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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,  
Plaintiffs,  
v.  
Arnold Schwarzenegger, et al.,  
Defendants.

NO. C 09-02292 JW

**ORDER DENYING DEFENDANT-  
INTERVENORS' MOTION TO VACATE  
JUDGMENT**

**I. INTRODUCTION**

Presently before the Court is Defendant-Intervenors' Motion to Vacate.<sup>1</sup> The Motion is made on the ground that the presiding judge, Chief District Judge Vaughn R. Walker (retired), was disqualified from presiding over this case. The grounds and procedures for recusal or disqualification of a federal judge are codified in Title 28 U.S.C. §§ 455, *et seq.* Those statutes require a federal judge to recuse if, *inter alia*, the judge has a substantial non-pecuniary interest in the case, or if there is some fact that brings the impartiality of the judge reasonably into question. If the judge does not recuse, a motion for disqualification may be made by a party.

Plaintiffs in this case are same-sex couples who claim that a California constitutional provision that redefined marriage in California solely to encompass a union between one man and one woman violated their rights under the federal Constitution. Defendant-Intervenors were allowed to intervene to advance an argument that the California constitutional provision did not violate the federal Constitution. After a court trial, Judge Walker entered judgment for Plaintiffs and enjoined

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<sup>1</sup> (Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and Protectmarriage.com's Motion to Vacate Judgment, hereafter, "Motion," Docket Item No. 768.)

1 enforcement of the state constitution against them. Defendant-Intervenors appealed that Judgment  
2 to the Ninth Circuit. After he had retired, and while the appeal was pending, a newspaper article  
3 reported that Judge Walker shared that he is gay and that he was in a same-sex relationship at the  
4 time when he was presiding over this case. Defendant-Intervenors brought this Motion before the  
5 District Court to vacate the Judgment on the ground that Judge Walker was disqualified from  
6 presiding over the case because his same-sex relationship was, or reasonably appeared to be, a non-  
7 pecuniary interest that could be substantially affected by the outcome of the case.

8 After considering the Oppositions to the Motion and the governing law, as discussed below,  
9 the Court finds that neither recusal nor disqualification was required based on the asserted grounds.  
10 The sole fact that a federal judge shares the same circumstances or personal characteristics with  
11 other members of the general public, and that the judge could be affected by the outcome of a  
12 proceeding in the same way that other members of the general public would be affected, is not a  
13 basis for either recusal or disqualification under Section 455(b)(4). Further, under Section 455(a), it  
14 is not reasonable to presume that a judge is incapable of making an impartial decision about the  
15 constitutionality of a law, solely because, as a citizen, the judge could be affected by the  
16 proceedings. Accordingly, the Motion to Vacate Judgment on the sole ground of Judge Walker's  
17 same-sex relationship is DENIED.

## 18 II. BACKGROUND

19 A detailed procedural history of this case can be found in the Court's August 4, 2010  
20 Findings of Fact and Conclusions of Law. (hereafter, "Aug. 4 Order," Docket Item No. 708 at 3-4.)  
21 In addition, a videotape and court reporter's transcript recorded the trial proceedings. The Court  
22 summarizes the history of the case as relevant to the present Motion.

23 From January 11-17, 2010, a bench trial was held by the Court with Judge Walker presiding.  
24 (Aug. 4 Order at 3-4.) On August 4, 2010, Judge Walker entered Findings of Fact and Conclusions  
25 of Law, and entered Judgment against the government Defendants, permanently enjoining them  
26 from the enforcement of Proposition 8 and Article I, § 7.5 of the California constitution. (Id. at  
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1 136.) On August 4, 2010, Defendant-Intervenors filed an appeal of the Court's final Judgment with  
 2 the Ninth Circuit. (See Docket Item No. 713.)

3 On March 2, 2011, following the retirement of Judge Walker, the District Court case was  
 4 reassigned to Chief Judge James Ware. (See Docket Item No. 765.) On April 25, 2011, while the  
 5 appeal was pending, Defendant-Intervenors moved the District Court to vacate the Judgment. (See  
 6 Docket Item No. 768.) On April 27, 2011, the District Court issued an Order setting the Motion for  
 7 an expedited hearing and setting a briefing schedule. (See Docket Item No. 769.)

8 On May 10, 2011, Defendant Los Angeles County Clerk-Recorder filed a Statement of No  
 9 Position on Defendant-Intervenors' Motion.<sup>2</sup> On May 12, 2011, Plaintiff-Intervenor City and  
 10 County of San Francisco filed an Opposition to Defendant-Intervenors' Motion. (See Docket Item  
 11 No. 775.) Also on May 12, 2011, State Defendants filed an Opposition to Defendant-Intervenors'  
 12 Motion. (See Docket Item No. 778.) On May 13, 2011, Plaintiffs filed an Opposition to Defendant-  
 13 Intervenors' Motion.<sup>3</sup> Various legal organizations and a broad swath of local and minority bar  
 14 associations have filed *amicus curiae* briefs in opposition to the Motion. (See Docket Item Nos.  
 15 783, 788, 793.) On June 13, 2011, the Motion was heard and submitted for decision.

### 16 III. DISCUSSION

#### 17 **A. Jurisdiction**

18 Fed. R. Civ. P. 60(b) prescribes the grounds for moving to vacate a district court judgment.  
 19 A permissible ground for moving to vacate a judgment is that the district court judge who presided  
 20 over the case was disqualified. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847,  
 21 862-63 (1988). Once an appeal from a judgment is filed, the district court is ousted of jurisdiction to  
 22 take certain actions. See Davis v. Yageo Corp., 481 F.3d 661, 685 (9th Cir. 2007). However, Fed.  
 23 R. Civ. P. 62.1(a) provides that "[i]f a timely motion is made for relief that the court lacks authority  
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25 <sup>2</sup> (See Defendant Dean C. Logan Los Angeles County/Registrar-Recorder County Clerk's  
 26 Statement of No Position to Motion to Vacate Judgment, Docket Item No. 774.)

