Case No. 14-35420

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. (BUTCH) OTTER,

Defendant-Appellant,

and

CHRISTOPHER RICH and STATE OF IDAHO,

Defendants

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

APPELLANT GOVERNOR C.L. "BUTCH" OTTER'S PETITION FOR INITIAL HEARING EN BANC

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INTRODUCTION AND F.R.A.P. RULE 35(b)(1) STATEMENT

Appellant Governor C.L. "Butch" Otter petitions for initial hearing en banc (i) to cure an intra-circuit conflict on the level of judicial scrutiny applicable to claims of sexual orientation discrimination ("Scrutiny Issue"), itself a question of exceptional importance, and (ii) to resolve an even more consequential constitutional question of exceptional importance and urgency, whether the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment compel the States to change the core meaning of marriage from "the union of a man and a woman" to "the union of two persons" ("Marriage Issue"). This case is the optimal vehicle for authoritatively resolving both of those questions and is far superior to *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), as the vehicle for resolving the Scrutiny Issue.

The exceptional importance and urgency of the Marriage Issue is demonstrated by the following facts:

1. This Court has already entered multiple orders expediting the hearings of the two cases pending before it and raising the

Marriage Issue cleanly: this case from Idaho (Dkt. No. 11) and *Sevcik v. Sandoval*, No. 12-17668, from Nevada (Dkt. Nos. 174, 211).

2. In order to resolve the Marriage Issue, the United States Supreme Court previously granted certiorari from this Court's panel decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), but found lack of Article III jurisdiction and therefore vacated the panel decision without reaching the merits. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
3. The Marriage Issue is being litigated right now in thirty-two States, that is, in all States except North Dakota that either by state legislative or by state judicial action have not previously redefined marriage. *See* Appendix 1.
4. The Marriage Issue is presently pending before the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, *see* Appendix 2, and other circuits will no doubt be added to the list shortly.
5. Because of the fundamental importance of marriage in our society and its powerful influence and impacts on a wide range of human endeavors, Americans—whether married or unmarried, gay or

straight, man or woman—understandably want the Marriage Issue resolved now, authoritatively and finally, so as to put an end to the uncertainty, confusion, and conflicts that the issue's long-protracted litigation has engendered all across the Nation. That uncertainty and confusion have certainly afflicted resolution by democratic processes of the much different issue—whether as a matter of wise public policy marriage ought to be redefined.

Regarding the Scrutiny Issue, the intra-circuit conflict is evidenced by the holding of *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), that rational basis review applies to claims of sexual orientation discrimination and the conflicting holding of *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014), that some form of "heightened scrutiny" applies to at least some of those kinds of claims.

The exceptional importance of the Scrutiny Issue is evidenced by, among other things, the present inter-circuit conflict on it. All circuits to consider the issue have held in favor of rational basis review except the Second Circuit, which held in favor of intermediate scrutiny. *See* Appendix 3.

A member of this Court has already requested rehearing en banc in *SmithKline*, *see* Case Nos. 11–17357, 11–17373; Dkt. No. 88. But *this* case is a superior vehicle for resolving the Scrutiny Issue and ending the intra-circuit conflict. Unlike *SmithKline*, where the opposing parties—two large pharmaceutical houses—have *no* inherent interest in the issue, here the parties have an intense and profound interest in the issue, knowing that its resolution may well dramatically affect matters of importance to them even beyond this case's scope.

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The Federal Rules of Appellate Procedure expressly recognize that some cases are so significant that they warrant initial hearing en banc. Fed. R. App. P. 35. Without doubt, this is such a case. Its resolution en banc will certainly end the conflict within this Court's level-of-judicial-scrutiny jurisprudence, with the Scrutiny Issue being one of exceptional importance in its own right. *See* Fed. R. App. P. 35(a)(1) & (2). This case also presents the profoundly important and consequential Marriage Issue cleanly, without justiciability concerns. *See* Fed. R. App. P. 35(a)(2).

