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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, JR., *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 JW

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ACLU FOUNDATION OF NORTHERN CALIFORNIA, NATIONAL CENTER FOR LESBIAN RIGHTS, AND EQUALITY CALIFORNIA IN OPPOSITION TO PROPONENTS' MOTION TO VACATE JUDGMENT

Judge: Chief Judge Ware
Courtroom: Courtroom 5, 17th Floor

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I. INTRODUCTION

Proponents' motion is part of an ugly history of attempts to disqualify federal judges on the basis of their personal characteristics. In a famous 1975 case alleging sex discrimination against a law firm, Judge Constance Baker Motley was accused of "'strongly identif[ying] with those who suffered discrimination in employment because of sex or race'" on account of her work as a civil rights advocate prior to joining the federal bench. *See Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975). Judge Motley rightly refused to recuse herself, and as Supreme Court Justice Ruth Bader Ginsberg has explained:

> Constance Baker Motley was engaged in the civil rights struggle as a principal member of Thurgood Marshall's NAACP Legal Defense and Educational Fund team. She helped write briefs in *Brown v. Board of Education* and follow-on school desegregation cases. She represented James Meredith in his successful effort to gain admission to the University of Mississippi and was counsel to Charlayne Hunter-Gault in her similarly successful effort to gain admission to the University of Georgia. She argued ten cases before the United States Supreme Court, winning nine. . . .
>
> Among the many cases over which she presided, in the mid-1970s, she was assigned to adjudicate *Blank v. Sullivan & Cromwell*, a Title VII gender-discrimination class action against several of New York's most prestigious firms. In the course of that litigation, she was asked by defense counsel to recuse herself because she was a woman and, before her elevation to the bench, a woman lawyer. She declined to do so, explaining politely but firmly:
>
> 'If background or sex or race of each judge were, by definition, sufficient 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 public service backgrounds.'

Justice Ruth Bader Ginsburg, *Human Rights Hero: Tribute to Constance Baker Motley*, Human Rights Magazine, Fall 2005, *available at* http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_Fall05_bakermotley.html (last visited May 10, 2011) (quoting *Blank*, 418 F. Supp. at 4).

Having lost after a trial on the constitutionality of Proposition 8, Proponents now try essentially the same tack. They ask for a do-over because—in their own words—it "must be presumed" that a male judge who was in a committed relationship with another man could not approach the case with the same unbiased judgment that they believe a heterosexual judge would bring to bear. Proponents' motion to vacate the judgment is a transparent attempt to deflect attention from the merits of this case and shift it onto an irrelevant sideshow regarding Chief Judge Walker's

sexual orientation. Chief Judge Walker's sexual orientation provides no basis for recusal in this case. First, rulings on broad constitutional questions routinely affect large segments of the public at large, and the fact that judges are part of the public does not warrant their recusal. Second, a rule that requires the disqualification of judges in same-sex relationships effectively amounts to the disqualification of lesbian and gay judges. The notion that a gay judge could not fairly preside over this case is incorrect, offensive, and damaging to the credibility of the judiciary itself, and should be rejected. Proponents' motion should therefore be denied.

II. ARGUMENT

A. Rulings on Broad Constitutional Questions Affect Large Segments of the Public and Therefore Cannot Constitute a Basis For Recusal.

By design, constitutional rights belong to everyone, and a ruling by a judge will often affect large segments of the public, and may even affect rights that judges along with others might exercise. But that does not constitute a disqualifying interest for purposes of recusal nor create a circumstance where a judge's impartiality could reasonably be questioned. 28 U.S.C. §§ 455(a) & (b)(4). It is often the case that a judge is called upon to decide issues that could directly or indirectly affect that judge along with large segments of the public, whether the issues concern the right to freedom of speech, the right to free exercise of religion, the right against unlawful search and seizure, the right to bear arms, or, as here, the right to be free from governmental discrimination and the fundamental right to marry. The fact that a pending case involves important constitutional rights in which broad groups or all citizens share an interest has never been held sufficient to require recusal. *See, e.g.*, *In re Houston*, 745 F.2d 925, 930 (5th Cir. 1984) ("an interest which a judge has in common with many others in a public matter is not sufficient to disqualify him") (quoting 48A C.J.S. *Judges* § 123 (1981)) (judge was not disqualified from hearing a voting rights case where the judge was a member of the class affected); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987) (refusing to disqualify judge from hearing a race discrimination case involving public universities in Alabama even though the judge's children were in the class affected by the ruling). Central to the functioning of the judicial system is "the general presumption that judges are unbiased and honest." *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998). That presumption applies with equal force when,

because of the broad nature of the rights at issue or the facial unconstitutionality of a broadly applicable law, all judges may be affected or potentially affected by a case.

