UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA FAMILY POLICY COUNCIL,

Plaintiff,

Case Action No. 4:06-CV-395 RH/WCS

v.

THOMAS B. FREEMAN, *et al.*,

Defendants.

MOTION OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO FILE BRIEF AS *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") moves the Court for leave to file an *amicus curiae* brief in the above-captioned case. This case presents important questions concerning the independence of the judiciary, an issue that particularly affects members of minority groups that *amicus* represent.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.. Lambda Legal has numerous Florida members whose interests are represented by its Southern Regional Office in Atlanta.

Lambda Legal's primary means of achieving the full recognition of civil rights for its community is through litigation in courts throughout the country. Over the past decade, many of the LGBT community's most significant civil rights successes have come through strategic lawsuits by Lambda Legal and other organizations that have resulted in precedent-setting legal victories. It has been essential to these victories not only to be correct on the law but also to have fair and impartial judges willing to consider all sides of a legal issue.

Lambda Legal has represented the interests of its community at all levels of federal and state courts. Lambda Legal served as lead counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and was *amicus curiae* in *Bragdon v. Abbott*, 524 U.S. 624 (1998) and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has represented the LGBT and HIV community in Florida, serving as *amicus curiae* in *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), *reh'g denied*, 377 F.3d 1275 (11th Cir. 2004) and *Lowe v. Broward County*, 766 So.2d 1199 (Fla. 4th DCA 2000), and as lead counsel in *Kazmierazak v. Query*, 736 So. 2d 106, 106 (Fla. 4th DCA 1999).

Proposed *amicus* seeks to provide the Court with an informed analysis of the legal issues raised in this case, focused on the compelling interest in judicial impartiality. *Amicus* will analyze not only the state's compelling interest in ensuring that judges approach cases willing to consider the evidence and arguments presented, but also the particular importance that this aspect of judicial impartiality has for members of minority groups. Additionally, *amicus* will discuss the importance to the judiciary as an institution that it be – and be seen as – a neutral arbiter that applies the law fairly to all. This interest is particularly important to *amicus*, in that the impartial

reputation of the judiciary is essential to ensure public respect for judicial decisions, especially those that are counter to majoritarian norms.

"The district court [] has the inherent authority to appoint amici curiae, or 'friends of the court,' to assist it in a proceeding." *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991); see also *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 960 n.10 (M.D. Fla. 1993) ("[I]t is generally accepted that it is within the Court's 'inherent authority'" to appoint "friends of the court.'"). "Participation as amicus curiae" is proper when it "will alert the court to the legal contentions of concerned bystanders . . ." *Resort Timeshare Resales*, 764 F. Supp. at 1501. For example, this Court previously has granted leave to appear as amicus to organizations representing minorities in a Voting Rights Act case, *see DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1080 (N.D. Fla. 1992), and to a concerned business organization wishing to assist the state in defending the constitutionality of challenged statutes affecting its members. *BT Inv. Managers, Inc. v. Lewis*, 461 F. Supp. 1187, 1191 (N.D. Fla. 1978), *aff'd in part and vacated in part*, 447 U.S. 27 (1980).

Accordingly, Lambda Legal respectfully asks the Court to grant leave to file an *amicus curiae* brief in this action.

Dated: October 4, 2006

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of October, 2006, a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. was served by United States Mail, postage prepaid, upon the following:

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AMICUS CURIAE BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

It is now clearly-established law that a judicial candidate may speak publicly about even controversial and sensitive issues and cannot be subject to discipline for exercising such rights. This case does not concern that proposition, however. Instead, plaintiff attacks the recusal mechanism that helps assure litigants that they will have their day in court before judges who have not already decided to rule against them and that generates confidence in the legal system by maintaining the appearance and actuality that cases will be decided by neutral and impartial decision-makers. The United States Supreme Court, in its 2002 ruling that the First Amendment protects judicial candidates' speech, specifically endorsed the alternative of recusal. Every reported case in every jurisdiction since then has rejected challenges to recusal rules, recognizing that they are narrowly-targeted means of ensuring that litigants face judges who will not be

predisposed to a particular result. *Amicus* respectfully submit that this Court should not be the first to invalidate this invaluable mechanism of promoting judicial fairness and integrity.

I. CASE LAW IS UNANIMOUS THAT RECUSAL CANONS DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF JUDICIAL CANDIDATES.

Beginning with *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), every case to consider the issue has held that, unlike blanket bans on speech, recusal canons are narrowly tailored to serve the government's compelling interest in judicial fairness. The Supreme Court specifically recognized in *White* that recusal – even forced recusal – is legitimate, while blanket punishment for speech is not. The Court held that Minnesota "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear . . ." *Id.* at 794.

