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 8 CITY AND COUNTY OF SAN FRANCISCO

9  
 10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA

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

14 Plaintiffs,

15 CITY AND COUNTY OF SAN  
 FRANCISCO,

16 Plaintiff-Intervenor

17 vs.

18 EDMUND G. BROWN JR., in his official  
 19 capacity as Governor of California; KAMALA  
 D. HARRIS, in her official capacity as  
 20 Attorney General of California; MARK B.  
 HORTON, in his official capacity as Director  
 21 of the California Department of Public Health  
 and State Registrar of Vital Statistics;  
 22 LINETTE SCOTT, in her official capacity as  
 Deputy Director of Health Information &  
 23 Strategic Planning for the California  
 Department of Public Health; PATRICK  
 24 O'CONNELL, in his official capacity as Clerk-  
 Recorder for the County of Alameda; and  
 25 DEAN C. LOGAN, in his official capacity as  
 Registrar-Recorder/County Clerk for the  
 26 County of Los Angeles,

27 Defendants,

28 (caption continued on following page)

Case No. 09-CV-2292 JW

**PLAINTIFF-INTERVENOR CITY AND  
 COUNTY OF SAN FRANCISCO'S  
 OPPOSITION TO DEFENDANT-  
 INTERVENORS' MOTION TO VACATE  
 JUDGMENT**

Trial: Jan. 11-27, 2010

Judge: Chief Judge James Ware

Location: Courtroom 5, 17th Floor

1 and

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

9 Defendant-Intervenors.

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## INTRODUCTION

1  
2 Proponents' Motion to Vacate the Judgment on the ground that Chief Judge Walker was  
3 actually biased and appeared to be biased is a baseless post hoc attack on Judge Walker's integrity—  
4 and its timing suggests that it is opportunistic as well as meritless. Ignoring the rule that "recusal  
5 issues must be raised at the earliest possible time after the facts are discovered," *First Interstate Bank*  
6 *of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 989 n.8 (9th Cir. 2000), Proponents waited to  
7 raise an issue about Judge Walker for more than a year after the press reported he was gay and more  
8 than ten months after his same-sex relationship was the subject of press commentary. They waited  
9 until *after* he had ruled against them, *after* he had retired from the bench, *after* their appeal was fully  
10 briefed and argued, and *after* the Ninth Circuit raised serious questions about their standing to appeal.  
11 Their motion is based on innuendo and speculation to which Judge Walker cannot now respond. It is  
12 blatant forum-shopping of the worst kind, seeking a second bite at the apple after the trial judge has  
13 ruled and the Court of Appeals has questioned the viability of their appeal.

14 The untimeliness of the motion is alone sufficient reason to deny it. If Proponents genuinely  
15 believed that being in a "long-term, same-sex relationship" were grounds for disqualifying Chief Judge  
16 Walker, the time to have raised that issue was no later than February 2010, when, as Proponents  
17 themselves admit (Doc. 768 at 14)<sup>1</sup>, the press printed reports of his sexual orientation or, at the very  
18 latest, in June 2010 when the same-sex companion who attends bar functions with him was called to  
19 their attention through further commentary in the press. (*Id.*) Had Proponents raised a concern about  
20 bias at either of those times, the Judge could have addressed their concerns in whatever way he  
21 thought appropriate before ruling on the merits. That they waited until long after he had ruled and  
22 until their ability to challenge that ruling was in question undermines the credibility of Proponents'  
23 claimed concerns and is unfair to the parties and this Court. It is also fatal to their motion:  
24 Proponents' delay in raising their claims of bias until the case was on appeal results in application of  
25 the plain error standard of review—a very stringent standard they cannot come close to meeting. Nor  
26 can Proponents meet the high standard required to obtain vacatur of judgment pursuant to Federal Rule  
27 of Civil Procedure 60(b)(6).

28 <sup>1</sup> Page references to the record are to ECF pagination.

1 Considered on its scant merits, Proponent's motion boils down to the assertion that a gay judge  
2 cannot fairly decide whether allowing gay people to marry will, as they contend, redefine and destroy  
3 the institution of marriage for "everyone else" and do serious harm to children, while any judge who is  
4 a member of the heterosexual "everyone else," including married people and parents of young  
5 children, can readily do so. Proponents' argument applies an extreme double standard: they presume a  
6 gay person cannot be impartial while heterosexuals of almost all stripes<sup>2</sup> can and will be.

7 Proponents' myopic view of judges and jurors who are part of a minority group—as being  
8 defined by one trait alone and unable to transcend their affiliation with the group and fulfill their  
9 obligations to decide cases based solely on the facts and law presented—is an insult that has been  
10 rejected emphatically time and again in motions to disqualify judges and dismiss jurors for cause  
11 based on race, ethnicity, gender, religious affiliation, and participation in civic, professional and even  
12 advocacy organizations. These judges, like all other judges, are presumed to be impartial.

13 To avoid the ineluctable result of applying these cases, Proponents argue that their motion is  
14 not based on Judge Walker's status as a gay person, but rather on his "committed,"<sup>3</sup> long-term, same-  
15 sex relationship" and certain of his rulings that they characterize as "unprecedented," "peremptory,"  
16 and "irregular." Doc. 768 at 10. Further, Proponents argue, Chief Judge Walker was duty-bound to  
17 disclose the existence and duration of his relationship, and his failure to do so is further evidence  
18 supporting recusal. Their effort to mask what is really a sexual orientation-based recusal motion as  
19

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20 <sup>2</sup> Proponents also sought unsuccessfully to recuse on grounds of bias and prejudice Ninth  
21 Circuit Judge Stephen Reinhardt who is married to a woman and presumably therefore heterosexual,  
22 asserting that his wife's position with the ACLU rendered him unable to be impartial. *Perry v.*  
*Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011). That this is Proponents' second motion seeking  
disqualification of a judge (or vacatur in this instance based on disqualification) makes their judge-  
shopping all the more apparent.

23 <sup>3</sup> Proponents mischaracterize the article they rely on as stating that Judge Walker "disclosed to  
24 the press on April, 6, 2011, that he is gay and that he has been *in a committed relationship* for more  
25 than 10 years." Doc. 768 at 10 (emphasis added). They then repeat this misstatement throughout their  
26 brief. *See id.* at 10, 11, 13, 16, 17, 18, 19. The press article states simply that Judge Walker "said he  
27 was in a 10-year relationship with a physician." Whether by "committed" Proponents mean to suggest  
28 Judge Walker and his partner have agreed to support each other or that they intend to remain together  
for life or something else is not clear, and whether or not their characterization is accurate is not  
discernable from the article. The City does not believe it makes a difference to the outcome of this  
motion whether Judge Walker's relationship is "committed," and if so, in what respects. However,  
Proponents' repeated overstatements reflect a lack of forthrightness that is particularly unfortunate in  
the context of a motion such as this one.

1 something more than that—to portray the issue as "sexual orientation-plus"—should be rejected for  
2 reasons similar "trait-plus" arguments have been rejected in disqualification motions rooted in race or  
3 religion: the claimed "plus" factors are a makeweight which, if accepted, would result in the recusal of  
4 almost any minority judge. Being gay, by definition, indicates an inclination to form relationships  
5 with people of the same sex. Thus the fact that Chief Judge Walker was in a same-sex relationship is  
6 indistinguishable from the defining characteristic of sexual orientation. Moreover, the duration of a  
7 relationship is not a proxy for whether a couple intends to or wishes to marry. Perhaps most  
8 importantly, even if Judge Walker could be shown or presumed to have an interest in marrying his  
9 same-sex partner, the case law holds such an interest is not sufficient to create an actual bias or an  
10 appearance of bias under the recusal statutes. It is well established that "an interest which a judge has  
11 in common with many others in a public matter is not sufficient to disqualify him." *United States v.*  
12 *Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987) (superseded by statute on other grounds) (quoting *In*  
13 *re City of Houston*, 745 F. 2d 925, 929-30 (5th Cir. 1984) (internal quotation marks omitted)). And  
14 since neither his gay identity nor his gay relationship are grounds for disqualification, he had no duty  
15 to disclose them (although he might well have chosen to do so and to discuss their irrelevance if  
16 Proponents had given him that opportunity by raising the issue while he was still sitting).

