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' REPLY BRIEF

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COUNTERSTATEMENT OF FACTS

Plaintiffs make two factual representations that are demonstrably belied by the very evidence on which they are based. First, they say that Judge Walker's "10-year relationship with a physician" was "already widely known and discussed in the media" when Judge Walker disclosed his relationship to the media on April 6, 2011, shortly after his retirement from the bench. Brief for Appellees Perry, et al. and Appellee-Intervenor City and County of San Francisco (filed Nov. 1, 2011) ("Pls. Br.") at 6. In fact, the newspaper articles cited by Plaintiffs reported only the "rumors" and "open secret" that Judge Walker is gay and that, according to one article quoting anonymous "colleagues," Judge Walker "attends bar functions with a companion, a physician." SER 45, 27, 31-32. Judge Walker consistently refused to answer questions about his sexual orientation when asked by reporters prior to this retirement. Obviously, a single unconfirmed news article reporting a statement from unnamed sources that Judge Walker attends bar functions with a companion does not establish that he was in a 10-year same-sex relationship, let alone that it was a matter of common knowledge.

Second, Plaintiffs repeatedly represent that Proponents' counsel had publicly "foresworn" the argument "that Judge Walker should have recused himself because he is 'gay and . . . in a committed same-sex relationship,' " Pls. Br. at 6; *see id.* at 14 n.2 (asserting that Proponents knew about and commented on "Judge

Walker's sexual orientation and same-sex relationship more than a year" before he issued his decision). But as the very news articles cited by Plaintiffs make clear, Proponents' counsel were asked only about Judge Walker's rumored homosexuality; no reporter suggested that Judge Walker was in a relationship of any kind, let alone a committed, 10-year relationship. Specifically, we were asked whether we intended to "make an issue of the judge's sexual orientation," SER 27, and whether we "plann[ed] to raise the specter of the judge's sexual orientation" on appeal, SER 40. We consistently disavowed any interest in Judge Walker's sexual orientation, let alone in making an issue of it. *See* SER 27, 40. Likewise, in our briefing on this issue in the court below, we unequivocally reaffirmed that "Judge Walker's sexual orientation, whether gay or heterosexual, does not itself raise a reasonable concern about his fitness to sit in this case." SER 9. That was our position before Judge Walker rendered his decision. That was our position after he rendered his decision. And that is our position now.

ARGUMENT

1. As noted, and reaffirmed, in our counterstatement above, we have consistently and unequivocally rejected the notion that Judge Walker's sexual orientation, standing alone, is itself reason to question his impartiality in this case. Indeed, in our opening brief we noted yet again that there is no legitimate "issue with a gay or lesbian judge hearing *this case* so long as a reasonable person,

knowing all the relevant facts and circumstances, would not have reason to believe that the judge has a current personal interest in marrying if Plaintiffs prevailed." Defendant-Intervenors-Appellants' Opening Brief (filed Oct. 3, 2011) ("Opening Br.") at 46; *see id.* at 44-47.

Plaintiffs refuse to take yes for an answer on this point. Falsely asserting that we seek "to disqualify Judge Walker based on his sexual orientation," PLs. Br. at 14, Plaintiffs open their legal argument with a lengthy section contending that "Judge Walker's sexual orientation cannot be a reasonable basis for questioning his impartiality." Pls. Br. at 13; *see id*. at 13-19; *see also id.* at 28-29 ("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)."). Once again, this point is not in dispute.

2. Plaintiffs, like the court below, repeatedly invoke the doctrine that " '[J]udges . . . are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety.' " Pls. Br. at 12, quoting *First Interstate Bank of Ariz., N.A.* v. *Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000). This familiar presumption, Plaintiffs say, places the burden on Proponents to prove not only that Judge Walker had an interest in marrying his long-term partner while he presided over this case, but that his " 'interest in getting married [was] so powerful that it would render [Judge Walker] incapable of

performing his duties.' " Pls. Br. at 24, quoting ER 15. And because Judge Walker is presumed to be impartial, Plaintiffs argue, he is entitled both to refuse to disclose whether he had an interest in marrying his partner and to have his silence interpreted consistently with the assumption that he is impartial. This reasoning is fatally flawed.

