Nos. 11-17357, 11-17373

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE,
Plaintiff-Appellee/Cross-Appellant,

v.

ABBOTT LABORATORIES,
Defendant-Appellant/Cross-Appellee,

Appeal From The United States District Court For The
Northern District of California
In Case No. 4:07-cv-05702-CW, Judge Claudia Wilken

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE and CROSS-APPELLANT SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE OPPOSING REHEARING *EN BANC*

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INTRODUCTION

This case is extraordinary only for its uniquely troubling facts, in which counsel for Defendant-Appellant Abbott Laboratories ("Abbott") exercised a discriminatory strike against a juror *because* the juror was gay. In this case, during *voir dire*, Juror B disclosed that he is gay. Abbott's counsel used his first peremptory strike to remove Juror B. Opposing counsel objected, and Abbott's counsel astonishingly declined to give any neutral reason for the strike, instead complaining that "[t]his is my first challenge" and that "I have no idea whether [Juror B] is gay or not." After carefully reviewing the record, the panel found it overwhelmingly clear that the statements of Abbott's counsel were not credible and that Abbott intentionally struck Juror B because of the juror's sexual orientation. The panel then faithfully applied Supreme Court and Ninth Circuit precedents to reach what should be an unremarkable conclusion: Gay men and lesbians cannot be struck from jury service simply for being gay or lesbian.

Rehearing *en banc* is "not favored," Fed. R. App. P. 35(a), and is unwarranted in this case, as Abbott apparently agreed by not requesting it. The panel unanimously held that *Batson v. Kentucky*, 476 U.S. 79 (1986), applies to peremptory strikes based on a juror's sexual orientation. That holding does not contravene circuit precedent or create a conflict with other courts of appeals. Nor does the issue arise with such frequency as to justify the attention of the full Court.

Discrimination based on sexual orientation is not only reprehensible, the question of whether or not it is permissible has rarely arisen. (Indeed, a LEXIS search reveals fewer than 15 state or federal cases that have ever mentioned the issue.) For more than a decade, California has prohibited striking jurors because of their sexual orientation, and that prohibition has been observed without fanfare or any intrusion into prospective jurors' privacy. And nationwide, the U.S. Department of Justice prohibits its more than 5,000 attorneys from engaging in sexual orientation discrimination in jury selection, and encourages its attorneys to challenge strikes that appear discriminatory.

Moreover, the context of this case weighs against *en banc* review. The dispositive question under *Batson* is not what precise standard of scrutiny should apply to classifications based on sexual orientation. *Batson* does not apply to classifications subject to only traditional rational basis review. Thus, the key question is whether *United States v. Windsor*, 133 S. Ct. 2675 (2013), applied something more than traditional rational basis review to classifications based on sexual orientation. The panel, in answering that question in the affirmative, correctly held that the Equal Protection Clause bans the use of peremptory challenges based on sexual orientation. Permitting such strikes perpetuates the indefensible fiction that sexual orientation bears on one's fitness to serve on a jury, and offends the foundational principle that all citizens should share in this duty and

privilege of American citizenship. The courthouse should be the last place the Constitution tolerates such discrimination.

ARGUMENT

I. THIS CASE DOES NOT JUSTIFY *EN BANC* REVIEW

A. The Panel Decision Creates No Conflict of Authority

The panel decision does not create any conflict with Ninth Circuit precedents or other courts of appeals' decisions. This Court's prior cases expressly assumed that the Equal Protection Clause bars peremptory strikes based on a juror's sexual orientation. *United States v. Osazuwa*, 446 Fed. App'x 919, 919 (9th Cir. 2011); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996). The only time the issue has arisen in other circuits was nearly a decade ago—long before *Windsor*—when the Eighth Circuit expressed doubt that *Batson* applied to sexual orientation-based challenges, but declined to decide the question because the challenges at issue failed regardless. *United States v. Blaylock*, 421 F.3d 758, 769-70 (8th Cir. 2005); *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005).

