releases Amended Endorsed Budget," Office of the Governor February 5, 2016 Press Release attached as Exhibit B to the Cutler Aff.

[14] Attorney General's Opinion, File No. 366-464-83, February 28, 1983 ("1983 Attorney General's Opinion"), attached as Exhibit C to the Cutler Aff.

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Governor's power to recommend a budget and appropriations is provided in Article IX, section 12 of the Constitution.[15] Further, "[a]pplying AS 37.07.070(1) strictly, rather than just as a guide, could prevent the governor from introducing an essential appropriation bill; that would produce a result that is both unconstitutional and unreasonable."[16] There is no reason for the Court to conclude otherwise just because the statute has been amended to add additional deadlines such as the one that the State claims is critical here. [17]

Furthermore, it is inevitable that final budget decisions will not be made until the end of the legislative session in April, as is the case every year. The February 18 deadline is a classic red herring. Moreover, if the State is correct that an "emergency" exists, the Governor has the power to propose additional appropriations to the legislature in order to address an emergency "at any time" in accordance with AS 37.07.100 and the 1983 Attorney General's Opinion.[18]

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[15] *Id.* at 2 (emphasis added).

[16] *Id.*

[17] *See also S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771-72 (Alaska 2007) ("If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party." In determining if a statute is considered directory three factors can be examined: "if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create 'guidelines for the orderly conduct of public business'; and (3) 'serious, practical consequences' would result if it were considered mandatory."); *West v. State, Bd. of Game*, 248 P.3d 689, 698 (Alaska 2010) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007)) ("[C]ourts should if possible construe statutes so as to avoid the danger of unconstitutionality."); *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004) ("[Courts should] narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature's intent.").

[18] 1983 Attorney General's Opinion at 2 (if the statute is not viewed as directory, it would prevent the Governor from "dealing with emergencies and other situations in which the best interests of the state require an appropriation to be submitted after the statutorily specified time.")

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Clearly the State faces budget challenges, but it is inaccurate to portray the State as unable to provide funding for its programs at the level deemed appropriate by the legislature. The State has healthier reserves than all of the other states when measured as a percentage of general funds and when measured by the number of days' worth of general fund revenues in reserve.[19] According to the Department of Revenue's most recently published State revenue forecast in December 2014, the current shortfall caused by the unanticipated oil price drop is both temporary, and in an amount well below the State's cash reserves.[20] Moreover, the key driver of the budget shortfall is oil price sensitivity,[21] not the Final Judgment. The State clearly has adequate resources if it wants to increase state funding for education in light of the Court's ruling that the RLC is unconstitutional. Reductions in spending for State programs in the next legislative session are going to be the result of policy choices, not fiscal necessity. It is the outcome of these policy choices that could "seriously impair[] educational opportunities,"[22] not the Final Judgment enforcing the Constitution.

In contrast to the State's decided lack of irreparable harm, Plaintiffs are harmed and cannot be provided adequate protection from that harm because, as noted above, the

[19] Exhibit D to Cutler Aff. (Fiscal 50: State Trends and Analysis, January 29, 2015 Update, the Pew Charitable Trusts). Exhibit D also demonstrates the dramatic increase in the State's reserves from FY 2007 to the present.

[20] http://dor.alaska.gov/Portals/5/Docs/PressReleases/RSB%20Fall%202014%20highres%20page.pdf at 26 and 30.

[21] *Id.* at 82. *See also* Exhibit E to Cutler Aff. (newspaper article in which the Commissioner of Revenue is reported to have told legislators on January 26, 2015 that paying out more in oil and gas production tax credits than the State receives in oil and gas production tax income is not problematic because the State is only experiencing a temporary "cash-flow" problem, "driven by low [oil] prices.").

[22] Motion at 4.

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Court has held that once the RLC payment has been made, the Borough is not entitled to a refund of that amount. If the RLC is in effect for FY 2016 and subsequent years until the Supreme Court appeal is decided, the Borough will be required to make an RLC payment in an amount equal to 2.65 mills on the full and true value of all taxable property in the Borough as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 each year.[23]

Additionally, Mr. Bockhorst explains, in his Affidavit at ¶ 4, that the private plaintiffs will be required to pay an allocated portion of the property and sales taxes levied by the Borough to generate the funds to make RLC payments. The Borough establishes the rate of property taxes by June 15 of each year, the deadline established in AS 29.45.240.[24] Even if the Supreme Court ultimately decides that the RLC should be refunded, the Borough does not have a record database which would facilitate refund of the taxes levied and collected to return the RLC payment to the individual taxpayers who paid them.[25] Moreover, some property owners die, or sell their property to other persons.[26] Additionally, to the extent the funds are derived from sales taxes, the taxes are

[23] Another form of harm that the Borough would suffer is described in ¶¶ 5-9 of the February 6, 2015 Affidavit of Dan Bockhorst ("Bockhorst Aff."). If a stay is granted but the Supreme Court ultimately upholds this Court's decision, the Borough would also be prevented from recovering its RLC payments because of the impact of the statutes described in Mr. Bockhorst's affidavit. Because of the interplay between total local contributions (*e.g.* the RLC and voluntary local contributions) and the cap on voluntary local contributions, the Borough would never recover its RLC payments from the district or the State.