First, as demonstrated in our opening brief, Opening Br. 21-23, 36, the issue under section 455(a) is whether in light of all the relevant facts, "it is *unreasonable even to question* [Judge Walker's] impartiality." *United States v. Bosch*, 951 F.2d 1546, 1555-56 (9th Cir, 1991) (O'Scannlain, J., dissenting). Here, the known facts—Judge Walker's refusal throughout his tenure in this case to disclose his long-term same-sex relationship (which he promptly and publicly disclosed upon his retirement from the bench), his findings regarding the benefits of marriage for same-sex couples, his extraordinary legal and procedural rulings and fact findings throughout the course of this litigation, and his refusal to disclose whether he desires to marry his same-sex partner—plainly raise a reasonable question about his impartiality. *See* Opening Br. at 28-34. Further, if Judge Walker had *any* significant interest, whether "powerful" or not, in marrying his partner, it would clearly require his mandatory, nonwaivable disqualification under section 455(b)(4).

More fundamentally, Plaintiffs simply misunderstand the nature and purpose of the presumption of judicial impartiality under section 455. The presumption is designed to protect *litigants*, not judges. "Section 455(a) . . . place[s] the burden of maintaining impartiality and the appearance of impartiality on the judge . . . ." *First Interstate Bank*, 210 F.3d at 987. Critical to satisfying that burden is faithfully discharging the "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 Textiles Mfr. Inst. v. The Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. 1999), quoting *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995). And litigants are entitled to assume that judges will "fully honor their ethical duties in *all* cases," *First Interstate Bank*, 210 F.3d at 989; *id.* at 988, including the duty to disclose any information possibly relevant to the partiality, or appearance of partiality, of the judge. Litigants are not obliged, therefore, to track down rumors or otherwise to investigate the private lives of judges to confirm that they are qualified to sit. *American Textiles*, 190 F.3d at 742 ("litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters"); *see also id.* ("a litigant's duty to investigate the facts of his case does not include a mandate for investigations into a judge's impartiality"); *Porter v. Singletary*, 49 F.3d at 1489 ("In light of the Canons governing judicial conduct, we do not believe that an

attorney conducting a reasonable investigation would consider it appropriate to question a judge . . . about the judge's lack of impartiality."). As Plaintiffs' lead counsel aptly put the matter in another case:

> Surely [Plaintiffs] cannot be urging a rule whereby, in order to preserve a possible . . . challenge, litigants must probe into the private lives of the jurists before whom they appear to discover interests which may cause a judge to be biased or which may create the strong appearance of bias. Nor do [Plaintiffs] explain what justification there might have been for [the judge's] not making this obvious conflict known to the parties . . . .

Reply Memorandum of Appellant at 2, *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601 (U.S.) (filed May 14, 1985).

In short, far from protecting a judge from having to disclose all facts potentially relevant to the question of disqualification, including private, personal facts, the presumption of judicial impartiality is precisely the reason why the judge is obliged to make such disclosures (or to recuse). Indeed, Plaintiffs' (and Judge Ware's) understanding of the presumption would effectively write subsection (a) out of section 455, for it would by definition defeat the mere "appearance of partiality."

3. Plaintiffs deny that Judge Walker's long-term relationship bears meaningfully on the question of disqualification in this case, arguing that "recusal has never turned on the objective likelihood, based on the judge's life circumstances, that the judge will exercise the right at issue." Pls. Br. at 20. They

even say, incredibly, that "whether Judge Walker would have standing to bring a similar suit as Plaintiffs has no bearing on the recusal question." Pls. Br. at 21 n.6.

The question under Section 455 is how direct and concrete – or conversely, how "remote, contingent, and speculative"[1] – is the judge's potential interest in the outcome of the case? A judge who stands in precisely the same shoes as the plaintiff before him has, by definition, the *same interest* as the plaintiff in the outcome of the case and obviously is disqualified under Section 455(b)(4) from sitting. And the closer that a judge's objective, known personal circumstances place him to standing in the plaintiff's shoes, the more reasonable it becomes to question his impartiality under Section 455(a) and the more imperative it becomes to insist that the judge fulfill his ethical obligation to fully disclose the plainly relevant facts known only to him. After all, the inquiry under Section 455(a) is whether "a reasonable person [would] perceive[ ] a *significant risk* that the judge will resolve the case on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (emphasis added and quotation marks omitted).

Plaintiffs argue, however, that the "true test for recusal" under Section 455(a) "is whether the judge has some differentiated, personalized connection to the case that gives rise to an appearance of partiality." Pls. Br. at 21; *id.* at 25n.7; *see also id.* at 27 ("as with Section 455(a), the true test for disqualification under

[1] *In re City of Houston*, 745 F.2d 925, 931 (5th Cir. 1984); *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987).

