Case Nos. 14-35420 & 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,

vs.

C.L. "BUTCH" OTTER, et al.,
Defendants-Appellants,

and

STATE OF IDAHO,
Defendant-Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Idaho
D.C. No. 1:13-cv-00482-CWD
(Dale, M.J., Presiding)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECALL OF MANDATE

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Ninth Circuit Rule 27-3, counsel for movants state:

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2. On May 13, 2014, the United States District Court for the District of Idaho entered a Memorandum Decision and Order declaring unconstitutional Idaho's marriage laws that define marriage as between one man and one woman. The court permanently enjoined enforcement of Idaho's marriage laws, effective May 16, 2014. On May 14, 2014, the court entered judgment declaring Idaho's marriage laws unconstitutional and permanently enjoining their enforcement, effective May 16. Also on May 14, the court denied the motions for stay pending appeal filed by one of the defendants, Governor Otter.

3. On May 15, 2014, this Court pursuant to Appellants Rich and Idaho's motion under Circuit Rule 27-3 entered an order temporarily staying the district court's permanent injunction in these appeals and, on May 20, 2014, entered an order staying the injunction.

4. On October 7, 2014, this Court entered its decision in these appeals and, in relevant part, affirmed the judgment of the district court. It thereafter entered an order for immediate issuance of the mandate. Pursuant to that order, the Clerk issued the mandate. The mandate's issuance dissolves the previously existing stay.

3. On October 8, 2014, at approximately 3:30 a.m. MDT I sent an e-mail to all counsel of record notifying them of this motion. I am serving all counsel with this motion by CM/ECF at the same time I file it with the Court.

/s/ *Clay R. Smith*
Clay R. Smith

INTRODUCTION

Rule 41, Fed. R. App. P., controls issuance of the mandate. Paragraph (b) provides that it "must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later." It further provides that "[t]he court may shorten or extend the time. Circuit Advisory Committee Note to Rule 41-1 controls a panel's discretion to shorten that time. The Note states that "[o]nly in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition." It adds in relevant part that "[s]uch circumstances include cases where a petition for rehearing, or petition for writ of certiorari would be legally frivolous." Appellants Rich and Idaho assume that the panel has concluded that the filing of a petition for rehearing or a writ of certiorari would be "legally frivolous." The stringent "legally frivolous" standard is not satisfied here.

First, the panel opinion invalidates the Idaho constitutional and statutory provisions authorizing only opposite-sex marriage[1] on a heightened scrutiny standard derived from *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir.), *reh'g denied*, 759 F.3d 990 (9th Cir. 2014). *SmithKline*, however, involved straightforward sexual orientation discrimination; here, the Idaho

[1] Idaho Const. art. III, § 28; Idaho Code §§ 32-201 and -209.

marriage statutes do not discriminate on the basis of sexual orientation. They classify on the basis of procreative capacity inherent generally in members of the opposite sex. The applicability of *SmithKline* in the present context presents an issue of first impression in this Circuit and is an appropriate basis for seeking en banc rehearing under Fed. R. App. P. 35.

Second, even assuming that the Idaho laws do discriminate on the basis of sexual orientation, the Supreme Court has never held that such discrimination triggers a heightened form of scrutiny.

Third, had the panel decision issued a week ago, the Court would have been hard-pressed to deem Appellants Rich and Idaho's position "legally frivolous." The only changed circumstance is the denial of certiorari in several cases where other Circuits invalidated state laws permitting only man-woman marriages. It is nonetheless hornbook law that a denial of certiorari carries no precedential weight. *E.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[a]s we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'"). The panel's immediate mandate issuance also essentially means not only that the dissents in three of the cases as to which certiorari was denied were

"legally frivolous" but also that, were another Circuit to issue an opinion contrary to the panel's, its decision would be labeled similarly.[2]

ARGUMENT

I. THE APPLICABILITY OF *SMITHKLINE* UNDER THE FACTS HERE PRESENTS A NON-FRIVOLOUS ISSUE FOR EN BANC REHEARING

The panel could not have been clearer about the rationale for its decision:

> We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*.

