**NO. 11-16577**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

KRISTIN PERRY, et al.,
*Plaintiffs-Appellees*,

v.

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

and

DENNIS HOLLINGSWORTH, et al.,
*Defendant-Intervenors-Appellants*.

---

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James S. Ware)

---

# DEFENDANT-INTERVENORS-APPELLANTS' OPENING BRIEF

---

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Charles J. Cooper
David H. Thompson
Howard C. Nielson, Jr.
Peter A. Patterson
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

*Attorneys for Defendant-Intervenors-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com*

**Corporate Disclosure Statement Under Fed. R. App. P. 26.1**

Defendant-Intervenor-Appellant ProtectMarriage.com is not a corporation but a primarily formed ballot committee under California Law. *See* Cal. Gov. Code §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Cases** **Page**

**Constitutional and Legislative Materials**



**Other**

## INTRODUCTION

Fundamental to the integrity of the judicial function, and therefore to public confidence in the courts, is strict fidelity to the ancient maxim that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 2003). The Supreme Court insists on scrupulous compliance with this principle as a *sine qua non* of due process of law. *See, e.g.*, *Aetna Life v. Lavoie*, 475 U.S. 813 (1986). Indeed, to avoid "even the appearance of impropriety," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988), federal law requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). And the classic instance in which a judge's impartiality might reasonably be questioned is specified in Section 455(b)(4): whenever the judge has "any . . . interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4). Both of these provisions were violated in this case, and the violation requires that the district court's judgment be vacated.

The underlying constitutional question presented in this case is whether gay and lesbian couples have a right under the Fourteenth Amendment to have their relationships recognized as marriages, notwithstanding California's state

constitutional provision, adopted by the People through the initiative known as Proposition 8, reaffirming the traditional definition of marriage as the union of a man and a woman. Plaintiffs allege in their complaint that they "are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex . . . ." ER 578. At the heart of their constitutional challenge is their claim that they "are similarly situated to heterosexual individuals for purposes of marriage because, like individuals in a relationship with a person of the opposite sex, they are in loving, committed relationships." ER 524. Indeed, Plaintiffs have consistently emphasized that the marital right they seek to vindicate is that of "two individuals of the same sex who have spent years together in a loving and committed relationship." ER 546. The district court invalidated Proposition 8 and entered an injunction purporting to require California officials statewide to issue marriage licenses to any and all same-sex couples who wish to marry and are otherwise eligible.

Former Chief Judge Vaughn R. Walker presided over this case until his retirement in February 2011. Shortly thereafter, on April 6, he disclosed to the press that he is gay and has been in a committed same-sex relationship for ten years. Dan Levine, *Gay Judge Never Thought To Drop Marriage Case*, Reuters, Apr. 6, 2011, *available at* http://www.reuters.com/article/2011/04/06/us-

gaymarriage-judge-idUSTRE7356TA20110406 (last visited Sept. 30, 2011). The published reports of former Judge Walker's statements to the press note that he had refused to comment on these issues while the case was before him. *Id.*; *see also* Phillip Matier, et al., *Judge Being Gay a Nonissue During Prop. 8 Trial*, San Francisco Chronicle, Feb. 7, 2010, *available at* http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker (last visited Sept. 30, 2011). The published reports do not address the question whether former Judge Walker and his partner have, or have had, an interest in marrying should the injunction he issued be upheld on appeal.

Given that Judge Walker was in a long-term, same-sex relationship throughout this case (and for many years before the case commenced), he was, in Plaintiffs' own words, "similarly situated to [Plaintiffs] for purposes of marriage." ER 524. And it is entirely possible—indeed, it is quite likely, according to Plaintiffs themselves—that Judge Walker had an interest in marrying his partner and therefore *stood in precisely the same shoes as the Plaintiffs before him.*

Disqualification under § 455(a) is governed by an objective test: "whether a reasonable person with knowledge of *all the facts* would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (emphasis added). "The reasonable third-party observer is

not a 'partly informed man-in-the-street,' but rather someone who 'understand[s] *all the relevant facts*' and has examined the record and law." *Id.* at 914 (emphasis added) (quoting *LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. 2007)). It follows that a judge is obliged to disclose *all the relevant facts*. As the Sixth Circuit has put it, "judges have an ethical duty to disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *American Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. 1999) (quotation marks omitted). *See Liljeberg*, 486 U.S. at 868 (federal judges have a duty to "carefully examine possible grounds for disqualification and to promptly disclose them when discovered").

In this case, Judge Walker has now disclosed, belatedly, that when he was presiding over this case, he was, like Plaintiffs, "involved in [a] long-term, serious relationship[] with [an] individual[] of the same sex." ER 578. Plaintiffs alleged in their complaint that they were in long-term, same-sex relationships to establish their standing to bring the suit—that is, their personal and direct interest in the outcome of the case—and the fact that Judge Walker is also in such a relationship is no less relevant to the question whether Judge Walker likewise had an interest in the outcome. This fact, in turn, obliged Judge Walker to disclose whether he, like

the Plaintiffs, had an interest in marrying his partner. For if he did, his interest in the outcome of the case was *identical* to that of the Plaintiffs; in other words, he was sitting in judgment of his own case.

The court below, however, held that Judge Walker was qualified to decide this case even if it was his own—that is, even assuming that he and his long-time partner intended to marry if and when it became legal in California to do so. Chief Judge Ware, who now presides over the case in the district court, held that disqualification under § 455(a) was unwarranted because it "depends on the assumption that a judge who is in a relationship has an interest in getting married which is so powerful that it would render the judge incapable of performing his duties." ER 15. According to Judge Ware, "[a] well-informed, thoughtful observer would recognize that the mere fact that a judge is in a relationship with another person . . . does not *ipso facto* imply that the judge must be so interested in marrying that person that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain." *Id.*

Putting aside the fact that Section 455 nowhere suggests that a judge's interest in the outcome of the case must be "so powerful that it would render the judge incapable of performing his duties," Judge Ware's analysis simply misses the whole point of Section 455(a)'s objective test. The "well-informed, thoughtful

observer" must have knowledge "of *all the relevant facts*," *Holland*, 519 F.3d at 914 (emphasis added), and the judge is thus obliged to disclose them, *Liljeberg*, 486 U.S. at 868. Here, the 10-year duration of Judge Walker's undisclosed relationship, especially when coupled with evidence in the record (in the form of testimony by Plaintiffs' own expert) that "almost two-thirds of [committed same-sex couples] in California would get married if permitted to do so," ER 15 n.18; *see also* ER 207-08, 211-12, and with Judge Walker's own findings concerning the manifold emotional and economic benefits of marriage, raises the obvious, natural question whether or not Judge Walker had any interest in marrying his partner. The answer to that question is a *fact* known to Judge Walker, and he was obligated either to disclose it or to recuse himself.

But Judge Ware went further, holding among other things that even evidence of a "fervently" held desire to marry would not suffice to disqualify Judge Walker. ER 9. For Judge Ware rejected as "inadministrable" any recusal standard based on a judge's subjective intent: "[I]t is beyond the institutional capacity of a court to interpret the subtleties of a judge's personal, and likely ever-changing, subjective states on such intimate matters." ER 10. Thus, even if Judge Walker had disclosed from the outset his long-term relationship and an intention to marry

should Proposition 8 fall, he would not have been disqualified from sitting in the case.

