No. 11-16577

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
*Plaintiffs-Appellees*,

v.

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

and

DENNIS HOLLINGSWORTH, et al.,
*Defendant-Intervenors-Appellants*.

On Appeal from United States District Court for the Central District of California
Case No. 09-CV-2292 (James S. Ware)

# BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL CENTER FOR LESBIAN RIGHTS; ACLU FOUNDATION OF NORTHERN CALIFORNIA; AND EQUALITY CALIFORNIA IN SUPPORT OF AFFIRMANCE

Jon W. Davidson
Tara L. Borelli
Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND
3325 Wilshire Blvd., #1300
Los Angeles, CA 90010
(213) 382-7600

Shannon P. Minter
Christopher F. Stoll
Ilona M. Turner
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., #370
San Francisco, CA 94102
(415) 392-6257

Alan L. Schlosser
Elizabeth O. Gill
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm St.
San Francisco, CA 94111
(415) 621-2493

**FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rules of Appellate Procedure, *amici* declare the following:

Lambda Legal Defense and Education Fund, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Center for Lesbian Rights does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

ACLU Foundation of Northern California does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Equality California does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Executed this 8th day of November, 2011.

s/ Peter Renn
Peter Renn
Attorney for *Amici Curiae*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

## STATUTES



## OTHER SOURCES

## INTERESTS OF *AMICI CURIAE*

*Amici* are leading nonprofit organizations dedicated to protecting the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people. *Amici* have an interest in the existence of an unbiased, impartial, and independent judiciary that operates free of discrimination on the basis of sexual orientation or gender identity.

**Lambda Legal Defense and Education Fund, Inc.** ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of LGBT people and those with HIV. With offices in Los Angeles, Atlanta, Chicago, Dallas, and New York, Lambda Legal litigates cases and engages in public advocacy in all areas of sexual orientation and gender identity discrimination law and policy. In 2005, Lambda Legal established a Fair Courts Project that seeks to educate LGBT and HIV-affected communities about the proper role of the judiciary, the importance of judicial fairness, and the need to encourage people across the nation to take action to support judicial fairness.

The **National Center for Lesbian Rights** ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR also has a strong interest

in protecting the fairness and diversity of the judiciary and has participated in numerous efforts to educate elected officials, the public, and policymakers about the critical role of judicial fairness in preserving democracy and protecting the rights and freedoms of all people.

The **ACLU Foundation of Northern California** ("ACLU-NC") is the largest affiliate of the American Civil Liberties Union, a nationwide, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and civil rights statutes. ACLU-NC works on behalf of LGBT people to win even-handed treatment by government; protection from discrimination in jobs, schools, housing, and public accommodations; and equal rights for same-sex couples and LGBT families.

**Equality California** is a statewide advocacy group protecting the needs and interests of same-sex couples and their children in California. It is also California's largest LGBT civil rights organization, with tens of thousands of members throughout the state. Equality California is committed to a diverse judiciary. In 2011, Equality California successfully supported the passage of California legislation that added sexual orientation and gender identity to the voluntarily reported demographic information collected by the state regarding state judges, justices, and judicial nominees and appointees.

All parties consent to the filing of this brief.

## STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund this brief; and no person—other than *amici*—contributed money to fund this brief.

## SUMMARY OF ARGUMENT

The motion to vacate the judgment that was filed by Defendant-Intervenors-Appellants (referred to herein as "Proponents") follows in an ugly history of attempts to disqualify federal judges on the basis of their personal characteristics. At bottom, Proponents contend that a judge in a long-term relationship with a person of the same sex—that is, a gay judge—could not approach the case with the same unbiased judgment Proponents believe a heterosexual judge would bring to bear. The notion that a gay judge could not fairly preside over this case is incorrect and offensive, and, if accepted by the courts, would be damaging to the credibility of the judiciary itself. This Court should reject any such notion, just as previous federal courts have rejected efforts to disqualify judges based on race, national origin, and sex.

*Amici* submit this brief to address three reasons why Proponents' motion and this appeal have no merit. First, rulings on broad constitutional questions routinely affect large portions of the public, and the fact that judges may be affected by those

rulings as members of the public does not warrant their recusal. Second, Proponents' arguments rest on speculation that Judge Walker had an interest in marrying his partner, but such speculative matters do not constitute a basis for recusal. Third, any rule that would require the disqualification of judges in same-sex relationships would amount to a rule requiring the disqualification of lesbian and gay judges—a result neither required by the recusal statute nor tolerated by the Constitution. For all these reasons and for the reasons explained by Plaintiffs, *amici* urge this Court to affirm the decision below.

## ARGUMENT

### I. Recusal Is Not Required Simply Because a Ruling on Broad Constitutional Questions May Affect a Judge Along with Other Members of the Public.