Dkt. 180-1 at 6 (footnote omitted). It later rejected Appellants Rich and Idaho's position that the state laws differentiated on the basis of procreative capacity, not sexual orientation, because they "distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized." *Id.* at 13.

That the laws distinguish on the basis of procreative capacity inherent in males and females—a biologically-driven criterion—does not equate to classification on the basis of sexual orientation—a conduct-driven criterion.

[2] This motion is limited to recall of the mandate in No. 14-35421.

SmithKline arose from the latter, not the former. 740 F.3d at 476-79.[3] Civil marriage under Idaho Code § 32-201 thus does not legitimize some and de-legitimize other sexual conduct; it instead leaves to the parties determination of whether to engage in sexual activity and, if so, with whom. Idaho law nevertheless anticipates that many heterosexual couples will have children and uses marital status as one means to further the state interest in encouraging stable family structures with both biological parents present.

The panel also could not been clearer about the importance of a heightened level of scrutiny being applied here. *See* Dkt. 180-1 at 33 ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. Heightened scrutiny, however, demands more than speculation and conclusory assertions, especially when the assertions are of such little merit."). Traditional rational basis, in contrast, requires only a plausible justification for the classification—a justification not subject to judicial override. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Consequently, a

[3] Even within its particular context, *SmithKline* drew criticism. In the rehearing dissent's view, it broke new equal protection ground. *See* 759 F.3d at 992 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[i]n concluding that heightened scrutiny applies to distinctions based on sexual orientation, the panel abandoned our circuit precedents, arrogating to itself, regrettably, the power of an en banc court").

determination that *SmithKline* does not provide a basis for heightened scrutiny would require an en banc panel to determine whether some other rationale does. The panel's concurring opinions offered alternatives. Dkt. 180-1 (Reinhardt, J., concurring) (substantive due process); *id.* (Berzon, J., concurring) (gender-based discrimination). Resolving *SmithKline*'s applicability is thus critical.

II. THE SUPREME COURT HAS NOT DETERMINED THAT DISTINCTIONS BASED UPON BIOLOGICAL CAPACITY IS SUBJECT TO HEIGHTENED EQUAL PROTECTION SCRUTINY

SmithKline carved out a new classification, sexual orientation, for heightened scrutiny in this Circuit. *See SmithKline*, 759 F.3d at 992-93 (O'Scannlain, J., dissenting from rehearing en banc denial). This Court charted that path based upon *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See SmithKline*, 740 F.3d at 484 ("*Windsor* requires that we reexamine our prior precedents, and *Witt* [*v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008)] tells us how to interpret *Windsor*. Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."). *Windsor* did not dictate that path.

The core problems there lay in Congress' inversion of the ordinary deference of the federal government to the States' regulation of marriage and, more importantly, in its transmutation of state-law protected status into a federal law disability. *See* 133 S. Ct. at 2692 ("[w]hat the State of New York treats as alike the

federal law deems unlike by a law designed to injure the same class the State seeks to protect"). The Court found this inversion and transmutation grounded, as the relevant House of Representatives report explained, in "'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.'" *Id.* at 2693. The *SmithKline* Court viewed this congressionally-sanctioned discrimination as predicated purely on sexual orientation, but the discrimination involved declining to give effect to one form of a State's marital status determination but not to another. *Windsor* did not hold that a State's restriction of civil marriage to opposite-sex couples embodies sexual orientation discrimination and expressly disclaimed any intent to resolve the issue raised in this litigation. *Windsor*, 133 S. Ct. at 2696; *see also id.* at 2697 (Roberts, C.J., dissenting). Consequently, to characterize a position contrary to *SmithKline* as "legally frivolous" is problematic.

