Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. 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, NO. 4:07-CV-5702 HON. CLAUDIA WILKEN, PRESIDING

ABBOTT LABORATORIES SUPPLEMENTAL BRIEF REGARDING *UNITED STATES V. WINDSOR*

JEFFREY I. WEINBERGER
STUART N. SENATOR
DANIEL B. LEVIN
KEITH R.D. HAMILTON
Munger, Tolles & Olson LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

KRISTA ENNS
Winston & Strawn LLP
101 California St., Suite 3900
San Francisco, CA 94111
(415) 591-1000

JAMES F. HURST
SAMUEL S. PARK
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHARLES B. KLEIN
STEFFEN N. JOHNSON
MATTHEW A. CAMPBELL
Winston & Strawn LLP
1700 K Street N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Defendant-Appellant and Cross-Appellee Abbott Laboratories

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INTRODUCTION

Abbott Laboratories submits this brief in response to the Court's order for supplemental briefing on the effect, if any, of *United States v. Windsor*, 133 S. Ct. 2675 (2013), on this appeal. As explained below, *Windsor* does not change the analysis set forth in our Third Brief on Cross Appeal that GSK's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), fails.

The Supreme Court has held that peremptory challenges may be exercised against jurors in "any group or class of individuals normally subject to 'rational basis' review." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143 (1994). In striking down § 3 of the Defense of Marriage Act ("DOMA")—which had defined "marriage," for purposes of all federal law, as a union between a man and a woman—the *Windsor* Court applied rational basis review. Following *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that "no legitimate purpose" overcame DOMA's "purpose and effect to disparage and to injure" those in same-sex marriages approved by the State. *Windsor*, 133 S. Ct. at 2696.

Windsor does not overrule this Court's prior precedent applying rational basis review under equal protection to classifications based on sexual orientation. This Court held in 1997 that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment."

Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997) (quoting *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990)). The Court continued to apply that rule in 2008 in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), in affirming dismissal of an equal protection challenge to the military's Don't Ask Don't Tell policy. Panels of this Court are bound by prior decisions unless those decisions are "clearly irreconcilable" with a subsequent en banc or Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *Windsor* is not clearly irreconcilable with *Witt* and *Philips*.

Thus, existing precedent would foreclose extending *Batson* to sexual orientation. But the Court need not reach this issue. Federal courts have long had a practice of deciding constitutional issues only when necessary, and it is unnecessary to decide the scope of *Batson* here for two reasons. First, the totality of the circumstances does not support an inference of intentional discrimination on the basis of sexual orientation in the exercise of the peremptory challenge to Juror B. Second, none of GSK's claims should have reached the jury in the first place, as neither federal law nor New York law imposes antitrust liability under the facts of this case. It is therefore unnecessary for this Panel to decide whether the Constitution precludes peremptory strikes based on sexual orientation.

ARGUMENT

A. *Windsor* Did Not Hold That Classifications Based on Sexual Orientation Are Subject to Heightened Scrutiny Under Equal Protection

Windsor involved the constitutionality of § 3 of DOMA, which defined marriage for purposes of federal law as limited to unions between a man and a woman. After concluding that it had jurisdiction, the Court held that § 3's exclusion of same-sex couples whose marriages were recognized by the States violated the equal protection component of the Fifth Amendment. *Windsor*, 133 S. Ct. at 2683. In so holding, the Court relied on rational basis review rather than heightened scrutiny, concluding that DOMA served "no legitimate purpose." *Id*. at 2695-96.

The Court began by detailing the "history and tradition" of State authority over the definition and regulation of marriage and the history of federal deference to this State authority. *Id*. at 2691-92. The Court then explained that DOMA had "depart[ed] from this history and tradition of reliance on state law to define marriage," *id.* at 2692, and that DOMA's "demonstrated purpose [was] to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second class marriages for purposes of federal law," *id.* at 2693-94. In particular, DOMA denied same-sex couples, whose marriages were lawfully

recognized by their State, the numerous federal benefits and protections granted to married couples. *Id.* at 2694-95.

