No. 11-16577

IN THE 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.
Defendants-Intervenors-Appellants

On Appeal From the United States District Court
for the Northern District of California
No. CV-09-022292 JW (Honorable James Ware)

BRIEF OF AMICUS CURIAE THE BAR ASSOCIATION OF SAN FRANCISCO IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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I. INTRODUCTION AND STATEMENT OF INTEREST

As California lawyers, members of the Bar Association of San Francisco ("BASF") have a duty under California Business & Professions Code § 6068(b) to "maintain the respect due to the courts of justice and judicial officers." With that duty comes the responsibility and right to speak out in defense of the courts and judicial officers when they are unjustly criticized. BASF submits this Memorandum in discharge of that responsibility and in exercise of that right.

II. ARGUMENT

A. Appellants' Premise Is False and Their Methodology Flawed

Appellants do not deny that this case was randomly assigned to Judge Walker or that he was legally bound to accept it unless he was properly subject to disqualification.

Nor do they claim that gay judges in general, or Judge Walker in particular, are disqualified from sitting on this case by reason of their sexual orientation. "[W]e are *not* suggesting," they told the district court, "that a gay or lesbian judge could not sit on this case." Motion at 5:18-19 (emphasis in original).[1]

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[1] Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez,

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Appellants also recognize and accept the authority of the many cases that have held that judges who are members of racial or religious minorities may rule on questions affecting the rights of their groups. Appellants' Opening Brief ("AOB") at 44-46. Indeed, they say that "nothing in these [recusal] statutes or our arguments would prevent a gay or lesbian judge from sitting in judgment in any sexual-orientation case where no reasonable observer could conclude that the . . . judge might have a direct, personal interest in the outcome of the proceedings." AOB at 18.

1. The Record Does Not Establish Any Basis For Disqualification

The sole basis of appellants' argument, then, is their claim that a reasonable person might believe that Judge Walker had a "direct, personal interest" in the outcome of this case, *viz* that he intended to marry.

Appellants admit that the record lacks "all the relevant facts" required for a determination under 28 U.S.C. § 455(b)(4) that Judge Walker had an "interest that could be substantially affected by the outcome of the proceeding." *See* AOB

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Mark A. Jansson, and Protectmarriage.Com's Motion to Vacate Judgment ("Motion"), filed April 25, 2011, is docket number 768 in the district court. Although BASF does not have access to the excerpts of record on appeal, the Motion is properly part of those excerpts under Circuit Rule 30-1.4(c)(ii).

at 48. They are thus in the odd position of saying that, although the record does not supply "all the relevant facts" that this Court would *itself* need to have to determine that Judge Walker had an interest in the outcome of the case, it should nevertheless order his disqualification under § 455(a) on the sole ground that a reasonable person might think he had such an interest.

They base their claim of "direct personal interest" on four elements: (a) Judge Walker's "findings regarding the desirability of marriage for same-sex couples," (b) his "long-term same-sex relationship," (c) "his failure timely to disclose that relationship," and (d) what they call "his continued failure to disclose his interest in marrying if permitted to do so." AOB at 48 and 18.[2]

Basing a claim of disqualification on Judge Walker's past or present failure to "disclose" is a boot-strap. There would be nothing to disclose unless the fact allegedly withheld was itself disqualifying. As the district court aptly observed: "[T]he requirement of disclosure on the record is conditional on the finding that there was a valid ground for disqualification under Section 455(a)." ER 17 n.23.[3]

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[2] In the district court, appellants also cited Judge Walker's failure to "unequivocally disavow[]" any intent to marry as a reason why "it must be presumed that he has a disqualifying interest." Motion at 10:5-7.