The actions of Justice Scalia, the author of *White*, confirm that recusal of a judge who has committed himself on an issue is appropriate. Justice Scalia wrote that "recusal is the course I must take -- and will take -- when, on the basis of established principles and practices, **I have said** or done something which requires that course. I have recused for such a reason this very Term. *See Elk Grove Unified School Dist. v. Newdow*, 540 U.S. 945, 124 S. Ct. 384, 157 L.Ed.2d 274 (*cert.granted*, Oct. 14, 2003)." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 916 (2004) (emphasis added). In the *Newdow* case, Justice Scalia recused himself because of a speech he had given in which he emphatically stated that any changes to the pledge of allegiance must not be brought about by the judiciary.[1]

[1] Tony Mauro, "Scalia Recusal Revives Debate Over Judicial Speech," Ethics *Legal Times*, October 20, 2003 at http://www.law.com/jsp/article.jsp?id=1066080440869

Since *White*, every federal court to rule on the issue has rejected claims that recusal canons violate the First Amendment rights of judicial candidates. *Family Trust Foundation of Kentucky, Inc v. Wolnitzek*, 345 F. Supp. 2d 672, 708 (E.D. Ky. 2004) ("the recusal laws certainly serve the state's interest in impartiality. . . . [and] are narrowly tailored to serve this state's interest in impartiality in this sense.") *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1084 (D. Alaska 2005) (the recusal "canon is narrowly tailored to serve a compelling State interest"); *Kansas Judicial Watch v. Stout*, 2006 WL 2038045 *18 (D. Kan. July 19, 2006) ("The recusal Canon is also narrowly tailored to serve the compelling government interest in open-mindedness."); *North Dakota, Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005) ("The recusal provisions in Canon 3e(1) serve the state's interest in impartiality and the canon is narrowly drafted to achieve that interest.").

Also notable is an opinion of the Mississippi Supreme Court, which held that a judge could not be disciplined for antigay comments in his letter to the editor of a local paper. *Mississippi Com'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1015 (Miss. 2004). Instead, the court held that the state's compelling interest in impartiality is served by allowing the speech and then permitting concerned litigants to file recusal motions:

> Whatever state interest the Commission may find in preventing judges from announcing their private views on gay rights would conflict with, and be outweighed by, the more compelling state interest of providing an impartial court for all litigants, including gays and lesbians. Allowing--that is to say, forcing--judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.

Id.

In sum, *White* and subsequent opinions are unanimous that, while judicial candidates and judges retain their rights to free speech, the protections of recusal rules are essential to the independence of the judiciary.

II. THE JUDICIARY MUST BE, AND MUST BE SEEN AS, AN INSTITUTION THAT IS OPEN-MINDED TO THE CONSTITUTIONAL CLAIMS OF POLITICAL MINORITIES.

The recusal mechanism is essential to ensure that litigants appear before judges who are fair in appearance and actuality. As plaintiff concedes, "[appearing] before 'an unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). But the judiciary has compelling interests beyond merely affording minimal due process to litigants by removing actually biased judges. "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' [citation]." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

"Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation." *Jenkins v. Forrest County General Hosp.*, 542 So.2d 1180, 1181 (Miss. 1988). "[O]penmindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine-as opposed to illusory-opportunity to be heard." *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003). "[T]he State, as steward of the judicial system, has the obligation to create and maintain a system that ensures equal justice and due process. We have described the State's interest in this regard as 'overriding' and have noted that '[t]here is "hardly * * * a higher governmental interest than a State's interest in the quality of its judiciary."'" *Id.* at 6.

Each of the courts that have considered challenges to recusal canons since *White* has stressed that the recusal mechanism ensures that litigants will have a fair chance to be heard. The recusal canon "offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant." *Feldman*, 380 F. Supp. 2d at 1084. "[I]mpartiality in this sense assures equal protection of the law. An impartial judge is essential to due process." *Wolnitzek*, 345 F. Supp. 2d at 707-08; *Bader*, 361 F. Supp. 2d at 1043. ("There is no question that an impartial judge is critical to due process and the administration of justice."). "The purpose of the recusal canon is to guarantee to litigants that the judge will apply the law to them in the same way. . . . The recusal Canon requires a judge to recuse if he or she is unable to maintain an open mind about the results of a particular case until all of the evidence and arguments have been presented." *Stout*, 2006 WL at *18. The *Wolnitzek* court explained why the recusal mechanism is crucial to ensure the removal of judges who will not listen to the evidence and arguments:

> Judges are expected to be open-minded in regard to cases over which they preside. It is often said that to maintain the requisite degree of impartiality, judges should not predetermine their decisions. In other words, they should keep an open mind about the outcome of a case until all of the evidence and arguments have been presented. The recusal laws mandate that a judge voluntarily disqualify himself from a case in which he feels that he cannot be open-minded.