While this case is of unquestionable importance to lesbian, gay, and bisexual individuals, the legal rights at stake in it are universally applicable. To illustrate: one of the key questions raised by this case concerns the proper standard of review required by the Equal Protection Clause of the Fourteenth Amendment for laws that discriminate on the basis of sexual orientation. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). Because all individuals have a sexual orientation, a pronouncement on the proper standard of review for sexual orientation-based classifications necessarily affects all individuals—whether lesbian, gay, bisexual, or heterosexual. That is, the constitutional right to be free from discrimination on the basis of sexual orientation protects gay and non-gay people alike, *see, e.g.*, *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001) (addressing equal protection claim asserted by heterosexual employee), just as the right to be free from race discrimination protects persons of all races, *see, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005), the right to be free of sex discrimination protects both men and women, *see, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982), and the rights protected by the Free Exercise Clause protect people of all religions or of no religion, *see, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985); *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (atheism is a religion for purposes of Free Exercise Clause).

If the recusal statute were interpreted to require recusal on the basis of race, sex, religion, sexual orientation, or any other personal characteristic as to which governmental discrimination is prohibited, the result would be intolerable and would itself violate equal protection. *See Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 U.S. Dist. LEXIS 65069, at *26 (D. Ariz. Jul. 15, 2009) ("the idea that an Hispanic judge should never preside over a controversial case concerning alleged acts of racial profiling committed against Hispanics is repugnant to the notion that all parties are equal before the law"). For example, in a case that raised the question of whether women should have the right to vote, it would be unthinkable to suggest that a judge would have a duty to recuse herself for the sole reason that she is a woman. That would be true even though it is obvious that the injunctive relief ordered in such a case might have a more direct impact upon female judges rather

than on male judges. "[T]he absolute consequence and thrust of [a contrary] rationale would amount to, in practice, a *double standard* within the federal judiciary." *Pennsylvania v. Local Union 542*, 388 F. Supp. 163, 165 (E.D. Pa. 1974) (Higginbotham, J.) (denying race-based recusal motion in employment case alleging racial discrimination because "[t]o suggest that black judges should be so disqualified would be analogous to suggesting that the slave masters were right when, during tragic hours for this nation, they argued that only they, but not the slaves, could evaluate the harshness or justness of the system").

There is similarly no requirement to recuse based on whether a judge is more or less likely to exercise a fundamental right or liberty interest that is at issue in a case. Female judges of reproductive age have no duty to recuse themselves from cases involving reproductive freedom or to disclose their pregnancy status. And surely a judge ruling on the constitutionality of a statue criminalizing consensual sodomy has no responsibility to disclose or disclaim anything about his or her intimate relationships or private conduct. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (declaring all laws prohibiting consensual sodomy facially invalid, including those in nine states outlawing both different-sex and same-sex conduct). Although judges must disclose certain types of information (such as financial interests, or a significant relationship to the parties themselves) in order to discharge their duties without the appearance of a conflict, that does not permit "an untethered expansion of the recusal statute to the point where a litigant can engage in a broad based fishing expedition to dig up potentially disqualifying 'interests' that a judge may be accused of having in a particular case." *Melendres*, 2009 U.S. Dist. LEXIS 65069, at *26.

B. Recusal on the Basis of Sexual Orientation Is Neither Required Nor Permitted.

1. Exclusion on the Basis of a Same-Sex Relationship Amounts to Exclusion on the Basis of Sexual Orientation.

Proponents appear to recognize that sexual orientation is not an appropriate basis for recusal. Mot. at 5 ("we are *not* suggesting that a gay or lesbian judge could not sit on this case") (emphasis in original). Rather, the discovery that has now purportedly shaken their confidence in the fairness of the district court proceedings is not simply that Chief Judge Walker has said that he is gay—to which they supposedly have no objection—but that, according to their motion, he has been in a ten-year

relationship with a man. But that alleged distinction defies common sense: if sexual orientation is not a basis for recusal, then neither is an intimate relationship with a person of the same sex, which is the essential way in which a gay person's sexual orientation is expressed. The Supreme Court has expressly recognized that its "decisions have declined to distinguish between status and conduct in this context." *See Christian Legal Soc'y v. Martinez*, 561 U.S. --, 130 S. Ct. 2971, 2990 (2010) (finding no difference between a policy of discriminating against lesbian and gay individuals and a policy of discriminating against individuals engaged in "unrepentant homosexual conduct"); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[1]

Proponents' motion is therefore indistinguishable from the many other recusal motions that have been historically levied against judges based on their personal characteristics, and that have been rejected as thinly-veiled accusations of bias based on those characteristics. As noted above, Judge Motley confronted a recusal motion in a sex discrimination case. *Blank*, 418 F. Supp. at 4. Similar recusal motions have been filed based on a judge's race. *See, e.g., Local Union 542*, 388 F. Supp. at 157 (denying recusal motion in race discrimination case based on speech delivered by judge to Association for Study of Afro-American Life and History); *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 138 F.3d 33 (2d Cir. 1998) (affirming Rule 11 sanctions against attorney who brought recusal motion based on district judge's involvement in Asian-American organizations); *Melendres*, 2009 U.S. Dist. LEXIS 65069, at *26 (denying recusal motion that "could easily be interpreted as an argument that this Court's alleged bias somehow flows from her racial heritage"). The same is true for recusal motions based on a judge's religion. *See United States v. El-Gabrowny*, 844 F. Supp. 955, 957 (S.D.N.Y. 1994) (denying recusal motion based on judge's Orthodox Judaism); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (affirming denial of recusal motion

