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 18 PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

19
 20 **UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

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

23 Plaintiffs,

24 CITY AND COUNTY OF SAN FRANCISCO,

25 Plaintiff-Intervenor,

26 v.

27 EDMUND G. BROWN, JR., in his official
 28 capacity as Governor of California; KAMALA

CASE NO. 09-CV-2292 JW

**DEFENDANT-INTERVENORS
 DENNIS HOLLINGSWORTH, GAIL
 J. KNIGHT, MARTIN F.
 GUTIERREZ, MARK A. JANSSON,
 AND PROTECTMARRIAGE.COM'S
 MOTION TO VACATE JUDGMENT**

Chief Judge James Ware

Date: July 11, 2011
 Time: 9:00 a.m.

1 D. HARRIS, in her official capacity as Attorney
2 General of California; MARK B. HORTON, in
3 his official capacity as Director of the California
4 Department of Public Health and State Registrar
5 of Vital Statistics; LINETTE SCOTT, in her
6 official capacity as Deputy Director of Health
7 Information & Strategic Planning for the
8 California Department of Public Health;
9 PATRICK O’CONNELL, in his official capacity
10 as Clerk-Recorder for the County of Alameda;
11 and DEAN C. LOGAN, in his official capacity
12 as Registrar-Recorder/County Clerk for
13 the County of Los Angeles,

Location: Courtroom 5, 17th Floor

9 Defendants,

10 and

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

15 Defendant-Intervenors.

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 11, 2011, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable James Ware, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, a Project of California Renewal, (“Proponents”) will move this Court pursuant to FED. R. CIV. P. 60(b) for an order vacating the final judgment (*see* Doc. # 708 at 138¹; Doc. # 728) and all orders entered by this Court in this case on the grounds that the then-presiding judge was disqualified from sitting in this action under 28 U.S.C. § 455(b)(4) and 28 U.S.C. § 455(a).

Given that an appeal is currently pending, FED. R. CIV. P. 62.1(a)(3) authorizes, and we urge, this Court to 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.” Upon entry of such an order, we will promptly notify the circuit clerk, *see* FED. R. CIV. P. 62.1(b); FED. R. APP. P. 12.1(a); and this Court may then decide the motion if the court of appeals remands for that purpose, *see* FED. R. CIV. P. 62.1(c); FED. R. APP. P. 12.1(b).

INTRODUCTION

Fundamental to the integrity of the judicial function, and therefore to public confidence in the courts, is the judiciary’s strict fidelity to the ancient maxim that “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” *In re Murchison*, 349 U.S. 133, 136 (1955). This principle is expressed in the Code of Judicial Ethics and is codified in federal law by statutes requiring that a judge recuse himself whenever he has an “interest that could be substantially affected by the outcome of the proceeding,” 28 U.S.C. § 455(b)(4), or more generally, in any other circumstance in which “his impartiality might reasonably be questioned,” *id.*, § 455(a).

¹ All citations to Doc. # 708, as well as all other documents filed with this Court, reference the page number from the ECF header (rather than the number at the bottom of the page).

1 The question presented in this case is whether gay and lesbian couples have a federal
2 constitutional right to have their relationships recognized as marriages, notwithstanding California's
3 state constitutional provision, adopted by the People through the initiative known as Proposition 8,
4 reaffirming the traditional definition of marriage as a relationship between a man and a woman.
5 Plaintiffs sought and obtained from this Court an injunction prohibiting California officials
6 statewide from enforcing Proposition 8. The injunction effectively requires California officials to
7 issue marriage licenses to any and all gay and lesbian couples who wish to marry and are otherwise
8 eligible.

9 The district judge who issued this judgment, retired Chief Judge Vaughn R. Walker, has
10 now disclosed to the press on April 6, 2011, that he is gay and that he has been in a committed
11 relationship for more than 10 years. Dan Levine, *Gay judge never thought to drop marriage case*,
12 Reuters, Apr. 6, 2011, available at [http://www.reuters.com/article/2011/04/06/us-gaymarriage-
13 judge-idUSTRE7356TA20110406](http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406) (last visited April 25, 2011). The published reports of former
14 Chief Judge Walker's statements to the press note that he had heretofore refused to comment on
15 these issues when asked by the press. *Id.*; see also Phillip Matier et al., *Judge being gay a nonissue*
16 *during Prop. 8 trial*, San Francisco Chronicle, Feb. 7, 2010, available at
17 [http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-
19 judge-walker](http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-
18 judge-walker) (last visited April 25, 2011). The published reports do not address the question
20 whether former Chief Judge Walker and his partner have, or have had, any interest in marriage
21 should the injunction he issued be upheld on appeal.