Wolnitzek, 345 F. Supp. 2d at 708.

Courts have recognized that the principle of open-mindedness, while important to all, is especially crucial for political minorities, who frequently must turn to the courts to vindicate their constitutional rights. "The irreplaceable value of the power [of judicial review] articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and

liberties of individual citizens and minority groups against oppressive or discriminatory government action." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . . may call for correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938); *see also Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1548 (11th Cir. 1990) ("Minorities have resorted frequently to the federal courts for vindication of their rights."); *Kane v. Winn*, 319 F. Supp. 2d 162, 203-04 (D. Mass. 2004) (discussing "the courts' traditional role as protectors of minority rights by interpreting statutes in light of the social reality surrounding marginalized groups.").

Courts frequently must counter the tide of public opinion to vindicate important constitutional rights. *See Pool v. Commonwealth*, 213 S.W.2d 603, 605-06 (Ky. 1948) ("It is the duty of courts to protect a minority group . . . regardless of the unpopularity frequently encountered in doing so."). For example, in 1968, the year *after* the Supreme Court unanimously invalidated bans on interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967), a Gallup poll revealed that 72% of Americans still opposed interracial marriage. *See U.S. v. Barber*, 80 F.3d 964, 973 n.7 (4th Cir. 1996) (*en banc*) (Murnaghan, J., dissenting); George Gallup, Jr. and Dr. Frank Newport, For First Time, More Americans Approve of Interracial Marriage than Disapprove, *The Gallup Poll Monthly*, Aug. 1991, at 60-62.

The state's interest in ensuring an open-minded forum for all litigants is beyond question. That interest is all the more compelling when it comes to political minorities seeking to vindicate

their constitutional rights, and the recusal mechanism that helps assure this crucial protection is a necessity.

III. FOR THE SAKE OF ITS LEGITIMACY, THE JUDICIARY MUST BE, AND MUST BE SEEN AS, AN INSTITUTION THAT IS OPEN-MINDED TO THE CONSTITUTIONAL CLAIMS OF ALL, INCLUDING MINORITY GROUP MEMBERS.

The recusal canon also serves the vital purpose of ensuring that the public regards the judiciary as an impartial institution. Like all officers of the court, *amicus* are concerned about public confidence in the courts, which derives from belief in the judiciary's commitment to providing a fair forum for all litigants. *Amicus* are particularly affected by this concern, because the minority group members they represent depend on public respect for the judiciary's vindication of constitutional rights.

"The public's confidence in the judicial system is the paramount interest safeguarded by the [recusal] canon. It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair." *In re K.L.W.*, 131 S.W.3d 400, 405 (Mo. Ct. App. 2004) (citations and internal quotations omitted). "An independent judiciary is essential for our society. The judiciary cannot function without the trust and confidence of the public in the integrity and independence of its judges." *Huffman v. Arkansas Jud'l Discipline and Disability Com'n*, 42 S.W.3d 386, 392 (Ark. 2001).

Public confidence in the judiciary is so vital to the institution's validity that courts must avoid even the appearance of unfairness. *See Jenkins*, 542 So.2d at 1181 ("The issue is . . . how this situation appears to the general public and the litigants whose cause comes before this judge."). "'[T]he perception of impartiality is as important as actual impartiality.' [citation]

This is so because '[j]udges personify the justice system upon which the public relies to resolve all manner of controversy, civil and criminal.'" *In re Watson*, 794 N.E.2d at 6-7.

The recusal mechanism is vital because "[t]he public and individual litigants must be reassured that the judiciary will decide legal disputes based on the law alone." *Wolnitzek*, 345 F. Supp. 2d at 707-08. Thus, recusal serves the interests not only of individual litigants, but also of the judiciary as an institution whose legitimacy derives from the public's belief that it decides cases based only on the evidence and the law.

CONCLUSION

Every court to consider the issue has determined that recusal canons comport with the First Amendment, because they are narrowly tailored to serve the state's compelling interest in providing a fair forum to litigants and ensuring that the public has confidence in the integrity of the judiciary. *Amicus* respectfully ask this Court to affirm the validity of this crucial means of ensuring judicial fairness.

Dated: October 4, 2006

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