BACKGROUND

Since territorial days, Idaho has always defined marriage as the union of a man and a woman, and that public meaning is enshrined in the State's statutes and constitution. The man-woman meaning has constitutional status because in 2006, after three years of debate, the legislature proposed a ballot measure to amend the state constitution to preserve that meaning and 63% of Idaho's voters in that year's general election approved the measure. Article III, Section 28, of the Idaho Constitution ("Amendment 2") reads: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." (We refer to the defining statutes and Amendment 2 as "Idaho's Marriage Laws.")

The Plaintiffs-Appellees ("Plaintiffs") are four same-sex couples residing in Idaho, two of whom want to be married in Idaho and two of whom want Idaho to recognize their foreign marriages. On November 8, 2013, they initiated a § 1983 action against Governor Otter and Ada County Clerk Christopher Rich, alleging that Idaho's Marriage Laws violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and seeking, among other forms of relief, an

injunction against official enforcement of marriage's man-woman meaning. Governor Otter appeared through Counsel to the Governor Thomas Perry. Idaho's Attorney General appeared on behalf of Clerk Rich and then successfully intervened on behalf of the State of Idaho (collectively the "Attorney General Clients").

Plaintiffs and Governor Otter made cross-motions for summary judgment and in their respective briefs engaged at a high level the Marriage Issue, including the Scrutiny Issue.[1] (Before issuance of the

[1] The uncertainty regarding the nature and scope of *SmithKline*'s holding is evidenced by the competing positions of the parties in this case. Plaintiffs argue that *SmithKline* "heightened scrutiny" applies to all cases alleging sexual orientation discrimination and, further, that such scrutiny is really the same as the "intermediate scrutiny" expressly articulated by the Supreme Court in cases such as *United States v. Virginia*, 518 U.S. 515 (1996)—although *SmithKline* itself never says that it is. Governor Otter, in contrast, perceives that *SmithKline* "heightened scrutiny" is clearly a new level of scrutiny, albeit one developed only vaguely, and that it applies only to legal distinctions of an "unusual character" that point to animus—a bare desire to harm an unpopular minority—as the motive behind the challenged government action. He further understands that the application must be so limited because *SmithKline* purports to ground its newly minted standard of "heightened scrutiny" in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which is the last in the *Moreno-Romer-Windsor* trilogy of cases, with *none* of those cases holding that sexual orientation discrimination should be subjected to "intermediate scrutiny" or, for that matter, any other form of "heightened scrutiny" and with *all* of them grounding their invalidation of government action on a finding of "animus."

SmithKline panel decision, the Attorney General Clients had filed a motion to dismiss.)

On May 5, 2014, Magistrate Judge Candy Dale, sitting by consent of all parties, heard oral argument on the dispositive motions. On May 13, 2014, the magistrate judge entered a Memorandum Decision and Order ("Order") invalidating all of Idaho's laws preserving man-woman marriage and enjoining their enforcement. The Order accepted the Plaintiffs' arguments on the nature and scope of *SmithKline* "heightened scrutiny."[2]

Governor Otter immediately appealed and filed an emergency motion for stay pending appeal.[3] Before the Order took effect, this Court stayed it pending appeal, ordered expedited briefing, and set this case for hearing in San Francisco the week of September 8, 2014. (Dkt. No. 11.) Briefing will be completed no later than August 1, 2014.

In the Nevada case raising the Marriage Issue, *Sevcik v. Sandoval*, No. 12-17668, this Court on May 23, 2014, ordered that the case "shall be entered on the September 2014 calendar." (Dkt. No. 211.)

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[2] *See supra* note 1.

[3] The Attorney General Clients appealed separately, Case No. 14-35421, and on May 29, 2014, moved to consolidate the two appeals, a motion that Governor Otter supports.

Briefing in that case has long since been completed, including a supplemental answering brief and a reply brief addressing *SmithKline*.[4]

ARGUMENT

1. This case is the optimal vehicle for eliminating, by en banc review, the present conflict and uncertainty in this Court's level-of-judicial- scrutiny jurisprudence, a highly important matter in its own right.