Judge Ware thus dismissed the facts concerning Judge Walker's long-term relationship and his interest, whether fervent or nonexistent, in marrying his partner as "irrelevant details about [Judge Walker's] personal life that were not reasonably related to the question of disqualification." ER 18. Judge Walker therefore was under no obligation, according to Judge Ware, to disclose these facts. To the contrary, Judge Walker was right to *conceal* these facts from the litigants, for disclosing them "would produce the spurious appearance that irrelevant personal information could impact the judge's decision-making, which would be harmful to the integrity of the courts." *Id.*

"The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. And fulfillment of that purpose depends *entirely* on the fidelity of individual judges to their ethical obligation to promptly disclose *all* information relevant to *all* "possible grounds for disqualification." *Id.* at 868. To be sure, the judge's duty to disclose is put to its greatest test when the relevant facts relate to highly personal or intimate information, but that is also when it is most critical that the duty be faithfully discharged, for such information is typically known, as here,

*only* to the judge. *See In re Kensington*, 368 F.3d 289, 314 (3d Cir. 2004) ("[T]he judge is in the best position to know of the circumstances supporting a recusal motion."). And neither the law, nor the canons, nor common sense leaves the judge with any choice but to disclose such information, for a judge who prefers not to make "a full disclosure on the record," 28 U.S.C. § 455(e), of personal facts that bear on his ability to sit in a case always has the option of simply asking the clerk to reassign it to another judge. But the judge is not free both to sit on the case and to keep silent. Accordingly, Judge Walker, we respectfully submit, was not faithful to his obligation, and for the reasons detailed below, the only way "to purge the perception of partiality in this case [is] to vacate the judgment and remand the case to the district court for retrial by a different judge." *Preston v. United States*, 923 F.2d 731, 735 (9th Cir. 1991).

Fulfillment of Section 455(a)'s purpose is also dependent on the fidelity of the judiciary as a whole to its obligation to enforce strict compliance by individual judges with their duty to avoid even the appearance of partiality and with the disclosure obligation on which it depends. The decision below, we respectfully submit, is not faithful to that obligation. Judge Ware excused Judge Walker from the duty to disclose his 10-year same-sex relationship and his interest, if any, in marrying his partner only by denying the relevance of these facts to the issue of

disqualification in a case claiming that the Constitution requires that committed same-sex relationships be recognized as marriages. Judge Ware, then, countenanced the very real possibility that Judge Walker both sat in this case and kept to himself the fact that he and his partner, like the plaintiffs, planned to get married should the injunction he himself had entered be upheld on appeal. The decision below thus nullifies the principle that no judge may decide his own case, suspends Section 455(a) and (b)(4) in this case, and mocks the federal judiciary's proud boast that it tolerates neither the fact nor the appearance of partiality. The decision cannot be allowed to stand.

## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court denied Proponents' motion to vacate the injunction, brought under Fed. R. Civ. P. 60(b), on June 14, 2011. Proponents timely noticed this appeal on June 23, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1) because the order refused to vacate the outstanding injunction. Alternatively, this Court has jurisdiction pursuant to 28 U.S.C. § 1291 because "[t]he denial of the [Rule 60(b)] motion is appealable as a separate final order." *Stone v. INS*, 514 U.S. 386, 401 (1995).

## STATEMENT OF ISSUES

1. Could the presiding judge's "impartiality … reasonably be questioned," 28 U.S.C. § 455(a), where he failed to disclose, until after he had entered judgment finding a constitutional right to same-sex marriage, that he was in a long-term, same-sex relationship, and failed ever to disclose whether or not he intended to marry his partner?

2. Did the presiding judge have an "interest that could be substantially affected by the outcome of the proceeding," 28 U.S.C § 455(b)(4)?

## PERTINENT LEGAL PROVISIONS

Title 28 U.S.C. § 455(a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Title 28 U.S.C. § 455(b)(4) states: "He shall also disqualify himself in the following circumstances: . . . (4) He 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[.]"

## STATEMENT OF THE CASE

On May 22, 2009, two same-sex couples filed this suit, claiming that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require California to redefine marriage to include same-sex relationships, and thus that Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5, is unconstitutional. ER 571. The case was assigned to Chief Judge Vaughn R. Walker, who presided over the case from beginning to end in the trial court, including motions, discovery, and a two-and-a-half week trial that took place in January 2010.

In August 2010, Judge Walker ruled in Plaintiffs' favor, holding that the Federal Constitution "protects an individual's choice of marital partner regardless of gender" and requires the State of California to redefine marriage to include same-sex relationships. ER 178-82. Judge Walker "order[ed] entry of judgment permanently enjoining [Proposition 8's] enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8." ER 204. Judge Walker made clear that he understood and intended the injunction to apply to every County Clerk in California. ER 54-55. Accordingly, Judge Walker's injunction purports to grant gay and lesbian couples

in California the right to marry, and to prohibit all officials across the State from refusing to issue marriage licenses to same-sex couples.

The official proponents of Proposition 8 ("Proponents"), who intervened to defend the validity of Proposition 8 when the named defendants refused to do so, immediately asked Judge Walker to stay the judgment pending appeal, ER 335, but he refused to do so, ER 38. This Court, however, promptly stayed the judgment pending appeal, so it has yet to take effect. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). On January 4, 2011, shortly after oral argument, this Court certified questions concerning Proponents' standing to the California Supreme Court, *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011); on February 16, 2011, the California Supreme Court accepted the certified questions, and the matter is still pending decision by that court.

In late February 2011, Judge Walker retired from the bench, and this case was re-assigned to Chief Judge James S. Ware.

On April 6, 2011, former Judge Walker for the first time publicly revealed that he is gay and has been in a "10-year relationship with a physician." Levine, *Gay Judge Never Thought To Drop Marriage Case*, *supra*. On April 25, 2011, Proponents filed their Motion to Vacate the Judgment on the grounds that Judge Walker was disqualified under 28 U.S.C. § 455(a) and (b)(4).

The district court, Judge Ware, agreed that judicial disqualification is a proper basis for vacating a judgment, *Perry v. Schwarzenegger*, No. 09-2292, 2011 WL 2321440 (N.D. Cal. June 14, 2011), ER 3, agreed that the district court had jurisdiction to consider Proponents' motion, ER 5, agreed the motion had been timely filed, ER 22, and rejected Plaintiffs' claim that Proponents sought to disqualify Walker solely because he is gay.[1] Nevertheless, the district court denied Proponents' motion on July 14, 2011. ER 12.

The district court first rejected Proponents' claim that Judge Walker was disqualified under 28 U.S.C. § 455(b)(4) because he had a direct personal interest in the outcome of the litigation when he presided over it. The court reasoned that Judge Walker's ability to marry his long-time partner upon enforcement of his own ruling "gave him no greater interest" in the decision than the public at large, because "all Californians have an equal interest in the outcome of the case." ER 8. Thus, said the court, Judge Walker's interest in the outcome of this case seeking to invalidate Proposition 8 "is the same as that shared by all citizens of California." ER 12.

[1] *See* ER 5 ("[T]he ground for [Proponents'] motion is Judge Walker's same-sex relationship, and not his sexual orientation.").

The strong possibility that Judge Walker stands to benefit personally from his own ruling permitting him to marry his long-time, same-sex partner did not enter into the district court's analysis because, according to the court, such an inquiry would turn on the presiding judge's "elusive" and "amorphous personal feelings" and would prove "undependable and invasive." ER 8-9. The district court opined that "interpret[ing] the subtleties of a judge's personal, and likely ever-changing, subjective states on such intimate matters" exceeded the court's "institutional capacity." ER 10. Therefore, the court reasoned, a recusal standard that required any inquiry into Judge Walker's "subjective intent" would prove "inadministrable," even assuming that he had admitted a desire to marry his partner if Proposition 8 should fall. *Id.*

Next, the district court rejected Proponents' claim that Judge Walker's "impartiality might reasonably be questioned" under Section 455(a). Although Judge Ware acknowledged that "the mere appearance of partiality may be sufficient under Section 455(a) to require recusal," ER 13 n.14, he concluded that a "well-informed, thoughtful observer" would not assume "that a judge who is in a relationship has an interest in getting married which is so powerful that it would render that judge incapable of performing his duties." ER 15. Such an assumption, the court declared, would be "[m]ere speculation." *Id.* Rather,

according to Judge Ware, a reasonable person would always assume that a judge will "ris[e] above" his apparent conflict of interest and "decid[e] such a case on the merits." ER 19.

