Case No. 12-17668

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al.,

Plaintiffs-Appellants,

v.

GOVERNOR 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

PETITION OF APPELLEE COALITION FOR THE PROTECTION OF MARRIAGE FOR REHEARING EN BANC

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INTRODUCTION
(FRAP 35(b)(1) STATEMENT)

The October 7, 2014 panel decision of Judges Reinhardt, Gould, and Berzon ("Decision") declared that Nevada's constitutional and statutory provisions preserving marriage as the union of a man and a woman ("Nevada's Marriage Laws") are unconstitutional. In effect, that declaration threatens to change the legal meaning of marriage throughout the Ninth Circuit to the union of two persons without regard to gender. Moreover, the Decision held that the "heightened scrutiny" announced in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), applies to all claims of sexual orientation discrimination, not just to claims based on the *Moreno-Cleburne-Romer-Windsor*[1] animus doctrine.

With respect to the level of judicial scrutiny applied to sexual orientation discrimination claims other than animus claims, the Decision conflicts with multiple decisions of this Court. *See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990) ("The plaintiffs assert that homosexuality should be added to the list of suspect or quasi-suspect classifications requiring strict or heightened scrutiny. We disagree and hold that the district court erred in applying heightened scrutiny to the regulations at issue

[1] *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1995); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

and that the proper standard is rational basis review."); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir.2003); *Philips v. Perry*, 106 F.3d 1420 (9th Cir.1997), and with the decisions of virtually all other circuits, *Cook v. Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008) (same); *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Davis v. Prison Health Servs*., 679 F.3d 433, 438 (6th Cir. 2012) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006) (same); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008) (same); *Lofton v. Sec'y of Dep't of Children & Family Servs*., 358 F.3d 804, 818 (11th Cir. 2004) (same); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same).[2]

Further, by overturning the marriage laws of Nevada and Idaho, the Decision conflicts with decisions of the United States Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).[3]

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[2] Only the Second Circuit has held that "intermediate scrutiny" should apply. *Windsor* v. *United States*, 699 F.3d 169, 180–85 (2d Cir. 2012).

[3] The Eighth Circuit's *Bruning* decision in turn conflicts with the Tenth Circuit, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), the Fourth Circuit, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and the Seventh Circuit, *Baskin v. Bogan*, ___ F.3d ___, 2014 WL

The constitutionality of man-woman marriage is a question of historic importance. Deciding that question based on a legal standard never endorsed by the Supreme Court for claims of sexual orientation discrimination and at odds with the rational-basis standard applied by virtually every other circuit in the country was plainly erroneous.

In light of all the foregoing, en banc consideration is necessary to secure and maintain uniformity of this Circuit's decisions and to bring those decisions into harmony with the decisions of the Supreme Court and, because justified, with the decisions of the other Circuits.

Further—en banc review is regrettably necessary to cure the appearance that the assignment of this case to this particular three-judge panel was ***not*** the result of a random or otherwise neutral selection process. Troubling questions arise because a careful statistical analysis reveals the high improbability of Judge Berzon and Judge Reinhardt being assigned to this case by a neutral selection process. The attached statistical analysis, Exhibit 3, explains that since January 1, 2010, Judge Berzon has been on the merits panel in five and Judge Reinhardt has been on the merits panel in four of the eleven Ninth Circuit cases involving the federal constitutional rights of gay men and lesbians ("Relevant Cases"), far more

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4359059 (7th Cir. Sept. 4, 2014). The Supreme Court denied certiorari in those recent cases on October 6, 2014. *Bogan v. Baskin*, ___ S. Ct. ___, 2014 WL 4425162 (Oct. 6, 2014).

than any other judge and far more than can reasonably be accounted for by a neutral assignment process. Indeed, statistical analysis demonstrates that the improbability of such occurring randomly is not just significant but overwhelming. Thus, the odds are 441-to-1 against what we observe with the Relevant Cases—the two most assigned judges receiving under a neutral assignment process five and four assignments respectively (and anything more extreme).

We bring the issue of bias in the selection process to the Circuit's attention with respect and with a keen awareness that questioning the neutrality of the panel's selection could hardly be more serious. But the sensitivity of raising uncomfortable questions for this Circuit must be balanced against the interests of ordinary Nevadans, who deserve a fair hearing before a novel interpretation of constitutional law deprives them of the right to control the meaning of marriage within their State. A hearing before an impartial tribunal is, after all, a central pillar of what our legal tradition means by due process of law, and the means of selecting the tribunal certainly implicates notions of impartiality. Measures have been put in place by this Court to assign judges through a neutral process. But in this case the appearance is unavoidable that those measures failed. En banc review is necessary to ensure that the appearance of bias is cured by a fresh hearing before a panel, the selection of which is unquestionably neutral.

