No. 11-16577

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

BRIEF FOR APPELLEES KRISTIN M. PERRY, ET AL. AND APPELLEE-INTERVENOR CITY AND COUNTY OF SAN FRANCISCO

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INTRODUCTION

Having spent years trying to strip gay and lesbian Californians of the right to marry, Proponents now aim to strip gay and lesbian *judges* of their ability—and their duty—to preside over cases challenging such discrimination. Proponents' motion to vacate the judgment is nothing more than a belated and regrettable attempt to divert attention from the merits of Plaintiffs' constitutional challenge to Proposition 8 by attacking the judge who presided over the case. The Court should not countenance this tactic, which has been tried repeatedly in civil rights cases throughout history, and has been rejected every time.

The district court correctly concluded that neither Chief Judge Walker's sexual orientation nor his same-sex relationship required him to recuse himself from this case. As longstanding case law uniformly makes clear, merely sharing circumstances or characteristics in common with the members of the public who will be affected by a ruling is not a basis for judicial disqualification. It is also clear that federal judges are entitled to a presumption of impartiality, which applies with equal force to gay and lesbian judges as to any other judge. As the district court explained, "the presumption that 'all people in same-sex relationships think alike' is an unreasonable presumption, and one which has no place in legal reasoning." ER 19. Because this unanimous body of precedent compelled the district

court's denial of Proponents' motion to vacate the judgment, the Court should affirm that decision.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court's jurisdiction to review the district court's decision denying Proponents' motion to vacate the judgment, brought under Fed. R. Civ. P. 60(b), rests on 28 U.S.C. § 1291. *See Stone v. INS*, 514 U.S. 386, 401 (1995) ("The denial of the [Rule 60(b)] motion is appealable as a separate final order."). As Proponents' "original appeal [of that same judgment] is still pending," *see* No. 10-16696, this Court should "consolidate the proceedings." *Stone*, 514 U.S. at 401; *see Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1147 (9th Cir. 2004) (consolidating appeal from denial of Rule 60(b) motion with appeal of underlying judgment).

STATEMENT OF THE ISSUE

Did the district court correctly determine that Chief Judge Walker was not required to recuse himself from this civil rights case merely because he might share personal circumstances and characteristics with the Plaintiffs that could be affected by the ruling?

STATEMENT OF FACTS

On May 22, 2009, Plaintiffs filed their complaint alleging that, by denying them the right to marry the person of their choice, Proposition 8 violates their rights to equal protection and due process of law under the Fourteenth Amendment of the United States Constitution. ER 571–81. The clerk of the district court, acting "blindly and at random," assigned the case to then-Chief Judge Vaughn R. Walker. ER 571; Civil L.R. 3-3(a); General Order No. 44 § D(2) (Jan. 4, 2010). In July 2009, Judge Walker granted Proposition 8 Official Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson; and ProtectMarriage.com – Yes on 8, A Project of California Renewal ("Proponents") leave to intervene to defend the constitutionality of Proposition 8. ER 72.

From January 11 to January 27, 2010, Judge Walker presided over a twelve-day bench trial in this case. ER 72. Soon after the trial ended, but before closing arguments were heard, the *San Francisco Chronicle* published an article reporting that "[t]he 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." SER 27.

The *San Francisco Chronicle* article was published on February 7, 2010. SER 27. The *Chronicle* had spoken to "a federal judge who counts himself as a friend and confidant of [Judge] Walker's" who explained that the Judge "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." *Id.* Andrew Pugno, who represents Proponents in this litigation, was quoted in the article. Responding to concerns that Proponents might "make an issue of the judge's sexual orientation" if this Court found the proposition unconstitutional, Pugno advised that "[w]e are not going to say anything about that." *Id.*

Closing arguments were held on June 16, 2010. ER 292, 322. Five days later, the *Los Angeles Times* published an article commenting on the status and impact of this litigation. *See* SER 31–32. The article described Judge Walker as "openly gay" and quoted his colleague, Judge Maxine M. Chesney. *Id.* The June 21, 2010 article also stated that Judge Walker "attends bar functions with a companion, a physician." *Id.*

On August 4, 2010, Judge Walker ordered entry of judgment in favor of Plaintiffs and Plaintiff-Intervenor and against Defendants and Proponents. ER 67–204. Proponents immediately appealed the decision to this Court. ER 3. That same day, Gerard Bradley published an editorial on FoxNews.com making argu-

ments identical to those now advanced by Proponents in their Motion to Vacate Judgment. *See* SER 36–37. Bradley argued that if "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." SER 37. Bradley stated that a discussion about whether Judge Walker should recuse himself because of his relationship "is a conversation worth having." *Id.* But given how far the case had already progressed, he concluded that "sadly, it is quite too late to have it." *Id.*

Two days later, the Associated Press spoke to Proponents' counsel about the impact of Judge Walker's sexual orientation on this case. *See* SER 39–41. The Associated Press reported that "[l]awyers in th[is] 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." SER 39. James Campbell of the Alliance Defense Fund, counsel for Proponents in this case, said that "[t]he bottom line in this case, from our perspective, is and always will be about the law and not about the judge who decides it . . . . 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." SER 40.

Nearly seven months later, on February 28, 2011, Judge Walker retired from the federal bench. On April 6, 2011, "Walker had a farewell meeting with a select group of courthouse reporters." SER 34; SER 45. In that meeting, Judge Walker acknowledged what was already widely known and discussed in the media: that he is gay and that "he was in a 10-year relationship with a physician." SER 34; SER 45. When reporters asked Judge Walker about recusal, "Walker said he never thought about recusing himself because he was gay and noted that no one had asked him to." SER 45.

Not until April 25, 2011—almost two years after initially intervening in this case, more than one year after an adverse ruling at trial, and four months after arguing their appeal before this Court—did Proponents move to vacate the district court's judgment, raising the argument they had previously (and publicly) foresworn: that Judge Walker should have recused himself because he is "gay and . . . in a committed same-sex relationship." Br. at 2.

