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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

KRISTIN M. PERRY, *et al.*,  
 Plaintiffs,  
 and  
 CITY AND COUNTY OF SAN FRANCISCO,  
 Plaintiff-Intervenor,  
 v.  
 EDMUND G. BROWN, JR., *et al.*,  
 Defendants,  
 and  
 PROPOSITION 8 OFFICIAL PROPONENTS  
 DENNIS HOLLINGSWORTH, *et al.*,  
 Defendant-Intervenors.

CASE NO. 09-CV-2292 JW

## PLAINTIFFS' OPPOSITION TO PROPONENTS' MOTION TO VACATE JUDGMENT

Date: June 13, 2011  
Time: 9:00 a.m.  
Judge: Chief Judge James Ware  
Location: Courtroom 5, 17th Floor

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1     **I.     INTRODUCTION**

2             Proponents’ motion to vacate this Court’s judgment is an utterly baseless attack on the  
3 integrity of the judicial system, on then-Chief Judge Walker, and on all gay and lesbian jurists who  
4 faithfully perform their duties and decide cases across this country each day. After a twelve-day trial,  
5 during which Proponents chose to call only two witnesses to rebut Plaintiffs’ seventeen, this Court  
6 found in favor of Plaintiffs, declared Proposition 8 unconstitutional under the Due Process and Equal  
7 Protection Clauses, and permanently enjoined its enforcement. Now, Proponents claim that their loss  
8 resulted not from the legal infirmity of their position or from the paucity of evidence offered in  
9 defense of Proposition 8, but instead from the fact that the presiding judge was gay and in a long-term  
10 relationship. According to Proponents, these facts create a reasonable belief that Judge Walker  
11 disregarded the law and the facts—as well as his oath as a federal judge—and ruled in favor of  
12 Plaintiffs because he might have an interest in marrying a person of the same sex. This deeply  
13 regrettable (and belated) attack on Judge Walker’s impartiality based on his membership in a  
14 minority group is factually groundless and legally insupportable.

15             Proponents’ motion suffers from the same transparent failure of proof as their case at trial.  
16 Instead of supporting their motion with facts, they baldly make the repeated assertion that Judge  
17 Walker’s bias “must be presumed.” But in determining whether a judge’s recusal is required, facts  
18 matter. Ungrounded speculation, beliefs, conjecture, innuendo, suspicion, and opinion do not render  
19 a judge unfit to perform his constitutional duties. Proponents lack any factual basis to assume that  
20 Judge Walker wishes to marry—indeed, he apparently made no effort to do so when marriage  
21 between individuals of the same sex was permitted in California in 2008—and instead rely on  
22 nothing more than the fact that he is gay, in a relationship with a person of the same sex, and  
23 recognizes in his decision the importance of marriage in American society. Such unvarnished  
24 speculation does not come close to meeting the statutory requirements for compelling a  
25 judge’s recusal.

26             In any event, even if Proponents had iron-clad proof of Judge Walker’s desire to marry and  
27 exercise a right already enjoyed by virtually everyone in this country other than gay men and  
28 lesbians, there would be absolutely no basis for questioning his impartiality in this case. The “other



1 interest” provision of 28 U.S.C. § 455(b)(4) does not require a judge to recuse himself simply  
2 because he is a member of a minority group that seeks access to a fundamental constitutional right  
3 denied to them by a discriminatory state law. If it did, the provision would plainly violate equal  
4 protection by restricting a judge’s ability to sit on a case based on his membership in a minority  
5 group that might benefit from the elimination of longstanding discriminatory barriers. In fact,  
6 Proponents’ argument is nothing more than a thinly veiled attempt to disqualify a gay judge based on  
7 his sexual orientation. If Judge Walker were not gay, Proponents would have no objection to his  
8 presiding over this case. Similarly, if Judge Walker were gay and not in a long-term relationship,  
9 Proponents could nevertheless speculate that he might benefit from the right to marry in the future.  
10 Proponents cannot escape the fact that their motion is, at its core, about Judge Walker’s sexual  
11 orientation. Proponents also ignore the obvious fact that under their expansive reading of the “other  
12 interest” provision of Section 455(b)(4), judges who belong to the majority group might just as  
13 readily be disqualified if they benefit in some way from the ongoing favored treatment of that group.  
14 Given that Proponents have argued that affording gay men and lesbians the right to marry would  
15 somehow harm heterosexual marriages (an argument that finds no support whatsoever in the record),  
16 it would follow from their argument that judges married to a person of the opposite sex would also  
17 possess an “interest” warranting recusal. Such a standard is plainly unworkable and unconstitutional.

18 Proponents’ reliance on the catch-all provision of 28 U.S.C. § 455(a) is equally unavailing.  
19 Proponents contend that a judge’s impartiality could reasonably be questioned because he is likely to  
20 favor the outcome that would afford greater rights to the minority group of which he is a member.  
21 The Equal Protection Clause bars this prejudiced and stereotyped reading of Section 455(a). In fact,  
22 under Proponents’ reasoning, African-American and female judges would have been required to  
23 recuse themselves in the most important civil rights cases in American history (*e.g.*, *Brown v. Bd. of*  
24 *Educ.*, 347 U.S. 483 (1954); *United States v. Virginia*, 518 U.S. 515 (1996)), and all judges would be  
25 required to disclose their most private thoughts and relationships in order to preside over any case  
26 that involves constitutional rights they might conceivably want to secure for themselves and their  
27 families. That is not the law—and our Nation is much the better for it.

Moreover, Proponents have failed to make the threshold showing of timeliness. Judge Walker is openly gay and has been since well before Proponents became involved in this litigation. During his tenure on the Northern District of California, Judge Walker was one of only two openly gay judges serving in the federal judiciary. Chris Geidner, *Edward DuMont, Praised by Colleagues as “Brilliant,” Would Be the First Openly Gay Federal Appellate Judge in the Country*, Metro Weekly, Apr. 16, 2010 (Monagas Decl. Ex. A).<sup>1</sup> He has been in a long-term relationship for ten years and “has never taken pains to disguise—or advertise—his orientation.” Phillip Matier & Andrew Ross, *Judge Being Gay a Nonissue During Prop. 8 Trial*, S.F. Chron., Feb. 7, 2010, at C-1 (Ex. B); see also Margaret Russell, *Sexual Orientation Singled Out for Scrutiny*, Daily Journal, Mar. 10, 2010 (Ex. C). Although he did not comment on the topic publicly until he left the bench in February 2011, Judge Walker has not attempted to conceal his sexual orientation. See Maura Dolan, *Distilling the Same-Sex Marriage Case*, L.A. Times, June 21, 2010 (Ex. D); Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*, Reuters, Apr. 6, 2011 (Ex. E). As early as February 2010, Proponents affirmatively disavowed any intention to challenge Judge Walker as biased based on his sexual orientation. Ex. B.