As for Judge Walker's failure to disclose his relationship before or during the proceedings and his refusal even now to say whether or not he has an interest in marrying, the district court held that these were not reasonable grounds for questioning Judge Walker's impartiality, because silence is not "conclusive evidence of a judge's partiality," but rather "is by its very nature ambiguous." ER 16. And because a judge should be presumed to be impartial, the court explained, a reasonable person would presume that Judge Walker had "already, *sua sponte*, considered the question of recusal" and had determined that "no reasonable observer would conclude that his impartiality could reasonably be questioned." *Id.*

Judge Ware went even further, concluding that the facts relating to Judge Walker's long-term relationship and his possible intent to marry his partner are "not reasonably related to the question of disqualification." ER 18. Such "intimate . . . details," he declared, are altogether "irrelevant" to the question of disqualification. Indeed, according to Judge Ware, Judge Walker was right to withhold this information, for disclosing it would only give credence to the

"spurious" notion that such "personal information could impact the judge's decision-making, which would be harmful to "the integrity of the judiciary." *Id.*

Proponents timely appealed.

## STATEMENT OF FACTS

Plaintiffs are a gay couple and a lesbian couple who seek to have the State of California recognize their same-sex relationships as marriages. Proposition 8, however, provides that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5. Former Chief Judge Vaughn R. Walker presided over the district court proceedings. After entering judgment in favor of the Plaintiffs and retiring from the bench, Judge Walker revealed for the first time publicly that he is gay and is in a long-term, same-sex relationship. *See* Levine, *Gay Judge Never Thought To Drop Marriage Case*, *supra*. Judge Walker has never disclosed publicly whether he and his partner have, or have had, any interest in marriage should the injunction he issued be upheld on appeal.

## SUMMARY OF ARGUMENT

1. Chief Judge Walker was disqualified from presiding over this case, in which Plaintiffs argued that the Constitution requires California to recognize committed same-sex relationships as marriages, because a reasonable person with knowledge of all the facts would conclude that "his impartiality might reasonably

be questioned." 28 U.S.C § 455(a); *see also Holland*, 519 F.3d at 913. As Judge Walker belatedly disclosed, he was in a long-term, same-sex relationship throughout his tenure over this case. He was thus similarly situated to the Plaintiffs before him for purposes of marriage, as they described themselves in their complaint. And in light of evidence offered by Plaintiffs' expert at trial and Judge Walker's own findings regarding the myriad benefits he believed would accrue to same-sex couples if they were permitted to marry, *see* ER 207-08, 211-12; *Perry v. Schwarzenneger*, 704 F. Supp. 2d 921, 961-64, 969, 970, 978 (N.D. Cal. 2010), a reasonable observer would conclude that Judge Walker likely would be interested in marrying his partner if Proposition 8 were held unconstitutional.

Judge Walker was thus legally obligated to timely disclose to the parties his interest, if any, in marrying his long-term partner. Although the district court concluded otherwise, these facts were plainly relevant to Judge Walker's qualification to sit in judgment of Plaintiffs' claims that the Constitution requires California to recognize committed same-sex relationships as marriages. Neither the recusal statutes, the precedents interpreting them, nor the American judicial tradition provides any exception for disclosure simply because these facts involved personal, intimate matters. Although a judge may choose to avoid disclosure by recusing himself without explanation, he cannot both remain silent and sit in

judgment of a case in which a reasonable observer, with knowledge of all of the relevant facts (undisclosed or not) would conclude that the Judge's impartiality might reasonably be questioned. Nor does enforcing strict compliance with the recusal statutes in this case impose an intolerable burden on minority judges, for nothing in these statutes or our arguments would prevent a gay or lesbian judge from sitting in judgment in any sexual-orientation case where no reasonable observer could conclude that the gay or lesbian judge might have a direct, personal interest in the outcome of the proceedings.

Here, however, based on Judge Walker's long-term same-sex relationship, his failure timely to disclose that relationship, and his continued failure to disclose his interest in marrying if permitted to do so, a reasonable observer would conclude that Judge Walker likely did have a personal, direct interest in the outcome of Plaintiffs' challenge to Proposition 8. That concern would only be heightened by the irregular course of proceedings and the unprecedented and extraordinary rulings in this case.

2. Because Judge Walker's recusal was required by Section 455(a), this Court need not decide whether his recusal was also required under Section 455(b)(4), which requires recusal when a judge has an "interest that could be substantially affected by the outcome of the proceeding," 28 U.S.C. § 455(b)(4). If

Judge Walker in fact desired to marry his long-term, same-sex partner at any time during which he presided over the proceedings in this case, however, there can be no doubt that his recusal was required under this provision. Further, though Judge Walker failed to disclose whether he had an interest in marriage, all of the available evidence strongly suggests that he did, in fact, wish to marry. Accordingly, if it is necessary to decide the issue in the absence of perfect information, the only reasonable conclusion would be that recusal was required under Section 455(b)(4).

3. When a judge sits in violation of the statutory standards, the "general rule" is that "the disqualified judge's rulings are, on appeal, to be vacated." *United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989). This Court should follow that rule here, given that the violation of the recusal statutes here is serious, that declining to vacate Judge Walker's ruling threatens a significant risk of injustice to Proponents and the People of California that may affect other cases as well, and that allowing the ruling to stand would severely undermine the public's confidence in the judicial system.

## STANDARD OF REVIEW

This Court reviews a district court's denial of a recusal motion for abuse of discretion. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1415-16 (9th Cir. 1995).[2] "A district court by definition abuses its discretion when it makes an error of law." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

## ARGUMENT

### I. CHIEF JUDGE WALKER'S IMPARTIALITY CAN REASONABLY BE QUESTIONED.

#### *A. Judge Walker was legally bound to disclose all facts relevant to any possible ground for disqualification.*

We argued below that "no one would suggest that Chief Judge Walker could issue an injunction directing a state official to issue a marriage license to him." ER 321. Plaintiffs disputed this proposition, ER 288, and Judge Ware's ruling effectively rejects it as well. So our argument must begin with the basics.

[2] The district court noted that "[w]hile [a recusal] Motion would be reviewed for clear error if raised for the first time before the circuit court, the Ninth Circuit has not definitively held that [a plain error] standard would apply in a case where the Motion is brought before the district court, but subsequent to the retirement of the presiding judge." ER 5. There is no basis for applying a "plain error" standard since this motion was timely raised in the district court, *id.*, and the Ninth Circuit has applied an abuse of discretion standard in the past where a recusal motion was filed after judgment and was adjudicated by a judge other than the one who presided at trial. *Hamid*, 51 F.3d at 1414-15.

As Thomas Jefferson said, for "any man to be a judge in his own case" is "contrary not only to the laws of decency, but to the fundamental principles of the social compact . . . ." *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2348 (2011) (quoting *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 31 (1801)). From the time of the founding, Congress has consistently "requir[ed] district court judges to recuse themselves if they had a personal interest in a suit . . . ." *Id.* Today, that congressional requirement is expansive, providing that a federal judge is to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned" and, more specifically, in any case in which the judge has "any . . . interest that could be substantially affected by the outcome . . . ." 28 U.S.C. § 455(a) & (b)(4).

The issue in this case under Section 455(a) is "whether a reasonable person with knowledge of *all the facts* would conclude that [Judge Walker's] impartiality might reasonably be questioned." *Holland*, 519 F.3d at 913 (emphasis added). This objective standard cares not at all whether Judge Walker was *actually* partial. Rather, because Section 455(a) aims to prevent "even the appearance of impropriety," *Liljeberg*, 486 U.S. at 865, "[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual

partiality exists . . . ." *Id.* at 860. "The critical question presented by [Section 455(a)] is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances." *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (quotation marks omitted); *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979).