REASONS FOR GRANTING REHEARING EN BANC

1. The exceptional importance of the constitutional issues implicated in a right to genderless marriage calls for en banc review.

Early in the debate over man-woman marriage/genderless marriage, Oxford's prominent liberal legal philosopher Joseph Raz accurately observed that "there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage."[4]

With its social institutional defense of man-woman marriage, the Coalition has demonstrated both the likely *adverse* consequences of that transformation and the social mechanisms causing those consequences. Paramount will be the diminution of what the literature calls the child's bonding right, which flows from the social message, expectation, ideal, and promise that, to the greatest extent possible, a child will know and be raised by her own mother and father, whose union brought her into this world and whose family and biological heritage are central and vital to the child's identity. The man-woman meaning at the core of the marriage institution, reinforced by the law, has always sustained, valorized, and made normative the child's bonding right. With its regime of "Parent A" and "Parent B," the genderless marriage institution, reinforced by the law, does just the

[4] Joseph Raz, *Ethics in the Public Domain* 23 (1994).

opposite. Genderless marriage's core institutionalized meaning of "the union of two persons without regard to gender" teaches everyone—married and unmarried, gay and straight, men and women, and all the children—that a child knowing and being reared by her mother and father is neither socially preferred nor officially encouraged.

The likely and logical consequence of that teaching will be some increase in the levels of fatherlessness and motherlessness among the vast majority of children—those resulting from a man-woman relationship. When the child's bonding right fails in the lives of *those* children, there is no loving, committed same-sex couple there to provide them with wonderful parenting; rather, they are relegated to a parenting mode whose outcomes generally entail lesser child flourishing and greater social ills.

Nevada has a compelling and wholly legitimate interest in minimizing the social ills clearly attendant upon a failure of the child's bonding right, that is, attendant upon an increase in the level of fatherlessness and motherlessness in the lives of the vast majority of children.

Those adverse consequences and related compelling societal interests are exactly why this federal constitutional contest between man-woman marriage and genderless marriage is of unmatched importance. That importance is so great that

it alone rightly calls out for en banc review. But that call is even louder here because of three realities: one, the Decision's failure to honestly engage the core defense of man-woman marriage, the defense just summarized and centering on the child's bonding right; two, the unquestioned inter-circuit conflict on the standard of review applicable to sexual orientation discrimination; and three, the appearance of deviation from a neutral selection process in the assignment of this case to this three-judge panel.

2. The Decision does not honestly engage the defense of Nevada's marriage laws.

Simply and fairly put, the Decision distorts, evades, and elides the Coalition's defense of man-woman marriage. The Decision's characterization of that defense does not amount to even a bad caricature. The Decision "disguised the difficulties" presented by that defense, which required an outcome contrary to judicial preferences; the Decision attempted to "win the game by sweeping all the chessmen off the table." Learned Hand, *Mr. Justice Cardozo*, 52 Harv. L. Rev. 361, 362 (1939). What an eminent scholar just said of Judge Posner's opinion in the Seventh Circuit's marriage case applies fully to the Decision: "[T]he argument that Posner is said to have refuted remains compelling. His judgment is one long attempt to hide from that argument and to conceal it from his readers. In its refusal to engage the opposing argument, Posner's opinion disgraces the federal

judiciary." John Finnis, *The Profound Injustice of Judge Posner on Marriage*, Public Discourse (October 9, 2014), http://www.thepublicdiscourse.com/2014/10/13896/.

3. The Decision's treatment of *SmithKline* creates significant conflicts within this Circuit's jurisprudence, between this Circuit's jurisprudence and that of the Supreme Court and nearly all other Circuits.

Even though *Windsor* was an animus case and the sole basis for *SmithKline*'s talk of "heightened scrutiny," the plaintiffs here urged that *SmithKline* be read as mandating quasi-suspect class, or intermediate, scrutiny for all sexual orientation discrimination claims, not just those invoking the *Moreno-Cleburne-Romer-Windsor* animus doctrine. The form of heightened scrutiny the Second Circuit decision in *Windsor* dictated is garden-variety intermediate review, ***but*** the Decision clearly treated *SmithKline* scrutiny as something different, as a form of heightened scrutiny without discernible boundaries in that it operates to invalidate any classification with the effect of stigmatizing gays and lesbians. Faithfully applied, the Decision thus appears to require the invalidation of every law classifying on the basis of sexual orientation, without any opportunity to justify the classification by reference to the societal interests it advances, an opportunity available even under strict scrutiny.