17 Finally, Proponents' argue various of Judge Walker's rulings are so "irregular,"  
18 "unprecedented," and "peremptory" as to indicate bias. These arguments are both wrong on the merits  
19 and, regardless, irrelevant to a motion such as this. Again, the courts have repeatedly rejected such  
20 litanies of actions and rulings by a judge claimed to be so wrong as to reflect prejudice, holding that  
21 they fail to establish bias, actual or in appearance. A court's rulings, either alone or in combination  
22 with traits such as race, gender or religion, are insufficient to require recusal as a matter of law.  
23 Disagreements with a judge's rulings are matters for consideration on appeal to the circuit court, not  
24 grounds for disqualification of the judge that made them.

25 Though the courts have consistently refused to impugn judges' integrity—their ability to decide  
26 cases fairly and impartially—based on criteria such as race, religion and gender, Proponents have  
27 impugned and would have this Court now impugn Judge Walker's integrity based, fundamentally, on  
28 his sexual orientation. Their willingness to make this argument without as much as mentioning this

1 extensive case law is emblematic of how unworthy of serious debate this motion is. For all of the  
2 reasons the courts have consistently rejected motions for disqualification based on bias alleged to arise  
3 from the judge's race, religion, gender, social relationships and factors closely related to those criteria,  
4 this Court should likewise reject Proponents' claim that Chief Judge Walker's sexual orientation  
5 required his recusal and compels that his ruling be vacated in this case.

#### 6 ARGUMENT

#### 7 **I. BECAUSE PROPONENTS' MOTION IS UNTIMELY, THEIR MOTION IS TESTED** 8 **UNDER THE PLAIN ERROR STANDARD AND THEY CANNOT OBTAIN THE** 9 **RELIEF OF VACATUR.**

10 There are two avenues available to disqualify a district judge. A litigant may move for the  
11 judge's recusal before trial upon filing a timely affidavit stating facts sufficient on their face to show  
12 actual personal bias against that party or in favor of another party pursuant to 28 U.S.C. § 144. The  
13 affidavit must "be accompanied by a certificate of counsel of record stating that it is made in good  
14 faith." 28 U.S.C. § 144. If such a motion is timely filed with the required affidavit and certificate of  
15 counsel, the judge may either recuse himself or, if he believes the affidavit to be legally insufficient,  
16 deny the motion. The filing of a § 144 motion triggers the judge's responsibility *sua sponte* under 28  
17 U.S.C. § 455 to consider all facts known to him that are pertinent to a claim of bias or appearance of  
18 bias and to recuse himself if warranted. *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980).

19 A litigant may also move pursuant to 28 U.S.C. § 455 for the judge's recusal. Section 455  
20 contains no requirement of an affidavit. However, neither is a judge faced with a § 455 motion bound  
21 by factual allegations made in the moving party's papers. *Sibla*, 624 F.2d at 867-68. Under § 455,  
22 recusal may be had where the judge's impartiality may reasonably be questioned (§ 455(a)) or where  
23 the judge "knows that he . . . has [an] interest that could be substantially affected by the outcome of the  
24 proceeding" (§ 455(b)(4)). Section 455 imposes a duty on a judge to be aware of sources of bias; it is  
25 intended to be self-enforcing. *Sibla*, 624 F.2d at 867-68. Section 455 contains no requirement that the  
26 accused judge refer the motion to another judge. *Id.* at 868. Under either statute, the test for  
27 disqualification is "whether . . . there are reasonable grounds for finding that the judge could not try  
28 the case fairly, either because of the appearance or the fact of bias or prejudice." *United States v.*  
*Conforte*, 624 F.2d 869, 881 (9th Cir. 1980). The Court of Appeals reviews a district court's denial of

1 a motion for disqualification for abuse of discretion, *United States v. Rogers*, 119 F.3d 1377, 1380 (9th  
2 Cir. 1997), unless (as here) the motion is made for the first time on appeal, in which case the review is  
3 for plain error. *Weiss v. Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302, 304 (9th  
4 Cir. 1983).

5 Timeliness is required for motions brought under either § 144 or § 455. As the Ninth Circuit  
6 observed in *United States v. Rogers*, 119 F.3d at 1380:

7 As we have often stated, a party having information that raises a possible  
8 ground for disqualification cannot wait until after an unfavorable judgment  
9 before bringing the information to the court's attention. [*E&J Gallo Winery v.*  
10 *Gallo Cattle Co.*, 119 F.3d 1280, 1295 (9th Cir. 1992).] "A defendant cannot  
11 take his chances with a judge and then, if he thinks that the sentence is too  
12 severe, secure a disqualification and a hearing before another judge." *United*  
13 *States v. Branco*, 798 F.2d 1302, 1304 (9th Cir. 1986) (quoting *Taylor v. United*  
14 *States*, 179 F.2d 640, 642 (9th Cir.), *cert. denied*, 339 U.S. 988, 94 L. Ed. 1389,  
15 70 S. Ct. 1010 (1950)). Absent a timeliness requirement, parties would be  
16 encouraged to "withhold recusal motions, pending a resolution of their dispute  
17 on the merits, and then if necessary invoke section 455 in order to get a second  
18 bite at the apple." *E. & J. Gallo*, 967 F.2d at 1295. (*Id.*)

19 The fact that § 455 is meant to be self-enforcing does not excuse a party who believes there are  
20 grounds for disqualification but fails to raise them until after the judge has ruled against her. *E&J*  
21 *Gallo Winery*, 119 F.3d at 1295. "A disqualification motion filed after trial and judgment is generally  
22 considered untimely." *Branco*, 798 F.2d at 1304 (9th Cir. 1986) (internal quotations and citation  
23 omitted). "Delay in filing a motion for disqualification may be excused," but only "if good cause is  
24 shown for why the motion was not timely filed." *Id.* Good cause cannot be shown if the information  
25 that is the basis for the claim of bias or appearance of bias was known to or could have been  
26 discovered by the party seeking disqualification well before the motion for disqualification or other  
27 relief based on disqualification was made. *See id.* at 1304-05.

28 Where the court entertains a claim of disqualification raised for the first time on appeal, the  
party claiming bias or prejudice "will bear a greater burden on appeal in demonstrating that the judge  
committed reversible error in failing to grant recusal under section 455. In those circumstances, the  
reviewing court must determine whether the district court erred in failing sua sponte to recognize  
obvious grounds for recusal under section 455 and to grant recusal pursuant to that section." *Sibla*,  
624 F.2d at 868 (internal citations omitted); *see also Weiss*, 719 F.2d at 304; *Conforte*, 624 F.2d at

1 880. If the moving party cannot show good cause or extraordinary circumstances, a reviewing court  
2 applies the plain error test to evaluate the trial judge's failure to *sua sponte* recuse himself. *Weiss*, 719  
3 F.2d at 304. The plain error test is extremely demanding; it is the "very pinnacle of fault" and relief  
4 must be "necessary to prevent a miscarriage of justice." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174,  
5 1193 (9th Cir. 2002).

6 Here, Proponents concede that they were on notice in February 2010—prior to the close of the  
7 trial and *six months prior to entry of judgment* in this case<sup>4</sup>—of press reports that Chief Judge Walker  
8 is gay. Doc. 768 at 14. Proponents did not raise a concern with the Court that Judge Walker might be  
9 biased because of his sexual orientation or for any other reason at that time or any time thereafter.  
10 Although by February 2010, if not earlier, they knew or had reason to believe he was gay, they did not  
11 ask him to provide any information about his relationship status or any matter related to it, although  
12 they admit that an article published by the *Los Angeles Times* shortly after closing arguments in June  
13 2010 reported that Judge Walker is "openly gay" and "attends bar functions with a companion, a  
14 physician." *Id.* The same article states Proponents' lawyers "refused to discuss" Judge Walker's  
15 sexual orientation, implying they were asked for their view about it. Although Judge Walker had not  
16 yet issued his decision at that point, Proponents *still* remained silent and made no motion under the  
17 recusal statutes.

