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16 Paul T. Katami, and Jeffrey J. Zarrillo

17
18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 KRISTIN M. PERRY, *et al.*,
21 Plaintiffs,
22 and
CITY AND COUNTY OF SAN FRANCISCO,
23 Plaintiff-Intervenor,
24 v.
EDMUND G. BROWN, JR., *et al.*,
25 Defendants,
26 and
PROPOSITION 8 OFFICIAL PROPONENTS
27 DENNIS HOLLINGSWORTH, *et al.*,
28 Defendant-Intervenors.

CASE NO. 09-CV-2292 JW

**DECLARATION OF ENRIQUE A.
MONAGAS IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
PROPONENTS' MOTION TO VACATE
JUDGMENT**

1 I, Enrique A. Monagas, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and in the United
3 States District Court for the Northern District of California. I am an associate at the law firm of
4 Gibson, Dunn & Crutcher LLP, counsel of record for Plaintiffs Kristin M. Perry, Sandra B. Stier,
5 Paul T. Katami, and Jeffrey J. Zarrillo (“Plaintiffs”). I make this declaration in support of Plaintiffs’
6 Opposition to Proponents’ Motion to Vacate Judgment. I have personal knowledge of the facts set
7 forth herein, and if called as a witness, I could and would competently testify hereto.
8

9 2. Attached hereto as **Exhibit A** is a true and correct copy of Chris Geidner, *Edward*
10 *DuMont, Praised by Colleagues as “Brilliant,” Would Be the First Openly Gay Federal Appellate*
11 *Judge in the Country*, Metro Weekly, Apr. 16, 2010, available at
12 <http://www.metroweekly.com/news/?ak=5094>.
13

14 3. Attached hereto as **Exhibit B** is a true and correct copy of Phillip Matier & Andrew
15 Ross, *Judge Being Gay a Nonissue During Prop. 8 Trial*, S.F. Chron., Feb. 7, 2010, at C-1, available
16 at [http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-](http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker)
17 [orientation-judge-walker](http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker).

18 4. Attached hereto as **Exhibit C** is a true and correct copy of Margaret Russell, *Sexual*
19 *Orientation Singled Out for Scrutiny*, Daily Journal, Mar. 10, 2010.
20

21 5. Attached hereto as **Exhibit D** is a true and correct copy of Maura Dolan, *Distilling the*
22 *Same-Sex Marriage Case*, L.A. Times, June 21, 2010, available at
23 <http://articles.latimes.com/print/2010/jun/21/local/la-me-prop8-judge-20100621>.

24 6. Attached hereto as **Exhibit E** is a true and correct copy of Dan Levine, *Gay Judge*
25 *Never Thought to Drop Marriage Case*, Reuters, Apr. 6, 2011, available at
26 <http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406>.
27
28

Exhibit A



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Breaking Barriers

Edward DuMont, praised by colleagues as "brilliant," would be the first openly gay federal appellate judge in the country

by *Chris Geidner*

Published on *April 16, 2010, 9:27am* | [3 Comments](#), [31 Tweets](#)

"If you screwed your eyes shut and imagined a judge for the Federal Circuit, you would have a hard time imagining anyone better than Ed DuMont."

President Obama rendered that exercise – suggested by former Clinton administration U.S. Solicitor General Seth Waxman – unnecessary when he nominated Edward C. DuMont, who is openly gay, for a seat on the U.S. Court of Appeals for the Federal Circuit. DuMont's nomination was announced on Wednesday, April 14, and requires Senate approval.

Although DuMont would be the first openly gay appellate judge in the United States, perhaps more noteworthy in the current political climate is the broad praise being given to the nominee – from Obama and Seth Waxman, DuMont's colleague at the [WilmerHale](#) law firm, to more conservative legal thinkers such as appellate judge Richard Posner and libertarian-leaning law professor [Eugene Volokh](#).

Waxman, who served as the top appellate litigator in the Justice Department during Clinton's second term, called DuMont "brilliant" and "thoroughly professional" when talking on Thursday afternoon about his longtime co-worker. Saying that he looked "wistfully" toward DuMont's departure should the Senate approve the nomination, Waxman said, "I will miss him as a colleague desperately."



Edward DuMont
(Photo courtesy WilmerHale)

As is customary for presidential judicial nominees, DuMont declined to comment for this story.

A nominee to the Federal Circuit, DuMont would sit on a unique appellate court that has its cases determined by the subject of the litigation and not geography – as is the situation with other federal appellate courts. Among the cases the court hears are those dealing with patent law and certain types of lawsuits against the government.

As a federal appellate judge, only the U.S. Supreme Court could reverse DuMont's decisions – which would be made as one of three judges on a panel hearing appeals. Like other federal judges, he would hold his position for a lifetime tenure.

In a statement announcing DuMont's nomination, Obama said, "Ed DuMont has distinguished himself throughout his legal career in both the public and private sectors. He possesses a keen intellect and a commitment to fairness and integrity that will serve him well as a judge on the Federal Circuit."

The announcement did not mention DuMont's sexual orientation, and the White House did not provide comment for this story. DuMont would only be the third known LGBT judge serving in the federal judiciary, which consists of more than 850 judgeships. The others are U.S. District Court Judge Deborah Batts, who was nominated for her judgeship in 1994 and sits in Manhattan, and U.S. District Court Judge Vaughn Walker, who sits in San

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Francisco and was not publicly known to be gay when nominated in 1989.