III. THE DENIAL OF CERTIORARI IN SAME-SEX CASES FROM THE FOURTH, SEVENTH AND TENTH CIRCUIT CASES DOES NOT ESTABLISH LEGAL FRIVOLITY

Had the panel opinion issued on September 30, 2014, no one would have contended seriously that Appellants Rich and Idaho's position is "legally frivolous." The denial of certiorari on October 6, 2014 in the several cases involving challenges to like statutes makes no difference in this regard. Although in Appellants' view those cases presented substantial federal constitutional issues

warranting review under the standard in S. Ct. R. 10(c), the Supreme Court may have concluded that it would withhold review until a conflict arose within the scope of Rule 10(a). Were another Circuit Court of Appeals to reach a contrary determination to those of the Fourth, Seventh and Tenth Circuits, would the Appellants' position become non-frivolous? Or, to recast the question, would that contrary determination be "legally frivolous"? The same question exists as to the dissents in the Fourth and Tenth Circuit decisions. *Bostic v. Schaeffer*, 760 F.3d 352, 385 (4th Cir. 2014) (Niemeyer, J., dissenting), *cert. denied*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014); *Bishop v. Smith*, 760 F.3d 1070, 1109 (10th Cir. 2014) (Kelly, dissenting in part), *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014) (Kelly, J., dissenting), *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014).[4] Simply put, the legal substantiality of Appellants Rich and Idaho's arguments is no less today than a week ago.

Finally, the procedural point at which the likelihood of a successful certiorari petition should be resolved for mandate-stay purposes is following disposition of Appellants Rich and Idaho's anticipated rehearing en banc petition. *See* Fed. R. App. R. 41(d). The panel's immediate issuance of the mandate short-

[4] Only the Seventh Circuit issued a unanimous opinion. *Baksin v. Bogan*, Nos. 14-2386 *et al.*, 2014 WL 4359059 (7th Cir. Sept. 4, 2014), *cert. denied*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014) & No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014).

circuited the normal process. It did so improperly.

CONCLUSION

The mandate in No. 14-35421 should be recalled.

DATED this 8th day of October 2014.

Respectfully submitted,

HON. LAWRENCE G. WASDEN
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Chief of Civil Litigation

/s/Clay R. Smith
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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 appellate CM/ECF system on October 8, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Clay R. Smith
Clay R. Smith

ATTACHMENT A

Order for Immediate Issuance of Mandate

FILED

OCT 07 2014

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN LATTA; et al., Plaintiffs - Appellees, v. C. L. OTTER, "Butch"; et al., 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 District of Idaho, Boise ORDER

SUSAN LATTA; et al., Plaintiffs - Appellees, v. C. L. OTTER, "Butch"; et al., Defendant, And	No. 14-35421 D.C. No. 1:13-cv-00482-CWD District of Idaho, Boise

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

Defendant - Appellant,

STATE OF IDAHO,

Intervenor-Defendant - Appellant.

BEVERLY SEVCIK; et al.,

Plaintiffs - Appellants,

v.

BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; et al.,

Defendants - Appellees,

And

COALITION FOR THE PROTECTION OF MARRIAGE,

Intervenor-Defendant - Appellee.

No. 12-17668

D.C. No. 2:12-cv-00578-RCJ-PAL
District of Nevada,
Las Vegas

ORDER

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

The mandate shall issue forthwith.

ATTACHMENT B

Mandate

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 07 2014

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

BEVERLY SEVCIK; et al.,

Plaintiffs - Appellants,

v.

BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; et al.,

Defendants - Appellees,

and

COALITION FOR THE PROTECTION OF MARRIAGE,

Intervenor-Defendant - Appellee.

No. 12-17668

D.C. No. 2:12-cv-00578-RCJ-PAL
U.S. District Court for Nevada, Las Vegas

MANDATE

SUSAN LATTA; et al.,

Plaintiffs - Appellees,

v.

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

Defendant - Appellant,

No. 14-35420

D.C. No. 1:13-cv-00482-CWD
U.S. District Court for Idaho, Boise

and

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

Defendant,

STATE OF IDAHO,

Intervenor-Defendant.

SUSAN LATTA; et al.,

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.

No. 14-35421

D.C. No. 1:13-cv-00482-CWD
U.S. District Court for Idaho, Boise

The judgment of this Court, entered October 07, 2014, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Eliza Lau
Deputy Clerk