[24] Bockhorst Aff. at ¶ 3.

[25] *Id.* at ¶ 4.

[26] *Id.*

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remitted by the merchants with no tracking of the individual taxpayers.[27] Thus, it is not possible to refund taxes to the parties who paid them.[28]

The State can be made whole through AS 14.17.610(b) if the Court's decision is reversed or alternatively, while the decision is on appeal, the State can choose not to make up the lack of RLC payments because it does not have to fully fund education. Plaintiffs, on the other hand, will be irrevocably deprived of significant funds while the decision is on appeal. The State ignores its own statutory and constitutional safety net and glosses over the lack of protection for the Plaintiffs.[29]

B. The Appeal Will Not Be Mooted if the Legislature Amends the Statutes.

The State relies upon *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986), for the proposition that mooting an appeal could give rise to irreparable harm and that the appeal will be mooted if the legislature changes the statute before the Supreme Court renders a decision.[30] Artukovic sought to stay an order extraditing him to Yugoslavia to stand trial in that country for war crimes committed when Croatia was a Nazi puppet regime. The Ninth Circuit noted that there was a "possibility" of irreparable harm to Artukovic because his habeas claim would be mooted once he was no longer in custody in the United States.[31] However, after considering the probability of success of Artukovic's appeal and balancing the interests at issue including the public's interest, the Ninth

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[27] *Id.*

[28] *Id.*

[29] A.R.C.P. 62(d) and AS 09.68.040(a) provide that the State is not required to post a supersedeas bond in conjunction with obtaining a stay.

[30] Motion at p. 4-5.

[31] *Artukovic*, 784 F.2d at 1356.

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Circuit *denied* Artukovic's request for a stay of his extradition to Yugoslavia.[32]

Moreover, as the Ninth Circuit noted recently in a case more analogous to this situation, the mere possibility of mootness does not support granting a stay.[33] The Court did not find persuasive the Forest Service's argument that "money and time spent reinitiating consultation may turn out to be wasted if the Court of Appeals rules in its favor ...".[34] The Court went even further:

> It must be emphasized, however, that "even certainty of irreparable harm has never *entitled* one to a stay ... and a "general balancing of all of the factors remains as the primary guidepost."[35]

Here, the State speculates about how the legislature might react in alleging irreparable harm without any consideration to or balancing of the tangible harm that it is certain that Plaintiffs will suffer if the Court grants the stay. [36]

Furthermore, under Alaska Supreme Court precedent, a change of law does not moot challenges to the law previously in effect. At issue in *Atlantic Richfield Company v. State*, 705 P.2d 418, 426 (Alaska 1985), was the constitutionality of the oil and gas separate accounting corporate income tax statute. While the case was underway, the

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[32] *Id.* at 1356-57.

[33] *Salix v. U.S. Forest Service*, 995 F.Supp.2d 1148, 1151-53 (2014) (irreparable harm not shown by possibility that court ordered Endangered Species Act consultation efforts could result in settlement which would eliminate the need for an appeal or alternatively, that appeal might reverse decision against Forest Service which it sought to have stayed).

[34] *Id.* at 1151.

[35] *Id.* at 1150 (citations omitted, emphasis in the original).

[36] The United States Supreme Court also expressly rejects any such "possibility" standard for granting a stay. *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (citations omitted) (a stay is not granted because of the possibility of irreparable injury); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 375, 172 O.Ed.2d 249 (2008) ("the possibility standard ... is too lenient.")

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legislature repealed and replaced separate accounting with a modified apportionment tax.[37] The Court noted in *ARCO* that the statutory change was primarily intended to avoid a further increase in the possible liability caused if the Supreme Court ultimately concluded that separate accounting was unconstitutional.[38] However, the change in law prior to the Supreme Court's ruling had no impact on the Supreme Court's ability to hear claims about the constitutionality of the separate accounting system. Instead, the Supreme Court ruled that separate accounting was in fact constitutional, even though it had long since been repealed and replaced by the new tax regime.[39]

The same situation exists here. Even if the legislature were to act to replace the RLC before the Supreme Court rules, the Supreme Court would likely proceed to rule on the RLC's constitutionality. Moreover, the issue of whether the current RLC is a violation of the Anti-Dedication Clause would remain relevant to the validity of an attorney's fee award and whether Plaintiffs were appropriately considered the prevailing parties regardless of whether the Legislature decides to revise the funding system.