Chief Judge Ware, who was reassigned the case following Judge Walker's retirement, denied Proponents' motion in a thorough written opinion. As Judge Ware explained, "[t]he sole fact that a federal judge shares the same circumstances or personal characteristics with other members of the general public, and that the judge could be affected by the outcome of a proceeding in the same way that other

members of the general public would be affected, is not a basis for either recusal or disqualification under Section 455(b)(4)." ER 2. And "under Section 455(a), it is not reasonable to presume that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceedings." *Id*. Judge Ware declined to decide whether a clear error standard would apply to review of Judge Walker's decision not to recuse himself because Proponents' motion "would not survive [even] the lower *de novo* standard of review." ER 5.

Judge Ware first analyzed the subjective standard for recusal under Section 455(b)(4) to determine whether, as Proponents argued, Judge Walker's same-sex relationship constituted a substantial non-pecuniary interest in the outcome of the case sufficient to require recusal. Recognizing the dangerous precedent such a holding would set, Judge Ware rejected Proponents' argument: "Requiring recusal because a court issued an injunction that could provide some speculative future benefit to the presiding judge solely on the basis of the fact that the judge belongs to the class against whom the unconstitutional law was directed would lead to a Section 455(b)(4) standard that required recusal of minority judges in most, if not all, civil rights cases." ER 7–8. Further, Judge Ware rejected Proponents' contention that recusal should turn on Judge Walker's intent to marry, or his failure to

disclose any such intent: "Even a full renunciation on the record of any intent to ever marry a person of the same sex would be ripe for challenge, should the judge's disclaimer not ring true enough or should indications arise that the judge's intent had shifted since the renunciation." ER 10. Therefore, "to base a recusal standard on future subjective intent to take advantage of constitutional rights is to create an inadministrable test, frustrating congressional efforts to protect judicial integrity with a clear, mandatory recusal statute." ER 10.

Next, Judge Ware evaluated the merits of Proponents' contention that Judge Walker's same-sex relationship would lead a reasonable person to question his impartiality. Under the objective standard for discretionary recusal set forth in Section 455(a), Judge Ware rejected that argument as well: "A well-informed, thoughtful observer would recognize that the mere fact that a judge is in a relationship with another person—whether of the same *or* the opposite sex—does not *ipso facto* imply that the judge must be so interested in marrying the person that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain." ER 15. Nor did Judge Walker's decision not to publicly disclose his same-sex relationship until after the trial contribute to any appearance of impropriety. To hold otherwise, Judge Ware explained, "would vitiate the presumption of judicial impartiality, as it would lead the reasonable observer to the opposite pre-

sumption; namely, that silence is to be taken as conclusive evidence of the judge's partiality." ER 16. Absent any personal "association with an individual having a clear, concrete stake in the outcome of the litigation," Judge Walker "had nothing to disclose." ER 18.

Finally, Judge Ware denied Proponents' motion with a parting admonition: "[T]he presumption that 'all people in same-sex relationships think alike' is an unreasonable presumption, and one which has no place in legal reasoning. The presumption that Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered him incapable of making an impartial decision, is as warrantless as the presumption that a female judge is incapable of being impartial in a case in which women seek legal relief." ER 19.

SUMMARY OF ARGUMENT

This Court should affirm the district court's denial of Proponents' motion to vacate the judgment under Rule 60(b) because the district court did not abuse its discretion in deciding that Chief Judge Walker was not required to recuse himself from the litigation.

First, recusal was not required under Section 455(a). No reasonable person could reasonably question Judge Walker's impartiality based on his sexual orientation or his same-sex relationship. Indeed, it is categorically *un*reasonable, and a

violation of the Equal Protection Clause, to question a judge's impartiality simply because he is a member of a minority group whose rights are implicated in a case before the court, regardless how the minority group is defined. Recusal under Section 455(a) is appropriate only in cases where the judge has a differentiated, personalized connection to the case or the litigants that gives rise to an appearance of impropriety, not where the judge—like a large segment of the public—simply shares certain circumstances or characteristics in common with the litigants. Absent such a connection to this case, Judge Walker had nothing to disclose and no reason to recuse himself, as the district court correctly held.

Second, recusal was not required under Section 455(b)(4). Under that section, recusal is required only where a judge has a substantial and individualized interest in the case, particularly a financial interest, that gives rise to actual bias. Again, mere membership in a minority group whose civil rights are at stake in the case is an improper basis for disqualification. Judge Walker has no interest in this case apart from generalized interests based on his sexual orientation and same-sex relationship. Thus, the district court correctly held that disqualification of Judge Walker under Section 455(b)(4) is inappropriate. Nor can disqualification depend on the likelihood that the judge, as a member of a minority group, might exercise the civil right at stake. A recusal rule that turns on a minority judge's subjective

desire to enjoy his basic civil rights would effectively disqualify all minority judges. As the district court held, such an unworkable recusal rule cannot be, and is not, the law.

Third, even if Proponents were correct that Judge Walker should have recused himself (which they are not), this Court should still not vacate the judgment below. Vacating the judgment would be a drastic and inappropriate remedy that would result in injustice to the Plaintiffs in this case, produce injustice in other cases by encouraging litigants to seek recusal of minority judges, and undermine the public's confidence in the judicial process.

STANDARD OF REVIEW

A decision denying a motion to vacate judgment under Fed. R. Civ. P. 60(b) will be reversed only for abuse of discretion. *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004). A decision denying a recusal motion will also be reversed only for abuse of discretion. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1415–16 (9th Cir. 1995). A district court abuses its discretion when it premises its decision on a legal error or a clearly erroneous view of the relevant facts. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Proponents' motion, however, "would not survive [even] the lower *de novo* standard of review." ER 5.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT JUDGE WALKER WAS NOT REQUIRED TO RECUSE HIMSELF.

"The sole fact that a federal judge shares the same circumstances or personal characteristics with other members of the general public, and that the judge could be affected by the outcome of a proceeding in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification . . . ." ER 2. That conclusion is amply supported by decades of case law, federal constitutional and statutory authority, and common sense. By contrast, Proponents' argument—that a federal judge must recuse himself from any civil rights case in which he shares personal traits with the minority group whose rights are implicated—finds no support in the case law, violates equal protection, and has been deemed worthy of sanctions by at least one federal court of appeals. *See MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998) (affirming sanctions against counsel calling into question a district judge's impartiality based on his race).

