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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, JR., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in

CASE NO. 09-CV-2292 JW

REPLY BRIEF IN SUPPORT OF MOTION TO VACATE OF DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM

Chief Judge James Ware

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

his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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INTRODUCTION

In our opening motion papers, we posited that "[s]urely no one would suggest that Chief Judge Walker could issue an injunction directing a state official to issue a marriage license *to him*." Doc. # 768 at 13. We stand corrected. For Plaintiffs argue in response that even "iron-clad proof of Judge Walker's desire to marry" his partner "would [provide] absolutely no basis for questioning his impartiality in this case." Doc. # 779 at 8. It follows, then, that even if Judge Walker and his long-time partner planned to marry if and when his injunction in this case became final and enforceable in California, he had no duty to recuse himself or even to disclose this fact to the parties. This startling proposition is based on Plaintiffs' equally startling claim that the longstanding statutory (and constitutional) prohibition against a judge hearing his or her own case does not apply when the judge "is a member of a minority group that seeks access to a fundamental constitutional right denied to them by a discriminatory state law." *Id*. at 9.

The cases cited by Plaintiffs do not support their proposed "member of a minority group" exception. In every one of these cases, the information disclosed by the judge or otherwise on the record provided no basis for concluding that the judge had a direct and substantial personal interest in the outcome of the case. These cases stand for the unremarkable proposition that merely belonging to the same minority group as one of the parties does not itself give rise to an interest in the outcome of the case requiring disqualification. As a leading case put it: "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." *United States v. Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987). Nor do the recusal statutes, of course, contemplate the double standard urged here by Plaintiffs, one that would permit a minority judge to preside over a case despite having a direct and substantial personal interest in the outcome. To the contrary, the same rules apply to all judges – black and white, male and female, straight and gay. Thus, black judges have routinely sat on school desegregation cases that did not directly and substantially affect them (or their children) personally, female judges have regularly heard gender discrimination cases that did not directly and substantially affect the judge's personal interests, and we have no doubt that it will become equally commonplace for gay and lesbian judges to decide

cases involving claims of sexual orientation discrimination where a reasonable person would not have any cause to believe that the outcome of the case could directly and substantially affect *the judge's own personal interests*.

Apart from Plaintiffs' proposed "minority judge" exception, Plaintiffs and their allies repeatedly caricature our motion as resting ultimately on the assertion that gay and lesbian judges may not sit in cases involving allegations of discrimination on the basis of sexual orientation. Again, this is plainly not so. 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 any effect -- much less a direct and substantial effect -- on the 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 the extraordinary rulings and course of proceedings in this case -- plainly do not necessarily exist for all or even most gay and lesbian citizens or judges.

To be sure, not all committed same-sex couples have an interest in marrying. But according to Plaintiffs themselves, almost two-thirds of such couples in California would get married if permitted to do so. Tr. 1397-98, 1407-08. And while we are not aware of "ironclad proof" that Judge Walker and his long-time partner have an interest in marrying, the lack of complete information concerning this relevant fact is attributable to Judge Walker's failure to carry out his duty to disclose on the record all of the relevant facts concerning his possible direct and substantial personal interest in the outcome of the case while he presided over it. Plaintiffs argue that the statutory disclosure duty "would require federal judges to publicly disclose intimate details of their

private lives," Doc. # 779 at 23, but of course any judge who does not wish 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.

Finally, Plaintiffs' argument that Proponents' motion is untimely fails for two independent reasons. First, Plaintiffs' claim rests entirely upon media reports concerning Judge Walker's sexual orientation that the Judge declined to confirm or deny. But it is settled that litigants are entitled to presume that the judge will disclose any and all information bearing on his fitness to sit in a case, and litigants therefore do not have any duty to investigate rumors and speculation concerning the judge's personal life to unearth evidence of possible bias. Second, even if the media reports cited by Plaintiffs had been confirmed, the information they provided did not put Proponents on notice that Judge Walker may have a direct and substantial personal interest in the outcome of the case. The first merely reported the "open *secret*" that Judge Walker is gay, and we stated publicly at the time, and have unequivocally reaffirmed in this motion, 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. The second added a report that, according to unidentified "colleagues," Judge Walker "attends bar functions with a companion, a physician." Doc. # 780-4 at 3. Standing alone, this information did not give rise to a reasonable belief that Judge Walker was in a long-term, committed relationship and thus may have a current personal interest in marrying. Only when Judge Walker belatedly disclosed that he is in a 10-year same-sex relationship did Proponents have a reasonable basis for concern that Judge Walker has a direct and substantial personal interest in the outcome of the case and that his impartiality could reasonably be questioned. As in *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 869 (1988), where the motion to vacate judgment was filed "10 months after the affirmance by the Court of Appeals," Proponent's motion is timely because "the entire delay [was] attributable" to the trial judge's "failure to disqualify himself" and to "disclose[] [his] interest" to the parties.