Because of the subjects heard by the court, some observers have suggested that DuMont's nomination could be seen as less contentious than those to other appellate courts. As Volokh, who teaches at the UCLA School of Law, [wrote at The Volokh Conspiracy](#), "It is thus an unusually apolitical appellate court, which I hope means that Ed won't run into the usual buzzsaw."

Volokh – who describes DuMont as a friend – echoed Waxman's comments on Thursday afternoon, referring to DuMont as the type of person you expect to be a judge – right out of "central casting," Volokh said. He added, "He smiles more than central casting judges would do."

Asked if sexual orientation would become an issue in DuMont's confirmation hearings, Volokh said, "I very much hope not," adding that he believed people would be "especially impressed by the apolitical, quality factors that Ed has going for him."

When told of Volokh's comments, Waxman said, "I have the same hopes. Ed DuMont is such an obvious choice . . . it would be very dismaying to see anything get in the way of it."

Because of the court's jurisdiction, Volokh said he hoped it would be "less likely that people are going to focus on this as a culture war" issue.

Referring to "those who would focus on his sexual orientation," Volokh – noting that most who do so use "sexual orientation as a proxy for political ideology" – said his hope for DuMont was that "even for those who would care about that on the Supreme Court, let's not care about that for the Federal Circuit."]]>

A graduate of Stanford Law School, DuMont clerked for Judge Richard Posner of the Seventh Circuit Court of Appeals before going into private practice.

In response to an inquiry from *Metro Weekly* about DuMont's nomination, Judge Posner wrote, "DuMont was an excellent law clerk and has had a distinguished career since. He seems eminently qualified to be a member of the Federal Circuit."

Posner added, in response to mention in the inquiry that DuMont would be the first openly gay appellate judge in the country, that he is "not interested in people's sexual orientation."

After working for Posner, DuMont entered private practice before spending more than seven years in the Department of Justice as an assistant to the solicitor general, where DuMont first worked with Waxman.

DuMont has argued 18 cases before the Supreme Court, and Waxman described how DuMont's facility with the "astonishing, technical complexities" of modern inventions and the "doctrinal issues" present in patent law make him "such an obvious choice" for the Federal Circuit.

The Senate Judiciary Committee has not yet scheduled a confirmation hearing on DuMont's nomination. Of Obama's 18 other appellate nominees, seven have been approved by the Senate and have taken their judgeships. Five of the remaining 11 have been reported out of committee and await action by the full Senate. The remaining six – all nominated in February or March – await committee action.

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Exhibit B

SFGate.com

Judge being gay a nonissue during Prop. 8 trial

Phillip Matier, Andrew Ross

Sunday, February 7, 2010

The biggest open secret in the landmark trial over same-sex marriage being heard in San Francisco is that the federal judge who will decide the case, Chief U.S. District Judge **Vaughn Walker**, is himself gay.

Many gay politicians in San Francisco and lawyers who have had dealings with Walker say the 65-year-old jurist, appointed to the bench by President **George H.W. Bush** in 1989, has never taken pains to disguise - or advertise - his orientation.

They also don't believe it will influence how he rules on the case he's now hearing - whether Proposition 8, the 2008 ballot measure approved by state voters to ban same-sex marriage, unconstitutionally discriminates against gays and lesbians.

"There is nothing about Walker as a judge to indicate that his sexual orientation, other than being an interesting factor, will in any way bias his view," said **Kate Kendell**, head of the National Center for Lesbian Rights, which is supporting the lawsuit to overturn Prop. 8.

As evidence, she cites the judge's conservative - albeit libertarian - reputation, and says, "There wasn't anyone who thought (overturning Prop. 8) was a cakewalk given his sexual orientation."

State Sen. **Mark Leno**, D-San Francisco, who has sponsored two bills to authorize same-sex marriage that were vetoed by Gov. **Arnold Schwarzenegger**, said that as far as he's concerned, Walker's background is a nonissue. "It seems curious to me," he said, that when the state Supreme Court heard a challenge to Prop. 8, the justices' sexual orientation "was never discussed."

Leno added, "I have great respect for Judge Walker, professionally and personally."

Walker has declined to talk about anything involving the Prop. 8 case outside court, and he wouldn't comment to us when we asked about his orientation and whether it was relevant to the lawsuit.

Many San Francisco gays still hold Walker in contempt for a case he took when he was a private attorney, when he represented the U.S. Olympic Committee in a successful bid to keep San Francisco's Gay Olympics from infringing on its name.

"Life is full of irony," the judge replied when we reminded him about that episode.

And did he have any concerns about being characterized as gay?

"No comment."

Shortly after our conversation, we heard from a federal judge who counts himself as a friend and confidant of Walker's. He said he had spoken with Walker and was concerned that "people will come to the conclusion that (Walker) wants to conceal his sexuality."

"He has a private life and he doesn't conceal it, but doesn't think it is relevant to his decisions in any case, and he doesn't bring it to bear in any decisions," said the judge, who asked not to be identified because of the sensitive nature of the Prop. 8 trial.

"Is it newsworthy?" he said of Walker's orientation, and laughed. "Yes."

He said it was hard to ignore the irony that "in the beginning, when (Walker) sought to be a judge, a major obstacle he had to overcome was the perception that he was anti-gay."

In short, the friend said, Walker's background is relevant in the same way people would want to know that a judge hearing a discrimination case involving Latinos was Latino or a Jewish judge was ruling in a case involving the Anti-Defamation League.

Walker, by the way, didn't seek out the Prop. 8 case - it was assigned to him at random.