A. No Reasonable Person Could Reasonably Question Judge Walker's Impartiality Requiring Recusal Under Section 455(a).

"[J]udges . . . are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety." *First Interstate Bank*

of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 988 (9th Cir. 2000); *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) ("[W]e abide by the general presumption that judges are unbiased and honest."). Against this background presumption, 28 U.S.C. § 455(a) 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." Recusal is appropriate under this section only if there is an *objective* likelihood of bias: when "a *reasonable* person . . . would conclude that the judge's impartiality might *reasonably* be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (emphases added) (internal quotation marks omitted). Further, a "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather a "well-informed, thoughtful observer." *Id.* at 914 (internal quotation marks omitted). Because a federal judge is presumed to be impartial and has a duty to decide a case absent a legitimate reason for recusal, *Clemens v. U.S. Dist. Court*, 428 F.3d 1175, 1179 (9th Cir. 2005) (per curiam), "there is a substantial burden upon the moving party" to show that recusal is required. *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1022 (N.D. Cal. 2001).

1. Judge Walker's Sexual Orientation Cannot Be A Reasonable Basis For Questioning His Impartiality.

It is categorically *un*reasonable to question a judge's impartiality simply because he is a member of a minority group whose rights are implicated in a case be-

fore the court. Indeed, the Equal Protection Clause forbids any presumption of bias or prejudice on such basis.[1] For that reason, there is a long and settled line of authority rejecting efforts to compel the recusal of judges based on their identity as part of a minority group. Proponents' ill-considered effort to disqualify Judge Walker based on his sexual orientation—a tactic they repeatedly and publicly foreswore throughout this litigation until filing their belated motion in April 2011—therefore must fail.[2]

"To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable." *United States v. Alabama*, 828 F.2d

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[1] *See Batson v. Kentucky*, 476 U.S. 79 (1986); *In re BellSouth Corp.*, 334 F.3d 941, 967 (11th Cir. 2003) (Cudahy, J., concurring); *MacDraw*, 138 F.3d at 37; *Ortega Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 WL 2132693, at *8 (D. Ariz. July 15, 2009) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *see also Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (Noonan, J.). At the very least, such an interpretation of Section 455(a) would raise substantial constitutional questions that should be avoided. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[2] Proponents' motion is untimely because it was not "filed with reasonable promptness after the ground for such a motion [wa]s ascertained." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295–96 (9th Cir. 1992) (internal quotation marks omitted); Fed. R. Civ. P. 62.1(a). Indeed, Proponents impermissibly "wait[ed] until after an unfavorable judgment before bringing" the motion, *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997), despite knowing about—and commenting on—Judge Walker's sexual orientation and same-sex relationship more than a year earlier. *See supra* pp. 3–6. Therefore, this Court may affirm the judgment below on this alternative ground. *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam).

1532, 1542 (11th Cir. 1987) (per curiam), *superseded by statute on other grounds*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 6, 102 Stat. 28, 31. "The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: 'that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.'" *Id.* (quoting *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 163 (E.D. Pa. 1974)). Nowhere in Proponents' lengthy brief is there a single citation of *any* authority in *any* state or federal court holding otherwise. Indeed, not a single one of the 90 Ninth Circuit cases or the 10 Supreme Court cases citing Section 455(a) or (b) even hints that a judge's membership in a minority group can require recusal.

To the contrary, unanimous federal authority confirms that a judge's membership in a minority group cannot be the basis for disqualification in a case implicating the rights of that group. *See, e.g.*, *MacDraw*, 138 F.3d at 37; *Alabama*, 828 F.2d at 1542; *In re City of Houston*, 745 F.2d 925, 930 (5th Cir. 1984); *Ortega Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 WL 2132693, at *8 (D. Ariz. July 15, 2009); *Day v. Apoliona*, 451 F. Supp. 2d 1133, 1138 (D. Haw. 2006). Women judges are not disqualified from hearing cases involving claims of

sex discrimination. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975). A Catholic judge may hear a case challenging laws restricting abortions. *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995). A Jewish judge is not disqualified from adjudicating cases challenging restrictions on head-wear that impinge on Orthodox Jews' exercise of their faith. *Menora v. Ill. High Sch. Ass'n*, 527 F. Supp. 632 (N.D. Ill. 1981). Mormon judges may hear a case that purports to challenge the Mormon "theocratic power structure of Utah." *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984). Judges who are African-American are not recused from hearing cases involving the Ku Klux Klan, *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 1017 (S.D. Tex. 1981), or from civil rights cases involving allegations of race discrimination against African Americans. *Alabama*, 828 F.2d 1532; *Pennsylvania*, 388 F. Supp. 155. Likewise, African-American, Latino and Jewish jurors may hear a civil rights claim against a group of white "skinheads." *United States v. Greer*, 968 F.2d 433 (5th Cir. 1992) (en banc).

Nor does it matter whether the minority group in question is defined by a characteristic warranting heightened equal protection scrutiny, such as race, gender

or religion.[3] Indeed, a judge's membership in *any* diffuse group, standing alone, is insufficient to compel recusal under Section 455(a). For example, serving on the board of a civic organization dedicated to improving a city does not necessitate recusal of a judge in a case involving that city. *Sexson v. Servaas*, 830 F. Supp. 475 (S.D. Ind. 1993). A judge rendered seriously disabled in an automobile accident may hear a case involving the safety of automobiles. *United States v. Fiat Motors of N. Am., Inc.*, 512 F. Supp. 247 (D.D.C. 1981). Judges who are members of a class defined as all federal employees who were Blue Cross and Blue Shield subscribers are not disqualified from a case implicating the sufficiency of funds to pay subscribers' medical claims. *Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 525–26 (D.C. Cir. 1982). Alaska resident judges are not disqualified from a dispute over oil drilling royalties even though damages would be paid into a state fund distributed to all Alaska residents. *Exxon Corp. v. Heinze*, 792 F. Supp. 72 (D. Alaska 1992).

[3] The United States Government recently concluded that classifications based on sexual orientation, like race, gender, and religion, are entitled to heightened equal protection scrutiny. Letter from Eric H. Holder, Jr., Attorney Gen., United States, on Litigation Involving the Defense of Marriage Act, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html ("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny . . . .").