22 Given that Chief Judge Walker was in a committed, long-term, same-sex relationship
23 throughout this case (and for many years before the case commenced), it is clear that his
24 "impartiality might reasonably [have been] questioned" from the outset. 28 U.S.C. § 455(a). He
25 therefore had, at a minimum, a *waivable* conflict and was obligated either to recuse himself or to
26 provide "full disclosure on the record of the basis for disqualification," *id.*, § 445(e), so that the
27 parties could consider and decide, before the case proceeded further, whether to request his recusal.
28 His failure to do either was a clear violation of Section 455(a), whose "goal ... is to avoid even the
appearance of partiality." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

1 But it also must be presumed that Chief Judge Walker had a *nonwaivable* conflict as well.
2 For if at any time while this case was pending before him, Chief Judge Walker and his partner
3 determined that they desired, or might desire, to marry, Chief Judge Walker plainly had an “interest
4 that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(4).
5 Indeed, such a personal interest in his own marriage would place Chief Judge Walker in precisely
6 the same shoes as the two couples who brought the case. Such a clear and direct stake in the
7 outcome would create a nonwaivable conflict, and recusal would have been mandatory. Chief
8 Judge Walker thus had a duty to disclose not only the facts concerning his relationship, but also his
9 marriage intentions, for the parties (and the public) were entitled to know whether his waivable
10 conflict was actually a nonwaivable conflict mandating his disqualification. Only if Chief Judge
11 Walker had unequivocally disavowed any interest in marrying his partner could the parties and the
12 public be confident that he did not have a direct personal interest in the outcome of the case in
13 violation of Section 455(b)(4). Because he did not do so when the case was assigned to him, and
14 has not done so since, it must be presumed that he has an interest in marrying his partner and
15 therefore was in fact the “judge in his own case.”

16 In light of Chief Judge Walker’s undeniable violation of Section 455(a) and his presumed
17 violation of Section 455(b)(4), the only responsible and just course is to vacate the judgment
18 entered in this case. Indeed, the Supreme Court in *Liljeberg* held that one of the key factors that
19 must be considered in deciding whether a Section 455 conflict disclosed after judgment requires
20 vacatur is “the risk of injustice to the parties in the particular case,” *Liljeberg*, 486 U.S. at 864, and
21 the Court undertook “a careful study of [a lower court judge’s] analysis of the merits of the
22 underlying litigation” to conclude that “there [was] a greater risk of unfairness in upholding the
23 judgment ... than there is in allowing a new judge to take a fresh look at the issues.” *Id.* at 868.

24 The course of proceedings in this case has been marked by a number of irregular and
25 unprecedented rulings, both procedural and substantive, that give gravely disquieting force to the
26 “appearance of partiality” created by the belated disclosure of Chief Judge Walker’s long-term,
27 committed relationship. For example:
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- Before the trial even began, the Ninth Circuit issued an extraordinary writ of mandamus to overturn Chief Judge Walker’s order requiring Proponents to turn over confidential internal communications concerning the initiative campaign. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009).
 - Also before trial commenced, the Supreme Court of the United States issued an emergency stay, pending the filing of a mandamus petition with the Court, enjoining Chief Judge Walker from video recording and disseminating the trial proceedings to other federal courthouses. The Court found that Chief Judge Walker had “ ‘so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court’s supervisory power,’ ” and that he had violated the “proper rules of judicial administration ... relat[ing] to the integrity of judicial processes.” *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010).
 - Chief Judge Walker’s decision recognizing a right under the Federal Constitution for same-sex couples to have their relationships recognized as marriages conflicts with the judgment of *every State and federal appellate court* to consider the validity of the traditional opposite-sex definition of marriage under the Federal Constitution—including both the United States Supreme Court and the Ninth Circuit—all of which have upheld that definition. Chief Judge Walker did not cite, let alone address, any of these prior decisions.
 - Chief Judge Walker peremptorily held that gays and lesbians are a suspect class under the Federal Constitution even though all eleven Circuit Courts of Appeals to consider the issue (including the Ninth Circuit) have repeatedly and squarely held to the contrary. Chief Judge Walker did not even cite, let alone address, any of these contrary precedents.
 - Despite the unprecedented nature of his ruling and its sharp conflict with the uniform judgment of appellate courts throughout the Country, Chief Judge Walker refused to stay his judgment pending appeal. As a result, the Ninth Circuit was forced to issue such a stay.
 - Shortly before his retirement from the bench, Judge Walker publicly displayed an excerpt from the video recording of the trial in this case in violation of (i) his order sealing the recording; (ii) this Court’s Rule 77-3; (iii) the Supreme Court’s decision in this case; (iv) the policy of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit; and (v) his own solemn assurance to Proponents that the trial recordings would be used solely in chambers.

24 The unprecedented, irregular, and/or peremptory nature of these rulings is difficult – very
25 difficult – to take as the product of an objective, impartial judicial mind. And while “judicial
26 rulings *alone* almost never constitute a valid basis for a bias or partiality motion,” *Liteky v. United*
27 *States*, 510 U.S. 540, 555 (1994) (emphasis added), the rulings summarized above are nevertheless
28 highly relevant to the inquiry under Section 455(a). The test is “ ‘whether a reasonable person with

1 knowledge of *all the facts* would conclude that the judge’s impartiality might reasonably be
2 questioned,’ ” *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (quoting *United States v.*
3 *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983)) (emphasis added), thus requiring recusal under Section
4 455(a). A disinterested observer would necessarily consider the uniform train of extraordinary and
5 unprecedented rulings favoring the gay and lesbian plaintiff couples and ultimately creating an
6 unprecedented federal constitutional right for them to have their relationships recognized as
7 marriages to be relevant facts in deciding whether Chief Judge Walker’s own long-term same-sex
8 relationship, and the fact that he did not disclose the relationship prior to entering judgment, gives
9 rise to a reasonable question as to Chief Judge Walker’s impartiality.