If the judge decides that Prop. 8 is unconstitutional, supporters of the measure are sure to take it to the federal appeals court and the U.S. Supreme Court, if necessary. Kendell expects that if that happens, the measure's proponents will make an issue of the judge's sexual orientation - at least in the public arena.

Not so, said **Andy Pugno**, general counsel for the group that sponsored the Prop. 8 campaign.

"We are not going to say anything about that," Pugno said.

He was quick to assert, however, that Prop. 8 backers haven't gotten a fair shake from Walker in court. He cited both the judge's order for the campaign to turn over thousands of pages of internal memos to the other side and Walker's decision to allow the trial to be broadcast - both of which were overturned by higher courts.

"In many ways, the sponsors of Prop. 8 have been put at significant disadvantage throughout the case," Pugno said. "Regardless of the reason for it."

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Chronicle columnists Phillip Matier and Andrew Ross appear Sundays, Mondays and Wednesdays. Matier can be seen on the KPIX morning and evening news. He can also be heard on KCBS radio Monday through Friday at 7:50 a.m. and 5:50 p.m. Got a tip? Call (415) 777-8815, or e-mail

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This article appeared on page **C - 1** of the San Francisco Chronicle

Exhibit C

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Wednesday, March 10, 2010

Sexual Orientation Singled Out for Scrutiny

By Margaret Russell

It is both newsworthy and valuable to have openly gay and lesbian judges but not because their presence will dictate any specific legal outcomes. Sexual orientation, like race, gender, and other categories of identity, is simply one facet of the human complexity of all individuals on the bench. The Hon. Deborah A. Batts, the first and only open lesbian on the federal bench, said of her historic appointment by President Bill Clinton in 1994: "I'm a mother, I'm an African-American, I'm a lesbian, I'm a former professor. If people assume any one of these aspects is going to predominate, it would create a problem."

Why, then, is it important to have openly gay and lesbian judges? This question re-emerged last month with the publication of two unrelated high-profile news stories in the same week. The first reported on what the story described as the "non-issue," "open secret" of the Proposition 8 (same-sex marriage) case in San Francisco federal district court: that its presiding judge, the veteran jurist Hon. Vaughn Walker, is openly gay. The second story reported on Senator Charles Schumer's recommendation of Daniel Alter to a New York federal district court judgeship; if confirmed, Alter will be the first openly gay male appointed to the federal bench. An increased number of openly gay and lesbian judges is likely to benefit the legitimacy of our justice system in several ways, including fostering the public's acceptance of diversity, and recognizing excellence in the legal profession regardless of sexual orientation. Unfortunately, these developments have led some to question the ability of gay and lesbian judges to be fair, particularly in cases involving issues of the law regarding sexual orientation (e.g., the Proposition 8 trial).

It would be troubling and unjust if anyone assumed that gay and lesbian judges' competence would somehow be compromised by their sexual orientation. Presumably, every judge has a sexual orientation, as surely as he or she has a race, gender, and ethnicity. To single out only those of minority sexual orientation for scrutiny fosters an unspoken assumption that heterosexual judges are by definition more "neutral" and

"impartial" on issues of sexual orientation and the law.

This invisible privilege of "neutrality" accorded to dominant groups was brilliantly challenged a generation ago, when pioneering African-American judges on the federal bench faced disqualification (recusal) motions filed by defense lawyers in civil rights cases. In these cases, lawyers had filed motions under 28 U.S.C. Sections 144 and 455, alleging that the judges manifested "personal bias or prejudice" or that their "impartiality might reasonably be questioned." In *Pennsylvania v. Local Union 542, International Union of Operating Engineers* (1974), the Hon. A. Leon Higginbotham, the first black appointed to the federal bench in Philadelphia, faced a motion to recuse based on his identity as a black judge and his civil rights background. His opinion denying the motion was lengthy and trenchant: "Perhaps, among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of black litigants and black citizens and thus assure that brand of 'impartiality' which some whites think they deserve.... Since 1844...black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations.... If blacks could accept the fact of their manifest absence from the federal judicial process for almost two centuries, the plain truth is that white litigants are now going to have to accept the new day where the judiciary will not be entirely white and where some black judges will adjudicate cases involving race relations." Judge Higginbotham, later appointed to the 3rd Circuit U.S. Court of Appeals, served on the federal bench for nearly three decades .

Similarly, the Hon. Constance Baker Motley, the first African-American female federal judge, confronted a recusal motion in *Blank v. Sullivan and Cromwell* (1975), a case against law firms for sex discrimination. The motion argued that her background as a female lawyer rendered her less likely to be impartial in evaluating claims of sex discrimination against female lawyers. She rejected the motion, asserting: "[I]f background or sex or race of each judge were, by definition, sufficient grounds 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...." Judge Motley served on the federal bench for nearly four decades.

Some asserted that Judges Higginbotham and Motley, as pioneering civil rights advocates in their pre-bench legal careers, lacked the "appearance of impartiality" required of a judge presiding over a civil rights case. Yet what would the requirement of the *absence* of pre-bench civil rights work mean to our understanding of who is fit to serve as a judge? Daniel Alter, the aforementioned first openly gay male nominee, is now the National Director of the Civil Rights Division of the Anti-Defamation League. It would be disturbing to think that his work on behalf of civil rights would be seen as a disqualifier.

