Nos. 14-35420, 14-35421

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,
v.

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
No. 1:13-cv-00482-CWD (The Honorable Candy W. Dale)

PLAINTIFFS-APPELLEES' RESPONSE TO PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Since the panel's ruling in this case and the Supreme Court's denial of a stay of the District Court's judgment and injunction, same-sex couples in Idaho have been able to marry, gaining for the first time the protections and responsibilities of marriage. The same is true for same-sex couples in Nevada, which is governed by the judgment that the panel entered, as well as couples in Arizona and Alaska, where the panel's decision has led to district court rulings striking down discriminatory marriage measures.[1] Many of these couples have waited decades for the opportunity to marry. Many are raising or expecting children. All have benefitted from the legal security that marriage uniquely provides and the dignity of being treated as equal citizens whose families and intimate personal decisions are worthy of equal protection of the laws. There is no reason for this Court to revisit the panel's decision, particularly since rehearing en banc would unnecessarily cause these families months of insecurity and uncertainty concerning whether their home state will continue to treat them as equal to other families under the law.

The panel correctly applied Supreme Court and Ninth Circuit precedent in unanimously holding that Idaho's marriage ban violates the Equal Protection Clause

[1] The only remaining Ninth Circuit state in which same-sex couples currently are not able to marry is Montana. A challenge to Montana's marriage ban is pending in the district court, and a hearing on plaintiffs' motion for summary judgment in that case is scheduled for November 20, 2014. *See Rolando v. Fox*, Case No. 4:14 CV 00040-BMM (D. Mont. filed May 21, 2014).

of the Fourteenth Amendment by "unjustifiably discriminat[ing] on the basis of sexual orientation." Opinion at 33. Petitions for rehearing en banc are disfavored and should not be granted except to secure or maintain uniformity of decisions among the panels of the Court or to resolve questions of exceptional importance. Fed. R. App. P. 35(a). Here, the panel decision reflects a correct and straightforward application of settled Supreme Court and Ninth Circuit precedent and does not conflict with prior decisions of this Court on any issue. Rehearing en banc is unwarranted.[2]

ARGUMENT

I. THE PANEL DECISION DOES NOT CREATE A CONFLICT WITH SUPREME COURT OR NINTH CIRCUIT RULINGS.

Governor Otter contends that the panel decision conflicts with Supreme Court and Ninth Circuit precedent and that rehearing is thus necessary to "ensure uniformity with this Court's prior decisions as well as decisions from the Supreme Court." Petition at 3. In fact, the panel decision comports completely with this Court's precedent. Moreover, like nearly every other federal court in the nation to consider similar marriage laws in recent months,[3] the panel correctly applied

[2] Only one defendant—Idaho Governor C.L. "Butch" Otter—has filed a petition for rehearing en banc. The remaining defendants—the State of Idaho and Ada County Recorder Christopher Rich—do not seek rehearing en banc.

[3] *But see DeBoer v. Snyder*, Nos. 14–1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014); *Robicheaux v. Caldwell*, 2

Supreme Court precedent to conclude that laws prohibiting same-sex couples from marrying violate the Fourteenth Amendment.

A. *Baker v. Nelson* Does Not Bar Plaintiffs' Claims.

Governor Otter erroneously argues that the panel decision conflicts with *Baker v. Nelson*, 409 U.S. 810 (1972). As the panel correctly explained, "three other circuits have issued opinions striking down laws like those at issue here since *United States v. Windsor*, 133 S. Ct. 2675 (2013), and all unanimously agree that *Baker* no longer precludes review." Opinion at 11 (citing *Bostic v. Schaefer*, 760 F.3d 352, 373-75 (4th Cir. 2014), *cert. denied*, __ S. Ct. __, 2014 WL 2354536, 2014 WL 4230092, 2014 WL 3924685 (U.S. Oct. 6, 2014) (Nos. 14-251, 14-225, 14-153); *Kitchen v. Herbert*, 755 F.3d 1193, 1204-08 (10th Cir. 2014), *cert. denied*, __ S. Ct. __, 2014 WL 3841263 (U.S. Oct. 6, 2014) (No. 14124); *Baskin v. Bogan*, 766 F.3d 648, __ (7th Cir. 2014), *cert. denied*, ___ S. Ct. __, 2014 WL 4425162, 2014 WL 4425163 (U.S. Oct. 6, 2014) (Nos. 14-227, 14-278)); *see also Bishop v. Smith*, 760 F.3d 1070, 1080 (10th Cir. 2014), *cert. denied*, __ S. Ct. __, 2014 WL 3854318 (U.S. Oct. 6, 2014) (No. 14-136). The recent contrary decision of the Sixth Circuit concerning the applicability of *Baker*, *see DeBoer v. Snyder*, Nos. 14–1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6,

