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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, JR., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

CASE NO. 09-CV-2292 JW

BRIEF OF *AMICI CURIAE* BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, *ET AL*. IN OPPOSITION TO PROPONENTS' MOTION TO VACATE JUDGMENT

Chief Judge James Ware

Date: June 13, 2011
Time: 9:00 a.m.
Location: Courtroom 5, 17th Floor

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

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IDENTITY OF *AMICI CURIAE*

Bay Area Lawyers for Individual Freedom, AIDS Legal Referral Panel, API Equality – LA, API Equality – Northern California, Asian American Bar Association of the Greater Bay Area, Asian American Institute, Asian American Justice Center, Asian Law Caucus, Asian Pacific American Bar Association of Los Angeles County, Asian Pacific American Bar Association of Silicon Valley, Asian Pacific American Legal Center, Asian Pacific Islander Legal Outreach, Bay Area Association of Muslim Lawyers, The Black Women Lawyers Association of Northern California, The California Employment Lawyers Association, The Charles Houston Bar Association, Courage Campaign, Equal Justice Society, Family Equality Council, Fred T. Korematsu Center for Law and Equality, Freedom to Marry, Gay & Lesbian Advocates & Defenders, Impact Fund, Iranian American Bar Association, Korean American Bar Association of Northern California, Korean American Bar Association of Southern California, Law Foundation of Silicon Valley, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Lesbian & Gay Lawyers Association of Los Angeles, Marin County Bar Association, Marriage Equality USA, National Asian Pacific American Bar Association, Philippine American Bar Association of Los Angeles, Queen's Bench Bar Association, Sacramento Lawyers for the Equality of Gays and Lesbians, San Francisco La Raza Lawyers Association, Santa Clara County Bar Association, Santa Clara County Black Lawyers Association, Society of American Law Teachers, Transgender Law Center, Vietnamese American Bar Association of Northern California, and Women Lawyers of Alameda County.

The undersigned *Amici Curiae* submit the following memorandum to urge the Court to deny Defendant-Intervenors' ("Petitioners") Motion To Vacate Judgment (the "Motion"). The Motion is based on invidious "presumptions" about gay and lesbian jurists that this Court should not entertain, and the relief sought is inconsistent with dearly held principles of equality, judicial independence, and public confidence in the integrity of our judicial system.

INTRODUCTION

Over the years, litigants have occasionally attempted to use judges' affiliations with minority communities to disqualify them. Some parties have made naked challenges based on a

judge's association with a particular community, while others have more obliquely asserted that a judge cannot separate his individual interests from those of his community. With good reason, these challenges have been uniformly rejected: a challenge, whether explicit or tacit, which seeks to disqualify a judge based on an association with a minority community wrongfully impugns not only the judge but also the independence of the judiciary and the fairness of our judicial system. The Motion, which is based only on the "presumption" that former Chief Judge Walker is or appears to be biased because he is gay—as expressed through his relationship with another man—should be rejected for the same reasons.

The Motion is in some respects even more pernicious than these past efforts to disqualify judges. The Motion not only demeans Chief Judge Walker and the judicial process, but it also would impose unique and highly invasive disclosure requirements on the most intimate details of gay and lesbian judges' lives. No judges—regardless of their sexual orientation—should be required to disclose their sexual orientation or intimate details of their private lives or to "disavow" exercising their civil rights as a predicate to presiding over a case.

ARGUMENT

Proponents assert that Chief Judge Walker's sexual orientation—reflected through his long-term relationship with another man—raises concerns about Chief Judge Walker's actual or perceived bias. These concerns, Proponents contend, are so severe that the trial judgment must be vacated because they "presume" that Chief Judge Walker had an interest "that could be substantially affected by the outcome of the proceeding," 28 U.S.C. § 455(b)(4), or because Chief Judge Walker's "impartiality might reasonably be questioned," *id.* § 455(a). Proponents' assertions are as baseless as they are offensive. Chief Judge Walker's sexual orientation and relationship status were irrelevant to his ability to oversee the trial fairly. A judge's affiliation with a minority group has no bearing on the judge's ability to hear a civil rights case. *Amici Curiae* urge the Court to reject Petitioners' arguments and to deny the Motion.

I. COURTS HAVE UNIFORMLY REJECTED CHALLENGES BASED ON JUDGES' AFFILIATIONS WITH MINORITY COMMUNITIES

As courts facing challenges based on a judge's race, religion, gender or political affiliation have uniformly recognized, neither a judge's innate characteristics nor his or her means of expressing them provide a proper basis for recusal. Whether the requests for recusal are made baldly or through pretext, judicial bias cannot be presumed based on a judge's personal characteristics or the ways in which they are expressed.