So, in the end, what will it mean to have diversity of sexual orientation on the bench? In a specific sense, it is impossible to know because the judiciary is still so non-diverse. However, the observations of pathbreaking African-American judges such as

Higginbotham and Motley are instructive; as they saw it, no one should have to repudiate his or her identity or heritage in order to be seen as impartial. In fact, "impartiality" itself does not mean being shorn of identity and experience; judging is an inherently human act. As noted U.S. Supreme Court Justice Benjamin Cardozo wrote: "We may try to see things as objectively as we please. Nevertheless, we can never see them with any eyes except our own."

Professor Margaret M. Russell teaches civil procedure and constitutional law at Santa Clara University School of Law. Her book, Freedom of Assembly and Petition: The First Amendment, Its Constitutional History, and the Current Debate will be published by Prometheus Books in spring 2010.

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Exhibit D

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Distilling the same-sex marriage case

Because he opted for a detailed trial of related issues, Chief Judge Vaughn R. Walker's decision will be the foundation for higher courts' verdicts.

June 21, 2010 | By Maura Dolan, Los Angeles Times

Chief Judge Vaughn R. Walker was supposed to be a bit player in Perry vs. Schwarzenegger, a federal constitutional challenge of the Proposition 8 ban on same-sex marriage.

Lawyers on both sides of the case viewed his federal courtroom in San Francisco as little more than a launching pad where they would argue fine points of constitutional law before the case moved to the appeals bench and eventually to the Supreme Court.

But the iconoclastic U.S. District Court judge had something else in mind: a full-blown nonjury trial to test assumptions about whether gays were inferior parents, whether same-sex marriage hurt straight marriage and whether sexual orientation was changeable.

Walker's intentions took lawyers on both sides by surprise, but those who know the lanky, silver-haired jurist said it was fitting that he would want to gather facts on an issue that tends to be viewed with considerable emotion.

"The one characteristic of Judge Walker that separates him from some other judges is that he loves to come up with a twist or a new idea that the parties haven't thought of," said Rory Little, a professor at UC Hastings Law School. "He is a very creative thinker."

The Republican appointee will soon fire the first volley in the federal legal battle over same-sex marriage. Walker's written decision, based on testimony he has heard, will become the foundation on which higher courts build.

Initially dubious about a trial, gay rights lawyers quickly saw advantages to Walker's plan. Indeed, the 2 1/2 weeks of often moving testimony in January substantially bolstered opponents of Proposition 8.

The confidence that gay rights lawyers expressed at testimony's end — closing arguments were held Wednesday — belied the anxiety some activists expressed when Walker was randomly chosen last year to oversee the case.

"People were saying that this assignment should leave no one resting easily," said Kate Kendell, who heads the National Center for Lesbian Rights.

Although openly gay, Walker, 66, was considered a traitor by some gay activists for having represented the U.S. Olympic Committee in a trademark lawsuit against the Gay Olympics, Kendell said.

The case, brought more than two decades ago when Walker was still a lawyer in private practice, went to the U.S. Supreme Court and ended up a historic setback in the struggle for gay rights. Gay rights lawyers viewed the case as being more about gay equality than about an athletic competition.

There had been dog Olympics, diaper Olympics and police Olympics, Kendell said, and gays felt targeted by the fact that the Gay Olympics had been challenged.

"Vaughn Walker was in the center of it," Kendell said, "and from the gay community's perspective, on the wrong side."

Gay rights groups and liberals opposed Walker's nomination by President Reagan and later by President George H.W. Bush.

But after his confirmation, Walker surprised critics.

He has been an independent judge, skeptical of government and protective of individual freedom — more libertarian than conservative. He favors the decriminalization of drugs, and he recently ruled against Bush administration policies in a major wiretap lawsuit.

That he vigorously represented the USOC over a gay athletic competition says nothing about his personal views, nor will his decision in the Proposition 8 case, said Boris Feldman, a corporate litigator who has appeared before Walker several times.

"It was a client he was hired to represent and represented very well," Feldman said. "He is a classic conservative legal scholar in that he actually believes in rules.... You don't hear a lot about fairness from him. You hear a lot about the law."

Walker, who declined to be interviewed with the marriage case pending, said at the time of his nomination that he believed good lawyers should not permit personal views to affect a client's representation.

Judge Maxine M. Chesney, who serves on the federal court with Walker, described him as "very smart, very thoughtful and not result-oriented."

Being gay "is not a political part of his life," she said.

Earlier this year, Walker was overturned by the U.S. 9th Circuit Court of Appeals in a case involving a gay man who sued a federal agency for emotional distress after it revealed his HIV status to another federal department.

Walker threw out the lawsuit on the grounds that a federal privacy act did not permit damages for emotional distress. The 9th Circuit resurrected the suit, ruling for the gay plaintiff.

Lawyers defending Proposition 8 have refused to discuss Walker's sexual orientation and have not made an issue of it. They have complained, however, that his pretrial rulings hurt their side and that the trial was irrelevant.

Although there has never been a federal trial over same-sex marriage, a state trial was held in Hawaii in 1996 and was broadcast on Court TV. The judge ruled in favor of the gay plaintiffs, and Hawaii's highest court concurred. Voters later reinstated the marriage ban at the polls.

Walker wanted to broadcast the Proposition 8 trial on the Internet, but the U.S. Supreme Court slapped him down. Gay rights activists said public dissemination of the testimony would educate the public. Backers of Proposition 8 countered that cameras would intimidate their witnesses and possibly spark reprisals.