Section 455(b)(4) is whether the judge's interest in the case is differentiated, personalized, and connected to the specific litigants before the court"). In support of this claim, Plaintiffs cite cases in which the judge himself had no personal interest in the outcome of the case, but was nonetheless disqualified because of some other prohibited personal connection to one of the litigants or lawyers in the case (*e.g.*, judge served on the board of trustees of an interested University; judge previously had a prosecutorial role in the case; judge's former clerk and close friend prosecuted case). *See* Pls. Br. at 21-22, 25 n.7, 27-28. According to Plaintiffs, then, a judge must recuse himself from a case if he has a personal connection to a party that has a direct and substantial interest in the outcome, but he is free to sit despite *his own* direct and substantial interest in the outcome. This argument answers itself. *See also* Opening Br. at 38 n.9.

4. Plaintiffs and their amici also make the related argument that a person in a long-term, committed relationship cannot be distinguished for purposes of marriage from any other single, uncommitted person. Pls. Br. at 32-33; Brief of Amici Curiae Lambda Legal Defense and Educ. Fund, et al. (fileed Nov. 8, 2011) ("Lambda Br.") at 13-15. Such a distinction "defies common sense," they say, for "if sexual orientation is not a basis for recusal, then neither is an intimate relationship with a person of the same sex, which is the central way in which gay

persons express the sexual orientation." Lambda Br. at 14; *see* Pls. Br. at 32 ("Being in a same-sex relationship is at the very core of being gay.").

It is Plaintiffs and their amici who are short on common sense. Indeed, throughout this case Plaintiffs themselves have consistently drawn the common-sense distinction, for purposes of marriage, between a single, uncommitted individual (whether gay or heterosexual) and an individual in a long-term serious relationship:

- Plaintiffs have repeatedly 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 at 15.
- 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 8.
- They argue that Proposition 8 is unconstitutional because it prohibits them "from marrying the person with whom they are in a loving, committed, and long-term relationship . . . ." ER 518 at 6.
- Plaintiffs insist 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. *See* Opening Br. at 24-28 & n.3.

Judge Walker, for his part, has likewise consistently equated marriage with "committed long-term relationships." ER 162 at 96. Indeed, he has emphasized that "deep emotional bonds and strong commitments" are the key "characteristics relevant to the ability to form successful marital unions." ER 145.

Thus, far from indistinguishable, a gay person (or a heterosexual person, for that matter) in a committed long-term relationship, is in no way even comparable for purposes of marriage to a gay person (or a heterosexual person) "with no romantic prospects on the horizon, but who might someday wish to marry," Lambda Br. at 15, as both Plaintiffs and Judge Walker have repeatedly recognized throughout this case. Section 455 disqualifies a judge only if he has, or appears likely to have, a direct and substantial personal interest in the outcome of the case—that is, a *current* personal interest, not a "remote, contingent and speculative" possibility of a future personal interest in the case.[2]

5. As noted above and in our opening brief, Opening Br. at 25-27 & n.3, Plaintiffs have made clear throughout this case that their long-term, committed

[2] For this reason the Supreme Court's statement in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010), that it has declined to distinguish between homosexual conduct and homosexual status in certain cases is entirely inapposite. Homosexual status is often *defined* by reference to homosexual conduct, *see, e.g.*, SER 198; SER 217; SER 212**,** and so it is hardly surprising that the Court has equated them in certain cases. But it is patently absurd to equate being gay with currently being in a long-term committed same-sex relationship and desiring to marry, just as it would be patently absurd to equate being heterosexual with currently being in a long-term committed relationship with a desire to marry.

relationships are the *sine qua non* of their interest in marrying and, thus, in challenging the validity of Proposition 8. But now, after Judge Walker disclosed that he too is in a long-term same-sex relationship, Plaintiffs have amended their position. Now Plaintiffs dismiss Judge Walker's 10-year relationship as "irrelevant" and having "no bearing" on the likelihood that he, like Plaintiffs, had an interest in marrying and, therefore, in the validity of Proposition 8 while the case was before him. Pls. Br. at 23, 24. Plaintiffs offer no reason, and we can conceive of none, why Plaintiffs' long-term committed relationships make them "similarly situated to heterosexual individuals for purposes of marriage," yet Judge Walker's similar relationship somehow does not make him similarly situated to Plaintiffs for purposes of marriage.

6. Plaintiffs note that "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." Pls. Br. at 21 n.6. We are not aware of any such evidence either, nor any evidence that he did not apply for a marriage license. But any such evidence, according to Plaintiffs, would be wholly irrelevant, for "[t]he question whether Judge Walker would have standing to bring a similar suit as Plaintiffs *has no bearing* on the recusal question . . . ." *Id.* (emphasis added). Even if Judge Walker had applied for a marriage license, Plaintiffs argue, he would

not have been required to recuse himself, nor even to disclose that he had a marriage application pending while the case was before him.