Despite having knowledge of Judge Walker’s sexual orientation and his relationship well before judgment was entered, Proponents lay in wait to file this motion. See *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 12 n.27 (S.D.N.Y. May 9, 2011) (“[T]he effort to force or shame off a case a judge . . . is becoming the latest weapon in a litigator’s arsenal—litigation by other means.”) (internal quotation marks omitted). They waited until after this Court had conducted a two-week trial, carefully deliberated over hundreds of exhibits and the testimony of nineteen witnesses, and announced its decision, and waited still further while they filed motions to stay in both this Court and the Ninth Circuit, briefed numerous issues on appeal, and participated in oral argument. Only after the Ninth Circuit asked the California Supreme Court to decide whether Proponents even possess the authority to appeal this Court’s decision did Proponents file their motion

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<sup>1</sup> All references to exhibits throughout this Opposition refer to exhibits to the Declaration of Enrique A. Monagas filed concurrently herewith.

1 seeking the nullification of the past two years of proceedings. Parties must promptly seek recusal  
2 after the grounds for such a motion are ascertained. Proponents plainly failed to do so.

3 Lastly, Proponents' motion to vacate provides yet another reason for this Court to lift the  
4 protective order covering the videotaped trial proceedings and release them to the public. It is telling  
5 that at precisely the same time they attack Judge Walker's impartiality and argue that his decision  
6 was based not on the evidence but rather on bias, Proponents are fighting tooth-and-nail to suppress  
7 the video record of the trial and keep the public from seeing for themselves the fair and impartial  
8 manner in which Judge Walker presided and the overwhelming evidentiary record that not only  
9 supports, but indeed compels, the decision that Proponents belatedly attack. Now that Proponents  
10 have publicly questioned the integrity of Judge Walker, the integrity of the proceedings, and thus the  
11 integrity of the judicial system, it is all the more important that the public have access to what  
12 actually occurred at trial.

## 13 **II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

14 On May 22, 2009, Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo  
15 ("Plaintiffs") filed a complaint in this Court that challenged the constitutionality of California's  
16 Proposition 8 as a violation of the Due Process and Equal Protection Clauses of the Fourteenth  
17 Amendment. Doc #1. The Clerk of the Court, acting "blindly and at random," assigned the case to  
18 then-Chief Judge Vaughn R. Walker. *Id.*; Civil L.R. 3-3(a); General Order No. 44 § D(2) (Jan. 4,  
19 2010). On May 28, 2009, Proposition 8 Official Proponents Dennis Hollingsworth, Gail J. Knight,  
20 Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson; and ProtectMarriage.com – Yes  
21 on 8, A Project of California Renewal ("Proponents") moved to intervene to defend Proposition 8.  
22 Doc #8. Judge Walker granted their motion on June 30, 2009. Doc #77.

23 From January 11 to January 27, 2010, Judge Walker presided over a twelve-day bench trial in  
24 this case. Doc #690. Soon after the trial ended, but before closing arguments were heard, the *San*  
25 *Francisco Chronicle* published an article acknowledging that "[t]he biggest open secret in the  
26 landmark trial over same-sex marriage being heard in San Francisco is that the federal judge who will  
27 decide the case, Chief U.S. District Judge Vaughn Walker, is himself gay." Ex. B.  
28

1 The *San Francisco Chronicle* article was published on February 7, 2010. *Id.* The *Chronicle*  
2 had spoken to “a federal judge who counts himself as a friend and confidant of [Judge] Walker’s”  
3 who explained that the Judge “has a private life and he doesn’t conceal it, but doesn’t think it is  
4 relevant to his decisions in any case, and he doesn’t bring it to bear in any decisions.” *Id.* Andrew  
5 Pugno, who represents Proponents in this litigation, was quoted in the article. Responding to  
6 concerns that Proponents might “make an issue of the judge’s sexual orientation” if this Court found  
7 the proposition unconstitutional, Pugno advised that “[w]e are not going to say anything about that.”  
8 *Id.*

9 Closing arguments were held on June 16, 2010. Doc #690. Five days later, the *Los Angeles*  
10 *Times* published an article commenting on the status and impact of this litigation. *See* Ex. D. The  
11 article described Judge Walker as “openly gay” and quoted his colleague, Judge Maxine M. Chesney.  
12 *Id.* The June 21, 2010 article also stated that Judge Walker “attends bar functions with a companion,  
13 a physician.” *Id.*

14 On August 4, 2010, this Court ordered entry of judgment in favor of Plaintiffs and Plaintiff-  
15 Intervenor and against Defendants and Proponents. Doc #708. Proponents immediately appealed the  
16 decision to the United States Court of Appeals for the Ninth Circuit. Doc #714. That same day,  
17 Gerard Bradley published an editorial on FoxNews.com making arguments identical to those now  
18 advanced by Proponents in their Motion to Vacate Judgment. *Compare* Prop. Mot., with Gerard V.  
19 Bradley, *Why Has Media Ignored Judge’s Possible Bias In California’s Gay Marriage Case?*,  
20 FoxNews.com, Aug. 4, 2010 (Ex. F). Bradley argued that if “Judge Walker is in a stable same-sex  
21 relationship, then he might wish or even expect to wed should same-sex marriage become legally  
22 available in California. This raises an important and serious question about his fitness to preside over  
23 the case. Yet it is a question that received almost no attention.” Ex. F. Bradley stated that a  
24 discussion about whether Judge Walker should recuse himself because of his relationship “is a  
25 conversation worth having.” *Id.* But given how far the case had already progressed, he concluded  
26 that “sadly, it is quite too late to have it.” *Id.*

27 Two days later, the Associated Press spoke to Proponents’ counsel about the impact of Judge  
28 Walker’s sexual orientation on this case. *See* Daniel Carty, *Gay Marriage Judge’s Personal Life*

1 *Debated*, Associated Press, Aug. 6, 2010 (Ex. G). The Associated Press reported that “[l]awyers in  
2 th[is] case, including those defending the ban, say the judge’s sexuality—gay or straight—was not an  
3 issue at trial and will not be a factor on appeal.” *Id.* James Campbell of the Alliance Defense Fund,  
4 counsel for Proponents in this case, said that “[t]he bottom line is this case, from our perspective, is  
5 and always will be about the law and not about the judge who decides it . . . . It’s just something that  
6 collectively as a legal team we have decided and going up, that’s what this case is. The appellate  
7 courts are going to focus on the law.” *Id.*

8 On September 15, 2010, Judge Walker’s sexual orientation first became a part of the official  
9 record in this case. Robert Wooten, a citizen of California, moved to file an *amicus* brief supporting  
10 Proponents in the Ninth Circuit. Application to File an Amicus Brief in Support of Traditional  
11 Marriage, *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696), ECF No. 19  
12 (“Wooten Amicus”). Wooten argued “that if the allegation that Judge Walker is a homosexual is  
13 true, that he has a personal interest in the outcome of the trial that he was over-seeing and, at the  
14 least, should have recused himself from the trial.” *Id.* at 2.