Walker was born in Watseka, Ill., the youngest of three children. He was an economics major at the University of Michigan and earned his law degree at Stanford University. He spent 18 years at the blue-chip law firm of Pillsbury Madison & Sutro in San Francisco, where he represented the National Rifle Assn. in an attempt to overturn a San Francisco gun law.

When he is not working, he travels the globe, attends the San Francisco Symphony, listens to traditional jazz, collects German Expressionist graphics and watches old movies (his favorites are "Sunset Boulevard" and "Double Indemnity"). He swims regularly and attends bar functions with a companion, a physician, colleagues say.

Walker is a commanding force in the courtroom, exuding energy and humor as he questions lawyers and witnesses in a baritone voice and tries to keep the proceedings on a brisk pace.

His creativity extends to sentencing. He once required a mail thief to stand in a post office with a sign that read: "I stole mail. This is my punishment."

Lawyers say Walker is always well-prepared and organized and demands strong performances. During the marriage trial, he twice chided San Francisco City Atty. Dennis Herrera for the legal work of one of his deputies and praised the performance of a lawyer defending Proposition 8.

A decision in the marriage trial is expected within weeks.

UC Hastings' Little said Walker faces a "very delicate and historic" task in crafting his Proposition 8 ruling and buttressing it with evidence from the trial.

Although higher courts could disregard his findings, "he also could lead a path to success at the Supreme Court," Little said.

maura.dolan@latimes.com

Exhibit E



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Gay judge never thought to drop marriage case

Wed, Apr 6 2011

By Dan Levine

SAN FRANCISCO (Reuters) - The U.S. judge who struck down California's gay marriage ban never considered his own homosexuality as a reason to recuse himself from the case, he said on Wednesday.

Former U.S. District Judge Vaughn Walker's comments were his first on what legal observers have been intensely -- but quietly -- discussing since the blockbuster case was filed. Some wondered whether his sexual orientation would affect his decision and how it would be received.

However the group defending California's gay marriage ban, Proposition 8, refrained from raising the issue in court. Walker eventually struck down Prop 8 as unconstitutional, and the case is currently on appeal.

The Republican-nominated judge, who had a stormy history with the local gay community, calmly controlled his courtroom during the trial, adding dollops of humor as well.

The case could set national policy if it reaches the U.S. Supreme Court and is being watched throughout the nation, where same-sex marriage is legal in only five of 50 states.

Gay rights advocates won a major victory late last year when a ban on gays serving in the U.S. military was overturned in Congress and signed into law by President Barack Obama.

Walker retired at the end of February, and he talked with a handful of reporters about issues like the Prop 8 case, cameras in the court, and his once-strained relationship with San Francisco's gay community.

It would not be appropriate for any judge's sexual orientation, ethnicity, national origin or gender to stop them from presiding over a case, he said.

"That's a very slippery slope," Walker said.

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.

A Midwesterner, Walker was born in 1944 in Watseka, Illinois, about 90 miles south of Chicago. He worked for years at one of San Francisco's top law firms before being nominated to the federal bench in 1989 by George H.W. Bush.

Seated at a table in a charcoal suit with a white handkerchief, Walker remembered how the gay community had once vilified his nomination to the federal bench.

As a lawyer, Walker represented the U.S. Olympic Committee in a bid to prevent a local gay group from calling itself the 'Gay Olympics.' Walker put a lien on the house of the founder of the group who was dying of AIDS. On Wednesday he said he had just tried to be a successful advocate for his client.

"I was the ogre of the gay community when I was nominated, and a hero when I leave," he said.

Walker made for an unpredictable jurist, ruling against the government in a widely watched state secrets case. In another matter that has become lore at the San Francisco federal courthouse, Walker sentenced a mail thief to stand outside a post office, carrying a sign with the words: "I stole mail. This is my punishment."

During the Prop 8 trial, one witness said an anti-gay marriage ad -- featuring a man, woman and child -- depicted a "heterosexual" couple. "How do you know they're heterosexual?" Walker deadpanned, prompting laughter in the courtroom.

Walker also tried to push the boundaries of courtroom protocol by permitting cameras, but the U.S. Supreme Court disallowed it.

"A pretty extraordinary decision," Walker said of the ruling, adding that cases like Prop 8 -- and the recent criminal perjury trial involving baseball home run king Barry Bonds -- should be available on video.

Walker served as chief judge in the Northern District of California for six years before retiring. He said he would open a law practice focusing on alternative dispute resolution and counseling clients on litigation risk.

As for the Prop 8 case, Walker said he had little regret.

"I'm glad that we had the trial," he said. "I think that was the way to air these issues and get them on the table."

(Reporting by Dan Levine; Editing by [Peter Henderson](#), [Sandra Maler](#) and [Eric Walsh](#))



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Exhibit F



Why Has Media Ignored Judge's Possible Bias In California's Gay Marriage Case?

By Gerard V. Bradley

Published August 04, 2010 | FoxNews.com

Any minute now we will hear the result of another lawsuit about same-sex marriage.

This month a federal judge in Massachusetts threw out a Congressional law which defined marriage as the union of man and woman.

Soon a federal judge in California is going to rule in a lawsuit challenging "Proposition 8," the referendum by which California's voters kept the traditional meaning of marriage in their law.

If the pending ruling throws out Prop. 8 – as it very likely will – it would be the biggest victory so far for those promoting same-sex marriage in the United States.

These high stakes have attracted a lot of attention to the California case of *Perry v. Schwarzenegger*. But not enough attention – in fact, almost none – has been paid to one very troubling aspect of the case.

