

Hearing Transcripts of the
Motion to Vacate the Prop. 8 Decision
and the
**Motion to Seal Video Recording
of the Prop. 8 Trial**

June 13, 2011

Chief Judge James S. Ware, Presiding

Phillip Burton Federal Building & United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Provided by:



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JAMES WARE

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

VS.)

NO. C 09-2292 JW

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

Defendants.)

San Francisco, California
Monday
June 13, 2011

TRANSCRIPT OF PROCEEDINGS

Reported By: *Debra L. Pas, CSR 11916, CRR, RMR, RPR*
Official Reporter - US District Court
Computerized Transcription By Eclipse

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P R O C E E D I N G S

JUNE 13, 2011

9:04 A.M.

THE COURT: Good morning. We have several matters and rather than have you come up and state your appearances again, I understand that the court reporter has taken your appearances. I thought I would maybe outline what I intend and then as you come to address the Court, you can introduce yourselves.

There are essentially two motions before the Court, the first having to do with the tape recording of the trial proceedings and the second having to do with this motion to vacate the judgment.

I intend, perhaps you have already been advised about this, to hear -- the first motion is the videotape motion, and then to proceed to the vacate the judgment motion. The parties are allowed a time period with respect to the tape motion of about 40 minutes, and we sort of divided that thinking that there are only two sides that wish to argue, 20 minutes each, but in a moment I'll see if there are others. And then on the motion having to do with the judgment, my understanding is my staff has advised you that you have about 45 minutes each, which is quite liberal by District Court standards. I understand that there are three parties who wish to be heard on that, but, again, I'll determine that in a moment.

1 This is a human institution and so I will take a
2 break occasionally. I have told my staff to give me a high
3 sign if any of them should need a break before I have a
4 scheduled break.

5 So with respect to the question having to do with the
6 videotape, please come up and state your appearances if you
7 would wish to address the Court on that.

8 **MR. COOPER:** Thank you very much, Chief Judge Ware.
9 My name is Charles Cooper. I represent the defendant-
10 intervenors, otherwise known as the proponents in this case.
11 I will be presenting the argument with respect to both motions
12 today.

13 Thank you again.

14 **THE COURT:** Thank you, Mr. Cooper.

15 **MR. BOUTROUS:** Good morning, Chief Judge Ware,
16 Theodore J. Boutrous, Jr. representing the plaintiffs Kris
17 Perry and Sandy Stier, Jeff Zarrillo and Paul Katami, who are
18 here with us today in court. I will also be presenting
19 argument on both motions.

20 I'm joined by my colleagues Christopher Dussault,
21 Enrique Monagas, Theane Kapur and Russell Gold.

22 **THE COURT:** Very well. Good morning.

23 **MS. STEWART:** Good morning, Chief Judge Ware.
24 Therese Stewart on behalf of the City and County of
25 San Francisco plaintiff-intervenor. I will address the Court

1 on behalf of the city in both motions, but I don't expect to
2 have more than a minute or two on the motion regarding the
3 video. I have a little more substantive things to say about
4 the motion to vacate. I'm going to try not to repeat what
5 Mr. Boutrous has to say, so I'm going to try to keep both
6 pretty short.

7 **THE COURT:** Thank you, Ms. Therese Stewart.

8 **MR. BURKE:** Good morning, your Honor. Thomas Burke
9 of Davis Wright Tremaine on behalf of the Media Coalition. I
10 don't anticipate any argument, but want to be available to the
11 Court should it have any questions.

12 **THE COURT:** Yes. As I understand it, your client is
13 perhaps more interested in the portion of the motion having to
14 do with the videotape to actually have the protective order
15 removed with respect to it and have it unsealed.

16 **MR. BURKE:** Correct, your Honor.

17 **THE COURT:** And I have decided to bifurcate that. I
18 often come back to second guess myself. That means I've got to
19 work more, but I thought it would be helpful to first get an
20 understanding, get it all under the Court's control. And there
21 may be a wider group, as I suspect, than your client who might
22 be interested in the public availability of it.

23 So that means I shouldn't reserve any time for you on
24 the argument. I doubt if I'll have any questions for you in
25 that regard, but you're welcome.

1 **MR. BURKE:** Thank you for clarifying that. Thank
2 you, your Honor.

3 **THE COURT:** With that, then I'll call on Mr. Cooper
4 for his argument with respect to this matter having to do with
5 the return of the tape of the trial proceedings.

6 **MR. COOPER:** Thank you again, Chief Judge Ware.

7 I'm obliged to note at the outset of my argument that
8 at least insofar as our motion is concerned, I need to suggest
9 the possibility here of mootness. Our motion, as you know,
10 sought as its primary relief that former Judge Walker be
11 ordered to be return the trial recordings and that they be
12 placed under seal. And the trial recordings have been returned
13 by former Judge Walker and they have been placed under seal, as
14 we understand this Court's orders. So depending upon what the
15 Court's inclinations are with respect to those, those trial
16 recordings, our motion may well be moot.

17 Obviously, the cross motion to unseal and make public
18 those trial recordings is definitely not moot. I understand
19 the Court's order and the Court's reiteration here just now,
20 that those issues will be taken up at a later time.

