IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEVERLY SEVCIK; et al., Plaintiffs-Appellants, v. BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada, et al., Defendant-Appellee, and COALITION FOR THE PROTECTION OF MARRIAGE, Intervenor-Defendant-Appellee.	No. 12-17668 USDC Las Vegas No. 2:12-cv-00578-RCJ-PAL

GOVERNOR BRIAN SANDOVAL'S RESPONSE TO INTERVENOR COALITION FOR THE PROTECTION OF MARRIAGE'S PETITION FOR REHEARING EN BANC

Defendant-Appellee Governor of the State of Nevada, Brian Sandoval, by and through his attorneys, Nevada Attorney General Catherine Cortez Masto and Solicitor General C. Wayne Howle (hereafter the State), pursuant to the Court's Order entered on October 22, 2014, as DktEntry: 277, hereby responds to the Petition of Appellee Coalition for the Protection of Marriage (Coalition) for Rehearing En Banc. This response is based upon the following Memorandum of Points and Authorities and the papers and pleadings on file herein.

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MEMORANDUM OF POINTS AND AUTHORITIES

This case involves the issue of same-sex marriage in Nevada. With its opinion of October 7, 2014, the Court resolved for Nevada[1] a question of public interest and concern. While the question whether same-sex marriage can be prohibited remains in controversy elsewhere, it is not here.[2] The legal resolution of the matter in Nevada is in the public interest and should not be deferred by further proceedings. The petition for en banc rehearing should therefore, respectfully, be denied.

BACKGROUND

Plaintiffs in this case challenged the constitutionality of Nevada's statutory and State constitutional provisions confining the definition of marriage to that between a man and a woman. The challenge, based upon an equal protection argument, initially failed when the district court granted summary judgment to the State on November 26, 2012. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). But that decision was reversed by this Court in its opinion filed on October

[1] The opinion also decided challenges in the State of Idaho. The State of Nevada makes no representation regarding the interests of the State of Idaho.

[2] The Sixth Circuit filed an opinion on November 6, 2014. *DeBoer v. Snyder,* ___ F.3d ___, 2014 WL 5748990 (6th Cir. 2014). Earlier decisions were filed in the Fourth, Seventh, and Tenth Circuits (*Rainey v. Bostic*, 760 F.3d 352 (4th Cir. 2014); *Bogan v. Baskin*, 766 F.3d 648 (7th Cir. 2014); *Herbert v. Kitchen*, 755 F.3d 1193 (Tenth Circuit 2014)). Petitions for certiorari were denied in each of these. *See* 135 S.Ct. 286, 135 S.Ct. 316, 135 S.Ct. 265, respectively.

7, 2014, *sub nom Latta v. Otter*, ___ F.3d ___, 2014 WL 4977682 (9th Cir. 2014). The reversal, in turn, was based on developments in the law. The pivotal two cases were the United States Supreme Court's decision in *United States v. Windsor*, 570 U. S. ____, 133 S. Ct. 2675 (2013), and this Court's opinion in *SmithKline Beecham Corp. v. Abbott Laboratories,* 740 F.3d 471(9th Cir. 2014). *See Latta v. Otter, passim.*

In the aftermath of the reversal, the Coalition's petition argues three points in support of its petition under FED. R. APP. P. 35: (1) the panel opinion conflicts with other decisions of this Court, the foremost of which is *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); (2) the panel opinion conflicts with decisions of the United States Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); and (3) "the assignment of this case to this particular three-judge panel was *not* the result of a random or otherwise neutral selection process." Petition at 1–3.

None of these points supports en banc rehearing.

ARGUMENT

To begin, "[e]n banc courts are the exception, not the rule." *United States v. American-Foreign S.S. Corp*., 363 U.S. 685, 689 (1960). En banc courts are "not

favored," FED. R. APP. P. 35, and are "convened only when extraordinary circumstances exist." *American Foreign S.S. Corp,* 363 U.S. at 689.

"The purpose of an en banc rehearing is different from that of a rehearing by the panel originally considering the appeal." 1 *Federal Appellate Practice: Ninth Circuit* § 9.13 (2d ed. 1999).[3] En banc review, authorized by 28 U.S.C.A. § 46, is used when (1) a conflict exists with a decision of the United States Supreme Court, or an intracircuit split that requires consideration by the full court to secure uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance, such as an issue on which the panel decision conflicts with decisions of other Courts of Appeals. FED. R. CIV. P. 35(b)(1)(A) and (B). *See generally* Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs,* 33 McGeorge L. Rev. 17 (2001) (objective study of circumstances under which en banc review is granted).

En banc procedures are cumbersome and consume significant resources of both the Court and the parties. *Hart v. Massanari,* 266 F.3d 1155, 1171–72 (9th Cir. 2001) ("overruling [panel] authority requires a substantial amount of courts' time and attention—two commodities already in very short supply"). *Accord, United States v. Moore,* 110 F.3d 99, 99 (D.C. Cir. 1997) (Sentelle, J., concurring in denial of rehearing en banc) ("[W]e should not waste the assets of the court on

[3] *Compare* FED. R. CIV. P. 40(a)(2), allowing panel rehearing when the panel "overlooked" or "misapprehended" something in the law or in the record.

an in banc proceeding unless the panel decision at least (a) is erroneous and (b) establishes or maintains a precedent of some importance").

