Case No. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al.
Plaintiffs-Appellants,
v.
BRIAN SANDOVAL, et al.,
Defendants-Appellees,
and
COALITION FOR THE PROTECTION OF MARRIAGE
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
For the District of Nevada
Case No. 2:12-CV-00578-RCJ-PAL
The Honorable Robert C. Jones, District Judge

DEFENDANT-APPELLEE ALAN GLOVER'S RESPONSE TO THE COURT'S ORDER (DKT. 131) TO RESPOND TO INTERVENOR'S PETITION FOR REHEARING EN BANC

Neil A. Rombardo, District Attorney
Randal R. Munn, Chief Deputy District Attorney
Joseph L. Ward. Jr., Senior Deputy District Attorney
CARSON CITY DISTRICT ATTORNEY'S OFFICE
885 East Musser St., #2030
Carson City, NV 89701
Phone: 775-887-2070
Attorneys for Defendant-Appellee Alan Glover, Carson City Clerk-Recorder

Defendant-Appellee Alan Glover is not currently an active participating litigant in this matter. (Dkt. 149 ORDER, receiving Alan Glover's notice of nonopposition to Appellants' opening brief, and granting Glover's motion for leave to withdraw answering brief). Nevertheless, Alan Glover (hereinafter "Carson City") files this Response as required by the Court's ORDER (Dkt. 131) issued on October 22, 2014 directing Defendant-Appellees to respond to Intervenor-Defendant-Appellee's petition for rehearing en banc.

Unless Plaintiffs-Appellants otherwise desire to seek an en banc affirmation of their victory finding equal protection under the law (which Carson City would not oppose), Carson City believes it is in its best interest that the Court deny the en banc review requested by the Intervenor-Defendant-Appellee Coalition. The Court should consider the following points:

1) Consistent with Carson City's prior stated goal in withdrawing its defense in this case, the Panel-majority's quasi-protected class approach to marriage equality for same-sex couples avoids the slippery slope to potential future polygamy equal protection marriage claims; and 2) Regardless of any alleged systemic panel-selection bias, due process of law is ensured in the mere existing right of a single Ninth Circuit Court judge to make a *sua sponte* call for an en banc review vote under General Order 5.4.c.3.

First, Carson City does not believe an en banc rehearing is in its best interest because the Panel-majority's finding of a quasi-protected class (and heightened scrutiny)[1] with respect to sexual orientation discrimination in the right to marriage is consistent with Carson City's expressed goal in voluntarily withdrawing its original answering brief—that it desired to avoid the foreseeable risk of a *Windsor*-based "personal liberty interest" theory of marriage, which might result in future claims that polygamy and other poly relationships are arguable personal liberty interest "marriage" rights.[2] Under the Panel-majority's holding a polygamist, bigamist or other polyamorist claiming some alternative "marriage" right will most likely fall short of being found a quasi-protected class, leaving any state law discrimination still subject to rational basis review by the judiciary.[3] The personal liberty interest to engage in alternative, but otherwise legal, poly sexual

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[1] ". . . that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbian 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, p.6, Opinion).

[2] "Glover's expressed concern that misapplication of the personal liberty interest found in *United States v. Windsor,* 570 U.S. ___, 133 S. Ct. 2675 (2013) could lead to future polygamy claims is greatly diminished by the quasi-protected class holding in *SmithKline,* a holding which will certainly be applied to the instant case." (Dkt. 142, p.4, Glover's Motion to Withdraw Answering Brief).

[3] "We have recognized that '[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." [*citations omitted*]. (Dkt. 180-1, p. 6, note 4, Opinion).

relationships does not (and should not) also require a state government to endorse such private conduct with society's official title of "marriage" with all its coveted benefits just because such private conduct is likely to produce children that might be stigmatized or injured by the government's lack of endorsement of their family arrangement. Thankfully, the Panel-majority's holding avoids the onset of this policymaker's conundrum.

Second, Carson City believes the Coalition's Petition for en banc rehearing should be denied because the Ninth Circuit's en banc rules ensure that sufficient due process of law is provided to all parties appearing before the decision panels of the Court. Ninth Circuit General Order 5.4.c.3 states:

> A judge may sua sponte call for a vote on rehearing en banc within 7 days of the expiration of the time for filing a petition for panel rehearing or rehearing en banc. This means the sua sponte call must ordinarily be made within 21 days of the filing of the panel's decision in all cases, except civil cases in which the United States is a party. In such cases, the call must ordinarily be made within 52 days of the filing of the panel's decision. See FRAP 40(a). When the panel grants a party an extension of time to file a petition for rehearing or rehearing en banc, the time to make a sua sponte call will extend for 7 days after the petition is due. If a judge makes a sua sponte en banc call when a party has filed a petition for rehearing and rehearing en banc, then the panel or the En Banc Coordinator will order a response to the petition for rehearing and rehearing en banc pursuant to G.O. 5.4.c.2

> rather than ordering the parties to file simultaneous supplemental briefing. A judge may also call for en banc within 21 days of the filing of an order directing that a previously unpublished disposition be published. Upon receipt of a timely sua sponte en banc call, the author of the panel opinion or the Clerk of Court upon the request of the En Banc Coordinator shall ordinarily enter an order directing the parties to file simultaneous briefs within 21 days setting forth their respective positions on whether the matter should be reheard en banc. If the En Banc Coordinator orders that no supplemental briefing will be filed, the parties will be notified of the sua sponte en banc call. (Rev. 7/1/02; 10/4/06; 9/17/14)

Pursuant to this General Order, ultimately any single eligible judge in the Ninth Circuit can cause at least a vote of the entire eligible Court regarding the merits of reconsidering a panel's decision. General Order 5.5.d states:

> If a majority of the judges eligible to vote on the en banc call votes in favor of en banc consideration, the Chief Judge shall enter an order taking the case en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court. (Rev. 1/27/04)

Pursuant to General Order 5.1.a.3 an "eligible" judge is defined:

> - means any active judge who is not recused or disqualified. Upon entry to active service, a judge may choose to recuse from voting on en banc calls for a transition period specified by the judge. When the transition period expires, the judge will become eligible to vote, including voting on calls in which the voting

> period has already commenced. Notice of recusal or disqualification shall be given to the full Court. No senior judge is eligible to vote on whether to take a case en banc. (Rev. 1/1/04; 9/17/14)

Without question, a majority of the eligible judges of the Court have the power under the rules to prevent any panel's opinion from becoming the law of the case or the Circuit, ensuring that any alleged or actual denial of due process due to alleged or actual bias by a panel is cured by either the lack of action by any single judge or ultimately by a resulting vote of the eligible judges considering a single judge's sua sponte call for rehearing en banc.

Therefore, based upon the above points and authorities, Carson City submits this Response that in the absence of the Plaintiff-Appellants' desire to have en banc review, the Court's denial of the Coalition's Petition for rehearing en banc would be in Carson City's best interest.

DATED this 28th day of October, 2014.

NEIL A. ROMBARDO
District Attorney
By: /s/ Randal R. Munn
RANDAL R. MUNN
Chief Deputy District Attorney
Nevada Bar No: 3327
Attorneys for Defendant-Appellee
Alan Glover,
Carson City Clerk-Recorder

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANT-APPELLEE ALAN GLOVER'S RESPONSE TO THE COURT'S ORDER (DKT. 131) TO RESPOND TO INTERVENOR'S PETITION FOR REHEARING EN BANC 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 28, 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/ Jana Whitson

Jana Whitson

Office of the Carson City District Attorney