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F.Supp. 3d 910 (E.D. La. 2014); *Conde-Vidal v. Garcia-Padilla,* Civil No. 14–1253 (PG), 2014 WL 5361987 (D. P. R. Oct. 21, 2014).

2014), is both erroneous and out of step with the clear weight of authority among the federal courts on this issue.

Baker did not involve "the precise issues presented and necessarily decided" here. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). As an initial matter, with respect to the issue whether a state must recognize the existing marriages of same-sex couples, at the time *Baker* was decided, same-sex couples were not permitted to marry in any state, and no state had enacted a law denying recognition to married same-sex couples. *Baker* thus did not address the constitutionality of measures like Idaho's laws that deny recognition to the existing marriages of same-sex couples who wed in other states, such as plaintiffs Susan Latta and Traci Ehlers and plaintiffs Lori Watsen and Sharene Watsen.

Nor does *Baker* bind lower courts on the question whether states must permit same-sex couples to marry. The Supreme Court has cautioned that a summary dismissal of an appeal for lack of a substantial federal question is no longer binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation omitted). Here, *Baker* predates important pronouncements by the Supreme Court regarding the fundamental right to marry,[4]

[4] *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that "the decision to marry is a fundamental right").

as well as the Supreme Court's determination that classifications based on sex require heightened scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). It also predates important decisions by both the Supreme Court and state courts striking down sex-based distinctions relating to marriage and other areas of family law and recognizing that such distinctions often rest upon impermissible sex role stereotypes about the "proper" roles of men and women in marriage and domestic life.[5]

Baker also predates the Supreme Court's express application of equal protection and due process principles to laws that discriminate based on sexual orientation or that disadvantage same-sex couples. Since *Baker* was decided, the Supreme Court has held that laws enacted to disadvantage gay and lesbian people lack a rational basis, *see Romer v. Evans*, 517 U.S. 620 (1996), and that same-sex couples have a constitutionally protected right to engage in intimate sexual conduct

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[5] *See, e.g., Califano v. Westcott*, 443 U.S. 76, 89 (1979) (striking down public assistance provision offering benefits to families with children when fathers, but not mothers, became unemployed, and stating that the provision carried the "baggage of sexual stereotypes") (internal quotation omitted); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down statutory scheme allowing women, but not men, to seek alimony in divorce proceedings); *see also Murphey v. Murphey*, 653 P.2d 441, 443-44 (Idaho 1982) (holding that a statute allowing alimony awards only to women is unconstitutional and extending the benefits of alimony to needy husbands); *Suter v. Suter*, 546 P.2d 1169, 1175 (Idaho 1976) (invalidating a statute that resulted in "unequal treatment for a husband and a wife as regards their individual earnings after a separation").

and to have their relationships treated with equal "dignity," *see Lawrence v. Texas*, 539 U.S. 558, 568 (2003). And in *Windsor*, the Court held that married same-sex couples have a protected liberty interest in their marriages that the federal government must respect. *Windsor*, 133 S. Ct. at 2695. Although nothing *precedential* can be read into the Supreme Court's denials of petitions for certiorari in recent marriage cases from the Fourth, Seventh, and Tenth Circuits, *see, e.g.*, *Robinson v. Ignacio*, 360 F.3d 1044, 1056 n.6 (9th Cir. 2004), it seems improbable that the Supreme Court would have denied review in cases requiring five states in three circuits to permit same-sex couples to marry and to recognize their existing marriages if *Baker* stood as precedent binding all lower courts in the country to rule otherwise. *See DeBoer*, 2014 WL 5748990, at *36 (Daughtrey, J., dissenting) ("If this string of cases—*Romer*, *Lawrence*, *Windsor*, *Kitchen*, *Bostic*, and *Baskin*—does not represent the Court's overruling of *Baker sub silentio*, it certainly creates the '"doctrinal development"' that frees the lower courts from the strictures of a summary disposition by the Supreme Court." (quoting *Hicks*, 422 U.S. at 344 (1975)).