ARGUMENT

I. JUDGE WALKER WAS DISQUALIFIED FROM HEARING THIS CASE.

1. In support of their repeated claim that this motion seeks to disqualify "Judge Walker

based on nothing more than his sexual orientation," Doc. # 779 at 15, Plaintiffs insist that there is no meaningful distinction for purposes of marriage between a gay person in a "long-term committed relationship" and any other gay person, and that any effort to draw such a distinction would present an "intractable line-drawing problem," *id*. at 16. But Plaintiffs have consistently drawn precisely this common-sense line throughout this case, repeatedly emphasizing 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." Doc. # 7 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 . . . ." Doc. # 1-1 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 . . . ." Doc. # 52 at 6. Indeed, 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." *Id*. at 12.[1]

Judge Walker, for his part, has likewise consistently equated marriage with "committed

[1]In almost all of their filings in this Court, Plaintiffs have equated responsible marital unions with couples in long-term, committed relationships. See, e.g., Doc. # 1-1 at 3 ("Plaintiffs Perry and Stier are lesbian individuals in a committed relationship. Plaintiffs Katami and Zarrillo are gay individuals in a committed relationship."); Doc. # 7 at 10 ("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."); Doc. # 202 at 30 ("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); *id.* at 28 ("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."); Doc. # 282 at 39-40 ("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."); Doc. # 607 at 7 ("[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."); Doc. # 686 at 8 ("[E]xisting constitutional 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); Tr. 21 ("The plaintiffs. . . are in deeply-committed, intimate and long-standing relationships.").

long-term relationships." Doc. # 708 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." *Id.* at 79. Judge Walker has even gone so far as to say that the committed long-term relationships of Plaintiffs in this case *are* marriages. *Id.* at 116 ("[P]laintiffs ask California to recognize their relationships for what they are: marriages.").

Thus, far from indistinguishable, a gay person who is in a committed long-term relationship, and a gay person who is not in such a relationship are in no way even comparable for purposes of marriage, as both Plaintiffs and Judge Walker have repeatedly recognized throughout this case. True, it is possible to "speculate," as Plaintiffs note, that a gay person who is not in a committed relationship nonetheless "might benefit from the right to marry in the future," Doc. # 779 at 9, but Section 455(b)(4) disqualifies a judge only if he has a direct and substantial personal interest in the outcome of the case -- that is, a *current* personal interest, not a remote and speculative possibility of a future personal interest in the case.

In short, the instant motion rests not on Judge Walker's sexual orientation, but on the fact that he, in Plaintiffs' own words, is "similarly situated to [Plaintiffs] for purposes of marriage because, like individuals in a relationship with a person of the opposite sex, [both Plaintiffs and Judge Walker] are in loving, committed relationships." Doc. # 52 at 12.[2] Indeed, had Plaintiffs alleged only that they are gay and lesbian, and as such, had merely "speculate[d]" that they "might benefit from the right to marry in the future," Doc. # 779 at 9, their suit would have been dismissed for lack of standing.