In light of this history and purpose, the Court held that the "principal purpose and the necessary effect" of DOMA was "to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. Based on this conclusion, the Court held that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2695-96. "By seeking to displace this protection and treating those persons as living in marriages less respected than others," the Court held, "the federal statute is in violation of the Fifth Amendment." *Id.* at 2696. The Court expressly limited the scope of its holding, stating: "This opinion and its holding are confined to those lawful marriages" that DOMA treated unequally. *Id.*

The Court employed a rational basis analysis to invalidate DOMA and relied upon prior decisions applying rational basis equal protection scrutiny. The Court twice quoted the statement from *Romer*, that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Windsor*, 133 S. Ct. at 2692, 2693 (quoting *Romer*, 517 U.S. at 633, quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). *Romer* itself, however, applied rational basis

precedent to Colorado's ban on any state or local prohibitions of discrimination based on sexual orientation, invalidating the Colorado law because it was not "directed to any identifiable legitimate purpose or discrete objective," but rather "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."[1] 517 U.S. at 635; *see also Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012) (explaining that, under *Romer*, "we must consider whether any legitimate state interest constitutes a rational basis for Proposition 8; otherwise, we must infer that it was enacted with only the constitutionally illegitimate basis of animus toward the class it affects" (internal quotation marks omitted)), *vacated on other grounds by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

The *Windsor* Court did not follow, or even expressly discuss, the approach of the Second Circuit, which had held that "homosexuals compose a class that is subject to heightened scrutiny" and that "the class is quasi-suspect." *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *cf. id.* at 208-11 (Straub, J.,

[1] The "careful consideration" language of *Romer* and *Windsor* comes from *Louisville Gas & Electric*, 277 U.S. at 37-38, a 1928 Supreme Court decision in which the Court invalidated, on equal protection grounds, a state tax imposed for recording mortgages with maturities exceeding five years, but not for recording mortgages with shorter maturities. *Cf. id.* at 41 (Holmes, J., dissenting) (arguing tax law was supported by a rational basis). The Supreme Court has repeatedly cited *Louisville Gas & Electric* as authority for the application of rational basis review. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719 n.13 (1972); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 (1930).

dissenting) (maintaining rational-basis review applied). Nor did the Court accept the urging of the United States or Windsor to apply heightened scrutiny to classifications based on sexual orientation. *See* Brief for the United States on the Merits Question at 18-36, *United States v. Windsor*, No. 12-307, 2013 WL 683048 (Feb. 22, 2013) (arguing heightened scrutiny applies); Brief on the Merits for Respondent Edith Schlian Windsor at 17-32, *United States v. Windsor*, No. 12-307, 2013 WL 701228 (Feb. 26, 2013) (same).

In sum, when the Court in *Windsor* followed *Romer* and struck down DOMA because "no legitimate purpose overcomes the purpose and effect [of DOMA] to disparage and to injure those whom the State, by its marriage laws, sought to protect," it must be read as having done so under a rational basis test. *Windsor*, 133 S. Ct. at 2696.[2]

[2] Nothing in *Windsor* alters the level of scrutiny the Supreme Court applies to sexual orientation as a matter of substantive due process. The question on which the Supreme Court granted certiorari in *Windsor* was whether § 3 of DOMA violated the equal protection component of the Fifth Amendment. *See* Petition for a Writ of Certiorari Before Judgment, *United States v.Windsor*, No. 12-307, 2012 WL 3991414 (Sept. 11, 2012). *Windsor* cited *Lawrence*, a substantive due process case, in explaining that the differentiation DOMA drew between same-sex and opposite-sex unions "demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). But *Windsor* does not otherwise discuss, and certainly does not alter, *Lawrence*'s holding.

B. *Windsor* Is Not "Clearly Irreconcilable" with Existing Circuit Precedent Applying Rational Basis Review Under the Equal Protection Clause to Sexual Orientation Classifications

The Supreme Court has held that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review" under the Equal Protection Clause. *J.E.B.*, 511 U.S. at 143; *accord United States v. Santiago-Martinez*, 58 F.3d 422, 422-23 (9th Cir. 1995) (no basis for *Batson* challenge based on classification not subject to heightened scrutiny).