A. Courts Have Uniformly Rejected Demands For Recusal Based Directly On A Judge's Race, Religion, And/Or Gender

Some litigants have been so bold as to assert that a judge's race, religion or gender alone is cause for disqualification. Because such assertions are baseless, they have been uniformly and forcefully rejected as proper bases for recusal under 28 U.S.C. § 455(b). In *MacDraw, Inc. v. CIT Group Equipment Financing*, 138 F.3d 33 (2d Cir. 1998), counsel sought the recusal of then-United States District Judge Denny Chin, arguing that his Asian-American racial and ethnic heritage and prior affiliation with the Asian-American bar reflected a presumptive bias. 138 F.3d at 36-37. Judge Chin denied the recusal request and sanctioned the moving party's attorneys, rulings emphatically affirmed by the Second Circuit:

> A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group. Such an accusation is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.

Id. at 37. *See also Day v. Apoliona*, 451 F. Supp. 2d 1133, 1138 (D. Haw. 2006) ("Recusal based solely on race is unwarranted and improper."), *rev'd in part on other grounds*, 496 F.3d 1027 (9th Cir. 2007). Similarly, in *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987) (superseded by statute on other grounds), the Eleventh Circuit forcefully rejected the assertion that an African-American judge should have been disqualified from hearing a lawsuit brought to end the continued segregation of Alabama's colleges and universities:

> To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable. This court cannot and will not countenance such a result. The recusal statutes do not contemplate such a double standard for minority judges. The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality[.]

828 F.2d at 1542. This was true even though the judge and his children were members of the class bringing the challenge and could have taken advantage of a favorable outcome. *See also In re City of Houston*, 745 F.2d 925, 929-30 (5th Cir. 1984); *Vietnamese Fishermen's Ass'n v. The Knights of the Ku Klux Klan*, 518 F. Supp. 1017, 1019-21 (S.D. Tex. 1981) (denying motion brought by members of the Ku Klux Klan seeking recusal of an African-American district judge).

In *United States v. Nelson*, 2010 U.S. Dist. LEXIS 63814 (E.D.N.Y. June 28, 2010), a criminal defendant charged with targeting a victim because he was an Orthodox Jew moved for the recusal of the district court judge, who was also an Orthodox Jew. The court denied the motion, noting that there is no statutory or other basis upon which to infer the bias claimed by the defendant:

> If Congress had enacted a statute disqualifying judges from sitting on certain cases because of their religious beliefs or because one of their co-religionists had some involvement or interest in the outcome of the case, there is no doubt that such a statute would be struck down. The defendant's efforts to invoke an act of Congress to achieve such a result is equally unacceptable.

2010 U.S. Dist. LEXIS 63814, at *7. Similarly, in *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995), Ninth Circuit Judge John T. Noonan, Jr. refused to disqualify himself from an abortion-related case on the basis of his Catholic faith. 69 F.3d at 400. After the Ninth Circuit reversed in part and vacated in part an abortion clinic's civil RICO judgment against protestors, the clinic renewed its motion to disqualify Judge Noonan based on his "fervently-held religious beliefs. . . ." *Id.* Judge Noonan flatly rejected the clinic's assertion that "incapacitating prejudice" should be presumed based on his Catholicism, noting that the clinic's argument would "qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases." *Id.* at 401.

As with race- and religion-based challenges, courts have likewise rejected challenges based on a judge's gender. In *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975), a class of female attorneys filed a gender discrimination lawsuit against a number of New York law firms. Some defendants moved for the recusal of district court Judge Constance Baker Motley because she "strongly identified with those who suffered discrimination in employment based on sex or race." 418 F. Supp. at 4 (internal quotation marks omitted). Judge Motley rejected the assertion that her gender, race, or background were proper bases for recusal: "[i]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or other public service backgrounds." *Id.*

B. Courts Have Uniformly Rejected Recusal Demands That Serve As Proxies For Characteristics Such As Race And Religion

Other parties seeking judges' recusal based on affiliations with minority communities have attempted a more subtle approach, couching their recusal demands in some proxy for race, religion or gender. Courts have uniformly seen through these pretexts, denying the requested recusals. In *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974), Judge A. Leon Higginbotham, Jr., issued a long and thoughtful opinion denying a motion to recuse brought by a predominantly white union, which argued that Judge Higginbotham demonstrated actual bias by delivering a speech to a predominantly African-American association of historians. 388 F. Supp. at 156-58.[1] After demonstrating that nothing in his speech was unusual or inflammatory, Judge Higginbotham rejected the assertion that African-American judges should refuse to hear cases involving civil rights:

> So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters where Protestants and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.

[1] As Judge Mukasey noted in *United States v. EI-Gabrowny*, 844 F. Supp. 955 (S.D.N.Y. 1994), Judge Higginbotham's "opinion is lengthy; to attempt to summarize it would do a disservice to both the opinion and its author. Besides, it is worth reading in full for its own sake." 844 F. Supp. at 962.

