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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 AMICUS CURIAE THE BAR ASSOCIATION OF SAN FRANCISCO IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO VACATE JUDGMENT

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

I. INTRODUCTION

Defendant-Intervenors ("Movants") claim that, to reassure the public about the rectitude of our justice system, it is necessary to vacate the judgment in this case. Defendant-Intervenors' Motion to Vacate Judgment ("Motion") at 17:12-18:12.

The opposite is true.

The judgment cannot be vacated unless this Court finds that Chief Judge Walker had a disqualifying conflict and chose to ignore it. Such findings would not only be unwarranted, they would be understood as signaling that judges in general, and gay judges in particular, are unwilling or unable to perform their duties in accordance with the law and their oath.

The members of The Bar Association of San Francisco ("BASF") have a duty to "maintain the respect due to the courts of justice and judicial officers." Cal. Bus & Prof. Code § 6068(b).[1] That duty carries with it the correlative right to defend the courts and judicial officers when they are unfairly criticized, as in this case.[2]

Movants are correct when they say that "this high-profile case involves a highly divisive subject matter" and that "[h]owever this case is ultimately resolved, a large segment of the population will be unhappy with the result." Motion at 18:5-10.

To that inevitable unhappiness Movants would add the undermining of public confidence in the fairness and impartiality of our judiciary.

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[1] *See also* ABA Model Rules Preamble ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

[2] BASF is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,300 individuals, law firms, corporate legal departments, and law schools. It provides a collective voice for public advocacy, professional growth and public education about our legal system.

II. ARGUMENT

A. Recusal Requires Justification

Judges cannot recuse themselves at will. There must be a legal basis that requires it. *Clemens v. U.S. Dist. Ct. for the Central Dist. of Cal.*, 428 F.3d 1175, 1179 (9th Cir. 2005) ("[A] judge has 'as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.'" (citation omitted)). Avoiding controversy or criticism is not such a basis. If it were, public clamor would drive many judges away from controversial or unpopular cases.

In the ordinary course, this case was randomly assigned to Chief Judge Walker, whose long and distinguished service to our District is well known. He did not ask for the assignment, nor did he have the option of declining to take it, unless he could properly conclude that he faced a disqualifying conflict.

He could not reach that conclusion and neither can this Court.

B. Chief Judge Walker's Alleged "Interest" Is Contingent and Speculative

Movants' legal argument is remarkably narrow.

They do not claim that a gay judge could not decide this case. Indeed, they expressly disclaim any such view. "It is important to emphasize at the outset," they say, "that we are *not* suggesting that a gay or lesbian judge could not sit on this case." Motion at 5:18-19 (emphasis in original).

Nor do they claim that Chief Judge Walker should not have presided over it. Rather, they say he could have done so, if only he had disclaimed any intention of marrying.

Movants derive Chief Judge Walker's obligation to make that disclaimer from the nature of his relationship with his partner. "[B]ecause Chief Judge Walker has not disclosed whether he and his partner have any interest in marrying, let alone unequivocally **disavowed** such an interest," they say, "it must be **presumed** that he has a disqualifying interest . . . ." Motion at 10:5-7 (emphasis supplied).

Fifteen times Movants refer to Chief Judge Walker's "long-term" and/or "committed" same-sex relationship. Motion at 2:10-11, 2:21, 3:26-27, 5:7-8, 5:24, 8:4-5, 9:9-10,

10:8-9, 11:24-25, 11:26, 12:14, 13:15, 13:17, 13:19, 14:6-7. It is on the assumed constancy of this "commitment" that Movants base their "presumption" that Judge Walker and his partner—about whose intentions nothing is known—intend to marry when they can, and it is on that "presumption" that Movants then base their claim that Chief Judge Walker was required to disclaim any marital intention. There is no little irony in the fact that Movants—whose arguments in support of Proposition 8 emphasized the importance of fostering stable and enduring relationships[3]—hinge their argument for vacating the judgment on Chief Judge Walker's presumed constancy.

