

**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**

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SUSAN LATTA, et al.,  
*Plaintiffs-Appellees,*

v.

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

CHRISTOPHER RICH,  
*Defendant,*

and

STATE OF IDAHO,  
*Intervenor-Defendant.*

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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)

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**UNOPPOSED MOTION OF GOVERNOR C.L. "BUTCH" OTTER  
FOR LEAVE TO EXCEED TYPE-VOLUME LIMITATIONS**

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Pursuant to Fed. R. App. P. 2 & 35(b)(2) and Circuit Rule 32-2, *see United States v. Molina-Tarazon*, 285 F.3d 807 (9th Cir. 2002), Appellant Governor C. L. “Butch” Otter respectfully seeks the Court’s leave to file a petition for rehearing en banc in excess of the applicable type-volume limitation of 15 pages, *see* Circuit Rule 40-1(a). Specifically, Otter requests leave to file a petition for rehearing en banc containing no more than 35 pages. For the following reasons, Governor Otter submits that he has substantial need for this relief.<sup>1</sup>

1. The panel decision holds that Idaho’s marriage laws, including a voter-approved amendment to the Idaho Constitution that defines marriage as the union of a man and a woman, ID. CONST. art. III, § 28, violates the Equal Protection Clause of the Fourteenth Amendment. It is difficult to overstate the importance of the outcome of this case to the people of Idaho. As this Court has recognized, “in our social and legal traditions the institution of marriage has been considered to be an integral part of the foundation of a well-ordered and viable society,” and

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<sup>1</sup> If an extension of time to file a petition for rehearing en banc is necessary to permit the Court's consideration of this motion, we respectfully request that the Court treat this as a motion for such an extension as well.

it is thus “difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative.” *Smelt v. County of Orange*, 447 F.3d 673, 679, 681 (9th Cir. 2006). For this reason, it is imperative that the members of this Court have the information necessary for careful consideration of whether this case should be reheard en banc.

2. The panel misunderstood, and for the most part ignored, Governor Otter’s fundamental argument regarding how the panel’s redefinition of an institution thousands of years old into a genderless union will negatively impact that institution, and with it Idaho and its citizens, especially children of heterosexuals. This needs to be carefully explained.

3. In deciding the exceedingly important questions presented by this case, the panel diverged from the established precedent of the Supreme Court, all other circuits, and this Court in its analysis of facial discrimination. The panel’s new test would effectively substitute a disparate impact for facial discrimination, in conflict with *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. Accordingly, the panel’s reasoning rests on grounds only partially addressed in the briefing to date.

4. The panel relied on a recent panel holding in *SmithKline*, which required heightened scrutiny for sexual orientation and placed this Circuit on the losing end of a 9-2 circuit split and in opposition to Supreme Court precedent. This application of *SmithKline* also has the potential for creating religious strife and other consequences that need to be adequately explained.

5. Counsel for the other parties to this appeal has stated that they will not oppose this motion to exceed the type-volume limitations.

For these reasons, Governor Otter respectfully requests leave to file a petition for rehearing en banc of no more than 35 pages.

Dated: October 21, 2014

Respectfully submitted,

s/ Gene C. Schaerr

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 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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By  /s/ Gene C. Schaerr