27 <sup>3</sup> (Plaintiffs' Opposition to Proponents' Motion to Vacate Judgment, hereafter, "Plaintiffs'  
 28 Opp'n," Docket Item No. 779.)

1 to grant because an appeal that has been docketed and is pending, the [district] court may: (1) defer  
2 considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the  
3 court of appeals remands for that purpose or that the motion raises a substantial issue.” Therefore,  
4 notwithstanding the pending appeal of the Judgment, the Court has jurisdiction to hear this Motion  
5 and, in so doing, to take one of the actions specified by Rule 62.1.

6 **B. Timeliness**

7 Fed. R. Civ. P. 62.1 provides that a motion seeking relief from a district court while an  
8 appeal is pending must be “timely.” Plaintiffs challenge the timeliness of the Motion. (Plaintiffs’  
9 Opp’n at 17-19.) The timeliness of a motion to vacate a judgment is governed by Fed. R. Civ. P.  
10 60(b), which permits a court to entertain a motion to relieve a party from a final judgment if the  
11 motion is made “at the earliest possible time after the facts are discovered.” See First Interstate  
12 Bank of Az., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 988 n.8 (9th Cir. 2000).

13 On April 6, 2011, a published interview with Judge Walker reported that he is gay and in a  
14 “10-year relationship with a physician.”<sup>4</sup> Apparently concluding that such a relationship constituted  
15 a ground for disqualification from presiding over this case, Defendant-Intervenors filed the present  
16 Motion on April 25, 2011. Defendant-Intervenors contend that their Motion is timely because they  
17 filed it “promptly” after they learned of Judge Walker’s relationship. (Motion at 12-13 n.3.)  
18 Plaintiffs respond that the Motion is untimely, because Defendant-Intervenors “knew well before”  
19 April 2011, and at least two months before the Court announced its decision, that Judge Walker “is  
20 gay and in a relationship.” (Plaintiffs’ Opp’n at 17-19.) Plaintiffs support this contention by  
21 pointing to newspaper articles from 2010 that suggested that Judge Walker is gay.<sup>5</sup>

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24 <sup>4</sup> (Motion at 7 (citing Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*,  
25 Reuters, Apr. 6, 2011, available at <http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406>.)

26 <sup>5</sup> (See, e.g., Declaration of Enrique A. Monagas in Support of Plaintiffs’ Opposition to  
27 Proponents’ Motion to Vacate Judgment, Ex. B, Judge Being Gay a Non-Issue During Prop 8 Trial,  
28 Docket Item No. 780-2.)

1 Because the ground for Defendant-Intervenors' Motion is Judge Walker's same-sex  
 2 relationship, and not his sexual orientation, the Court does not find that the articles from 2010  
 3 provide a basis for imputing to Defendant-Intervenors knowledge of Judge Walker's same-sex  
 4 relationship that would be sufficient to render the Motion untimely. Therefore, the Court finds that  
 5 the Motion is timely within the meaning of Rules 60(b) and 62.1.

6 The Court observes that this Motion presents a unique procedural posture, insofar as  
 7 Defendant-Intervenors first raised the Motion following entry of a Judgment that is under appeal,  
 8 and before a different district court judge, in light of the retirement of the presiding judge. While  
 9 such a Motion would be reviewed for clear error if raised for the first time before the circuit court,<sup>6</sup>  
 10 the Ninth Circuit has not definitively held that such a standard would apply in a case where the  
 11 Motion is brought before the district court, but subsequent to the retirement of the presiding judge.  
 12 However, because this Motion would not survive the lower *de novo* standard of review, the Court  
 13 need not reach whether a clear error standard would be more appropriate.

14 **C. Recusal Pursuant to 28 U.S.C. § 455(b)(4)**

15 At issue is whether Judge Walker was required to recuse himself under Section 455(b)(4).<sup>7</sup>

16 The fact that a federal judge shares a fundamental characteristic with a litigant, or shares  
 17 membership in a large association such as a religion, has been categorically rejected by federal  
 18 courts as a sole basis for requiring a judge to recuse her or himself.<sup>8</sup> Defendant-Intervenors deny  
 19 that the Motion is based on bias against gay or lesbian judges or based on the broad proposition that

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21 <sup>6</sup> Weiss v. Sheet Metal Workers Local No. 544 Pension Trust, 719 F.2d 302, 304 (9th Cir.  
 22 1997).

23 <sup>7</sup> The Court examines this ground for the Motion first, while recognizing that even if the  
 24 Court finds that Judge Walker has no actual interest, a finding or reasonable appearance of partiality  
 under Section 455(a) is an independent ground for disqualification. See, e.g., First Interstate Bank  
 of Az., 210 F.3d at 985 n.1.

25 <sup>8</sup> See, e.g., Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 660 (10th  
 26 Cir. 2002); MacDraw, Inc. v. CIT Group Equip. Financing, Inc., 138 F.3d 33, 37 (2d Cir. 1998);  
 27 Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975); Feminist Women's Health  
 Center v. Codispoti, 69 F.3d 399, 400 (9th Cir. 1995); United States v. Alabama, 828 F.2d 1532,  
 1541-42 (11th Cir. 1987); In re City of Houston, 745 F.2d 925, 931 (5th Cir. 1984).