Nor does the panel's threshold holding—that, under *Windsor*, classifications based on sexual orientation are subject to something more than traditional rational basis review, *i.e.*, heightened scrutiny—create any conflict. No other Ninth Circuit panel or other court of appeals has analyzed what standard of review the Supreme Court applied in *Windsor*, much less decided whether *Batson* applies to sexual

orientation-based challenges in light of *Windsor*. And the panel's mode of determining whether *Windsor* applied traditional rational basis review was no innovation, let alone a departure from existing precedents. The panel relied on this Circuit's decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), which dictates the analysis to determine what standard of scrutiny the Supreme Court applied when it fails to expressly identify the relevant standard. The panel faithfully applied *Witt* to parse *Windsor*, and concluded that *Windsor* applied something more than rational basis review to a federal law that discriminated on the basis of sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014). Having reached that conclusion, the panel properly held that *Windsor*, as the supreme law of the land, displaced earlier Ninth Circuit cases holding that traditional rational basis review applied to classifications based on sexual orientation. *Id.* at 484; *see also Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc).

The Supreme Court repeatedly stressed in *Windsor* that DOMA's central constitutional fault was to "differentiat[e]" between the marriages of heterosexuals and those of same-sex couples *because the latter involved same-sex relations*. 133 S. Ct. at 2694; *see also, e.g., id.* at 2693 ("[t]he avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages" because they involve same-sex

relations); *id.* at 2696 ("[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State . . . sought to protect in personhood and dignity"). *Windsor*, in sum, held that the federal government could not differentiate on the basis of sexual orientation, a status that many States protect by legalizing marriage between individuals of the same-sex. The Department of Justice accordingly views *Windsor* as a "ruling [that] gives real meaning to the Constitution's promise of equal protection to all members of our society, regardless of sexual orientation"—not merely same-sex couples in States that permit them to marry. *Statement of Attorney General Eric Holder on the Supreme Court Ruling on the Defense of Marriage Act*, U.S. Dep't of Justice (Jun. 26, 2013).

Not only is a cramped reading of *Windsor* wrong; any dispute on this point is also unworthy of *en banc* review. Members of this Court urged *en banc* review when *Witt* interpreted *Lawrence v. Texas*, 539 U.S. 558 (2003), as invalidating prior Ninth Circuit precedents and applying heightened scrutiny to any restrictions on the fundamental right of all gay men and lesbians to engage in intimate conduct. *Witt v. Dep't of Air Force*, 548 F.3d 1264, 1269 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing en banc). But the full Court rejected the notion that *en banc* review was needed to determine whether *Lawrence* could be limited to its facts of "criminal sanction[s] on private conduct." *Id.* This Court also denied

en banc review despite the dissent's claims that *Witt*'s method of determining what level of scrutiny the Supreme Court applied was faulty and that *Lawrence* applied rational basis review. *Id.* at 1271-72, 1275. And this Court denied *en banc* review in *Witt* even though the United States urged rehearing and the decision created a circuit split and allegedly intruded into sensitive military affairs. *Id.* at 1265, 1274. Having rejected a case that presented far more factors favoring rehearing, this Court should not relax the stringent criteria for *en banc* review here.

B. The Decision Does Not Pose Implementation Problems

Prohibiting jurors from being struck based on their sexual orientation does not pose practical implementation problems—let alone problems that should give this Court pause before protecting an obvious constitutional right. Nothing about the panel's decision suggests that henceforth, jurors should be quizzed as to their sexual orientation, or that the *voir dire* process needs to change in any way. Quite the contrary: the panel held that "applying *Batson* to strikes based on sexual orientation creates no requirement that prospective jurors reveal their sexual orientation." *SmithKline Beecham*, 740 F.3d at 487. This case involved a juror who voluntarily disclosed his sexual orientation; all the panel held was that any juror who supplies that information cannot be struck from jury service merely for being gay. *Id.*

If any further support were needed, California's thirteen years of experience show that existing *venire* procedures are more than up to the task of solving administrative difficulties in implementing such a prohibition in the nation's most populous State. Likewise, since 2012, the Department of Justice has taken the position that *Batson* prohibits peremptory strikes based on sexual orientation and that all DOJ attorneys "should consider challenging improper defense strikes based on sexual orientation" if they arise. GSK's Sept. 12, 2013 28(j) Letter at 2-4.