2. Plaintiffs attempt to cast doubt on the likelihood of Judge Walker's interest in marriage by noting that "he apparently made no effort to do so" when same-sex marriage was briefly

[2] Plaintiffs make the remarkable claim that acceptance of our position would "require the recusal of all married heterosexual judges," given our "argu[ment] that permitting marriage between persons of the same sex would weaken opposite-sex marriage." Doc. # 779 at 20. But 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 affected. See, e.g., Doc. # 172-1 at 97-98; Opening Brief of Defendant-Intervenors-Appellants at 114, *Perry v. Brown*, No. 10-16696 (9th Cir. argued Dec. 6, 2010); Reply Brief of Defendant-Intervenors-Appellants at 77, *Perry v. Brown*, No. 10-16696 (9th Cir. argued Dec. 6, 2010). The notion that all married heterosexual judges have a direct and substantial personal interest in the outcome of this case is, of course, patently absurd.

permitted in California in 2008. *Id.* at 8. Plaintiffs fail to mention that they, too, did not marry during that period, although they, like Judge Walker, had been in their committed relationships for many years by then. Doc. # 7-1 at 3; Doc. # 7-2 at 2. Nor do Plaintiffs mention the evidence they presented at trial projecting that nearly two-thirds of committed same-sex couples in California – 64 percent – will get married if permitted to do so. Tr. 1397-98, 1407-08.

3. None of the cases cited by Plaintiffs and their allies stands for the proposition that a judge may sit when a reasonable person would have cause to believe that the judge might have a direct and substantial personal interest in the outcome of the case, and the judge failed to disclose his interest in the matter. Plaintiffs place their greatest reliance upon *United States v. Alabama*, 828 F.2d 1532, 1541-42 (11th Cir. 1987), but that case strongly supports disqualification here. *Alabama* 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 both Section 455(b)(4) and (b)(5), which requires disqualification if the judge or a member of his immediate family "is a party to the proceeding." The Eleventh Circuit held that the judge was not disqualified under either Section 455(b)(4) or (b)(5) because "[a]ny beneficial effects of this suit upon these children were remote, contingent and speculative." *Id.*[3]

Critical to the result in *Alabama* was the fact that there was no reason to believe that the trial judge's children had "any desire or inclination to attend a Montgomery area institution." *Id.* Indeed, the judge squarely acknowledged that *he would have to recuse* under Section 455 "if I know that any minor child residing in my household has an interest that could be substantially affected by

[3] The Eleventh Circuit did not consider whether the interests of the trial judge's children might support disqualification under Section 455(a), presumably because no one advanced that argument. The Court ultimately held that the trial judge was required to recuse based upon his direct participation in the events giving rise to the lawsuit prior to taking the bench, and accordingly the Court reversed the judgment and remanded for a new trial. *See Alabama*, 828 F.2d at 1544-46.

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).[4] Obviously, if the judge's 16-year-old child *had* expressed an interest in attending one of the universities at issue, disqualification would have been required because the child's interest in the case would not be "remote, contingent and speculative," but rather direct and substantial.

Plaintiffs also rely heavily on *In re City of Houston*, 745 F.2d 925, 931 (5th Cir. 1984), but as in *Alabama*, 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." *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 the trial judge at issue, however, "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 case was reassigned to a black trial judge for consideration of the fee petition, and the City sought her recusal because she was a member of the 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

[4] *Day v. Apoliona*, 451 F. Supp. 2d 1133 (D. Haw. 2006), *rev'd in part on other grounds*, 496 F.3d 1027 (9th Cir. 2008), is similarly distinguishable. The case involved access to benefits available to Native Hawaiians, and one of the judge's law clerks was a Native Hawaiian. The court explained that, "[i]f a clerk has a possible conflict of interest, … the clerk … must be disqualified." *Id.* at 1137. However, the court denied a motion seeking recusal because "[n]either the law clerk nor any of her family members mentioned above is currently receiving funds or other benefits" available to Native Hawaiians, and "[n]one of them is presently applying for *or presently intends* to seek funds or other benefits … in the future." *Id.* at 1138 (emphasis added).

and her and her husband's voter registration status. *Id.* at 418. The trial judge rejected the recusal motion, explaining that no "appearance of impropriety exists" because (i) during the period when the case was tried, she resided in "a non-black and non-Mexican-American precinct where because of [her] minority status [her] vote was not being diluted," and (ii) "the only question before [her] is whether an award of attorney's fees would be appropriate," and she therefore had no personal interest in the outcome of the case. *Id.* at 419-20.