1 a gay or lesbian judge is incapable of being fair if sexual orientation is an issue in a case.<sup>9</sup> Rather,  
 2 Defendant-Intervenors narrow their Motion to the contention that Judge Walker had an actual  
 3 interest in the case. Plaintiffs in the underlying case were same-sex couples who were challenging  
 4 the constitutionality of a California Proposition that, Plaintiffs contend, stripped them of the right, as  
 5 same-sex couples, to marry. At the time the case was assigned to him, Judge Walker was in a same-  
 6 sex relationship. Defendant-Intervenors contend that Judge Walker had an interest in the case  
 7 because if he were to decide that Plaintiffs were entitled to have their right to marry restored, even  
 8 though there was no evidence that Judge Walker intended to marry, the sole fact that he was in a  
 9 same-sex relationship placed Judge Walker in the position of deciding a case that could affect him if  
 10 he were to desire to marry. (Motion at 5-7.)

11 Section 455(b)(4) provides that a judge shall disqualify himself where “[h]e knows that he,  
 12 individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial  
 13 interest in the subject matter in controversy or in a party to the proceeding, or any other interest that  
 14 could be substantially affected by the outcome of the proceeding . . . .” Unlike Section 455(a),  
 15 Section 455(b) provides for mandatory recusal in cases of “actual bias” and, thus, the test is a  
 16 subjective one. United States v. Spangle, 626 F.3d 488, 496 (9th Cir. 2010). Section 455(b)(4)  
 17 contains two distinct bases for recusal: (1) when a judge has a financial interest in the subject matter  
 18 in controversy or in a party to the proceeding; or (2) when a judge has any other interest that could  
 19 be substantially affected by the outcome of the proceeding. The latter basis of “any other interest,”  
 20 unlike the former basis which is not so modified, requires recusal only if these non-pecuniary  
 21 interests “could be substantially affected by the outcome in the proceeding.” In re Cement Antitrust  
 22 Litigation, 688 F.2d 1297, 1308 (9th Cir. 1982).

23 Neither the Ninth Circuit nor any other circuit has considered whether a judge presiding over  
 24 a same-sex marriage case who is also in a same-sex relationship has a disqualifying non-pecuniary  
 25 interest. However, other circuits have held that “where federal judges have possessed speculative

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 27 <sup>9</sup> (See Motion at 5 (“It is important to emphasize at the outset that we are *not* suggesting that  
 a gay or lesbian judge could not sit in on this case.”) (emphasis in original).)

1 [non-pecuniary] interests as members of large groups, [] these interests [are] too attenuated to  
2 warrant disqualification [under Section 455(b)(4)].” Alabama, 828 F.2d at 1541-42. In light of the  
3 attenuated nature of non-pecuniary interests held by a judge as a general member of the public or a  
4 large community, “courts also have concluded that no personal bias or reasonable doubt about the  
5 judge’s impartiality exists in these circumstances.” Id. In regards to non-pecuniary benefits reaped  
6 by judges solely by nature of their membership in a minority group, courts have cautioned against  
7 mandating recusal “merely because of the way in which the attorneys in the case decided to frame  
8 the class,” noting ripe grounds for manipulation. In re City of Houston, 745 F.2d at 931 (citing Ely  
9 Valley Mines, Inc. v. Lee, 385 F.2d 188, 191 (9th Cir. 1967) (finding recusal not warranted when  
10 parties intentionally framed the litigation to involve the presiding judge’s personal interests in order  
11 to move for recusal)). Further, such a standard “would come dangerously close to holding that  
12 minority judges must disqualify themselves from all major civil rights actions.” Alabama, 828 F.2d  
13 at 1542.

14 These cases lead the Court to adopt the following legal conclusion: In a case that could affect  
15 the general public based on the circumstances or characteristics of various members of that public,  
16 the fact that a federal judge happens to share the same circumstances or characteristic and will only  
17 be affected in a similar manner because the judge is a member of the public, is not a basis for  
18 disqualifying the judge under Section 455(b)(4).

19 In applying this conclusion to the present case, the Court finds that Judge Walker was not  
20 required to recuse himself under Section 455(b)(4) on the ground that he was engaged in a long-term  
21 same-sex relationship and, thus, could reap speculative benefit from an injunction halting  
22 enforcement of Proposition 8 in California. In particular, in a case involving laws restricting the  
23 right of various members of the public to marry, any personal interest that a judge gleans as a  
24 member of the public who might marry is too attenuated to warrant recusal. Requiring recusal  
25 because a court issued an injunction that could provide some speculative future benefit to the  
26 presiding judge solely on the basis of the fact that the judge belongs to the class against whom the  
27 unconstitutional law was directed would lead to a Section 455(b)(4) standard that required recusal of  
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1 minority judges in most, if not all, civil rights cases. Congress could not have intended such an  
2 unworkable recusal statute.

3         Alternatively, Defendant-Intervenors contend that Judge Walker should be disqualified  
4 because his same-sex relationship gave him a markedly greater interest in a case challenging  
5 restrictions on same-sex marriage than the interest held by the general public. The Court rejects this  
6 argument on two readily apparent grounds. First, it is inconsistent with the general principles of  
7 constitutional adjudication to presume that a member of a minority group reaps a greater benefit  
8 from application of the substantive protections of our Constitution than would a member of the  
9 majority. The fact that this is a case challenging a law on equal protection and due process grounds  
10 being prosecuted by members of a minority group does not mean that members of the minority  
11 group have a greater interest in equal protection and due process than the rest of society. In our  
12 society, a variety of citizens of different backgrounds coexist because we have constitutionally  
13 bound ourselves to protect the fundamental rights of one another from being violated by unlawful  
14 treatment. Thus, we all have an equal stake in a case that challenges the constitutionality of a  
15 restriction on a fundamental right. One of the duties placed on the shoulders of federal judges is the  
16 obligation to review the law to determine when unequal treatment violates our Constitution and  
17 when it does not. To the extent that a law is adjudged violative, enjoining enforcement of that law is  
18 a public good that benefits all in our society equally. Although this case was filed by same-sex  
19 couples seeking to end a California constitutional restriction on their right to marry, all Californians  
20 have an equal interest in the outcome of the case. The single characteristic that Judge Walker shares  
21 with the Plaintiffs, albeit one that might not have been shared with the majority of Californians, gave  
22 him no greater interest in a proper decision on the merits than would exist for any other judge or  
23 citizen.