21 **THE COURT:** Let me suggest a middle area that you,
22 perhaps, are about to address; and that is, it is true that I
23 issued an order to Judge Walker to have him show cause why he
24 should not return the copy that he had, and he returned it, and
25 I excused him from being here.

1 I have not taken up the question of whether or not
2 he's entitled to have it. The disclosure of it, the public use
3 of it is a separate matter from whether or not he, as a judge
4 in the court who took a copy as part of his documents and
5 papers, is entitled to have it.

6 But as I understand the circumstances, he has not
7 been brought before the Court formally and so there is no
8 mechanism by which I can do anything necessarily to him. It
9 was a courtesy for him to return it, as opposed to appear and
10 discuss it with the Court. But at the end of the day, it could
11 well be that I will give it back to him with a finding that the
12 protective order is still in force and effect and that might
13 govern his use of it in his hands.

14 I also understand that others might have a copy of
15 it, subject to the protective order. And so part of my inquiry
16 today is to find out if any other party or person has a copy
17 and what use they might make of it pending the second part of
18 the motion.

19 **MR. COOPER:** Exactly, your Honor. I understand. And
20 it was certainly my understanding from Judge Walker's lawyer's
21 letter that he may well approach the Court to have the tapes
22 returned, but I understood him to be reserving that
23 possibility.

24 But in any event, your Honor, our motion was
25 precipitated by a speech, your Honor, that former Judge

1 Walker -- at that time he was Judge Walker -- at the University
2 of Arizona on February 18th. That speech was taped by C-SPAN
3 and broadcast several times beginning sometime in middle to
4 late March. And within that speech, your Honor, there was an
5 excerpt from the trial in this case, an excerpt of one of the
6 proponent's expert witnesses being cross examined.

7 Now, a year earlier on January 13, 2010, the Supreme
8 Court had entered an emergency stay, prohibiting enforcement of
9 Judge Walker's order of January 7th, 2010 calling for the live
10 broadcast in certain selected courthouses throughout the
11 country of the trial in this case. The Supreme Court ruled
12 that an amendment to local Rule 77-3 of this court, which had
13 been designed to permit the public broadcast in a pilot program
14 of civil trials in this Court, had not been validly
15 promulgated. And the Court summarized its ruling as follows,
16 your Honor. This is from the Court's opinion:

17 "The District Court attempted to change
18 its rules at the 11th hour to treat this case
19 differently than other trials in the
20 district. Not only did it ignore the federal
21 statute that establishes the procedures by
22 which its rules may be amended, its express
23 purpose was to broadcast a high profile trial
24 that would include witness testimony about a
25 contentious issue. If courts are to require

1 that others follow regular procedures, Courts
2 must do so as well."

3 And, your Honor, in that opinion the Court had
4 several times stressed the inappropriateness, really, of this
5 trial in light of its high profile nature and the divisive
6 issues that --

7 **THE COURT:** The inappropriateness of the trial?

8 **MR. COOPER:** The inappropriateness of this trial
9 being used as a candidate for a pilot program for public
10 broadcast of the trial proceedings.

11 **THE COURT:** That's not my recollection. But I'm
12 familiar with that procedural history.

13 What is your point with respect to the motion?

14 **MR. COOPER:** Your Honor, our point is that just the
15 following day after that decision the proponents objected to
16 the continued recording, trial recording, of the proceedings.
17 And Chief Judge Walker insisted that the trial recording
18 continue, and he did so on the assurance that continuing the
19 recording would comply with original Rule 77-3, which
20 prohibits -- and which was then operative and is still
21 operative, which prohibits public televising or broadcasting or
22 recording for those purposes outside of the confines of the
23 courthouse itself.

24 And, your Honor, Chief Judge Walker assured the
25 proponents and the parties that the trial recording could

1 continue consistent with 77.3 because he intended not to -- the
2 recording would not be for the purpose of public televising or
3 broadcasting, but, rather, for his personal purposes in
4 chambers in connection with the case, judicial purposes in
5 chambers. He said they would be helpful to him in preparing
6 his findings of fact. The proponents relied upon that
7 assurance and did not take any steps after that to try to
8 prevent continued recording.

9 Your Honor, if the proponents had any reason to
10 suspect that the trial recordings would ultimately be used and
11 publicly broadcast, even an excerpt of them, or for that
12 matter, that they might be retained by the Court, by Judge
13 Walker in his personal and private capacity for non-judicial
14 uses at some point in the future, including after the time of
15 his service on this court, the proponents --

16 **THE COURT:** Let me ask one clarification, because I
17 studied the sequence of events, but I understood that the Court
18 also indicated that the recording could be useful to the
19 parties in preparing their argument to the Court. And it's not
20 unusual in argument to have parties read from a transcript or
21 display a videotape of something that occurs during the trial.

22 And so it's not my understanding that he restricted
23 it purely to his use, but that -- in fact, the docket reflects
24 there might have been copies given to the parties for their use
25 in various ways. And so far as the Court understands, they

1 continue to have them and are, I presume, available to use them
2 in the appeal that's going on in this case.