18 As we explain in Section II.B., *infra*, Proponents' claim that the essential basis for their motion  
19 is not that Chief Judge Walker is gay but that he is in a same-sex relationship rings hollow. But even  
20 if Judge Walker's same-sex relationship added anything to their claim of bias, Proponents could have  
21 raised the issue of his relationship status once they learned he was gay, and in any event when the  
22 press reported that he had a same-sex "companion" who attended professional functions with him,  
23 which was still six weeks *before* he issued his ruling on the merits of the case. Recusal is required  
24 only "if a reasonable person, *knowing all the circumstances*, would expect the judge to have actual  
25 knowledge of his interest or bias in the case." *Sao Paulo State of Federative Republic of Brazil v.*

26 \_\_\_\_\_  
27 <sup>4</sup> The trial was conducted from January 10 through January 27, 2010, Proponents submitted  
28 their final documentary evidence in April 2010, and the court held closing arguments on June 16,  
2010. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Chief Judge Walker  
issued the court's final decision in the case on August 4, 2010. *Id.*

1 *American Tobacco Co., Inc.*, 535 U.S. 229, 232-33 (2002). As the Supreme Court has made clear, the  
2 concerns of a party raising a disqualification issue can be allayed by the court through appropriate  
3 clarification, *id.* at 233, as Chief Judge Walker could have done if he felt it appropriate if Proponents  
4 had raised this issue in a timely fashion.<sup>5</sup> But Proponents have shown no good cause or extraordinary  
5 circumstances that would justify their waiting to raise the issue until after judgment was entered.  
6 Much less have they shown any justification for their failure to raise the issue for a full *eight months*  
7 *after entry of judgment*, by which time their appeal had been fully briefed by the parties and amicus  
8 curiae in the Ninth Circuit, oral arguments had been held, their standing had been questioned by the  
9 Ninth Circuit, the Ninth Circuit had certified questions related to standing to the California Supreme  
10 Court, and briefing was nearly complete in the certification proceedings. Indeed, their timing strongly  
11 suggests that they filed their motion as a last-ditch effort to undo a ruling they do not like, in light of  
12 their dim prospects on appeal.

13 A recusal motion in these circumstances is highly disfavored because it raises the specter that  
14 the party does not fear bias at all but simply dislikes the outcome of the case and would prefer another  
15 bite at the apple. *Branco*, 798 F.2d at 1304-05. Even under the objective "impartiality might  
16 reasonably be questioned" standard of § 455(a), the Senate Judiciary Committee Report warned judges  
17 not to grant disqualification motions brought for such strategic, rather than legitimate, reasons:

18 [In] assessing the reasonableness of a challenge to his impartiality, each judge  
19 must be alert to avoid the possibility that those who would question his  
20 impartiality are, in fact, seeking to avoid the consequences of his expected  
21 adverse decision. . . . Nothing in the proposed legislation should be read to  
22 warrant the transformation of a litigant's fear that a judge may decide a question  
23 against him into a "reasonable fear" that the judge will not be impartial.  
24 Litigants . . . are not entitled to judges of their own choice. (S. Rep. No. 93-419,  
25 93d Cong., 1st Sess. 1973, p. 5.)

26 The timing of Proponents' motion, coupled with their earlier baseless attempt to recuse Judge Reinhart  
27 based on his wife's affiliation with the ACLU, makes plain that their purpose is not to achieve  
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25 <sup>5</sup> We do not suggest that Chief Judge Walker would have been required to make any  
26 disclosures about his personal life. Since, as we discuss *infra* at 19, interests that are widely shared  
27 with a broad segment of society are insufficient as a matter of law to create bias, either actual or  
28 apparent, then no interest that Chief Judge Walker may have in marriage rights could disqualify him.  
However, many judges faced with such motions take the opportunity to supply or clarify facts and  
explain why there is no basis for recusal.

1 impartiality, but to avoid an unfavorable outcome. As we discuss in the next section, they cannot  
2 show it was "plain error" for Chief Judge Walker to fail *sua sponte* to recuse himself.

3 Moreover, Proponents' failure to raise the issue of Chief Judge Walker's possible bias, even  
4 when they were on notice of his sexual orientation and the presence of a "companion" in his life,  
5 means that even if disqualification were appropriate here for the appearance, Proponents cannot obtain  
6 vacatur of the judgment. As the Supreme Court indicated in *Liljeberg v. Health Services Acquisition*  
7 *Corporation*, 486 U.S. 847 (1988), whether a judgment may be vacated in a case where the judge  
8 should have recused himself is controlled by Federal Rule of Civil Procedure 60(b). *Id.* at 863.  
9 Proponents rely on *Liljeberg* for their entitlement to vacatur, Doc. 768 at 20, but *Liljeberg* holds that  
10 vacatur is not available under the extraordinary circumstances prong of Rule 60(b)(6) where the  
11 moving party has shown "neglect or lack of due diligence," 486 U.S. at 863 n.11, as Proponents have  
12 here by failing to raise the issue until long after they were on notice of Chief Judge Walker's  
13 relationship and after judgment was issued and the appeal was well under way. Nor can Proponents  
14 rely on Rule 60(b)(1), which offers relief from judgment in a case of "mistake, inadvertence, surprise,  
15 or excusable neglect," since Proponents offer no excuse at all for their failure to raise this issue by  
16 February 2010 or June 2010. Finally, as we demonstrate *infra* at 19, Proponents categorically cannot  
17 show a statutory violation to support vacatur, as they contend. Doc. 768 at 20. The remedy of vacatur  
18 is simply unavailable to them here.

19 **II. PROPONENTS HAVE NOT MET AND CANNOT MEET THEIR BURDEN TO**  
20 **DEMONSTRATE BIAS OR AN APPEARANCE OF BIAS UNDER THAT SECTION.**

21 The standard that Proponents must meet here—that Chief Judge Walker's failure to disclose to  
22 them his personal life or *sua sponte* recuse himself was plain error that resulted in manifest injustice to  
23 them, *see supra* at 6—is not met. Indeed, Proponents have failed to carry the lesser but still  
24 "substantial burden" to overcome the presumption of judicial impartiality that would have applied  
25 even had they timely moved to disqualify Chief Judge Walker. *See Torres v. Chrysler Fin. Co.*, 2007  
26 U.S. Dist. LEXIS 83154 (N.D. Cal. 2007); *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1021-22  
27 (N.D. Cal. 2001). As discussed below, well established case law about the nondisqualifying effects of  
28

1 minority group membership makes clear that Proponents cannot meet their burden under *any* test that  
2 has been applied pursuant to § 144 or § 455.

3 **A. The Courts Have Categorically Rejected Claims That Characteristics Like Sexual**  
4 **Orientation Are Grounds For Bias Or An Appearance Of Bias.**

5 The case law could not be more clear that a judge's membership in a group is not a basis for  
6 disqualification in a case that affects that group. Women judges are not disqualified from hearing  
7 cases involving claims of sex discrimination. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y.  
8 1975). A Catholic judge may hear a case challenging laws restricting abortion notwithstanding her  
9 Church's strong stance against abortion, *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399  
10 (1995) (Noonan, J.), or a case in which an order of Catholic priests is a defendant. *Poplar Lane Farm*  
11 *LLC v. The Fathers of Our Lady of Mercy*, 2010 U.S. Dist. LEXIS 85233 (W.D.N.Y. Aug. 19, 2010).  
12 A judge who is Jewish is not disqualified from adjudicating cases involving criminal prosecution of  
13 acts of violence and intimidation motivated by antipathy toward Israel or directed at Jews, *United*  
14 *States v. El-Gabrowni*, 844 F. Supp. 955 (S.D.N.Y. 1994); *United States v. Nelson*, 2010 U.S. Dist.  
15 LEXIS 63814 (E.D.N.Y. June 28, 2010), or cases challenging restrictions on head wear in  
16 interscholastic sports that impinge on Orthodox Jews' exercise of their faith. *Menora v. Illinois High*  
17 *School Association*, 527 F.Supp. 632 (N.D. Ill. 1981). Mormon judges may hear a case affecting  
18 proposed constitutional amendments to which the Mormon Church is strongly and publicly opposed,  
19 *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981), or one that purports to challenge the Mormon  
20 "theocratic power structure in Utah." *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984). A judge  
21 who once headed a segregated, *i.e.*, whites only, bar association may hear a case challenging the  
22 administration of the state's bar exam on the grounds that it discriminated against African Americans.  
23 *Parrish v. Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975). A judge who was rendered seriously  
24 disabled in an automobile accident may hear a case involving the safety of automobiles. *United States*  
25 *v. Fiat Motors of North America*, 512 F.Supp. 247 (D.D.C. 1981). Judges who are African American  
26 are not recused from hearing cases involving the Ku Klux Klan, *Vietnamese Fishermen's Association*  
27 *v. Knights of the Ku Klux Klan*, 518 F.Supp. 1017 (S.D. Tex. 1981), or from civil rights cases  
28 involving allegations of race discrimination against African Americans, *United States v. Alabama*, 828