The underlying case from which this appeal arises asks whether the fundamental right to marry and the right to equal protection of the law exist for all Americans, and the answers to those questions will necessarily affect all Americans. As a matter of course, rulings on the scope of constitutional rights will often affect the public at large, including the judges called upon to decide a case. Judges are routinely called upon to decide issues that could directly or indirectly affect them along with the general 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 to exercise the fundamental right to marry. This common and necessary feature of our system of judicial review does not translate into 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).

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. "'[A]n interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.'" *In re Houston*, 745 F.2d 925, 930 (5th Cir. 1984) (holding that a judge was not disqualified from hearing a voting rights case where the judge was a member of the class affected). Thus, "where federal judges have possessed speculative interests as members of large groups, the federal courts have held these interests to be too attenuated to warrant disqualification." *United States v. Alabama*, 828 F.2d 1532, 1541-42 (11th Cir. 1987) (holding that a judge hearing a race discrimination case involving public universities in Alabama was not disqualified on the grounds that his children were in the class affected by the ruling).

While the underlying case here is of unquestionable importance to many lesbian, gay, and bisexual individuals, the constitutional rights at issue affect the entire public. For example, 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). A ruling on the proper standard of review for sexual orientation-based classifications will affect not only lesbian, gay, and bisexual persons, but also heterosexual persons. That is because the constitutional right to be free from discrimination on the basis of sexual orientation protects gay and non-gay people alike,[1] just as the right to be free from race discrimination protects persons of all races,[2] the right to be free of sex discrimination protects both men and women,[3] and the rights protected by the Free Exercise Clause protect people of all religions or of no religion.[4]

As Chief Judge Ware noted below, "[t]he fact that this is a case challenging a law on equal protection and due process grounds being prosecuted by members of a minority group does not mean that members of the minority group have a

---

[1] *See, e.g., Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001) (addressing equal protection claim asserted by heterosexual employee).
[2] *See, e.g., Johnson v. California*, 543 U.S. 499 (2005).
[3] *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982).
[4] *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).

greater interest in equal protection and due process than the rest of society." Order at 8. Rather, "we all have an equal stake in [this] case."[5] *Id.*

There is similarly no requirement to recuse based on whether a judge is more or less likely to *exercise* a right that is affirmed for all individuals through a case. To be clear, the actual legal right recognized by the judgment here—an individual's ability to marry the person of his or her choice, without regard to sex—belongs to every person in California who is otherwise eligible to marry. But Proponents' argument rests on the belief that because individuals in some groups are more likely than others to subsequently *exercise* that right as a result of the judgment, given they have been historically prevented from doing so, individuals in those groups must be disqualified.

This same logic would never support disqualification of a judge in other contexts. For example, according to some polling, white male Republicans are the demographic group most likely to report owning a gun. Joseph Carroll, *Gun Ownership and Use in America*, Gallup Poll, Nov. 22, 2005, *available at* http://www.gallup.com/poll/20098/Gun-Ownership-Use-America.aspx (last visited

---

[5] That is not to suggest that "all Californians" could have brought this case. Appellant Br. 44. Whether an Article III case or controversy exists is different from whether "any other interest" exists for purposes of the recusal statute. 28 U.S.C. § 455(b)(4). But even if Article III standing requirements could be imported into the recusal context, a plaintiff couple would need to allege that they intended to marry and would do so if the challenged law were invalidated. Here, there is no basis to conclude that Judge Walker had such an intent.

Oct. 23, 2011). In some polling, a majority of Republicans (55%) reported owning a gun, whereas only a minority of Democrats (32%) and independents (36%) reported owning a gun. Joseph Carroll, *Gun Ownership Higher Among Republicans Than Democrats*, Gallup Poll, Feb. 16, 2006, *available at* http://www.gallup.com/poll/21496/Gun-Ownership-Higher-Among-Republicans-Than-Democrats.aspx (last visited Oct. 23, 2011). Nevertheless, a white male Republican judge randomly assigned to a case regarding the constitutionality of a gun ownership restriction would have no duty to recuse based on an assumption that he has a likely interest in gun ownership simply based on his race, gender, and party affiliation.

Even in cases where the particular legal remedy appropriate for a constitutional violation runs to only one group of people, recusal is not required simply because a judge is a member of that group. For example, in a case raising the question of whether women should have the right to vote, a female judge would not have a duty to recuse herself simply because she was a woman. Likewise, female judges have no duty to recuse themselves from cases involving the scope of women's reproductive freedom. This is true even though the injunctive relief that might be ordered or denied in such cases (for example, mandating or refusing to mandate that government officials allow women to vote, and striking down or upholding an abortion restriction) could 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).