Both the statute and Supreme Court precedent thus make clear that the relevant inquiry is what *could* reasonably be believed, not what *would necessarily* be believed. The question is whether "a reasonable person perceives a *significant risk* that the judge will resolve the case on a basis other than the merits." *Holland*, 519 F.3d at 913 (emphasis added); *Preston v. United States*, 923 F.2d 731, 735 (9th Cir. 1991) ("[T]he focus has consistently been on the question whether the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality . . . might reasonably be questioned by the public."); *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *In re Basciano*, 542 F.3d 950, 956 (2d Cir. 2008); *In re Walker*, 532 F.3d 1304, 1310 (11th Cir. 2008); *United States v. Walker*, 920 F.2d 513, 517 (8th Cir. 1990). Conversely, "to conclude that it was not improper for the trial judge to have presided over [a] trial,

one must conclude that it is *unreasonable even to question* his impartiality." *United States v. Bosch*, 951 F.2d 1546, 1556 (9th Cir. 1991) (O'Scannlain, J., dissenting).

Moreover, as several Courts of Appeals have held, "[t]he use of '[m]ight reasonably be questioned' in section 455(a) . . . clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980); *see, e.g.*, *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (" '[I]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.' " (quoting *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995))); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) ("It has been stated on numerous occasions that when a judge harbors any doubts concerning whether his disqualification is required he should resolve the doubt in favor of disqualification.").

Finally, the "reasonable third-party observer is not a 'partly informed man-in-the-street,' but rather someone who 'understand[s] all the relevant facts' and has examined the record and law." *Holland*, 519 F.3d at 913 (quoting *LoCascio v. United States*, 473 F.3d 493, 496 (2d Cir. 2007)). The reasonable observer is also a layperson "who ha[s] not served on the bench" and thus is "often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljeberg*,

486 U.S. at 864-65. "In high profile cases such as this one, the outcome of which will in some way affect millions of people, such suspicions are especially likely." *In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992).

Section 455(a)'s objective test thus assumes, and depends entirely on, the reasonable third-party observer having knowledge of "all the relevant facts." Indeed, "[d]isqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the particular case." *Holland*, 519 F.3d at 913 (quotation marks omitted). "Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question [Judge Walker's] impartiality." *Liljeberg*, 486 U.S. at 865.

It follows that it is no less "critically important" that the judge disclose to the litigants any and all "facts that might reasonably cause an objective observer to question [his] impartiality." *Id*. This bedrock judicial responsibility has been phrased in different ways by different courts, but no court—none—disputes that the judge is ethically bound to disclose all facts that might be perceived by a reasonable third-party observer to be relevant to any and all "possible grounds for disqualification." *Id*. at 868; *see, e.g.*, *In re Kensington Int'l Ltd.*, 368 F.3d at 314 ("[S]ound public policy considerations . . . militate for the adoption of a . . . rule that the parties should be apprised of any possible ground for disqualification

known privately to the judge. The most compelling of these public policy considerations is that the judge is in the best position to know of the circumstances supporting a recusal motion.") (quotation marks omitted); *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004) ("A judge must make disclosure on the record of circumstances that may give rise to a reasonable question about his impartiality."); *American Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. 1999) ("[J]udges have an ethical duty to disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification."); *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985) ("[T]he statute places on the judge a personal duty to disclose on the record any circumstances that may give rise to a reasonable question about his impartiality.").

And no case—none—suggests that a judge is relieved of this legal obligation if the facts that bear on the issue of disqualification are personal or intimate. None, that is, until Judge Ware's decision below.

### *B. An objective observer would conclude that Judge Walker's impartiality might reasonably be questioned.*

The first step in the disqualification inquiry under Section 455(a) is "to identify the facts that might reasonably cause an objective observer to question [Judge Walker's] impartiality." *Liljeberg*, 486 U.S. at 865. And to determine

whether Judge Walker's impartiality may have been compromised by a stake in the outcome of the case similar to the Plaintiffs, the best place to look is Plaintiffs' complaint. Plaintiffs' key allegation is this: "Plaintiffs are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex and desire to marry those individuals. They are now prohibited from doing so as a direct result of Defendants' enforcement of Prop. 8." ER 578.[3] Judge Walker, then, would have been situated *identically* to the

[3] In almost all of their filings in this case, Plaintiffs have equated responsible marital unions with couples in long-term, committed relationships. *See, e.g.*, ER 573 ("Plaintiffs Perry and Stier are lesbian individuals in a committed relationship. Plaintiffs Katami and Zarrillo are gay individuals in a committed relationship."); ER 541 ("Plaintiffs are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex . . . . Plaintiffs Perry and Stier are lesbian individuals who have been in a committed relationship for ten years. . . . Plaintiffs Katami and Zarrillo are gay individuals who have been in a committed relationship for eight years."); ER 524 (Plaintiffs "are similarly situated to heterosexual individuals for purposes of marriage because, like individuals in a relationship with a person of the opposite sex, they are in loving, committed relationships."); ER 485 ("Plaintiffs are seeking to secure the same freedom of personal choice to marry the person with whom they are in a loving, long-term relationship that the State has long afforded to heterosexual individuals.") (quotation marks omitted); ER 483("If either Plaintiff Katami or Zarrillo were female, and if either Plaintiff Perry or Stier were male, then California law would permit each of them to marry the person with whom they are in a long-term, committed relationship."); ER 447-48 ("Prop. 8 communicates the official view that same-sex couples' committed relationships are of a lesser stature than the comparable relationships of opposite-sex couples."); ER 401 ("[P]ermitting Plaintiffs and other same-sex couples in loving, committed relationships to marry will strengthen the institution and the relationships of both same-sex and opposite-sex couples."); ER 358 ("[E]xisting constitutional

Plaintiffs before him—he would have had precisely the *same* stake in the outcome of the case as the Plaintiffs—if he was a gay resident of California who was involved in a long-term, serious relationship with an individual of the same sex and desired to marry that individual. Not only would this possibility reasonably cause an objective observer to question Judge Walker's impartiality, it would, if true, conclusively establish that Judge Walker had an "interest that could be substantially affected by the outcome of the proceeding," a nonwaivable conflict under Section 455(b)(4). *See* 28 U.S.C. § 455(e).

While the case was before him, Judge Walker refused to comment on rumors about his sexual orientation when asked by reporters. But shortly after his retirement from the bench, he confirmed to a group of reporters that he is gay, and he disclosed that he had been in a relationship with another man for ten years. *Gay Judge Never Considered Dropping Prop 8 Case*, Reuters, Apr. 6, 2011, *available at* http://www.reuters.com/article/2011/04/06/gaymarriage-judge-idUSN0625669220110406. Thus, throughout his tenure on this case, Judge Walker was, as Plaintiffs put it in their complaint, "a gay resident[] of California who [was] involved in [a] long-term, serious relationship[] with [an] individual[]

---

protections for personal decisions relating to marriage extend to individuals in a loving, committed relationship with a person of the opposite sex or the same sex." (quotation marks and brackets omitted)).

of the same sex." ER 578. Indeed, Judge Walker has himself consistently equated marriage with "committed long-term relationships," ER 162, and has emphasized that "deep emotional bonds and strong commitments" are the key "characteristics relevant to the ability to form successful marital unions." ER 145. He has even said that the committed long-term relationships of Plaintiffs in this case *are* marriages. ER 182 ("[P]laintiffs ask California to recognize their relationships for what they are: marriages.").

Plainly, the fact of Judge Walker's ten-year, same-sex relationship was directly relevant to the question of disqualification. Indeed, on learning this information, the reporters asked, tellingly, whether Judge Walker had considered recusing himself from this case. *Gay Judge Never Considered Dropping Prop 8 Case*, *supra*. And if Judge Walker had timely disclosed the fact of his relationship to the parties, as he was legally bound to do, he would have been asked the obvious question that his relationship so naturally raised: did he have an interest in marrying his partner? Again, an affirmative answer would have placed Judge Walker in precisely the same shoes as the Plaintiffs before him and would have, obviously, required his immediate nonwaivable disqualification under Section 455(b)(4). Equally obvious, it would have gravely compounded, to put it mildly, the serious concerns about his impartiality that Judge Walker's long-term

relationship would have already raised in the mind of any reasonable third-party observer. Accordingly, Judge Walker was legally bound to disclose the answer to this plainly critical question.