24         Second, disqualifying Judge Walker based on an inference that he intended to take advantage  
25 of a future legal benefit made available by constitutional protections would result in an unworkable  
26 standard for disqualification. Under such a standard, disqualification would be based on  
27 assumptions about the amorphous personal feelings of judges in regards to such intimate and  
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1 shifting matters as future desire to undergo an abortion, to send a child to a particular university or  
 2 to engage in family planning. So too here, a test inquiring into the presiding judge’s desire to enter  
 3 into the institution of marriage with a member of the same sex, now or in the future, would require  
 4 reliance upon similarly elusive factors. Given Section 455(b)(4)’s requirement that non-pecuniary  
 5 interests must be “substantially affected” to require recusal, recusal could turn on whether a judge  
 6 “fervently” intended to marry a same-sex partner versus merely “lukewarmly” intended to marry,  
 7 determination that could only be reached through undependable and invasive self-reports. The  
 8 Ninth Circuit has recognized the inherent unworkability of such a subjective recusal standard.  
 9 Feminist Women’s Health Center, 69 F.3d 399 at 400. In holding that recusal was not warranted on  
 10 Article VI grounds in an action brought by an abortion clinic against protestors of the clinic where  
 11 one of the presiding panel judges belonged to the Catholic faith, the court acknowledged that any  
 12 test where recusal would turn on whether the judge’s religious beliefs were “fervently-held” or  
 13 “lukewarmly maintained” would collapse under such amorphous, unworkable distinctions. Id. (“No  
 14 thermometer exists for measuring the heatedness of a religious belief objectively.”).

15 To hold otherwise, and require recusal merely based on the fact that the presiding judge is  
 16 engaged in a long-term same-sex relationship, is to place an inordinate burden on minority judges.  
 17 Such a standard would, in essence, infer subjective future intent on the basis of a judge’s  
 18 membership in a particular class. In this case, it is notable that the presiding judge has publicly  
 19 disclosed that he is in a “10-year relationship with a physician.”<sup>10</sup> However, there has been no  
 20 similar disclosure as to the judge’s intent to marry, whether now or in the future. The Court declines  
 21 to adopt the principle that absence of disclosure should warrant the mandatory inference that the  
 22 presiding judge “fervently” intends to marry and, thus, holds an interest in this case that is

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26 <sup>10</sup> (Motion at 7 (citing Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*,  
 27 Reuters, Apr. 6, 2011, available at <http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406>.)

1 substantially affected by the outcome.<sup>11</sup> Absence of disclosure could equally connote ambivalence  
 2 or uncertainty in the face of such a weighty question as whether one intends to marry now or in the  
 3 future, especially when such an intent involves the willingness and participation of a partner for  
 4 whom the judge cannot answer. Inferring otherwise would transmute the subjective standard of  
 5 Section 455(b)(4) requiring “actual bias” into an objective standard, in contravention of clear Ninth  
 6 Circuit precedent.<sup>12</sup> Spangle, 626 F.3d at 496. Further, assuming *arguendo* such a disclosure had  
 7 occurred, it is beyond the institutional capacity of a court to interpret the subtleties of a judge’s  
 8 personal, and likely ever-changing, subjective states on such intimate matters. Even a full  
 9 renunciation on the record of any intent to ever marry a person of the same sex would be ripe for  
 10 challenge, should the judge’s disclaimer not ring true enough or should indications arise that the  
 11 judge’s intent had shifted since the renunciation. Thus, to base a recusal standard on future  
 12 subjective intent to take advantage of constitutional rights is to create an inadministrable test,  
 13 frustrating congressional efforts to protect judicial integrity with a clear, mandatory recusal statute.

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18 <sup>11</sup> Contrary to Defendant-Intervenors’ efforts to distinguish In re City of Houston and  
 19 Alabama on the grounds that the judges in each made disclosures regarding information relevant to  
 20 their membership in the class, in neither case did the circuit courts hold that Section 455(b)(4)  
 21 mandated such disclosure. In fact, in holding that recusal was not required, the Eleventh Circuit  
 22 recognized in Alabama that any potential interest, disclosed or not, to attend a public institution of  
 23 higher learning is “shared by all young black Alabamians.” 828 F.2d at 1541. Moreover, while the  
 24 judge in In re City of Houston did disclose on the record certain facts that would be relevant to her  
 25 status as a class member, including her past and current residential addresses, and the voter  
 26 registration status of both herself and her husband, the court neither based its holding upon  
 27 disclosure, nor required the presiding judge to disclose her future intent to move into a  
 28 predominantly black or Hispanic neighborhood or to register to vote. See Leroy v. City of Houston,  
 592 F. Supp. 415, 418 (S.D. Tex. 1984). Rather, the court focused its inquiry on the factors that  
 placed the presiding judge within the class, all of which would generally be a matter of public record  
 and did not extend to consideration of future intentions.

<sup>12</sup> Moreover, such a presumption would similarly contravene Ninth Circuit precedent  
 recognizing the opposite principle: that a presumption of impartiality should guide any interpretation  
 of a judge’s decision not to disclose. See, e.g., First Interstate Bank of Az., 210 F.3d at 988; see also  
Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998).