15 On November 28, 2010, the parties learned that Judge Stephen Reinhardt, Judge Michael  
16 Daly Hawkins, and Judge N. Randy Smith would sit on the Ninth Circuit’s three-judge panel in this  
17 case. Appellants’ Motion for Disqualification at 1, *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir.  
18 2011) (No. 10-16696), ECF No. 282. Two days later, Proponents filed a motion to disqualify Judge  
19 Reinhardt based on his “wife’s beliefs, as expressed in her public statements and actions, both  
20 individually and in her capacity as Executive Director of the American Civil Liberties Union of  
21 Southern California.” *Perry*, 630 F.3d at 911. Judge Reinhardt denied Proponents’ motion,  
22 explaining that “Proponents’ contention that I should recuse myself due to my wife’s opinions is  
23 based upon an outmoded conception of the relationship between spouses.” *Id.* at 912.

24 On December 6, 2010, the Ninth Circuit panel, including Judge Reinhardt, heard oral  
25 argument. *Perry*, 628 F.3d at 1199. Prior to oral argument, the panel had “asked the parties to brief,  
26 as a preliminary matter, the Proponents’ standing to seek review of the district court order, in light of  
27 *Arizonans [for Official English v. Arizona]*, 520 U.S. 43 (1997)] and earlier decisions of the United  
28 States Supreme Court.” *Id.* at 1195. After oral argument, the panel was “convinced that Proponents’

claim to standing depends on Proponents’ particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative, which rights it appears to us have not yet been clearly defined by the [California Supreme] Court.” *Id.* On January 4, 2011, the panel certified the standing question to the California Supreme Court and stayed proceedings in the Ninth Circuit pending a final decision on that question. *Id.* at 1200. The panel explained that “Proponents’ standing—and therefore our ability to decide this appeal—rises or falls on whether California law affords them the interest or authority” to be heard in the Ninth Circuit. *Id.* at 1196 (internal quotation marks omitted).

On February 28, 2011, Judge Walker retired from the federal bench. On April 6, 2011, “Walker had a farewell meeting with a select group of courthouse reporters.” Ex. E; Lisa Leff, *Experts: Judge’s Sexual Orientation Is Non-Issue*, Associated Press, Apr. 26, 2011 (Ex. H). In that meeting, Judge Walker acknowledged that he is gay and that “he was in a 10-year relationship with a physician.” Ex. E; Ex. H. When reporters asked Judge Walker about recusal, “Walker said he never thought about recusing himself because he was gay and noted that no one had asked him to.” Ex. H.

More than two weeks later, on April 25, 2011, almost two years after initially intervening in this case, more than one year after the completion of the bench trial, and four months after oral argument in the Ninth Circuit, Proponents moved to vacate this Court’s judgment because Judge Walker is “gay and . . . in a committed relationship.” Prop. Mot. 2.

### **III. THE COURT SHOULD DENY PROPONENTS’ MOTION TO VACATE ITS THOROUGH AND AMPLY SUPPORTED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Under Federal Rule of Civil Procedure 62.1, “[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . deny the motion.” Fed. R. Civ. P. 62.1(a)(2). This Court should deny Proponents’ motion to vacate because Judge Walker’s sexual orientation and long-term relationship did not require his recusal under 28 U.S.C. § 455 and because the motion is untimely; in any event, even if recusal were required, vacating the judgment would be an extreme and inappropriate remedy.

1           **A.       There Is No Plausible Basis For Questioning Judge Walker’s Impartiality**

2           Judges have a duty to sit and decide cases unless there is a legitimate reason to recuse.  
3           *Clemens v. U.S. District Court*, 428 F.3d 1175, 1179 (9th Cir. 2005); *accord Perry*, 630 F.3d at 916  
4           (Reinhardt, J.). Moving to vacate this Court’s decision on the ground that Judge Walker should have  
5           recused himself “is [an] extremely serious [allegation that] should not be made without a factual  
6           foundation going well beyond the judge’s membership in a particular [minority] group.” *MacDraw*  
7           *Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998); *see also id.* (affirming sanctions  
8           against counsel calling into question a district judge’s impartiality based on his race). Rampant  
9           speculation and baseless assumptions cannot support such an accusation. *United States v. Holland*,  
10          519 F.3d 909, 914 n.5 (9th Cir. 2008); *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).  
11          Yet Proponents have not presented a single piece of evidence suggesting that Judge Walker was  
12          biased or might reasonably have been perceived as biased.

13          Proponents claim that they “are not suggesting that a gay or lesbian judge could not sit on this  
14          case.” Prop. Mot. 5 (emphasis omitted). But the complete absence of factual support for Proponents’  
15          assertion that Judge Walker wishes to marry exposes the real basis for their attack on the judge’s  
16          impartiality. Instead of offering evidence to support their claim about Judge Walker’s private,  
17          personal wishes, Proponents simply urge the Court six times to “presume” his wishes. Prop. Mot. 3,  
18          5, 10, 14. This lack of substantiation alone is a sufficient basis for denying Proponents’ motion and  
19          exposes their arguments as a blatant attack on Judge Walker based on nothing more than his sexual  
20          orientation. Prop. Mot. 5; *see also United States v. Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987)  
21          (the recusal sought “would come dangerously close to holding that minority judges must disqualify  
22          themselves from all major civil rights actions”), *superseded by statute on other grounds*, Civil Rights  
23          Restoration Act of 1987, Pub. L. No. 100-259, § 6, 102 Stat. 28, 31; *Ortega Melendres v. Arpaio*, No.  
24          CV-07-2513-PHX-MHM, 2009 WL 2132693, at \*8 (D. Ariz. July 15, 2009) (“Defendants’ ‘natural  
25          bias’ contention could easily be interpreted as an argument that this Court’s alleged bias somehow  
26          flows from her racial heritage.”); *United States v. Nelson*, No. CR-94-823 (DGT), 2010 U.S. Dist.  
27          LEXIS 63814, at \*26-27 (E.D.N.Y. June 28, 2010) (“Based on the facts, as well as on frivolous  
28          nature of the other two grounds for the motion, and the lack of any semblance of relevance of them,

1 . . . a reasonable and objective person can and would conclude that this motion was made simply  
2 because I am an Orthodox Jew.”). But like a judge’s race, gender, or religion, Judge Walker’s sexual  
3 orientation cannot be the basis for requiring his recusal.