Rule 35(b) emphasizes that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed that issue." Fed. R. App. P. 35(b)(1)(B). That quintessential illustration of "exceptional importance"—a direct inter-circuit conflict—exists here. Until the panel decision in *SmithKline*, every circuit but one to consider the Scrutiny Issue concluded that rational basis review applies. Only the Second Circuit held for intermediate scrutiny. *See* Appendix 3. The

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[4] *Jackson v. Rosen* (formerly *Jackson v. Fuddy*), Nos. 12-16995, 12-16998, 12-17668 (Hawaii), also raises the Marriage Issue and is also pending before this Court, but this Court has asked for briefing on whether the case is moot because of enactment of legislation in Hawaii changing the legal definition of marriage.

Geiger v. Kitzhaber, No. 14-35427 (Oregon), also raises the Marriage Issue and is also pending before this Court, but no party in the district court appealed; the appeal was lodged by an entity seeking to intervene, and that entity's party status has not yet been resolved.

inter-circuit conflict exacerbated by *SmithKline*, and the likelihood that that decision incorrectly resolves the Scrutiny Issue, warrant en banc review alone.

Because of the claim of sexual orientation discrimination at the heart of Plaintiffs' Complaint, this case unavoidably requires resolution of the Scrutiny Issue. That resolution is made difficult right now by the conflict between *High Tech Gays* and *SmithKline*, by the uncertainty of the nature and scope of the "heightened scrutiny" announced by *SmithKline*, and by the pending consideration of *SmithKline* for en banc review. Granting en banc review now will cure those difficulties, and *this* case is the optimal vehicle for such review, for at least two reasons.

First, unlike *SmithKline*, where the opposing parties—two large pharmaceutical houses—have *no* inherent interest in the issue,[5] here the parties have a genuine and intense interest in the issue, knowing that its resolution may well dramatically affect matters of importance to them even beyond the scope of this case. Governor Otter is sworn to uphold Idaho's constitution and laws, an obligation that an expansion of "heightened scrutiny" will substantially frustrate in any number of

[5] And have shown a rather limited zeal towards its informed resolution. *See* Case Nos. 11–17357, 11–17373; Dkt. Nos. 91, 92.

settings regulated by Idaho law. *See, e.g., Sevcik v. Sandoval*, 911 F. Supp.2d 996, 1011-13 (D. Nev. 2012) (explaining how "heightened scrutiny" operates to "remov[e] from the People the ability to legislate in a given area"); *see also San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973). By the same token, Plaintiffs' counsel, the National Center for Lesbian Rights, is committed to "advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through *litigation*, legislation, policy, and public education . . . ." *See* http://www.nclrights.org/about-us/ (emphasis added). Ninth Circuit expansion of "heightened scrutiny" would markedly improve the NCLR's position across a wide array of its cases.

Second, the Governor's legal team and Plaintiffs' counsel have engaged the Scrutiny Issue at a high level.[6] Their zealous, thorough, and professional presentation will aid the Court in resolving this extraordinarily important issue.

[6] As have, in the Nevada marriage case now pending before this Court, the plaintiffs (represented by Lambda Legal Defense and Education Fund and by O'Melveny & Myers), the intervenor-defendant, and many *amici*. *See Sevcik v. Sandoval*, No. 12-17668. Those same *amici* will quite certainly share their views in this case also.

2. Without doubt, the exceptionally important Marriage Issue as cleanly presented in this case warrants an initial hearing en banc.

Whether the Fourteenth Amendment mandates genderless marriage and therefore requires legal suppression of the man-woman marriage institution is, of course, an issue of exceptional importance. Nothing less than the fate of our society's most basic social institution hangs in the balance because the passionate, divisive contest over the Marriage Issue is at its core a contest between two *mutually exclusive* and *profoundly different* social institutions, one seeking to retain and the other trying to wrest away the authoritative designation of "marriage." Justice Alito, with no opposing voice on this point from any of his colleagues, recognized as much in *United States v. Windsor*, 133 S. Ct. 2675, 2718-19 (2013) (Alito, J., dissenting). That contest is so important because government-mandated (whether by judicial action or otherwise) genderless marriage—and therefore of necessity legal suppression of the man-woman marriage institution—*both* promises, in the eyes of many thoughtful citizens, social benefits and opportunities for gay men and lesbians and children connected to their relationships *and* poses, in the eyes of an equally large number of thoughtful citizens,

real, concrete risks to the well-being of children generally, now and for generations to come. Consequently, the Court's resolution of the Marriage Issue will carry profound legal and broader social consequences for all people within the Ninth Circuit.[7]