If mere membership in a group that includes the plaintiffs in a civil rights case were enough to raise an inference of impartiality sufficient to require recusal, as Proponents contend, then judges belonging to an *opposing* group would also be disqualified from hearing the case. "For every class that claims to be injured by an action or policy that is the subject of declaratory relief, there is a counter-class that, by definition, must be benefited." *City of Houston*, 745 F.2d at 931. Therefore, the impossible result of Proponents' logic is that nearly every judge—whether a member of the minority or majority group—would be disqualified.

In this very case, Proponents have repeatedly argued in defense of Proposition 8 that permitting marriage between persons of the same sex would weaken opposite-sex marriage. *See* SER 172–91.[4] By Proponents' lights, every *heterosexual* judge who is currently married or who has an interest in marrying would benefit from a ruling upholding Proposition 8 because that measure purportedly strengthens opposite-sex marriage. But Proponents do not advocate the disqualification of heterosexual judges in this case, and recusal of majority judges in civil rights cases

[4] SER 177 ("[T]here is every reason to believe . . . that redefining marriage in this manner will fundamentally change the public meaning of marriage in ways that will weaken this institution."); SER 185 (same-sex marriage would "[c]ontribute over time to the further erosion of the institution of marriage, as reflected primarily in lower marriage rates, higher rates of divorce and non-marital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents").

cannot be the law—white, male, Protestant and heterosexual judges have long been presumed impartial in cases pitting those groups' interests against a minority group's civil rights. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *cf. Baker v. City of Detroit*, 458 F. Supp. 374 (E.D. Mich. 1978) (African-American judge not disqualified from reverse discrimination cases challenging promotion policies claimed to disadvantage whites). Requiring recusal of judges from the minority group but not judges from the majority would, if accepted, "amount to . . . a *double standard* within the federal judiciary," *Pennsylvania*, 388 F. Supp. at 165, and would itself violate the Equal Protection Clause.

2. Judge Walker's Same-Sex Relationship Cannot Be A Reasonable Basis For Questioning His Impartiality.

Faced with the untenable nature of their position, Proponents attempt to define the minority group to which Judge Walker belongs more narrowly. Specifically, they purport to limit the group to only those members who might have a near-term opportunity to exercise the fundamental right at issue—in this case, gay men and lesbians currently in committed same-sex relationships. *See* Br. at 18 (arguing that their motion is "based on Judge Walker's long-term same-sex relationship").

In cases involving fundamental rights, however, recusal has never turned on the objective likelihood, based on the judge's life circumstances, that the judge will exercise the right at issue. *See, e.g.*, *City of Houston*, 745 F.2d at 926 (rejecting recusal in a voting rights case even though judge "was a registered voter in the City"); *Alabama*, 828 F.2d at 1541 (rejecting recusal in a case involving vestiges of school segregation even though judge had "children who are eligible to attend . . . the public institutions of higher education" that were at issue in the case (internal quotation marks omitted)).[5] An infertile judge is no more qualified to hear a case involving the right to contraception than a judge of child-rearing age and ability. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). A judge who is otherwise qualified to preside over a case asking whether the Government's warrantless use of a tracking device on a vehicle violates the Fourth Amendment is not rendered ineligible because the judge drives a car. *Cf. United States v. Maynard*, 615 F.3d 544

[5] Proponents attempt to distinguish *City of Houston* by citing the district court opinion in that case, where the judge explained that her "past and current street addresses and her and her husband's voter registration status" made it unlikely they would be affected by the at-large election system in question. Br. at 42 (citing *LeRoy v. City of Houston*, 592 F. Supp. 415, 418 (S.D. Tex. 1984)). But the Fifth Circuit did not rely on those facts in reaching its decision, instead describing the question as "whether a judge who is a member of a class in a voting rights case must recuse herself from sitting on that case," and resolving that question in the negative. *City of Houston*, 745 F.2d at 928–30. Proponents employ a similar tactic—citing facts from the district court opinion on which the court of appeals did not rely—in trying to distinguish *Alabama*, to no avail. *See infra* note 10.

(D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (June 27, 2011) (No. 10-1259).

Under Section 455(a), the true test for recusal is whether the judge has some differentiated, personalized connection to the case that gives rise to an appearance of partiality, not whether the judge has life experiences in common with a segment of the general public that may be affected by the ruling.[6] *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 (1988) (finding an appearance of partiality where judge served on board of university involved in negotiations with Liljeberg, especially because outcome of negotiations turned on Liljeberg's success in the litigation); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir.

[6] Proponents relatedly argue that Judge Walker should be disqualified because he "had precisely the *same* direct stake in the outcome of this case as the Plaintiffs." Br. at 44; *id.* at 27–28 (alleging that "Judge Walker [was] in precisely the same shoes as the Plaintiffs before him"). But they conflate the requirements for standing with the requirements for recusal. *See* Br. at 44 (discussing the "'injury in fact' requirement of Article III standing"). The question whether Judge Walker would have standing to bring a similar suit as Plaintiffs has no bearing on the recusal question: Even in class actions where the judge is a member of the plaintiff class and would therefore receive a direct benefit should the plaintiff class prevail, courts have held that the judge is not disqualified. *See, e.g.*, *Alabama*, 828 F.2d at 1541; *City of Houston*, 745 F.2d at 926, 928; *Christiansen*, 683 F.2d at 526. This case presents a far less compelling case for recusal because Judge Walker does not have *any* direct stake in the outcome of the case. And—in sharp contrast to the Plaintiffs—there is no evidence that Judge Walker applied for and was denied a marriage license by the State of California, casting doubt on his "standing" to bring a similar suit. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953 (N.D. Cal. 2010).

1994) (holding Section 455(a) required recusal where judge was the U.S. Attorney who initiated prosecution); *United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989) (holding that magistrate judge should have disqualified himself where he possessed *ex parte* police report about the case). This is especially so "in the area of constitutional adjudication," where no reasonable person should expect a federal judge to be a "*tabula rasa*." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., in chambers) (noting that such a prerequisite would be "evidence of lack of qualification, not lack of bias").

