2009 WL 2251795 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California,
Southern Division.

Arthur Bruno SMELT and Christopher David Hammer, Plaintiffs,
v.
UNITED STATES OF AMERICA, State of California, and Does 1 through 1,000, inclusive, Defendants.

No. SACV09-00286 DOC (MLGx).
July 27, 2009.

Plaintiffs' Opposition to Defendant United States of America's Motion to Dismiss

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FILED CONCURRENTLY WITH PLAINTIFFS' MOTION TO DEEM THE COMPLAINT FILED NUNC PRO TUNC AND THE FEE WAIVER GRANTED

RES JUDICATA

In Smelt and Hammer I, the United States Court of Appeal for the Ninth Circuit published its ruling in CV-04-01042-GLT.

In that ruling, the Appellate Court held that to have standing to address all legal issues in DOMA, the parties must be married. The Court did not address the issue of whether the marriage could be a second class marriage not protected as a fundamental Constitutional right as all same gender California marriages are second class marriages unprotected by the United States Constitution.

While Plaintiffs respectfully disagree with the Court's analysis of standing, to accommodate the ruling of the Court, Plaintiffs reluctantly, but successfully, obtained their second class fishing license style marriage from the State of California subject to revocation, at will, by the State of California, unlike any opposite gender marriage which is protected as a fundamental Constitutional right.

Now that Plaintiffs have this fishing license class B marriage, Plaintiffs have standing to address the issues in the Complaint.

PLAINTIFFS SOUGHT ORIGINAL JURISDICTION FOR THIS CASE IN THE UNITED STATES DISTRICT COURT BUT WERE DENIED A FEE WAIVER

On November 4, 2008, Plaintiffs sought to file this instant Complaint in Smelt and Hammer II. Every prior Court including Judge Gary Taylor, the Appellate Court for the Ninth Circuit Court of Appeals, and the United States Supreme Court approved of each Plaintiffs' application for a fee waiver. Each Plaintiff is permanently disabled and unable to work.

The same applications for a fee waiver for each Plaintiff was submitted to this Federal District Court with this instant Complaint. Judge Stotler denied the fee waivers. As a result, it was necessary for the Plaintiffs to file in State court because the doors to the Federal Court were locked shut to Smelt and Hammer as a result of the denial of the fee waivers.

Counsel for Smelt and Hammer contacted counsel for the United States of America and advised counsel of the above facts. It was understood in the course of the meet and confer that the United States would remove the case back to Federal Court.

Perhaps it was an oversight for the United States of America to fail to mention any of the above facts in their motion which may have inadvertently led the court to misunderstand why Plaintiffs filed in State court.

Concurrently with this Opposition, Plaintiffs are filing a motion to have the original filing and fee waiver applications be deemed filed and approved *NUNC PRO TUNC* in the interests of justice.

Over the last decade, few areas of constitutional law have received more attention from the Supreme Court than sovereign immunity. It's most recent ruling on the issue, in *United States vs. Georgia,* Nos. 04-12-3, 04-1236, 2006. WL 4397 (U.S. Jan. 10, 2006) actually opens the door to more lawsuits against states by holding that Plaintiffs may use federal laws to sue state governments if they claim that the state is violating the Constitution.

In *City of Bourne,* the Supreme Court declared that the federal Religious Freedom Restoration Act ("RFRA") is a 1993 United States federal law aimed at preventing laws which substantially burden a person's free exercise of their religion, was unconstitutional as applied to state and local governments, because it exceeded the scope of Congress's power under Section 5.

In subsequent cases, the Supreme Court considered whether several other statutes constituted a valid exercise of Congress's Section 5 authority and thus could be used to sue state governments. In *Florida Prepaid vs. College,* 527 U.S. 627 (1999) the Supreme Court held that state governments could not be sued for patent infringement even though a federal statute expressly authorized such suits.

The Supreme Court explained that the federal law did not fit under Congress' Section 5 power because Congress had not proven that the states were engaged in pervasive unconstitutional behavior when infringing patents.

The Supreme Court shifts course in two more recent cases, the Supreme Court allowed more leeway for lawsuits filed against state governments under federal statutes. *Nevada Department of Human Resources vs. Hibbs,* 538 U.S. 721 (2003), was a Supreme Court case which held that Congress had constitutionally abrogated the states' sovereign immunity by enacting the Family and Medical Leave Act of 1993. The Court held that state governments may be sued for violating the family leave provisions of the Family and Medical Leave Act.

The Supreme Court found that when Congress enacted this law it was concerned with gender discrimination and that the loss of family leave disproportionately affected women in the workplace. The Supreme Court said gender discrimination receives intermediate scrutiny rather than the rational-basis review that applies to age or disability cases, and it concluded that Congress has more latitude to legislate under Section 5 when it aims to eliminate discrimination that receives the courts' heightened scrutiny.