Beyond its intrinsic significance, the exceptional importance of the Marriage Issue is indicated by this Court's orders expediting the appeals in this case (Dkt. No. 11) and in the Nevada marriage case, *Sevcik,* No. 12-17668, (Dkt. Nos. 174, 211); by the Supreme Court's grant of certiorari in *Hollingsworth*, 133 S. Ct. at 2652; by the fact that the same issue is now under review on appeal by the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, *see* Appendix 2; and by the fact that at the present moment no less than thirty-two States are embroiled in litigation of the issue. *See* Appendix 1.

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[7] Because the Marriage Issue is so passionately contested and so divisive among the citizenry, the perception of the legitimacy of this Court's resolution of it must be of paramount concern. When it comes to the public perception of the legitimacy of such a judicial decision and the public respect it may garner, a decision by an eleven-judge panel stands far higher and stronger than does a decision by a three-judge panel—just as a decision by a three-judge panel stands far higher and stronger than does a decision by a single judge. For the sake of the public respect for this Court's resolution of the Marriage Issue, whatever it may be, this case ought to go to an initial en banc hearing.

The exceptional importance of the Marriage Issue is matched by its urgency, an urgency that this Court has already acknowledged with its expediting orders in this case and in the Nevada marriage case. Governor Otter is petitioning for an initial hearing en banc early in the appellate process (just 16 days after entry of the magistrate judge's Order) to enable this Court to vindicate both that importance and that urgency.[8] Governor Otter urges that the initial hearing en banc be scheduled for the week of September 8, 2014, the date already selected by this Court, or, at the very latest, during the month of September.

CONCLUSION

The optimal presentation of the exceptionally important Scrutiny Issue in this case *coupled with* this case's clean presentation of the exceptionally important Marriage Issue moves beyond all doubt the compelling wisdom of an initial hearing en banc here. Accordingly,

[8] This petition is timely under F.R.A.P. 35(c), which requires that a petition for initial hearing en banc "be filed by the date when the appellee's brief is due." Appellees' brief in this case is due July 18, 2014—more than six weeks away. Dkt. No. 11.

Governor Otter respectfully petitions for an initial hearing en banc and for its setting during the week of September 8, 2014.

Date: May 30, 2014

By /s/ *Monte Neil Stewart*
Lawyers for Defendant-Appellant Governor Otter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 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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APPENDIX 1
Pending Cases Addressing in Whole or in Part the Marriage Issue

State	Case Name	Current Court	Case Number
Alabama	*Hard v. Bentley*	U.S.D.C. M.D. AL	2:13-cv-922
	Searcy v. Bentley	U.S.D.C. S.D. AL	1:14-cv-00208
Alaska	*Harris v. Millennium Hotel*	Alaska Supreme Court	S15230
	Hamby v. Parnell	U.S.D.C. D. AK	3:14-cv-00089
Arizona	*Connolly v. Roche*	U.S.D.C. D. AZ	2:14-cv-00024
	Majors v. Horne	U.S.D.C. D. AZ	2:14-CV-00518
Arkansas	*Jernigan v. Crane*	U.S.D.C. E.D. Ark.	4:13-cv-00410
	Wright v. State of Arkansas	Circuit Court of Pulaski County Second Division (Little Rock)	60CV-13-2662
Colorado	*Brinkman v. Long*	Adams County District Court	2013CV32572
	McDaniel-Miccio v. Colorado	Denver County District Court	2014CV30731
Florida	*Pareto v. Ruvin*	11th Circuit (Miami-Dade County)	2014-1661-CA-01
	Brenner v. Scott	U.S.D.C. N.D. Fl.	4:14-cv-00107
	Grimsley v. Scott (consolidated with *Brenner*)	U.S.D.C. N.D. Fl.	4:14-cv-00138
Georgia	*Inniss et al. v. Aderhold*	U.S.D. C. N. D. Ga.	1:14-cv-01180
Idaho	*Latta v. Otter*	9th Cir.	14-3520; 14-3521

