NOS. 14-35420 & 13-35421

DECIDED OCTOBER 7, 2014
(JUDGES STEPHEN REINHARDT, RONALD GOULD & MARSHA BERZON)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUSAN LATTA, et al.,
Plaintiffs-Appellees,

v.

C. L. "Butch" OTTER,
Defendant-Appellant,

CHRISTOPHER RICH,
Defendant,
and

STATE OF IDAHO,
Intervenor-Defendant.

On Appeal from United States District Court for the District of Idaho
Case No. 1:13-cv-00482-CWD (Honorable Candy W. Dale, Magistrate Judge)

MOTION OF GOVERNOR C.L. "BUTCH" OTTER FOR LEAVE TO FILE A REPLY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Appellant Governor C. L. "Butch" Otter respectfully seeks the Court's leave to file a reply in support of the Governor's petition for rehearing en banc. Although Plaintiffs-Appellees oppose this motion, for the following reasons, Governor Otter submits that he has substantial need for this relief.

1. Since the Governor submitted his petition, the Sixth Circuit has issued an opinion counter to this Court's ruling in this case, requiring a reply by the Governor regarding this new circuit split.

2. Since the Governor submitted his petition, more than two dozen scholars of the institution of marriage have filed an amicus brief in the Fifth Circuit, presenting a gold mine of scholarship regarding the practical, real-world impact of redefining marriage. That analysis needs to be presented to the Court, particularly since the Plaintiffs claim these scholars and the more than two hundred sources they cite are nothing but "unsubstantiated fears."

3. The Governor needs to point out to the Court the ways in which the Petitoner-Appellee's response fails to engage the Governor's showing on the need for a rehearing en banc.

For these reasons, Governor Otter respectfully requests leave to file a reply in support of his petition for rehearing en banc.

Dated: November 19, 2014

Respectfully submitted,

s/ Gene C. Schaerr

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 19, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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REPLY IN SUPPORT OF PETITION OF DEFENDANT-APPELLANT GOVERNOR C.L. "BUTCH" OTTER FOR REHEARING EN BANC

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ARGUMENT

Plaintiffs' response merely confirms the need for *en banc* review. In Governor Otter's petition, he noted that the panel has resolved three questions of exceptional importance in a way that departs from controlling authorities of the Supreme Court, this Circuit and others:

1. Did the people of Idaho violate the Fourteenth Amendment when they limited marriage to man-woman unions?

2. For Fourteenth Amendment purposes, are classifications based on sexual orientation subject to some form of "heightened scrutiny?"

3. Can a law like Idaho's marriage law be deemed to "classify" or "facially discriminate" based on sexual *orientation* merely because it distinguishes between opposite-sex couples and all other types of relationships, including same-sex couples?

Petition at 2-3. Plaintiffs' response to the petition barely addresses—much less disputes—the petition's analysis of each of these points, analysis that now finds additional support in the Sixth Circuit's recent decision in *DeBoer v. Snyder*, Nos. 14–1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014).

As to the third issue, Plaintiffs do not even cite or discuss the Supreme Court decision on which the petition most heavily relies, *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199

(1991), which holds that facial discrimination depends on "the explicit terms" of the allegedly discriminatory provision. Indeed, Plaintiffs do not even *attempt* to reconcile the panel's opinion with that controlling decision. And Plaintiffs' citations to *United States v. Windsor,* 133 S. Ct. 2675, 2693-94 (2013), and *Christian Legal Soc. Chapter of the Univ. of California, Hastings College of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010), are irrelevant here, because neither decision suggested (much less held) that the man-woman definition of marriage discriminates *facially* on the basis of sexual orientation—thereby precluding any inquiry into discriminatory intent. Plaintiffs thus have no answer to Governor Otter's showing that by its "explicit terms" Idaho's marriage laws discriminate facially, not on the basis of sexual orientation, but on the basis of biological complementarity. By itself, that is not enough to trigger heightened scrutiny under any theory.

On the second issue, Plaintiffs do not dispute Judge O'Scannlain's analysis in his dissent from denial of rehearing *en banc* in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

And as to the first issue, Plaintiffs do not dispute Governor Otter's showing that removing the man-woman definition threatens serious

harm to the institution of marriage and, thus, to the children of heterosexual couples. *See* Petition at 4-21. Plaintiffs claim (at 13) that these concerns are nothing but "unsubstantiated fears." But in fact, those risks are well substantiated—as demonstrated by the large number of social-science studies that Governor Otter cited in the petition and presented in the district court, and which the Plaintiffs do not even attempt to rebut.

Plaintiffs' argument that these risks are "unsubstantiated" is further refuted by an amicus brief recently filed in the Fifth Circuit by undersigned counsel on behalf of twenty-five scholars of the institution of marriage. That brief, attached as Appendix A, demonstrates that Governor Otter's serious concerns about the societal risks posed by the panel decision are shared by a wide range of reputable and well-informed scholars, and by a wide range of social-science studies in addition to those cited in the district court record.

Finally, in light of the Sixth Circuit's recent decision, Governor Otter respectfully urges this Court to resolve the present petition quickly, so that the Supreme Court has the benefit of this Court's views as it considers anew whether to address the core question presented in

this petition—whether the States may, consistently with the Fourteenth Amendment, continue to define marriage as the union of a man and a woman.

CONCLUSION

For all these reasons, and those explained in the petition, the panel decision merits *en banc* review.

DATED: November 19, 2014

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