The panel was correct in holding that, "[a]s any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions." Opinion at 11. *Baker* presents no reason for en banc review.

B. The Panel Decision Does Not Conflict With Other Supreme Court Precedent.

Governor Otter argues that rehearing en banc is necessary because the panel decision "conflicts in principle with *Murphy* [*v. Ramsey*, 114 U.S. 15 (1885)], *Windsor* and a host of other decisions reiterating the States' broad authority over marriage and domestic relations." Petition at 2; *see also id.* at 22. That argument ignores the express holding in *Windsor* that State laws defining and regulating marriage "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The panel thus correctly held that "considerations of federalism cannot carry the day." Opinion at 29. More than 25 federal courts, including the Fourth, Seventh, and Tenth Circuits, have similarly concluded that denying the right to marry to same-sex couples and withholding recognition of their marriages unconstitutionally deprives them of their rights under the Fourteenth Amendment.

C. Rehearing En Banc To Reconsider *SmithKline Beecham Corp. v. Abbott Labs.* Is Unwarranted.

In an attempt to overcome binding precedent, Governor Otter suggests that *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), was wrongly decided and should not apply "in the critical context of State marriage laws," relying on the dissent from the denial of rehearing en banc in *SmithKline*. *See* Petition at 21-22. The Governor's reliance on that dissent, however, underscores that

rehearing is similarly unwarranted here. *Id.* The dissent raised essentially the same objections and concerns about *SmithKline's* application to state marriage laws as Governor Otter raises here, including that *SmithKline* misinterprets *Windsor* and "is perhaps all but this court's last word on the question whether the Constitution will require States to recognize same-sex marriages." *SmithKline Beecham Corp. v. Abbott Labs.*, 759 F.3d 990, 991 (2014) (O'Scannlain, J., dissenting from denial of rehearing en banc). All of those arguments were insufficient to warrant rehearing en banc in *SmithKline,* and they are similarly insufficient here. *Id.* at 990.

Indeed, *SmithKline* was not the first time this Court has denied rehearing en banc despite objections concerning the impact of such a denial on state laws prohibiting same-sex couples from marrying. 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. As en banc review was not warranted in those cases, it likewise is not warranted here.

D. *Citizens for Equal Protection v. Bruning* And Other Out-Of-Circuit Cases Do Not Warrant Rehearing En Banc.

Governor Otter also contends that rehearing en banc should be granted in light of *Citizens for Equal Protection v. Bruning*, 455 F.3d (8th Cir. 2006), which upheld

Nebraska's ban on marriage for same-sex couples. *Bruning*, however, did not consider the constitutional questions addressed in the panel's decision in this case. The plaintiffs in *Bruning* did not "assert a right to marriage." *Id.* at 865. Instead, the *Bruning* plaintiffs claimed that Nebraska's constitutional marriage ban impermissibly "raise[d] an insurmountable political barrier to same-sex couples obtaining the many . . . benefits . . . based upon a legally valid marriage relationship," *id*., and also violated the prohibition against bills of attainder, *id*. at 869.

Governor Otter also contends that the panel's decision conflicts with *Bruning* and other out-of-circuit cases because the panel applied heightened scrutiny, whereas the Eighth Circuit applied rational basis review to the (different) claims before that court. Pet. at 2-3 & n.1. *Bruning* and other pre-*Windsor* decisions, which are inconsistent with settled law in this Circuit, provide no basis for rehearing en banc. As this Court has expressly recognized, *see SmithKline*, 740 F.3d at 482, *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014), the Supreme Court's decision in *Windsor* stands for the principle that laws that discriminate against same-sex couples require "careful consideration." *Windsor*, 133 S. Ct. at 2693. As a result, "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481.