3 So that the restrictions are not as great as you are
4 describing, so far as I'm understanding, but correct me if my
5 understanding is incorrect.

6 **MR. COOPER:** No, your Honor. Your understanding is
7 correct.

8 Notwithstanding Judge Walker's assurances with
9 respect to the purpose of the continued recording, after the
10 actual trial proceedings were concluded and the closing
11 arguments were approaching, Judge Walker did make available to
12 the parties and the defendants. Both the plaintiffs in this
13 case and City of San Francisco did ask that copies of those
14 trial recordings be provided to them.

15 **THE COURT:** And they were or not?

16 **MR. COOPER:** They were, your Honor. Yes, they were.
17 And the specific purpose for that was not, your Honor, for the
18 public broadcast or televising outside the confines of the
19 courthouse, but, rather, for the use by the parties with the
20 court in the courthouse and in the trial proceedings
21 themselves.

22 **THE COURT:** And, again, my understanding is that is
23 by virtue of the fact that they were placed under the
24 protective order. There was nothing expressly said, other than
25 they are subject to the protective order. And your

1 understanding of the protective order is that anything that's
2 covered by the protective order has to be used internal to the
3 court proceedings and not made available to the public.

4 **MR. COOPER:** Yes, your Honor. That's -- those were
5 the terms of the protective order, and they -- and they
6 satisfied us, frankly, that the Court's essentially amendment
7 to his earlier assurances, his earlier oral ruling, if you
8 will, were consistent with 77.3, and that our friends
9 representing the plaintiffs in this case were under the
10 protective order and so that was not a matter that we then
11 objected to or in any way attempted to prevent.

12 **THE COURT:** Is there any authority that the judge is
13 subject to the protective order?

14 **MR. COOPER:** I beg your pardon?

15 **THE COURT:** Is there any authority that the judge
16 himself is subject to the protective order?

17 **MR. COOPER:** When we were preparing this motion, your
18 Honor, we concluded that he was not, at least not by its terms.
19 So we haven't voiced the -- that consideration in our papers,
20 and we do not know the --

21 **THE COURT:** The reason I asked that is this sounds
22 like an argument that is pertinent to a question as to whether
23 or not Judge Walker made some mistake by displaying an excerpt
24 in his speech. That's not before the Court, but -- because no
25 such motion has been brought. And I would think if I were to

1 hear such a motion, I would certainly want to do it in a
2 process that would allow Judge Walker to participate. And
3 since he's not before the Court, I'm not sure I'm understanding
4 why you're reciting this for me.

5 **MR. COOPER:** I'm not sure I'm following what you mean
6 by "mistake." We definitely are presenting to the Court our
7 view that Judge Walker's use of an excerpt from those trial
8 recordings did, indeed -- was, indeed, a mistake and was,
9 indeed, inconsistent and contrary to this court's Rule 77.3.

10 **THE COURT:** Well, what is the -- what is the relief
11 that you're seeking from me?

12 **MR. COOPER:** Your Honor, we were seeking the relief,
13 and our motion makes clear that we were seeking that the Court
14 as the custodian, if you will, of the record of this case, and
15 most particularly the portion of the record that is sealed, and
16 that includes the trial recordings, order that all persons
17 having those trial recordings return them to the Court,
18 including Judge Walker, and --

19 **THE COURT:** So you -- let me clarify that. You want
20 me to order all of the parties who were given copies for
21 whatever purpose during the trial to now return them to the
22 custody of the Court?

23 **MR. COOPER:** Yes, your Honor.

24 **THE COURT:** And not to allow them any further use,
25 even on appeal?

1 **MR. COOPER:** Your Honor, our position with respect to
2 the plaintiffs' copies of the trial recordings is much
3 different than our position with respect to --

4 **THE COURT:** "Yes" or "no"? They should not have
5 further use of them on appeal?

6 **MR. COOPER:** That's right, your Honor. We don't --

7 **THE COURT:** And what's the authority for not allowing
8 that record to be used on appeal if it's used in conformance
9 with the protective order? I don't understand the protective
10 order to preclude use by the parties.

11 **MR. COOPER:** It does not preclude use, your Honor.
12 Our position -- and we -- and after the closing arguments in
13 this Court, we asked Judge Walker to order that all copies of
14 the then -- of the trial recordings be returned to the Court in
15 order to protect against any kind of inadvertent disclosure.

16 **THE COURT:** Did he do that?

17 **MR. COOPER:** No, your Honor. He denied that motion
18 and he -- and that is, in light of the plaintiffs' arguments,
19 they might be useful on appeal.

20 Our position now, your Honor, is that -- as it was in
21 the initial argument, that the plaintiffs be required to return
22 the trial recordings, is that their justification for
23 possession of them has now either evaporated entirely or become
24 so attenuated that it no longer justifies continued possession,
25 even under the protective order.

1 We are not in any way suggesting that we doubt that
2 the plaintiffs will do anything other than scrupulously adhere
3 to the protective order, but so long as the tapes are not in
4 the possession of the Court, there is some -- some risk of
5 inadvertent disclosure. And we have not heard any serious
6 argument for how those tapes can be useful to the parties on
7 appeal apart from and over and above the fact that the
8 transcript is available, as it is in every case for purposes on
9 appeal.