Moreover, Proponents' disingenuous attempt to limit the impact of their recusal rule is inherently unworkable. As the district court explained, even if a judge is in a position to exercise the civil right at issue, a "well-informed, thoughtful observer" would have no way of knowing whether the judge is "so interested in [exercising that right] that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain." ER 15. Any correlation between the judge's likelihood of exercising the right at issue and his bias can never be anything other than speculative. *Cf.* Br. at 29 (using statistics to calculate purported likelihood that Judge Walker will marry). Yet mere "speculation about a judge's motives and desires on the basis of an unsubstantiated suspicion that the judge is personally biased or prejudiced . . . does not trigger the recusal requirements of

Section 455(a)." ER 15 (citing *Clemens*, 428 F.3d at 1180; *Holland*, 519 F.3d at 914).

3. Judge Walker's Decision Not To Publicly Disclose His Same-Sex Relationship Cannot Be A Reasonable Basis For Questioning His Impartiality.

Proponents also contend that Judge Walker's "failure timely to disclose [his long-term same-sex] relationship" contributed to an appearance of impropriety. Br. at 18. Judges, however, cannot possibly have a duty to disclose facts about themselves that are irrelevant to recusal, such as their membership in a minority group. Section 455 itself states that judges are required to make a "disclosure on the record" only if the parties are seeking a waiver of disqualification under Section 455(a), and even then disclosure is required only if there is a "basis for disqualification." 28 U.S.C. § 455(e). As the district court explained, "the requirement of disclosure on the record [contained in Section 455(e)] is conditional on the finding that there was a valid ground for disqualification under Section 455(a)." ER 17 n.23.

Further, forcing minority judges to disclose their minority status would again "amount to . . . a *double standard* within the federal judiciary." *Pennsylvania*, 388 F. Supp. at 165. The district court was rightly concerned that this could lead the public to conclude that minority group characteristics *are* relevant to a judge's

ability to remain impartial, thereby "produc[ing] the spurious appearance that . . . personal information could impact the judge's decision-making, which would be harmful to the integrity of the courts." ER 18.

Proponents' attempt to draw adverse inferences from Judge Walker's silence on matters that have *no bearing* on recusal turns the presumption of impartiality on its head. *See First Interstate Bank of Ariz.*, 210 F.3d at 988 (explaining presumption of impartiality); *Ortiz*, 149 F.3d at 938 (same). Indeed, their argument relies on a presumption of *partiality* based on speculation that both Judge Walker and his partner have "an interest in getting married which is so powerful that it would render [Judge Walker] incapable of performing his duties." ER 15. As the district court recognized, however, Proponents' "[m]otion fails to cite any evidence that Judge Walker would be incapable of being impartial, but [rather] presume[s] that Judge Walker was incapable of being impartial." ER 19. Proponents' presumption of partiality is based on nothing more than Judge Walker's sexual orientation and the unremarkable fact that he, like most adults, is in a relationship. But it is "*unreasonable even to question* [a judge's] impartiality," *United States v. Bosch*, 951 F.2d 1546, 1556 (9th Cir. 1991) (O'Scannlain, J., dissenting), based on his membership in a minority group, regardless whether the judge discloses that infor-

mation.[7] Gay and lesbian jurists are entitled to the same presumption of impartiality as everyone else; recusal under Section 455(a) is therefore unnecessary and inappropriate.[8]

* * *

The purpose of Section 455(a) is "to promote public confidence in the impartiality of the judicial process." H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. "[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. . . . Litigants . . . are not entitled to judges of their own choice." *Id.* The timing of Proponents' motion—eight months after judgment, and

[7] Proponents wrongly rely on Judge O'Scannlain's dissent in *Bosch*. *See* Br. at 22–23, 36. As Judge O'Scannlain explained, *Bosch* is representative of the typical scenario in which a judge may be recused under Section 455(a), based on the judge's close, personal connection to one of the litigants in the case. The prosecutor in *Bosch* was a former law clerk of the presiding judge and, in Judge O'Scannlain's view, the judge had made comments during the trial creating an appearance of partiality. *See* 951 F.2d at 1552–53 (noting that the judge referred to the prosecutor as his "dear friend," looked upon the prosecutor "as a good father would," and stated his desire "to make things easier for [the prosecutor]").

[8] Further, Proponents' preposterous suggestion that a judge who seeks to "avoid disclosure" should simply "recus[e] himself without explanation," Br. at 17, ignores the duty judges have to preside over the cases they are assigned. *Clemens*, 428 F.3d at 1179; *see also Perry v. Schwarzenegger*, 630 F.3d 909, 916 (9th Cir. 2011) (Reinhardt, J.) ("It is . . . important . . . that judges not recuse themselves unless required to do so . . . .").

long after they disavowed any intent to seek Judge Walker's disqualification—coupled with the dearth of caselaw supporting their argument, strongly suggests that their motion seeks only to overturn an adverse judgment by means other than appeal.[9] To reward such an attempt would encourage collateral litigation and frivolous disqualification motions in other cases, and would ultimately undermine, not serve, the public's confidence in the judicial process.

B. Judge Walker Had No Personal Interest In The Litigation Requiring Disqualification Under Section 455(b)(4).

Section 455(b)(4) requires recusal where a judge knows he has an actual, substantial interest in the outcome of the litigation. *See* 28 U.S.C. § 455(b)(4) (requiring recusal if a judge "knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding"). Unlike Section 455(a), Section 455(b)(4) applies to cases of "actual bias," making the test a *subjective* one. *United States v. Spangle*, 626 F.3d 488, 496 (9th Cir. 2010), *cert. denied*, No. 10-10893, 2011 WL 4532051 (Nov. 19, 2011).

[9] This is not the first time Proponents have resorted to such unfortunate tactics. *See Perry*, 630 F.3d at 911.

1. Any Widely Held Interests That Judge Walker Holds In Common With The General Public Cannot Require Recusal.

Decisions construing Section 455(b)(4) make clear that—far from requiring the recusal of judges who have an interest in securing broadly shared constitutional rights—Section 455(b)(4) addresses unique, individualized interests, particularly those that are financial in nature. *See, e.g., United States v. Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997) ("[Section (b)(4)] requires disqualification when the judge, the judge's spouse, or the judge's minor child has a financial interest in the subject matter in controversy") (internal quotation marks omitted); *see also Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 714 (7th Cir. 1986) ("The purpose of [Section] (b) is to establish an absolute prohibition against a judge's knowingly presiding in a case in which he has a financial interest, either in his own or a spouse's (or minor child's) name.").

