

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Kail Marie, *et al.*,

Plaintiffs/Appellees,

v.

Case No. 14-3246

Robert Moser, M.D., *et al.*

Defendants/Appellants.

**APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS'
MOTION FOR INITIAL HEARING EN BANC**

On November 7, 2014, Appellants filed a Motion for Initial Hearing En Banc (“the Motion”). Later that day, the Court directed Appellees “to file a response to the Motion on or before November 21, 2014.” For the following reasons, Appellees oppose the Motion.

I. Standard for Granting En Banc Review

“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). Defendants cannot meet this standard. The petition for initial hearing en banc does not accurately identify any conflict between different panels of this Court. And although the constitutionality of state laws prohibiting same-sex couples from marrying is unquestionably one of

national importance, en banc review cannot eliminate the current circuit split, and the Supreme Court is poised to definitively resolve that question by the end of this Term. In these circumstances, convening this court en banc would be an empty exercise and a waste of judicial resources.

II. There Is No Intra-Circuit Conflict Regarding the Standard of Scrutiny for Sexual Orientation Classifications.

Contrary to Defendants' assertions, there is no conflict among Tenth Circuit panels with respect to the standard of scrutiny for sexual orientation classifications.

Defendants assert that the panels in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert denied*, 135 S. Ct. 271 (2014), departed from precedent by applying heightened scrutiny to such classifications, but the *Kitchen* and *Bostic* panels applied heightened scrutiny because the laws infringed on the fundamental right to marry, not because of any conclusion that sexual orientation classifications in general require heightened scrutiny. Indeed, the *Kitchen* panel made clear that its opinion did "not address whether [the marriage bans] might be subject to heightened scrutiny on any alternative basis" other than the burden they place on the fundamental right to marry. *Kitchen*, 755 F.3d at 1223 n.11.

By the same token, earlier Tenth Circuit decisions stating that sexual orientation classifications are subject to rational-basis review did not address the standard of scrutiny for classifications that infringe on the fundamental right to

marry. *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 & n.9 (10th Cir. 2008) (applying rational basis analysis because plaintiff’s claim did “not implicate a fundamental right” or “implicate a protected class, which would warrant heightened scrutiny”); *Walmer v. U.S. Dep’t of Defense*, 52 F.3d 851, 854 (10th Cir.1995) (rational basis analysis applies to cases not involving suspect classes or fundamental rights); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir.1992) (classifications based on sexual orientation entitled to rational basis review).

There is simply no intra-circuit split for the en banc court to resolve.

III. Defendants’ Arguments About Pending Proceedings in the Kansas Supreme Court Lack Merit.

On November 18, 2014, in an interim order issued in the mandamus case, the Kansas Supreme Court held “that judicial comity and other principles favor waiting for the federal courts to finish the task begun in that jurisdiction.” *State ex. rel. Schmidt v. Moriarty*, No. 112,590, slip op. at 7 (Kan., Nov. 18, 2014), available at http://www.kscourts.org/State_v_Moriarty/112590Order111814.pdf.

Thus, because the Kansas Supreme Court has now deferred the issue of the constitutionality of the Kansas ban on same-sex marriage to the federal courts, there is no jurisdictional conflict between federal and state courts that might warrant consideration of issues of comity or abstention. In addition, Defendants do not point to any intra-circuit conflict in support of their argument that en banc review should be granted to address the relationship between these federal

proceedings and the proceedings before the Kansas Supreme Court. Moreover, Defendants' arguments do not raise an issue of exceptional importance because the unique procedural history following the Supreme Court's denial of petitions for certiorari in *Kitchen* and *Bishop* is unlikely to recur in the future.

In any event, Defendants' arguments based on the federal courts' purported interference with the Kansas Supreme Court proceedings are entirely without merit. "[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989). Federal and State courts have concurrent jurisdiction over constitutional questions, and "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). The district court thoroughly and carefully explained why each of Defendants' arguments regarding the mandamus proceeding is meritless, and Defendants have offered no meaningful response to the district court's careful analysis.

IV. Because the Supreme Court Will Likely Soon Resolve Whether State Marriage Laws Excluding Same-Sex Couples Are Unconstitutional, There Is No Need for This Court to Revisit the Question En Banc.

The question raised in these cases is unquestionably one of national importance, but "the swiftest and most efficient means of addressing it is already at hand—Supreme Court review." *Henry v. Ryan*, 748 F.3d 940 (9th Cir. 2014).

Four different petitions for certiorari are now before the Supreme Court seeking review of the Sixth Circuit's decision in *DeBoer v. Snyder*, Nos. 14-1341, 14-5291, 14-3057, 14-5297, 14-3464, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). See Lyle Denniston, *Same-sex marriage: A simple appeal*, SCOTUSblog (Nov. 17, 2014, 3:04 PM), <http://www.scotusblog.com/2014/11/same-sex-marriage-a-simple-appeal/>. And now that there is a circuit split with respect to whether state laws banning same-sex couples from marriage violate the Fourteenth Amendment, the Supreme Court is widely expected to grant review.

Now that there is a split among the circuits, and the Supreme Court is already poised to definitively resolve the constitutional question, convening the entire Tenth Circuit en banc would be an empty exercise and a waste of judicial resources. Rehearing en banc cannot resolve the current split, in which the Fourth, Seventh, Ninth, and Tenth Circuits have struck down state marriage bans and the Sixth Circuit has upheld them as constitutional. Instead, overruling *Kitchen* and *Bishop* would simply turn a 4-1 split into a 3-2 split.

In these circumstances, “overruling [circuit precedent] would neither eliminate the conflict altogether nor advance a new line of argument; ‘restless movement’ to another side of the circuit split would waste judicial resources on a disagreement that only the Supreme Court can resolve.” *Guerrero v. Holder*, 407 Fed.Appx. 964, 967 (7th Cir. 2011) (unpublished); accord *Chavira-Cervantes v.*

Holder, 435 Fed. Appx. 527, 530 (7th Cir. 2011) (unpublished) (Hamilton, J., concurring) (circuit courts are “rarely inclined to grant en banc review for purposes of switching from one side of a circuit split to another, and certainly not when Supreme Court resolution of the issue is likely to come as quickly as [the circuit court] could act”); *Dep’t of Treasury, IRS v. Fed. Labor Relations Auth.*, 862 F.2d 880, 884 (D.C. Cir. 1989) (Ginsburg, J., concurring in denial of rehearing en banc) (in light of contrary decisions by the Fourth and Ninth Circuits, it is “likely that the Supreme Court will want to resolve this question,” and so “I do not conceive it to be a sensible allocation of our time to rehear this case en banc”).

CONCLUSION

Appellants’ Motion for Initial Hearing En Banc should be denied.

Respectfully submitted,

/s/ Stephen Douglas Bonney
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the form and page limitation requirements of Fed. R. App. P. 27(d) and 32(a)(5 & 6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Stephen Douglas Bonney
Stephen Douglas Bonney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 19th day of November, 2014, the foregoing brief of Appellees was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

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