Nos. 2011-17357, 2011-17373
Oral Argument Scheduled for September 18, 2013
Before Hon. Mary M. Schroeder, Stephen R. Reinhardt, and Marsha S. Berzon

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE,
Plaintiff-Appellee/Cross-Appellant,

v.

ABBOTT LABORATORIES,
Defendant-Appellant/Cross-Appellee,

Appeal From The United States District Court For The
Northern District of California
In Case No. 4:07-cv-05702-CW, Judge Claudia Wilken

SUPPLEMENTAL BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLEE and CROSS-APPELLANT SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE

Brian J. Hennigan
Alexander F. Wiles
Andrew Ow
Christopher Beatty
IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Lisa S. Blatt
Sarah M. Harris
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5842
Facsimile: (202) 942-5999

Attorneys for Plaintiff-Appellee and Cross-Appellant SmithKline Beecham Corporation d/b/a GlaxoSmithKline

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Other Authorities

INTRODUCTION

Abbott Laboratories ("Abbott") used a peremptory challenge on the only known gay juror during *voir dire* for a trial that challenged Abbott's controversial 400% price increase for an HIV medication. Plaintiffs immediately objected to the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), and the district judge held that *Batson* does not apply to peremptory strikes on the basis of sexual orientation, in civil cases, or to challenges of a single juror. After trial, GlaxoSmithKline ("GSK") appealed. After briefing, the Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated Section 3 of the Defense of Marriage Act ("DOMA") because "seek[ing] to injure" gays and lesbians as a class by denying them equal rights to federal marriage benefits "violates basic due process and equal protection principles." *Id.* at 2693. On July 31, 2013, this Court directed the parties to file supplemental briefs "addressing the effect, if any, of . . . *Windsor* . . . on whether *Batson* . . . applies to the sexual orientation of jurors and, if so, what level of scrutiny shall be applied in this case."

Windsor compels the conclusion that if the Equal Protection Clause offers any meaningful protection to gays and lesbians, the Clause must guarantee them the right and duty to participate in our country's jury process. *Batson* prohibits striking jurors based on classifications that have historically perpetuated discrimination against minority groups, *i.e.*, classifications that

warrant some form of "heightened scrutiny" under the Equal Protection Clause. *Windsor* removes any doubt that sexual orientation is such a classification. *Windsor* obviously applied more than traditional rational basis review when it invalidated Section 3 of DOMA as a law that denied equal protection to married same-sex couples on the basis of their sexual orientation. *Windsor* also strongly supports the conclusion that sexual orientation satisfies all the factors that courts consider when determining whether to apply heightened scrutiny.

ARGUMENT

I. *Windsor* Confirms That Sexual Orientation Discrimination During Jury Selection Violates The Equal Protection Clause

It is untenable after *Windsor* for courts to sanction invidious discrimination against gays and lesbians in a federal courthouse. We are now at a point where gays and lesbians have equal rights in contexts as varied as marriage benefits under federal law, *Windsor*, 133 S. Ct. 2675, general anti-discrimination laws, *Romer v. Evans*, 517 U.S. 620 (1996), and private intimate conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003). Tellingly, the proponents of California Proposition 8 stated to the Supreme Court that "outside of the marriage context," the government could not discriminate against gays and lesbians in any context or manner. *See* Transcript of Oral Argument at 14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (question by

Justice Sotomayor to Charles Cooper). Surely the Equal Protection Clause's guarantee that gays and lesbians be free from discrimination does not stop at the courthouse door.

Just as DOMA violated the equal protection rights of lawfully married same-sex couples, 133 S. Ct. at 2593, 2595-96, striking prospective jurors solely on the basis of their sexual orientation denies them equal legal status. Just as DOMA "demeans" and "humiliates" those same-sex couples and their children, *id.* at 2694, striking gays and lesbians from federal juries blatantly and seriously "demeans" and "humiliates" those potential jurors. *Windsor* aptly observed that "responsibilities, as well as rights, enhance the dignity and integrity of the person." 133 S. Ct. at 2694. Few rights or responsibilities are more significant than "the honor and privilege of jury duty," which "for most citizens . . . is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Bias in the "selection of jurors offends the dignity of persons and the integrity of the courts." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) (quoting *Powers*, 499 U.S. at 402). Depriving gays and lesbians of the right and responsibility of jury service inflicts a stigma that offends equal protection principles and impugns the integrity of our Nation's courts.