1 F.2d 1532 (11th Cir. 1987); *Pennsylvania v. Local Union 542, International Union of Operating*  
2 *Engineers*, 388 F.Supp. 155 (E.D. Pa. 1974), or from reverse discrimination cases that challenge  
3 promotion policies that are claimed to disadvantage whites. *Baker v. City of Detroit*, 458 F. Supp. 374  
4 (E.D. Mich. 1978). Nor does serving on the board of a civic organization dedicated to improving a  
5 city necessitate recusal of a judge in a case involving that city, *Sexson v. Servaas*, 830 F. Supp. 475  
6 (S.D. Ind. 1993), or being a member of the NRA require dismissal for cause of a juror in a case  
7 involving gun control laws. *United States of America v. Salamone*, 800 F.2d 1216 (3rd Cir. 1986).  
8 African American, Latino and Jewish jurors may hear a civil rights claim against a group of white  
9 "skinheads." *United States v. Greer*, 968 F.2d 433 (5th Cir. 1992).

10 These cases demonstrate that a judge's background and associations, religious or otherwise,  
11 are not grounds for finding bias or an appearance of bias. *Paschall v. Mayone*, 454 F. Supp. 1289,  
12 1300 (S.D.N.Y. 1978) (and cases cited therein). In all of these situations, the courts have rejected  
13 claims of actual bias and appearance of bias and declined to disqualify themselves or other judges for  
14 the simple reason that inferring bias based on a judge's affiliation with those with whom he or she  
15 shares beliefs, a history or a perspective would be antithetical to our system of justice. It is offensive  
16 and "demeaning" to "lump all Jews [or members of any other group] as fungible." *Menora*, 527 F.  
17 Supp. at 635, 637. Indeed, to treat background or group affiliation as indicia of or creating an  
18 appearance of bias would directly contradict one of our nation's core principles: "that the Government  
19 must treat citizens as individuals, not as simply components of a racial, religious, sexual or national  
20 class." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (internal  
21 quotations and citations omitted). Exclusion of even a single juror based on such criteria sends a  
22 "message . . . to all those in the courtroom, and all those who may later learn of the discriminatory act,  
23 [] that certain individuals, for no reason other than [those traits], are presumed unqualified . . . to  
24 decide important questions upon which reasonable persons could disagree" and "undermines public  
25 confidence in the fairness of the system." *J.E.B. v. Alabama*, 511 U.S. 127, 142 & n.13 (1994). The  
26 message can only be amplified when a judge is presumed unable to be impartial based on such criteria.

27 Moreover, to assume that a black judge cannot set aside his personal beliefs and decide a case  
28 about racial prejudice, that a woman judge cannot apply the law fairly when it comes to issues

1 concerning women's right to autonomy and equal treatment, or that a Mormon or Jewish or Catholic  
2 judge cannot carry out his duty to apply a law that may implicate his or her religious beliefs would be  
3 highly hypocritical, since for centuries white judges, male judges and Protestant judges have been  
4 presumed impartial when it comes to the very same matters. *Pennsylvania v. Local Union 542*, 388  
5 F.Supp at 177. Until very recently no openly gay and lesbian person was appointed to the federal  
6 bench, and it is still the case that the number of gay judges on state court benches is exceedingly small.  
7 Thus most or all of the judges and justices who have heard and decided the many cases involving the  
8 civil rights of gay men and lesbians have been heterosexual or at least not openly gay. *See, e.g.*,  
9 *Bowers v. Hardwick*, 478 US 186 (1986); *Lawrence v. Texas*, 539 U.S. 567; *Romer v. Evans*, 517 U.S.  
10 620 (1996); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Log Cabin*  
11 *Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010). This has even been true when the  
12 rights of gay people were alleged to be pitted against the rights of heterosexuals and their children.  
13 *See Lawrence*, 539 U.S. at 2497 (Scalia, J., dissenting) ("Many Americans do not want persons who  
14 openly engage in homosexual conduct as partners in their business, as scoutmasters for their children,  
15 as teachers in their children's schools, or as boarders in their home. They view this as protecting  
16 themselves and their families from a lifestyle that they believe to be immoral and destructive.");  
17 *Romer*, 517 U.S. at 645, 651-52 (Scalia, J., dissenting) (referring to the "problem" posed by "the  
18 introduction into local schools of books teaching that homosexuality is an optional and fully  
19 acceptable 'alternative life style'" and homosexuals' exercise of their "disproportionate" political power  
20 "to achiev[e] not merely a grudging social toleration, but full social acceptance, of homosexuality,"  
21 equating "the perceived social harm of homosexuality" to "the perceived social harm of polygamy,"  
22 and describing the harm caused to those who view opposite-sex marriage as the ideal and hold  
23 "traditional attitudes" from treating their negative views toward homosexuality as bigotry.).

24 In all of these situations, members of minority races, religions and sexual orientations, as well  
25 as women for decades or centuries had to "accept the fact of their manifest absence from the federal  
26 judicial process," *Pennsylvania v. Local Union 542*, 388 F. Supp. at 177, and the reality that all  
27 judicial decisions about their civil rights would be made by judges who were non-minorities and male.  
28 Perhaps not surprisingly, white judges do not appear to have been concerned that they might be unable

1 to decide the civil rights of other white people who claimed that laws designed to address racial  
2 discrimination deprived whites of their civil rights. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306  
3 (2003); *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2006);  
4 *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527 (1982); *Regents of the University of California*  
5 *v. Bakke*, 438 U.S. 265 (1978); *Reitman v. Mulkey*, 387 U.S. 369 (1967). The proposition that a  
6 person's *minority* race or *homosexual* orientation renders *them* partial and unable to hear cases  
7 regarding their own or other groups' civil rights when no such inference is drawn for white or  
8 heterosexual judges would, if accepted, "amount to, in practice, a *double standard* within the federal  
9 judiciary." *Pennsylvania v. Local Union 542*, 388 F.Supp. at 165 (emphasis in original).

10 The courts have rejected such a double standard and recognized that disqualifying minority  
11 judges from major civil rights litigation solely because of their minority status is "intolerable" and will  
12 "not [be] countenance[d]." *United States v. Alabama*, 828 F.2d at 1542. Such motions amount to "a  
13 charge that the judge is [himself] racially or ethnically biased and is violating the judge's oath of  
14 office." *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998); see also *Liteky*  
15 *v. United States*, 510 U.S. 540, 552 (1994) ("bias," "prejudice" and "partiality" are pejorative terms  
16 "applied only to judicial predispositions that go beyond what is normal and acceptable"). The courts  
17 have also recognized that in order to avoid a double standard, if minority judges *were* disqualified  
18 then judges of the majority race or religion could not hear civil rights cases either, and the rule of  
19 necessity would preclude disqualification. *See, e.g., Blank*, 418 F. Supp. at 4 ("Indeed, if background  
20 or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court  
21 could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex,  
22 often with distinguished law firm or public service backgrounds.")