State	Case Name	Current Court	Case Number
Indiana	*Brennon, et al., v. Milby Productions, et al.,*	IndianaCourt of Appeals	49A02-1401-ct-00020
	Love v. Pence	U.S.D.C. S.D. IN	4:14-cv-00015
	Baskin v. Bogan	U.S.D.C. S.D. IN	1:14-cv-00355
	Fuji v. Governor, State of Indiana	U.S.D.C. S.D. IN	1:14-cv-00404
	Bowling v. Pence	U.S.D.C. S.D. IN	1:14-cv-00405
	Lee v. Pence	U.S.D.C. S.D. IN	1:14-cv-00406
Kansas	*Nelson v. Kansas Dept of Revenue*	Shawnee County District Court, KS	13-c-001465
Kentucky	*Bourke v. Beshear*	6th Circuit	14-5291
	Love v. Beshear	U.S.D.C., W.D. Ky.	3:13-cv-00750
	Franklin v. Beshear (transferred to W.D. Ky and consolidated with Bourke v. Beshear)	6th Circuit	14-5291
	Romero v. Romero	Jefferson Family Court	13 CI 503351

State	Case Name	Current Court	Case Number
Louisiana	*Robicheaux v. Caldwell*	U.S.D.C. E.D. La.	2:13-cv-05090
	Robicheaux v. George (consolidated with Robicheaux)	U.S.D.C. E.D. La.	2:14-cv-00097 (consoldiated with 13- cv-05090)
	Forum for Equality v. Barfield (consolidated with Robicheaux)	U.S.D.C. E.D. LA	2:14-cv-00327 (consoldiated with 13- cv-05090)
	In re Angela Costanza and Chastity Brewer	3rd Circuit Louisiana Court of Appeals	13-01049
	In re Nicholas Ashton Costanza Brewer	3rd Circuit Louisiana Court of Appeals	JAC14-314
Michigan	*DeBoer v. Snyder*	6th Circuit	14-1341
Mississippi	*Lauren Beth Czekala-Chatham v. Dana Ann Melancon*	DeSoto County Chancery Court	13-CV-1702
Missouri	*Barrier v. Vasterling*	16th Judicial District of Jackson County	1416-cv-03892
Montana	*Donaldson v. State of Montana*	Montana First Judicial District Court Lewis and Clark County	BDV-2010-702
Nebraska	*Nichols v. Nichols*	Nebraska Court of Appeals	S-13-0841
Nevada	*Sevcik v. Sandoval*	9th Circuit	12-17668

State	Case Name	Current Court	Case Number
North Carolina	*Fisher-Borne v. Smith*	U.S.D.C. M.D. N.C.	1:12-cv-00589
	Gerber v. Cooper	U.S.D.C. M.D. N.C.	1:14-cv-00299
Ohio	*Obergefell v. Himes*	6th Circuit	14-3057
	Henry v. Ohio Dept. of Health	6th Circuit	14-3464
Oklahoma	*Bishop v. Oklahoma*	10th Circuit	4-5003; 14-5006
Oregon	*Geiger v. Kitzhaber & Rummell v. Kitzhaber* (consolidated)	9th Circuit	14-35427
Pennsylvania	*Whitewood v. Corbett*	U.S.D.C. M.D. Pa.	1:13-cv-01861
	Palladino v. Corbett	U.S.D.C. E.D. Pa.	2:13-cv-05641
	Cucinotta v. Commonwealth of Pennsylvania	Commonwealth Court of PA	451 M.D. 2013
	Ballen v. Corbett (listed as related to Cucinotta)	Commonwealth Court of PA	481 M.D. 2013
	Commonwealth of PA v. Hanes	Supreme Court of Pennsylvania	77 MAP 2013
	In re estate of Catherine Burgi- Rios	Northhampton County's Orphans Court	2012-1310
	Ankney v. Allegheny Intermediate Unit	Allegheny County Court of Common Pleas	GD-13-005851
South Carolina	*Bradacs, et al. v. Haley, et al.*	U.S.D.C. D.S.C.	3:13-cv-02351
South Dakota	*Rosenbrahn v. Daugaard*	U.S.D.C. S.D.	4:14-cv-04081