10 These extraordinary rulings likewise bear directly—indeed, dispositively—on the question
11 whether vacating the judgment invalidating Proposition 8 is necessary to avoid a genuine risk of
12 unfairness to Proponents of that measure (and to the People of the State who enacted it by initiative)
13 and to avoid “the risk of undermining the public’s confidence in the judicial process.” *Liljeberg*,
14 486 U.S. at 864. We respectfully submit that the judgment must be vacated in order to ensure that
15 “the administration of justice ... reasonably appear to be disinterested as well as be so in fact.” *Id.*
16 at 869-70 (quoting *Public Util. Comm’n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952)
17 (Frankfurter, J., in chambers)).

18 It is important to emphasize at the outset that we are *not* suggesting that a gay or lesbian
19 judge could not sit on this case. Rather, our submission is grounded in the fundamental principle,
20 reiterated in the governing statute, that no judge “is permitted to try cases where he has an interest
21 in the outcome.” *In re Murchison*, 349 U.S. at 136. Surely, no one would suggest that Chief Judge
22 Walker could issue an injunction directing a state official to issue a marriage license *to him*. Yet on
23 this record, it must be presumed that that is precisely what has occurred. At a bare minimum,
24 “[r]ecusal is required” because former Chief Judge Walker’s long-term committed relationship, his
25 failure to disclose that relationship at the outset of the case, his failure to disclose whether he has
26 any interest in marriage should his injunction be affirmed, and his actions over the course of this
27 lawsuit give rise to “a genuine question concerning [his] impartiality.” *Liteky*, 510 U.S. at 552.
28

1 We deeply regret the necessity of this motion. But as the Supreme Court emphasized earlier
2 in this very case, “[b]y insisting that courts comply with the law, parties vindicate not only the
3 rights they assert but also the law’s own insistence on neutrality and fidelity to principle.... If
4 courts are to require that others follow regular procedures, courts must do so as well.”
5 *Hollingsworth*, 130 S. Ct. at 713, 715. The “regular procedure” here requires adherence to the
6 principles that a judge may not sit on a case when “his impartiality might reasonably be
7 questioned,” 28 U.S.C. § 455(a), and certainly not when he has an “interest that could be
8 substantially affected by the outcome of the proceeding,” 28 U.S.C. § 455(b)(4). Proponents ask
9 only that these principles be applied faithfully and neutrally here as in any other case.

10 BACKGROUND

11 On May 22, 2009, two same-sex couples filed this suit claiming that the Due Process and
12 Equal Protection Clauses of the Fourteenth Amendment require California to redefine marriage to
13 include same-sex relationships, and thus that Proposition 8, which provides that “[o]nly marriage
14 between a man and a woman is valid or recognized in California,” Cal. Const. art. I, § 7.5, is
15 unconstitutional. Doc. # 1. The case was assigned to the Honorable Vaughn R. Walker, who at the
16 time was Chief Judge of this Court. He presided over the case from beginning to end, including
17 motions, discovery, and a two-and-a-half week trial that took place in January 2010.

18 Shortly after the parties concluded their evidentiary submissions in late January 2010, a
19 newspaper story reported that Chief Judge Walker is rumored to be gay, but when asked by the
20 reporters, he refused to “comment ... about his orientation and whether it was relevant to the
21 lawsuit.” *See, e.g., Phillip Matier et al., Judge being gay a nonissue during Prop. 8 trial, San*
22 *Francisco Chronicle, Feb. 7, 2010, available at [http://articles.sfgate.com/2010-02-07/bay-](http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker)*
23 *[area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker](http://articles.sfgate.com/2010-02-07/bay-area/17848482_1_same-sex-marriage-sexual-orientation-judge-walker)* (last visited April 25, 2011).
24 And soon after closing arguments on June 16, 2010, a press report in the *Los Angeles Times* claimed
25 that unidentified “colleagues” of Chief Judge Walker said that he “attends bar functions with a
26 companion, a physician[.]” Maura Dolan, *Distilling the same-sex marriage case*, L.A. Times, June
27 21, 2010, available at <http://www.latimes.com/news/local/la-me-prop8-judge->
28

1 [20100621,0,4456510,full.story](#) (last visited April 25, 2011). Again, however, Chief Judge Walker
2 refused to comment.

3 A little over a month later, Chief Judge Walker ruled in Plaintiffs' favor, holding that the
4 Federal Constitution "protects an individual's choice of marital partner regardless of gender" and
5 therefore requires the State of California to redefine marriage to include same-sex relationships.
6 Doc. # 708 at 112-16. Chief Judge Walker "order[ed] entry of judgment permanently enjoining
7 [Proposition 8's] enforcement; prohibiting the official defendants from applying or enforcing
8 Proposition 8 and directing the official defendants that all persons under their control or supervision
9 shall not apply or enforce Proposition 8." Doc. # 708 at 138. Chief Judge Walker made clear that
10 he understood and intended the injunction to apply to every County Clerk in California. Doc. # 709
11 at 6-7. Accordingly, Chief Judge Walker's injunction grants every gay and lesbian couple in
12 California the right to marry, and prohibits all officials across the State from refusing to issue
13 marriage licenses to same-sex couples.