[1] Despite their attempt to disclaim such a categorical result, the logical conclusion of Proponents' reasoning can only be that all lesbian, gay, and bisexual people, as a class, would necessarily be disqualified from presiding over this action. Proponents assert that a disqualifying interest is triggered whenever a judge determines that he or she "might desire[] to marry" a person of the same sex. Mot. at 3. Thus, recusal would be required of even an unpartnered lesbian or gay judge with no romantic prospects on the horizon, but who might someday wish to marry a person of the same sex.

where district judge was Mormon and lawsuit involved "theocratic power structure in Utah"). As in *El-Gabrowny*, "[t]he 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 motions in those cases; it is the same rancid wine in a different bottle." 844 F. Supp. at 957.

2. Sexual Orientation Is Unrelated to One's Ability to Judge Impartially.

All of these historical recusal motions share a common and fatal flaw: the belief that a judge's personal characteristic clouds his or her ability to render a fair and impartial decision. While every federal judge comes to the bench with a particular sexual orientation—as well as a particular race, sex, religious viewpoint, and socioeconomic status—every judge also takes an oath to "faithfully and impartially discharge and perform [their] duties" and to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Lesbian, gay, and bisexual judges are entitled to the same presumption of impartiality that all other judges enjoy. *Ortiz*, 149 F.3d at 938. Indeed, for that reason, any lesbian, gay, or bisexual judge who had been randomly assigned to hear this case would have an affirmative obligation *not* to recuse on the basis of his or her sexual orientation—as would be true for a heterosexual judge. *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008) ("in the absence of a legitimate reason to recuse himself, 'a judge should participate in the cases assigned'").

It is incorrect—and deeply offensive—to suggest that a judge's sexual orientation would determine how he or she would rule in a case involving claims of sexual orientation discrimination, just as it would be offensive as to suggest that a judge's race or sex would determine how he or she would rule in a case alleging race or gender discrimination. This clearly is not the case. For example, in 2004, an openly-gay justice on the Oregon Supreme Court voted to deny marriage to same-sex couples asserting rights under the state constitution. *See Li v. Oregon*, 338 Ore. 376 (2004); Joan Biskupic, *Amid Debate Over Rights, Number of Gay Judges Rising*, USA Today, Oct. 17, 2006, *available at* http://www.usatoday.com/news/washington/2006-10-17-gay-judges_x.htm (last visited May 9, 2011) (noting that the justice at issue considered and rejected the notion that he had a duty to recuse himself from the case on the basis of his sexual orientation). Simply put, there is no reason to believe that gay jurists will be unable to rule fairly and reject arguments made on behalf

of gay people when they believe that that is what the law requires, just as members of all minority and majority groups are able to do when considering claims made by members of populations to which they belong.

3. Recusal Based on Sexual Orientation Undermines, Rather Than Promotes, Public Confidence in an Unbiased Judiciary.

Although Proponents' motion is meritless, it is not costless. First, by placing Chief Judge Walker's sexual orientation at issue, Proponents seek to cast doubt on the impartiality of all lesbian, gay, and bisexual judges. This harm is one-sided, because the thrust of the motion is that it would be impossible for a heterosexual judge to be biased in this case on the basis of his or her sexual orientation, whereas the same purportedly cannot be said of a gay judge. Second, the broader proposition advanced by the motion is that *any* personal characteristic of a judge may be relevant to whether he or she can render a fair and impartial decision, which damages the credibility of every judge and therefore undermines public confidence in the judiciary as a whole. Third, to the extent that members of minority groups are more likely to experience discrimination and seek redress for those harms in court, judges of minority groups will be targeted for unwarranted recusal motions far more often than other judges. As shown above, history has already proven that to be true.

Judicial diversity encourages public confidence in the judiciary, and efforts to require the recusal of judges based on sexual orientation would ultimately impair public confidence by undermining that diversity. *See* Alfred P. Carlton, Jr., *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, at 12 (July 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf ("We are becoming a more and more diverse people. Our judiciary . . . should reflect the diversity of the society in which we live. If they do not, the legitimacy of the courts and the judicial system will be called into question with increasing frequency."). As then U.S. Magistrate (and now District) Court Judge Edward M. Chen explained, "The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by

the majority. How can the public have confidence and trust in such an institution if it is segregated – if the communities it is supposed to protect are excluded from its ranks?" *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1117 (2003). A judicial system that would countenance the forced recusal of a judge based on his or her sexual orientation—or race, sex, or any other protected characteristic—is not one in which the public could reasonably have confidence.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court deny Proponents' motion to vacate the judgment.

Dated: May 13, 2011

Respectfully submitted,

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