4 Proponents’ claim that Judge Walker’s “long-term committed relationship” somehow  
5 distinguishes his interest in this case from that of other gay and lesbian judges not only suffers from  
6 rampant speculation but is also nebulous and entirely unworkable. Prop. Mot. 5. All gay and lesbian  
7 judges have an interest in securing the constitutional rights that have been denied to gay and lesbian  
8 Americans for centuries—but that is hardly a reasonable or constitutionally permissible basis for  
9 requiring their recusal from cases involving discrimination based on sexual orientation. Indeed,  
10 Proponents’ purported rationale for recusal suffers from the same intractable line-drawing problem as  
11 failed efforts to distinguish Judge Noonan’s Catholicism from that of other judges by labeling his  
12 beliefs “fervently-held” when seeking his recusal in abortion litigation. *Feminist Women’s Health*  
13 *Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (Noonan, J.). Just how long term, or how serious,  
14 would a gay judge’s relationship have to be to require recusal under Proponents’ proposed standard?  
15 Would we inquire not only into the judge’s interest in marriage, but also that of the person with  
16 whom he is in a relationship? Of course Proponents attempt no such line-drawing, because to do so  
17 would only highlight the unworkability of their position.

18 Despite Proponents’ efforts to obscure the true basis for their arguments, there can be no  
19 doubt that Proponents are seeking to vacate the judgment based on Judge Walker’s status as a gay  
20 man and the fact like he, like millions of other gay men and lesbians, might benefit from having the  
21 same right to marry as virtually all other citizens. Section 455 does not permit the disqualification of  
22 judges based on status, nor does it countenance the shameful and wholly unsupported assumption that  
23 a judge who belongs to a minority group cannot possibly be impartial simply because the group  
24 might benefit from an end to the challenged discrimination. If Section 455 could be used to further  
25 such discriminatory ends, the statute itself would violate the Equal Protection Clause.

#### 26 **1. Section 455(b)(4) Did Not Require Judge Walker’s Recusal**

27 Under Section 455(b)(4), a judge must recuse when he “knows that he, individually or as a  
28 fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject



1 matter in controversy or in a party to the proceeding, *or any other interest that could be substantially*  
2 *affected by the outcome of the proceeding.*” 28 U.S.C. § 455(b)(4) (emphasis added). Judge  
3 Walker’s membership in a minority group whose civil rights are at issue in this case is not an  
4 “interest” that requires recusal under Section 455(b)(4).

5 It is well-established that a judge’s membership in a minority group cannot constitute an  
6 “other interest . . . substantially affected by the outcome of the proceeding” within the meaning of  
7 Section 455(b)(4). *Alabama*, 828 F.2d at 1541-42; *see also MacDraw*, 138 F.3d at 37. “Courts have  
8 repeatedly held that matters such as race or ethnicity are improper bases for challenging a judge’s  
9 impartiality.” *MacDraw*, 138 F.3d at 37 (collecting cases). “To disqualify minority judges from  
10 major civil rights litigation solely because of their minority status is intolerable.” *Alabama*, 828 F.2d  
11 at 1542; *see also Day v. Apoliona*, 451 F. Supp. 2d 1133, 1138 (D. Hawaii 2006) (“Recusal based  
12 solely on race is unwarranted and improper.”), *rev’d in part on other grounds*, 496 F.3d 1027 (9th  
13 Cir. 2007); *Ortega Melendres*, 2009 WL 2132693, at \*8 (“Obviously, such an argument would be  
14 unwarranted and baseless.”). A contrary interpretation of Section 455(b)(4) would restrict the rights  
15 and duties of Article III judges based on membership in a protected class—a proposition that is  
16 repugnant to the Fourteenth Amendment. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *In re*  
17 *BellSouth Corp.*, 334 F.3d 941, 967 (11th Cir. 2003) (Cudahy, J., concurring); *MacDraw*, 138 F.3d at  
18 37; *Ortega Melendres*, 2009 WL 2132693, at \*8 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)  
19 (Harlan, J., dissenting)); *see also Feminist Women’s Health Ctr.*, 69 F.3d at 400.<sup>2</sup>

20 That Judge Walker is a member of a minority group because of his sexual orientation, rather  
21 than his race, gender, or religion, is of no moment. Whether or not a characteristic warrants  
22 heightened equal protection scrutiny, a judge cannot be compelled to recuse on the basis of that  
23 characteristic unless there is some evidence that it would impair his ability to decide the case  
24 impartially. There is absolutely no evidence that Judge Walker’s sexual orientation prevented him  
25 from impartially deciding this case. In any event, as this Court held—and the United States

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26  
27 <sup>2</sup> At the very least, such an interpretation of Section 455(b)(4) would raise substantial  
28 constitutional questions that should be avoided. *See Edward J. DeBartolo Corp. v. Fla. Gulf*  
*Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

1 Government recently concluded—sexual orientation, like race, gender, and religion, is entitled to  
2 heightened equal protection scrutiny. Letter from Eric H. Holder, Jr., Attorney General, United  
3 States, on Defense of Marriage Act, to John A. Boehner, Speaker, U.S. House of Representatives,  
4 (“[T]he President and I have concluded that classifications based on sexual orientation warrant  
5 heightened scrutiny”), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. A  
6 group warrants heightened scrutiny if it is classified based on factors unrelated to its ability to  
7 contribute to society (*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)) and has  
8 experienced a history of discrimination. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Also  
9 potentially relevant are whether the characteristic distinguishing the group is immutable (*Lyng v.*  
10 *Castillo*, 477 U.S. 635, 638 (1986)) and whether the group is “a minority or politically powerless.”  
11 *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Plaintiffs proved at trial that gay and lesbian  
12 individuals satisfy each of these factors, and this Court accordingly concluded that gay and lesbian  
13 individuals, like racial minorities, are “the type [of group] . . . strict scrutiny was designed to protect.”  
14 Doc #708 at 121; see also *id.* at 71-72, 74-77, 96-109, 121-22.<sup>3</sup> Restricting the duties of judicial  
15 office based on sexual orientation is therefore no less suspect than doing so on the basis of any other  
16 protected classification.