By contrast, "where federal judges have possessed speculative [non-pecuniary] interests as members of large groups . . . these interests [are] too attenuated to warrant disqualification" under Section 455(b)(4). *Alabama*, 828 F.2d at 1541–42. Thus, as with Section 455(a), the true test for disqualification is whether the judge's interest in the case is differentiated, personalized, and connected to the specific litigants before the court. *See, e.g.*, *In re Cement Antitrust Litig.*, 688 F.2d

1297, 1315 (9th Cir. 1982) (finding judge properly recused himself under Section 455(b)(4) where judge's wife owned stock in class member corporations); *see also In re N.M. Nat'l Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980) (recusal unwarranted under Section 455(b)(4) where judge, like all other New Mexico customers, may have benefitted from lower gas and electric bills in a class action brought against statewide utility company); *Ortega Melendres*, 2009 WL 2132693, at *9 ("The Court . . . agrees with Plaintiffs that the term 'any other interests' [under Section 455(b)(4)] should be interpreted as being limited to financial or pecuniary interests, whether by ownership or some other means.").

For many of the same reasons described above, Judge Walker's sexual orientation cannot constitute an "interest . . . substantially affected by the outcome of the proceeding" within the meaning of Section 455(b)(4). *Alabama*, 828 F.2d at 1541 (internal quotation marks omitted); *see also MacDraw*, 138 F.3d at 37 (collecting cases). Proponents' argument that Judge Walker should have recused himself "is [an] extremely serious [allegation that] should not be made without a factual foundation going well beyond the judge's membership in a particular [minority] group"—a foundation Proponents are plainly lacking. 138 F.3d at 37; *see also Ortega Melendres*, 2009 WL 2132693, at *8 ("Defendants' 'natural bias' contention could easily be interpreted as an argument that this Court's alleged bias somehow

flows from her racial heritage."). Proponents' implausible interpretation of Section 455(b)(4) would dramatically rewrite the statute and extend its reach to situations that Congress could not conceivably have sought to address—indeed, situations in which it would be unconstitutional to require recusal.

2. Judge Walker's Same-Sex Relationship Does Not Distinguish Him From The Gay Community At Large.

Again, Proponents try unsuccessfully to cabin the reach of their argument, pretending their rule would require recusal only if the gay judge in question were involved in a "same-sex relationship" and "*desired* to marry." Br. at 2, 19 (emphasis added); *id.* at 46 (arguing that there would be no "issue with a gay or lesbian judge hearing *this case*" provided there is no "reason to believe that the judge has a *current personal interest* in marrying" (emphasis added)). Such limitations, however, find no support in precedent and make no sense in practice—in reality, they are not limitations at all. Recusal of a judge who is a member of a minority group in a case seeking recognition of that minority group's civil rights cannot possibly turn on whether the judge subjectively "desire[s]" to someday take advantage of the specific civil right at issue, or on how soon he may have an opportunity to do so.

If minority status is insufficient to require recusal, as Proponents concede, *see* Br. at 44–46, then sharing a widely held desire to exercise basic civil rights as a

member of that minority group must also be insufficient. *See Alabama*, 828 F.2d at 1541 ("An interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.") (alteration and internal quotation marks omitted); *City of Houston*, 745 F.2d at 929–30 (same). Under Proponents' flawed reasoning, an African-American judge in Alabama could be disqualified from a case challenging racial inequality in Alabama's public colleges *if* his children might one day wish to attend those schools. *But see Alabama*, 828 F.2d at 1542.[10] A female judge could be forced off a case addressing the Family and Medical Leave Act or the Pregnancy Discrimination Act *if* she is pregnant or desires to become pregnant. *But see Hosler v. Green*, 173 F.3d 844 (2d Cir. 1999) (unpublished table decision) (opinion joined by Sotomayor, J.).

In fact, Proponents concede that widespread recusals, based on a judge's likelihood of exercising the civil right at issue, would be mandatory under their theory. *See* SER 16. For example, Proponents argue that "[a]ny judge, black or

[10] Proponents argue that the judge in *Alabama* was allowed to sit only because his children had no "'interest in attending either of the colleges or universities involved in this action.'" Br. at 41 (quoting *United States v. Alabama*, 574 F. Supp. 762, 764 n.1 (N.D. Ala. 1983)). But in holding that the district judge was not required to recuse himself, the Eleventh Circuit expressly held that the judge's children were members of the plaintiff class and that, apart from whether they "have any desire or inclination to attend a Montgomery area institution," "[a]ny potential interest [they have] is shared by all young black Alabamians." *Alabama*, 828 F.2d at 1541.

white, who lived in Virginia when it prohibited interracial marriage, and who was married to, or wished to marry, a person of a different race in violation of the statute, would be disqualified [from *Loving v. Virginia*, 388 U.S. 1 (1967)] because he or she would have a direct and substantial personal interest in the outcome." SER 16. And "[a]ny judge, black or white, who had a child attending the racially segregated public school [in *Brown v. Board of Education*, 347 U.S. 483] would be disqualified because he or she would have a direct and substantial personal interest in the outcome." SER 16.

Such artificial limitations on the recusal requirements ignore the undeniable reality that *all* citizens have a commensurate interest in equal protection and due process, regardless whether they happen to be in a position to enjoy a particular civil right in the imminent future. *See* ER 8. Proponents' argument rests on the contrary fallacy that "a member of a minority group reaps a greater benefit from application of the substantive protections of our Constitution than would a member of the majority." *Id*. Therefore, Proponents' purported solution "would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions." *Alabama*, 828 F.2d at 1542; *see* ER 7–8 (holding that Proponents' recusal rule "would lead to a Section 455(b)(4) standard that required recusal of minority judges in most, if not all, civil rights cases").