A. *Batson* Bars Striking From Jury Service Members Of Groups Subject To Heightened Scrutiny

Batson v. Kentucky, 476 U.S. 79 (1986), holds that the "core guarantee of equal protection, ensuring citizens that their [government] will not discriminate . . . would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors'" membership in a class that has historically suffered discrimination. *Id.* at 97-98. Classifications that cannot be used as a basis for governmental action in other contexts without triggering any form of heightened scrutiny cannot be used as a basis for peremptory strikes either. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994). Striking jurors because they belong to a group that has suffered enduring discrimination is "practically a brand upon them, affixed by the law, [and] an assertion of their inferiority" that perpetuates the very stereotypes used to justify unconstitutional discrimination. *Id.* at 142. Thus, "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Id.* at 128 (citations omitted). The Equal Protection Clause thus prohibits the use of such classifications to deprive individual members of those groups of "'the right and responsibility of jury service.'" *Edmonson*, 500 U.S. at 628 (quoting *Powers*, 499 U.S. at 402).

Batson has limits. The Constitution permits peremptory strikes against members of a class subject to traditional rational basis review; because such groups have not suffered longstanding prejudice disqualifying them from other forms of civil and political participation, those peremptory strikes do not reinforce deep-seated prejudices. *J.E.B*, 511 U.S. at 143; *see also United States v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995) (upholding use of peremptory strikes for obesity). Although individual peremptory strikes may be exercised in an inherently arbitrary fashion, the use of peremptory strikes as a whole is a rational means of allowing litigants to participate in jury selection. *Lewis v. United States*, 146 U.S. 370, 376 (1892). But the Constitution does not tolerate peremptory strikes based on classifications such as race, gender, or sexual orientation.

B. *Windsor* Confirms That Heightened Scrutiny Applies To Sexual Orientation

1. *Windsor* Did Not Apply A Rational Basis Form Of Review

When the Supreme Court reviews the constitutionality of a classification without expressly stating the applicable level of scrutiny, this Court determines the relevant level of scrutiny by "analyz[ing] what the [Supreme] Court actually *did*." *Witt v. Dep't of Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (emphasis in original). When determining what level of scrutiny the Supreme Court applied in *Lawrence* to invalidate a criminal law prohibiting sodomy,

this Court considered it unimportant that *Lawrence* never used the words "heightened scrutiny." *See id.* at 814-19. *Witt* held that the Supreme Court applied heightened scrutiny because this Court could not "reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review." *Id.* at 816. *Witt* explained that "rational basis review" was incompatible with *Lawrence*'s discussion of the "liberty at stake," *Lawrence*'s conclusion that *Bowers* "demean[ed] the lives of homosexual persons," and *Lawrence*'s rigorous analysis and dismissal of justifications for Texas's law. *Id.* at 817 (internal quotation marks and citations omitted). Had *Lawrence* applied rational basis review, "any hypothetical rationale for the law would do." *Id.*

Applying *Witt*'s analysis to *Windsor*, it cannot seriously be contended that *Windsor* used rational basis review to invalidate DOMA—a law that was overwhelmingly approved by Congress and accompanied by significant legislative history—under the Equal Protection Clause. Section 3 of DOMA discriminated against gays and lesbians by defining "marriage," for purposes of federal benefits, to include heterosexual couples married under state law, but not married same-sex couples. *Windsor* all but ignored the numerous, facially plausible reasons advanced to justify DOMA, and did not even bother to consider other conceivable justifications. Yet under rational basis review, challenged laws "bear[] a strong presumption of validity," *FCC v. Beach*

Commc'ns, Inc., 508 U.S. 307, 314 (1993), and challengers bear the burden of negating even hypothetical, *post hoc* rationalizations that did not motivate the legislature, *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2082 (2012); *Heller v. Doe*, 509 U.S. 312, 319-321 (1993). That is why the United States advised the Supreme Court that DOMA could not be invalidated under the "highly deferential standard" of rational basis review, and could only be struck down by applying heightened scrutiny or "'a more searching form of rational basis review.'" Brief for the United States on the Merits Question at 52, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (quoting *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring)).

Windsor's analysis is particularly revealing because the briefs in *Windsor* canvassed at least seven rationales for upholding Section 3 under rational basis review. U.S. Br. at 38-51; Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives at 30-49, *Windsor*, 133 S. Ct. 2675 (No. 12-307). Had the Supreme Court applied rational basis review, any of these reasons would have been a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Witt*, 527 F.3d at 817 (quoting *Beach Commc'ns*, 508 U.S. at 313). For instance, DOMA's defenders cited administrative convenience as a primary justification for the law. BLAG Br. at 34. Under rational basis review, that justification alone would have sufficed. *E.g.*,

Armour, 132 U.S. at 2081-82 (relying on "administrative considerations"). Justice Scalia's dissent thus observed that "the Court certainly does not *apply* anything that resembles that deferential framework." *Windsor*, 133 S. Ct. at 2706.