23 To presume that a gay judge will not fairly and impartially evaluate a claim involving gay  
24 people's civil rights and will favor the gay over the non-gay party or position would be as intolerable  
25 as making similar assumptions with respect to judges who are racial and ethnic minorities, women,  
26 Jews, Catholics and members of other social, political or civic organizations. It would treat the gay  
27 judge, and him or her alone, as simply a "component[] of a [sexual orientation] class" and not as an  
28 individual. And it would be duplicitous in the context of decades of decisionmaking by scores of

1 heterosexual judges all of whom have been presumed impartial in cases involving the rights of gay  
2 people and attempts by heterosexual people to deny those rights.

3       Such a presumption would be particularly hypocritical in this case in which, by Proponents'  
4 own account, allowing gay people to marry would produce a range of social ills that would adversely  
5 affect heterosexual marriage, children and society at large. If, as Proponents have posited, allowing  
6 gay couples to marry will "redefine," "deinstitutionalize" and ultimately destroy marriage for  
7 "everyone else," how can a heterosexual judge who is married or desires to marry be presumed any  
8 more impartial than a gay judge? And if, as Proponents again have advocated, allowing gay couples to  
9 marry will result in grave harms to children, no judge who is a parent or grandparent may be presumed  
10 impartial since the outcome of the case could gravely impact their close family members. And finally,  
11 if as Proponents have argued, allowing gay couples to marry threatens the religious freedom of those  
12 whose churches teach that homosexuality is immoral and sinful, then we cannot presume the  
13 impartiality of a judge who is Catholic, Orthodox Jew, Mormon, Baptist or a member of many other  
14 Protestant sects. In short, Proponents have insisted throughout the Prop 8 campaign and the trial of  
15 this case that marriage equality is a battle between the interests of gay people and the interests of  
16 "everyone else." And if gay judges and judges who comprise "everyone else" are all presumed biased,  
17 no one will be left to hear and decide this case.

18       The case law discussed above is not new. This consistent line of federal courts decisions  
19 rejecting recusal motions based on such traits and affiliations is nearly four decades in the making.  
20 The courts long ago made plain that a person's race or gender or religion "com[es] nowhere near the  
21 standards required for recusal" *Blank v. Sullivan & Cromwell*, 418 F. Supp. at 4; *see also Menora*,  
22 527 F.Supp. at 634 ("What is critical here, . . . are not these facts as to religious beliefs, but rather the  
23 poverty of IHSA's legal position in seeking to place them in issue"); *El-Gabrownny*, 844 F. Supp. at  
24 962 (claim that judge should recuse himself because he was Jewish and movant suspected he had ties  
25 to political Zionism" is not based on race or sex or the Mormon religion, but . . . is the same rancid  
26 wine in a different bottle.") Indeed, so clear is the rule that criteria such as racial and ethnic heritage,  
27 religion and gender are not a basis for accusing the judge of bias or appearance of bias that litigants  
28 have been sanctioned for filing such motions. *MacDraw, Inc.*, 138 F.3d at 37.

1 Proponents are no doubt aware of these precedents, which is why they deny that their motion is  
2 based on Chief Judge Walker's sexual orientation alone. Doc. 768 at 13 ("we are *not* suggesting that a  
3 gay or lesbian judge could not sit on this case"). In an effort to take themselves out of this line of  
4 authority Proponents claim that their motion is instead grounded in "Chief Judge Walker's long-term  
5 committed relationship, his failure to disclose that relationship at the outset of the case, his failure to  
6 disclose whether he has any interest in marriage should his injunction be affirmed, and his actions over  
7 the course of this lawsuit." Proponents' attempt to cloak their sexual orientation-based recusal motion  
8 in other clothing ultimately must fail, for the same reasons similar motions have been repeatedly  
9 rejected with respect to judges with other traits that are impermissible bases for disqualification: the  
10 "plus factors" asserted are closely connected to the traits at issue and add no basis for recusal beyond  
11 the prohibited trait. *See, e.g., United States v. El-Gabrowni*, 844 F. Supp. 955 (alleged relationships  
12 of judge's family members to State of Israel and ties to political Zionism and prior rulings defendant  
13 claimed were so unjustified as to raise inference that they stem from bias); *Vietnamese Fishermen's*  
14 *Association*, 518 F.Supp. at 1020 (types of cases judge handled as a practicing attorney prior to  
15 becoming a judge); *Idaho v. Freeman*, 507 F. Supp. 706 (Mormon Church's politically active  
16 opposition to Equal Rights Amendment, Church's institution of excommunication of leader of group  
17 supporting ERA, fact that numerous newspaper editorialists were questioning judge's impartiality,  
18 judge's former position as Regional Representative of the Mormon Church); *Blank*, 418 F. Supp. 1  
19 (judge's prior rulings in the case and manner of issuing such rulings, comments attributed to judge  
20 regarding crippling effects of discrimination and fact that she represented blacks who suffered race  
21 discrimination during her legal career); *Pennsylvania v. Local Union 542*, 388 F. Supp. 1 (African  
22 American Judge's identification with causes of blacks and the social injustices caused to them,  
23 personal and emotional commitments to civil rights causes of the black community, speech judge  
24 made to historical association focused on Afro-American life and history criticizing Supreme Court  
25 decisions involving racial discrimination, and use of the pronoun "we" in the course of the speech);  
26 *United States v. Nelson*, 2010 U.S. Dist. LEXIS 63814 (judge's alleged close relationship with head of  
27 an organization that allegedly brought about the prosecution of the crimes at issue, fact that judge  
28 previously was an Assistant U.S. Attorney).

1           There can be no doubt that Proponents' motion is based at least in part on Judge Walker's  
2 sexual orientation since Proponents do not suggest that any judge with a long-term relationship would  
3 have to recuse herself from the case. Rather, the fact that Judge Walker had, and according to  
4 Proponents should have disclosed," a long term *same-sex* relationship, is the crux of their concern that  
5 he cannot be impartial. It is this relationship which in Proponents' view requires the Court to infer that  
6 he has "a direct personal interest" in being permitted to marry his partner. Doc. 768 at 10 ("Given that  
7 Chief Judge Walker was in a committed, long-term, same-sex relationship throughout this case (and  
8 for many years before the case commenced), it is clear that his 'impartiality might reasonably [have  
9 been] questioned' from the outset."); *see also id.* 9-10. At least one court has held that a motion "based  
10 even in part on impermissible criteria relating to a judge's background or affiliations shifts the burden  
11 to the defendant to prove that the other grounds offered to justify the motion are not pretextual."  
12 *United States v. Nelson*, 2010 U.S. Dist. LEXIS 63814 at \*9. As discussed in Parts II(B)-(D) below,  
13 none of the factors Proponents assert in addition to Judge Walker's sexual orientation creates a basis  
14 for finding either that he was or that he appeared to be impartial.

15           **B. Proponents Have Shown No More Than That Judge Walker Has The Same  
16 Interest All Gay Persons Have In Being Free From Discrimination, And It Is Well  
17 Established That Interests Shared By A Broad Group Of People Are Not Grounds  
18 For Disqualification.**

18           The claim that Judge Walker's relationship renders him unable to be impartial implies that gay  
19 judges, unlike other judges, must be monks or hermits in order to be impartial in a gay civil rights  
20 case. After all, the reason gay people are disdained and treated differently is precisely because of their  
21 relationships. To be or desire to be in a same-sex relationship is to be gay; to be gay and to be in a  
22 same-sex relationship are for all intents and purposes the same. As Plaintiffs' and the City's expert on  
23 social psychology, sexual orientation and stigma, Dr. Gregory Herek (Trial Tr. 2022), testified at trial:

24                   "[S]exual orientation is at its heart a relational construct, because it is all about a  
25 relationship of some sort between one individual and another, and a relationship  
26 that is defined by the sex of the two persons involved, whether male and female,  
27 male and male, female and female. . . . "[W]hether we are talking about  
28 behavior or attraction or identity, it is really about the fundamental relationships  
that people form to meet their needs for intimacy and attachment."