17 Moreover, even if this Court were to credit Proponents’ implausible assertion that they are not  
18 challenging Judge Walker’s impartiality based solely on his sexual orientation—but instead based on  
19 his hypothetical desire to marry a person of the same sex—a widely held interest in exercising a basic  
20 civil right cannot be an “interest” requiring recusal under Section 455(b)(4). See *Alabama*, 828 F.2d  
21 at 1541 (“An interest which a judge has in common with many others in a public matter is not  
22 sufficient to disqualify him.”) (alteration and internal quotation marks omitted); *In re City of*

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23  
24 <sup>3</sup> E.g., Tr. 2252:1-10 (Herek: “It certainly is the case that there have been many people who,  
25 most likely because of societal stigma, wanted very much to change their sexual orientation  
26 and were not able to do so.”); Tr. 361:11-22 (Chauncey: “[L]esbians and gay men have  
27 experienced widespread and acute discrimination from both public and private authorities  
28 over the course of the 20th century.”); Tr. 2072:19-2073:4 (Herek: “[T]he vast majority of  
people are consistent in their behavior, their identity, and their attractions.”); Tr. 1646:19-21  
(Segura: “I conclude that gays and lesbians lack the sufficient power necessary to protect  
themselves in the political system.”).

1 *Houston*, 745 F.2d 925, 929-30 (5th Cir. 1984) (same). *But see* Prop. Mot. 10 (claiming that Judge  
2 Walker “has a personal interest in exercising the federal constitutional right he recognized to marry a  
3 same-sex partner”). Unsurprisingly, Proponents are unable to identify a *single* case that supports  
4 their preposterous argument that interest in securing a constitutional right requires recusal under  
5 Section 455(b)(4). To the contrary, in *City of Houston*, the Fifth Circuit held that a district judge was  
6 not required to recuse herself even though she was a member of the plaintiff class challenging denial  
7 of voting rights to Houston residents based on race—“a public matter in which [the District Judge]  
8 ha[d] no greater or lesser interest than any other federal judge who votes in Houston.” 745 F.2d at  
9 930. As in *City of Houston*, the fact that Judge Walker—like hundreds of thousands of other gay and  
10 lesbian Californians—might have an interest in securing the fundamental right to marry could not  
11 constitute the type of “interest” that requires recusal under Section 455(b)(4).

12 Under Proponents’ reasoning, an African-American judge in Alabama would have been  
13 required to recuse himself from a case challenging racial inequality in Alabama’s public colleges  
14 because his children might one day wish to attend those schools. *Contra Alabama*, 828 F.2d at 1542.  
15 A female judge who was pregnant or might become pregnant could not decide a case addressing the  
16 Family and Medical Leave Act or the Pregnancy Discrimination Act. *But see Hosler v. Green*, 173  
17 F.3d 844 (2d Cir. 1999) (unpublished table decision) (opinion joined by Sotomayor, J.). Similarly,  
18 judges living in the District of Columbia would have been required to recuse themselves from a  
19 challenge to the District’s firearm ban if they had any interest in owning a gun. *But see Dist. of*  
20 *Columbia v. Heller*, 554 U.S. 570 (2008). And, judges would have to recuse from every Fourth  
21 Amendment case that might conceivably have some bearing on the security of their “persons, houses,  
22 papers, [or] effects.” U.S. Const. amend. IV. Although recusal in any of these situations is patently  
23 absurd, Proponents’ reading of the “other interest” provision in Section 455(b)(4) would require  
24 recusal in all of them. Recusal law is meant to safeguard the integrity of the judicial process, not seek  
25 out judges who lack any view on important issues. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972)  
26 (Rehnquist, J.) (“Proof that a Justice’s mind at the time he joined the Court was a complete tabula  
27 rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack  
28 of bias.”).

1           Indeed, Proponents’ construction of Section 455(b)(4) would not only prevent unmarried gay  
2 and lesbian judges from presiding over this case, but would also require the recusal of all married  
3 heterosexual judges (and every unmarried heterosexual judge who might wish to marry in the future).  
4 In defense of Proposition 8, Proponents repeatedly argued that permitting marriage between persons  
5 of the same sex would weaken opposite-sex marriage. Doc #295.<sup>4</sup> They argued further that same-  
6 sex marriage would force Christian, Jewish, and Muslim Americans to “choose between being a  
7 believer and being a good citizen.” *Id.* at 10. Thus, according to Proponents, every heterosexual  
8 judge who is currently married or who has an interest in marrying could benefit from a ruling  
9 upholding Proposition 8 because that measure purportedly strengthens opposite-sex marriage. This  
10 benefit would be particularly acute for Christian, Jewish, and Muslim Americans whose faith,  
11 Proponents claim, is inconsistent with the recognition of marriage between persons of the same sex.  
12 *But see* Brief for California Faith for Equality et al. as *Amici Curiae* Supporting Plaintiffs at 26,  
13 *Perry*, 628 F.3d 1191 (No. 10-16696), ECF No. 198-1.

14           Nowhere in Proponents’ 18-page motion is there a single citation to *any* authority in *any* state  
15 or federal court holding that a judge’s membership in a minority group requires recusal in a case  
16 involving that group’s access to a fundamental constitutional right. That is hardly surprising given  
17 the fact that none of the 90 Ninth Circuit cases or the 10 Supreme Court cases citing Section 455(a)  
18 or (b) even hints that a judge’s membership in a minority group can require recusal. And authority  
19 from other circuits and district courts in this circuit is equally at odds with Proponents’ insupportable  
20 assertions. *See, e.g., MacDraw*, 138 F.3d at 37; *Alabama*, 828 F.2d at 1542; *City of Houston*, 745  
21 F.2d at 930; *Day*, 451 F. Supp. 2d at 1138; *Ortega Melendres*, 2009 WL 2132693, at \*8. A contrary  
22 rule would call into question countless decisions of the Supreme Court and lower federal courts in  
23 cases involving the rights of millions of people. This Court should not be the first to sanction use of

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25       <sup>4</sup> Doc #295 at 1 (“[T]here is every reason to believe . . . that redefining marriage in this manner  
26 will fundamentally change the public meaning of marriage in ways that will weaken this  
27 institution.”); *id.* at 9 (same-sex marriage would “[c]ontribute over time to the further erosion  
28 of the institution of marriage, as reflected primarily in lower marriage rates, higher rates of  
divorce and non-marital cohabitation, and more children raised outside of marriage and  
separated from at least one of their natural parents”).