C. The Panel Decision's Possible Impact on Cases Involving Whether States Must Allow Same-Sex Couples to Marry Does Not Warrant *En Banc* Review

This case is also unworthy of *en banc* review under the theory that the panel's holding might affect pending cases in this circuit concerning the constitutionality of state bans on marriage by same-sex couples. This case concerns the distinct issue of whether jurors may be struck from jury service because of their sexual orientation. Unlike cases seeking to invalidate bans on marriage by same-sex couples, where the precise standard of scrutiny applicable to such laws may or may not be outcome-determinative,[1] the standard-of-review

[1] Every post-*Windsor* case to have considered the constitutionality of state bans on marriage by same-sex couples have found them unconstitutional (or likely unconstitutional) even under traditional rational basis review. *DeBoer v. Snyder*, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); *Tanco v. Haslam*, 2014 WL 997525 (M.D. Tenn. Mar 14, 2014); *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. Feb 12, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014);

question here is different. All that the panel held—and all it needed to hold to resolve whether *Batson* applied—was that "[a]t a minimum . . . *Windsor* scrutiny requires something more than traditional rational basis review." 740 F.3d at 483 (quotations omitted). The panel thus did not specify what precise type of "heightened" scrutiny courts must apply in evaluating laws banning same-sex marriage. Given the range of options, this Court should resolve that issue, if necessary, in a case actually involving a challenge to a law banning marriage by same-sex couples. This Court denied *en banc* review in *Diaz v. Brewer*, 676 F.3d 823 (9th Cir. 2012), over a dissent arguing that the panel's decision called into question the constitutionality of laws "recognizing or promoting traditional marriage." *Id*. at 828. This Court similarly denied *en banc* review in *Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012), involving California's initiative barring marriage by same-sex couples. If *en banc* review was not warranted in those cases, it likewise is not here.

D. The Panel Decision Is Unequivocally Correct

The panel correctly held that, under *Batson*, the Equal Protection Clause bars litigants from using peremptory challenges to disqualify gay men and lesbians from the right and responsibility of jury service. Whether *Batson* applies to sexual orientation depends on whether sexual orientation is subject to only traditional

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Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

rational basis review. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143 (1994); Abbott Suppl. Br. at 7. *Windsor* invoked the Equal Protection Clause in invalidating a law that discriminated on the basis of sexual orientation. 133 S. Ct. at 2693, 2695-96. *A fortiori*¸ if *Windsor did* apply something more than traditional rational basis review, *Windsor* supersedes any Ninth Circuit rulings to the contrary. *See Miller*, 335 F.3d at 892-93.

Windsor did not expressly identify what type of scrutiny it was applying to invalidate Section 3 of the Defense of Marriage Act ("DOMA"). But *Witt* conclusively settled the analysis this Court must follow in determining what standard of scrutiny the Supreme Court applies when it fails to expressly identify one. 527 F.3d at 816. The threshold question before the panel was thus whether, under *Witt*'s method of analysis, *Windsor* applied only traditional rational basis review, or something more. And the answer was all but preordained by *Witt*. Because *Windsor* failed to consider the multitude of offered rational justifications for DOMA; because *Windsor* faulted DOMA for failing to articulate a legitimate basis for its discrimination; and because *Windsor* relied more heavily on cases applying heightened scrutiny, *Witt* compelled the conclusion that the Supreme Court applied some form of "heightened scrutiny." *SmithKline Beecham*, 740 F.3d at 480-84. Moreover, by explaining the extensive overlap between substantive due process and equal protection concepts in the context of sexual orientation, *Windsor*

repudiates *Witt*'s separation of these two concepts. *See Windsor*, 133 S. Ct. at 2693, 2695-96. Given *Windsor*'s recognition of the strong interconnection between these two rights, it is untenable to maintain that heightened scrutiny applies only to the substantive due process right to engage in same-sex relations, but not to discrimination based on an individual's status as gay or lesbian.

The panel's ultimate conclusion that *Batson* applies to strikes based on sexual orientation because of "the unique circumstances of gays and lesbians in our society" is equally unimpeachable. *SmithKline Beecham*, 740 F.3d at 484. *J.E.B* makes clear that *Batson* forbids peremptory strikes based on a particular characteristic if that characteristic is subject to heightened scrutiny and has been used to exclude a group from civic participation and to perpetuate pernicious group stereotypes. 511 U.S. at 145. This Court's precedents recognize that gay men and lesbians have suffered a long history of discrimination and exclusion. *SmithKline Beecham*, 740 F.3d at 484-86. Peremptory strikes based on sexual orientation are inherently suspect and invariably offensive, because sexual orientation, like race and gender, is immutable, and has nothing to do with the ability to serve on a jury. To hold that gay men and lesbians could nonetheless be struck from jury service on the basis of their sexual orientation would "continue [a] deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rights and rituals." *Id.* at 485. *En banc* review is unwarranted.

Dated: April 17, 2014

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Circuit Rules 35-4 and 40-1, the brief in opposition to rehearing en banc is in compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: April 17, 2014

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