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.

PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANT-APPELLEE-INTERVENOR'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

As a direct result of this Court's ruling, hundreds of same-sex couples are now married in Nevada. With each passing day, more join their ranks. Some of these couples have waited a lifetime to experience the dignity that marriage uniquely provides. Their children can also finally take pride in their families without the humiliating badge of inferiority imposed by the State. The public officials who previously enforced Nevada's exclusion of same-sex couples from marriage have accepted this reality, and are ready to move on.

Only Intervenor stands in the way. Without the support of a single party, it seeks to force the continuation of this litigation. But because Intervenor has no direct stake in the outcome of this appeal, it has no standing to petition for rehearing en banc. Even if it did, the petition should be denied, because the panel decision was a correct and straightforward application of binding precedent, and it follows a wave of decisions nationwide striking down marriage bans. Intervenor's final act of desperation—attacking this Court's integrity—is wholly devoid of merit and should be rejected.

ARGUMENT

I. Intervenor Lacks Standing to Petition for Rehearing En Banc.

"[S]tanding must be met by persons seeking appellate review." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (internal quotation marks

omitted). As the only party seeking further appellate review here, Article III standing rises or falls on Intervenor's direct stake in the outcome of the appeal, which is non-existent. No court has ordered Intervenor "to do or refrain from doing anything," just like the official proponents of California's Proposition 8 who intervened in *Hollingsworth* but whom the Supreme Court held lacked standing to seek appellate review. *Id.* at 2662. "No matter how deeply committed [Intervenor or its members] may be to upholding [the law] or how zealous [their] advocacy, that is not a particularized interest sufficient to create a case or controversy under Article III."[1] *Id.* at 2663 (citation and internal quotation marks omitted); *accord Geiger v. Kitzhaber*, No. 14-35427 (9th Cir. Aug. 27, 2014) (dismissing advocacy organization's appeal of decision invalidating Oregon's marriage ban for lack of standing). "The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997) (internal quotation marks omitted).

An intervenor lacking Article III standing cannot drag the other parties up the steps of appellate review against their wishes. That is true regardless of

[1] Intervenor has previously asserted that its "reputation" will supposedly suffer if the law it helped to pass is invalidated on grounds of animus, but that was not the basis for the panel decision here. In addition, although there were strong assertions of animus on the part of the proponents in *Hollingsworth*, *see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), the Supreme Court nevertheless held they lacked a sufficient interest to create standing to appeal.

whether the next step of appellate review is from the district court to the appeals court, from the original panel to the en banc court, or from the appeals court to the U.S. Supreme Court. The underlying principle is the same: the parties with a particularized interest are the ones vested with authority to say when enough is enough. *See Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 539 (D.C. Cir. 1999) ("an entity lacking Article III standing . . . [can] neither petition for rehearing en banc nor petition for certiorari unless [a party with standing] first did the same"); *accord City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). *Hollingsworth* confirmed that an actual controversy must persist "throughout *all stages of litigation*." 133 S. Ct. at 2661 (emphasis added). There is no reason to believe that, when the Supreme Court used the word "all," it meant anything less than that.

Even if Intervenor could satisfy the requirements of Article III, the petition should still be denied as a prudential matter. In order to have standing to seek appellate review, a party "must both satisfy the Article III constitutional requirements of federal court jurisdiction and be within [its] prudential limitations." *Fisher v. Tucson Sch. Dist.*, 625 F.2d 834, 837 (9th Cir. 1980). The elected officials in Nevada who are charged with enforcing its laws have made a considered judgment not to prolong this litigation. Intervenor, who is answerable to no one, should not be permitted to override that decision unilaterally.

II. The Panel Decision Correctly Applied Binding Precedent and Presents No Conflict Warranting En Banc Review.

The panel decision presents no conflict with precedent warranting en banc review. In terms of circuit precedent, the panel correctly applied this Court's decision in *SmithKline*, which requires heightened scrutiny for differential treatment based on sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014). Indeed, even the dissent from the denial of rehearing en banc in *SmithKline* recognized that "[i]n the view of many, the application of heightened scrutiny in this case precludes the survival under the federal Constitution of long-standing laws" prohibiting same-sex couples from marriage. *SmithKline Beecham Corp. v. Abbott Labs.*, 759 F.3d 990, 991 (9th Cir. 2014). Intervenor's sole rebuttal—that heightened scrutiny should only apply to differential treatment motivated by animus—is contrary to settled equal protection jurisprudence. *See, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 226-27 (1995) (all governmental classifications based on race must be strictly scrutinized, even where the proffered justification is "benign").