1 Section 455 as a means of furthering discrimination. *See Pennsylvania v. Local Union 542, Int’l*  
2 *Union of Operating Eng’rs*, 388 F. Supp. 155, 165 (E.D. Pa. 1974) (“Defendants do not go so far as  
3 to precisely assert that black judges should *per se* be disqualified from hearing cases which involve  
4 racial issues, but, as will be demonstrated hereinafter, the absolute consequence and thrust of their  
5 rationale would amount to, in practice, a *double standard* within the federal judiciary.”).

6 Decisions construing Section 455(b)(4) make clear that—far from requiring the recusal of  
7 judges who have an interest in securing broadly shared constitutional rights—Section 455(b)(4)  
8 addresses unique, individualized interests, particularly financial interests. *See, e.g., United States v.*  
9 *Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997) (“[Section (b)(4)] requires disqualification when the  
10 judge, the judge’s spouse, or the judge’s minor child has a financial interest in the subject matter in  
11 controversy”) (internal quotation marks omitted); *see also Union Carbide Corp. v. U.S. Cutting Serv.,*  
12 *Inc.*, 782 F.2d 710, 714 (7th Cir. 1986) (“The purpose of (b) is to establish an absolute prohibition  
13 against a judge’s knowingly presiding in a case in which he has a financial interest, either in his own  
14 or a spouse’s (or minor child’s) name.”). Proponents’ implausible interpretation of Section 455(b)(4)  
15 would dramatically rewrite the statute and extend its reach to situations that Congress could not  
16 conceivably have sought to address.

17 In the absence of any case law to support their extreme reading of Section 455, Proponents  
18 attempt to impugn Judge Walker’s rulings in this case, claiming that those rulings give rise to  
19 reasonable questions about his impartiality. But Proponents themselves concede that “judicial rulings  
20 alone almost never constitute a valid basis for a bias or partiality motion.” Prop. Mot. 4 (emphasis  
21 omitted). Indeed, the Supreme Court has made clear that, “[a]lmost invariably, [judicial rulings] are  
22 proper grounds for appeal, not for recusal.” *Liteky v. United States*, 510 U.S. 540, 555 (1994).  
23 Perhaps concerned about the fate of their appeal due to the “grave doubts” that the Supreme Court  
24 has expressed about ballot proponents’ standing (*Arizonans for Official English*, 520 U.S. at 66),  
25 Proponents simply grasp at straws with their patently false claim that Judge Walker did not address  
26 contrary authority when invalidating Proposition 8. Prop. Mot. 15. *Contra* Summ. J. Hr’g Tr. 75-79,  
27 Oct. 14, 2009 (“The Court does not agree that *Baker* [*v. Nelson*, 409 U.S. 810 (1972)] is either settled  
28 law, or that it addresses the issues plaintiffs have raised here.”); *id.* at 82-83 (“the Ninth Circuit [*High*

1 *Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) decision]  
2 relied explicitly on *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)], and reasoned that if homosexual  
3 conduct can be criminalized, then homosexuals cannot constitute a protected class. Well, *Lawrence*  
4 [*v. Texas*, 539 U.S. 558 (2003)], of course, undermined *High Tech Gays*.”); *id.* at 83 (“*Witt* [*v.*  
5 *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)] applied rational basis review to Witt’s  
6 Equal Protection claims. Her Equal Protection claims were, however, based on conduct, not sexual  
7 orientation; and for that reason it is not clear whether this determination has much bearing on  
8 this case.”). If there were any need for confirmation, Judge Walker’s thorough legal analysis and  
9 detailed factual findings would eliminate any doubt about his impartiality in this case.

## 10 **2. Section 455(a) Did Not Require Judge Walker’s Recusal**

11 Proponents’ argument that Judge Walker should have recused under Section 455(a) fares no  
12 better. Under Section 455(a), “[a]ny justice, judge, or magistrate judge of the United States shall  
13 disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28  
14 U.S.C. § 455(a). Recusal is appropriate under this section only when “*a reasonable person . . . would*  
15 *conclude that the judge’s impartiality might reasonably be questioned.*” *Holland*, 519 F.3d at 913  
16 (emphases added) (internal quotation marks omitted); *see also United States v. El-Gabrowni*, 844 F.  
17 Supp. 955, 961 (S.D.N.Y. 1994) (“[T]o say that § 455(a) requires concern for appearances is not to  
18 say that it requires concern for mirages”). No reasonable person would reasonably question Judge  
19 Walker’s impartiality in this case.

20 There is nothing reasonable about questioning a judge’s impartiality simply because he is a  
21 member of a minority group whose rights are implicated in a case before the court. *Alabama*, 828  
22 F.2d at 1542; *City of Houston*, 745 F.2d at 930. The Equal Protection Clause renders such prejudice  
23 a *per se* unreasonable basis for interpreting recusal law. For that reason, there is a long and settled  
24 line of authority rejecting efforts to compel the recusal of judges on this discriminatory basis. *See,*  
25 *e.g., Alabama*, 828 F.2d at 1542; *Pennsylvania*, 388 F. Supp. at 163-65; *cf. Virginia*, 518 U.S. at 533  
26 (rejecting stereotype and prejudice as a governmental interest under the Equal Protection Clause). As  
27 these courts have explained, “[t]he fact that an individual belongs to a minority does not render one  
28 biased or prejudiced, or raise doubts about one’s impartiality: ‘that one is black does not mean, *ipso*

1 *facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic  
2 implies being anti-Protestant.”” *Alabama*, 828 F.2d at 1542 (quoting *Pennsylvania*, 388 F. Supp. at  
3 163). We must and do expect more of those tasked with interpreting our laws.

