9TH CIRCUIT EXTENDS EQUAL PROTECTION (AND BATSON) TO SEXUAL IDENTITY

In yet another win for equality, and equal protection, on issues involving sexual orientation and identity, the Ninth Circuit has issued an important opinion holding *Batson v. Kentucky* protections apply to sexual orientation issues in jury selection.

The case is *Smithkline Beecham Corp, dba GSK v. Abbott Laboroatories*, and the decision is here.

This case evolved out of a licensing dispute between two pharmaceutical makers of HIV medications. GSK contended Abbott violated antitrust laws, dealt in bad faith and otherwise engaged in unfair trade practices by licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own combination drug.

Judge Steve Reinhardt set the table:

> During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under Batson v. Kentucky, 476 U.S. 79 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.
>
> This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such

> classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

The fact the court unanimously found that heightened scrutiny applies is critical. Finding heightened scrutiny controlling on sexual preference issues has been the holy grail for a long time, and exactly what the Supreme Court ducked in *Windsor* (mostly) and *Perry* (completely through avoidance).

The *Batson* challenge was effectively uncontroverted materially by Abbot, and the court found exactly that. The far more important discussion, however, comes in the analysis of whether the violation by Abbott violated the Equal Protection Clause. This is a necessary question because, while the Supreme Court in *J.E.B. v. Alabama* extended Batson protections to gender, and presumably other suspect class groups, it still stated:

> "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."

In short, if heightened scrutiny is not found to apply, Abbott's *Batson* violation would nevertheless be permissible (even if slimy). And the 9th Circuit, for all its claimed "liberal tendencies" had in the past avoided clear cut assignment of heightened scrutiny to sexual orientation in such well known cases as *High Tech Gays v. Defense Industrial Security Clearance Office* and *Witt v. Department of the Air Force*. In those cases, the 9th instead framed away and attempted to decide on Due Process grounds instead of Equal Protection, even though they often strained to do so.

But today Judge Reinhardt, writing for the

unanimous panel, took the final step up he was too cowardly to do in *Perry v. Schwarzenegger*. I have always had an inclination Reinhardt was uncomfortable with the dodge he took in *Perry*, today we have some confirmation. Reinhardt notes the Supreme Court, through his friend Anthony Kennedy, still managed to avoid the critical Equal Protection question in the seminal Windsor opinion:

> Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. Lawrence presented us with a nearly identical quandary when we confronted the due process claim in Witt. Just as Lawrence omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does Windsor fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. Witt, 527 F.3d at 816. When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text."

And from there, the barn door opened for full on, and clear cut, assignment of heightened scrutiny under the Equal Protection Clause. After an explanation of the evolution from Kennedy's decision in *Lawrence v. Texas* through *Windsor*, The Ninth states:

> Windsor review is not rational basis review. In its words and its deed, Windsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, Windsor requires that

> heightened scrutiny be applied to equal protection claims involving sexual orientation.

and…

> Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. See McGowan, 366 U.S. at 425–26 (applying the presumption that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"). Due to this distinctive feature of rational basis review, words like harm or injury rarely appear in the Court's decisions applying rational basis review. Windsor, however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. Windsor concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians. 133 S. Ct. at 2692, 2693.

and…

> 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. In short, Windsor requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with Windsor. See Miller, 335 F.3d at 892–93. Because we are bound by controlling, higher authority, we now hold that Windsor's heightened scrutiny applies to classifications based on

> sexual orientation.

There is more, much more, justification and reasoning laid down by Steve Reinhardt. And it is beyond persuasive. This is the decision Reinhardt should have stuck in the face of the oh so timid Supreme Court in *Perry*. It may not have created a different ultimate result, but at least the framing of the question would have been straight up for all to see, and the nine justices forced to confront. When Reinhardt framed his Perry opinion in terms of *Romer* and state law, he weakened both *Perry* and *Windsor*. Today, he makes some amends.

Coupled with the decision of Judge Shelby in the Utah case of *Kitchen v. Herbert* (and apparent receptiveness of the 10th Circuit to upholding it) and in a very similar case the 10th Circuit is being asked by all parties to consolidate, the table is being set rather rapidly for the Supreme Court to have to decide once and for all whether or not to apply heightened scrutiny and give sexual orientation the suspect class protection it deserves. The 9th has now said it is the only logical conclusion, and the 10th Circuit looks lined up to do the same. The time is coming, and likely a lot faster than the Supremes wanted.