Because Intervenor cannot seriously contend that the panel misapplied *SmithKline*, Intervenor takes primary aim at overturning *SmithKline* itself. But this Court has already considered and rejected that possibility when it denied rehearing en banc in *SmithKline*. 759 F.3d at 990. Indeed, Intervenor recycles the same arguments that were unsuccessfully advanced in favor of rehearing in *SmithKline*.

For example, Intervenor maintains that *SmithKline* conflicts with purported circuit authority that governmental classifications based on sexual orientation receive only rational basis review, even though all of the case law cited predates *Windsor*. *United States v. Windsor*, 133 S. Ct. 2675 (2013). This Court correctly rejected that argument when it voted to deny rehearing en banc in *SmithKline*. *See United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (holding that rehearing en banc is inappropriate where a panel decision purportedly in conflict with other precedent is distinguishable). Since then, the Seventh Circuit has joined this Court and the Second Circuit in requiring greater judicial scrutiny than rational basis review to evaluate sexual orientation-based classifications. *See Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014) (noting "ultimate convergence" with *SmithKline*); *accord Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

Furthermore, granting rehearing en banc in order to reconsider *SmithKline* could require the Court to decide questions of constitutional law that the panel decision did not reach. That includes the question of whether excluding same-sex couples from marriage violates the fundamental right to marry and other liberty interests protected by the Due Process Clause, as discussed in Judge Reinhardt's concurrence. In addition, the Court would be presented with the question of whether this exclusion constitutes sex discrimination under the Equal Protection Clause, as discussed in Judge Berzon's concurrence. Applying precedent already

established by *SmithKline*, the panel decision did not reach these alternate grounds; but an en banc court choosing to revisit *SmithKline* may need to decide them.

In any event, the marriage ban fails any level of scrutiny, including rational basis review. It defies rationality to believe that allowing same-sex couples to marry would deter different-sex couples from marrying, which is the lynchpin to Intervenor's defense. Panel Decision at 19-21. That is particularly the case in Nevada: the State already recognizes that same-sex couples should have access to the rights and responsibilities of marriage under state law through registered domestic partnerships, making its choice to withhold only the status of marriage especially indefensible. *Id.* at 12 n.7, 27-28. Against a similar legal framework in California, which provided same-sex couples with access to the rights and responsibilities of marriage but withheld the status of marriage, this Court voted to deny rehearing en banc in *Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012).

The panel arrived at the same conclusion as the Fourth, Seventh, and Tenth Circuits in holding that the exclusion of same-sex couples from marriage is unconstitutional. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin*, 766 F.3d at 648; *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2014). That is also the same conclusion reached by scores of federal district courts and state courts. *See Condon v. Haley*, 2014 U.S. Dist. LEXIS -- (D.S.C. Nov. 12, 2014) (collecting cases); *Pidgeon v. Parker*, 2014 U.S. Dist. LEXIS 120458, at *3 n.3 (S.D. Tex.

Aug. 28, 2014) (same). While there is only virtual, rather than complete, unanimity, *see DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014), the existence of outliers does not transform this case into a close call warranting en banc review.

Intervenor struggles to create other conflicts that do not exist. For example, Intervenor contends that the dozens of cases striking down marriage bans are in conflict with *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), but that is yet another pre-*Windsor* case holding that sexual orientation discrimination receives only rational basis review. Intervenor similarly argues that this appeal fails to present even a substantial federal question capable of resolution in light of *Baker v. Nelson*, 409 U.S. 810 (1972). Yet *Baker* was decided decades before not only *Windsor* but also other watershed due process and equal protection cases recognizing the shared humanity of lesbian and gay people. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *see also Baskin*, 766 F.3d at 660 (holding that *Baker* was decided in "the dark ages" of relevant law); *Bostic*, 760 F.3d at 373; *Kitchen*, 755 F.3d at 1206.

