

2015 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 85

BY REPRESENTATIVES HODGES, HENRY BURNS, GUINN, IVEY, MACK,
SEABAUGH, AND WHITNEY AND SENATORS CROWE AND GUILLORY

JUDGES/SUPREME COURT: Requests that the United States Supreme Court Justices
Ginsburg and Kagan recuse themselves in the case of *Obergefell v. Hodges*

1 A CONCURRENT RESOLUTION

2 To urge and request United States Supreme Court Justices Ruth Bader Ginsberg and Elena
3 Kagan to each recuse themselves from the case of *Obergefell v. Hodges*, Supreme
4 Court Docket No. 14-556.

5 WHEREAS, in 2004, the Legislature of Louisiana passed House Bill No. 61 of the
6 2004 Regular Session, which proposed an amendment to the Constitution of Louisiana
7 known as the "Defense of Marriage" act and which declared that "marriage in the state of
8 Louisiana shall consist only of the union of one man and one woman"; and

9 WHEREAS, in 2004, the people of Louisiana, by a favorable vote of seventy-eight
10 percent of Louisiana's electorate, amended the Constitution of Louisiana to declare that
11 marriage shall be between one man and one woman; and

12 WHEREAS, the United States Supreme Court has granted writs to review the case
13 of *Obergefell v. Hodges*, supra, which is a case challenging the state of Ohio's defense of
14 marriage act; and

15 WHEREAS, Ohio's defense of marriage act, which is similar to Louisiana's defense
16 of marriage act, declares that marriage in Ohio shall also be "only a union between one man
17 and one woman"; and

18 WHEREAS, *Obergefell v. Hodges*, supra, has been consolidated with *Tanco v.*
19 *Haslam*, Supreme Court Docket No. 14-562, a case which challenges Tennessee's defense
20 of marriage act; *DeBoer v. Snyder*, Supreme Court Docket No. 14-571 a case which

1 challenges Michigan's defense of marriage act, and *Bourke v. Beshear*, Supreme Court
2 Docket No. 14-574, a case which challenges Kentucky's defense of marriage act; all four of
3 which address the authority of states to retain the historic definition of marriage and whether
4 a state must recognize same-sex marriages performed in other states; and

5 WHEREAS, in the cases consolidated in *Obergefell v. Hodges*, supra, opponents of
6 traditional marriage desire to have the United States Supreme Court strike down the laws of
7 the respective states and the will of the people of those states, which all declare marriage to
8 be between one man and one woman; and

9 WHEREAS, a decision in the case of *Obergefell v. Hodges*, supra, would arguably
10 affect Louisiana's defense of marriage act, which also declares that marriage is between one
11 man and one woman; and

12 WHEREAS, United States Supreme Court Justices Ruth Bader Ginsberg and Elena
13 Kagan have each engaged in public conduct suggestive to reasonable observers of a
14 predisposition to rule in favor of the plaintiffs in the consolidated cases prior to a hearing on
15 the merits; and

16 WHEREAS, United States Supreme Court Justices Ruth Bader Ginsberg and Elena
17 Kagan have each engaged in public conduct suggestive of bias in all of the following ways:

18 (1) Justices Ginsberg and Kagan have each officiated highly publicized same-sex
19 marriages that would potentially be affected by the ruling in these cases; therefore, the
20 justices thus may have a predisposition to vote in these cases to validate the marriages they
21 have performed. (Robert Barnes, "Ginsberg to Officiate Same-Sex Wedding", Washington
22 Post, 8/30/13) and "Supreme Court Justice (Kagan) Performs Her First Same-Sex Wedding",
23 CBS News, 9/22/14)

24 (2) Four weeks after the United States Supreme Court granted *certiorari* in the
25 consolidated cases, when asked whether parts of the country might not accept same-sex
26 marriage being constitutionalized, Justice Ginsberg answered: "I think it's doubtful that it
27 wouldn't be accepted. The change in people's attitudes on that issue has been enormous...
28 It would not take a large adjustment..." (Bloomberg News interview, 2/12/15). Although
29 recent polling data disputes her conclusion as to the attitudes of the public, these
30 extrajudicial comments about a matter pending before the United States Supreme Court

1 violate Canon 3A(6) of the Code of Conduct for United States Judges which states that "A
2 judge should not make public comment on the merits of a matter pending or impending in
3 any court..."

4 (3) By performing same-sex weddings, Justices Ginsberg and Kagan have each
5 improperly lent the prestige of their judicial office to a cause that is now before them for
6 decision, in violation of Canon 2B, Code of Conduct for United States Judges.

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

11 (5) The United States Code, 28 U.S.C. §455(b)(4), requires recusal when a Supreme
12 Court Justice has "any other interest that could be substantially affected by the outcome of
13 the proceeding."

14 (6) A reasonable observer would doubt that any judge can objectively sit in
15 judgment of her very own acts, actions, or directives; thus, the burden of recusal has been
16 fully satisfied under 28 U.S.C. §455.