Id. at 181. Similarly, in *Paschall v. Mayone*, 454 F. Supp. 1289 (S.D.N.Y. 1978), Judge Robert L. Carter denied a motion to recuse himself from a civil rights action brought by an African-American plaintiff, where the defendants argued that Judge Carter's prior employment with the N.A.A.C.P. and New York Special Commission on Attica constituted actual or reasonably perceived bias. 454 F. Supp. at 1299. "To accept that reasoning would require a judge to disqualify himself in any suit dealing with the General Subject matter with which he dealt in practice prior to ascending the bench." *Id.* at 1301. *See also LeRoy v. City of Houston*, 592 F. Supp. 415, 424 (S.D. Tex. 1984) (African-American district court judge denied motion to recuse in a suit alleging discriminatory hiring and elections by the City of Houston: "The fact that I am black and have been a registered voter is not and should not be sufficient to create an appearance of impropriety."); *Baker v. Detroit*, 458 F. Supp. 374, 377 (E.D. Mich. 1978) (Denying motion to recuse: "The conclusion is inescapable that the likely grounds upon which plaintiffs' motion is based is the fact that I am Black, that Mayor Young is Black, that this action was brought by white policemen seeking to challenge the affirmative action program in the Detroit Police Department, and that, therefore, it is reasonable to infer that I am somehow incapable of presiding over this case in a fair and impartial manner.")

In *EI-Gabrowny*, one of the defendants charged with conspiring to destroy the World Trade Center in 1993 sought the recusal of Judge Michael Mukasey, asserting that recusal was required both because of Judge Mukasey's religion and his "Zionist political beliefs." 844 F. Supp. at 957. Judge Mukasey rejected these accusations, finding them improper bases for recusal: "That someone with an imagination or a motive might hallucinate relevance is not the standard, and therefore cannot provide the basis for decision." *Id.* at 962. *See also Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (affirming denial of motion to recuse on grounds that the district court judge was Mormon and the case allegedly involved "a challenge to the theocratic power structure of Utah"); *Idaho v. Freeman*, 507 F. Supp. 706, 730-31 (D. Idaho 1981) (denying motion to recuse based on district court judge's membership in and former leadership position in The Church of Jesus Christ of Latter-Day Saints).

In sum, "[i]t is clear that a judge's color, sex, or religion does not constitute bias in favor of that color, sex or religion." *United States v. Alabama*, 582 F. Supp. 1197, 1203 (N.D. Ala. 1984) (citations omitted), *aff'd* 828 F.2d 1532. Sexual orientation is no different.

II. LIKE RACE, RELIGION AND GENDER, SEXUAL ORIENTATION AND THE MANNER IN WHICH IT IS EXPRESSED ARE NOT PROPER BASES FOR RECUSAL

Proponents concede that Chief Judge Walker's sexual orientation, standing alone, is an insufficient basis upon which to force his recusal. (Doc. No. 768 at 5; *see also generally* Doc. No. 787.) Nonetheless, they contend that he was required to disclose his sexual orientation, his relationship status and his "marriage intention" and to "unequivocally disavow any interest in marrying his partner" in order to demonstrate his impartiality. Because he did not, Petitioners contend "it must be presumed" that Chief Judge Walker was biased against them. (Doc. No. 768 at 3.) Proponents' contentions are baseless. Like a judge's race, ethnicity, religion, gender—and sexual orientation—Chief Judge Walker's relationship with another man is irrelevant to his ability to oversee impartially a trial dealing with gay and lesbian civil rights.

As an initial matter, Proponents are wrong as a matter of law to contend that this Court should presume that Chief Judge Walker was biased. As this Court has recognized, "[s]ince a federal judge is presumed to be impartial, the party seeking disqualification bears a substantial burden to show that the judge is biased." *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665, at *1 (N.D. Cal. Oct. 25, 2007) (Ware, J.) (citing *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1021-22 (N.D. Cal. 2001) ("The judge is presumed to be qualified, and thus there is a substantial burden upon the moving party to show that such is not the case.")). Indeed, the same presumption of bias advocated by Proponents has been rejected time and again by the many cases discussed above. *See, e.g., United States v. Alabama*, 828 F.2d at 1542 ("The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality. . . ."). In *MacDraw*, for example, the Second Circuit affirmed sanctions where a party presumed bias of an Asian-American judge based on the judge's race and ethnic heritage, involvement with the Asian American Legal Defense Fund and prior presidency of the Asian American Bar Association because the party's contention amounted to "a charge that the judge is

[himself] racially or ethnically biased and is violating the judge's oath of office." 138 F.3d at 37. Proponents are not even close to satisfying their "substantial burden" of establishing that Chief Judge Walker was biased. *Torres*, 2007 WL 3165665 at *1; *Reiffin*, 158 F. Supp. 2d at 1021.