And the record of this case, which a reasonable third-party observer would be bound to examine, *Holland*, 519 F.3d at 913, makes clear that an affirmative answer was highly likely. According to Plaintiffs' own expert, nearly two-thirds of committed same-sex couples in California—64 percent[4]—will get married if permitted to do so. ER 207-08, 211-12.[5] Judge Walker's legal analysis and fact findings, moreover, extol marriage and identify numerous benefits, ranging from the financial to the emotional, that he concluded would accrue specifically to same-sex couples if they were permitted to marry. As Judge Walker pointed out, for example, "[m]arriage is widely regarded as the definitive expression of love and

[4] Additionally, another of Plaintiffs' experts submitted a survey showing that 78% of same-sex couples were "somewhat" to "very likely" to marry if permitted to do so. ER 215.

[5] In his opinion, Judge Ware argued that this information "does not necessarily imply" that Judge Walker intended to marry, since "more than one-third of such couples in California have no interest in being married." ER 31 n.18. But as discussed in Part I.A, *supra*, Proponents need not show that anything "necessarily impl[ies]" that Judge Walker intended to marry his partner, only that a person could reasonably believe there was a significant risk that Judge Walker was biased. That Judge Walker is statistically likely to marry his partner if his injunction is upheld on appeal alone constitutes reasonable grounds for doubting Judge Walker's impartiality.

commitment in the United States." *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 970. Marriage, he found, "benefits both spouses by promoting physical and psychological health," *id*. at 962, and "can increase wealth and improve psychological well-being for married spouses," *id.* at 963. All of these "tangible and intangible benefits from marriage" would accrue to same-sex couples just as they do to opposite-sex couples, according to Judge Walker. *Id.* at 969. On the other hand, he found, remaining unmarried, "increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage." *Id.* at 978. In light of this record, it would hardly be unreasonable for an objective third-party observer to conclude that Judge Walker likely desired to marry his long-time partner. To the contrary, it would be wholly *unreasonable* for an objective observer to conclude on this record that Judge Walker had no interest at all in marriage.[6]

[6] Judge Ware rejected the presumption that "all people in same-sex relationships think alike." *Perry*, 2011 WL 2321440, at *11. So do we, and Proponents have never made such an argument. Rather, our argument is that an objective observer familiar with the record in this case could reasonably expect that two individuals—whether of the opposite sex or the same sex—who have been in a decade-long relationship very well may have an interest in marrying if permitted to do so. *Cf. Liljeberg*, 486 U.S. at 860-61 ("Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or

Yet Judge Walker consciously withheld from the parties the facts concerning his relationship and his interest, if any, in marriage, and he continued to sit in a case in which he ultimately declared his own right to marry his long-time partner. He could not do both. The proceedings before Judge Walker are now concluded and so the timely disclosures that were required by the law, the canons, and the ethical tradition of the federal judiciary are no longer possible. Vacating Judge Walker's judgment, therefore, is not only the appropriate remedy, as we demonstrate in Part II below, it is the only remedy.

### *C. The appearance of partiality in this case is exacerbated by Judge Walker's unprecedented rulings.*

In determining whether Judge Walker's impartiality in this case can reasonably be questioned, the reasonable third-party observer is bound to "examine[] the record and law." *Holland*, 519 F.3d at 914. The course of proceedings in this case has been marked by a number of irregular and unprecedented rulings, both procedural and substantive, that give gravely disquieting force to the "appearance of partiality" created by Judge Walker's refusal to disclose his long-term, same-sex relationship and whether he has an interest in marrying his partner. For example:

---

bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.").

- Before the trial even began, this Court issued an extraordinary writ of mandamus to overturn Judge Walker's order requiring Proponents to turn over confidential internal communications concerning the initiative campaign. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009).

- Also before trial commenced, the Supreme Court of the United States issued an emergency stay, pending the filing of a mandamus petition with the Court, enjoining Judge Walker from video-recording and disseminating the trial proceedings to other federal courthouses. The Court found that Judge Walker had " 'so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power,' " and that he had violated the "proper rules of judicial administration . . . relat[ing] to the integrity of judicial processes." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (quoting Sup. Ct. R. 10(a)).

- Judge Walker's decision establishing a constitutional right for same-sex couples to have their relationships recognized as marriages conflicts with the judgment of *every State and federal appellate court* to consider the validity of the traditional opposite-sex definition of marriage under the Federal Constitution—including both the United States Supreme Court and this Court—all of which have upheld that definition.[7]

- Judge Walker peremptorily held that gays and lesbians are a suspect class even though all eleven Circuit Courts of Appeals to consider the issue (including this Court) have repeatedly and squarely held to

[7] *See Baker v. Nelson*, 409 U.S. 810 (1972); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. Ct. App. 1995); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

the contrary.[8]

- Despite the unprecedented nature of his ruling and its sharp conflict with the uniform judgment of appellate courts throughout the country, Judge Walker refused to stay his judgment pending appeal. As a result, this Court was forced to issue such a stay.

- Shortly before his retirement from the bench, Judge Walker publicly displayed an excerpt from the video recording of the trial in this case in violation of (i) his order sealing the recording; (ii) Local Rule 77-3; (iii) the Supreme Court's decision in this case; (iv) the policy of the Judicial Conference of the United States and this Court's Judicial Council; and (v) his own solemn assurance to Proponents that the trial recordings would be used solely in chambers.

ER 252.

True, "judicial rulings *alone* almost never constitute a valid basis for a bias or partiality motion," *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis

[8] *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation).

added), but the extraordinary rulings in this case are part of and give force to a larger and disturbing body of evidence indicating Judge Walker's lack of impartiality. *See supra* at 25-31. In any event, as the Supreme Court has said of the extrajudicial source doctrine, "there is not much doctrine to the doctrine." *Liteky*, 510 U.S. at 554. "The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias or prejudice' recusal . . . ." *Id.* Judge Walker's remarkable rulings bear directly on his partiality, and they would be highly revealing to an objective observer.

### *D. Judge Ware's decision below is plainly contrary to statutory text, uniform precedent, and common sense.*

Although Judge Ware implicitly acknowledged the substantial possibility, indeed likelihood, that a couple in a ten-year relationship has an interest in marrying, *see* ER 15-16 & n.18, he dismissed the undisclosed fact of Judge Walker's long-term relationship and the unknown fact concerning Judge Walker's interest in marriage as "details about his personal life that were not reasonably related to the question of disqualification." ER 18. Judge Walker, therefore, had no duty to disclose "irrelevant personal information" concerning his own interest in marrying his long-time partner, even as he announced that he had a constitutional right to marry his partner. *Id.* To the contrary, Judge Ware reasoned, Judge Walker had an obligation *not* to disclose this information because to do so "would

produce the spurious appearance that irrelevant personal information could impact the judge's decision-making, which would be harmful to the integrity of the courts." *Id.* Judge Ware, then, transformed the legal duty to disclose information bearing directly on the judge's potential impartiality into a legal duty to *conceal* such information.

1. The analytical path taken by Judge Ware to this breathtaking conclusion, although at times difficult to follow, is marked by a series of points that are at war with clear statutory text, uniform precedent, and common sense. At the heart of his reasoning under Section 455(a) is the proposition that "[m]ere speculation" about Judge Walker's interest in marrying his partner "does not trigger the recusal requirements of Section 455(a)." ER 15. Judge Walker's undisclosed ten-year relationship, Judge Ware concluded, does not support "the assumption that . . . [he] has an interest in getting married that is so powerful that it would render [him] incapable of performing his duties." *Id.* According to Judge Ware, "[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 that person that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain." *Id.*

First, while Judge Ware is certainly correct that the fact of Judge Walker's relationship does not *ipso facto* imply that he was *actually* partial or otherwise "incapable of performing his duties," *id.*, the issue is whether in light of all the facts "it is unreasonable even to question his impartiality," *United States v. Bosch*, 951 F.2d at 1555-56 (O'Scannlain, J. dissenting). And *any* significant interest in marrying his partner, not just a debilitating "powerful" interest, would raise a substantial question about Judge Walker's impartiality.