Instead, *Windsor* concluded that "the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution." *Id.* at 2689. Based on that inquiry, *Windsor* held that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon" gays and lesbians. *Id.* at 2693. Just as *Lawrence* invalidated a statute because it "demean[ed]" the lives of gays and lesbians, *Windsor* held Section 3 of DOMA unconstitutional because it "demean[ed] those persons who are in a lawful same-sex marriage." *Id.* at 2695. That language mirrors the language the Supreme Court uses to discuss other protected classes subject to heightened scrutiny—not traditional rational basis review. *E.g.*, *J.E.B.*, 511 U.S. at 142; *Powers*, 499 U.S. at 412.

2. *Windsor* Justifies Recognition Of Sexual Orientation As A Suspect Classification

Windsor also supports applying heightened scrutiny to all government actions that discriminate on the basis of sexual orientation because such classifications are presumptively "suspect" or "quasi-suspect." *See* GSK

Second Br. 19-29. The Supreme Court has often looked to four considerations to determine whether a classification that singles out a particular group is "suspect": the group has faced a history of discrimination; the classification is irrelevant to an individual's capacity to contribute to society; the group is relatively powerless politically; and the classification is based on an immutable characteristic that makes the group a discernible minority. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-441 (1985). The United States' brief in *Windsor* unequivocally concluded that sexual orientation should be subject to heightened scrutiny based on these considerations. U.S. Br. 18-36; *accord* GSK Second Br. 25-29.

Windsor's reasoning confirms that conclusion. The Court observed a history of discrimination against gays and lesbians with regard to the rights and benefits that flow from the status of marriage. *See* 133 S. Ct. at 2689. The Court then underscored that nothing about sexual orientation should preclude gays and lesbians from enjoying those rights and benefits, reiterating that "[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State." *Id.* at 2692. The Court also emphasized the relative political powerlessness and discreteness of gays and lesbians as a group, insisting that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a

politically unpopular group cannot' justify disparate treatment of that group." *Id.* at 2693 (quoting *Dep't of Ag. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

Peremptory strikes based on a person's race or gender violate the Equal Protection Clause because those classifications, like sexual orientation, historically have been used to justify invidious discrimination. *See J.E.B.*, 511 U.S. at 141-42; *Batson*, 476 U.S. at 96-98. California over a decade ago held that discrimination against gays and lesbians during jury selection is unconstitutional. *People v. Garcia*, 77 Cal. App. 4th 1269, 1279-80 (Cal. Ct. App. 2000). *Windsor* confirms that this same conclusion applies in federal court.

3. *Windsor* Forecloses Any Argument That Ninth Circuit Precedent Requires Rational Basis Review

Abbott does not contest that heightened scrutiny *should* apply to classifications based on sexual orientation. Nor has Abbott argued that striking gay or lesbian jurors on the basis of their sexual orientation could be justified under anything other than traditional rational basis review. Abbott instead relies solely on the syllogism that (1) under *J.E.B.*, no classification subject to traditional rational basis review is subject to *Batson*; (2) *Witt* and *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), held that traditional rational basis review applies to equal protection challenges to laws that discriminate on the basis of

sexual orientation; therefore (3) *Batson* does not apply to discrimination on the basis of sexual orientation. Abbott Third Br. 14-16.

GSK has explained that pre-*Windsor* precedents invalidating discriminatory government action against gays and lesbians already undermined *Witt* and *Phillips*. GSK Fourth Br. 7-11. *Phillips* already had less precedential force because it pre-dated *Lawrence.* And the *only* basis *Witt* offered for declining to apply heightened scrutiny to sexual orientation classifications in the equal protection context was that *Lawrence* addressed only substantive due process. *Witt*, 527 F.3d at 821.

Unlike *Lawrence*, however, *Windsor* is expressly based on equal protection grounds, and thus eviscerates *Witt* and *Phillips*'s rationale for applying traditional rational basis review to sexual orientation discrimination. Although principles of federalism and individual liberty were also at issue, *Windsor* independently invalidated DOMA on equal protection grounds. *Windsor* held that DOMA "violated basic . . . equal protection principles applicable to the Federal Government." 133 S. Ct. at 2693. *Windsor* noted the "strong evidence" that DOMA "ha[d] the purpose and effect of disapproval of th[e] class" of same-sex couples. *Id.* *Windsor* castigated DOMA for making state-recognized same-sex marriages "second-class marriages for purposes of federal law," *id.* at 2693-94, and concluded, "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at

2694. *Windsor* further stressed, "DOMA contrives to deprive some couples . . . but not other couples, of both rights and responsibilities." *Id.* And *Windsor* closed by invoking "the prohibition against denying to any person the equal protection of the laws" as a reason why "treating [same-sex couples] as living in marriages less respected than others" violated the Equal Protection Clause. *Id.* at 2695-96.