This is the question of the judge's bias due to his possible interest in which side wins the case.

Judge Vaughan Walker has surprised just about everyone with his unorthodox handling of the Prop. 8 trial.

Supporters describe him as iconoclastic and creative. Those less enamored have charged him with turning the proceedings into a sensationalized show-trial.

Both sets of observers could probably agree with the explanation offered by conservative commentator Ed Whelan who has observed that Walker has been determined from the outset "to use the case to advance the cause of same-sex marriage."

I do not doubt that Judge Walker made up his mind about Prop 8 before the trial began.

But that is not the bias that has received too little attention.

Battalions of commentators have wondered about his bizarre handling of the case, and many have attributed it to Walker's belief that it is unjust for the law to limit marriage to opposite-sex couples.

Nor is the neglected bias related to the fact that (as several newspapers have reported) the judge is openly gay.

Of course, Walker's opinions about marriage and sexual preference could be related to his own homosexuality.

But even if they are, it does not follow that he would be incapable of being impartial and of rendering a judgment in accord with the law in the Prop. 8 case – any more than a happily married heterosexual would necessarily be.

In fact, all judges have beliefs and personal habits which intersect from time to time with the matters in dispute before them. We do not require judges to be blank slates without a personal life. Judges are not automatons.

All we ask and what we rightly expect is that judges put aside those things insofar as they might interfere with deciding a case fairly and in accord with the law.

But no one is immune to all conflicts of interest or of belief.

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So our law rightly requires that public officials – judges included – stay out of matters in which they have a financial stake. It is not that everyone would be corrupted by the prospect of financial gain. Not at all.

But some people would be corrupted. And everyone can have greater confidence in the outcome of public deliberations when they know that at least one temptation towards corruption has been removed.

The neglected bias in the Prop. 8 trial has instead to do with the fact that – as reported in The Los Angeles Times last month – Judge Walker “attends bar functions with a companion, a physician.”

If (as The Times suggests) Judge Walker is in a stable same-sex relationship, then he might wish or even expect to wed should same-sex marriage become legally available in California.

This raises an important and serious question about his fitness to preside over the case. Yet it is a question that received almost no attention.

When a judge is obliged to withdraw from a case due to a conflicting interest we call it “recusal.”

Federal law requires that, whenever a judge knows that he has “any other interest [that is, besides a financial interest] that could be substantially affected by the outcome of the proceeding” at hand, or when “his impartiality might reasonably be questioned”, he must recuse himself.

I am not saying that Judge Walker should have refused himself in *Perry v. Schwarzenegger*.

I am not saying so because nowhere (as far as I know) has Judge Walker volunteered or been made to answer questions about how the outcome of that case would affect his interest (whatever it is) in marrying, and thus his interest in the manifold tangible and intangible benefits of doing so.

That is a conversation worth having.

And, sadly, it is quite too late to have it.

Gerard V. Bradley is a Professor of Law at the University of Notre Dame.

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Exhibit G

August 6, 2010 10:17 AM

Gay Marriage Judge's Personal Life Debated

By Daniel Carty

(AP) The federal judge who [overturned California's same-sex marriage ban](#) this week is a Republican who once came under fire for his membership to a powerful all-male club that had only recently allowed blacks to join.

But after Chief U.S. Judge Vaughn Walker struck down the voter-approved ban known as Proposition 8, he became something else in the minds of some: a gay activist.

Rumors have circulated for months that Walker is gay, fueled by the blogosphere and a San Francisco Chronicle column that stated his sexual orientation was an "open secret" in legal and gay activism circles.

Walker himself hasn't addressed the speculation, and he did not respond to a request for comment by The Associated Press on Thursday. Lawyers in the case, including those defending the ban, say the judge's sexuality - gay or straight - was not an issue at trial and will not be a factor on appeal.

But that hasn't stopped a public debate that exploded in the wake of the 66-year-old jurist's ruling. Most of the criticism has come from opponents of same-sex marriage.

"Here we have an openly gay federal judge, according to the San Francisco Chronicle, substituting his views for those of the American people and of our Founding Fathers who, I promise you, would be shocked by courts that imagine they have the right to put gay marriage in our Constitution," said Maggie Gallagher, chairwoman of The National Organization for Marriage, a group that helped fund Proposition 8.

In response, the Gay and Lesbian Victory Fund, a political action committee for gay candidates, launched an online petition accusing Gallagher's group of "gay-baiting."

But the debate raises the question: Why is sexuality different from other personal characteristics judges possess? Can a female judge rule on abortion issues? A black judge on civil rights?

"The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal," Walker wrote in his exacting, 136-page opinion.

Gerard Bradley, a law professor at the University of Notre Dame, published a Fox News column in the hours before Walker filed his opinion faulting the media for not forcing Walker to address his sexual orientation.

And Byran Fischer, issues director for the American Family Association, urged the group's members to contact their congressional representatives about launching impeachment proceedings because Walker had not recused himself from a case in which "his own personal sexual proclivities utterly compromised his ability to make an impartial ruling."

William G. Ross, an expert on judicial ethics and law professor at Samford University in Alabama, said that a judge's sexual orientation has no more relevance to his or her ability to rule fairly on a case involving gay marriage than it would for a deeply religious judge or a judge who had been divorced multiple times.

"Under the logic of the people challenging the judge's fitness to rule on a case involving gay rights because he or she was gay, one would have to find a eunuch to serve on the case, because one could just as easily argue that a heterosexual judge couldn't rule on it either," Ross said.