10 We have never heard any serious justification for why
11 those tapes under seal, whose existence is owed to Chief Judge
12 Walker's assurances that they will be used only in chambers for
13 his judicial purposes and whose existence would not -- and the
14 trial recordings wouldn't exist at all, your Honor, again.

15 **THE COURT:** Wouldn't the utility of the tapes or
16 their use before the appellate court be more appropriately
17 addressed to the appellate court?

18 **MR. COOPER:** Your Honor, we did address this motion
19 to the appellate court initially, and the Court then remanded
20 it to this Court for initial consideration and disposition.

21 **THE COURT:** You understand the remand that I am to
22 decide whether it to be useful to the appellate court?

23 **MR. COOPER:** We are not asking that the appellate
24 court be required to return its copy of the tapes --

25 **THE COURT:** No, no, no. The use before the

1 appellate -- do you understand the remand is to the District
2 Court to decide whether the use of the tapes would be pertinent
3 to the appellate court proceedings or useful in the appellate
4 court proceedings?

5 **MR. COOPER:** Your Honor, we understand the remand to
6 bring to this Court for its, at least, initial consideration
7 and decision the issues that we brought to the Court of
8 Appeals.

9 **THE COURT:** I didn't -- that doesn't help me. That's
10 too general.

11 **MR. COOPER:** I'm sorry?

12 **THE COURT:** Is it your position that the appellate
13 court remanded to the district court to decide whether or not
14 in the appellate court proceedings the use of the videotape
15 should be allowed or disallowed?

16 **MR. COOPER:** Yes, your Honor. We believe that this
17 Court can make a judgment --

18 **THE COURT:** No, no, not can make a judgment. Whether
19 the remand was for that purpose.

20 You said, yes, but you started in to say make a
21 judgment. I can make a judgment about lots of things, but it's
22 not my business about what normally happens before the
23 appellate court or what they use to make their decisions.
24 That's a matter before the appellate court.

25 I'll review the remand. I was trying to understand

1 your position with respect to that, as to whether or not I am
2 now to decide what the record on appeal will consist of and
3 what can be used in the prosecution of the appeal.

4 **MR. COOPER:** Your Honor, we have never asked that
5 this Court withdraw the trial recordings from the record on
6 appeal. Only that this Court, and we initially asked the Court
7 of Appeals, to require the return of the tapes now that the
8 argument -- now that the case has been fully briefed and the
9 argument has been made, that the tapes be returned to the
10 record of the Court from the parties that have them.

11 **THE COURT:** Do you have a copy?

12 **MR. COOPER:** No, your Honor, I do not.

13 **THE COURT:** Do you know who else has a copy?

14 **MR. COOPER:** To my knowledge, the only copies, your
15 Honor, are the copies that are in the -- I assume in the record
16 of this Court, which is now before the Court of Appeals, and
17 the copy -- full copy in the possession of the plaintiffs, and
18 a partial copy in the possession of intervenor San Francisco.
19 Up until the copy was returned by former Judge Walker, there
20 was, we now know, a third copy. We did not know that at the
21 time.

22 So those are the only copies that we're aware of and,
23 certainly, those are the only copies that there is any record
24 before this Court of having --

25 **THE COURT:** I will have to ask a recusal question,

1 somewhat tongue-in-cheek, but serious enough that I want to
2 raise it given the second argument that we have here.

3 The copy that Judge Walker has returned was presented
4 to him at a passing of the gavel ceremony over which I
5 presided. So it was done under my auspices. The technologist
6 of the court presented him with a copy of the videotape for his
7 personal possession. And so I want to disclose that in case an
8 argument would wish -- you would wish to make an argument that
9 somehow having presided over that event, I need to recuse
10 myself from ruling on further matters with respect to Judge
11 Walker's copy of the tape.

12 **MR. COOPER:** Your Honor, did the Court at that time
13 consider any of the issues with respect to the seal, the sealed
14 nature of the recording?

15 **THE COURT:** Frankly, I was unaware of anything about
16 this case since it hadn't even been assigned to me at that
17 time. So it's the fact of presiding over that, that I'm asking
18 whether or not there is a request for me to recuse myself from
19 the matter. You might not wish to answer now since there will
20 be some time before I decide this.

21 Any closing comments?

22 **MR. COOPER:** Only this, your Honor. In light of the
23 point that the Court has just made, that it was not in any way
24 considering or aware of the facts and arguments that we are now
25 bringing to the Court, we would, of course, not consider that

1 an issue for your recusal.

2 **THE COURT:** You waive any interest?

3 **MR. COOPER:** In light of what you have said, yes,
4 your Honor.

5 Thank you.

6 **THE COURT:** Mr. Boutrous?

7 **MR. BOUTROUS:** Thank you, your Honor. May it please
8 the Court.