The Decision has thrown this Circuit onto the sharp blades of the scholarly critique made by one of the Nation's strongest advocates for gay/lesbian rights in general and genderless marriage in particular. *See* Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2014 The Supreme Court Review 183, 202–03, http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2424743. Prof. Carpenter states that *SmithKline* "is an aggressive and incomplete reading of *Windsor*" and then goes on to demonstrate by detailed examination of *Windsor* and its history why that is so, concluding with this:

> . . . *Windsor* stands outside the conventional tiers-of-scrutiny analysis. In cases where the Court has found animus, it does not engage in the usual equal protection review. A specialized form of review peculiar to animus cases applies. . . . [T]he Ninth Circuit in *SmithKline Beecham Corporation* failed to attribute any independent weight to the animus analysis. That is an error that can no longer be justified.

Id. (footnotes omitted).

4. The appearance is strong and inescapable that the assignment of this case to this three-judge panel was not done through a neutral process but rather was done in order to influence the outcome in favor of the plaintiffs. [5]

a. The Ninth Circuit's public commitment to a neutral process to match judges and cases.

All circuits, including the Ninth, are committed to a neutral process[6] to match judges and cases, that is, a process that precludes the assignment of

[5] This subsection is supported by the attached affidavits of Dr. James H. Matis and Monte Neil Stewart and the four attached exhibits.

particular judges to particular cases with an intent to thereby influence the outcome—what is sometimes called "panel packing." *See, e.g.*, J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 Tex. L. Rev. 1037 (2000) ("*Neutral Assignment*").

The virtue of a neutral process is self-evident, as is the injury to the justice system when there are deviations from it.

> The random assignment of cases, and the random reassignment in the event of disqualification, has the obvious, commonsensical and beneficial purpose of maintaining the public's confidence in the integrity of the judiciary. This purpose is defeated when cases or motions are assigned, or reassigned, to judges who are handpicked to decide the particular case or motion in question. A system of random assignment is purely objective and is not open to the criticism that business is being assigned to particular judges in accordance with any particular agenda.

Grutter v. Bollinger, 16 F. Supp. 2d 797, 802 (E.D. Mich. 1998); *see also Neutral Assignment*, 78 Tex. L. Rev. at 1066.

Serious deviations from a neutral process do occur. Perhaps the best known instance occurred in the "old" Fifth Circuit when key actors in that court engaged in panel packing of both circuit panels and three-judge district courts to assure a particular outcome in civil rights cases. *See Neutral Assignment*, 78 Tex. L. Rev.

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[6] *See Jenkins v. Bellsouth Corp.*, 2002 WL 32818728, at *6 n.20 (N.D. Ala. Sept. 13, 2002) (discussing the meaning of "neutrality" and "randomness" in this context).

at 1044–65; Todd C. Peppers et. al., *Random Chance or Loaded Dice: The Politics of Judicial Designation*, 10 U. N.H. L. Rev. 69, 69–71 (2012). The use of statistics helped uncover that deviation. *See Neutral Assignment*, 78 Tex. L. Rev. at 1050–64.

b. The appearance of departure from a neutral process.

From January 1, 2010, to the present, this Court has assigned to merits panels eleven[7] cases involving the federal constitutional rights of gay men and lesbians, what we refer to as the Relevant Cases. They are listed and described in Exhibit 1. Judge Berzon has been on five of those panels. *Id*. Judge Reinhardt has the next highest number, with four panel assignments. *Id.* With two, Judges Schroeder, Thomas, and Alarcón are the only other judges with more than one assignment. *Id.* Seventeen, including District Judge Bennett, received one assignment. *Id*. Eighteen of the judges with active status during any part of the relevant time period received none.

Careful statistical analysis indicates a high likelihood that the number of Judges Reinhardt and Berzon's assignments to the Relevant Cases, including this and the Hawaii and Idaho marriage cases (which we treat as one for these purposes), did *not* result from a neutral judge-assignment process. That careful

[7] Treating the Nevada, Idaho, and Hawaii marriage cases as *one* for purposes of this count.

analysis is set forth in the attached report of Dr. Matis ("Report"), Exhibit 3. The Report's careful statistical analysis shows a substantial and significant bias in the selection process, centering on Judges Reinhardt and Berzon.

c. The appearance of favoring one side.

Judges Reinhardt and Berzon are publicly perceived to be favorably disposed to arguments for expanding the rights of gay men and lesbians, more so than all or nearly all other judges in this Circuit. That perception gives rise to an appearance of an uneven playing field. That perception is reinforced by, one, the unremarkable observation that experienced and informed lawyers would readily assess this panel as one quite congenial to the plaintiffs in these marriage cases and just the opposite to the parties defending man-woman marriage;[8] and, two, since the announcement of this three-judge panel on September 1, 2014, the consistent public commentary to the effect that, for the plaintiffs, this panel is the most favorable panel possible.[9]

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[8] See the attached affidavit of Monte Neil Stewart at paragraph 6.