Plaintiffs explain that "[r]ecusal of a judge who is a member of a minority group . . . 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." Pls. Br. at 29; *see id.* at 33 (recusal "does not turn on a judge's subjective desire to exercise the particular civil right in dispute"). It follows, as Plaintiffs make clear, that the African-American district court judge in *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), would not have been disqualified from hearing that case even if his teenage son had applied for admission to the very Montgomery area colleges whose allegedly discriminatory admissions policies were being challenged. *See* Pls. Br. at 30. Likewise, the trial judge in *Loving* would not have been disqualified under Section 455 to hear and decide the Lovings' challenge to Virginia's antimiscegenation law even if the judge was in a secret 10-year relationship with a woman of a different race whom he planned to marry if his decision invalidating the prohibition was upheld. *See* Pls. Br. at 30-31. Nor would the judges in these cases even have been obliged to disclose the fact of their direct, personal interests in the outcomes of the cases before them, for "there is no statute or judicial principle," Plaintiffs claim, "that requires federal judges to divulge every characteristic, circumstances, or desire

they might have in common with the parties in each case over which they preside." Pls. Br. at 33.

These startling results are compelled, Plaintiffs say, because "*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." Pls. Br. at 31. We have already answered this facially flawed reasoning in detail, *see* Opening Br. at 43-47, and will not further belabor the obvious here. But Plaintiffs' candor in admitting the results that their analysis would yield brings into sharp focus an additional fatal flaw. For while Plaintiffs assert—wrongly, *see id.*—that *our* understanding of Section 455 " 'would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions,' " Pls. Br. at 31 (citation omitted), it is clear that adoption of *their recusal rule* would indisputably mean that minority judges would *never* be disqualified from *any* civil rights cases on the ground that the judge has a direct and personal "interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Plaintiffs' recusal rule would thus add a novel proviso to what has always been the most basic requirement of an impartial judiciary: "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," *In re Murchison*, 349 U.S. 133, 136 (1955); *provided that*, if the judge "is a member of a minority group in a case

seeking recognition" of an alleged civil right, the judge may try the case notwithstanding that he has a direct and substantial interest in exercising "the specific civil right at issue." Pls. Br. at 29.

Plaintiffs' recusal rule thus amounts to an open and explicit double standard for minority judges, granting them a special "minorities only" exemption from the fundamental prohibition against a judge deciding his own case[3]—a prohibition that has governed federal judges from the time of the founding and that is, as Thomas Jefferson put it, essential "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)). *Nothing* in the text or history of Section 455, nor in the precedents construing and applying it, nor in the canons of judicial ethics, nor in the long history of the American and common-law judicial traditions, supports creation of such a special license for minority judges to hear

[3] Plaintiffs' analysis thus starkly exposes the irony in their claim that *our* understanding of the disclosure and recusal requirements of Section 455 "would amount to . . . a *double standard* within the federal judiciary" for minority judges. Pls. Br. at 19, 23. Our reading of Section 455's requirements, however, is entirely indifferent to the judges' status—black or white, male or female, believer or nonbeliever, gay or straight—and depends only on the individual facts and circumstances bearing on whether the judge has or appears to have a personal interest in the outcome of the particular case before him. Under our view of the law of judicial disqualification, for example, a white judge, no less than a black one, would have been disqualified from hearing the *Alabama* case if his teenage child had an application pending at the colleges in dispute. *See* SER 16.

and decide their own cases. To the contrary, *everything* in the statute, the cases, the canons, and our judicial traditions condemns Plaintiffs' rule.

7. Plaintiffs also argue, Pls. Br. at 30; *see id.* at 27, that any interest that Judge Walker may have in marrying his partner comes within the doctrine that "an interest which a judge has in common with many others in a public matter is not sufficient to disqualify him." *In re City of Houston*, 745 F.2d at 929-30, *quoted in United States v. Alabama*, 828 F.2d at 1541. As *City of Houston* makes clear, however, this exception relates only to interests that are held by the judge in common with the general public, or a large segment of it, "as a resident, taxpayer, or property owner," and that are "not direct or immediate, but remote or contingent." 745 F.2d at 930. Obviously, in a case seeking to establish a federal constitutional right to official recognition of same-sex relationships as marriages, a judge with a direct and substantial personal interest in marrying a person of the same sex satisfies none of these limitations.