9 The first point that I would like to make is I think
10 that your Honor's suggestion, that the issue of whether the
11 tapes are part of Judge Walker's papers and should be given
12 back to him under whatever conditions your Honor might decide,
13 is exactly right. That seems to be an issue for the Chief
14 Judge, you, and the judge is to determine how judicial papers
15 and records are maintained.

16 With respect to the protective order issue, the
17 plaintiffs, who I represent, we have a copy of the videotape.
18 We have been abiding scrupulously by the protective order.
19 This is an important judicial record, which we have found
20 extraordinarily useful. It is a part of the record of this
21 Court, part of the record in the Ninth Circuit. If there is
22 en banc proceeding, it's part of the record for an en banc
23 proceeding. If we end up in the Supreme Court, it would be a
24 part of the record in the Supreme Court.

25 One of the underlying premises of Mr. Cooper's

1 presentation today and in his motion is that this is some
2 radioactive state secret that we're talking about. We respect
3 the protective order. We have been abiding by it.

4 But what we're talking about here is an actual
5 depiction in real time of what happened in this courthouse, in
6 an open public courtroom. So it's the quintessential judicial
7 record that I know we're going to come back to whether it
8 should be publicly released, but for today's purposes we're
9 talking about an important judicial record that the plaintiffs
10 and our legal team have found to be extremely useful.

11 As your Honor was pointing out, Chief Judge Walker
12 allowed the parties to use it during closing arguments. And I
13 was here for every moment of the trial, saw it unfold in real
14 time, read the transcript as we were preparing our briefs. And
15 when it came time to prepare for closings, we went back and
16 started looking at parts of the trial.

17 Contrary to what Mr. Cooper suggested -- I don't
18 think they requested a copy of the tapes, so he didn't have the
19 opportunity himself to go back and look and hear based on the
20 videotape what happened at the trial, but we found it extremely
21 useful. Even having been here to see the witnesses, we used
22 portions of the star witness for the proponents, Mr.
23 Blankenhorn. We couldn't -- there were so many clips that
24 graphically demonstrated our point, in the side of our case,
25 and that showed that their case was baseless, that we had to --

1 it took a lot of discipline just to cull out what we wanted to
2 use. But to see him testify and see him admit things about how
3 same-sex marriage would benefit Americans was -- you know, a
4 picture is worth a thousand words and when you have the audio,
5 it's even more valuable.

6 So for purposes of the appeal --

7 **THE COURT:** Technically, however, you're acting in
8 excess of the protective order. If the protective order limits
9 you to use for purposes of closing argument, don't you need to
10 seek, either from the Ninth Circuit or from this Court, an
11 expansion?

12 It could be that the protective order is general
13 enough that it's inherent in use for closing argument that it
14 is used for post trial proceedings, but -- and appeal is a post
15 trial proceeding. But don't you have, at least on the face of
16 the language of the protective order, an issue with respect to
17 whether or not you're acting in excess of it?

18 **MR. BOUTROUS:** No, your Honor. The protective order
19 only limited public dissemination and it did not limit us from
20 actually consulting the tape, from using it in court. If we
21 decided during further appellate proceedings to use it in court
22 consistent with the protective order, again, we probably would
23 have to get permission to use -- play clips in open court,
24 citing it and the like.

25 So I think that the protective order allows us to

1 consult it and use it as any other judicial record that has
2 been sealed.

3 **THE COURT:** Say that last part again? You thought
4 you would need permission to use it even by playing it again
5 during closing argument?

6 **MR. BOUTROUS:** No. Judge Walker gave us permission
7 to use any part of the videotape during the closing arguments,
8 which we did in this court.

9 In the Ninth Circuit, we have not played any portions
10 of the trial. There has already been, as the Court is aware,
11 the argument on December 6th. We did not use any of that in
12 court, but we had it available for ourselves, for our use, for
13 our consultation, and that's consistent with the protective
14 order.

15 The protective order would not limit us from then
16 using it, citing it, playing it in the Ninth Circuit or in the
17 Supreme Court. And the judges and justices --

18 **THE COURT:** Now, let me ask this: You also describe
19 it as part of the trial record. Is it?

20 **MR. BOUTROUS:** Yes, your Honor.

21 **THE COURT:** What makes it a part of the record?

22 **MR. BOUTROUS:** It's a part of the record. I think it
23 was officially made part of the record by Judge Walker, and it
24 is part of the Ninth Circuit record on appeal, and I believe
25 that it was transmitted as part of the record to the Ninth

1 Circuit. So this is a judicial record that Judge Walker relied
2 on as part of his decision.

3 **THE COURT:** So was there -- the transcript, of
4 course, is part of the record, certified by the reporter. What
5 certifies of the videotape?

6 **MR. BOUTROUS:** I believe the fact that it was
7 transmitted by the Court. I'm trying to think back of how the
8 sequencing came about, but the --

9 **THE COURT:** The clerk, as part of her record,
10 transmitting the files and records of the Court transmitted to
11 the Ninth Circuit a copy of the video?

12 **MR. BOUTROUS:** That's correct, your Honor. And I
13 also think because, as Judge Walker made clear in his
14 statements during the trial and in his findings, he relied on
15 the videotape that was the -- one of the principal purposes for
16 the recording in his preparation of his ruling.