[3] The only disclosure required by 28 U.S.C. § 455 is disclosure of a

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2. Statistics Cannot Substitute For Evidence

This leaves, as support for appellants' claim, only: (a) the fact that Judge Walker's findings "extol marriage and identify [its] numerous benefits" and (b) the fact of his "long-term" relationship. AOB at 29. On that slim basis, they assert: "[A]ll of the available evidence . . . strongly suggests that [Judge Walker] did, in fact, wish to marry" if permitted to do so. AOB at 48.

Unsurprisingly, appellants cite no authority for the proposition that a judge's finding in the case before him or her that the plaintiffs have been denied valuable rights implies that the judge intends to claim those rights personally.

Nor is there support for the "statistical" methodology that appellants employ to convert Judge Walker's "long-term relationship" into proof of an intent to marry. "That Judge Walker is statistically likely to marry his partner if his injunction is upheld on appeal," they say, "alone constitutes reasonable grounds for doubting Judge Walker's impartiality." AOB at 29, n. 5.

Appellants' assertion that disqualification turns on the "statistical" likelihood that a judge will receive a benefit created by his or her ruling ignores the many cases cited by both appellants and appellees in which women and members

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disqualifying conflict under subsection (a) when securing a waiver. *See* 28 U.S.C. § 455(e).

of racial and religious minorities were found to be appropriate adjudicators of questions affecting those groups, without inquiry into the chances that they might themselves someday enjoy or claim a benefit from their rulings. Indeed, as shown in appellees' Memorandum, courts have denied disqualification in many cases in which judges or their families might someday benefit from a decision affecting a racial or religious minority to which they belonged. Appellees' Brief at 14-17.

3. Adopting Appellants' Novel Statistical Argument Would Be Unworkable

Appellants offer no guidance as to how their "statistical" methodology would work. How great would the likelihood of personal benefits have to be to justify disqualification, or to require disavowal of those benefits? How reliable would the statistical evidence have to be, and how and by whom would it be confirmed or tested? How would statistical evidence be weighed against actual evidence of a judge's intention, such as that available in this case?

Putting appellants' methodology to work in other cases produces bizarre results. How pervasive would gender-based discrimination have to be to require a judge to be disqualified because he or she either has, or is statistically likely to have, a daughter? What level of public hostility against members of a racial or religious group would justify a suspicion that a judge who belonged to it was likely to find that group entitled to legal protection? How common would

securities class actions have to be to create a statistical case for disqualifying a stockholding judge from a case which involved setting the standards for class certification in such cases?

Against appellants' "statistical" proof of Judge Walker's intent to marry "if permitted to do so" is the only actual proof on that subject--namely, the fact that he and his partner did *not* marry in 2004 or 2008, when they were "permitted to do so."

Though appellants deny it, their argument rests on the assumption that gay judges are somehow less able to render unbiased decisions in cases involving issues that might someday affect them personally than are heterosexual judges who are women, African-Americans, Jews, Catholics, Mormons, or disabled persons--all of whom have been found qualified to rule on cases that could advance the interests of members of their group, including themselves.

For this discriminatory premise, appellants offer no proof, statistical or otherwise.

B. Reversal would erode, not support, confidence in the courts.

Appellants say that reversal is necessary to preserve public confidence in our courts. AOB at 52-54.

The opposite is true.

Reversing the district court requires endorsing the proposition that gay

judges cannot abide by their oaths and must be disqualified unless they do something no judge ever has been required to do--commit to forever forgo any potential benefit from their rulings.

That result could not possibly serve appellants' declared purpose of upholding public confidence in the courts. It would, inevitably, be understood as confirming that judges decide cases on the basis of their gender, sexual orientation or membership in ethnic or religious groups, not the facts and the law.

There would be no way to confine the resulting taint to gay judges.

III. CONCLUSION

"However this case is ultimately resolved," appellants say, "a large segment of the population will be unhappy with the result." AOB at 53-54.

To that inevitable unhappiness, appellants would add the undermining of public confidence in the judiciary's fairness and impartiality. The District Court's order should be affirmed.

DATED: November 8, 2011

Respectfully submitted,

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