In short, any change in the statute before the Supreme Court rules will not moot the State's appeal.

C. The State is Not Irrevocably Harmed Because the Legislature May Revise the Education Funding Statute before the Supreme Court Renders a Decision.

The Motion implies that policy makers should not consider a new funding scheme until the Supreme Court rules, and that the State will be irreparably harmed if the

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[37] 705 P.2d at 422.

[38] *Id.*

[39] *Id.* at 429-438.

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legislature hurries to amend the statute this session.[40] However, if policy makers use the stay as a reason to put off consideration of changes to the RLC statute until the Supreme Court rules, policy makers will not have been prevented from -- in the words of the State, not Plaintiffs -- "urgently and imprudently overhaul[ing] education funding."[41] If the Supreme Court affirms the present decision in the middle of a legislative session, the legislature may still act quickly to change the system before the session ends. Alternatively, if the Supreme Court rules when the legislature is not in session and the legislature decides to have a special session to consider statutory changes, the same alleged pressure to act fast and make allegedly "imprudent" decisions could still occur.

Given its clear constitutional duty to decide what and how much to fund, the Final Judgment does not put any pressure on the legislature to move too quickly; all it does is point out to the legislature that education must be funded in conformance with the Constitution. The State does not explain why it would be so damaging for the legislature to consider alternative methods of funding education that comply with the Constitution, or why it is essential for that consideration to be delayed until after the Supreme Court rules. One can certainly conclude that the public interest would be served by policy makers beginning to consider how to reform the education funding system now without feeling rushed, even if they decide to wait to implement any statutory changes until the Supreme Court has spoken.[42]

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[40] Motion at 5.

[41] *Id.*

[42] *See, e.g., Keane*, 893 P.2d at 1249 (in deciding whether to grant a stay of a nonmonetary judgment, superior court should be guided by the public interest; under the

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Indeed, the real pressure to make a hurried decision that is being exerted here is the pressure that the State is attempting to put on the Court to rule as quickly as possible on whether to grant the stay, despite the Court's careful consideration of both sides' arguments regarding the Anti-Dedication Clause and the longstanding Supreme Court opinions interpreting it, in the Order. The Anti-Dedication Clause is not some minor nuisance which, as interpreted by the Court, creates a school funding crisis of epic proportions as the State asserts.[43] Instead, it was vigorously debated by the Founders who made a conscious decision to include it in our Constitution so that the legislature would annually consider competing needs for the State's resources.[44] Encouraging the Governor and legislature to face this constitutional responsibility sooner rather than later favors the public interest in upholding the Constitution.

D. Uncertainty as to School Budgets is Not a Harm to the State, Occurs Each Year when the Legislature Considers the Appropriate Level of School Funding, and therefore, is not a Direct Result of the Court's Final Judgment.

Since the school districts are not parties to this proceeding, uncertainty in local school district budgeting does not create an irreparable harm to the State. Moreover, a stay of the Final Judgment would not eliminate uncertainty in school district funding

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facts presented, it was in the public interest to deny the stay); *Nken*, 556 U.S. at 427 (citation omitted) ("The public's interest in the 'integrity' of judicial proceedings includes the public interest in the finality of judgments. That is why stays are generally regarded as 'an intrusion into the ordinary processes of administration of judicial review.'").

[43] Motion at 4.

[44] Exhibit A to April 28, 2014 Plaintiffs' Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Cross Motion For Summary Judgment (1975 Alaska Op. Att'y Gen. No. 9, summarizing the constitutional history). This Attorney General's Opinion was relied upon by the Alaska Supreme Court in *State v. Alex*, 646 P.2d 203 (Alaska 1982), the seminal Anti-Dedication Clause case.

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because such funding is inherently uncertain since funding levels change and are adjusted throughout the year.[45] The inevitable uncertainty arises from the many variables which impact school funding such as the final amount of State aid and other state funding for schools as well as student count which varies and is adjusted over the course of the year.[46] The RLC is not nearly as significant as other variables because it is not a factor in calculating basic need.[47] Basic need is what sets a district's budget floor.[48] Basic need varies based upon the base student allocation and student count, and fluctuates widely.[49] The reality is that uncertainty in school budgets continues throughout the year, even after the legislature adjourns.[50] Thus, even if the Court requires the Borough to continue to pay the RLC during the pendency of the appeal, uncertainty in school funding will continue. Therefore, the Final Judgment does not cause irreparable harm to the State because this Court found that the RLC is unconstitutional and that the Borough is relieved from its obligation to provide an RLC to the Ketchikan School District.