Moreover, 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, that result itself might well violate equal protection.[6] *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"). "To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable." *Alabama*, 828 F.2d at 1542.

---

[6] Even if such an interpretation had any legitimate basis in the text of the statute, which it does not, the doctrine of constitutional avoidance would preclude its adoption. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1121 (9th Cir. 2007) ("statutes should be construed so as to avoid difficult constitutional questions").

## II. There Is No Duty to Disclose the Absence of Any Interest in Litigation.

Even if the intent to marry a same-sex partner in California constituted a disqualifying interest—which, as explained above, it does not—Judge Walker's duty could only logically extend, at most, to disclosing the *existence* of that intent. Proponents, however, contend that Judge Walker had a duty to disclose "whether" he intended to marry, Appellant Br. 4, including the *absence* of any such intent. According to Proponents, this alleged duty to disclose the absence of any interest in the litigation arose because Judge Walker's sexual orientation and his ten-year relationship with another man made it possible for a reasonable observer to infer that Judge Walker intended to marry. Proponents' sole basis for this assertion is a poll stating that 64 percent of same-sex couples in California wish to marry. Appellant Br. 29.

There is no support for Proponents' supposed duty to disclose the absence of any interest in litigation. To the contrary, there is a presumption that all judges are impartial, and the party seeking disqualification bears the "substantial burden" of demonstrating that disqualification is warranted by "point[ing] to specific behavior on the part of the judge." *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1301 (8th Cir. 1982). Creating a disclosure obligation based on general polling statistics would directly contravene the well-settled principle that disqualification cannot be based on speculative or contingent interests. *See United States v.*

*Holland*, 519 F.3d 909, 914 n.5 (9th Cir. 2008) (holding that "rumor, speculation, beliefs . . . and similar non-factual matters" cannot form the basis for recusal) (internal quotation marks omitted); *Alabama*, 828 F.2d at 1541-42.

Here, instead of basing their motion on evidence that Judge Walker actually had an interest in marrying, Proponents' repeatedly *speculate* that he might have had such an interest. *See, e.g.*, Appellant Br. 3 ("It is entirely *possible* … that Judge Walker had an interest in marrying his partner"), 9 ("real *possibility*" that Judge Walker and his partner planned to get married), 14 ("strong *possibility*"), 19 (evidence "strongly *suggests* that he did, in fact, wish to marry"), 30 n.6 ("very well *may* have an interest in marrying"), & 43 (facts raised "strong *possibility*" that Judge Walker had an interest in the outcome of the case) (emphases added). Proponents' argument is contingent on Judge Walker actually having an interest in marrying, which Proponents readily concede is an "unknown" fact they cannot demonstrate. *See* Appellant Br. 27 ("if" it were true that Judge Walker had an interest in marrying his partner, an objective observer could question his impartiality), 34 ("unknown fact concerning Judge Walker's interest in marriage"), & 44 (Judge Walker had the same stake in the outcome of this case "if he desired to marry his long-term partner").

Adoption of Proponents' reasoning could warrant disqualification in limitless cases. For example, in a case where a judge's current or future gun

ownership created a disqualifying interest under Section 455(b), a party unable to demonstrate that the judge actually had such an interest could nevertheless argue that a Republican judge's impartiality "might reasonably be questioned" under Section 455(a) by pointing to statistical evidence (noted above) that a majority of Republicans own a gun. As Proponents have done, the party seeking disqualification could argue that it is "statistically likely" that the judge owns a gun, that "'any doubts' should be resolved 'in favor of disqualification,'" and that the relevant inquiry "is what *could* reasonably be believed, not what *would necessarily* be believed." Appellant Br. 22, 29 n.5, & 48.

In short, Proponents have failed to adduce any individualized evidence—as opposed to gross generalizations about an entire group of people—from which it can be reasonably inferred that Judge Walker stood in the same shoes as Plaintiffs. For many of the same reasons that the opinions of a judge's spouse cannot and should not be automatically imputed to the judge, *Perry v. Schwarzenegger*, 630 F.3d 909, 912 (9th Cir. 2011) (Reinhardt, J.), then neither should the supposed views of 64% of a group to which a judge belongs be imputed to him.

Proponents' novel claim that judges must disclose personal, and often deeply private, information to establish that they do *not* have an interest in a case would have many troubling repercussions. For example, if a judge ruling on the constitutionality of an abortion restriction has just learned she is one month

pregnant, Proponents' position would require that she publicly disclose that fact, even where she has no interest in seeking an abortion, and then publicly confirm the absence of that interest. Likewise, their position would require a judge ruling on whether Prozac should be banned from the market to disclose (needlessly) that she has clinical depression but that she only believes in counseling as a form of treatment and has no intent to take Prozac.

