NOS. 14-556, 14-562, 14-571, 14-574
(CONSOLIDATED)

IN THE SUPREME COURT OF THE UNITED STATES

JAMES OBERGEFELL, *ET AL.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEP'T OF HEALTH, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF *AMICUS* FOUNDATION FOR MORAL LAW FOR RECUSAL OF JUSTICES RUTH BADER GINSBURG AND ELENA KAGAN

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Comes now the Foundation for Moral Law, *Amicus Curiae,* ("*Amicus*"), and respectfully moves, pursuant to 28 U.S.C. § 455, for the recusal of Justices Ruth Bader Ginsburg and Elena Kagan in these consolidated cases, and states the following grounds:

1. These cases address the authority of states to retain the historic definition of marriage and whether a state must recognize same-sex marriages performed in other states.

2. Justices Ginsburg and Kagan have officiated at highly publicized same-sex marriages that would potentially be affected by the ruling in these cases. They thus may have a predisposition to vote in these cases to validate the marriages they have performed.

3. In addition, four weeks after this Court granted *certiorari* in these cases, Justice Ginsburg was asked whether parts of the country might not accept same-sex marriage being constitutionalized. She answered: "I think it's doubtful that it wouldn't be accepted. The change in people's attitudes on that issue has been enormous. ... It would not take a large adjustment ...." Bloomberg News interview, Feb. 12, 2015. These extrajudicial comments about a matter pending before the Court violate Canon 3A(6) of the Code of Conduct for

United States Judges: "A judge should not make public comment on the merits of a matter pending or impending in any court ...."

4. On or about 9 September 2014, Justice Ginsburg told a Minnesota audience that if the 6th Circuit Court of Appeals allows laws banning same-sex marriage to stand, "there will be some urgency" for the Supreme Court to act, but if the 6th Circuit rules that such laws are unconstitutional there will be "no need for us to rush." (Brian Bakst, "Ruth Bader Ginsburg: Watch 6th Circuit for SCOTUS' Next Move on Gay Marriage," Huffpost Politics 16 September 2014). She may have meant that an affirmation of traditional marriage laws would create a split among the circuit courts, but her comments could be perceived to mean that she hopes the 6th Circuit will strike such laws down and will be more likely to overrule the 6th Circuit if they do not so rule.

5. In an interview about the upcoming same-sex wedding ceremony that she was to perform at the Kennedy Center for the Performing Arts in Washington, D.C. on or about 31 August 2013, Justice Ginsburg said, "I think it will be one more statement that people who love each other and want to live together should be able to enjoy the blessings and the strife in a marriage relationship." (Robert Barnes, "Ginsburg to Officiate Same-Sex

Wedding," *Washington Post,* 30 August 2013). This statement, coupled with the act of performing a same-sex wedding, clearly shows a predisposition on the part of Justice Ginsburg to rule in favor of same-sex marriage.

6. Additionally, by performing same-sex weddings, Justices Ginsburg and Kagan have improperly lent the prestige of their judicial office to a cause that is now before them for decision. See Canon 2B, Code of Conduct for United States Judges.

7. Furthermore, 28 U.S.C. § 455(a) mandates that any justice of the United States "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *See Pilla v American Bar Ass'n*, 542 F.2d 56, 58 (8th Cir. 1976) (explaining that 28 U.S.C. § 455(a) applies to members of the U.S. Supreme Court).

8. Section 455(b)(4) requires recusal when a Supreme Court Justice has "any other interest that could be substantially affected by the outcome of the proceeding."

9. A reasonable observer would doubt that any judge can objectively sit in judgment of her very own acts, actions, or directives. Thus, Respondent has fully satisfied the burden required under 28 U.S.C. § 455.

10. "'The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 869-70 (1988) (quoting *Public Utilities Comm'n of D. C. v. Pollak*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers)).

11. Due process requires a neutral and detached judge. A hearing before a biased judge is structural error that is not subject to harmless error analysis. *See Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (noting that every litigant has "the right to have an impartial judge"). Justices Ginsburg and Kagan have personally and publicly engaged in extrajudicial conduct that dramatically endorses the legal recognition that petitioners seek to have nationalized in these cases. Their vividly demonstrated favorable disposition towards the petitioners "is so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994).