1 Defendant-Intervenors' reliance on In re City of Houston and Alabama for the principle that  
2 Section 455(b)(4) mandated recusal in the present case misinterprets the doctrine.<sup>13</sup> In re City of  
3 Houston involved an action seeking injunctive relief against the City's at-large election system on  
4 the ground that it discriminated against the City's African-American and Hispanic citizens by  
5 diluting their votes. 745 F.2d at 926-27. The judge assigned to the case was African-American and  
6 a resident of the City. The City moved the judge to recuse herself under Sections 455(a), (b)(4) and  
7 (b)(5)(i). The City contended that recusal was warranted because the judge herself was a member of  
8 the class and, given her ethnicity, it was likely that at least one member of her family was also a  
9 member of the class. Id. at 930. The Fifth Circuit held that it was not clearly erroneous for the  
10 judge to deny the City's motion. Id. at 926-27. The court held that the judge's "posture in this case  
11 is not what Congress intended to proscribe in the recusal provisions of [Section 455]" because: (1)  
12 the judge's "interest in this case is nonpecuniary and is no different from that of the general voting  
13 public . . ."; (2) there was a "lack of any possible attrition of public confidence in the impartiality of  
14 the judicial system if recusal is not ordered"; (3) of "the attenuated nature of any interest that the  
15 judge might have in the outcome of this case"; and (4) of "the illusoriness of the class delineation,  
16 inasmuch as all members of the voting public in Houston have an equal interest in the suit . . . ." Id.  
17 at 932. Given the attenuated nature of the judge's interest, the court held that recusal under Section  
18 455(b)(4) was not required. Id.

19 In Alabama, the Eleventh Circuit held that it was not clearly erroneous for the African-  
20 American trial judge, who had minor children who were members of the class, which included all  
21 children "who are eligible to attend or will become eligible to attend the public institutions of higher  
22 learning . . .," to deny a motion to disqualify in an action seeking solely injunctive relief  
23 desegregating Alabama's system of public higher education. 828 F.2d at 1541-42. Relying heavily  
24 on the Fifth Circuit's holding in In re City of Houston, the court found that "the interests of [the

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26 <sup>13</sup> (Reply Brief in Support of Motion to Vacate of Defendant-Intervenors Dennis  
27 Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and Protectmarriage.com at 6-  
28 9, hereafter, "Reply," Docket Item No. 787.)

1 presiding judge’s] children are not ‘substantial’ enough to merit disqualification” and that “[a]ny  
2 beneficial effects of this suit upon these children were remote, contingent and speculative.” Id. at  
3 1541. The court based its holding on the ground that it lacked evidence that the presiding judge’s  
4 children had any future intent to attend a public institution of higher learning and, further, “[a]ny  
5 potential interest . . . is shared by all young black Alabamians.” Id. In addition, the court found that  
6 “[t]o disqualify [the presiding judge] on the basis of his children’s membership in the plaintiff class  
7 also would come dangerously close to holding that minority judges must disqualify themselves from  
8 all major civil rights actions,” a result that would be “intolerable.” Id. at 1542.

9 Moreover, in contrast to the present case, both the Eleventh and Fifth Circuits faced civil  
10 rights actions that were brought on behalf of a class, and in each case the presiding judge or that  
11 judge’s minor children were parties to the action before them. Here, any substantial interest that  
12 Defendant-Intervenors contend is affected by the outcome of the present action is even more  
13 attenuated given the fact that the benefit is not bestowed upon the presiding judge as a consequence  
14 of his membership within a class, but as a possible side-effect of the enjoinder of the enforcement  
15 of an unconstitutional proposition. Such an interest is the same as that shared by all citizens of  
16 California and, thus, the same reasoning that guided the Fifth and Eleventh Circuits to hold that such  
17 an attenuated interest is not sufficiently substantial to require recusal under Section 455(b)(4) also  
18 applies in this case.

19 Accordingly, the Court DENIES Defendant-Intervenors’ Motion to Vacate Judgment on the  
20 ground that under Section 455(b)(4) the presiding judge failed to recuse himself.

21 **D. Recusal Pursuant to 28 U.S.C. § 455(a)**

22 Alternatively, Defendant-Intervenors contend that even if Judge Walker’s same-sex  
23 relationship did not constitute a substantial interest under Section 455(b)(4), that relationship brings  
24 his impartiality reasonably into question under Section 455(a). (Motion at 2, 10.) Thus, they  
25 contend that Judge Walker should be disqualified to protect the integrity of the judicial system. (Id.)  
26 Further, they contend that the fact of Judge Walker’s non-disclosure of his relationship brings his  
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1 impartiality into question under Section 455(a). (Id. at 12.) The Court considers each contention in  
2 turn.

3 **1. Whether Judge Walker’s Impartiality Could Reasonably Be Questioned**

4 Section 455(a) provides that a judge “shall disqualify himself in any proceeding in which his  
5 impartiality might reasonably be questioned.”<sup>14</sup> “Since a federal judge is presumed to be impartial,  
6 the party seeking disqualification bears a substantial burden to show that the judge is biased.”  
7 Torres v. Chrysler Fin. Co., No. C 07-00915 JW, 2007 WL 3165665, at \*1 (N.D. Cal. Oct. 25, 2007)  
8 (citing Reiffin v. Microsoft Corp., 158 F. Supp. 2d 1016, 1021-22 (N.D. Cal. 2001)). “The test for  
9 creation of apparent bias sufficient to require dismissal under [Section 455] is an objective one:  
10 ‘whether a reasonable person with knowledge of all the facts would conclude that the judge’s  
11 impartiality might reasonably be questioned.’” Herrington v. Sonoma Cnty., 834 F.2d 1488, 1502  
12 (9th Cir. 1987) (quoting United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)). In this context,  
13 the “reasonable person” is not someone who is “hypersensitive or unduly suspicious,” but rather a  
14 “well-informed, thoughtful observer” who “understand[s] all the relevant facts” and “has examined  
15 the record and law.” United States v. Holland, 519 F.3d 909, 914 (9th Cir. 2008) (citations  
16 omitted).<sup>15</sup> This standard does not mandate recusal upon the mere “unsubstantiated suspicion of  
17 personal bias or prejudice.” Id. (citation omitted).