Because *Windsor* undercuts "the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," *Windsor*, not this Court's earlier reasoning in *Witt* and *Phillips*, controls. *Witt*, 527 F.3d at 820 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). Because sexual orientation is a classification subject to more than traditional rational basis review, *J.E.B.* and *Witt* do not permit peremptory strikes on the basis of sexual orientation.

4. *Windsor* Disposes Of Abbott's Other Arguments

Windsor also dispels Abbott's arguments that "[e]xtending *Batson* to [s]exual [o]rientation [w]ould [p]resent [s]ignificant [i]mplementation [p]roblems," Abbott Third Br. 18, and that gays and lesbians have suffered insufficient discrimination in jury service to warrant *Batson*'s protections. *Id.* at 16.

a. *Windsor* holds that concerns about implementing constitutional protections for gays and lesbians are insufficient. The Supreme Court

invalidated DOMA despite dire warnings about significant implementation issues and "difficult choice-of-law issues," *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting), because of the constitutional imperative of ensuring that married same-sex couples were treated no differently than other married couples.

That reasoning applies with equal force here. The difficulty of implementing non-discriminatory peremptory strikes is not relevant under *Batson*. Ethnicity, after all, often is not a visible characteristic, but is nonetheless a classification subject to heightened scrutiny and an unconstitutional basis for striking jurors. *E.g.*, *Hernandez v. New York*, 500 U.S. 352, 355 (1991); *U.S. v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989) (applying *Batson* to Hispanic jurors). Thus, in *United States v. Guerrero*, 595 F.3d 1059 (9th Cir. 2010), this Court observed that *Batson* prohibits discriminatory strikes even though "in the modern world it can be difficult, if not impossible, to accurately identify the race/ethnicity of everyone we meet." *Id.* at 1063 n. 3. And California's decade-long prohibition on sexual orientation discrimination in jury selection further belies Abbott's speculation about difficulties of administration.

b. *Windsor* also undermines Abbott's contention that a specific and documented history of "exclusion from jury service" is a prerequisite before the Constitution prohibits striking members of a protected group from juries on the basis of their status. Abbott Third Br. 16. *Windsor* underscored that gays

and lesbians have faced discrimination that was so pervasive and deep-seated that "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." 133 S. Ct. at 2689. Part of that sad history includes discrimination against gays and lesbians in jury service. *See* Kathryne M. Young, *Outing Batson: How The Case Of Gay Jurors Reveals The Shortcomings Of Modern Voir Dire*, 48 Willamette L. Rev. 243, 262-63 (2011). Moreover, the profound pressures on gays and lesbians to suppress their sexual orientation lest they face criminal sanctions, disqualification from military service, and harassment explains why many chose silence over the risk of exclusion from public life.

Even if discrimination against gays and lesbians in jury service were not well documented, it would not matter. The Equal Protection Clause does not flicker in and out of existence depending on the particular context. The Clause bars government discrimination against any given protected class across the board—whether in housing, employment, or jury service. The Constitution bars restrictive covenants against women notwithstanding the absence of historical discrimination against women in housing. So too here. If the promise of equal rights after *Windsor* carries any force, *Batson* prohibits the use of sexual orientation as a basis for excluding gays and lesbians from federal juries.

CONCLUSION

This Court should reverse and remand for a new trial.

Dated: August 14, 2013

Respectfully submitted,
IRELL & MANELLA LLP

By: /s/ Brian J. Hennigan
Brian J. Hennigan

Attorneys for Plaintiff-Appellee and Cross-Appellant SmithKline Beecham Corporation d/b/a GlaxoSmithKline

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Times New Roman in Microsoft Word, 14 point.

I further certify that the brief complies with this Court's July 31, 2013 Order that this supplemental brief be no longer than fifteen (15) pages and that the word count of the brief divided by 280 does not exceed the designated page limit pursuant to Circuit Rule 32-3(3).

Dated: August 14, 2013

/s/ Brian J. Hennigan
Brian J. Hennigan
IRELL & MANELLA LLP
Attorneys for Plaintiff-Appellee and Cross-Appellant SmithKline Beecham Corporation d/b/a GlaxoSmithKline