Moreover, the exception from disqualification for attenuated and widely held nonpecuniary interests is designed to address the practical reality that judges are members of the general public and that, therefore, all or many judges will have interests in common with all or many members of the general public. The exception is thus akin to the "rule of necessity"—the principle that "where all are disqualified, none are disqualified." *City of Houston*, 745 F.2d at 930 n.9. *See*

generally Christiansen v. National Savings and Trust Co., 683 F.2d 520 (D.C. Cir. 1982); *In re New Mexico Natural Gas Antitrust Litig.*, 620 F.2d 794 (10th Cir. 1980). For example, in *City of Houston*, the City moved to disqualify the trial judge, a black resident of Houston, in a case alleging that the City's at-large election system diluted the black vote. The court of appeals, noting that for every vote that is diluted, another vote is inflated, determined that every voter in Houston "has an equal stake in this litigation." 745 F.2d at 931. Accordingly, the trial judge had "no greater or lesser an interest than any other federal judge who votes in Houston." *Id.* at 930.[4]

Here, it cannot be said, of course, that Judge Walker had no greater or lesser interest than any other federal judge in marrying a person of the same sex. Indeed, the great irony of this case is that it was assigned to *the only federal judge in the country* currently known to have a potential direct and substantial personal interest

[4] Plaintiffs make the remarkable claim that "[b]y 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." Pls. Br. at 18. To the contrary, our argument is that adoption of same-sex marriage will likely harm the *institution* of marriage over time, not that any individual's existing marriage will be directly affected. *See, e.g.*, SER 204-08; Opening Brief of Defendant-Intervenors-Appellants at 111-22, *Perry v. Brown*, No. 10-16696 (9th Cir. filed Sept. 17, 2010) (Doc # 21) (ECF pagination). The notion that all married heterosexual judges have the same direct and substantial personal interest in the outcome of this case as a judge who desires to marry a person of the same sex is, of course, patently absurd.

in its outcome. *See, e.g.*, Chris Geidner, "Breaking Barriers," *Metroweekly* (Apr. 16, 2010), available at http://metroweekly.com/news/?ak=5094.

8. With respect to the question of remedy—whether vacatur of the decision below is warranted—Plaintiffs and their amici offer little that has not been addressed in our opening brief. *See* Opening Br. at 49-54. Two of Plaintiffs' points, however, turn the principles governing vacatur, and judicial ethics, on their head and warrant brief response.

First, Plaintiffs argue that, "*even if this Court finds that Judge Walker should have recused himself,*" Pls. Br. at 38 (emphasis added), this Court should nonetheless refuse to vacate the judgment to avoid "encouraging similar intrusive recusal motions" in other cases, *id.* at 39. We would have thought it self-evident that members of the federal judiciary should *never* deliberately seek to discourage litigants from properly raising *meritorious* questions about a judge's potential interest in the outcome of a case, nor be urged to do so by members of the bar. Indeed, one of the fundamental purposes of vacating a judgment rendered in violation of Section 455 is to "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." *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 868 (1988). We believe the following words are instructive here:

> Counsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court. Judges are not omniscient and, despite all safeguards, may overlook a conflict of interest. A lawyer who reasonably believes that the judge before whom he is appearing should not sit must raise the issue so it may be confronted and put to rest. Any other course would risk undermining public confidence in our judicial system.

In re Bernard, 31 F.3d 842, 847 (9th Cir. 1994).

Second, Plaintiffs argue that vacatur of Judge Walker's decision is not necessary to protect "the public's confidence in the judicial process," even if Judge Walker was bound by law and the canons to disclose "that he was gay and in a long-term relationship with a person of the same sex when the case was assigned to him." Pls. Br. at 40. "No one," they say, "would, or should, expect a judge to publicly disclose private, intimate matters." *Id.*

We note, first, that Judge Walker *did disclose*, freely and publicly, his sexual orientation and his relationship, but not until *after* he had presided over the trial in this case and had rendered his judgment invalidating Proposition 8. Indeed, he willfully refused to disclose these palpably critical facts when the case was assigned to him and throughout the period that he presided over it, and his refusal to do so obviously cannot be attributed to the private, intimate nature of the information.

More fundamentally, as we have repeatedly explained, Opening Br. at 8, 31, 36-37, there is no requirement that a judge disclose private, personal information

concerning his potential interest in the outcome of a case, for he always has the option of declining to sit if he would prefer not to disclose such information. Judge Walker thus had a choice: he could either disclose the facts relevant to his potential interest in the outcome of the case, or he could simply defer the case to the next judge on the wheel. But he was not free to do neither.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, 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: November 18, 2011

Respectfully submitted,

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