Indeed, *SmithKline* expressly reconsidered and superseded this Court's prior precedent, which, like the older cases from other circuits on which Governor Otter

relies, had previously held that sexual orientation classifications are subject only to rational basis review. *See SmithKline*, 740 F.3d at 480 (citing *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997)). Because the panel in this case correctly relied on existing Night Circuit precedent in subjecting the challenged marriage laws to heightened scrutiny, out-of-circuit cases applying rational basis review do not warrant rehearing en banc.

Finally, the Sixth Circuit's recent decision in *DeBoer* provides no basis for rehearing this case en banc. The Sixth Circuit's decision is a distinct outlier, and the Supreme Court will soon be called upon to decide whether to review that court's judgment,[6] which is at odds with all other circuit court decisions following *Windsor*, as explained by Judge Daughtrey in dissent. *See DeBoer*, 2014 WL 5748990, at *27-42 (Daughtrey, J. dissenting).

II. THE PANEL CORRECTLY APPLIED SUPREME COURT AND CIRCUIT PRECEDENT.

The panel correctly recognized that the standard of review applicable to Plaintiffs' equal protection claims was established in *SmithKline*. Applying that

[6] *See* Lyle Denniston, *Analysis: Paths to same-sex marriage review (UPDATED)*, SCOTUSblog (Nov. 7, 2014), http://www.scotusblog.com/2014/11/analysis-paths-to-same-sex-marriage-review/ (noting that "[l]awyers representing the challengers in all six of the cases decided by the Sixth Circuit Court have agreed, legal sources said . . . , that they will each go directly to the Supreme Court, bypassing en banc review requests.").

binding precedent, the panel concluded that Idaho's and Nevada's marriage bans "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*." Opinion at 6 (footnote omitted).

In *SmithKline*, this Court, applying the Supreme Court's decision in *Windsor*, held that classifications based on sexual orientation are subject to heightened scrutiny. *See SmithKline*, 740 F.3d at 474. This Court held that "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *Id.* at 481. Having determined that *SmithKline* supplies the applicable standard of review, the panel carefully reviewed the justifications for the Idaho marriage ban proffered by the state defendants and concluded that none of them could satisfy the requirements of heightened scrutiny. Opinion at 15-32.

In his petition for rehearing en banc, Governor Otter argues that Idaho's marriage laws do not facially discriminate on the basis of sexual orientation because gay men and lesbians could marry persons of the opposite sex. Petition at 26. As the panel correctly decided, however, Idaho's marriage laws "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." Opinion at 13. That is discrimination based on sexual orientation, as both the Supreme Court and many other courts have concluded. *See Windsor*, 133 S. Ct. at 2694 (finding that DOMA was based on "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.") (citation omitted); *Christian Legal Soc. Chapter of the Univ. of California, Hastings College of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (rejecting contention that student group's membership policy did not exclude individuals based on sexual orientation, but rather based on "conduct") (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)); *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (analyzing federal DOMA as discriminating against gay and lesbian people); *Baskin*, 766 F.3d at 657 (holding that Indiana and Wisconsin's marriage laws discriminate based on "sexual orientation"); *Massachusetts v. United States Dep't of Health & Human Servs*., 682 F.3d 1, 11 (1st Cir. 2012) (same); *Bishop v. United States*, 962 F. Supp. 2d 1252, 1287 (N.D. Okla. 2014) ("The conduct targeted . . . —same-sex marriage—is so closely correlated with being homosexual that sexual orientation provides the best descriptor for the class-based distinction being drawn.")

Governor Otter also argues that the panel misunderstood the justifications he offered in support of Idaho's marriage ban, and that, properly understood, those justifications are sufficient to withstand any level of equal protection scrutiny, including strict scrutiny. Pet. at 13-18. But there was no misunderstanding. The panel clearly understood, and correctly rejected, the central premise of Governor Otter's defense of the Idaho marriage ban and the central reason he now seeks rehearing en banc: "that same-sex marriage will harm existing and especially future opposite-sex couples and their children because *the message communicated by the social institution of marriage* will be lost." Opinion at 17-18 (emphasis added). *Compare* Petition at 19 (arguing that "the real issue . . . is the impact of redefining marriage on the *institution* itself.").