On two occasions, this Court has applied rational basis review in equal protection challenges to classifications based on sexual orientation. *Witt*, 527 F.3d at 821; *Philips*, 106 F.3d at 1420, 1425. In 2008, this Court affirmed the district court's dismissal of an equal protection challenge to the military's "Don't Ask Don't Tell" (DADT) policy. *Witt*, 527 F.3d at 821. In so doing, this Court explained that its earlier decision in *Philips v. Perry*, 106 F.3d 1420, "clearly held that DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence* [*v. Texas*, 539 U.S. 558]." *Witt*, 527 F.3d at 821.[3] Because circuit precedent applies rational basis review under the Equal

[3] GSK has argued that *Witt* "merely assumed without deciding that [*Philips v. Perry*] supplied the standard of review for sexual orientation-based classifications," and thus that this Panel is free to address the merits of the issue. GSK Fourth Brief on Cross-Appeal at 7-8, *GSK v. Abbott Labs.*, Nos. 11-17357, 11-17373 (9th Cir. July 27, 2012) (citing *Brecht v. Abrahamson*, 507 U.S. 619,

Protection Clause to classifications based on sexual orientation, existing law precludes application of *Batson* to sexual orientation.[4]

A three-judge panel is bound by prior precedent unless an intervening decision by a higher court has directly overruled the precedent or "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gamie*, 335 F.3d 889, 900 (9th Cir.

630-31 (1993)). GSK is incorrect. A court may assume the answer to a legal question without deciding if the result would be the same regardless of how the court were to resolve the legal question. *E.g.*, *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996) (assuming without deciding that *Batson* applies to sexual orientation but rejecting *Batson* claim for lack of proof of intentional discrimination). A court may not assume an answer to a legal question without deciding it when the resolution of a claim *depends* on the standard.

The resolution of the equal protection claim in *Witt* depended on the standard of review. Major Witt challenged Don't Ask Don't tell on three separate grounds: (1) procedural due process; (2) substantive due process; and (3) equal protection. *Witt*, 527 F.3d at 809. This Court found a ripeness problem with the procedural due process claim and remanded, *id.* at 812-13; and it remanded the substantive due process claim after holding that *Lawrence* had raised the standard of review for substantive due process claims, *id.* at 813-21. But the Court *affirmed* the dismissal of the equal protection claim. *Id.* at 821. The Court could have avoided deciding the standard of review if the military policy *failed* even under rational basis review, *cf. Perry v. Brown*, 671 F.3d at 1076; but if the standard is undecided, a statement that the policy survives rational basis review only begs the question whether the policy would survive heightened scrutiny.

[4] *Windsor*'s deference to the history and tradition of state regulation of marriage does not support the extension of *Batson* to sexual orientation. Although a California court has held that "exclusion of lesbian and gay men [from a jury] on the basis of group bias violates the California Constitution," *People v. Garcia*, 77 Cal. App. 4th 1269, 1275 (2000), the make-up of federal juries is governed by federal law. And, unlike in *Windsor*, where DOMA thwarted New York's decision to treat all marriages equally, a decision about the reach of *Batson* will not impact the California rule on the make-up of juries in state-court juries.

2003) (en banc). This is a "high standard." *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal quotation marks and citation omitted). Rather, "[t]he intervening higher precedent must be 'clearly inconsistent' with the prior circuit precedent." *Id.* (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir. 2012)).

Windsor is not "clearly irreconcilable" with *Witt*'s equal protection holding. *Windsor* does not reject rational basis review, does not indicate that sexual orientation is a suspect classification, and does not state that classifications based on sexual orientation must be subject to heighted scrutiny under equal protection. Indeed, as discussed above, *Windsor* must be read to have applied rational basis review. And because *Romer* predates *Witt*, *Windsor*'s citation to *Romer* certainly cannot be interpreted to call *Witt*'s holding into question, let alone to be "clearly irreconcilable" with *Witt*. Thus, should this Panel reach the issue of what level of scrutiny applies, *Witt* remains binding.

C. This Court Can and Should Affirm the Judgment Without Reaching the Constitutional Question

It is well established that a federal court should avoid resolution of constitutional questions when the case may be decided on a narrower ground.

Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 453 (1985) (following "the rule of judicial restraint requiring us to avoid unnecessary resolution of constitutional issues"); *see, e.g.*, *Perry v. Brown*, 671 F.3d at 1076 (resolving constitutionality of California's Proposition 8 on narrowest available ground and declining to reach broader constitutional questions).

