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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

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

15 Plaintiffs,

16 v.

17 CITY AND COUNTY OF SAN FRANCISCO,

18 Plaintiff-Intervenor,

19 v.

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

28 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

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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*

1
2 Bay Area Lawyers for Individual Freedom, AIDS Legal Referral Panel, API Equality –
3 LA, API Equality – Northern California, Asian American Bar Association of the Greater Bay
4 Area, Asian American Institute, Asian American Justice Center, Asian Law Caucus, Asian
5 Pacific American Bar Association of Los Angeles County, Asian Pacific American Bar
6 Association of Silicon Valley, Asian Pacific American Legal Center, Asian Pacific Islander Legal
7 Outreach, Bay Area Association of Muslim Lawyers, The Black Women Lawyers Association of
8 Northern California, The California Employment Lawyers Association, The Charles Houston Bar
9 Association, Courage Campaign, Equal Justice Society, Family Equality Council, Fred T.
10 Korematsu Center for Law and Equality, Freedom to Marry, Gay & Lesbian Advocates &
11 Defenders, Impact Fund, Iranian American Bar Association, Korean American Bar Association of
12 Northern California, Korean American Bar Association of Southern California, Law Foundation
13 of Silicon Valley, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, Lesbian
14 & Gay Lawyers Association of Los Angeles, Marin County Bar Association, Marriage Equality
15 USA, National Asian Pacific American Bar Association, Philippine American Bar Association of
16 Los Angeles, Queen’s Bench Bar Association, Sacramento Lawyers for the Equality of Gays and
17 Lesbians, San Francisco La Raza Lawyers Association, Santa Clara County Bar Association,
18 Santa Clara County Black Lawyers Association, Society of American Law Teachers, Transgender
19 Law Center, Vietnamese American Bar Association of Northern California, and Women Lawyers
20 of Alameda County.

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

INTRODUCTION

26
27 Over the years, litigants have occasionally attempted to use judges’ affiliations with
28 minority communities to disqualify them. Some parties have made naked challenges based on a

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

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

15 ARGUMENT

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

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

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

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

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

18 A suggestion that a judge cannot administer the law fairly because
 19 of the judge's racial and ethnic heritage is extremely serious and
 20 should not be made without a factual foundation going well beyond
 21 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.

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

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

7 828 F.2d at 1542. This was true even though the judge and his children were members of the
8 class bringing the challenge and could have taken advantage of a favorable outcome. *See also In*
9 *re City of Houston*, 745 F.2d 925, 929-30 (5th Cir. 1984); *Vietnamese Fishermen's Ass'n v. The*
10 *Knights of the Ku Klux Klan*, 518 F. Supp. 1017, 1019-21 (S.D. Tex. 1981) (denying motion
11 brought by members of the Ku Klux Klan seeking recusal of an African-American district judge).

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

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

23 2010 U.S. Dist. LEXIS 63814, at *7. Similarly, in *Feminist Women's Health Center v. Codispoti*,
24 69 F.3d 399 (9th Cir. 1995), Ninth Circuit Judge John T. Noonan, Jr. refused to disqualify himself
25 from an abortion-related case on the basis of his Catholic faith. 69 F.3d at 400. After the Ninth
26 Circuit reversed in part and vacated in part an abortion clinic's civil RICO judgment against
27 protestors, the clinic renewed its motion to disqualify Judge Noonan based on his "fervently-held
28 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.

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

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

13 Other parties seeking judges' recusal based on affiliations with minority communities
14 have attempted a more subtle approach, couching their recusal demands in some proxy for race,
15 religion or gender. Courts have uniformly seen through these pretexts, denying the requested
16 recusals. In *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 388
17 F. Supp. 155 (E.D. Pa. 1974), Judge A. Leon Higginbotham, Jr., issued a long and thoughtful
18 opinion denying a motion to recuse brought by a predominantly white union, which argued that
19 Judge Higginbotham demonstrated actual bias by delivering a speech to a predominantly African-
20 American association of historians. 388 F. Supp. at 156-58.¹ After demonstrating that nothing in
21 his speech was unusual or inflammatory, Judge Higginbotham rejected the assertion that African-
22 American judges should refuse to hear cases involving civil rights:

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

27 ¹ As Judge Mukasey noted in *United States v. El-Gabrowni*, 844 F. Supp. 955 (S.D.N.Y. 1994),
28 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.