Unlike the situation in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), on which Movants principally rely, Chief Judge Walker's ruling had no direct or immediate impact on him, or on any entity in which he had an interest or to which he owed a duty.[4] Whether Chief Judge Walker's ruling might ever impact him would depend on future events, including his own wishes and those of his partner.

Many cases have held that membership in a class of persons that may derive immediate benefit from the outcome of a case does not require recusal. *See, e.g.*, *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984) (judge could hear voting rights case despite living in the affected district); *Christiansen v. National Savings and Trust Co.*, 683 F.2d 520, 521 (D.C. Cir. 1982) (judges insured by Blue Cross could hear case involving all federal employees who were Blue Cross subscribers); *U.S. v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987) (superseded by statute on other grounds) ("'[A]n interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.'" (quoting *In re City of Houston*, 745 F.2d at 929-30)).

This case is one giant step removed even from those cases.

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[3] Defendant-Intervenors' Proposed Findings of Fact, Doc. No. 290 at 20, ¶ 208.

[4] *Liljeberg* involved a judge who, as a university trustee with fiduciary obligations to it, decided a case involving the university in question.

Movants do not contend that the judgment in this case conferred an immediate benefit on Chief Judge Walker, but rather only that it created the potential for such a benefit if he and his partner chose, at some future time, to take advantage of it. Such a contingent and speculative interest cannot supply the basis for recusal. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998) ("remote, contingent, or speculative interest[s]" do not require recusal); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) ("where an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's impartiality"). *See also Guardian v. 950.80 Acres of Land*, 525 F.3d 554, 557 (7th Cir. 2008).[5]

Movants try to turn the possibility of a benefit into the obtaining of one by presuming that Chief Judge Walker intends to claim the benefit. The "evidence" on which this "presumption" rests is scant. It consists of the following statement in a press report:

> Walker had never previously discussed his sexual orientation in the press, but on Wednesday said he was in a 10-year relationship with a physician.[6]

To avoid the fact that their challenge to the judgment is belated, Movants themselves note that "The Ninth Circuit has repeatedly stressed that '[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion,' and 'characterizations appearing in the media' are inadequate to require recusal under Section 455." Motion at 13 n.3 (citations omitted).

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[5] In *Guardian*, the alleged bias—on the part of a court-appointed commissioner rather than a judge, but still based upon an application of Section 455—was his potential future financial benefit. 525 F.3d at 555. The underlying case involved pipeline easements, and the commissioner was a retired judge who worked at a firm that represented pipeline companies. *Id.* Indeed, he himself did work for such companies. Movants in that case alleged that the commissioner was necessarily biased because he hoped to secure future business from pipeline companies and would rule in their favor. *Id.* The Seventh Circuit affirmed the district court's denial of the motion. *Id.* at 559.

[6] *See* Motion at 7:24-26 (quoting Dan Levine, *Gay judge never thought to drop marriage case*, REUTERS, Apr. 6, 2011, *available at* http://www.reuters.com/article/2011/04/06/us-gaymarriagejudge-idUSTRE7356TA20110406). The only other "evidence" Movants offer to support their "presumption" is a statement from the *L.A. Times* that Chief Judge Walker "attends bar functions with a companion, a physician, colleagues say." *See* Motion at 6:24-26.

But relying on "rumor" and "speculation" is exactly what Movants attempt to do. The only "evidence" of the marital intentions of Chief Judge Walker and his partner is speculation that, although they did *not* marry when they could have done so prior to the passage of Proposition 8, they would do so if given the opportunity again.

Applying Movants' logic to other situations yields strange results. Must judges who own—or might someday own—any securities disclaim all benefits they might derive from a ruling on the scope of the securities laws or the duties of stockbrokers? Must judges who rule on the criteria for bringing class actions promise to opt out of any class in which they may find themselves?