14 Proponents immediately asked Chief Judge Walker to stay the judgment pending appeal,
15 Doc. # 705, but he refused to do so, Doc. # 727. The Ninth Circuit, however, promptly stayed the
16 judgment pending appeal, so it has yet to take effect. *Perry v. Schwarzenegger*, No. 10-16696,
17 2010 WL 3212786 (9th Cir. Aug. 16, 2010). On January 4, 2011, shortly after oral argument, the
18 Ninth Circuit certified questions concerning Proponents' standing to the California Supreme Court,
19 *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011); on February 16, 2011, the
20 California Supreme Court accepted the certified questions, and the parties are currently briefing the
21 standing issues to that court.

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

24 On April 6, 2011, former Chief Judge Walker met with a small group of reporters and for
25 the first time publicly "discussed his sexual orientation in the press," disclosing that he is gay and
26 "in a 10-year relationship with a physician." Dan Levine, *Gay judge never thought to drop*
27 *marriage case*, Reuters, Apr. 6, 2011, available at [http://www.reuters.com/article/2011/04/06/us-](http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406)
28 [gaymarriage-judge-idUSTRE7356TA20110406](http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406) (last visited April 25, 2011). According to the

1 press account, when asked whether he considered recusing himself from this case, former Chief
2 Judge Walker commented that it “would not be appropriate for any judge’s sexual orientation,
3 ethnicity, national origin or gender to stop them from presiding over a case.” There is no mention
4 in the account, however, of his view regarding the relevance to the recusal issue of his 10-year
5 committed relationship, nor does it address his thoughts on marriage to his partner. *See id.*

6 ARGUMENT

7 The Supreme Court in *Liljeberg* outlined the appropriate analysis for resolving a Rule 60(b)
8 motion to vacate a judgment on the ground that the trial judge was disqualified under 28 U.S.C.
9 § 455. *Liljeberg* instructed courts to consider whether the judge was disqualified from participating
10 in the case under Section 455 and, if so, whether it is appropriate under the circumstances to vacate
11 the judgment under Rule 60(b). *Liljeberg*, 486 U.S. at 858-64. Our analysis proceeds accordingly.

12 I. Chief Judge Walker Was Disqualified from Participating in This Case Under Section 13 455.

14 Section 455 requires disqualification of a judge in multiple circumstances, two of which are
15 relevant here. Subsection (b)(4) requires recusal whenever the judge “knows that he . . . has . . . any
16 . . . interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. §
17 455(b)(4). Subsection (a) is more general, requiring recusal “in any proceeding in which [the
18 judge’s] impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Subsection (b)(4) is “a
19 somewhat stricter provision” than subsection (a) because recusal under the former is mandatory and
20 may not be waived, while a judge “may accept such a waiver under § 455(a) after ‘a full disclosure
21 on the record of the basis for disqualification.’ ” *Liljeberg*, 486 U.S. at 859 n.8 (quoting 28 U.S.C.
22 § 455(e)). Subsection (a) “has a ‘broader reach’ than subsection (b)” because it covers all situations
23 involving the mere appearance of partiality, and is not limited to the instances of actual bias or
24 interest enumerated in subsection (b). *Liteky*, 510 U.S. at 553 n.2.

25 It is well settled that a judge has a duty to inquire into and disclose to the parties any
26 possible grounds for disqualification. *See Liljeberg*, 486 U.S. at 868 (emphasizing the importance
27 of “encouraging a judge or litigant to more carefully examine possible grounds for disqualification
28 and to promptly disclose them when discovered”); *In re Kensington Int’l Ltd.*, 368 F.3d 289, 313

1 (3d Cir. 2004) (the “burden is to be placed on the judge to disclose possible grounds for
2 disqualification”); *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985) (“[Section 455]
3 places on the judge a personal duty to disclose on the record any circumstances that may give rise to
4 a reasonable question about his impartiality.”). “A judge has a duty to be watchful of such
5 disqualifying circumstances and decide any requests to recuse *with disclosure necessary to the*
6 *decision made clear upon the record.*” *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1031 (5th Cir.
7 1998) (emphasis added).

8 In this case, it is undeniable that Chief Judge Walker failed to make the required disclosure.
9 At no point prior to the entry of judgment did Chief Judge Walker disclose that he is in a now 10-
10 year long, committed same-sex relationship. And he has yet to disclose whether he has any interest
11 in marrying his partner should the injunction he issued be upheld on appeal. These facts are plainly
12 critical to the disqualification inquiry under both Subsection 455(b)(4) and Subsection 455(a), for
13 they are directly relevant to the question whether Chief Judge Walker has an interest in the outcome
14 of this case and they are facts that a disinterested observer would consider in deciding whether
15 Chief Judge Walker’s impartiality might reasonably be questioned.