17 So from the context of public access, for example, to
18 judicial records, it's a classic record. It's a record that
19 the Court relied on for making its decision. It's part of the
20 record. It's part of the Ninth Circuit record. And I must say
21 it's a very, very useful record.

22 **THE COURT:** Well, no doubt it's useful. One of the
23 reasons for deference by the appellate courts to the trial
24 courts with respect to matters such as credibility of witnesses
25 is that we're able to see the witnesses and they aren't and

1 able to judge matters having to do with long pregnant pauses or
2 things that might not appear on the record.

3 To the extent that we are now going to advance
4 ourselves so that the appellate courts can now essentially
5 watch the trial, there might be some concern that it will upset
6 the deference that we otherwise enjoy.

7 **MR. BOUTROUS:** We would not argue that, your Honor.
8 We will continue to argue for deference to our district judges,
9 even when there's videotape.

10 But it really is, I think in terms of bringing to
11 life what happened, very valuable both on appeal and in the
12 District Court.

13 And to go back to the legal issue, your Honor. You
14 asked Mr. Cooper about the Ninth Circuit's ruling. Mr. Cooper
15 has now conceded that the protective order did not govern Judge
16 Walker.

17 The remand from the Ninth Circuit, the Ninth Circuit
18 interpreted the motion to -- proponent's motion as a motion to
19 enforce against plaintiffs and Judge Walker the protective
20 order. Mr. Cooper has now admitted the protective order does
21 not apply to Judge Walker. Therefore, I think as he -- their
22 motion as to Judge Walker is mooted and complete, and the issue
23 of how to deal with the copy in Judge Walker's papers is
24 something for your Honor and your colleagues to decide.

25 With respect to the plaintiffs, we have a simple

1 request. We request to be able to continue to maintain,
2 pursuant to the protective order, our copy of the trial video.
3 We would look forward to coming back before this Court and
4 arguing about the broader question of public access.

5 One thing I think that -- the one thing about the
6 motion to vacate the judgment that I think is relevant here is
7 that by attacking the integrity of the court and of Judge
8 Walker, proponents have made it all the more appropriate for
9 the public to be able to see what actually happened in the
10 trial. So we look forward to coming back and arguing that
11 point.

12 But for today we request that the Court deny the
13 request by the proponents of Proposition 8, that we return the
14 video, and that we be able to maintain it as we have
15 scrupulously until the Court rules on the broader question of
16 public release, which we think would be very valuable.

17 **THE COURT:** And you have no objection to the current
18 state of the protective order and are not asking the Court,
19 while it has this matter before it, to modify it in any way.

20 **MR. BOUTROUS:** That's correct, your Honor. Subject
21 to the -- our motion to lift the protective order, which the
22 Court has deferred.

23 **THE COURT:** Very well.

24 **MR. BOUTROUS:** Thank you, your Honor.

25 **THE COURT:** And, Mr. Cooper, I didn't ask this

1 question directly, but I wanted to confirm that there is no
2 claim by the defendant-intervenors that the protective order
3 has been violated by the plaintiffs in any way.

4 **MR. COOPER:** No, your Honor. We make no claim. We
5 make no suggestion that they might violate it. That is not our
6 concern.

7 Our concern with respect to the copies held by the
8 plaintiffs is simply that the justification for their
9 possession of this record under seal, again, who owes its
10 existence only to Chief Judge Walker's assurances, has -- that
11 it is -- the reason for its possession is no longer justified.
12 If the Court disagrees --

13 **THE COURT:** You answered my question. I just wanted
14 to know if there was any violation claimed.

15 And, finally, do you feel that your client is at a
16 disadvantage that they did not themselves have a copy of the
17 videotape? And so you're not requesting the Court to make a
18 copy available, notwithstanding your motion to have it
19 withdrawn? If I deny that, to allow the plaintiff to keep it,
20 you're not making a motion that you would wish a copy, correct?

21 **MR. COOPER:** No, your Honor, I'm not.

22 **THE COURT:** Thank you very much.

23 **MR. COOPER:** Thank you.

24 **THE COURT:** Anyone else that was -- maybe a
25 one-minute possibility?

1 **MS. STEWART:** Thank you, your Honor.

2 I wanted to point the -- or draw the Court's
3 attention to Page 4 of Chief Judge Walker's Findings of Fact
4 and Conclusions of Law in which, among other things, he says
5 that the trial proceedings were recorded and used by the Court
6 in preparing the findings and conclusions. And he says:

7 "The clerk is now directed to file the
8 trial recording under seal as part of the
9 record."

10 So I think that's the most sort of official place, if
11 you will, where he did that.

12 I wanted to just underscore one point that
13 Mr. Boutrous made, and that is that there -- and it really,
14 perhaps, goes more to the motion that will come before the
15 Court later. But it feels ironic and really unworthy that the
16 proponents would raise a question about the judge's fairness
17 and integrity and at the same time try to hide from public view
18 that record which best shows how fairly and carefully and
19 patiently he conducted the trial.

