IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-00281-WJM-KMT

ABBY LANDOW,
JEFFREY ALAN,
SUSAN WYMER,
LAWRENCE BEAL,

individually and on behalf of
others similarly situated,

GREENPEACE, INC.,
NANCY YORK,

Plaintiffs,

v.

CITY OF FORT COLLINS,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR JUDICIAL RECUSAL

Plaintiffs, at the Court's direction, hereby respond to Defendant's Motion for Judicial Recusal (#20).

INTRODUCTION

Defendant has submitted a request that the Court recuse itself based upon its involvement before 2010 with the Legal Panel of the ACLU of Colorado. Plaintiffs submit the following authority, which may assist the Court in its determination.

DISCUSSION

I. GENERAL STANDARDS

Defendant moves for recusal pursuant to 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *David v. City & County of Denver*, 101 F.3d 1344, 1350 (10th Cir. 1996) (internal citation omitted). The decision as to whether recusal is appropriate is committed to the judge's discretion, and it is to be "determined from an informed, reasonable viewpoint." *Id.* at 1351.

II. PRIOR WORK OR ADVOCACY ON RELATED ISSUES

A judge's prior work or advocacy on an issue related to the instant matter does not require recusal. "Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court." *Carter v. W. Publ'g Co.*, No. 99-11959-EE, 1999 WL 994997, at *9 (11th Cir. Nov. 1, 1999).

Thus, a judge's prior participation in an advisory capacity regarding an issue that later comes before the court does not require recusal. *See, e.g.*, *United States v. Voccola*, 99 F.3d 37, 42-43 (1st Cir. 1996) (affirming district judge's decision not to recuse herself from financial fraud prosecution, where judge participated on investigative commission concerning financial fraud, where commission "did not focus on this particular case or on this particular defendant"). Nor does a court's prior work

with a civil rights organization itself require recusal. *See Wessmann by Wessmann v. Boston Sch. Comm.*, 979 F. Supp. 915, 916-17 (D. Mass. 1997) ("A number of judges who have confronted precisely the same issue that I face here have concluded that association with a public position on the issue of civil rights, and even representation of civil rights plaintiffs—without more—does not create a reasonable doubt about one's impartiality in future civil rights cases."). Similarly, a judge who has previously provided policy advice involving an issue in the litigation before him or her need not recuse. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006) ("[J]udges who previously participated in policy matters and provided policy advice in government do not ordinarily recuse in litigation involving those policy issues.").

Finally, a judge's membership in an advocacy organization, political party, or a church does not necessitate recusal. *See In re McCarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004) ("[W]e note that merely because Judge Stewart belongs to and contributes to the Mormon Church would never be enough to disqualify him"). In *Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n*, 328 F.3d 638, 645 (10th Cir. 2003), the Tenth Circuit Court made clear that a judge's prior affiliation with a political organization does not require recusal in a case involving others affiliated with the same organization:

> [The fact] that Judge Leonard and Governor Keating have been members of the same political party, and that Judge Leonard may once have been active in the party, do not call into question Judge Leonard's impartiality. It is, of course, 'an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.' . . . The fact of past political activity alone will rarely require recusal, and we conclude it does not do so here.

Id. at 645 (internal citation omitted); *see also Armenian Assembly of Am., Inc. v. Cafesjian*, 783 F. Supp. 2d 78, 91 (D.D.C. 2011) ("Similarly, a judge's past membership in organizations that advocate for positions advanced by a party does not necessarily require recusal."), *aff'd*, 758 F.3d 265, 282-83 (D.C. Cir. 2014).

And it is well established that "a judge's prior representation of . . . a party in an unrelated matter does not automatically require disqualification." *David*, 101 F.3d at 1350. For example, in *Mitchael v. Intracorp, Inc.*, the judge had a prior background in insurance defense and representing insurance companies, including parties to the action. Plaintiffs filed a motion requesting that the trial judge recuse himself because he, "prior to assuming the bench, had an extensive insurance defense practice, had represented some of the defendants, and had worked with some of the defense witnesses in the past . . . ." 179 F.3d at 860. The judge declined to recuse himself, and the Tenth Circuit affirmed, explaining that even if the judge "had represented some of the defendant insurers, or at least represented some of their insureds," it was "insufficient to require recusal under § 455." *Id.* at 861. The court continued that the judge's "familiarity with insurance defense work" gained from his prior representations did not support recusal. *Id.* The court also rejected as unsupported speculation the plaintiffs' argument that the judge's prior work may have been related to the instant case because it may have been part of the insurers' "overall strategy," which ostensibly also involved the subject litigation. *Id.* at 861 n.15.

In addition, Plaintiffs attach two documents that may be of assistance to the Court. Exhibit 1 is the written testimony before a Congressional subcommittee by the

Honorable M. Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit in her capacity as Chair of the Committee on Codes of Conduct of the Judicial Conference of the United States, dated December 10, 2009. Judge McKeown's testimony provides an overview of the recusal standards that apply to federal judges. Exhibit 2 is a copy of the Code of Conduct for United States Judges.

CONCLUSION

Plaintiffs recognize that Defendant's Motion is directed to the Court. However, based upon the allegations in the Motion, and the authority cited above, Plaintiffs believe that recusal is not warranted.

Dated: February 25, 2015

Respectfully submitted,

/s/ Hugh Q. Gottschalk
Hugh Q. Gottschalk
Thomas A. Olsen
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: gottschalk@wtotrial.com
olsen@wtotrial.com

In cooperation with the ACLU Foundation of Colorado

Mark Silverstein
Rebecca T. Wallace
Sara R. Neel
American Civil Liberties Union Foundation of Colorado
303 E. 17th Ave., Suite 350
Denver, CO 80203
Telephone: 720.402.3114
Facsimile: 303.777.1773

Email: msilverstein@aclu-co.org
rtwallace@aclu-co.org
sneel@aclu-co.org

Attorneys for Plaintiffs Abby Landow, Jeffrey Alan, Susan Wymer, Lawrence Beal, Greenpeace, Inc., and Nancy York

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on February 25, 2015, I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR JUDICIAL RECUSAL** with the Clerk of Court using the CM/ECF system, which will send notification of the same via email to the following:

Heidi J. Hugdahl hhugdahl@nbdmlaw.com, kbrowning@nbdmlaw.com, nmcilvenna@nbdmlaw.com

Hugh Q. Gottschalk gottschalk@wtotrial.com, egan@wtotrial.com, gottesfeld@wtotrial.com

J. Andrew Nathan anathan@nbdmlaw.com, eherding@nbdmlaw.com, kbrowning@nbdmlaw.com

Mark Silverstein msilverstein@aclu-co.org, jhoward@aclu-co.org

Rebecca Teitelbaum Wallace rtwallace@aclu-co.org, jhoward@aclu-co.org

Sara R. Neel sneel@aclu-co.org, jhoward@aclu-co.org

Thomas Austin Olsen olsen@wtotrial.com, farina@wtotrial.com

s/ Hugh Q. Gottschalk by Colleen Egan