Intervenor's claim of purported conflict between the panel decision and other precedent finds no support in the Supreme Court's recent actions. On October 6, 2014, the Supreme Court denied certiorari in cases striking down marriage bans in Indiana, Oklahoma, Utah, Virginia, and Wisconsin—thereby

allowing same-sex couples in those states to marry immediately, and opening the door to marriage for many more couples in states in the same circuits.[2] The Supreme Court subsequently denied stays pending appeal sought by officials in Idaho and Alaska, and more recently, Kansas.[3] Prior to the Supreme Court's recent actions, there were 19 states in which same-sex couples could marry; now, there are 33 states in which same-sex couples can marry—with more on the way.[4] As the panel noted when dissolving the stay in *Latta*, the Supreme Court's recent actions strongly suggest that a party defending a marriage ban is unlikely to succeed. *Latta v. Otter*, -- F.3d --, 2014 U.S. App. LEXIS 19828, at *18 (9th Cir. Oct. 15, 2014). Rehearing en banc is unwarranted in light of these developments.

III. Intervenor's Baseless Attacks on the Integrity of this Court Do Not Present Valid Grounds for Granting Rehearing En Banc.

Although the identity of the panel was revealed on September 1, 2014, Intervenor did not reveal its belief that the Court manipulated the panel

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[2] *Herbert v. Kitchen*, 2014 U.S. LEXIS 6637 (Oct. 6, 2014); *Smith v. Bishop*, 2014 U.S. LEXIS 6054 (Oct. 6, 2014); *Rainey v. Bostic*, 2014 U.S. LEXIS 6053 (Oct. 6, 2014); *Schaefer v. Bostic*, 2014 U.S. LEXIS 6405 (Oct. 6, 2014); *McQuigg v. Bostic*, 2014 U.S. LEXIS 6316 (Oct. 6, 2014); *Bogan v. Baskin*, 2014 U.S. LEXIS 5797 (Oct. 6, 2014); *Walker v. Wolf*, 2014 U.S. LEXIS 6655 (Oct. 6, 2014).

[3] *Otter v. Latta*, 2014 U.S. LEXIS 6735 (Oct. 10, 2014); *Parnell v. Hamby*, 2014 U.S. LEXIS 7011 (Oct. 17, 2014); *Moser v. Marie*, 2014 U.S. LEXIS -- (Nov. 12, 2014).

[4] *See Condon*, 2014 U.S. Dist. LEXIS --; *Lawson v. Kelly*, 2014 LEXIS 157802 (W.D. Mo. Nov. 7, 2014); *State v. Florida*, No. 1422-CC09027 (Mo. Cir. Ct. Nov. 5, 2014).

composition until after the panel issued its decision adverse to Intervenor.[5] Intervenor's accusation of bias is an unfortunate yet familiar litigation tactic of assailing the impartiality of judges following a loss on the merits. *See, e.g.*, *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (denying a disqualification motion based on a judge's same-sex relationship). Holding a losing hand, however, does not mean that the deck has been stacked.

A. A Petition for Rehearing En Banc Must Be Judged on Its Own Merits, Independent of Allegations Regarding Judge Assignment.

As an initial matter, a petition for rehearing en banc is an inappropriate vehicle for raising or remedying Intervenor's allegations. The criteria for whether to grant rehearing en banc appropriately turns on the merits of the case, such as whether the panel decision conflicts with Supreme Court precedent—not on whether there was any purported deviation from neutral assignment. Fed. R. App. Proc. 35. If a case meets the extraordinary criteria to warrant rehearing en banc based on its merits, then it should be reheard en banc; but if it does not, then nothing about improper judge assignment can or should salvage the petition. Otherwise, rehearing en banc would occur even where there is *no disagreement*

[5] Intervenor claims that, immediately upon disclosure of the panel identity, there was a "vivid appearance" of deviation from random judge assignment that even an uninformed lawyer would "readily" perceive. Pet. at 12-13. If that is so, Intervenor offers no explanation for why it waited until after oral argument, and after the panel decision was issued, before airing concerns that any reasonable person would supposedly perceive without any statistical analysis. Pet. at 14.

whatsoever with the substance of the panel decision, which would amount to an exercise in futility at tremendous public and private cost. In short, Intervenor's allegations add nothing to the analysis for whether to grant rehearing en banc.