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20 <sup>14</sup> Even if there is no finding of actual bias or partiality, the mere appearance of partiality  
21 may be sufficient under Section 455(a) to require recusal. See, e.g., First Interstate Bank of Az., 210  
22 F.3d at 985 n.1 (finding that the basis for recusal may be the “appearance of impropriety,” even  
23 where there was “no suggestion of actual impropriety or lack of impartiality” by a judge).

24 <sup>15</sup> In Holland, the court explained that the “reasonable” observer under Section 455(a) is  
25 “someone who ‘understand[s] all the relevant facts’ and has examined the record and law.” Holland,  
26 519 F.3d at 914 (citation omitted). The Holland court did not make clear whether the “law” which  
27 the reasonable observer would examine consists of: (1) the substantive law governing the case itself  
28 (e.g., contract law in a breach of contract case); (2) the law of recusal governing judicial conduct; or  
(3) both. However, because the Holland court stated that a reasonable observer would examine “the  
record and law,” the Court understands it to have meant that the reasonable observer would examine  
the record of the case (i.e., the facts of the case) and the law pertinent to those facts. Thus, the Court  
construes Holland to say that the reasonable observer under Section 455(a) is someone who has  
examined the substantive law governing the case itself, but who is not necessarily familiar with the  
law of recusal.

1 The reasonable observer contemplated by Section 455(a) is, like the “reasonable person”  
2 contemplated in other areas of the law, a personification created by the Court to facilitate discussion  
3 of the idea of “reasonableness.” However, in speaking of reasonableness in terms of the reasonable  
4 person, the Court is careful to avoid converting the objective standard of Section 455(a) into a  
5 subjective one. That is, there is no actual person whose thoughts or beliefs are used as the yardstick  
6 of what is “reasonable.” The Court, in creating that personification of reasonableness, is bound to  
7 do so within the confines of the Constitution and other law. Thus, it would not be reasonable to  
8 regard a fact as bringing a judge’s impartiality into question if doing so would institute a “double  
9 standard for minority judges” whereby the fact that a judge is gay, or black, or female would “raise  
10 doubts about [that judge’s] impartiality.” See Alabama, 828 F.2d at 1542. In addition, the Court  
11 recognizes that a fact is not necessarily a basis for questioning a judge’s impartiality merely because  
12 that fact might lead a segment of the public to question the judge’s impartiality. Reasonableness is  
13 not determined on the basis of what a particular group of individuals may think, nor even on the  
14 basis of what a majority of individuals in a group believe to be the case.<sup>16</sup>

15 In addition, Section 455(a) is “limited by the ‘extrajudicial source’ factor which generally  
16 requires as the basis for recusal something other than rulings, opinions formed or statements made  
17 by the judge during the course of trial.” Holland, 519 F.3d at 913-14. The Ninth Circuit has  
18 cautioned that Section 455(a) claims “are fact driven, and as a result, the analysis of a particular  
19 [Section 455(a)] claim must be guided, not by comparison to similar situations addressed by prior  
20 jurisprudence, but rather by an independent examination of the unique facts and circumstances of the  
21 particular claim at issue.” Clemens v. United States Dist. Court for Central Dist. of California, 428

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23 <sup>16</sup> See, e.g., Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 923-29 (2004)  
24 (Scalia, J.) (explaining, in response to a Section 455(a) recusal motion, that Justice Scalia’s  
25 impartiality could not “reasonably be questioned,” even though many members of the public had  
26 concluded that he appeared to be partial in the case, because the recusal question cannot be  
27 determined by “uninformed opinion[s],” even if a “significant portion of the press . . . demands”  
28 such recusal); see also In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)  
(explaining that judges determine the “appearance of impropriety” under Section 455(a) as they  
determine “all legal issues,” and “not by considering what a straw poll of the only partly informed  
man-in-the-street would show”).

1 F.3d 1175, 1178 (9th Cir. 2005) (citation omitted). Moreover, Section 455(a) “does not require  
2 recusal based on speculation.” Id. at 1180.

3 Here, Defendant-Intervenors contend that consideration of the fact that Judge Walker “has  
4 been involved in a 10-year (8-year at the time that Plaintiffs commenced this suit) committed same-  
5 sex relationship” would lead a reasonable person to question Judge Walker’s impartiality. (Motion  
6 at 11-12.) The Court finds that disqualification under Section 455(a) on the basis of this fact fails,  
7 because it depends upon the assumption that a judge who is in a relationship has an interest in  
8 getting married which is so powerful that it would render that judge incapable of performing his  
9 duties.<sup>17</sup> Under Ninth Circuit law, however, this assumption is unreasonable. A well-informed,  
10 thoughtful observer would recognize that the mere fact that a judge is in a relationship with another  
11 person—whether of the same *or* the opposite sex—does not *ipso facto* imply that the judge must be so  
12 interested in marrying that person that he would be unable to exhibit the impartiality which, it is  
13 presumed, all federal judges maintain.<sup>18</sup> Torres, 2007 WL 3165665, at \*1; see also Holland, 519  
14 F.3d at 912 (explaining that a judge’s general obligation to participate in cases assigned to him is  
15 reflected in the oath whereby federal judges “obligate[] [themselves] to ‘faithfully and impartially  
16 discharge and perform [their] duties’ and to ‘administer justice without respect to persons, and do  
17 equal right to the poor and to the rich’”) (quoting 28 U.S.C. § 453)). To assume otherwise is to  
18 engage in speculation about a judge’s motives and desires on the basis of an unsubstantiated  
19 suspicion that the judge is personally biased or prejudiced. Mere speculation of that nature does not  
20 trigger the recusal requirements of Section 455(a). Clemens, 428 F.3d at 1180; Holland, 519 F.3d at  
21 914.