The Fifth Circuit agreed, and denied the City's mandamus petition. The court explained that any interest the trial judge 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. The court rejected the argument that recusal was required because the judge was technically a member of the class, explaining that, "in delimiting the class the attorneys cast the definitional net wider than was arguably necessary, so that Judge McDonald falls within the overbroad category of plaintiffs." *Id*. Moreover, the court explained, in a vote dilution case "the interest of the class member is equal to that of persons not members of the class" because increasing the voting power of the class necessarily entails a corresponding decrease in the voting power of the counter-class. *Id*. Accordingly, "[v]irtually every citizen of Houston who is a voter … has an equal stake in this litigation, infinitesimal though any individual's interest may be." *Id*. The case thus fell within the established rule that disqualification is not required " 'in all cases in which the judge might benefit as a member of the general public.' " *Id.* (quoting *In re New Mexico Natural Gas Antitrust Litig.*, 620 F.2d 794, 796-797 (10th Cir. 1980)). Such an interest is plainly "insubstantial." *Id.* at 930.

In sum, in both *Alabama* and *Houston*, the trial judge had disclosed all of the relevant personal facts, and those facts made clear that any interest the judge (or his family) may have had in the outcome of the case was remote, contingent, speculative, and attenuated. The trial judge's children in *Alabama* had no intention of attending the colleges at issue, so however the case came out, it would not affect them. And the trial judge in *Houston* lived in a precinct unaffected by the elimination of the at-large system, her interest in the case was no greater than that of any other voter

in Houston, and in any event, the only issue remaining to be decided when the case was reassigned to her was whether attorneys' fees would be awarded, so the outcome would not affect her at all.

Nor do any of the other cases cited by Plaintiffs and their allies remotely support their position. They cite numerous cases in which the judge belonged to the same racial, ethnic, religious, or gender group as one of the parties.[5] These cases are all completely inapposite because, unlike in this case, the judges had no current personal interest whatsoever in the outcome. The same is true with respect to the cases cited by Plaintiffs in which the judge was a member of a racial, ethnic, or religious group that had a general interest in an issue presented in the case.[6] These cases too are all completely inapposite because, unlike in this case, the judges had no current personal interest whatsoever in the outcome.

[5] *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); *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); *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); *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).

[6] *See Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995) (Noonan, J.) (Catholic judge could hear RICO action by abortion clinic against abortion protesters); *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981) (Mormon judge, whose Church opposed ratification of Equal Rights Amendment, could hear action seeking to rescind ratification of Equal Rights Amendment); *United States v. El-Gabrowny*, 844 F. Supp. 955 (S.D.N.Y. 1994) (Jewish judge could hear criminal prosecution of Muslim terrorist for conspiracy related to 1993 World Trade Center bombing); *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 1017 (S.D. Tex. 1981) (black judge could hear suit by Vietnamese fisherman seeking an injunction against Klan violence and intimidation against them).

Unable to cite any actual case where a judge was permitted to sit even though a reasonable observer, knowing all the relevant facts and circumstances, could reasonably believe that the judge had a direct and substantial personal interest in the outcome, Plaintiffs turn to hypotheticals based on landmark cases: *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Grutter v. Bollinger*, 539 U.S. 306 (2003), as well as a more generic hypothetical involving a female judge of childbearing age hearing an abortion case. *See* Doc. # 779 at 19, 23. None of Plaintiffs' hypotheticals advance their cause.

- *Heller*. Any judge who lived in the District of Columbia and who wished to keep a firearm in his or her home that was prohibited by the statutes under review would indeed have to recuse because he or she would have a direct and substantial personal interest in the outcome.

- *Loving*. Any judge, black or white, who lived in Virginia when it prohibited interracial marriage, and who was married to, or wished to marry, a person of a different race in violation of the statute, would be disqualified because he or she would have a direct and substantial personal interest in the outcome.

- *Brown*. Any judge, black or white, who had a child attending the racially segregated public school would be disqualified because he or she would have a direct and substantial personal interest in the outcome.

- *Grutter*. Any judge, black or white, who had a child applying to the University of Michigan when it employed affirmative action admission criteria could not sit because the child would have a direct and substantial personal interest in the outcome.

- *Abortion case.* A female judge of childbearing age could almost certainly hear a challenge to an abortion regulation because any interest she might have in the outcome would be remote, contingent, and speculative. Only if the female judge (i) was pregnant, (ii) wished to have an abortion that was (iii) prohibited by the regulation being challenged would she be directly and substantially affected by the outcome and thus have to recuse.