State	Case Name	Current Court	Case Number
Tennessee	*Tanco v. Haslam*	6th Circuit	14-5297
Texas	*In the Matter of J.B and H.B*	Supreme Court of Texas	11-0024
	State of Texas v. Angelique S. Naylor and Sabina Daly	Supreme Court of Texas	11-0114
	DeLeon v. Perry	5th Circuit	14-50196
	Pidgeon v. Parker	U.S.D.C. S. D. Tex.	4:13 -cv-03768
	Freeman v. Parker	U.S.D.C. S.D. Tex.	4:13-cv-03755
	Zahrn v. Perry	U.S.D.C. W.D. Tex.	1:13-cv-00955
	McNosky v. Perry	U.S.D.C. W.D. Tex.	1:13-cv-00631
Utah	*Kitchen v. Herbert*	10th Circuit	13-4178
	Evans v. Utah	U.S.D.C. D. Utah	2:14-cv-00055
Virginia	*Bostic v. Schaefer*	4th Circuit	14-1167
	Harris v. Rainey	U.S.D.C. W.D. Va.	5:13-cv-00077
West Virginia	*McGee v. Cole*	U.S.D.C. S.D. W.Va.	3:13-cv-24068
Wisconsin	*Wolf v. Walker*	U.S. D.C. W.D Wis.	3:14-cv-00064
	Appling v. Walker	Wis. Supreme Court	2011AP001572
Wyoming	*Courage v. State of Wyoming, et al.*	First Judicial District Court, Laramie County, Wyoming	182-262

APPENDIX 2

THE MARRIAGE ISSUE
United States Circuit Courts of Appeal Cases

The following cases pending in United States Circuit Courts of Appeal as of May 29, 2014,[1] raise in whole or in part the Marriage Issue:

- *Bostic v. Harris*, Case No. 14-1167 (4th Cir.) (Virginia)
- *DeLeon v. Perry*, No. 14-50196 (5th Cir.) (Texas)
- *DeBoer v. Snyder*, Case No. 14-1341 (6th Cir.) (Michigan)
- *Obergefell v. Himes*, Case No. 14-3057 (6th Cir.) (Ohio)
- *Bourke v. Beshear*, Case No. 14-5291 (6th Cir.) (Kentucky)
- *Tanco v. Haslam*, Case No. 14-5297(6th Cir.) (Tennessee)
- *Jackson v. Rosen* (formerly *Jackson v. Fuddy*), Nos. 12-16995, 12-16998, 12-17668 (9th Cir.) (Hawaii)
- *Sevcik v. Sandoval,* No. 12-17668 (9th Cir.) (Nevada)
- *Geiger v. Kitzhaber*, No. 14-35427 (9th Cir.) (Oregon)
- *Kitchen v. Herbert*, Case No. 13-4178 (10th Cir.) (Utah)
- *Bishop v. Smith*, Case No. 14-5003 (10th Cir.) (Oklahoma)

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[1] In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit upheld against Fourteenth Amendment challenge Nebraska's state constitutional marriage amendment.

APPENDIX 3

Circuit Court Treatment of the Level-of-Judicial-Scrutiny Issue

Rational Basis Review

- *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (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 and that the proper standard is rational basis review.");
- *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).

Intermediate Scrutiny

- *Windsor* v. *United States*, 699 F.3d 169, 180-85 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) … [and that laws discriminating against it must] survive[ ] intermediate scrutiny review.").

***SmithKline* Standard**

- *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481, 483 (9th Cir. 2014) ("In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation…. *Windsor* requires that when state action

discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.").