20 And I wanted to add one further point, which is
21 that -- and I think Mr. Boutrous ably described how the
22 testimony, live or seeing it on video, it more palpably conveys
23 the feelings of the witnesses; not just the credibility issues
24 on the other side, but the plaintiffs when they testified about
25 how they felt both to be denied marriage and to hear some of

1 the ads saying they posed a threat to children and some of the
2 other witnesses who testified about their experiences. And
3 that -- it's just no substitute to read the cold transcript,
4 although I know we've done it for centuries, but the record in
5 the video is much stronger. And we will want to point that out
6 as the case goes along and draw the higher Court's attention to
7 some of those portions of the video. Thank you.

8 And we, your Honor, do have a copy as well and have
9 abided by the protective order and intend to do so until and
10 unless the Court lifts it.

11 **THE COURT:** Very well. I will give you a written
12 order on this. It does appear to the Court that there is no
13 good cause for assuming that the protective order will not be
14 followed. And it does appear that the -- this is an issue that
15 at this point was addressed only to the parties to the case and
16 not to Judge Walker.

17 In my written order I do intend to deny the motion to
18 order the return of the tape by those parties, but as I said,
19 maybe the reasons and all of those things might cause me to
20 modify that in some minor respect. I haven't received a
21 request from anyone with respect to allowing them, who are
22 parties to the appeal, at this point to have a copy; but that
23 is something that the Court would be willing to consider, if
24 appropriate request is made.

25 That being disposed of, the Court now turns its

1 attention to the motion to vacate the judgment. It could be
2 that we will take a break after kind of the first part of the
3 argument, unless I hear from my staff that they need a break
4 earlier. Counsel?

5 Now, let me preface your argument with a similar
6 statement, since this is about recusal and interest. There was
7 an occasion when, as you all know from the history of these
8 matters in the State of California, where same-sex couples
9 could lawfully be married and, as a judge, I presided over such
10 a marriage. I want to make that disclosure. I don't regard
11 that as inhibiting me from hearing this motion.

12 There is a question that I have asked the parties to
13 address with respect to the nature of the standard that I am
14 using for purposes of these proceedings. Ordinarily a motion
15 to disqualify under our process is made to the judge, and the
16 statute which most of your briefing is directed states that the
17 disqualification is made by the judge. It's a sua sponte
18 obligation. And there are other procedures available where an
19 affidavit might be filed that would require the judge to refer
20 the matter to yet another trial judge.

21 This is an unusual circumstance because Judge Walker
22 is not available to consider a motion to recuse himself, and I
23 am not in a position of knowing all of the things that Judge
24 Walker might know about his own feelings or situation that I
25 can't be in a position of determining whether or not he should

1 recuse himself.

2 I stand as a judge who took over his caseload, and
3 the motion to vacate the judgment is directed to me. And as I
4 understand the ground, it is that he had an obligation to
5 recuse himself and having failed to do so, a motion is made to
6 the judge assuming the case to find that he was disqualified.

7 So as part of this process, I would wish the parties
8 to address whether or not I am reviewing Judge Walker's failure
9 to sua sponte recuse himself denovo, or clear error, or for
10 some other standard that would be important to my
11 consideration.

12 Otherwise, you've briefed this matter quite well. It
13 is not surprising to the Court that both sides cite pretty much
14 the same cases. This is purely a question of law. And the
15 facts on which the motion is made is one that is stated by the
16 defendant-intervenors clearly.

17 I don't know why we gave you so much time to argue it
18 under these circumstances, but we did. So proceed.

19 **MR. COOPER:** Well, your Honor, we're very grateful
20 for the Court's time. We approach the Court awkwardly and not
21 in any way welcoming the obligation to make and argue this
22 motion, but nonetheless, here we are.

23 And at the heart, your Honor, of the concept of due
24 process is the requirement by our Constitution and at the
25 common law that decision be by an impartial tribunal. That's

1 why the ancient maxim has governed in the Constitution and
2 under the common law, in the Supreme Court's words, that: No
3 man can be judged in his own case and no man is permitted to
4 try cases where he has an interest in the outcome.

5 Again, that Supreme Court is insistent on scrupulous
6 observance of that postulate as a matter of constitutional law.
7 And Congress has codified the basic precept for the federal
8 judicial arrest in Section 455(a), which mandates recusal in
9 any proceeding in which the judge's impartiality might
10 reasonably be questioned.

11 The classic instance in which a judge's impartiality
12 might be questioned reasonably is when the judge has any
13 interest that could be substantially affected by the outcome of
14 the proceeding. And that is the specific restriction in
15 455(b)(4), your Honor.

16 **THE COURT:** So you can't conflate (a) and (b)(4)?

17 **MR. COOPER:** In many respects they are very much
18 related, your Honor.

19 Before is a little bit stricter standard in the sense
20 that it requires mandatory -- that is, non-waivable -- recusal
21 and disqualification in any case in which the judge has an
22 interest that could be substantially affected by the outcome.
23 For example, if the judge owns a single share of a stock and no
24 one would doubt that it wouldn't affect the judge's
25 impartiality, nonetheless, the judge is required to recuse him

1 or herself in that circumstance.