Months before Walker struck down Proposition 8 as an unconstitutional violation of gay Americans' civil rights, members of the team defending the ban in court had complained about what they perceived as judicial bias.

Over their vigorous objections, Walker pushed to have the proceedings televised live, a plan the U.S. Supreme Court quashed at the last minute. Then, he refused to excuse as a witness a Proposition 8 supporter who had compared gays to child molesters during the 2008 campaign. Lawyers for the two same-sex couples who sued to invalidate the ban had called him as a witness to try to prove the measure was fueled by anti-gay prejudice.

Nevertheless, the defense does not plan to raise the specter of the judge's sexual orientation as they appeal his ruling to the 9th U.S. Circuit Court of Appeals, said Jim Campbell, a lawyer with the defense team.

"The bottom line is this case, from our perspective, is and always will be about the law and not about the judge who decides it," Campbell said. "It's just something that collectively as a legal team we have decided and going up, that's what this case is. The appellate courts are going to focus on the law."

Walker has ruled in at least two other cases involving gay rights issues during his two decades as a judge. In 1999, he rejected arguments from the parents of a San Leandro boy who claimed their religious rights were violated by pro-gay comments their son's teacher had made in the classroom.

In the other case, he dismissed a free speech claim by two Oakland city employees whose managers had confiscated a bulletin board flier for a religious group that promoted "natural family, marriage and family values." The city had "significant interests in restricting discriminatory speech about homosexuals," Walker wrote in his 2005 ruling.

Until this week, though, Walker had come under more criticism for representing the U.S. Olympic Committee in a lawsuit against a gay ex-Olympian who had created the so-called Gay Olympics. Walker won, forcing the Gay Olympics to become the Gay Games. He also

aggressively pursued legal fees by attaching a \$97,000 lien to the home of the organization's founder while he was dying of AIDS.

Gay activists cried foul, and his appointment to a federal judgeship was delayed for two years in the waning days of Ronald Reagan's presidency.

Civil rights groups also opposed Walker's nomination because of his 15-year membership in the Olympic Club, an all-male athletic club that had only recently admitted its first black members. California's senior senator at the time, Democrat Alan Cranston, used the club issue to question Walker's fitness for the bench.

Observers usually describe him as a maverick who delights in keeping people guessing. They still are.

On the day of closing arguments in the gay marriage ban case, Walker said it was appropriate that the case was wrapping up in June.

"June, after all, is the month for ... " He let his deep voice trail off, and smiled at the predominantly gay courtroom.

Many froze, wondering if he would refer to the month in which San Francisco celebrates gay pride like Mardi Gras. Would that be a nod to rumors he was gay?

Walker waited a beat longer, savoring the pregnant pause.

"... weddings."

Exhibit H

About AP

Essential News from The Associated Press

Apr. 26, 2011 9:02 PM ET

A A A

Experts: Judge's sexual orientation is non-issue

LISA LEFF, Associated Press 

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SAN FRANCISCO (AP) — The sponsors of California's same-sex marriage ban insist they are not trying to disqualify the federal judge who struck down Proposition 8 because he is gay.

Instead, they argue the judge's decade-long relationship with another man poses a potential conflict because they might want to get hitched themselves.

Experts in judicial ethics said Tuesday that carefully parsed line of reasoning is unlikely to prevail.

They pointed out that while courts have not yet had to wrestle with sexual orientation as grounds for judicial recusal, judges typically have rejected efforts to remove jurists based on personal characteristics such as race, gender, religion or even the contents of their investment portfolios.

"I don't think this judge had any more duty to disclose his sexual orientation than a Christian or Jewish or Muslim judge has a duty to discuss their religion or a heterosexual judge has his duty to



In this photo taken Nov. 19, 2010, Chief District Judge Vaughn R. Walker, of the Northern District of California, speaks at a legal conference in Seattle. The sponsors of California's same-sex marriage ban say the recent disclosure by Walker that he is in a long-term relationship with another man has given them new grounds to appeal the ruling that struck down Proposition 8 last summer. Walker retired from the bench at the end of February. (AP Photo/Elaine Thompson)

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discuss their sexual orientation," retired Illinois state Judge Raymond McKoski said.

At the center of the dispute is Chief U.S. District Judge Vaughn Walker, who issued the ruling last August declaring Proposition 8 to be an unconstitutional violation of gay Californians' civil rights.

"We are not suggesting that a gay or lesbian judge could not sit on this case," attorneys for the backers of Proposition 8 wrote in their motion filed Monday to overturn the landmark ruling. "Simply stated, under governing California law, Chief Judge Walker currently cannot marry his partner, but his decision in this case ... would give him a right to do so."

They claim Walker should have disclosed the relationship while presiding over the case and said if he had any interest in marrying his partner.

DePaul University College of Law professor Jeffrey Shaman, co-author of a widely used textbook on judicial conduct, said the fact that Walker was rumored to be gay from the moment he randomly drew the Proposition 8 case "somewhat undercuts the argument that he should have disclosed he was in a long-term relationship."

Lawyers for backers of the ban seem to be grasping at straws in making their argument against the now-retired Walker, Shaman said.

"But it's their prerogative to do this as lawyers," Shaman said. "It might indicate they are worried about the judge's opinion, which was such a strong opinion, and they are trying to make an end run around it."

The Gay and Lesbian Victory Fund, a political action committee and recruitment organization for gay politicians, said there are now 102 openly gay, lesbian, bisexual and transgender judges in the U.S.