Not only did the panel correctly hold that Governor Otter's unsubstantiated fears about the impact of allowing same-sex couples to marry on the institutional meaning of marriage failed the test of heightened scrutiny required under *SmithKline*, the panel's reasoning also strongly suggests that those fears would fail as justification even under a less demanding standard. As the panel correctly noted, "[Defendants] cannot even explain the manner in which, as they predict, children of opposite-sex couples will be harmed." Opinion at 33; *see also Kitchen*, 755 F.3d at 1223 (holding that it was "wholly illogical" to think that permitting same-sex

couples to marry would affect opposite-sex couples' choices about marriage and parenting).

Additionally, to the extent Governor Otter seeks to justify Idaho's marriage ban as an expression of a governmental preference for marriage and parenting by opposite-sex couples over same-sex couples, that is not even a *legitimate* interest that government may pursue. As the panel noted: "The official message of support that Governor Otter and the Coalition wish to send in favor of opposite-sex marriage is equally unconstitutional, in that it necessarily serves to convey a message of disfavor towards same-sex couples and their families." Opinion at 33. *Windsor* and *SmithKline* hold that laws which, like Idaho's marriage ban, serve only to send such a message of disapproval "violate[] basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693.

In sum, applying settled precedent, the panel considered, and properly rejected, every argument in defense of Idaho's marriage ban that Governor Otter now presents in his Petition.

III. ANY FURTHER DELAY IN ISSUANCE OF THE MANDATE HARMS IDAHOAN SAME-SEX COUPLES AND THEIR CHILDREN.

Finally, this Court should deny Governor Otter's petition because any further delay in issuance of the mandate would cause needless uncertainty and harm to same-sex couples and their families. Two federal courts—the district court and a

unanimous panel of this Court—have now held that Idaho's laws are unconstitutional and that same-sex couples in the state must be afforded the right to marry. Both the panel and the Supreme Court denied Governor Otter's requests for stays pending en banc or Supreme Court review. As a result, many same-sex couples have been marrying in Idaho or having their existing marriages recognized. The harms that Idaho's discriminatory marriage laws previously inflicted on same-sex couples touched on virtually every aspect of life, from "the mundane to the profound." *Id*. at 2694. Idaho's marriage ban previously denied same-sex couples the vast array of protections that enable married couples to join their lives together, to care for one another in times of illness and crisis, to provide for one another financially, to make important joint decisions, to plan for retirement, to be recognized as a surviving spouse in the event of the other partner's death, and to have their relationship recognized and respected by the government and third parties. It also stigmatized their relationships and families, inviting and sanctioning both public and private discrimination and subjecting children being raised by same-sex parents to needless humiliation and harm. *See Windsor,* 133 S. Ct. at 2696. The panel's ruling has enabled same-sex couples in Idaho for the first time to be able to make decisions in reliance on validly issued marriage licenses. Those couples for the first time have been able to experience the security that marriage provides,

including security to engage in adoption, financial, property, healthcare, and retirement planning like other married couples.

En banc rehearing by this Court would create uncertainty regarding the security of the hundreds of marriages that have already taken place and the ability of same-sex couples to continue to be treated as equal citizens and to marry on an equal basis with other couples going forward. Further, because "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated," *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), rehearing would delay the vindication of the shared interest of *all* Idahoans in enforcing the Constitution's guarantees and reinforcing this "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970). Particularly given the interests at issue, en banc review of the panel's correct application of settled precedent is unwarranted.

CONCLUSION

Governor Otter's petition for rehearing en banc should be denied.

Dated: November 10, 2014

Respectfully submitted,

By: /s/ Deborah A. Ferguson

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CERTIFICATE OF COMPLIANCE

This brief complies with the enlargement of brief size granted by court order Dated October 22, 2014. This brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 17 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Dated: November 10, 2014

/s/ Deborah A. Ferguson
Attorney for Plaintiffs-Appellees

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 November 10, 2014.

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

s/ Deborah A. Ferguson