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23 <sup>17</sup> (See, e.g., Motion at 5 (stating that it “must be presumed” that Judge Walker, by finding  
24 that Proposition 8 was unconstitutional, in effect “issue[d] an injunction directing a state official to  
issue a marriage license *to him*”) (emphasis in original).)

25 <sup>18</sup> Further, the mere fact that an individual is in a relationship with a person does not  
26 necessarily imply that that individual is interested in getting married to that person at all. (See, e.g.,  
27 Reply at 2 (contending that “almost two-thirds of [committed same-sex couples] in California would  
get married if permitted to do so,” which suggests that more than one-third of such couples in  
California have no interest in being married).)

1           **2.       Whether Judge Walker’s Non-Disclosure of His Relationship Would Lead a**  
2           **Reasonable Observer to Question His Impartiality**

3           Alternatively, Defendant-Intervenors contend that a reasonable observer would question  
4 Judge Walker’s impartiality, given the fact that Judge Walker did not disclose his same-sex  
5 relationship “until eight months after final judgment was entered, and after he had retired from the  
6 bench,” and because Judge Walker “has never disclosed whether he and his partner have (or have  
7 ever had) any interest in marrying should a right to marry an individual of the same sex be  
8 established.” (Motion at 11-12.) That is, Defendant-Intervenors posit that Judge Walker’s silence  
9 about the existence of his relationship, and about whether he and his partner have any interest in  
10 marrying, would necessarily give rise, in the mind of a reasonable observer, to an assumption that  
11 Judge Walker’s silence indicates that he was not impartial.<sup>19</sup> However, silence is by its very nature  
12 ambiguous, and thus is open to multiple interpretations. Another, and equally reasonable, way to  
13 interpret that silence is suggested by Ninth Circuit caselaw, which holds that it is to be presumed  
14 that any judge is impartial. See, e.g., First Interstate Bank of Az., 210 F.3d at 988 (stating that  
15 judges “are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the  
16 appearance of impropriety”); see also Ortiz v. Stewart, 149 F.3d at 939 (“[W]e abide by the general  
17 presumption that judges are unbiased and honest”). Beginning from the presumption that judges are  
18 impartial, the Court postulates that a judge who is silent in such a situation has already, *sua sponte*,  
19 considered the question of recusal and has determined that he need not disqualify himself, because  
20 no reasonable observer would conclude that his impartiality could reasonably be questioned. To  
21 adopt Defendant-Intervenors’ contrary interpretation would vitiate the presumption of judicial  
22 impartiality, as it would lead the reasonable observer to the opposite presumption; namely, that  
23 silence is to be taken as conclusive evidence of a judge’s partiality.

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27           <sup>19</sup> As the Court has previously found, Judge Walker was under no duty to disclaim any  
28 future subjective interest in entering a same-sex marriage.



1 Defendant-Intervenors' reliance on In re Kensington International Limited,<sup>20</sup> United States v.  
2 Murphy<sup>21</sup> and Tramonte v. Chrysler Corp.<sup>22</sup> in support of the proposition that Judge Walker was  
3 required to disclose the existence and nature of his relationship is misplaced.<sup>23</sup> (Motion at 8-9.) In  
4 In re Kensington, the Third Circuit found that a district court judge should have recused himself  
5 under Section 455(a), because of his extensive *ex parte* communications with two court-appointed  
6 advisors in a complex asbestos-related case, where those advisors were simultaneously representing  
7 asbestos claimants in a separate case. In re Kensington, 368 F.3d at 302-04. The Third Circuit  
8 stated that the burden was on the judge to inform the parties that he was being advised *ex parte* by  
9 lawyers who, because they were "actively participating as zealous advocates" in the other case, had  
10 a conflict of interest. Id. at 313-14. Murphy involved a criminal trial in which the district court  
11 judge was "the best of friends" with the government's principal lawyer, and in which the judge and  
12 the lawyer went on a vacation together immediately following the trial. Murphy, 768 F.2d at 1536-  
13 37. The Seventh Circuit found that the burden was on the judge to disclose his close friendship and  
14 vacation plans with the lawyer. Id. at 1537. Tramonte was a class-action suit in which Chrysler was  
15 the defendant, and in which a family member of the district court judge owned a car manufactured  
16 by Chrysler, which made that family member a potential member of the class. Tramonte, 136 F.3d

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17 <sup>20</sup> 368 F.3d 289 (3d Cir. 2004).

18 <sup>21</sup> 768 F.2d 1518 (7th Cir. 1985).

19 <sup>22</sup> 136 F.3d 1025 (5th Cir. 1998).