4 Proponents’ construction of Section 455(a), however, would require federal judges to publicly  
5 disclose intimate details of their private lives “so that the parties [can] consider and decide, before the  
6 case proceed[s] further, whether to request [a judge’s] recusal.” Prop. Mot. 2 (citing 28 U.S.C.  
7 § 455(e)). For example, under Proponents’ unprecedented construction, no African-American judge  
8 who had children attending segregated schools could have decided *Brown v. Board of Education*,  
9 unless he publicly disavowed any interest in his children attending integrated schools. See *Alabama*,  
10 828 F.2d at 1542 (describing absurdity of defendants’ theory). Similarly, no judge in an interracial  
11 relationship could have decided *Loving v. Virginia*, 388 U.S. 1 (1967), unless the judge disclosed to  
12 the public that he had no desire to marry his partner. And, no female judge of childbearing age—and  
13 no male judge in a relationship with a woman of childbearing age—could decide an abortion case  
14 unless the judge publicly disclosed those intimate relations and disavowed any interest in an abortion  
15 (or disclosed an inability to conceive). See *Day*, 451 F. Supp. 2d at 1138. Moreover, Proponents’  
16 expansive construction of Section 455(a) would not be limited to judges who are members of  
17 minority groups. For example, according to Proponents, no judge with white children could have  
18 decided *Grutter v. Bollinger*, 539 U.S. 306 (2003), or *Gratz v. Bollinger*, 539 U.S. 244 (2003), unless  
19 the judge disavowed any intent for those children to attend a public college. See *Day*, 451 F. Supp.  
20 2d at 1138. Proponents’ argument thus not only would severely restrict the number of judges deemed  
21 sufficiently impartial to decide constitutional questions, but Proponents’ emphasis on disclosure of  
22 any theoretical interest that a judge might have in the constitutional rights at issue would effectively  
23 require a public inquest into judges’ most private thoughts and relationships—including their plans to  
24 wed and bear children.

25 For the reasons discussed above, a judge’s sexual orientation cannot give rise to a reasonable  
26 question as to his impartiality any more than can a judge’s race, gender, or religion. See *supra* note 3  
27 (citing examples of trial evidence regarding history of discrimination against gay and lesbian  
28 individuals). To hold otherwise would enshrine discrimination in Section 455(a) and altogether

1 eliminate the word “reasonably” from the text of the statute. *See El-Gabrowni*, 844 F. Supp. at 961  
2 (“Section 455(a) was not meant to require disqualification every time one party can make some  
3 argument, no matter how unreasonable, that the appearance of prejudice would result.”) (internal  
4 quotation marks omitted). In fact, any questions about whether a judge’s membership in a minority  
5 group could compromise his impartiality are unreasonable *per se* because they are based on the very  
6 stereotyping that the Fourteenth Amendment condemns.

7 **B. Proponents’ Deliberate Strategy To Wait Until After An Adverse Judgment**  
8 **To Seek Recusal Renders This Motion Unjust And Untimely**

9 It is well settled that a party seeking recusal must “make a timely request for relief.”  
10 *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988); *see also* Fed. R. Civ. P.  
11 62.1(a) (requiring a “timely motion”). “To hold otherwise would encourage parties to withhold  
12 recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke  
13 section 455 in order to get a second bite at the apple.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967  
14 F.2d 1280, 1295 (9th Cir. 1992); *accord Rogers*, 119 F.3d at 1380 (“As we have often stated, a party  
15 having information that raises a possible ground for disqualification cannot wait until after an  
16 unfavorable judgment before bringing the information to the court’s attention.”). Accordingly, the  
17 Ninth Circuit requires that a recusal motion “be filed with reasonable promptness after the ground for  
18 such a motion is ascertained.” *E. & J. Gallo Winery*, 967 F.2d at 1296 (internal quotation marks  
19 omitted). Here, there is no question that Proponents’ post-judgment request for recusal is untimely.

20 Although Proponents’ motion never actually informs the Court when they first learned that  
21 Judge Walker is gay, it is plain that they knew that he was in a same-sex relationship at least two  
22 months before this Court announced its decision (Ex. E (reporting that Judge Walker “attends bar  
23 functions with a companion, a physician”)), and that he was gay at least four months prior to that  
24 (Ex. B (“Chief U.S. District Judge Vaughn Walker[ ] is himself gay.”)). *See also* Prop. Mot. 6 (citing  
25 articles). Rather than seek recusal at that time, however, Proponents affirmatively rejected the notion  
26 that Judge Walker’s sexual orientation should be an issue in this litigation and represented that they  
27 would not sidetrack consideration of the important constitutional issues raised by Plaintiffs on such a  
28 trivial and unwarranted basis. For example, four months before closing arguments, “Andy Pugno,  
general counsel for the group that sponsored the Prop. 8 campaign, rebuffed claims that his group



1 might bring [up Judge Walker’s sexual orientation] if Walker ultimately rules against them. ‘We are  
2 not going to say anything about that,’ Pugno said.” Ashby Jones, *Prop. 8 Judge Is Reportedly Gay:*  
3 *What to Make of That?*, Wall St. J., Feb. 8, 2010 (Ex. I). Similarly, in August 2010, after the decision  
4 invalidating Proposition 8 was announced, Proponents’ counsel advised the Associated Press that  
5 “[t]he bottom line in this case, from our perspective, is and always will be about the law and not  
6 about the judge who decides it . . . . It’s just something that collectively as a legal team we have  
7 decided and going up, that’s what this case is. The appellate courts are going to focus on the law.”  
8 Ex. G.

9 Moreover, the very first *amicus* brief filed in the Ninth Circuit on September 15, 2010 argued  
10 that Judge Walker should have recused himself because, as a gay man, “he has a personal interest in  
11 the outcome of the trial that he was over-seeing.” Wooten Amicus 2. Proponents nevertheless  
12 continued to refrain from seeking Judge Walker’s recusal while the case was being briefed in, and  
13 argued to, the Ninth Circuit. It was not until after the Ninth Circuit issued an opinion certifying the  
14 question of Proponents’ standing to appeal this Court’s decision—and issued a separate opinion  
15 holding that Imperial County lacked the right to intervene and pursue an appeal on the merits—that  
16 Proponents decided to move for recusal and vacatur of this Court’s decision.

17 Proponents have forfeited their right to seek recusal by strategically deciding to wait until  
18 after the entry of an adverse judgment—and the issuance of opinions signaling a potentially adverse  
19 result in the Ninth Circuit—to file their recusal motion. *See, e.g., E. & J. Gallo Winery*, 967 F.2d at  
20 1295 (denying a motion to recuse as untimely where the moving party’s counsel knew of the  
21 allegedly disqualifying facts seven months before an adverse judgment was entered); *Wood v.*  
22 *McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (per curiam) (recusal motion not timely when not made  
23 “until it was clear that the court intended to dismiss the underlying claim without leave to amend”).  
24 Proponents were required to file their motion upon first learning of Judge Walker’s sexual  
25 orientation. They did not. As reflected in Proponents’ repeated public comments that Judge  
26 Walker’s sexual orientation was irrelevant, by the various articles and editorials reporting on Judge  
27 Walker’s sexual orientation, and by the September 15, 2010 *amicus* brief that sought to disqualify  
28 Judge Walker because he is gay, Proponents knew well before the April 6, 2011 article they now

1 invoke that he is gay and in a relationship. Because Proponents' motion is a naked attempt to "get a  
2 second bite at the apple," it cannot meet the threshold timeliness requirement and should be denied.