Even as to this case, Movants' argument raises difficult questions: Would *any* judge be able to hear this case? Is a judge with strong religious convictions subject to recusal when asked to find that "[e]xtending marriage to same-sex couples would render the traditional definition of marriage embraced by millions of Christian, Jewish, and Muslim Americans no longer legally or socially acceptable, thereby forcing many of these Americans to choose between being a believer and being a good citizen"? Defendant-Intervenors' Proposed Findings of Fact, Doc. No. 290 at 10-11. Is a male judge with a family subject to recusal when asked to find that "[e]xtending marriage to same-sex couples would send a message to men that they have no significant place in family life, weakening the connection of fathers to their children"? *Id.* at 11. *See, e.g.*, *In re City of Houston*, 745 F.2d 925, 931 (5th Cir. 1984) ("For every class that claims to be injured . . . there is a counter-class that, by definition, must be benefited."). Movants' own formulation of the issues in this case suggests that all, or nearly all, judges have a personal stake in this case.

C. Even a Non-Contingent Interest Would Not Be Disqualifying

It is well accepted that a judge who belongs to a racial minority can decide a case involving the rights of members of that same racial minority, even if the judge might benefit directly from the ruling. *See, e.g.*, *Alabama*, 828 F.2d at 1542 (improper to disqualify judge on basis of his children's membership, and his own arguable membership, in the plaintiff class;

"fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality"); *In re City of Houston*, 745 F.2d 925 (judge who was a member of a class in a voting rights case properly denied motion to recuse).

It is well accepted that women judges can be trusted to decide issues of gender equality about which they have strong personal feelings, or from which they and their daughters might derive direct personal benefit. *See, e.g., Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) ("The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal.").

As noted in the amicus briefs of other parties, the case law is clear and consistent that membership in a religious group does not disqualify a judge from presiding over cases that involve the rights of members of that group or cases that involve issues on which the judge's religion takes a strong stand. In all these cases it is presumed that judges can and do base their decisions on the facts and the law and not on the potential effect of those decisions on the interests of the groups to which they belong or the religious doctrines they hold dear. *See, e.g.*, *United States v. El-Gabrowny*, 844 F. Supp. 955 (S.D.N.Y. 1994) (judge who followed precepts of Orthodox Judaism and held Zionist political beliefs could handle trial of alleged terrorists indicted for the 1993 attack on the World Trade Center allegedly motivated by anti-Israel sentiments); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (upholding denial of motion to disqualify where "[o]ne of the grounds asserted was that [the judge] was a Mormon" and that the case involved "a challenge to the theocratic power structure of Utah"); *State of Idaho v. Freeman*, 507 F. Supp. 706, 729 (D. Idaho 1981) (denying motion to recuse Mormon judge in case involving Equal Rights Amendment; "a judge's background associations, which would include his religious affiliations, should not be considered as grounds for disqualification"); *Feminist Women's Health Center v. Codispoti*, 69 F. 3d. 399 (9th Cir. 1995) (Catholic judge with "fervently held" religious beliefs not precluded from ruling on case involving abortion clinic);

Menora v. Illinois High School Association, 527 F. Supp. 632 (N.D. Ill. 1981) (Jewish judge could rule on case under Free Exercise clause by Jewish basketball player challenging prohibition of head gear).

Though they claim to agree that a gay judge could decide this case, Movants are unwilling to accord the rulings of gay judges the same presumption of regularity that the courts routinely apply in all these other cases, cases involving issues no less important to the groups to which the judges belong than the issue presented in this case to Chief Judge Walker. Implicit in Movants' argument is the notion that being gay is so different from being female, African American, Jewish, Catholic, Mormon or disabled that a gay judge who has only a speculative and contingent personal interest in the outcome of the case must disclaim any possibility of accepting any benefit from his or her ruling, or else be recused.

III. CONCLUSION

Central to the rule of law is the proposition that judges can and do decide cases on the facts and the law, and not their personal interests.

Movants supply no basis for concluding that Chief Judge Walker did otherwise.

DATED: May 27, 2011

Respectfully submitted,

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