Moreover, the dangers of Proponents' approach are especially invidious where, as here, the civil right at issue is closely intertwined with the minority group's identity. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Being in a same-sex relationship is at the very core of being gay. As Justice O'Connor recognized in *Lawrence*, "the conduct targeted by [the Texas anti-sodomy] law is conduct that is closely correlated with being homosexual." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment). "Under such circumstances, [the] law is targeted at more than conduct" and "is instead directed toward gay persons as a class." *Id.*; *see also id.* at 575 (majority opinion) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)). A majority of the Supreme Court recently adopted this view, explaining that "[the Court's] decisions have declined to distinguish between status and conduct in [the sexual orientation] context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010). Thus, to argue, as Proponents do, that Judge Walker should have been disqualified because of his same-sex *relationship* and not because of his sexual *orientation* is disingenuous at best.

The fact that Judge Walker—like more than a million other gay and lesbian Californians—might have an interest in equal availability of the fundamental right to marry cannot require recusal.

3. Judge Walker's Decision Not To "Disclose" His Subjective Intentions Regarding Marriage Has No Bearing On His Impartiality.

Proponents also contend that Judge Walker's true affront was in not *disclosing* whether he desires to marry his same-sex partner. But, as explained above, recusal does not turn on mere commonalities between a judge and the minority group whose civil rights are at issue, and it certainly does not turn on a judge's subjective desire to exercise the particular civil right in dispute. Thus, there is no statute or judicial principle—and Proponents point to none—that requires federal judges to divulge every characteristic, circumstance, or desire they might have in common with the parties in each case over which they preside.[11] Indeed, such a

[11] To support their position that Judge Walker was required to disclose any intention to marry, Proponents rely on two inapposite cases. *See* Br. at 24–25 (citing *In re Kensington Int'l Ltd.*, 368 F.3d 289, 314 (3d Cir. 2004); *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985)). As the district court explained, each of those cases involved a judge who was "associated with one or more individuals who had a clear, concrete stake in the outcome of the litigation." ER 18. Thus, "in each instance, the appellate court found that the judge was required to disclose the existence and nature of his association with those individuals. Here, by contrast, Judge Walker had no such association, and thus had nothing to disclose." *Id.*; *see Kensington*, 368 F.3d at 302–04 (judge had *ex parte* communications with persons related to one party); *Murphy*, 768 F.2d at 1536–37 (judge was "the best of

rule would have absurd consequences. For example, Proponents contend that the judges who presided over *Loving*, 388 U.S. 1, should have disclosed whether they had any secret longing to marry someone of another race, or whether they believed they might have an opportunity to do so. *See* SER 16. What invasive disclosures should have been required, in Proponents' view, for the judges presiding over *Lawrence*, 539 U.S. 558?

In any event, Proponents cannot seriously contend that such a disclosure by Judge Walker would have made a whit of difference to their decision to seek recusal. After all, how would Proponents know whether Judge Walker's alleged desire is compelling enough to constitute "actual bias," *Spangle*, 626 F.3d at 496, requiring recusal under Section 455(b)(4)? Must the judge's desire be "fervently-held" before it requires disqualification, or would a "lukewarmly maintained" interest suffice? *Feminist Women's Health Ctr.*, 69 F.3d at 400. Will there be some attempt to measure the judge's desire or must the litigants trust the judge's own re-

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friends" with government lawyer). Proponents also rely on two cases that explicitly refute their disclosure argument. *See* Br. at 25 (citing *In re McCarthey*, 368 F.3d 1266, 1268–69 (10th Cir. 2004) (rejecting argument that judge was required to disclose anything beyond his "independent knowledge of any of the events at issue" or any "present or contingent financial interest in a party to, or the outcome of, this litigation"); *Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. 1999) (admonishing that "litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs")).

port of desire and intensity? *See* ER 10 ("[I]t is beyond the institutional capacity of a court to interpret the subtleties of a judge's personal, and likely ever-changing, subjective state on such intimate matters."). Even if Judge Walker had affirmed his intention to remain a bachelor in perpetuity, what would stop Proponents from contesting the sincerity of his arguably self-serving pronouncement and seeking disqualification anyway? *See* ER 10 ("Even a full renunciation on the record of any intent to ever marry a person of the same sex would be ripe for challenge, should the judge's disclaimer not ring true enough or should indications arise that the judge's intent had shifted since the renunciation."). Tellingly, Proponents contend that Judge Walker was required to recuse himself if he "desired to marry his long-term, same-sex partner *at any time* during which he presided over the proceedings in this case." Br. at 19 (emphasis added). Was he therefore required to update the parties on the status of his relationship on a regular basis? Proponents make no attempt to answer these questions because their disclosure rule is as unworkable as it is unconstitutional.

4. Judge Walker's Rulings In This Case Cannot Give Rise To Reasonable Questions About His Impartiality.

Lacking any evidence or case law to support their untenable position that Judge Walker had some differentiated, personal "interest" in this case sufficient to

require recusal, Proponents reveal the true source of their dissatisfaction: Judge Walker's rulings during the course of this litigation. But Proponents themselves concede that "'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" Br. at 33 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis omitted)). Indeed, the Supreme Court has made it clear that, "[a]lmost invariably, [judicial rulings] are proper grounds for appeal, not for recusal." *Liteky*, 510 U.S. at 555; *see also United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978) (holding that, under the extrajudicial source doctrine, generally "[a]dverse rulings do not constitute the requisite bias or prejudice" to support disqualification).

A closer look at the specific rulings to which Proponents point shows that, in fact, there was nothing "irregular [or] unprecedented" about them. Br. at 31. To the contrary, they involved the type of issues over which reasonable jurists might—and, in fact, did in this case—disagree. The Ninth Circuit's writ of mandamus concerning pre-trial discovery matters, Br. at 32, largely upheld Judge Walker's order requiring Proponents to disclose internal campaign-related communications, reversing him only with respect to "an important issue of first impression." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1137 (9th Cir. 2009). Judge Walker's order to stream video of the trial to other courthouses, Br. at 32, was sup-

ported by Ninth Circuit Chief Judge Kozinski, and four dissenting members of the U.S. Supreme Court would not have stayed the order. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 720 (2010) (Breyer, J., dissenting). And Judge Walker's decision not to stay his judgment pending appeal, Br. at 33, turned, in part, on his concern that Proponents lack standing to appeal, ER 40–43, a question this Court has stated it cannot answer until the California Supreme Court resolves open questions of state law. *See Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011).