16 The core issue presented in this case is whether the Fourteenth Amendment requires the
17 redefinition of marriage to include same-sex relationships. Governmental recognition of a
18 relationship as a marriage is, in and of itself, a significant legal interest, a point no party in this case
19 has ever disputed. Indeed, Chief Judge Walker’s legal analysis and fact findings, which are drawn
20 directly from Plaintiffs’ proposed findings, identify numerous benefits, ranging from the financial
21 to the emotional, that he concludes would accrue specifically to same-sex couples if they are
22 permitted to marry.² Thus, to the extent Chief Judge Walker and his partner have any interest in
23 marrying if the injunction is affirmed, he indisputably has a direct personal interest that “could be

24
25 ² To cite a few examples, see Doc. # 708 at 81 (“Same-sex couples receive the same
26 tangible and intangible benefits from marriage that opposite-sex couples receive.”); *id.* at
27 93 (“Proposition 8 increases costs and decreases wealth for same-sex couples because of
28 increased tax burdens, decreased availability of health insurance and higher transactions
costs to secure rights and obligations typically associated with marriage. Domestic
partnership reduces but does not eliminate these costs.”); *id.* at 96 (“Proposition 8 results in
frequent reminders for gays and lesbians in committed long-term relationships that their
relationships are not as highly valued as opposite-sex relationships.”).

1 substantially affected by the outcome of th[is] proceeding.” 28 U.S.C. § 455(b)(4). Indeed, the
2 resolution of this case has the potential to *create* that personal interest. Simply stated, under
3 governing California law, Chief Judge Walker currently cannot marry his partner, but his decision
4 in this case, and the sweeping injunction he entered to enforce it, would give him a right to do so.

5 As previously noted, because Chief Judge Walker has not disclosed whether he and his
6 partner have any interest in marrying, let alone unequivocally disavowed such an interest, it must be
7 presumed that he has a disqualifying interest under Subsection 455(b)(4). For only such an
8 unequivocal disavowal would negate the strong inference, arising from his acknowledged long-
9 term, committed relationship and his findings in this case concerning the benefits of marriage for
10 same-sex couples, that he has a personal interest in exercising the federal constitutional right he
11 recognized to marry a same-sex partner should the injunction he issued be affirmed. That inference
12 is strengthened by the fact that Chief Judge Walker did not disclose the existence of the relationship
13 before entering judgment and has never disclosed whether he has any interest in marrying his
14 partner. In any case, this Court need not decide whether Chief Judge Walker was disqualified under
15 Section 455(b)(4) because he was clearly disqualified under Section 455(a).

16 Section 455(a) mandates that a judge “shall disqualify himself in any proceeding in which
17 his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). “The goal of [S]ection
18 455(a),” the Supreme Court has emphasized, “is to avoid even the appearance of partiality.”
19 *Liljeberg*, 486 U.S. at 860. And thus the analytical focus under that provision “is not the reality of
20 bias or prejudice but its appearance.” *Liteky*, 510 U.S. at 548; *see also Herrington v. Sonoma*
21 *County*, 834 F.2d 1488, 1502 (9th Cir. 1987) (Section 455(a) “covers circumstances that *appear* to
22 create a conflict of interest, whether or not there is actual bias”). In applying Section 455(a), then,
23 “the judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the
24 issue.” *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993).

25 “The standard for judging the appearance of partiality requiring recusal” under Section
26 455(a) “is an objective one and involves ascertaining ‘whether a reasonable person with knowledge
27 of all the facts would conclude that the judge’s impartiality might reasonably be questioned.’ ”
28 *Preston*, 923 F.2d at 734 (quoting *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983)).

1 “The reasonable person is . . . a well-informed, thoughtful observer,” *United States v. Holland*, 519
2 F.3d 909, 913 (9th Cir. 2008) (quotation marks omitted), but is nevertheless a layperson “who ha[s]
3 not served on the bench” and thus is “often all too willing to indulge suspicions and doubts
4 concerning the integrity of judges,” *Liljeberg*, 486 U.S. at 864-65. “In high profile cases such as
5 this one, the outcome of which will in some way affect millions of people, such suspicions are
6 especially likely.” *In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992).

7 “The use of ‘[m]ight reasonably be questioned’ in section 455(a) . . . clearly mandates that it
8 would be preferable for a judge to err on the side of caution and disqualify himself in a questionable
9 case.” *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980); *see also In re*
10 *Boston’s Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (“ ‘if the question of whether § 455(a)
11 requires disqualification is a close one, the balance tips in favor of recusal’ ”) (quoting *Nichols v.*
12 *Alley*, 71 F.3d 347, 352 (10th Cir. 1995)); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th
13 Cir. 1988) (“It has been stated on numerous occasions that when a judge harbors any doubts
14 concerning whether his disqualification is required he should resolve the doubt in favor of
15 disqualification.”).

16 “Disqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the
17 particular case. Consequently, the analysis of a particular section 455(a) claim must be guided, not
18 by comparison to similar situations addressed by prior jurisprudence, but rather by an independent
19 examination of the unique facts and circumstances of the particular claim at issue.” *Holland*, 519
20 F.3d at 913 (quotation marks omitted); *see also Clemens v. United States Dist. Court for Cent. Dist.*
21 *of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005). “Thus, it is critically important in a case of this kind
22 to identify the facts that might reasonably cause an objective observer to question [Chief Judge
23 Walker’s] impartiality.” *Liljeberg*, 486 U.S. at 865. Here, the following facts must be considered:

- 24 • Chief Judge Walker has been involved in a 10-year (8-year at the time that
25 Plaintiffs commenced this suit) committed same-sex relationship.
- 26 • Chief Judge Walker did not disclose the fact that he has been involved in a long-
27 term same-sex relationship until eight months after final judgment was entered,
28 and after he had retired from the bench. *See Liljeberg*, 486 U.S. at 865-67
(stating that a judge’s failure to “disclos[e]” his interest was “remarkable” and
“might reasonably cause an objective observer to question [his] impartiality”).
Indeed, he refused to comment on the issue when asked by the press.