Tellingly, Intervenor declined to file a disqualification motion or a judicial misconduct complaint. *See* 28 U.S.C. §§ 455 & 351-364. While those efforts would have been equally doomed to failure given Intervenor's inability to substantiate its allegations, they would have at least involved more appropriate vehicles for airing Intervenor's grievances. Yet neither vehicle would have achieved the remedy Intervenor actually seeks—which is not merely rehearing before a different three-judge panel (given that the panel would have still been bound by *SmithKline*) but by an en banc panel in particular. Only a petition for rehearing en banc can achieve that. But shoehorning allegations of bias into the petition distorts the purpose of rehearing en banc and should be rejected.

B. Intervenor's Conspiracy Theory is Unsubstantiated and Implausible.

Even if this Court were to consider the substance of Intervenor's allegations, it should deny the petition. Intervenor has failed to rebut the "general presumption that judges are unbiased and honest" with any credible evidence or argument. *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998). Despite this presumption, Intervenor nevertheless asserts that there was a vast conspiracy spanning several years, implicating multiple judges of this Court, and presumably implemented by

the Clerk's office staff responsible for panel assignment. The purported objective of this conspiracy was to influence the outcome of a narrow subset of appeals—those concerning the federal constitutional rights of lesbian and gay people—and to obtain decisions favorable to those litigants.

Intervenor's conspiracy theory might be more believable as the plot to a John Grisham novel than a credible legal argument substantiated by evidence. If such a conspiracy existed, one might expect at least *some* evidence of it; but Intervenor has not presented a single percipient witness with personal knowledge of its existence.[6] Instead, Intervenor relies entirely on a post hoc statistical report. But Intervenor concedes that "regardless of how small the probabilities may be, a neutral judge selection process may have generated the outcomes observed in the Relevant Cases," including 1 out of 60 times according to one estimate.[7] Intervenor offers nothing from which to make the leap from presuming that the panel here was created by chance to believing that it was created by mischief. Naked statistics alone are not enough to bridge that gap.[8]

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[6] Indeed, Intervenor even acknowledges public accounts of the Ninth Circuit's practice of assigning expedited appeals to panels in a neutral manner. Dkt. No. 284. Of course, particular panels may lack capacity to add an expedited appeal.

[7] Dkt. No. 281 (Document G on Intervenor's website); Dkt. 274-2 at 1.

[8] Indeed, the need to rely on more than statistics is proven by the example that Intervenor cites of purported "panel packing" on the Fifth Circuit in 1963. There, the Clerk admitted that a judge had directed him to assign certain judges to certain

Intervenor's conspiracy theory is also fundamentally flawed in many other respects: it fails to present a coherent explanation for why the conspirators would manipulate judge assignment in this case and, perhaps more importantly, why they would not do so in other types of cases. First, because *SmithKline* created precedent binding on all future panels, there would have been no obvious need to influence composition of the panel here. As the dissent from the denial of rehearing in *SmithKline* recognized, the holding of *SmithKline* "precludes the survival" of laws barring same-sex couples from marriage. 759 F.3d at 991. Intervenor also fails to explain why the two judges identified were selected, given that one or both delivered adverse results to lesbian or gay litigants in *one third* of the six appeals that Intervenor views as suspicious. *See Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012); *United States v. Osazuwa*, 446 Fed. Appx. 919 (9th Cir. Aug. 12, 2011). If there was a conspiracy to aid lesbian and gay litigants, it apparently was not very reliable.

Second, in order to obtain its desired statistical results, Intervenor has narrowly defined the parameters of its search—to only cases decided after 2009 involving the federal constitutional rights of lesbian and gay people. But that federal constitutional limitation on subject matter is arbitrary, as is the temporal restriction, given that the accused judges were appointed in 1980 and 2000.

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cases. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 Tex. L. Rev. 1037, 1053 n.90 (2000).

Intervenor's theory posits that the conspirators were uniquely fixated upon constitutional issues (and only federal ones at that)—but were utterly indifferent to the huge range of other legal issues affecting lesbian and gay people. That makes no sense. For example, the conspirators supposedly sprang into action to manipulate the panel for a case concerning a city's lease of property to an organization with a discriminatory membership policy. *Barnes-Wallace*, 704 F.3d at 1071. But they were apparently uninterested in cases about lesbian and gay people being fired from their jobs, being denied asylum and sent back to countries where they could be tortured or killed, or being subjected to bullying and harassment in schools prohibited by statute. Intervenor offers no plausible explanation for why the conspiracy would target only a myopic subset of cases affecting lesbian and gay people, to the exclusion of other cases where the stakes can be just as high.