But even more fundamentally, a "thoughtful observer" is by definition *not* "well informed" if he does not have knowledge of "all the relevant facts," let alone the potentially dispositive facts. And, again, Judge Walker's long-term relationship and his interest in marrying his partner were *facts* bearing directly and critically on his potential interest in the outcome of the case and, therefore, on his potential partiality, or at least its appearance. These were *facts* known only to Judge Walker, and the objective test under Section 455(a)—"whether a reasonable person *with knowledge of all the facts* would conclude that the judge's impartiality might reasonably be questioned"—obviously depended upon Judge Walker disclosing this information to the parties. The whole point of Section 455(a) is to eliminate "speculation" from the disqualification inquiry. A judge is free, of

course, to allow the parties to speculate about his possible interest in the outcome of a case, but only by recusing himself.

2. With respect specifically to Judge Walker's failure to disclose "his same-sex relationship . . . and . . . whether he and his partner have (or have had) any interest in marrying," Judge Ware noted that "silence is by its very nature ambiguous and thus is open to multiple interpretations." ER 16. And he determined that it is "*equally reasonable*" to interpret Judge Walker's silence either as "indicat[ing] that [Judge Walker] was not impartial" or as indicating that he was. *Id*. (emphasis added). That should have been the end of the matter, for the question before Judge Ware, as this Court has emphasized, was whether "a reasonable person [would] perceive[] a *significant risk* that the judge will resolve the case on a basis other than the merits." *Holland*, 519 F.3d at 913 (emphasis added and quotation marks omitted).

But in light of "the presumption that judges are impartial," Judge Ware "postulate[d] that a judge who is silent in such a situation has already, *sua sponte*, considered the question of recusal and has determined that he need not disqualify himself, because no reasonable observer would conclude that his impartiality could reasonably be questioned." ER 16. Here again, Judge Ware has subverted the objective standard of Section 455(a), which was adopted by Congress in 1974 "to

avoid even the 'appearance of partiality' . . . and ensure that the judge's decision is reasonable to an informed observer." *Holland*, 519 F.3d at 914 (citation omitted).

> [I]n drafting § 455(a) Congress was concerned with the "appearance" of impropriety, and to that end changed the previous subjective standard for disqualification to an objective one; no longer was disqualification to be decided on the basis of the *opinion of the judge in question*, but by the standard of what a reasonable person would think.

*Liljeberg*, 486 U.S. at 872 (Rehnquist, C.J., dissenting) (emphasis added).

Judge Ware's postulate converts the presumption of judicial impartiality into a presumption of judicial infallibility. It would allow a judge to identify and consider the facts relevant to disqualification and to decide for himself, in private and without review, that he is impartial. Far from faithfully enforcing Section 455(a), Jude Ware's rule is the antithesis of it.[9]

[9] Judge Ware attempted to distinguish three cases on which Proponents relied below: *Kensington*, 368 F.3d at 314, *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), and *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998). Each of these cases involved a trial judge's nondisclosure of personal information, and the courts of appeals unequivocally enforced the "rule that the parties should be apprised of any possible ground for disqualification known privately to the judge." *Kensington*, 368 F.3d at 313-14. Judge Ware distinguished these cases on the basis that "[i]n each of these instances, the judge was associated with one or more individuals who had a clear, concrete stake in the outcome of the litigation." ER 18. By contrast, according to Judge Ware, Proponents "cite no case suggesting that a judge has a duty to disclose information about his personal life when such information does not pertain to the judge's association with an individual having a clear, concrete stake in the outcome of the litigation . . . ." *Id.* We submit that the broad disclosure rule enforced in these cases extends to cases in which the personal

3. Judge Ware also deemed "unworkable" and "inadministrable" any disqualification standard "based on assumptions about the amorphous personal feelings of judges in regards to such intimate and shifting matters as future desire to undergo an abortion, to send a child to a particular university," or "to enter into the institution of marriage with a member of the same sex now or in the future." ER 8-10.[10] Such a test, he said, would rely on "undependable and invasive self-reports," and "could turn on whether a judge 'fervently' intended to marry a same-sex partner versus merely 'lukewarmly' intended to marry . . . ." ER 9. Judge Ware concluded that because "it is beyond the institutional capacity of a court to interpret the subtleties of a judge's personal, and likely ever-changing, subjective states on such intimate matters," disqualification would not be warranted in this case even if Judge Walker had disclosed that he " 'fervently' intends to marry and, thus, holds an interest in this case that is substantially affected by the outcome." ER 9-10.

---

information at issue pertains to the judge's own possible clear, concrete stake in the outcome of the litigation.

[10] Although this feature of Judge Ware's analysis appeared in his discussion of Section 455(b)(4), it would be equally applicable to, and would thus preclude, a disqualification inquiry under Section 455(a).

In cases involving controversial issues relating to "personal" and "intimate" matters, then, judges are qualified to sit, according to Judge Ware, despite the appearance of partiality, and even despite the fact of impartiality. Nothing in the text and history of Section 455, nor in the precedents enforcing it, nor in the long history of the American judicial tradition even hints of such an exemption from, as Jefferson aptly put it, "the laws of decency [and] the fundamental principles of the social compact." *Nevada Comm'n*, 131 S. Ct. at 2348. There is no such exemption in the law, nor any need for judicial creation of one; again, any judge whose current personal interests place him, or appear to place him, in the same shoes as a party before him can avoid disclosure of personal information by simply deferring to the next judge on the wheel.

Judge Ware discussed two cases in connection with his "personal feelings" exemption from Section 455's disclosure requirement. Neither case can be squared with Judge Ware's decision. *United States v. Alabama*, 828 F.2d 1532, 1541-42 (11th Cir. 1987), involved a class action to desegregate the State's institutions of higher learning, and the certified class "include[d] all [black] children 'who are eligible to attend or who will become eligible to attend the public institutions of higher education in the Montgomery, Alabama area.' " *Id*. at 1541. The trial judge had two children who, "like all young black Alabamians,"

were "technically members of this class and possess an interest in the outcome of this litigation." *Id.* The State defendants sought to disqualify the trial judge under Section 455(b)(4) and under Section 455(b)(5), which requires disqualification if the judge or a member of his immediate family "is a party to the proceeding." The trial judge squarely acknowledged that *he would have to recuse* under Section 455(b)(4) "if I know that any minor child residing in my household has an interest that could be substantially affected by the outcome of this proceeding." *United States v. State of Alabama*, 571 F. Supp. 958, 962 (N.D. Ala. 1983). Accordingly, unlike in this case, the trial judge in *Alabama* took pains to disclose the relevant facts: "Neither my sixteen-year old son nor my nine-year old daughter has indicated to me any interest in attending either of the colleges or universities involved in this action." *United States v. State of Alabama*, 574 F. Supp. 762, 764 n.1 (N.D. Ala. 1983). The Eleventh Circuit held that the judge was not disqualified because there was no reason to believe that the trial judge's children had "any desire or inclination to attend a Montgomery area institution," and "[a]ny beneficial effects of this suit upon these children were remote, contingent and speculative." 828 F.2d at 1541.