- Chief Judge Walker has never disclosed whether he and his partner have (or have ever had) any interest in marrying should a right to marry an individual of the same sex be established.

A reasonable person, knowing these facts, could reasonably question Chief Judge Walker's impartiality. In addition, the "objective observer" would necessarily consider the extraordinary course of proceedings in this case while Chief Judge Walker has presided. As catalogued *infra* at pp. 14-16, Chief Judge Walker consistently issued extraordinary and unprecedented rulings, both procedural and substantive, often without even citing contrary binding authority, in favor of the plaintiff gay and lesbian couples. To be sure, "judicial rulings *alone* almost never constitute a valid basis for a bias or partiality motion," *Liteky*, 510 U.S. at 555 (emphasis added), and standing alone, we do not contend that Chief Judge Walker's rulings (extraordinary though they are) would do so here. But they are properly considered as part of the Section 455(a) analysis, and here, they could only deepen the concerns that a reasonable, disinterested observer would have about Chief Judge Walker's impartiality as a result of his long-term same-sex relationship, the fact that he did not disclose the relationship while he presided over the case, and the fact that he has not yet disclosed whether he has any interest in marrying his partner.

II. The Section 455 Violations Require This Court to Vacate the Judgment and All Orders Entered in This Case.

Fed. R. Civ. P. 60(b) "provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *Liljeberg*, 486 U.S. at 863. The general rule is that "when a judge[] sits in violation of an express statutory standard," as occurred here, "the disqualified judge's rulings are . . . to be vacated." *United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989); *see also Liljeberg*, 486 U.S. at 868 ("[i]t is . . . appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment").³ The Court has identified three factors that should be

³ This motion is clearly timely. In *Liljeberg*, the Court found that the motion to vacate was timely even though it was filed not only after judgment was entered in the trial court, but "10 months after the affirmance by the Court of Appeals"—long after the current posture of this case—because "the entire delay [was] attributable" to the trial judge's "failure to disqualify himself" and to "disclose[] [his] interest" to the parties. *Id.* at 869; (Continued)

1 considered “in determining whether a judgment should be vacated for a violation of [Section]
 2 455(a) ...[:] [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial
 3 of relief will produce injustice in other cases, and [3] the risk of undermining the public’s
 4 confidence in the judicial process.” *Liljeberg*, 486 U.S. at 864. To succeed in vacating the
 5 judgment, however, a party need not satisfy all three factors. *Cf. United States v. Kelly*, 888 F.2d
 6 732, 747 (11th Cir. 1989) (finding reversible error even though the court mentioned that only two of
 7 the three factors were satisfied). Nevertheless, all three factors here weigh in favor of vacating the
 8 judgment.

9 **A. The Risk of Injustice to Proponents Favors Vacating the Judgment.**

10 Evaluating the risk of injustice to the parties involves a multifaceted analysis. Here, at least
 11 three considerations under that broad analytical umbrella demonstrate that this Court should vacate
 12 the judgment. First, the Section 455 violation at issue here is serious. Second, declining to vacate
 13 the judgment poses a substantial risk of injustice, not only to Proponents, but to the People of

14 (Cont’d)

15 *see also id.* at 863 n.11. The same is true here. Chief Judge Walker did not disclose his
 16 long-term same-sex relationship “on the record,” as required by Section 455(e), while the
 17 case was pending before him, and he refused to comment to the press about the issue until
 18 after he had retired from the bench. It was not until April 2011 that he finally disclosed his
 19 long-term same-sex relationship to the press, and Proponents filed the instant motion
 20 promptly thereafter. This analysis is not altered by the fact that a published report surfaced
 21 about Chief Judge Walker’s rumored sexual orientation and “companion” shortly after
 22 closing arguments. As with an earlier press report concerning his sexual orientation, Chief
 23 Judge Walker declined to comment. Nor did the report indicate the long-term nature of
 24 Chief Judge Walker’s same-sex relationship. The Ninth Circuit has repeatedly stressed
 25 that “[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion,” and
 26 “characterizations appearing in the media” are inadequate to require recusal under Section
 27 455, *see Clemens*, 428 F.3d at 1178-79; *Holland*, 519 F.3d at 914 n.5; *see also Green v.*
 28 *Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997), and the law is clear that “a litigant’s duty
 to investigate the facts of his case does not include a mandate for investigations into a
 judge’s impartiality.... [Courts] believe instead that 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 Textile Mfrs. Inst., Inc. v. The*
Limited, Inc., 190 F.3d 729, 742 (6th Cir. 1999); *see also First Interstate Bank of Az., N.A.*
v. Murphy, Weir & Butler, 210 F.3d 983, 987-88 (9th Cir. 2000) (“Section 455(a) [and] the
 Code of Judicial Conduct ... place the burden of maintaining impartiality and the
 appearance of impartiality on the judge.... Lawyers are entitled to assume that judges . . .
 will perform their duty.”); *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995) (“we
 do not believe that an attorney conducting a reasonable investigation would consider it
 appropriate to question a judge, or the court personnel in the judge’s court, about the
 judge’s lack of impartiality”).