Only one, U.S. District Judge Deborah Batts in New York, serves at the federal level, although President Barack Obama has nominated two gay men for federal judgeships but they have not been confirmed.

Rumors that Walker was gay and had a long-term partner who accompanied him to social functions circulated during the 13-day trial that preceded his decision and after he handed it

down. The judge declined to comment at the time.

Members of the Proposition 8 team openly complained about Walker's handling of the case and accused him of favoring the same-sex couples who had sued in his court for the right to marry. But they refrained from raising the specter of the judge's sexual orientation, saying media reports and gossip were an unsound basis for legal strategy.

"The bottom line is this case, from our perspective, is and always will be about the law and not about the judge who decides it," Jim Campbell, a lawyer with the Christian legal defense group Alliance Defense Fund, told The Associated Press in August.

That might have remained their position if Walker, who retired in late February after two decades on the federal bench, had not decided to end the speculation himself.

Earlier this month, Walker had a farewell meeting with a select group of courthouse reporters. When the topic came up, Walker said he never thought about recusing himself because he was gay and noted that no one had asked him to, according to the San Francisco Chronicle, which had a reporter at the gathering.

The judge also revealed that he'd been in a relationship with a man he identified only as a physician for a decade.

"If you thought a judge's sexuality, ethnicity, national origin (or) gender would prevent the judge from handling a case, that's a very slippery slope," Walker said. "I don't think it's relevant."

The lawyers who filed the motion to wipe out the judge's ruling declined to elaborate outside their written arguments about why they concluded that Walker's comment about his partner caused them to change course.

In their filing, they stated in a lengthy footnote that the burden for "maintaining impartiality and the appearance of impartiality" lies with judges, and that it was not the place of the lawyers to investigate Walker's private affairs.

Retired California state Judge Jeffrey Rothman said bias claims have arisen in the past surrounding judges with strong religious views. But he noted that the bar for disqualification is purposefully set high. Lawyers representing a clinic that performed abortions, for example, would not be able to challenge a devoutly Catholic judge, he said.

"They would get absolutely nowhere with such a challenge unless that judge had gone out and made statements or speeches saying he believed that Roe v. Wade ought to be overturned if that case ever came before them," Rothman said. "The question is, can the beliefs be set aside and the judge decide the case on its merits and be fair."

Associated Press

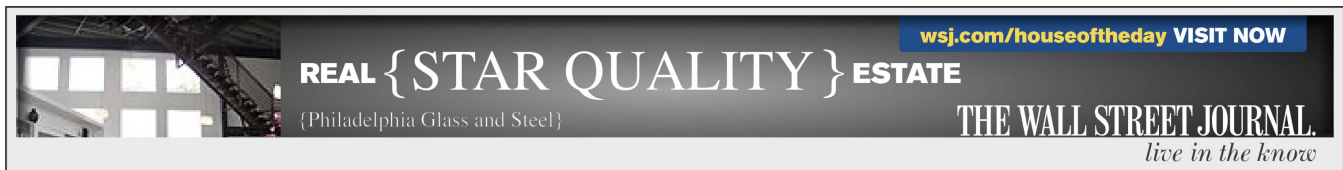
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Exhibit I



THE WALL STREET JOURNAL.
WSJ.com

FEBRUARY 8, 2010, 10:22 AM ET

Prop. 8 Judge is Reportedly Gay: What to Make of That?

The lede from an [article out Sunday](#) in the SF Chronicle reads as follows:

The biggest open secret in the landmark trial over same-sex marriage being heard in San Francisco is that the federal judge who will decide the case, Chief U.S. District Judge Vaughn Walker, is himself gay.



Interesting. So, what to make of this fact?

According to the article, folks aren't making much of it. Andy Pugno, general counsel for the group that sponsored the Prop. 8 campaign, rebuffed claims that his group might bring it up if Walker ultimately rules against them. "We are not going to say anything about that," Pugno said.

Others quoted in the article say that Walker, appointed to the bench by George H.W. Bush in 1989, say they don't believe that Walker's sexual orientation will affect his ruling on Prop. 8.

"There is nothing about Walker as a judge to indicate that his sexual orientation, other than being an interesting factor, will in any way bias his view," said Kate Kendell, head of the National Center for Lesbian Rights, to the Chron. Kendell cites the judge's jurisprudential reputation, and says, "There wasn't anyone who thought (overturning Prop. 8) was a cakewalk given his sexual orientation."

Walker has declined to talk about anything involving the Prop. 8 case outside court, and he wouldn't comment to the Chron when we asked about his orientation and whether it was relevant to the lawsuit.

We can certainly understand why the parties might not want to address Walker's sexual orientation: No reason to stir more controversy into a case that will ultimately be settled at the Ninth Circuit or the U.S. Supreme Court. Plus, it's not like Judge Walker raised his hand for the case — it was reportedly randomly assigned to him.

But is Walker's sexual orientation relevant to the trial? Frankly, it's hard to see how it's not, especially if you believe that the opinions of judges, try as they might to divorce their personal opinions from their rulings, are invariably colored and informed by their own experiences, just like the rest of us.

The Chron story quotes a fellow federal judge and friend of Walker's conceding the relevance of the fact. Walker's background, says the judge, is relevant in the same way people would want to know that a judge hearing a discrimination case involving Latinos was Latino or a Jewish judge was ruling in a case involving the Anti-Defamation League.

LBers, any thoughts?

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