27           Trial Tr. 2027. Given this reality, under Proponents' theory, in order to be fair in a case about gay civil  
28 rights, gay people either must either be celibate and devote themselves to the law alone or, in the

1 alternative, fit the gay stereotype Proponents relied on at trial, of someone who leads a promiscuous  
2 "lifestyle" and is uninterested in enduring relationships. *See, e.g.* Trial Tr. 616-18. Stereotypes aside,  
3 how does having a same-sex relationship distinguish Judge Walker from the vast majority of gay  
4 people? To ask the question is to answer it.

5 The law of recusal does not require judges to forego personal and social lives, as eminent  
6 authority indicates:

7 A judge must have neighbors, friends, and acquaintances, business and social  
8 relations, and be part of his day and generation. . . . The ordinary results of such  
9 associations and the impressions they create in the mind of the judge are not the  
10 personal bias or prejudice to which the recusal statute refers.

11 *Pennsylvania v. Local 542*, 388 F. Supp. at 157 (Higginbotham, J.).

12 The eminent legal scholar and teacher Louis Schwartz once explained: "To be  
13 only a lawyer is to be half a lawyer." The same could be said of judges. Taking  
14 the bench is a form of public service which does not operate to exclude all other  
15 forms of social and civil life. To adopt the [contrary] view . . . is not only  
16 inadvisable, it is dangerous. What could be more inimical to the sound  
17 application of contemporary standards of justice than to banish those who must  
18 administer it to an uncontemporary existence?

19 *Sexson*, 830 F.Supp. at 482 (Barker, J.).

20 Nor does being in a relationship fundamentally change one's interest in the subject matter of  
21 this case. All gay people share an interest in being afforded the same basic freedoms heterosexuals  
22 already enjoy, including the freedom to decide for themselves whether and whom to marry. Even  
23 individual gay people who do not now desire to marry have an interest in being allowed, as every  
24 heterosexual person is readily allowed, to change their mind when they meet that person who becomes  
25 the love of their life. And every gay person—regardless of relationship status—has an interest in the  
26 elimination of laws like Proposition 8 that treat gay relationships, and thus by definition gay people, as  
27 different and inferior. Such laws stigmatize all gay people whether coupled or single. *See, e.g.*, Trial  
28 Tr. 818-21; 2051-54.

The duration of a person's relationship does not change this; people in longstanding  
relationships have no stronger an interest in marriage than people in relationships formed relatively  
recently. No one would suggest that a man and woman who became engaged six months after they  
met had any less interest in marriage than a couple who made the same decision after many years.  
Duration tells us little about the nature or quality of a relationship. A couple may be "together" for

1 many years without cohabiting, without commingling their assets, and without undertaking to support  
2 each other. And duration of a relationship does not tell us the couple's intentions with respect to  
3 marriage. Nor, finally, does it tell us whether the couple is already married, which if Judge Walker  
4 and his partner had desired to do they could (and may) have done in 2008 when marriage was legal for  
5 same-sex couples in California, or at various times from 2001 through the present in the many states  
6 and countries that have permitted same-sex couples to marry.<sup>6</sup>

7 But, Proponents contend, we were entitled to know more about Judge Walker's relationship  
8 with his partner and, more specifically, whether they intended to marry. Doc. 768 at 11. Indeed,  
9 Proponents contend Judge Walker should have volunteered this information, and since he did not the  
10 Court must infer that he intended to marry his partner once that right was secured by his ruling in this  
11 case. According to Proponents, Judge Walker's presumed subjective intent makes all the difference  
12 and necessitated his recusal and, indeed, requires that his decision in this case must now be vacated.

13 That is not and cannot be the standard. In rejecting challenges to judges based on their  
14 religious affiliation, the courts have not based their decisions on how fervently a judge held the beliefs  
15 that were feared likely to affect his judgment both because the standards for bias and appearance of  
16 bias are objective as a matter of law, and because a subjective standard is unworkable. See *Feminist*  
17 *Women's Health Center v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (Noonan, J.) ("[T]he plaintiffs  
18 qualify my beliefs as 'fervently-held' as if to distinguish my beliefs from those that might be  
19 lukewarmly maintained. A moment's consideration shows that the distinction is not workable. . . . No  
20 thermometer exists for measuring the heatedness of a religious belief objectively. Either religious  
21 belief disqualifies or it does not. Under Article VI it does not."<sup>7</sup> So here, there is no thermometer to  
22 measure the strength or intimacy of a couple's relationship or the intensity of their desire to formalize  
23 and celebrate that relationship now or in the future, and to inquire into such matters is as offensive to  
24

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25 <sup>6</sup> States that permit same-sex couples to marry include Massachusetts, Connecticut, Iowa,  
26 Vermont and New Hampshire. The District of Columbia does so as well. Other countries that permit  
27 same-sex couples to marry include the Netherlands, Belgium, Canada, Spain, South Africa, Norway,  
28 Sweden, Argentina, Iceland and Portugal.

<sup>7</sup> Accord, *In re McCarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004) ("Should we require federal  
judges to disclose the firmness of their beliefs in religious doctrine, it is a very fine line before we  
enter the business of evaluating the relative merits of differing religious claims.").

1 the constitutional right of privacy, *see Lawrence v. Texas*, 539 U.S. 558, as inquiring into religious  
2 beliefs is to the right to freely exercise one's religious beliefs.

3 Consider the consequences of such an inquiry or disclosure obligation. If Judge Walker said  
4 he did not intend to marry his partner; would Proponents then be satisfied? What if he said they did  
5 not currently plan to do so; would that be adequate? What if he said they were already married?  
6 (Proponents would no doubt complain that this demonstrated a prejudgement that same-sex couples  
7 should be allowed to marry, although it would in fact tell us nothing about his view of the  
8 constitutional issues.) And if he said they simply did not wish to marry for personal reasons, would  
9 Proponents be entitled to inquire further? What if he said they did not wish to marry, but they changed  
10 their minds at some later time? Would that be grounds for vacating the judgment at that later date?  
11 Would we ask the same intrusive questions of a heterosexual judge about his or her marriage or  
12 interests in this matter to assess his potential bias in the case, in light of the harms to heterosexual  
13 couples and their families that Proponents contended Proposition 8 was intended to prevent? These  
14 scenarios demonstrate the absurdity of basing a disqualification decision on an inquiry into subjective  
15 beliefs or intentions of a judge or particulars regarding his or her relationship. Just as the question in  
16 evaluating the recusal motion in *Feminist Women's Health Center*, 69 F.3d at 400 could not be how  
17 fervently held Judge Noonan held his religious beliefs, so here, it cannot depend on Judge Walker's  
18 subjective feelings and intentions with respect to his relationship. Rather, in deciding this motion, the  
19 question must simply be "whether incapacitating prejudice flows from [sexual orientation]." *Id.*

20 Contrary to Proponents' arguments, the possibility that Judge Walker may wish to marry his  
21 companion now or in the future does not constitute "a financial interest in the subject matter of the  
22 controversy . . . or any other interest that could be substantially affected by the proceeding" requiring  
23 his disqualification under § 455(b)(4) because of the rule that interests that are widely shared with a  
24 broad segment of society are insufficient as a matter of law to create bias, either actual or apparent.  
25 For example, in *City of Houston*, 745 F. 2d 925, the judge was a member of the plaintiff class of black  
26 and Mexican voters challenging Houston's at-large system for electing council members on grounds  
27 that it unconstitutionally discriminated against African American and Mexican American voters by  
28 diluting their votes. The city sought to disqualify the judge on the ground that as a member of the

1 plaintiff class the judge was a "party to the proceeding" and as such was required to disqualify herself  
2 under 28 U.S.C. § 455(b)(5). The judge declined to recuse herself and the Fifth Circuit affirmed,  
3 holding that her membership in the class did not make her a party for purposes of the recusal statutes.  
4 Nor did the membership of the judge's husband in the class provide any more basis for disqualification  
5 because "[m]any civil rights suits are brought in the form of class actions," and "it is hard to imagine a  
6 case in which a minority judge would not have a family member within the class." A holding that a  
7 judge's family member's inclusion in the plaintiff class in civil rights cases subjected the judge to  
8 disqualification "would be an offensive precedent against judges who are members of minority  
9 groups." *Id.* at 930. Further, disqualification in a case such as this would mean no judge could hear  
10 the case because if voting rights of minorities were at stake so were those of the majority:

11           For every class that claims to be injured by an action or policy that is the subject  
12           of declaratory relief, there is a counter-class that, by definition, must be  
13           benefited. If the voting power of blacks is made less diluted and more  
14           equitable, then the voting power of any other class of voters, such as whites, is  
15           proportionally affected. (*Id.* at 931.)