Plaintiffs make passing reference to one other landmark case, *see* Doc. No. 779 at 9, 22, but they completely miss its significance to the issue before the Court. In *United States v. Virginia*, 518 U.S. 515 (1996), the question before the Court was whether the Virginia Military Institute ("VMI") could continue to accept only male cadets. Both of the Court's female justices and six of the Court's seven male justices sat on the case as a matter of course because, even though the dispute concerned a claim of gender discrimination, none of the sitting Justices had any personal interest in

the outcome. Justice Thomas, however, recused – not because he was a male, but rather because his son attended VMI, and as a result, had a direct and substantial personal interest in the outcome of the case. The same is true here.

II. THIS MOTION IS TIMELY.

Proponents brought this motion promptly after former Chief Judge Walker publicly acknowledged, for the first time, that he is in a 10-year, same-sex relationship. Plaintiffs nevertheless argue that this motion is untimely, pointing to a handful of unconfirmed media reports that Judge Walker is gay, Proponents' statements that they did not intend to make an issue out of his sexual orientation, and a single, unconfirmed news article reporting statements from unnamed sources that Judge Walker "attends bar functions with a companion, a physician," as evidence that Proponents should have filed this motion earlier. Doc. # 779 at 24-25. But none of this demonstrates that Proponents were on notice that Judge Walker was in a long-term, committed same-sex relationship, and thus would likely directly and substantially benefit from his own ruling in this case.

1. Proponents do not contend, and indeed have consistently disavowed, that Judge Walker was disqualified from this case simply because of his sexual orientation. Accordingly, media reports that he is gay—reports that he refused to confirm or deny prior to last month, *see* Doc. # 780-4—plainly did not put Proponents on notice of Judge Walker's long-term same-sex relationship, let alone provide a basis for the present motion. For the same reason, Proponents' statements that they did not intend to make an issue of Judge Walker's sexual orientation in no way indicate that they knew of his long-term relationship or somehow waived the right to object to the actual or at least apparent conflict of interest it creates.

2. Nor did the single news article reporting that Judge Walker "attends bar functions with a companion, a physician," Doc. # 780-4 at 3, inform Proponents of this conflict. This assertion was attributed only to unnamed "colleagues" of Judge Walker, *id*., and, as the article made clear, had not been confirmed by the Judge himself, "who declined to be interviewed with the marriage case pending," *id*. at 2. Even were it clearly reliable, moreover, this cryptic assertion could not reasonably be understood to have put Proponents on notice that Judge Walker was in a 10-year

same-sex relationship. Although the article indicated that Judge Walker attended at least some professional functions with another individual, the article did not otherwise discuss the nature (let alone duration) of the relationship between the Judge and his "companion."

Plainly Proponents could not responsibly have taken the serious step of seeking Judge Walker's recusal based on such uncorroborated, ambiguous reports from unnamed sources. To the contrary, it is well settled that a motion for recusal may not be based on "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion," *Clemens v. United States District Court*, 428 F.3d 1175, 1178 (9th Cir. 2005), "an uncorroborated news report or rumor," *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995), or "a hearsay statement from an undisclosed informer of unknown reliability," *Willner v. University of Kansas*, 848 F.2d 1023, 1027 (10th Cir. 1988).

Nor did this uncorroborated rumor create a duty (or even provide an appropriate basis) for Proponents to investigate or inquire into Judge Walker's personal life. "Section 455(a) [and] the Code of Judicial Conduct . . . place the burden of maintaining impartiality and the appearance of impartiality on the judge," *First Interstate Bank of Arizona v. Murphy, Weir & Butler*, 210 F.3d 983, 987 (9th Cir. 2000), and "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 Textiles Manufacturers Institute, Inc. v. The Limited, Inc*., 190 F.3d 729, 742 (6th Cir. 1999). "Lawyers are entitled to assume that judges . . . will perform their duty." *First Interstate Bank*, 210 F.3d at 988. Accordingly, "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." *American Textiles*, 190 F.3d at 742; *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*, 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.").[7] As Plaintiffs' lead counsel aptly put the matter in another case:

[7] Contrary to San Francisco's suggestion, *see* Doc. # 775, at 13-14, nothing in *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc*., 535 U.S. 229 (2002), (Continued)

> 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 [Chief Judge Walker] not making this obvious conflict known to the parties . . . .
>
> Reply Brief of Appellant at 2, *Aetna Life Insurance Co., v. Lavoie*, No. 84-1601 (1984)

In short, the unconfirmed and anonymous reports identified by Plaintiffs are "not comparable at all to the evidence now proffered" in support of this motion. *Porter*, 49 F.3d at 1488. And, "[u]nlike the newly proffered evidence, [they] fell far short of overcoming the presumption of regularity and supporting a claim of judicial bias." *Id*.