3 **C. Even If Disqualification Were Required, Vacating The Judgment Would**  
4 **Not Be Warranted**

5 Section 455 "neither prescribes nor prohibits any particular remedy for a violation of th[e]  
6 duty" to recuse. *Liljeberg*, 486 U.S. at 862. Accordingly, even if a judge should have recused  
7 himself, vacatur pursuant to Rule 60(b) is not automatic, but rather, as the Supreme Court has  
8 instructed, "should only be applied in *extraordinary* circumstances." *Id.* at 863 (emphasis added)  
9 (internal quotation marks omitted); *see also id.* at 862 ("There need not be a draconian remedy for  
10 every violation of § 455(a)."); *United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989)  
11 (quoting same). In determining whether "extraordinary circumstances" exist, the Supreme Court has  
12 identified three factors to consider: "[1] the risk of injustice to the parties in the particular case, [2]  
13 the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining  
14 the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 863. Here, not only is there  
15 no risk of harm if the Court leaves the judgment in place, but vacatur would be certain to cause harm  
16 to Plaintiffs and the public.

17 Tellingly, *none* of the Defendants have joined Proponents' vacatur motion, and the Governor,  
18 the Attorney General, and the other State Defendants affirmatively oppose it because there is "no  
19 question that Judge Walker properly presided over this matter." Doc #778 at 7; *see also* Doc #774.  
20 Because the government-defendants are the only parties to this case who have standing to appeal the  
21 judgment (*see Arizonans for Official English*, 520 U.S. at 66), they alone bear the risk of being  
22 harmed if the Court were to conclude that recusal was required but nevertheless left the judgment in  
23 place. In contrast, Proponents have not shown that they have a particularized interest in the  
24 constitutionality of Proposition 8 (*see* Doc #727 at 7-8), and thus could not possibly suffer any  
25 injustice if the Court's judgment invalidating Proposition 8 remains in place.<sup>5</sup>

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26 <sup>5</sup> To the extent Proponents claim harm from this Court's interlocutory rulings (Prop. Mot. 4),  
27 those rulings were subsequently appealed and reversed, in part, in Proponents' favor.  
28 *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010); *Perry v. Schwarzenegger*, 591 F.3d 1147  
(9th Cir. 2010).

1           Despite Proponents’ attempt to cast themselves as victims, it is Plaintiffs who are harmed  
2   every day that Proposition 8 remains in force and continues to deny them access to the fundamental  
3   right to marry in violation of the U.S. Constitution. That harm would only be exacerbated by  
4   requiring Plaintiffs to relitigate this case in its entirety in order to prove (yet again) their ongoing  
5   constitutional injury. Accordingly, there is a significantly greater risk of unfairness in vacating the  
6   judgment than there is in upholding it.

7           Nor is there a risk that leaving the judgment in place would produce injustice in other cases.  
8   Indeed, *vacating* the judgment would inevitably produce injustice in other cases by encouraging  
9   similar intrusive recusal motions and strategic gamesmanship. *See Liljeberg*, 486 U.S. at 868  
10   (considering the effect of similar motions in other cases). Vacatur would result in a proliferation of  
11   attempts by other litigants to secure the recusal of judges based on their membership in a protected  
12   class. In so doing, vacatur would encourage intrusive inquiries into judges’ private lives in an effort  
13   to uncover possible grounds for recusal. It would also establish a dangerous precedent that parties  
14   can evade adverse decisions by strategically choosing not to file recusal motions against “rumored”  
15   gay and lesbian judges until after an adverse decision is entered. To avoid such disruptive effects on  
16   the judicial system—and unseemly investigations into judges’ backgrounds and private  
17   relationships—the Court should leave the judgment undisturbed.

18           Finally, the fact that Judge Walker did not publicly announce that he was gay and in a long-  
19   term relationship with a person of the same sex when this case was assigned to him has not  
20   undermined the public’s confidence in the judicial process. No one would, or should, expect a judge  
21   to publicly disclose private, intimate matters. Moreover, Proponents’ allegations are far removed  
22   from the extreme factual scenarios in which the Supreme Court has held that recusal was required to  
23   maintain public confidence in the judicial system. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 129  
24   S. Ct. 2252 (2009) (recusal required where judge benefitted from millions of dollars in campaign  
25   expenditures by a litigant); *Bracy v. Gramley*, 520 U.S. 899 (1997) (judge accepting bribes). In any  
26   event, this trial was closely followed by the public. The trial proceedings were covered on a daily  
27   basis by the press, and the trial transcripts and final opinion have been widely disseminated to the  
28   public and commented upon by observers. A person who took the time to follow the trial in this

1 matter would see both the fairness and even-handedness with which Judge Walker treated all parties  
2 and that the decision he reached was fully supported by the evidence presented. *See Chevron Corp.*  
3 slip op. at 40 (denying recusal motion because “[i]nformed persons, knowing and understanding all  
4 of the myriad and complex facts of these extensive proceedings, and putting aside the rhetoric and  
5 other devices deployed here by the [moving party], readily would see that the Court’s rulings have  
6 been firmly grounded in the law and the evidence”).<sup>6</sup> Vacatur is therefore wholly unnecessary to  
7 bolster public confidence in the thoroughly reasoned and constitutionally compelled result reached by  
8 this Court.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Plaintiffs respectfully request that this Court deny Proponents’  
11 Motion to Vacate Judgment.

12 Respectfully submitted,

13 DATED: May 13, 2011

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14  
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23  
24  
25 <sup>6</sup> Proponents’ motion gives the Court yet another reason to unseal the videotape of the trial  
26 proceedings. Ensuring public trust and confidence in the judicial system and the results it  
27 produces is the overarching rationale for the right of public access guaranteed by the First  
28 Amendment and longstanding common-law principles. In light of Proponents’ unfounded  
attacks on the integrity of Judge Walker and the proceedings over which he presided, that  
purpose would be powerfully served by unsealing the trial video and permitting the public to  
reach their own conclusions about the fairness of the proceedings.