Similarly, in *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984), the information in the record and the trial judge's disclosures demonstrated that any

interest she had in the outcome of the case was "remote, contingent, and speculative." 745 F.2d at 931. *Houston* initially involved a claim that the City's at-large election system diluted the votes of blacks and Hispanics. By the time the action was reassigned to a new trial judge, who was black, "the City had changed its method of election," thus mooting the voting rights issue, and the only remaining question to be decided concerned the "the availability of attorneys' fees to any of the parties to the action." *Id*. at 926. The City sought the new judge's recusal from the fee petition proceeding on the ground that she was a member of the original plaintiff class of registered black and Hispanic voters in Houston. The trial judge, noting that the standard for determining the appearance of partiality under Section 455(a) requires disclosure of "all the facts of a situation," deemed it "incumbent upon [herself] to acknowledge and deal with the facts of [her] particular situation." *Leroy v. City of Houston*, 592 F. Supp. 415, 418 n.5 (S.D. Tex. 1984). Accordingly, she disclosed on the record all relevant "personal" facts, including her past and current street addresses and her and her husband's voter registration status. *Id.* at 418. The Fifth Circuit held that the trial judge was not disqualified, explaining that any interest she might have had was "remote, contingent, and speculative" because "she has resided in a voting precinct that is predominantly non-black and non-Hispanic," and thus it was "doubtful whether the

change sought to be effected by plaintiffs in the creation of voting districts would have benefited Judge McDonald at all." *Houston*, 745 F.2d at 931.

In sum, in both *Alabama* and *Houston*, the trial judge had fulfilled his or her ethical obligation to disclose all of the relevant personal facts, and those facts made clear that the judge (or the judge's family) had no current, direct interest in the outcome of the case. Here, in contrast, the facts that are now known raise the strong possibility, indeed likelihood, that Judge Walker had a current, direct interest in the outcome of this case, yet while presiding over this case he failed to disclose any of the relevant facts.

4. Finally, Judge Ware held that Judge Walker's ten-year, same-sex relationship gave him no "markedly greater interest in a case challenging restrictions on same-sex marriage than the interest held by the general public." ER 24. Because "we all have an equal stake in a case that challenges the constitutionality of a restriction of a fundamental right," enjoining enforcement of a law that is unconstitutionally discriminatory "is a public good that benefits all in our society equally." *Id*. It follows, Judge Ware said:

> Although this case was filed by same-sex couples seeking to end a California constitutional restriction on their right to marry, all Californians have an equal interest in the outcome of the case. The single characteristic that Judge Walker shares with the Plaintiffs, albeit one that might not have been shared with the majority of Californians, gave him no greater interest in

> a proper decision on the merits than would exist for any other judge or citizen.

*Id.*

Judge Ware's analysis cannot be correct, of course, because it would mean that the "injury in fact" requirement of Article III standing no longer applies in equal protection cases. This case could not have been brought by "all Californians." To the contrary, it could have brought *only* by Californians with a "direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). As noted earlier, *supra* at 4, Plaintiffs established their standing to bring this case by alleging that they "are gay and lesbian residents of California who are involved in long-term, serious relationships with individuals of the same sex and desire to marry those individuals." ER 578. Judge Walker, too, was a gay resident of California who was involved in a long-term, serious relationship with an individual of the same sex, and so he plainly had a greater interest in this case than that held by the general public and by the vast majority, if not all, other federal judges. Indeed, he had precisely the *same* direct stake in the outcome of this case as the Plaintiffs if he desired to marry his long-time partner, and he was thus obliged, as previously demonstrated, to disclose that information to the parties.

Nor does this case fall within the legion of cases holding that merely belonging to the same minority group as one of the parties does not itself give rise

to a disqualifying interest in the outcome of the case. As the Fifth Circuit put it in *United States v. Alabama*, "To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable. . . . The recusal statutes do not contemplate such a double standard for minority judges." 828 F.2d at 1542. Thus, for example, black judges have routinely sat on school desegregation and other race discrimination cases that did not directly and substantially affect them (or their children) personally,[11] and female judges have

[11] *See Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974) (black judge could hear employment discrimination suit brought by black plaintiffs against construction industry); *Baker v. City of Detroit*, 458 F. Supp. 374 (E.D. Mich. 1978) (black judge could hear Title VII challenge against Detroit police department affirmative action policies); *see also Ortega Melendres v. Arpaio*, No. 07-2513, 2009 WL 2132693 (D. Ariz. July 15, 2009) (Hispanic judge could hear Title VI suit by Hispanic plaintiffs against sheriff's Office for racial profiling and unlawful detention); *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98 (5th Cir. 1975) (en banc) (white judge who was formerly president of a local bar association that did not admit blacks could hear suit by black lawyers against state bar association challenging discriminatory administration of bar exam); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (Episcopal judge could hear sexual harassment claim by former employee against an Episcopal church in a different state); *Menora v. Illinois High Sch. Ass'n*, 527 F. Supp. 632 (N.D. Ill. 1981) (Jewish judge could hear Free Exercise challenge to public school policy forbidding religious headgear during basketball games brought by Orthodox Jewish high school students); *Poplar Lane Farm LLC v. The Fathers of Our Lady of Mercy*, No. 08-509S, 2010 WL 3303852 (W.D.N.Y. Aug. 19, 2010) (Catholic judge could hear breach of contract suit brought against Catholic organization); *United States v. Nelson*, No. 94-823, 2010 WL 2629742 (E.D.N.Y. June 28, 2010) (Orthodox Jewish judge could hear criminal prosecution against alleged killer of an Orthodox Jew).

regularly heard gender discrimination cases that did not directly and substantially affect their personal interests.[12]

And as with minority judges in the mine run of racial or gender discrimination cases, there will rarely be any reason to believe that the outcome of a sexual orientation case might have a direct and substantial effect on the current personal interests of a gay or lesbian judge assigned to the case. We know of no reason to believe, for example, that Judge Walker would have any personal interest in the outcome of litigation over, say, the constitutionality of the military's "Don't Ask, Don't Tell" policy. Nor would there be any issue with a gay or lesbian judge hearing *this case* so long as a reasonable person, knowing all of the relevant facts and circumstances, would not have reason to believe that the judge has a current personal interest in marrying if Plaintiffs prevailed. The particular facts and circumstances that give rise to such a reasonable concern in this case—Judge Walker's ten-year same-sex relationship, his refusal to disclose both his relationship and whether he and his partner have any interest in marriage, his findings concerning the manifold benefits of marriage for "committed, long-term same-sex relationships," and Plaintiffs' evidence that a large majority of

[12] *See Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (female judge could hear gender discrimination suit against law firm by former female employee).

committed same-sex couples in California would marry if permitted to do so—plainly do not necessarily exist for all or even most gay and lesbian citizens or judges.

At bottom, then, Judge Ware's holding that "all Californians have an equal interest in the outcome" of this case means that any individual, no matter how personally unaffected by Proposition 8, could have brought this case, and that any judge, no matter how personally affected by Proposition 8, could have heard it. Both propositions are facially wrong.

## II. CHIEF JUDGE WALKER LIKELY HAD A DIRECT PERSONAL INTEREST IN THE LITIGATION THAT WOULD REQUIRE RECUSAL.

Because, as demonstrated above, Judge Walker's impartiality could reasonably be questioned, his recusal was required by Section 455(a). Accordingly, this Court need not decide whether his recusal was also required because he in fact had an "interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). If the Court finds it necessary to reach the issue, however, it should hold that recusal was also required on this ground.

If Judge Walker in fact had an interest in marrying his long-term, same-sex partner at any time during which he presided over the proceedings in this case, there can be no doubt that he had a direct interest in the litigation that would be

substantially affected by the outcome of Plaintiffs' challenge to Proposition 8. Indeed, he would have effectively been sitting as "a judge in his own case." *Nevada Comm'n on Ethics*, 131 S. Ct. at 2348. Accordingly, recusal plainly would have been required by Section 455(b)(4).

While Judge Walker has failed to disclose his marriage intentions, all of the available evidence—including the existence and belated disclosure of his long-term, same-sex relationship, the statistical likelihood that he wished to marry (according to Plaintiffs' own expert), and Judge Walker's own findings regarding the desirability of marriage for same-sex couples—strongly suggests that he did, in fact, desire to marry. Accordingly, if it is necessary to decide the issue in the absence of all the relevant facts, the only reasonable conclusion would be that recusal was required under Section 455(b)(4). It is well settled, after all, that "any doubts" should be resolved "in favor of disqualification." *Parker*, 855 F.2d at 1524. That rule surely applies with special force in this case, where those doubts result entirely from the judge's improper failure to disclose information directly relevant to whether he in fact stood in precisely the same shoes as the Plaintiffs before him.