In this case, en banc rehearing is unwarranted . A unanimous panel decision is supported with concurrences that only urge additional reasons why same-sex marriage bans are unconstitutional. The panel itself is therefore unlikely to favor rehearing of any kind.

En banc rehearing is further unnecessary due to this Court's earlier denial of the petition for en banc rehearing in *SmithKline Beecham,* 740 F.3d 471, since so much of the Coalition's argument is that *SmithKline Beecham* was wrongly decided. *See* Petition beginning at p. 8. The Coalition's attempt to reargue *SmithKline* in this case is misguided, as further described below. The Circuit did not earlier, and would not likely now, wish to reconsider *SmithKline.*

Moreover, the panel in this case did not ask for en banc consideration, although it could have. General Orders 5.2(b) and 5.4(b)(1). Nor did any party ask for an initial en banc hearing, even though it could have been requested. General Order 5.2(a). And nothing prevented the three-judge panel from adequately, competently speaking for the Circuit in this case. *See Hill v. Blind Indus.*, 179 F.3d 754, 762 (9th Cir. 1999) ("When existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an en banc panel"); *compare California Med.*

Ass'n v. FEC, 641 F.2d 619, 632 (9th Cir. 1980) (en banc) (taking case en banc initially in order to avoid addressing constitutionality of statute that required appeals taken under the statute be decided by court en banc).

The Ninth Circuit has already spoken definitively. Extensive briefing and full argument have occurred. Nothing new remains for discussion. This issue is resolved. For this reason and additional ones listed below, the petition should be denied.

1. THE COALITION'S FIRST ARGUMENT IS FORECLOSED BY PROCEEDINGS IN *SMITHKLINE*.

The Coalition's first point is that the panel opinion is contrary to other decisions in this Circuit, the principal one of which is *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990). The problem with this argument is that events in the Circuit have moved past *High Tech Gays*: the extended proceedings in *SmithKline* render this argument moot.

High Tech Gays stood for the proposition that rational basis review is the measure of constitutional challenges to statutes distinguishing on the basis of sexual orientation. This rule, though, was altered by the decision in *SmithKline*. And in post-decision proceedings in *SmithKline,* this Court rejected the same arguments that the Coalition makes here. *See* 759 F.3d 990 (order denying sua sponte call for en banc rehearing; Judge O'Scannlain dissenting).

The *SmithKline* Court overtly relied upon doctrinal development to reach its holding. "In its words and its deed, [*United States v.*] *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. . . . *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." 740 F.3d at 841. This rule announced by the *SmithKline* panel was subjected to a sua sponte call for en banc review, which was rejected. 759 F.3d 990. Therefore, it is indisputable that heightened scrutiny review for classifications based on sexual orientation is the law of this Circuit.

The Circuit's development of law directly affects the State. The State ought and needs to be able to rely on the Court's definitive decisions, which *SmithKline* and *Otter* represent.

2. THE COALITION'S SECOND POINT IS REBUTTED BY *WINDSOR*.

The Coalition's second point is that the panel opinion conflicts with decisions of the United States Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006). But there is no reason after *Windsor* why this Circuit should reconsider *Baker's* effect now (much less another circuit's antedated decision).

The issue of *Baker's* current effect was thoroughly addressed by the Circuit's opinion in *SmithKline*. The Circuit, as stated above, concluded that

Windsor meant that heightened scrutiny applies to equal protection claims involving sexual orientation. That being so, *Baker* cannot any longer be the law: *Baker* and heightened scrutiny are logically inconsistent. The Coalition's argument simply refuses to come to terms with the law thus developed.

Nor has time stood still in the real world. Numerous same-sex marriages have occurred in Nevada since the Court's ruling in this case, and these marriages would only be cast in doubt if the petition were granted. The personal toll on those who entered into them would be incalculable.

3. THE COALITION'S ARGUMENT ABOUT PANEL SELECTION IS UNFOUNDED.

The Coalition concludes with an argument that the panel selection in this case was unfair. It evidently seeks en banc rehearing to rectify this perceived unfairness. But there is no authority to support the argument. No evidence of bias or unfairness exists.[4]

Moreover, the Coalition's concerns with the panel could have been presented much earlier. As noted already, the Coalition or any party could have asked for initial en banc consideration under General Order 5.2(a). But no party

[4] A defendant has no right to any particular procedure for the selection of the judge—that being a matter of judicial administration committed to the sound discretion of the court . . . ." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987). In the assignment of cases, the Constitution does not require randomness, as this Court held in *U.S. v. Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989). "We see no constitutional reason why cases could not be assigned, for example, on the basis of a judge's expertise." *Id.*

did. Only now, after the law established by the panel opinion has been relied upon by the State, its clerks and its citizens, is the panel's lack of neutrality alleged.

Accordingly, the petition should be denied on this point.

CONCLUSION

The State's withdrawal of its brief in this appeal came only after it deliberately considered the controlling law. The State did not lightly take this action. The law as it existed after *Windsor* and *SmithKline* did not permit the gender or sexual orientation of marriage license applicants to be considered.

This matter has been fully briefed, argued, and resolved through a published opinion. Nothing remains for additional review. Therefore, the State respectfully requests that the Coalition's petition for en banc review be denied.

DATED November 12, 2014.

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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 November 12, 2014.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Vicki Beavers
Vicki Beavers, an employee of the office of the Attorney General for the State of Nevada