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

21 (8) Due process requires a neutral and detached judge. A hearing before a biased
22 judge is structural error that is not subject to harmless error analysis. See *Tumey v. Ohio*,
23 273 U.S. 510, 535 (1927) (noting that every litigant has "the right to have an impartial
24 judge"). Justices Ginsberg and Kagan have each personally and publicly engaged in
25 extrajudicial conduct that dramatically endorses the legal recognition that petitioners seek
26 to have nationalized in these consolidated cases. Their vividly demonstrated favorable
27 disposition towards the petitioners "is so extreme as to display clear inability to render fair
28 judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994).

29 (9) Because the resolution of these marriage cases could have an enormous impact
30 on the moral and cultural fabric of our nation and our federalism, the strong ethical

1 proscription against allowing a case to be decided under the cloud of an appearance of
2 impropriety should apply with particular force.

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

10 WHEREAS, the following justices of the United States Supreme Court have recused
11 themselves in the following circumstances:

12 (1) Throughout history of the court, dozens of justices have recused themselves in
13 the interests of justice. (James J. Sample, "*Supreme Court Recusal: From Marbury to the*
14 *Modern Day*", Vol. 26 at 95, 2013, The Georgetown Journal of Legal Ethics)

15 (2) Justice Thurgood Marshall recused himself from many dozens of cases while he
16 served on the Supreme Court in order to protect the integrity of the court. Justice Marshall
17 had been general counsel for the National Association for the Advancement of Colored
18 People (NAACP) or the NAACP Legal Defense Fund from 1943 to 1960. Before his
19 appointment as a justice on the high court, Marshall's greatest and most significant legal
20 victory as a lawyer came when he was the NAACP's general counsel in *Brown v. Board of*
21 *Education*, 347 U.S. 483 (1954), the case which achieved the noble end of outlawing
22 segregation in public education. After Justice Thurgood Marshall was appointed as justice
23 to the United States Supreme Court, he routinely recused himself for seventeen years in
24 matters which came before the high court where either the NAACP or the NAACP Legal
25 Defense Fund were parties to the case. Ross E. Davies, "*The Reluctant Recusants: Two*
26 *Parables of Supreme Judicial Disqualification*", Vol. 10, No. 1, 79, at 81, George Mason
27 Law & Economics Research Paper No. 06-51, (Autumn 2006).

28 (3) Justice Stephen Breyer has consistently recused himself from cases in which his
29 brother participated as a lower court judge. *Olympic Airways v. Husain*, 540 U.S. 644
30 (2004), *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002),

1 *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 482 (2001), *Monsanto Co. v.*
2 *Geertson Seed Farm*, 561 U.S. 139 (2010) and *Amgen, Inc. v. Connecticut Retirement Plans*
3 *and Trust Funds*, 133 S. Ct. 1184 (2013).

4 (4) Justice Antonin Scalia recused himself from a high-profile case concerning the
5 constitutionality of the Pledge of Allegiance, based on comments he previously made. *Elk*
6 *Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

7 (5) Justice Clarence Thomas recused himself from the highly publicized case
8 concerning the admission of women at the Virginia Military Institute, because his son was
9 enrolled at the college. See *United States v. Virginia*, 518 U.S. 515 (1996); and

10 WHEREAS, public comments by Justice Ginsberg in support of same-sex marriage,
11 including her published statement that our nation is supposedly ready to accept same-sex
12 marriage, reflect a strong opinion about the underlying issue before oral argument has even
13 been heard; and

14 WHEREAS, the public conduct of Justices Ginsberg and Kagan has created an
15 appearance of partiality in the minds of reasonable observers and is ". . . a serious problem
16 that casts disrepute upon the judiciary." (Shaman, Lubet and Alfini, JUDICIAL CONDUCT
17 AND ETHICS, page 96 (Michie Law Publishers, 1990); and

18 WHEREAS, given the precedent of recusal established by Justices Breyer, Thurgood
19 Marshall, Scalia, Thomas, and many others, the Legislature of Louisiana finds that recusal
20 by Justices Ginsberg and Kagan is in order to protect the integrity of this important
21 adjudication and to protect the integrity of the United States Supreme Court.

22 THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby
23 find that Justices Ruth Bader Ginsberg and Elena Kagan have taken sides on the important
24 issue of "same-sex marriage", thus demonstrating an inability to be objective on the matter
25 in question, and giving rise to a legal, moral, ethical, and professional duty to withdraw.

26 BE IT FURTHER RESOLVED that, in order to preserve public confidence in the
27 integrity of the judicial system, the Legislature of Louisiana does hereby urge and request
28 Justices Ruth Bader Ginsberg and Elena Kagan to each recuse themselves from further
29 consideration in the matter of *Obergefell v. Hodges*, U.S. Supreme Court Docket No. 14-556.

1 BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the
2 United States Supreme Court Justices Ruth Bader Ginsberg and Elena Kagan and to the
3 Clerk of the Supreme Court of the United States of America.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

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Hodges

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