3. All of the cases cited by Plaintiffs that find a motion to disqualify untimely are based on information plainly—often concededly—known to the moving party, and indeed often as a matter of public record, long before the motion was filed. *See United States v. Rogers*, 119 F.3d 1377, 1381-83 (9th Cir. 1997); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992); *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981).[8] Certainly none of these cases hold a motion to disqualify untimely on the ground that the movant should have acted on cryptic, unsubstantiated rumors and media reports based on anonymous sources. To the contrary, it is well settled that a motion to disqualify is timely, regardless of the stage of the proceedings at which it is made, so long as it is made by a party with reasonable promptness after that party becomes aware of the *facts* on which it is based. *See Liljeberg*, 486 U.S. at 850, 867, 869; *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (recusal motion was timely when filed shortly after party learned of Judge's previous association with law firm representing company that could benefit from ruling, even though that association had long been a matter of public record); *United States v. Amico*, 486 F.3d 764, 773-75 (2d Cir. 2007) (recusal motion was timely when filed promptly after parties

(Cont'd)

suggests that it is necessary, or even appropriate, for a party to question a judge about actual or apparent partiality. Rather, that case holds only that, in reviewing a trial court's ruling on a recusal motion, an appellate court should consider extenuating circumstances identified by the trial court *in the order being reviewed*. *See* 535 U.S. at 231-33.

[8] The cases cited by San Francisco in support of reviewing Proponents' motion only for plain error, *see* Doc. # 775, at 12-13, are to the same effect.

learned that witness would testify that the judge *knowingly* falsified loan application, even though parties long knew that witness would testify that he had assisted the judge in filing a false loan application); *United States v. Kelly*, 888 F.2d 732, 747 (1989) (recusal motion was timely when filed shortly after the judge revealed "the intensity of his personal reaction to the dilemma he faced" when a close friend was called as a witness, even though party "was aware for some time before trial that [the witness] and the judge had an indirect social relationship").

III. THE JUDGMENT MUST BE VACATED.

As we demonstrated in our opening brief, vacatur of the judgment in this case follows inexorably from Judge Walker's disqualification, under the Supreme Court's analysis in *Liljeberg*, *see* Doc. # 768 at 20-26, and Plaintiffs have no meaningful response. Instead, they argue principally that no harm would result from allowing the judgment to stand notwithstanding Judge Walker's violation of Section 455 because "*none* of the Defendants have joined Proponents' vacatur motion …." Doc. # 779 at 26. But of course, the Defendants all support (or at a minimum, do not oppose) Plaintiffs' case, so it is hardly surprising that they are indifferent to the fact that the case was decided favorably to them by a judge who likely had a direct and substantial personal interest in the outcome and whose impartiality could reasonably be questioned. Plaintiffs also claim that vacatur would "establish a dangerous precedent" by encouraging recusal motions, *id*. at 27, but there is nothing "dangerous" about a precedent that enforces the fundamental rule that no judge may hear his own case. To the contrary, as the Supreme Court emphasized in *Liljeberg*, vacating the judgment here "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. Finally, because this case has been "closely followed by the public," Doc. # 779 at 27, Plaintiffs somehow conclude that "[v]acatur is therefore wholly unnecessary to bolster public confidence" in the resulting judgment. *Id*. at 28. With all due respect, Plaintiffs have it precisely backwards. The great public importance of this case and the highly controversial nature of the dispute make it all the more vital that it be decided at every stage by judges whose impartiality cannot be reasonably questioned.

CONCLUSION

For the foregoing reasons, and those stated in our opening motion papers, Proponents respectfully request that this Court enter an order "stat[ing] either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." FED. R. CIV. P. 62.1(a)(3).

DATED: May 23, 2011

Respectfully Submitted,

ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/ Charles J. Cooper
Charles J. Cooper