

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

MATTHEW HAMBY and CHRISTOPHER
SHELDEN, a married couple, CHRISTINA
LABORDE and SUSAN TOW, a married
couple, SEAN EGAN and DAVID
ROBINSON, a married couple, TRACEY
WIESE and KATRINA CORTEZ, a married
couple, and COURTNEY LAMB and
STEPHANIE PEARSON, unmarried
persons,

Plaintiffs - Appellees,

vs.

BILL WALKER, in his official capacity as
Governor of Alaska, CRAIG RICHARDS, in
his official capacity as Attorney General of
the State of Alaska,
VALERIE DAVIDSON, in her official
capacity as Commissioner of the State of
Alaska, Department of Health and Social
Services, and PHILLIP MITCHELL, in his
official capacity as State Registrar and
Licensing Officer, Alaska Bureau of Vital
Statistics,

Defendants - Appellants.

No. 14-35856

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

Appeal from the United State District Court for the District of Alaska

(Timothy M. Burgess Presiding)

**OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE AND TO
SUSPEND BRIEFING SCHEDULE**

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February 19, 2015

OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE

Defendants ask the Court to hold their appeal in abeyance and to suspend the briefing schedule pending the Supreme Court's decision in *DeBoer v. Snyder*.¹ Plaintiffs oppose this motion because of their strong interest in obtaining final resolution as soon as possible. Plaintiffs request that this Court deny Defendants' motion and suggest that Defendants instead withdraw their appeal based on the clear binding precedent in this circuit.²

Defendants have not established that holding this appeal in abeyance is appropriate. Citing *Mediterranean Enters., Inc. v. Ssangyong Corp.*³ and *Leyva v. Certified Grocers of California, Ltd.*,⁴ Defendants contend that this appeal should be stayed "pending resolution of independent proceedings which bear upon the case."⁵ Both of the cases Defendants cite involved an appeal from the district court's decision to stay action in trial court pending arbitration between parties to a contract and thus do not provide authority for holding appellate proceedings in abeyance.⁶ Moreover, the "independent proceedings" Defendants refer to—ostensibly, the Supreme Court's review

¹ Mot. to hold appeal in Abeyance; *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, -- S.Ct. --, Nos. 14-556, 14-562, 14-571, 14-574, 2015 WL 213650 (Jan. 16, 2015).

² See *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (rehearing en banc denied, ---F.3d---, 2015 WL 128117 (9th Cir. Jan. 8, 2015)).

³ 708 F.2d 1458 (9th Cir. 1983).

⁴ 593 F.2d 857 (9th Cir. 1979).

⁵ Mot. for Abeyance at 2.

⁶ *Mediterranean Enters., Inc.*, 708 F.2d at 1461; *Leyva*, 593 F.2d at 859.

of *DeBoer*—do not bear upon this case in the same way that pending arbitration between parties bears upon the related civil suit between the same parties. In the Ninth Circuit, the law is clear that a State may not deny same-sex couples the right to marry or to remain married.⁷

Defendants cite factors the Court has considered in reviewing an administrative law judge's refusal to stay civil proceedings pending the outcome of criminal proceedings as applicable to their motion to hold this appeal in abeyance.⁸ These factors include: (1) the interest of the plaintiffs in an expeditious proceeding and potential prejudice from delay; (2) the burden the proceedings may impose on the defendants; (3) “the convenience of the court in the management of its cases, and the efficient use of judicial resources;” and (4) the interest of the public in the pending litigation.⁹

To the extent these factors are applicable here, they weigh in favor of denying Defendants' motion to hold their appeal in abeyance. First, Plaintiffs have a clear interest in the expeditious and final resolution of this case. Defendants allege that Plaintiffs would suffer no harm if the appeal is held in abeyance because the district court's order is in effect.¹⁰ Defendants are incorrect. Plaintiffs want final resolution, as

⁷ See *Latta*, 771 F.3d 456.

⁸ Mot. for Abeyance at 3; *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-25 (9th Cir. 1995).

⁹ *Keating*, 45 F.3d at 325.

¹⁰ Mot. for Abeyance at 3.

soon as possible. Second, Defendants have imposed the burden of these proceedings on themselves by appealing an order that correctly applied clear Ninth Circuit precedent. Third, Defendants contend that holding the appeal in abeyance will “avoid unnecessary expense of judicial resources and the resources of the parties.”¹¹ But given the clear precedent in this circuit, the best way to avoid the unnecessary expense of judicial resources and the resources of the parties is to withdraw or dismiss the appeal. Fourth, the public also has an interest in the final resolution of this case.

The fact that the Eleventh Circuit has decided to hold certain appeals in abeyance is of little import to this Court. *SmithKline Beecham v. Abbott Laboratories* holds that heightened scrutiny applies to Equal Protection claims based on sexual orientation.¹² And *Latta v. Otter* holds that the marriage laws of Idaho and Nevada denying same-sex couples the right to marry or to remain married violate equal protection.¹³ A Ninth Circuit panel’s judgment in this circuit is “final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.”¹⁴ This Court’s decisions in *Latta* and *SmithKline* are binding precedent, regardless of pending Supreme Court review of a case from a different circuit presenting similar questions.¹⁵

¹¹ *Id.*

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

¹³ *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (rehearing en banc denied, ---F.3d---, 2015 WL 128117 (9th Cir. Jan. 8, 2015)).

¹⁴ *Wedbush, Noble, Cook v. SEC*, 714 F.3d 923, 924 (citations omitted).

¹⁵ *See Latta*, 771 F.3d 456; *SmithKline*, 740 F.3d 471.

Unlike the Ninth Circuit, in which the law is settled, the Eleventh Circuit has not yet decided the issue.

Plaintiffs continue to have a strong interest in establishing the finality of the District Court's order and thus resolution of Defendants' appeal. The Defendants asked to stay the order pending appeal and were denied by the District Court, this Court, and the United States Supreme Court.¹⁶ All three courts denied the State's request. This Court should similarly deny Defendants' instant motion.

CONCLUSION

Plaintiffs respectfully ask this Court to DENY Defendants' Motion to hold the appeal in abeyance and stay the briefing schedule.

By:

_____/s/_____

Allison Mendel #8310136
Mendel & Associates, Inc.

¹⁶ Emergency Mot. for Stay Pending Appeal (U.S. D.C., Ak., Oct. 13, 2014); Emergency Mot. for Stay Pending Appeal (9th Cir., Oct. 14, 2014); Petitioner's Application for Emergency Stay (S. Ct., Oct. 16, 2014).

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 appellee CM/ECF system on February 19, 2015.

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 appellee CM/ECF system.

DATED February 19, 2015

By: _____/s/_____

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