12. Because the resolution of these marriage cases could have an enormous impact on the moral and cultural fabric of our nation and our federalism, the strong ethical proscription against allowing a case to be decided under the cloud of an appearance of

impropriety should apply with particular force.

13. No motion is required to precipitate a Judge's recusal under 28 U.S.C. § 455. *See Davis v. Board of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); 13 A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3550 (1984). In addition, parties may seek recusal by motion. *See Klenske v. Goo*, 781 F.2d 1370, 1373 (9th Cir. 1986) ("Though section 455 is stated in terms of a self-enforcing obligation upon the Judge, it may be invoked by a party.").

14. Justice Stephen Breyer consistently recuses himself from cases in which his brother participated as a lower court judge, and Justices have always recused themselves from cases in which they had personally participated. Justice Thurgood Marshall recused himself from many dozens of cases while he served on the Supreme Court, in order to protect its integrity. Justice Antonin Scalia recused himself from a high-profile case concerning the constitutionality of the Pledge of Allegiance, based on comments he had previously made. Justice Clarence Thomas recused himself from the highly publicized case concerning the admission of women at the Virginia Military Institute, because his son was

enrolled at the college. *See United States v. Virginia*, 518 U.S. 515 (1996).

15. Public comments by Justice Ginsburg in support of same-sex marriage, including her published statement that our nation is supposedly ready to accept same-sex marriage, reflect a strong opinion about the underlying issue before oral argument has even been heard. Given the precedent of recusal established by Justices Breyer, Thurgood Marshall, Scalia, Thomas, and many others, we respectfully request recusal by Justices Ginsburg and Kagan in order to protect the integrity of this important adjudication.

16. Should Justices Ginsburg and Kagan decline to recuse themselves, Respondent respectfully requests that the remaining justices review that decision.

17. The possibility that other Justices of this Court may have performed opposite-sex marriages is not relevant to this question of recusal. The legality of opposite-sex marriages is not an issue in this case.

18. Specifically, in the event this motion for recusal is denied by an individual Justice, then Respondent moves the entire Court to review the underlying facts and grant the requested disqualification. Justices Ginsburg

and Kagan have an interest – their official acts in performing same-sex marriages as Supreme Court Justices – that would be substantially affected by a decision in these cases, or would at least cause their impartiality to "reasonably be questioned." 28 U.S.C. § 455(a).

19. No harm would result from these recusals as the seven remaining Justices constitute a quorum without the likelihood of a tie vote.

20. *Amicus* is a 501(c)(3) tax-exempt nonprofit corporation founded for the purpose of defending the United States Constitution as interpreted according to the intent of its Framers. *Amicus* has filed a brief *amicus curiae* in the present case. *Amicus* also has a heightened interest in this matter because *Amicus* represents a third-party defendant in a case involving same-sex marriage, *Hard v. Bentley,* Civ. Action No., 2-13-cv-00922 WKW-SRW (2013), which case is currently pending before the Federal District Court for the Middle District of Alabama, the outcome of which will very likely turn upon this Court's decision in the case at hand.

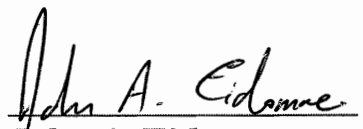
21. *Amicus* recognizes that, as a non-party in the present case, the standing of *Amicus* to raise this motion may be questioned. However, *Amicus* observes that the factors cited in

paragraph 19 above give *Amicus* the heightened standing required for a matter of substantial and general constitutional interest in which public officials have a constitutional duty to the general public. Furthermore, because a motion is not needed on a matter of recusal (see para. 13 of this Motion), *Amicus* presents this motion as a basis for considering the issue of recusal.

Conclusion

***Amicus* respectfully requests that Justices Ginsburg and Kagan recuse themselves from these cases, or that they be disqualified upon review by the remainder of the Justices.**

Respectfully submitted this 27TH day of April, 2015.



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