The reality is that Ninth Circuit jurisprudence implicating the rights of lesbian and gay people is far more expansive than the meager 11 cases that Intervenor has cherry-picked. There has been a litany of appeals implicating the rights of lesbian and gay people in which neither accused judge was assigned to the panel. This includes appeals related to immigration,[9] military service,[10] public and

[9] *Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014); *F.A. v. Holder*, 565 Fed. Appx. 603 (9th Cir. Mar. 20, 2014); *Lomeli v. Holder*, 561 Fed. Appx. 630 (9th Cir. Mar. 11, 2014); *Soriano v. Holder*, 553 Fed. Appx. 705 (9th Cir. Jan. 24, 2014); *Vitug v.*

private employment,[11] schools,[12] prisons,[13] jury selection,[14] free speech,[15] privacy,[16] and even marriage.[17] The addition of these cases, which are far from exhaustive, more than quadruples the number of purportedly relevant cases identified by Intervenor. It is hardly surprising that in some 50-odd cases or more, the same judges would be assigned across at least a handful of panels.

Holder, 723 F.3d 1056 (9th Cir. 2013); *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011); *Barrios-Aguilar v. Holder*, 386 Fed. Appx. 587 (9th Cir. Jul. 2, 2010); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[10] *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008); *Hensala v. Dep't of the Air Force*, 343 F.3d 951 (9th Cir. 2003); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Meinhold v. U.S. Dep't. of Def.*, 1997 U.S. App. LEXIS 35603 (9th Cir. Aug. 28, 1997); *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996); *Meinhold v. U.S. Dep't. of Def.*, 34 F.3d 1469 (9th Cir. 1994); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992); *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989); *Watkins v. U.S. Army*, 721 F.2d 687 (9th Cir. 1983).

[11] *Drumm v. Morningstar, Inc.*, 416 Fed. Appx. 606 (9th Cir. Feb. 25, 2011); *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011); *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004); *Patches v. City of Phoenix*, 68 Fed. Appx. 772 (9th Cir. May 12, 2003); *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989).

[12] *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Flores v. Morgan Hill Unified Sch. Dist.*, 18 Fed. Appx. 646 (9th Cir. Sept. 10, 2001).

[13] *Smith v. Woodford*, 398 Fed. Appx. 243 (9th Cir. Oct. 4, 2010); *Whitmire v. Arizona*, 298 F.3d 1134 (9th Cir. 2002).

[14] *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996).

[15] *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Christian Legal Soc'y v. Martinez*, 319 Fed. Appx. 645 (9th Cir. Mar. 17, 2009), *aff'd*, 561 U.S. 661 (2010); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

[16] *Cooper v. FAA*, 622 F.3d 1016, 1030 (9th Cir. 2010).

[17] *Geiger*, No. 14-35427; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

As a last-ditch argument, Intervenor argues that even if there was no actual impropriety, there is at least an appearance of impropriety. Intervenor's support for random assignment is therefore noncommittal: random assignment is desirable when it produces results that *appear* random, but random assignment must be "remedied" when it produces results that could appear non-random to an uninformed observer. By that logic, a lottery drawing that randomly produced winning numbers of 1, 2, 3, 4, 5, and 6 would require a do-over to remedy the appearance of irregularity. If adopted, Intervenor's argument would invite limitless challenges to panels perceived as too "favorable" to one's opponents.

CONCLUSION

The parties and the challenged laws received a fair hearing that resulted in the only outcome permitted by precedent. As a result, the institution of marriage has now shed a discriminatory barrier and gained "models of loving commitment to all" in its place. Panel Decision at 34. For the reasons set forth above, Plaintiffs respectfully request that this Court deny the petition for rehearing en banc.

DATED: November 12, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(c)(2) and Ninth Circuit Rule 40-1(a) and does not exceed 15 pages. This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

DATED: November 12, 2014 By: s/ Tara L. Borelli

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.

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.

By: s/ Tara L. Borelli