[9] *See, e.g., 9th Circuit gets best possible panel for marriage equality*, Daily Kos, Sept. 1, 2014, http://www.dailykos.com/story/2014/09/01/1326347/-9th-Circuit-gets-best-possible-panel-for-marriage-equality (noting that same-sex couple plaintiffs "hit the jackpot" with Ninth Circuit panel assigned to review the Idaho, Nevada and Hawaii marriage cases); Scottie Thomaston, *Liberal three-judge panel picked to hear marriage cases in Ninth Circuit next week*, Equality on Trial, Sept. 2, 2014, http://equalityontrial.com/2014/09/02/liberal-three-judge-panel-ninth-circuit-judges-picked-hear-marriage-cases-next-week/?utm_source=rss&utm_ medium=rss&utm_ campaign=liberal-three-judge-panel-ninth-circuit-judges-

d. This Circuit's need to remedy the appearance of unfairness.

The problem to be remedied is the *appearance* of unfairness. *See generally Liljeberg v. Health Sers. Acquisition Corp.*, 486 U.S. 847, 860 (1988); *Liteky v. United States*, 510 U.S. 540, 548 (1994). When that appearance is present, it does not matter that "the judge actually has no interest in the case or . . . the judge is pure in heart and incorruptible." *Liljeberg*, 486 U.S. at 860 (quotation marks omitted). Thus, it does not matter whether Judge Reinhardt or Judge Berzon played any conscious role in the particular acts causing their many assignments; what matters is the vivid appearance of a deviation from the Circuit's neutral selection process.

The appearance of unfairness is not a close question here. Even without the aid of professional statisticians, a reasonable person will immediately sense that something is amiss when one judge out of more than thirty is assigned over a four

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picked-hear-marriage-cases-next-week (noting that the three judges on this panel are "considered to be some of the most liberal appeals court judges in the country" and that the make-up of the panel "makes it even less likely" that the state laws at issue would be upheld); Carlos Santoscoy, *Ninth Circuit Announces Judge Panel to Hear Gay Marriage Cases From Nevada, Idaho, Hawaii*, On Top Magazine, Sept. 2, 2014, http://www.ontopmag.com/article.aspx?id=19362&MediaType=1&Category=26 (stating that the Ninth Circuit panel "bodes well for plaintiffs and marriage equality supporters" and quoting Dr. Gregory Herek, a social science researcher at the University of California, Davis, as stating, "All judges on the 9th Circ panel for ID HI & NV marriage cases have supported heightened scrutiny for sexual orientation discrimination" and "it's all over but the shouting").

and one-half year period to five of this Circuit's eleven cases involving the federal constitutional rights of gay men and lesbians, another to four of those cases, and both of them to the momentous "gay marriage" cases. That sense will deepen on realizing that eighteen of the judges with active status during any part of the relevant time period were assigned to *none* of the eleven. That sense will deepen even further because of the appearance, arising from widely shared public perceptions, that Judges Reinhardt and Berzon's presence on this panel favors one side over the other.

Sophisticated statistical analysis validates the reasonable person's sense that something is amiss. Compared to a selection process that is genuinely neutral, the odds are as reflected in the Report's tables, including Table 4 with its odds of 441-to-1 against what we observe with the Relevant Cases—the two most assigned judges receiving under a neutral assignment process five and four assignments respectively. The appearance to a reasonable person is of something serious being wrong and requiring a remedy.

It must be remembered that a "system of neutral assignment means little absent an effective enforcement mechanism." *Neutral Assignment*, 78 Tex. L. Rev. at 1108. When "[e]nforcement . . . [is] left to the judges on the circuit . . .

[the] judges must become aware that the procedures governing random assignment have been violated. In general, this requires empirical observation." *Id.* The requisite empirical observation is now before this Circuit and calls out for an effective remedy. At this juncture, that effective remedy is to grant rehearing en banc of this case.

CONCLUSION

To protect its own jurisprudence in the realm of federal constitutional law and civil rights, to bring that jurisprudence into harmony with Supreme Court jurisprudence and that of nearly all other Circuits, to vindicate the values and integrity of its own judge-assignment process, and to resolve within this Circuit our generation's most consequential social issue in a way that commands a broader public respect and acceptance, this Circuit needs to review this case en banc. There is no other way to accomplish those essential tasks.

Dated: October 13, 2014

Respectfully submitted,

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By: s/ Monte Neil Stewart
Monte Neil Stewart

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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 October 13, 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/ Monte N. Stewart