In sum, neither the law nor the facts support Defendant's contention that it will be irreparably harmed if a stay is not granted for the numerous reasons set forth above.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM AND CANNOT BE ADEQUATELY PROTECTED IF THE JUDGMENT IS STAYED.

In contrast, as discussed above in Section II.A, if a stay is imposed, the parties that

[45] *See* February 5, 2015 Affidavit of Robert Boyle, Superintendent of the Ketchikan Gateway Borough School District ("Boyle Aff.").

[46] Boyle Aff. at ¶¶ 5-7.

[47] *Id.* at ¶ 10.

[48] *Id.* at ¶ 4.

[49] *Id.* at ¶ 4.

[50] *Id.* at ¶ 5-7.

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will be irreparably harmed are the Plaintiffs because the Court has already found that an RLC once paid will not be refunded and because even if a refund were available, it is not possible for the Borough to refund the taxes that were used to fund the RLC. This is the "cognizable financial harm"[51] to Plaintiffs which the State ignores. Thus, the State misses the mark when it argues that the "only" impact of the stay would be that Plaintiffs would have to wait longer to get a final ruling.

Although the State is not required to post a bond in conjunction with its request for a stay, the lack of a bond requirement does not eliminate the need for adequate protection of Plaintiffs as a necessary predicate to granting the stay.[52] The Motion does not even attempt to place the Plaintiffs in the position they currently occupy, but simply proposes that the current unconstitutional system remain in place, and that the Plaintiffs continue to make unconstitutional payments with no prospect of refund.

IV. THE STATE DOES NOT DEMONSTRATE A CLEAR LIKELIHOOD OF PREVAILING ON THE MERITS.

Because the State cannot show that the Plaintiffs are adequately protected, the State is not entitled to a stay of a non-monetary judgment in the absence of a showing that the State has a clear likelihood of prevailing on the merits.[53] The State has not attempted to meet this burden, which would be quite difficult in light of the fact that this

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[51] Motion at 6.

[52] *See* AS 09.68.040(c) (a litigant requesting a stay may not be excused from protecting those who would be adversely affected because of the "nature of the policy or interest" advocated by the litigant). Nor is the Borough required to post a bond under AS 09.68.040(a). The State's argument that the Borough should continue to pay the RLC is akin to requiring the Borough to post a bond but without any possibility that the Borough would recoup it if Plaintiffs prevail.

[53] *Keane*, 893 P.2d 1239 at 1249-50.

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Court has just rejected the State's position as a matter of law.[54] While that is a theoretical possibility where there is substantial doubt as to the correctness of the decision, the decision in the instant case follows inevitably from binding Supreme Court precedent. The court correctly concluded that the current school funding mechanism involved the proceeds of a State tax, dedicated to a particular purpose in a way that was indistinguishable from the mechanism previously found to be unconstitutional in *Alex*.[55] This is not a case where an issue of first impression is involved, but is instead the application of settled law where the Supreme Court has had numerous opportunities to re-examine the Anti-Dedication Clause over the years, but has consistently held that a broad interpretation of this constitutional provision is appropriate.[56] The State essentially asks this Court to overrule *Alex* and its progeny. In light of the doctrine of *stare decisis*,[57] this uphill battle renders the likelihood of success on the merits much less than clear.

While the State urges this court to apply the lower "serious and substantial

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[54] *See Powell v. City of Anchorage,* 536 P.2d 1228 (Alaska 1975) n. 2 (citing to 7 J. Moore, Federal Practice 62.05 (2d ed. 1972) for the proposition that "it may be the unusual case in which the trial judge would arrive at the conclusion that appellant is likely to prevail on appeal" after having just concluded that appellant has not prevailed).

[55] Order at 8-14.

[56] *Id.* at 9-10.

[57] *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996) (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)) ("[S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands. In balancing these interests, we will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.' "); *Beesley v. Van Doren*, 873 P.2d 1280, 1283 (Alaska 1994) (quoting *State v. Souter*, 606 P.2d 399, 400 (Alaska 1980)) ("Under the rule of stare decisis, this court will overrule precedent only 'where the court is clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.' ").

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question" standard, that standard is only appropriate when the plaintiffs will be protected from harm. Because the Plaintiffs will suffer irreparable harm if a stay is granted, the State is not entitled to a stay in the absence of a showing that it will prevail on appeal, which it does not make simply by asserting that it will present the same arguments to the Supreme Court that it has presented to this Court.

Conclusion

For all of the above stated reasons, the Motion should be denied.

Dated this 9th day of February, 2015.

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KETCHIKAN GATEWAY BOROUGH

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I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST: _____
CLERK-TRIAL COURTS
State of Alaska
at Ketchikan

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