1 California. Third, Plaintiffs cannot show a risk of injustice from vacating the judgment because
2 they cannot show that they relied on that judgment. We evaluate each of those three considerations
3 in turn.

4 *First*, an important consideration in assessing the risk of injustice to the parties is the
5 seriousness of the presiding judge’s Section 455 violation. *See Liljeberg*, 486 U.S. at 865-67. This
6 case involves a serious violation both because Chief Judge Walker’s duty to disclose his long-term
7 relationship is not a close question under Section 455(a) and (e), and because he must be presumed
8 to have a direct personal interest in the outcome of the case, which could substantially affect him
9 *personally* by creating a legal right to marry his long-term partner. Chief Judge Walker had
10 knowledge of the facts giving rise to his disqualifying interest from the moment of this case’s
11 inception. *Cf. id.* at 867-68 (vacating the judgment even though the judge “did not know of his
12 [disqualifying] interest” until after trial). And despite this knowledge, he failed to disclose the facts
13 on the record to the parties. *See id.* at 866-67 (vacating the judgment because the judge, after
14 learning of his disqualifying interest, did not “disclos[e]” it to the parties). As in *Liljeberg*, this
15 conduct amounts to a Section 455 violation that is “neither insubstantial nor excusable,” *see id.* at
16 867, but instead serious and inexplicable.

17 *Second*, there can be no question that a significant risk of injustice is presented if the
18 judgment is not vacated. “[A] careful study of [Chief Judge Walker’s] analysis of the merits of the
19 underlying litigation” compels the conclusion, as in *Liljeberg*, that “there is a greater risk of
20 unfairness in upholding the judgment ... than there is in allowing a new judge to take a fresh look at
21 the issues.” *Id.* at 868. As previously noted, the proceedings in this case have been marked by a
22 series of irregular and unprecedented rulings, often without citation of binding contrary authority.
23 *See supra* at pp. 3-5. For example, Chief Judge Walker’s unprecedented pre-trial orders relating to
24 discovery and to broadcasting the trial proceedings prompted extraordinary intervention by the
25 Ninth Circuit and the Supreme Court. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009);
26 *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). On the merits, Chief Judge Walker’s holding that
27 there is a federal constitutional right for same-sex couples to have their relationships recognized as
28 marriages conflicts with the judgment of *every State and federal appellate court* to consider the

1 validity of the traditional opposite-sex definition of marriage under the Federal Constitution—
 2 including both the United States Supreme Court and the Ninth Circuit—all of which have upheld
 3 that definition.⁴ Chief Judge Walker’s opinion did not even acknowledge, let alone address, any of
 4 this contrary authority, including the Supreme Court’s decision in *Baker v. Nelson*, 409 U.S. 810
 5 (1972), holding that a state law limiting marriage to opposite sex couples did not violate either the
 6 Equal Protection or the Due Process Clauses of the Fourteenth Amendment. Chief Judge Walker
 7 also held that gays and lesbians are a suspect class under the Federal Constitution even though the
 8 Ninth Circuit (like every other Circuit to address the issue) has repeatedly and squarely held to the
 9 contrary. *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74
 10 (9th Cir. 1990); *Witt v. Departmentt of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).⁵ Again, he
 11 did not even cite these cases. With respect to remedy, Chief Judge Walker issued an injunction
 12 granting every gay and lesbian couple in California the right to marry even though the individual
 13 plaintiffs did not seek class certification, nor assert class claims. And he refused to stay
 14 implementation of his sweeping, unprecedented injunction pending appeal, thus requiring the Ninth
 15 Circuit to enter such a stay. *See Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th
 16 Cir. Aug. 16, 2010). Finally, while the case was on appeal, Judge Walker publicly displayed, in a
 17 speech broadcast by C-SPAN, an excerpt from the video recording of the trial, in violation of (1)

18
 19 ⁴ *See Baker v. Nelson*, 409 U.S. 810 (1972); *Citizens for Equal Prot. v. Bruning*, 455 F.3d
 20 859, 871 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982); *Dean*
 21 *v. District of Columbia*, 653 A.2d 307, 308 (D.C. Ct. App. 1995); *Jones v. Hallahan*, 501
 22 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *In re*
 23 *Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010); *Standhardt v. Superior*
 24 *Court of Ariz.*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Singer v. Hara*, 522 P.2d 1187,
 25 1197 (Wash. Ct. App. 1974).

26 ⁵ *See also, e.g., Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80
 27 F.3d 915, 928 (4th Cir. 1996) (en banc); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.
 28 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Scarborough v. Morgan*
County Board of Education, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Found. v. City of*
Cincinnati, 128 F.3d 289, 294 (6th Cir. 1997); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d
 946, 950-51 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989);
Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-*
Cornelison v. Brooks, 524 F.2d 1103, 1114 (10th Cir. 2008); *Rich v. Secretary of the Army*,
 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep’t of Children &*
Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3
 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir.
 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis
 scrutiny to classification based on sexual orientation).

1 his own order placing the video recording under seal; (2) the clear terms of this Court’s Rule 77-3
2 prohibiting the dissemination of trial proceedings outside the courthouse; (3) the longstanding
3 policies of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit
4 prohibiting public broadcast of trial proceedings; (4) his assurances on the record to Proponents that
5 the trial recordings would be used solely in chambers; and (5) the Supreme Court’s prior decision in
6 this case ruling that Chief Judge Walker’s earlier attempt to publicly disseminate the trial
7 proceedings “complied neither with existing rules or policies nor the required procedures for
8 amending them.” *Hollingsworth v. Perry*, 130 S. Ct. at 713.