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21 <sup>23</sup> In addition, Defendant-Intervenors appear to suggest that Judge Walker had a duty, under  
22 Section 455(e), to disclose his same-sex relationship. (See Motion at 2 (contending that Judge  
23 Walker, because of his same-sex relationship, was "obligated either to recuse himself or to provide  
24 'full disclosure on the record of the basis for disqualification'") (quoting 28 U.S.C. § 455(e)).)  
25 However, this contention is misguided. Section 455(e) governs the conditions under which a ground  
26 for disqualification may be waived by the parties, and states that if the ground for disqualification  
27 arises only under Section 455(a), a judge may accept waiver of that ground from the parties,  
28 "provided [that the waiver] is preceded by a full disclosure on the record of the basis for  
disqualification." Thus, the requirement of disclosure on the record is conditional on the finding that  
there was a valid ground for disqualification under Section 455(a). However, as discussed  
previously, the Court finds that Judge Walker had no valid ground for disqualifying himself under  
Section 455(a). Therefore, the disclosure requirement of Section 455(e) was not triggered, and  
Judge Walker had no obligation under Section 455(e) to disclose his relationship status on the  
record.

1 at 1027. The Fifth Circuit found that the burden was on the judge to disclose whether her spouse or  
2 children owned a car manufactured by Chrysler, because a judge “has a duty to be watchful of such  
3 disqualifying circumstances” and disclose them on the record. Id. at 1030-31.

4 In each of these instances, the judge was associated with one or more individuals who had a  
5 clear, concrete stake in the outcome of the litigation. And in each instance, the appellate court found  
6 that the judge was required to disclose the existence and nature of his association with those  
7 individuals. Here, by contrast, Judge Walker had no such association, and thus had nothing to  
8 disclose. Defendant-Intervenors cite no case suggesting that a judge has a duty to disclose  
9 information about his personal life when such information does not pertain to the judge’s association  
10 with an individual having a clear, concrete stake in the outcome of the litigation, and the Court is not  
11 aware of any cases standing for that proposition.<sup>24</sup>

12 In fact, the Court observes that Judge Walker, like all judges, had a duty to preserve the  
13 integrity of the judiciary. Among other things, this means that if, in an overabundance of caution, he  
14 were to have disclosed intimate, but irrelevant, details about his personal life that were not  
15 reasonably related to the question of disqualification, he could have set a pernicious precedent.  
16 Such a precedent would be detrimental to the integrity of the judiciary, because it would promote,  
17 incorrectly, disclosure by judges of highly personal information (e.g., information about a judge’s  
18 history of being sexually abused as a child), however irrelevant or time-consuming. Contrary to the  
19 intent of Section 455, which was designed to preserve judicial integrity through practices of  
20 transparency, it is clear that fostering the practice of commencing a judicial proceeding with an  
21 extensive exploration into the history and psyche of the presiding judge would produce the spurious  
22 appearance that irrelevant personal information could impact the judge’s decision-making, which  
23 would be harmful to the integrity of the courts.

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25  
26 <sup>24</sup> In fact, courts that have considered the question have taken the opposite view. See, e.g.,  
27 In re McCarthey, 368 F.3d 1266, 1269 (10th Cir. 2004) (declining to “craft a procedure that  
28 essentially will require district judges to submit to discovery . . . when a party lacks an adequate  
factual basis for disqualification on non-financial matters”).


1 Finally, the presumption that “all people in same-sex relationships think alike” is an  
 2 unreasonable presumption, and one which has no place in legal reasoning. The presumption that  
 3 Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered  
 4 him incapable of making an impartial decision, is as warrantless as the presumption that a female  
 5 judge is incapable of being impartial in a case in which women seek legal relief. On the contrary: it  
 6 is reasonable to presume that a female judge or a judge in a same-sex relationship is capable of  
 7 rising above any personal predisposition and deciding such a case on the merits. The Motion fails to  
 8 cite any evidence that Judge Walker would be incapable of being impartial, but to presume that  
 9 Judge Walker was incapable of being impartial, without concrete evidence to support that  
 10 presumption, is inconsistent with what is required under a reasonableness standard.<sup>25</sup>

11 Accordingly, the Court DENIES Defendant-Intervenors’ Motion to Vacate Judgment on the  
 12 ground that the presiding judge failed to recuse himself under Section 455(a).

#### 13 IV. CONCLUSION

14 The Court DENIES Defendant-Intervenors’ Motion to Vacate Judgment.<sup>26</sup>

15  
 16 Dated: June 14, 2011

  
 17 \_\_\_\_\_  
 18 JAMES WARE  
 19 United States District Chief Judge

20 \_\_\_\_\_  
 21 <sup>25</sup> Defendant-Intervenors also point to a number of Judge Walker’s rulings in the case, “both  
 22 procedural and substantive,” and contend that the “nature of these rulings” contributes to the  
 23 “appearance of partiality” under Section 455(a). (Motion at 3-4.) Defendant-Intervenors concede  
 24 that these rulings of themselves would not constitute a valid basis for a Section 455(a) motion,  
 25 insofar as judicial rulings “almost never” constitute a basis for such a motion. (*Id.* at 12 (citing  
*Liteky v. United States*, 510 U.S. 540, 555 (1994)).) Defendant-Intervenors only contend that such  
 rulings would “deepen the concerns” that a reasonable observer would, they contend, already have  
 about Judge Walker’s impartiality “as a result of his long-term same-sex relationship.” (*Id.*)  
 However, as discussed previously, the Court finds that a reasonable observer would not question  
 Judge Walker’s impartiality on the basis of his same-sex relationship.

26 <sup>26</sup> In light of the Court’s finding that there was no violation of Section 455, the Court need  
 27 not reach the issue of whether such a violation would be of such a degree as to warrant the  
 28 extraordinary remedy of vacating the Judgment under Fed. R. Civ. P. 60(b). See *Liljeberg*, 486 U.S.  
 at 862-63.

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**Dated: June 14, 2011**

**Richard W. Wieking, Clerk**

By:           /s/ JW Chambers            
**Susan Imbriani**  
**Courtroom Deputy**