16           Another example is *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), in which the  
17           judge and his children were members of the plaintiff class challenging Alabama's system of public  
18           higher education on the ground that the state had failed to remove the vestiges of the dual system of  
19           education that resulted from its past policy of racial segregation, and the judge was not required to  
20           recuse himself on those grounds.<sup>8</sup> The suits sought increased funding, the transfer of programs to  
21           historically black universities, and a merger of two white universities into one of the historically black  
22           universities. *Id.* at 1534, 1535. The judge was part of the class of black citizens who would become  
23           eligible for employment including as professors at public institutions of higher education, *id.* at 1542  
24           n.38, and his children, one of whom was 16 at the time, were eligible or could become eligible to  
25           attend the public colleges and universities run by the state that were the subject of the suit. *Id.* at 1541.  
26           The court applied the rule that "[a]n interest which a judge has in common with many others in a  
27           public matter is not sufficient to disqualify him" and observed that "no personal bias or reasonable

28           <sup>8</sup> The Court ultimately held that Judge Clemon was properly recused because through earlier  
work he had acquired extrajudicial knowledge of facts at issue in the case. *Id.* at 1545-46.

1 doubt about the judge's impartiality exists in these circumstances." *Id.* at 1541 (internal quotations and  
2 citations omitted). The court also observed that "[t]o disqualify Judge Clemon on the basis of his  
3 children's membership in the plaintiff class also would come dangerously close to holding that  
4 minority judges must disqualify themselves from all major civil rights actions" and that "[t]o  
5 disqualify minority judges from major civil rights litigation solely because of their minority status is  
6 intolerable" and "[t]his court cannot and will not countenance such result." *Id.* at 1542. And like the  
7 Fifth Circuit's observation about the reciprocal interests of minority and majority voters in voting  
8 rights cases, the Eleventh Circuit concluded that it was not only minority members who have an  
9 interest in the proposed changes to the Alabama college and university system: "every Alabama judge  
10 with children, whether members of the class or not, has an interest in the future of the state university  
11 system." *Id.* Other courts have likewise rejected disqualification motions where the asserted "interest"  
12 is one a judge has in common with many others. *E.g., Christiansen v. National Savings & Trust Co.*,  
13 683 F.2d 520, 525-26(D.C. Cir. 1982) (judges were members of class defined as all federal employees  
14 who were Blue Cross and Blue Shield subscribers claiming breach of fiduciary duties by  
15 overwithholding funds to pay subscribers' medical claims); *Exxon Crop. v. Heinze*, 792 F. Supp. 72  
16 (D. Alaska 1992) (judge who was Alaska resident was not disqualified from hearing dispute over oil  
17 drilling royalties due to state even though damages would be paid into fund distributed as dividends to  
18 all Alaska citizens).

19 This case provides even less ground for disqualification than *City of Houston* and *United States*  
20 *v. Alabama* because, unlike those cases, this case was not a class action and Chief Judge Walker unlike  
21 the judges in those cases or their family members was not a member of any putative or certified class.  
22 And while the right to marry is significant for all gay men and lesbians (and for that matter all people),  
23 the interests of African Americans (and for that matter people of all races) in attending unsegregated  
24 colleges and universities and being able to vote without discriminatory dilution of their votes are  
25 equally significant. And just as in those cases, if Judge Walker could be disqualified from hearing this  
26 case because he has a same-sex relationship, it is hard to see how any gay judge could hear any major  
27 civil rights case brought on behalf of gay people.

1 Finally, Proponents' contention that Judge Walker's interest in marriage is a "financial interest"  
2 within the meaning of § 455(b)(4) because of the testimony demonstrating denial of marriage has  
3 adverse financial consequences for many lesbians and gay men ignores the definition of "financial  
4 interest" in § 455(b)(5) as "ownership of a legal or equitable interest" or "active participant in the  
5 affairs of a party."

6 **C. Proponents' Litany Of Complaints About Judge Walker's Rulings Falls Far Short**  
7 **Of The Required Showing Of "Deep Seated Favoritism Or Antagonism" Toward**  
8 **A Party "That Would Make Fair Judgment Impossible."**

9 Proponents contend not only that Chief Judge Walker should have disclosed his so-called  
10 interest in the outcome of the proceeding, but that the only proper remedy now is the complete vacatur  
11 of the judgment in the case along with every other order the district court entered—in effect, erasing  
12 the entire 14-day trial and the court's findings of fact and conclusions of law. Doc. 768 at 11. They  
13 base this extraordinary request in part on what they deem the district court's "irregular and  
14 unprecedented rulings." *Id.* Their characterization of the court's rulings provides no basis to vacate  
15 the judgment, for two reasons: first, under the extrajudicial source doctrine, a disqualification cannot  
16 be based on judicial rulings except in extreme circumstances not present here; and second, Proponents'  
17 litany of complaints about the district court's rulings are exaggerations or mischaracterizations that  
18 find no support in the record.

19 Under the extrajudicial source doctrine, generally "[a]dverse rulings do not constitute the  
20 requisite bias or prejudice" to support disqualification. *United States v. Azhocar*, 581 F.2d 735, 739  
21 (9th Cir. 1978); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger v. United*  
22 *States*, 255 U.S. 22, 31 (1921); *Sibla*, 624 F.2d at 869; *Davis v. Bd. of Sch. Commissioners of Mobile*  
23 *County*, 517 F.2d 1044, 1051, 1052 (5th Cir. 1975). Indeed, as the Supreme Court has explained and  
24 as Proponents admit (Doc. 768 at 11), judicial rulings "[a]lmost invariably . . . are proper grounds for  
25 appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *Ex parte American Steel*  
26 *Barrel Co.*, 230 U.S. 35, 44 (1913) (recusal statute was "never intended to enable a discontented  
27 litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise").  
28 Unless judicial rulings "display a deep-seated favoritism or antagonism that would make fair judgment  
impossible," they do not support a bias challenge. *Liteky*, 510 U.S. at 555.

1 The rulings of which Proponents complain as a basis for Chief Judge Walker's bias are  
2 reviewable—indeed, they are presently pending appellate review, and Proponents have raised some of  
3 the same objections to the district court's orders in their appellate briefs that they raise in this motion.  
4 *Compare* Doc. 768 at 11 *with* Ninth Circuit Case No. 10-16696, Doc. 21 at 64-65. Nor is this a case  
5 where the district court's rulings display antagonism, much less antagonism of the kind and degree that  
6 *Liteky* requires to support a bias challenge. Stripped of their mischaracterizations, Proponents'  
7 complaints have little force, as we show here.

8 1. Proponents imply that the district court issued an unwarranted discovery ruling,  
9 pointing to the Ninth Circuit's issuance of a writ of mandamus to narrow that discovery order. Doc.  
10 768 at 11:1-3. They neglect to mention that the Ninth Circuit characterized the particular discovery  
11 issue as "an important issue of *first impression*," *Perry v. Schwarzenegger*, 591 F.3d 1126, 1137 (9th  
12 Cir. 2009) (emphasis added), and largely upheld the scope of the district court's order, permitting  
13 Proponents to withhold pursuant to a First Amendment privilege only a narrow swath of "private,  
14 internal campaign communications concerning the formulation of campaign strategy and messages,"  
15 *id.* at 1145 n.12 (emphasis omitted), not all communications except those directed to the general  
16 public, as Proponents would have had it. Nor do they mention that Judge Walker's orders simply  
17 affirmed the analysis of Magistrate Judge Spero, or explain why he might be biased in this matter.