9 *Third*, juxtaposing the significant risk of injustice to Proponents is Plaintiffs’ inability to
10 show any “special hardship by reason of their reliance on the original judgment.” *See Liljeberg*,
11 486 U.S. at 869. The Ninth Circuit has stayed that judgment pending appeal, *see Perry v.*
12 *Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and thus Plaintiffs
13 cannot credibly claim harm from relying on a judgment that has yet to be implemented. Indeed,
14 any professed reliance on that judgment would be unreasonable and thus not entitled to any weight.

15 In sum, all of these factors, separately and taken together, weigh decisively in favor of
16 vacating the judgment.

17 **B. Upholding the Judgment Will Create a Significant Risk of Injustice in Other**
18 **Cases.**

19 Upholding the judgment here notwithstanding Chief Judge Walker’s disqualification would
20 create a significant risk of injustice in other cases, for it would tacitly approve the Judge’s failure to
21 disclose his direct personal interest in the outcome of the case, and his consequent failure to recuse
22 himself. The judiciary should take pains to avoid creating the impression that it approves—or at
23 least will tolerate—such conduct. As in *Liljeberg*, vacating the judgment “may prevent a
24 substantive injustice in some future case by encouraging a judge ... to more carefully examine
25 possible grounds for disqualification and to promptly disclose them when discovered.” 486 U.S. at
26 868.

27 Additionally, the high-profile nature of this case, its overriding importance to countless
28 people in California and throughout the Country, Chief Judge Walker’s sweeping and anomalous

1 “factual” findings, and his unprecedented and unexplained legal conclusions magnify the risk of
2 injustice in other cases that would result from denying this motion and declining to vacate the
3 judgment. In fact, other federal courts have already relied on Chief Judge Walker’s “factual”
4 findings, *see Dragovich v. United States Dep’t of the Treasury*, --- F. Supp. 2d --- , 2011 WL
5 175502, at *11 (N.D. Cal. Jan. 18, 2011), and his unprecedented legal conclusions, *see RHJ Med.*
6 *Ctr., Inc. v. City of DuBois*, --- F. Supp. 2d ---, 2010 WL 4959879, at *45 n.50 (W.D. Pa. Dec. 7,
7 2010) (citing this case for the proposition under federal law that “strict scrutiny is the appropriate
8 standard of review to apply to legislative classifications based on sexual orientation”). Hence,
9 treating this case as though Chief Judge Walker had no appearance of partiality and no personal
10 interest in the outcome poses a particularly serious risk of spreading injustice to other federal
11 litigation.

12 **C. Upholding the Judgment Will Create a Significant Risk of Undermining the**
13 **Public’s Confidence in Judicial Proceedings.**

14 Declining to vacate the judgment and allowing Chief Judge Walker’s decision to stand
15 would severely undermine the public’s confidence in the judicial system. The Ninth Circuit has
16 repeatedly recognized that when faced with a trial court ruling tainted by the appearance of
17 impartiality, vacatur is the only way to preserve the public’s trust in the judiciary. In *Preston*, for
18 example, the Ninth Circuit, after finding that the trial judge had violated Section 455 by failing to
19 recuse himself, held that “[t]here is no way . . . to purge the perception of partiality in this case
20 other than to vacate the judgment and remand the case to the district court for retrial by a different
21 judge.” 923 F.2d at 735. The *Preston* court then went on to state:

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

28 *Id.* at 735-36 (quotation marks and alterations omitted); *see also Potashnick*, 609 F.2d at 1115
(similar). Similarly, in *United States v. Arnpriester*, 37 F.3d 466, 468 (9th Cir. 1994), the Ninth
Circuit explained that the judicial “process was irreparably flawed when a judge who would

1 reasonably be believed to be biased was the judge who ruled,” and the Court therefore ordered that
2 the case be remanded and “assign[ed] to a different district judge.” *Id.*

3 The need to “purge the perception of partiality” is particularly acute here. *See Preston*, 923
4 F.2d at 735. As the Supreme Court has already recognized, *see Hollingsworth*, 130 S. Ct. at 714,
5 this high-profile case involves a highly divisive subject matter, and it raises nationally important
6 constitutional and public-policy questions. The pall cast by the palpable appearance of judicial
7 partiality upon one of the most prominent and widely publicized constitutional cases in this
8 Country’s history threatens deep and lasting harm to the public’s confidence in our nation’s judicial
9 system. However this case is ultimately resolved, a large segment of the population will be
10 unhappy with the result. In these circumstances, it is especially essential that all concerned have
11 complete confidence in the impartiality of the judges deciding it. We respectfully submit that such
12 confidence is not possible here, and so the judgment must be vacated.

13 CONCLUSION

14 For the foregoing reasons, Proponents respectfully request that this Court vacate the
15 judgment (*see* Doc. # 708 at 138; Doc. # 728) and all prior orders entered in this case on the
16 grounds that the then-presiding judge was disqualified from this action under 28 U.S.C. § 455(b)(4)
17 and 28 U.S.C. § 455(a).

18
19 DATED: April 25, 2011

Respectfully Submitted,

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