This Court has followed this principle in the *Batson* arena at least twice, by assuming *arguendo* that *Batson* extends to juror strikes based on sexual orientation, and then affirming on an alternative basis—in each case because there was an insufficient showing that the peremptory challenge was discriminatory. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996) (no prima facie case of discrimination); *United States v. Osazuwa*, 446 F. App'x 919 (9th Cir. 2011) (unpublished) (no clear error in district court's finding that strike was not discriminatory). As Abbott explained in its Third Brief on Cross Appeal, there are two alternative independent bases for affirmance here.

First, the totality of the circumstances does not raise any inference that the strike of Juror B was motivated by discrimination on the basis of sexual orientation. The record shows there were at least three clear neutral reasons for the strike: (1) Juror B worked at this Court; (2) he was the only potential juror who had heard of one of the drugs at issue in the case (Kaletra); and (3) he was the only eligible juror whose testimony suggested he had lost friends to AIDS. *See* Abbott

Third Brief on Cross-Appeal at 23-24, *GSK v. Abbott Labs*., Nos. 11-17357, 11-17373 (9th Cir. July 19, 2012). This Court can and should affirm for lack of a prima facie case without addressing the scope of *Batson*. *See Campbell*, 92 F.3d at 953 (assuming *Batson* applies to sexual orientation but affirming for lack of prima facie showing of discrimination).

Second, none of GSK's claims should have gone to the jury in the first place. *See* Abbott Third Brief on Cross-Appeal at 32-45. In *John Doe I v. Abbott Labs.*, 571 F.3d 930, 935 (9th Cir. 2009), this Court rejected, as a matter of law, the claim that Abbott's repricing of Norvir without repricing its boosted drug, Kaletra, violated the antitrust laws because there was no refusal to deal in the booster drug (Norvir) and no below cost pricing of the boosted drug (Kaletra). And there was no basis here to conclude Abbott had monopoly power—an essential prerequisite to GSK's theory that Abbott had a duty to deal. Abbott Third Brief on Cross-Appeal at 39-43.[5] GSK's state-law claims likewise should never have reached the jury because GSK's implied contract claim and its UDTPA claim failed as a matter of law. *Id.* at 44-45.

[5] GSK's refusal-to-deal theory relies almost exclusively on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a decision "at or near the outer boundary of § 2 liability," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). The facts here, however, are not comparable to *Aspen Skiing*, where Aspen refused to sell its lift tickets to a competitor even at its retail price, demonstrating its intent to reduce competition. *Aspen Skiing*, 472 U.S. at 593, 608.

It is irrelevant whether, as GSK argues, *Batson* errors are exempt from harmless error review. Abbott is not making a harmless error argument—i.e., that another jury, differently constituted, more than likely would have reached the same result; Abbott is arguing that GSK's claims failed as a matter of law and thus should not have gone to the jury in the first place. Likewise, GSK's suggestion that Abbott waived this argument by failing after the verdict to renew its Rule 50 motion for judgment with respect to the antitrust claims makes no sense. The jury's verdict was in Abbott's favor on the antitrust claims. And even a party that is on the losing end of a jury verdict waives only the right to challenge the sufficiency of the evidence by failing to make a post-verdict motion for judgment. *Unitherm Food Sys., Inc. v. Swift Eckrich, Inc.*, 546 U.S. 394, 406 (2006).

CONCLUSION

For the foregoing reasons and those set forth in Abbott's Third Brief on Appeal, this Court should reject GSK's request for a new trial on the basis of the alleged *Batson* violation.

August 14, 2013

Respectfully submitted,

/s/ Daniel B. Levin
DANIEL B. LEVIN

JEFFREY I. WEINBERGER
STUART N. SENATOR
DANIEL B. LEVIN
KEITH R.D. HAMILTON
Munger, Tolles & Olson LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

KRISTA ENNS
Winston & Strawn LLP
101 California St., Suite 3900
San Francisco, CA 94111
(415) 591-1000

JAMES F. HURST
SAMUEL S. PARK
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHARLES B. KLEIN
STEFFEN N. JOHNSON
MATTHEW A. CAMPBELL
Winston & Strawn LLP
1700 K Street N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Defendant-Appellant/Cross-Appellee Abbott Laboratories

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This brief does not exceed 15 pages and therefore complies with the page limit set forth in this Court's July 31, 2013, Order. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/s/ Daniel B. Levin
DANIEL B. LEVIN
Counsel for Abbott Laboratories

9th Circuit Case Number(s) 11-17357, 11-17373

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Matthew A. Campbell
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006

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