At the heart of Proponents' argument is their assertion that because Chief Judge Walker is gay and in a relationship, he cannot be trusted to rule fairly on the merits of the case. Proponents try to argue that they express only the concerns that a reasonable individual would possess. They are incorrect. As courts have established in denying past efforts to mask bias behind similar pretexts, a challenge directed at an intrinsic aspect of a group's member is an impermissible challenge directed at the group as a whole. *See*, *e.g.*, *Local Union 542*, 388 F. Supp. 155, 156-158 (African-American judge's prior speeches to African-American groups not grounds for recusal in civil rights litigation); *El-Gabrowny*, 844 F. Supp. 955, 959-962 (Jewish judge's family members' relationships with State of Israel and connections to political Zionism not a basis for recusal in terrorist trial); *Vietnamese Fishermen's Assn.*, 518 F. Supp. 1017, 1018 (African-American judge's former job as counsel for the NAACP not basis for recusal in action involving members of the Ku Klux Klan); *Blank*, 418 F. Supp. 1. 2-5 (female judge who had previously worked in civil rights not required to recuse from case involving gender discrimination). As Judge Mukasey stated, Proponents' "objection here is not based on race or sex or the Mormon religion, but the motion in this case is in all relevant ways the same as the motion in these cases; it is the same rancid wine in a different bottle." *El-Gabrowny*, 844 F. Supp. at 962.

In addition to the lack of any legal basis, the intimate disclosures demanded by Proponents ask too much of judges, as analogous situations demonstrate. Judges are not required to disclose marital problems or the circumstances surrounding a divorce prior to hearing a constitutional challenge to the Family Code. Immigration judges do not disclose their family's immigration history so the parties can decide whether or not to seek recusal. Transgender judges are not asked to disclose the sex they were assigned at birth as a requirement for presiding over a sexual harassment suit. The precedent Proponents seek to establish would subvert the presumption of impartiality and make every aspect of a judge's personal life fair game for questioning. This is not what is required by 28 U.S.C. § 455(b) and should not be accepted here.

Finally, there is also no basis for Proponents' demand that Chief Judge Walker was required to "disavow" marriage in order to oversee trial in this matter. Judge Higginbotham rejected the assertion that to remain impartial he would be required to "disavow" an interest in his African-American heritage:

> [B]y the subtle tone of their objection, [movants] demonstrate either that they want black judges to be robots who are totally isolated from their racial heritage and unconcerned about it, or, more probably, that the impartiality of a black judge can be assured only if he disavows, or does not discuss, the legitimacy of blacks' aspirations to full and first class citizenship in their own native land.

Local Union 542, 388 F. Supp. at 178. Similarly, in *United States v. Alabama*, the Eleventh Circuit did not require Judge Clemon to "disavow" that his children would ever attend public colleges in Alabama, 828 F.2d at 1541-42, nor did the Fifth Circuit require Judge McDonald to "disavow" any intention to vote in municipal elections in order to preside over a challenge to Houston's system for electing city council members, *City of Houston*, 745 F.2d at 929-31.

Whether or not in a committed relationship, whether or not hoping to marry some day, all judges, all Americans, clearly have an interest in having the freedom to marry—the right to decide for themselves rather than be precluded by a government bar; that is not the kind of interest that triggers judicial disqualification, for then what judge would be qualified to sit? Proponents have shown nothing to suggest that Judge Walker's familial status makes that general interest into the kind of more than speculative, concrete interest that disqualifies. Any interest Chief Judge Walker may have in the litigation is far too speculative to give rise to a conflict. "'[A]n interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.'" *United States v. Alabama*, 828 F.2d at 1541 (quoting *In re City of Houston*, 745 F.2d at 929-30); *City of Houston*, 745 F.2d at 926 (affirming district judge's decision declining to recuse even though judge was member of a voting rights class). Like the judges in *United States v. Alabama* and *City of Houston*, any potential benefit Chief Judge Walker might possibly receive from the ruling is far too nebulous or general to give rise to a conflict requiring his recusal or justifying vacating his judgment.

CONCLUSION

Despite their arguments to the contrary, Proponents' Motion is grounded in the offensive and absurd assumption that gay and lesbian judges are unable to separate their personal interests from their ability to decide cases based on the law and facts presented to them. Proponents argue that gay and lesbian judges cannot fairly decide a case relating to their civil rights without expressly identifying themselves as gay or lesbian, describing their relationship status and the intimate aspirations they share with their partners, and then disavowing their rights. Proponents cite no authority requiring such intrusive, derogatory disclosures. In fact, courts have time and again affirmed that a judge affiliated with a minority community can indeed remain impartial and fairly preside over cases that involve that particular minority community. Proponents' Motion should be denied.

DATED: May 25, 2011

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