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

17 In *EI-Gabrownny*, one of the defendants charged with conspiring to destroy the World
18 Trade Center in 1993 sought the recusal of Judge Michael Mukasey, asserting that recusal was
19 required both because of Judge Mukasey’s religion and his “Zionist political beliefs.” 844 F.
20 Supp. at 957. Judge Mukasey rejected these accusations, finding them improper bases for
21 recusal: “That someone with an imagination or a motive might hallucinate relevance is not the
22 standard, and therefore cannot provide the basis for decision.” *Id.* at 962. *See also Singer v.*
23 *Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (affirming denial of motion to recuse on grounds
24 that the district court judge was Mormon and the case allegedly involved “a challenge to the
25 theocratic power structure of Utah”); *Idaho v. Freeman*, 507 F. Supp. 706, 730-31 (D. Idaho
26 1981) (denying motion to recuse based on district court judge’s membership in and former
27 leadership position in The Church of Jesus Christ of Latter-Day Saints).

28

1 In sum, “[i]t is clear that a judge’s color, sex, or religion does not constitute bias in favor
2 of that color, sex or religion.” *United States v. Alabama*, 582 F. Supp. 1197, 1203 (N.D. Ala.
3 1984) (citations omitted), *aff’d* 828 F.2d 1532. Sexual orientation is no different.

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

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

16 As an initial matter, Proponents are wrong as a matter of law to contend that this Court
17 should presume that Chief Judge Walker was biased. As this Court has recognized, “[s]ince a
18 federal judge is presumed to be impartial, the party seeking disqualification bears a substantial
19 burden to show that the judge is biased.” *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665, at *1
20 (N.D. Cal. Oct. 25, 2007) (Ware, J.) (citing *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016,
21 1021-22 (N.D. Cal. 2001) (“The judge is presumed to be qualified, and thus there is a substantial
22 burden upon the moving party to show that such is not the case.”)). Indeed, the same
23 presumption of bias advocated by Proponents has been rejected time and again by the many cases
24 discussed above. *See, e.g., United States v. Alabama*, 828 F.2d at 1542 (“The fact that an
25 individual belongs to a minority does not render one biased or prejudiced, or raise doubts about
26 one’s impartiality. . . .”). In *MacDraw*, for example, the Second Circuit affirmed sanctions where
27 a party presumed bias of an Asian-American judge based on the judge’s race and ethnic heritage,
28 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

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

4 At the heart of Proponents' argument is their assertion that because Chief Judge Walker is
5 gay and in a relationship, he cannot be trusted to rule fairly on the merits of the case. Proponents
6 try to argue that they express only the concerns that a reasonable individual would possess. They
7 are incorrect. As courts have established in denying past efforts to mask bias behind similar
8 pretexts, a challenge directed at an intrinsic aspect of a group's member is an impermissible
9 challenge directed at the group as a whole. *See, e.g., Local Union 542*, 388 F. Supp. 155, 156-
10 158 (African-American judge's prior speeches to African-American groups not grounds for
11 recusal in civil rights litigation); *El-Gabrownny*, 844 F. Supp. 955, 959-962 (Jewish judge's family
12 members' relationships with State of Israel and connections to political Zionism not a basis for
13 recusal in terrorist trial); *Vietnamese Fishermen's Assn.*, 518 F. Supp. 1017, 1018 (African-
14 American judge's former job as counsel for the NAACP not basis for recusal in action involving
15 members of the Ku Klux Klan); *Blank*, 418 F. Supp. 1, 2-5 (female judge who had previously
16 worked in civil rights not required to recuse from case involving gender discrimination). As
17 Judge Mukasey stated, Proponents' "objection here is not based on race or sex or the Mormon
18 religion, but the motion in this case is in all relevant ways the same as the motion in these cases; it
19 is the same rancid wine in a different bottle." *El-Gabrownny*, 844 F. Supp. at 962.

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

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

5 [B]y the subtle tone of their objection, [movants] demonstrate either
6 that they want black judges to be robots who are totally isolated
7 from their racial heritage and unconcerned about it, or, more
8 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.

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

14 Whether or not in a committed relationship, whether or not hoping to marry some day, all
15 judges, all Americans, clearly have an interest in having the freedom to marry—the right to
16 decide for themselves rather than be precluded by a government bar; that is not the kind of
17 interest that triggers judicial disqualification, for then what judge would be qualified to sit?
18 Proponents have shown nothing to suggest that Judge Walker's familial status makes that general
19 interest into the kind of more than speculative, concrete interest that disqualifies. Any interest
20 Chief Judge Walker may have in the litigation is far too speculative to give rise to a conflict.
21 "[A]n interest which a judge has in common with many others in a public matter is not sufficient
22 to disqualify him." *United States v. Alabama*, 828 F.2d at 1541 (quoting *In re City of Houston*,
23 745 F.2d at 929-30); *City of Houston*, 745 F.2d at 926 (affirming district judge's decision
24 declining to recuse even though judge was member of a voting rights class). Like the judges in
25 *United States v. Alabama* and *City of Houston*, any potential benefit Chief Judge Walker might
26 possibly receive from the ruling is far too nebulous or general to give rise to a conflict requiring
27 his recusal or justifying vacating his judgment.
28