There is no legal basis or precedent for requiring judges to disclose such private information in order to show that certain contingencies do *not* exist and that speculation about them is unfounded. It is, after all, only when a reasonable observer, with knowledge of *all* of the relevant facts, would conclude that a judge's impartiality might reasonably be questioned that recusal is warranted. Because Proponents concede they lack the one fact that is foundational to their argument—that Judge Walker intended to marry—they cannot satisfy their burden of showing that recusal was required.

## III. Despite Their Denial, Proponents' Argument Is Premised on Judge Walker's Sexual Orientation and Recusal on the Basis of Sexual Orientation Is Neither Required Nor Permitted.

### A. Recusal on the Basis of a Same-Sex Relationship Amounts to Recusal on the Basis of Sexual Orientation.

Proponents claim to agree that sexual orientation is not an appropriate basis for recusal. Appellant Br. 46 (finding "no issue with a gay or lesbian judge hearing *this case* so long as a reasonable person . . . would not have reason to believe the

judge has a current personal interest in marrying"). Rather, the discovery that purportedly shook their confidence in the fairness of the district court proceedings was not simply that Judge Walker is gay—to which they supposedly have no objection—but that he was in a ten-year relationship with another man.

This 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 central way in which gay persons express their sexual orientation. The Supreme Court has recently explained 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"); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Despite Proponents' attempt to disclaim a categorical rule of exclusion based on sexual orientation, the logical conclusion of their reasoning can only be that all lesbian, gay, and bisexual people, as a class, would necessarily be disqualified. Proponents argued below that a disqualifying interest is triggered whenever a judge determines that he or she "desired, or 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. If a poll suggesting that 64% of same-sex couples want to marry is enough to disqualify any judge in a same-sex relationship, then it would follow that all lesbian and gay judges would need to be disqualified, since polling also suggests that 74% of all gay people would like to marry if they could. Kaiser Family Foundation, *Inside Out: A Report on the Experience of Lesbians, Gays, and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* 4 (2000), *available at* http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf (last visited Oct. 29, 2011).

Proponents' argument is therefore similar to the many other historical attempts to require recusals of judges based on their personal characteristics, and that have been rejected as thinly-veiled accusations of bias based on those characteristics. In a 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 Oct. 23, 2011) (quoting *Blank*, 418 F. Supp. at 4).

Similar recusal motions have been attempted, and rejected, 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 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 962.

### B. 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 belief, 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 v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) (affirming "the general presumption that judges are unbiased and honest"). 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. *Holland*, 519 F.3d at 912 ("in the absence of a legitimate reason to recuse himself, 'a judge should participate in the cases assigned'"). "It is, indeed, important that judges be and appear to be impartial. It is also important, however, that judges not recuse themselves unless required to do so, or it would be too easy for those who seek judges favorable to their case to disqualify those that they perceive to be unsympathetic merely by publicly questioning their impartiality." *Perry*, 630 F.3d at 916

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,[7] just as it would be offensive as to suggest that

---

[7] 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 Oct. 23, 2011 (noting that the justice at issue considered and rejected the

a judge's race or sex would determine how he or she would rule in a case alleging race or gender discrimination. There is no reason to believe that gay jurists will be unable to rule fairly and reject arguments advanced by gay people when they believe that the law requires such a result, just as the law presumes all other jurists are able to do when considering claims advanced by members of groups to which the jurists also belong.

### C. Recusal Based on Sexual Orientation Would Undermine, Rather Than Promote, Public Confidence in an Unbiased Judiciary.

Although Proponents' arguments are meritless, they are not costless. First, by placing Judge Walker's sexual orientation at issue, Proponents' logic inevitably translates into an attack on the impartiality of all lesbian, gay, and bisexual judges. This harm is one-sided, because the thrust of Proponents' position 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 any gay judge in a long-standing relationship is automatically suspect. Second, the broader proposition advanced by the Proponents is that *any* personal characteristic of a judge may be relevant to whether he or she can render a fair and impartial decision. This toxic and offensive presumption damages the credibility of every judge and undermines public confidence in the judiciary as a whole. Third, when members of minority

---

notion that he had a duty to recuse himself from the case on the basis of his sexual orientation).

groups seek redress for discrimination in court, the result of Proponents' position is that judges who are members of minority groups undoubtedly will be targeted for unwarranted recusal motions. 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 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 personal characteristic—is not one in which the public can reasonably have confidence.

## CONCLUSION

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

DATED: November 8, 2011

Respectfully submitted,

By: s/ Peter C. Renn
Attorney for *Amici Curiae*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,316, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type style.

Dated: November 8, 2011

s/ Peter C. Renn
Attorney for *Amici Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Sklar K. Toy