A year after *Hibbs,* in *Tennessee v. Lane,* 541 U.S. 509 (2004) was a case in the Supreme Court of the United States involving Congress' enforcement powers under Section 5 of the Fourteenth Amendment, The Supreme Court held that state governments may be sued under Title II of the ADA when they discriminate against people with disabilities by limiting their access to the courts.

The case involved a criminal defendant who crawled on his hands and knees to reach a second-floor courtroom that had no wheelchair access or other accommodation for those with disabilities. In its ruling, the Supreme Court emphasized that access to the courts is a long-recognized, basic right and that states can be sued for keeping people with disabilities from exercising it.

But the *Lane* ruling left many questions unanswered. The Supreme Court said only that states can be sued under Title II if they violate a fundamental right; it did not consider whether Title II could be used to sue state governments for any other reasons.

The Eleventh Circuit upheld a trial court ruling that dismissed Goodman's claims, but the Supreme Court reversed in a unanimous decision. In a brief opinion written by Justice Antonin Scalia, the Supreme Court stated, "While the members of this Court have disagreed regarding the scope of Congress' 'prophylactic' enforcement powers under 6 Section 5 of the

Fourteenth Amendment, no one doubts that Section 5 grants Congress the power to 'enforce ... the provisions of the amendment by creating private remedies against the states for actual violations of those provisions.' The Court declared that "Congress is expressly granted authority to enforce the substantive provisions of the Fourteenth Amendment. The decision clearly says that state governments may be sued for violating the Constitution so far as it is reasonably practical.

After the flurry of sovereign immunity cases the Supreme Court decided between 1996 and 2004, a simple, but controversial principle which has emerged. If a federal law targets types of discrimination that receive heightened scrutiny, then it can be used to sue state governments, even without proof of past constitutional violations. But if the statue involves discrimination or other rights violations that don't receive heightened scrutiny, then Congress cannot authorize suits against states, no matter how elaborate the legislative history. In the instant case of Smelt and Hammer, it has always been argued that same gender marriage is a constitutional fundamental right no different than opposite gender marriage and that, at a minimum, heightened scrutiny must be the standard to adjudicate a fundamental constitutional right.

In *Hibbs,* for example, the Court found that states could be sued for violating the family leave provision, even without finding that the absence of family leave results in unconstitutional gender discrimination.

United States v. Georgia does not alter this framework but adds to it in an important way. The Supreme Court held that a state government can be sued for violating a federal law when the law authorizes a remedy for a constitutional violation. This will expand the circumstances in which such lawsuits can go forward.

The *Hibbs* and *Lane* decisions involve rights that receive heightened scrutiny. In *United States vs. Georgia,* the Supreme Court focused on the Eighth Amendment's prohibition of cruel and unusual punishment. The Supreme Court has never articulated a level of scrutiny for this right. In fact, Scalia's opinion never mentions heightened scrutiny.

Perhaps we cannot interpret *United States vs. Georgia* as simply holding that a state can be sued using federal law if the suit alleges a direct violation of a right or if there is a heightened-scrutiny claim. If so, then the ruling significantly expands the possibilities for suing state governments. Again, Smelt and Hammer have always asserted, and still do, a heightened scrutiny issue in this case.

California's Private Attorney General Statute authorizes this case by private counsel because the State of California is alleged to be violating a fundamental constitutional right. guaranteed by the United States Constitution.

The Attorney General for the State of California simply argues the "M" word as a misnomer, and certainly not as a fundamental constitutional right.

California is now using the word "marriage" as a misnomer like smoke and mirrors to present a misleading argument that since Smelt and Hammer are recognized by California to have a second class marriage, less than a fundamental constitutional right guaranteed by the United States Constitution there is no standing.

This court must look to what the State of California means by the use of the word "marriage" as it is applied to Smelt and Hammer.

California does not mean that Smelt and Hammer have any fundamental constitutional right to be married. In fact, California does not even permit same gender marriage to take place at this time. Not only is there no fundamental constitutional right for same gender couples to marry in California, there is no right at all. Hence, the smoke screen argument that uses the word "marriage" with a wholly different meaning than that of an opposite gender couple.

Therefore, the motion to dismiss is a sham, Marriage to the moving party in this case means nothing more than a second class statutory right to be married until such time as the State of California decides to dissolve the right to this second class marriage.

If this same argument were applied to opposite gender marriages in California there would be a revolution.

Furthermore, in Smelt and Hammer I, the Ninth Circuit Court of Appeals ordered the case "stayed" based upon the claim that

Smelt and Hammer must be married to present the issues at bar. It is therefore absurd for California to urge this Court to ignore the ruling of the Ninth Circuit Court of Appeals now that Smelt and Hammer have achieved second class marriage status. Clearly, the Ninth Circuit ruled that if Smelt and Hammer were married they had standing to address DOMA in it's entirety.

For these reasons, it is respectfully requested that the Court deny the Motion.

Dated: July 24, 2009

Respectfully Submitted,

/S/

Richard C. Gilbert, Attorney for Plaintiffs