18 2. They complain of Chief Judge Walker's order permitting the real-time streaming of  
19 video of the trial proceedings to federal courthouses beyond the San Francisco branch of the Northern  
20 District of California and cite the Supreme Court's order staying this broadcast. Doc. 768 at 11:4-8.  
21 They neglect to mention that the Supreme Court also stayed Ninth Circuit Chief Judge Kozinski's  
22 order approving streaming video to these courthouses, *Hollingsworth v. Perry*, 130 S. Ct. 705, 709  
23 (2010) or that four Justices dissented from the Supreme Court's order, and they offer no explanation  
24 for any personal bias that, under their logic, these five jurists must have also possessed to have agreed  
25 with Chief Judge Walker's original order. In any event, as we argue in the following section, other  
26 than the bare fact that Proponents opposed broadcasting the trial proceedings and Plaintiffs supported  
27 it, there is nothing in Chief Judge Walker's order concerning the videotaping or broadcasting of trial  
28 proceedings—or in his subsequent use of a small excerpt of the video in an academic talk, as

1 Proponents also bemoan (Doc. 768 at 11:20-23)—that indicates any "deep-seated . . . antagonism" to  
2 them or their position concerning Proposition 8. If anything, these events indicate only that Chief  
3 Judge Walker is a stalwart supporter of permitting greater public access to trial proceedings through  
4 video broadcasts.

5 3. Proponents cite the district court's evaluation of the merits of Plaintiffs' claims as a  
6 factor favoring his disqualification. Doc. 768 at 11:9-16. They note in particular that the court  
7 recognized a federal constitutional right of same-sex couples to marry and that the court held that gay  
8 men and lesbians are a suspect class, requiring heightened scrutiny of discrimination against them. All  
9 Proponents have established by these complaints is that Chief Judge Walker acted as a judge by evaluating  
10 merits of the case before him after a full trial in which they had every opportunity to defend  
11 Proposition 8 but failed to do so persuasively. As Justice Scalia explains in *Liteky*,

12 The judge who presides at a trial may, upon completion of the evidence, be  
13 exceedingly ill disposed towards the defendant, who has been shown to be a  
14 thoroughly reprehensible person. But the judge is not thereby recusable for bias  
15 or prejudice, since his knowledge and the opinion it produced were properly and  
16 necessarily acquired in the course of the proceedings, and are indeed sometimes  
17 (as in a bench trial) necessary to completion of the judge's task.

18 *Liteky*, 510 U.S. at 551. Here, the district court held a 14-day bench trial and heard all of the modest  
19 evidence in support of Proposition 8 that Proponents had to offer. The fact that the judge formed an  
20 opinion of Proposition 8's constitutionality after hearing evidence concerning it is precisely what  
21 judges are expected to do. Nor is there merit to Proponents' irresponsible implication that the district  
22 court's findings of fact and conclusions of law did not respect relevant precedent. See Doc. 768 at  
23 11:12 ("Chief Judge Walker did not [even] cite, let alone address" prior decisions about marriage of  
24 same-sex couples or whether gay people are a suspect class). As Proponents are well aware, the  
25 authority that the district court's ultimate opinion supposedly ignores were treated in the district court's  
26 ruling on Proponents' motion for summary judgment. Doc. 228 (Tr. 75-90). The district court  
27 concluded that *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), was not on all fours with Proposition 8  
28 and that it had been fatally undermined by subsequent doctrinal developments. *Id.* at 75-78. The court  
considered Proponents' contentions that the Due Process Clause does not protect the right of lesbians  
and gay men to marry but determined that evidence was required to determine what government

1 interests a ban on their marriages served. *Id.* at 79-81. Finally, the court addressed Proponents' claim  
2 that lesbians and gay men are not a suspect class entitled to heightened Equal Protection Clause  
3 scrutiny, and found that there was no Ninth Circuit precedent controlling the question, since *Lawrence*  
4 *v. Texas*, 539 U.S. 558, had fatally undermined a prior circuit case holding rational basis review  
5 appropriate. *Id.*

6 In short, the district court has treated the doctrines that Proponents claim it ignored, and their  
7 disagreement with the court's legal judgment is a suitable basis for appeal, not the recusal of the judge.  
8 In any event, Proponents' complaint that Chief Judge Walker must have suffered under a bias to  
9 conclude that gay people are a suspect class under federal Equal Protection Clause analysis would  
10 seem to apply equally to Attorney General Eric Holder, who announced recently that the U.S.  
11 Department of Justice would not defend section 3 of the Defense of Marriage Act because it cannot  
12 withstand heightened scrutiny under the same suspect class analysis that Chief Judge Walker applied  
13 here. Likewise Proponents' faulting of Judge Walker's ruling as conflicting with the judgments of  
14 other state and federal appellate courts to consider the issue must mean the judges who recently struck  
15 down the federal Defense of Marriage Act under the Equal Protection Clause in *Gill v. Office of*  
16 *Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) and *Dragovich v. U.S. Department of*  
17 *the Treasury*, No. 10-01564 CW, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011), were equally  
18 biased, since their decisions that the federal statute denying the status of marriage under federal law to  
19 same-sex couples who are permitted by their states to marry failed the rational basis test and were  
20 rooted in animus, and their rulings were likewise "unprecedented." And presumably the State  
21 Supreme Courts in California, Iowa, Massachusetts and Connecticut, which struck down their states  
22 statutory denials of marriage to same-sex couples under their state equal protection and due process  
23 guarantees must be biased because their decisions departed from prior state court precedents.

24 4. Proponents claim that the district court's order denying them a stay of judgment  
25 pending appeal shows bias is equally without merit. Doc. 768 at 11:17-19. They neglect to note in  
26 their discussion that a critical reason the court denied their stay request, and the chief focus of the  
27 court's analysis of their likelihood of success on the merits, is that it found they likely lacked standing  
28 to sustain an appeal. Doc. 727 at 3-6. The Ninth Circuit, too, has questioned Proponents' standing.

1 *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011).

2 In short, Proponents' claim that Chief Judge Walker's merits rulings show bias only  
3 demonstrates that Proponents disagree with those rulings, of which they are currently seeking review  
4 by means of appeal. This is not the rare case where intrajudicial decisions provide a basis for recusal.

5 **D. Proponents' Complaint That Judge Walker's Use Of A Small Portion Of The Trial  
6 Video At A Legal Education Event In No Way Demonstrates Bias Against Them.**

7 Proponents cite Chief Judge Walker's use of a portion of the trial video during a talk in an  
8 academic setting as an example of bias. Even if they had averred the underlying facts in an affidavit  
9 filed pursuant to 28 U.S.C. § 144, which they did not, these events would not have raised a prima facie  
10 inference of bias because there is nothing about them that indicates any hostility to them or their  
11 position. Apparently Chief Judge Walker has displayed a few moments of the cross-examination of  
12 Professor Kenneth Miller, Proponents' political science expert, to illustrate the information conveyed  
13 by video testimony that a bare transcript would not convey. *See* [http://www.c-](http://www.c-spanvideo.org/program/298109-3)  
14 [spanvideo.org/program/298109-3](http://www.c-spanvideo.org/program/298109-3) (last visited May 12, 2011). As is evident from both sides'  
15 arguments for and against Proponents' motion that all trial video recordings be returned and Plaintiffs'  
16 cross-motion that the video recordings be unsealed, Chief Judge Walker's remarks relate to the  
17 question whether it is appropriate and important to allow greater public access to trial proceedings  
18 through the use of video recordings. They have nothing at all to do with whether Proposition 8 is or is  
19 not constitutional. Chief Judge Walker's views in the former context shed no light at all on whether he  
20 has any untoward bias in regard to the latter.

21 **CONCLUSION**

22 Proponents' motion has no support other than the argument that a person who is a member of a  
23 minority group, and has associations typical of members of that minority group, cannot fairly judge a  
24 case involving the rights of that group. This tired argument has been repeatedly and consistently  
25 rejected and is not worthy of further debate. Proponents' motion should be denied.  
26  
27  
28