## III. JUDGE WALKER'S RULING MUST BE VACATED.

"The general rule has been that when a judge sits in violation of an express statutory standard, the disqualified judge's rulings are, on appeal, to be vacated." *Van Griffin*, 874 F.2d at 637. In *Liljeberg*, however, the Supreme Court made clear that "[a]s in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. In determining whether vacatur was appropriate in that case, the Supreme Court carefully analyzed the nature and seriousness of the violation of the recusal statute. *See id*. at 865-67. It further explained that "in determining whether a judgment should be vacated" for such a violation, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id*. at 864. In considering these factors, a court "must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Id*. (quotation marks omitted). Leaving aside the fact that this case, unlike *Liljeberg*, does not involve mere inadvertent oversight by a busy judge, *id*.

at 862, the considerations identified by the Supreme Court in that case make clear that vacatur is required here.[13]

*First*, as demonstrated above, this case involves a violation of the recusal statutes that is even more serious than that in *Liljeberg*, for Judge Walker had knowledge of the facts giving rise to a reasonable question about his interest, and thus his impartiality, in this case from the moment it was filed. *See id.* at 867-68 (vacating the judgment even though the judge "did not know of his [disqualifying] interest" until after trial). And despite this knowledge, he failed to disclose the facts on the record to the parties. *See id.* at 866-67 (vacating the judgment because the judge, after learning of his disqualifying interest, did not "disclos[e]" it to the parties). As in *Liljeberg*, this conduct amounts to a Section 455 violation that is "neither insubstantial nor excusable," *see id.* at 867, but instead serious and inexplicable.

*Second*, "a careful study of [Judge Walker's] analysis of the merits of the underlying litigation" compels the conclusion, as in *Liljeberg*, that "there is a greater risk of unfairness in upholding the judgment . . . than there is in allowing a

[13] Because Judge Ware erroneously held that Judge Walker did not violate the recusal statutes, it did not address whether vacatur was appropriate. *See* ER 19 n.26. As demonstrated below, however, vacatur is plainly required here. Accordingly, there is no need for the district court to address the propriety of vacatur in the first instance.

new judge to take a fresh look at the issues." *Id*. at 868. As previously detailed, *supra* at 31-33, the proceedings in this case have been marked by a series of irregular and unprecedented rulings that themselves raise a gravely serious question about Judge Walker's impartiality. Allowing Judge Walker's ruling to stand thus threatens a significant risk of injustice to Proponents and the People of California. Plaintiffs, on the other hand, cannot show any "special hardship by reason of their reliance on the original judgment." *See Liljeberg*, 486 U.S. at 869. This Court has stayed that judgment pending appeal, *see Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and thus Plaintiffs cannot credibly claim harm from relying on a judgment that has yet to be implemented.

*Third*, allowing Judge Walker's ruling to stand would create a significant risk of injustice in other cases as well, for it would tacitly approve Judge Walker's failure either to disclose the facts relating to his potential direct personal interest in the outcome of the case, or to recuse himself. As in *Liljeberg*, vacating the judgment "may prevent a substantive injustice in some future case by encouraging a judge . . . to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 868.

Additionally, the high-profile nature of this case, its overriding importance to countless people in California and throughout the Country, Judge Walker's sweeping and anomalous "factual" findings, and his unprecedented legal conclusions magnify the risk of injustice in other cases that would result from declining to vacate the judgment. In fact, other federal courts have already relied on Judge Walker's "factual" findings, *see Dragovich v. United States Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011); *In re Balas*, 449 B.R. 567, 576-77 (Bankr. C.D. Cal. 2011), and his unprecedented legal conclusions, *see RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 773 n.50 (W.D. Pa. 2010) (citing this case for the proposition under federal law that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation"). Hence, treating this case as though Judge Walker had no obligation to disclose the facts relating to his potential personal interest in the outcome poses a particularly serious risk of spreading injustice to other federal litigation.

*Finally*, letting Judge Walker's decision stand would severely undermine the public's confidence in the judicial system. This Court has repeatedly recognized that when faced with a trial court ruling tainted by the appearance of impartiality, vacatur is the only way to preserve the public's trust in the judiciary. In *Preston v.*

*United States*, for example, this Court, after finding that the trial judge had violated Section 455 by failing to recuse himself, held that "[t]here is no way . . . to purge the perception of partiality in this case other than to vacate the judgment and remand the case to the district court for retrial by a different judge." 923 F.2d at 735. The *Preston* Court added:

> We recognize that this case has been tried once to judgment and that a retrial will involve considerable additional expense, perhaps with the same result as the first trial. This is unfortunate. [But it] prompts us to repeat . . . that the unfairness and expense which results from disqualification can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned.

*Id.* at 735-36 (quotation marks and alterations omitted); *see also Potashnick*, 609 F.2d at 1115 (similar); *United States v. Arnpriester*, 37 F.3d 466, 468 (9th Cir. 1994).

The need to "purge the perception of partiality" is particularly acute here. As the Supreme Court has already recognized, *see Hollingsworth*, 130 S. Ct. at 714, this high-profile case involves a highly divisive subject matter, and it raises nationally important constitutional and public-policy questions. The pall cast by a palpable appearance of judicial partiality upon one of the most prominent and widely publicized constitutional cases in this Country's history threatens deep and lasting harm to the public's confidence in our Nation's judicial system. However this case is ultimately resolved, a large segment of the population will be unhappy

with the result. In these circumstances, it is especially essential that all concerned have complete confidence in the impartiality of the judges deciding it. We respectfully submit that such confidence is not possible here, and so Judge Walker's judgment must be vacated.

## CONCLUSION

For the foregoing reasons, we respectfully request that the district court's order denying Proponents' Motion to Vacate be reversed and the case remanded to the district court with instructions that the judgment and all orders entered by Judge Walker be vacated.

Dated: October 3, 2011

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

*Attorneys for Defendant-Intervenors-Appellants*

**Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 13,035 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* 2003 Microsoft Word *(state font size and name of type style)* Times New Roman Size 14 font, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____.

Signature s/Charles J. Cooper

Attorney for Defendant-Intervenors-Appellants

Date Oct 3, 2011

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Intervenors-Appellants certify that there are three related appeals pending in the Ninth Circuit, *Perry et al. v. Brown et al.*, No. 10-16696; *Perry et al. v. Brown et al.*, No. 11-17255; and *Perry et al. v. Brown et al.*, No. 10-16751, which arise out of the same district court case as the present appeal.

Dated: October 3, 2011

By: s/Charles J. Cooper

Charles J. Cooper*
D.C. Bar No. 248070
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
Fax: (202) 220-9601

Attorney for Defendant-Intervenors-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com

* *Admitted pro hac vice*

9th Circuit Case Number(s) 11-16577

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

**********

## CERTIFICATE OF SERVICE
## 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) Oct 3, 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/ Charles J. Cooper

**********

## CERTIFICATE OF SERVICE
## When Not 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) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

**NO. 11-16577**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

KRISTIN PERRY, et al.,
*Plaintiffs-Appellees*,

v.

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

and

DENNIS HOLLINGSWORTH, et al.,
*Defendant-Intervenors-Appellants*.

---

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James S. Ware)

---

## NOTICE OF ERRATA

---

Defendant-Intervenors-Appellants hereby submit the following errata to their Opening Brief in the above-captioned case:

| | |
|---|---|
| Page 8, line 4 | "any choice" should be replaced with "no choice." |
| Page 31, line 8 | "Part II" should be replaced with "Part III." |
| Page 40, line 3 | "the fact of impartiality" should be replaced with "the fact of partiality." |
| Page 50 n.13 | "it did not address" should be replaced with "he did not address." |

Dated: October 4, 2011

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

*Attorney for Defendant-Intervenors-Appellants*

**CERTIFICATE OF SERVICE**

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 October 4, 2011. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Charles J. Cooper
Charles J. Cooper

Dated: October 4, 2011