Other than those rulings, Proponents point only to Judge Walker's decisions on the very issues that lie at the heart of this case: whether "gays and lesbians are a suspect class," and whether there is a "constitutional right for same-sex couples to have their relationships recognized as marriages." Br. at 32. Yet the compelling trial record in this case, and core principles of due process and equal protection, lead inescapably to Judge Walker's conclusions on these issues. *See generally* SER 47–171. Indeed, Judge Walker's thoughtful, well-reasoned opinion speaks for itself.

Proponents have every right to disagree with Judge Walker's ruling, but they have no right to impugn the judge who ruled against them as biased. As the Supreme Court has explained, "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has

been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task." *Liteky*, 510 U.S. at 550–51.

II. THERE IS NO BASIS FOR VACATING THE JUDGMENT BELOW.

Even if Proponents were correct that Judge Walker should have recused himself (and they are not), vacating the judgment below is a drastic and inappropriate remedy. Section 455 "neither prescribes nor prohibits any particular remedy for a violation of th[e] duty" to recuse. *Liljeberg*, 486 U.S. at 862. The Supreme Court has instructed that vacatur is only appropriate in the most "*extraordinary* circumstances." *Id.* at 863 n.11 (emphasis added); *see also id*. at 862 ("There need not be a draconian remedy for every violation of § 455(a)."); *Van Griffin*, 874 F.2d at 637 (quoting same).

Proponents agree that a judge's failure to recuse himself is subject to "harmless error" analysis. Br. at 49 (citing *Liljeberg*, 486 U.S. at 862). Accordingly, even if this Court finds that Judge Walker should have recused himself (which it plainly should not), the Supreme Court has identified three factors this Court should consider in deciding whether there are "extraordinary circumstances" re-

quiring vacatur: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. Here, not only is there no risk of harm if the Court leaves the judgment in place, but vacatur would indisputably cause harm to Plaintiffs and the public.

Despite Proponents' attempt to cast themselves as victims, *see, e.g.*, Br. at 51 ("Allowing Judge Walker's ruling to stand thus threatens a significant risk of injustice to Proponents and the People of California."), it is Plaintiffs who are harmed every day that Proposition 8 remains in force and continues to deny them access to the fundamental right to marry in violation of the U.S. Constitution. That harm would only be exacerbated by requiring Plaintiffs to relitigate this case in its entirety in order to prove (yet again) their ongoing constitutional injury. Accordingly, there is a significantly greater risk of unfairness in vacating the judgment than there is in upholding it.

Nor is there a risk that leaving the judgment in place would produce injustice in other cases. Indeed, *vacating* the judgment would inevitably produce injustice in other cases by encouraging similar intrusive recusal motions and strategic gamesmanship. *See Liljeberg*, 486 U.S. at 868 (considering the effect of similar

motions in other cases). Vacatur would result in a proliferation of attempts by other litigants to secure the recusal of judges based on their membership in a protected class. In so doing, vacatur would encourage intrusive inquiries into judges' private lives in an effort to uncover possible grounds for recusal. It would also establish a dangerous precedent that parties can evade adverse decisions by strategically choosing not to file recusal motions against "rumored" gay and lesbian judges until after an adverse decision is entered. To avoid such disruptive effects on the judicial system—and unseemly investigations into judges' backgrounds and private relationships—the Court should affirm the district court's decision.

Finally, that Judge Walker did not publicly announce that he was gay and in a long-term relationship with a person of the same sex when this case was assigned to him has not undermined the public's confidence in the judicial process. No one would, or should, expect a judge to publicly disclose private, intimate matters. Moreover, Proponents' allegations are far removed from the extreme factual scenarios in which the Supreme Court has held that recusal was required to maintain public confidence in the judicial system. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (recusal required where judge benefitted from millions of dollars in campaign expenditures by a litigant); *Bracy v. Gramley*, 520 U.S. 899 (1997) (judge accepting bribes). Nor do they bear any resemblance to the cases on

which Proponents rely, *see* Br. at 52–53, in which this Court has ordered vacatur. *See Arnpriester*, 37 F.3d at 467–68 (recusal and reversal required in criminal case where judge was the U.S. Attorney during "the time that [defendant] was being investigated for the crimes for which he was later indicted"); *Preston v. United States*, 923 F.2d 731, 734–35 (9th Cir. 1991) (recusal and vacatur required where judge had practiced law at a law firm representing an "interested party" to the litigation, creating at least the appearance of a "conflict of interest" as defined by Section 455(b)); *see also Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980) (recusal and reversal required where judge "was involved in business dealings with the plaintiff's attorney").

This trial was closely followed by the public. The trial proceedings were covered on a daily basis by the press, and the trial transcripts and final opinion have been widely disseminated to the public and commented upon by observers. Any person who took the time to follow the trial in this matter would see both the fairness and even-handedness with which Judge Walker treated all parties and that the decision he reached was fully supported by the evidence presented.[12] Vacatur

[12] Ironically, it is Proponents who continue to oppose releasing the trial tapes to the public. Plaintiffs have maintained from the beginning that the public should be able to view the trial for themselves. *See* ER 252–80.

is therefore wholly unnecessary to bolster public confidence in the thoroughly reasoned and constitutionally compelled result that Judge Walker reached.

CONCLUSION

This Court should affirm the district court's decision denying Proponents' motion to vacate the judgment.

Dated: November 1, 2011

/s/ Theodore B. Olson

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STATEMENT OF RELATED CASES

Other than the related appeals identified in Defendant-Intervenors' Statement (Nos. 10-16696, 11-17255, and 10-16751), Plaintiffs are aware of no related cases pending before this Court.

/s/ Theodore B. Olson

Dated: November 1, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellees' Response Brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,174 words of text (not counting the cover, Tables of Contents and Authorities, this Certificate of Compliance, the Statement of Related Cases, or the Proof of Service) according to the word count feature of Microsoft Word used to generate this Brief.

/s/ Theodore B. Olson

Dated: November 1, 2011

9th Circuit Case Number(s) 11-16577

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When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Nov 1, 2011 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/Theodore B. Olson

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