2 The obligation, if it isn't an equitable interest, an
3 ownership interest of some kind, but is some other kind of
4 interest, including other kinds of financial interests, then
5 the test isn't quite so strict. It's whether or not the
6 interest would substantially affect -- would be substantially
7 affected by the outcome of the proceeding.

8 **THE COURT:** Now, I have looked at those two as
9 separate; that there is a pecuniary interest that is the
10 subject of disqualification, and the term is "any." And it
11 means that it doesn't matter how much. A diminimus interest is
12 sufficient with respect to a financial or a pecuniary interest.

13 With respect to a non-pecuniary interest, it seems to
14 me that that is qualified by having a substantial -- being
15 substantially affected by the outcome.

16 Now, I've treated those as separate. It sounds like
17 you would put the two together; that even a pecuniary interest
18 needs to be substantially affected.

19 **MR. COOPER:** Your Honor, it depends upon the kind of
20 pecuniary interest. As I read the statute, it defines a
21 financial interest to be confined to some kind of equitable
22 ownership; for example, in stock or something such as that.

23 **THE COURT:** Well, we could debate that, but here the
24 defendant-intervenors are not claiming that Judge Walker had a
25 pecuniary interest.

1 **MR. COOPER:** We are not, your Honor.

2 **THE COURT:** All right. So let's move beyond that.

3 **MR. COOPER:** Very well, your Honor, except I do have
4 to make this caveat. Judge Walker did recognize and it is --
5 and it is true; that marriage has financial benefits that flow
6 from it to those who are the participants in a marriage, but
7 that is not -- we're not suggesting that that required a
8 (b)(4), a (b)(4) by itself, required a (b)(4) non-waivable
9 disqualification, your Honor.

10 The test under Section 455 is an objective one. It
11 doesn't depend upon whether the judge was actually impartial or
12 there was any actual bias. That is not -- that is not the
13 standard, your Honor. Rather, it's an objective one, again,
14 designed to prevent even the appearance of partiality.

15 **THE COURT:** Now, you're back to (a). (a) is
16 objective, and so you need to be mindful of which part you're
17 addressing because I am making a clear distinction between the
18 standard to be used under 455(a), which is an objective
19 standard having to do with the reasonableness test, and (b)(4),
20 which seems to me to be subjective.

21 **MR. COOPER:** Well, your Honor, I would disagree with
22 that point to this extent. (b)(4), as the Court mentioned
23 earlier, it requires recusal no matter how slight and trifling
24 the financial interest is.

25 **THE COURT:** Yes, but you measure it by the judge, not

1 by what a reasonable person would have in the sense -- I'm
2 using subjective meaning under (b)(4). The entire measure has
3 to be the judicial officer who is under consideration. And you
4 don't measure it by any outside hypothetical reasonable person.

5 **MR. COOPER:** Well, nor do you measure it subjectively
6 by whether or not the judge has any actual partiality or bias.
7 That is not the issue.

8 And, in fact, in many cases judges whose impartiality
9 is not doubted are mandatorily recused because they have even a
10 trifling financial interest. That's the only point I'm making
11 here, is that --

12 **THE COURT:** You, again, went back to financial
13 interest. What about the non-pecuniary interest would apply to
14 that statement; that a trifling non-pecuniary interest, that is
15 one that is not substantial, may be the basis of
16 disqualification?

17 **MR. COOPER:** Your Honor, if -- if -- if an interest
18 is not substantial, it would not provide the basis for
19 disqualification under (b)(4).

20 If it's remote and speculative or contingent, the
21 cases are clear that under (b)(4), that that is not the kind of
22 interest that would be substantially affected by the outcome.
23 It is only a direct and substantial personal interest in the
24 outcome that (b)(4) would require recusal for.

25 And, your Honor, just to identify for the Court the

1 standard test from the Ninth Circuit -- and I think most, if
2 not all, of the Courts of Appeals for the objective test under
3 455(a) -- it is simply whether a reasonable person with
4 knowledge of all the facts would conclude that the judge's
5 impartiality might reasonably be questioned.

6 Now, the plaintiffs, your Honor, allege in their
7 complaint -- and this is a quote from their complaint, your
8 Honor.

9 "They are gay and lesbian residents of
10 California who are involved in long-term
11 serious relationships with individuals of the
12 same sex."

13 And, your Honor, at the heart of the plaintiffs'
14 constitutional challenge to Proposition 8, is their claim --
15 and, again, this is in plaintiffs' own words, that they are:

16 "Similarly situated to heterosexual
17 individuals for purposes of marriage, because
18 like individuals in a relationship with a
19 person of the opposite sex, they are in
20 loving, committed relationships."

21 Your Honor, it now appears that Judge Walker at the
22 time the complaint was filed and throughout the litigation
23 occupied precisely those same shoes as the plaintiffs; that he
24 was, again in the plaintiffs' words, similarly situated to the
25 plaintiffs for purposes of marriage because he, too, was in a

1 serious long-term relationship with an individual of the same
2 sex.

3 **THE COURT:** I'm not sure what you mean by "for
4 purposes of marriage." What is the fact that you rely upon
5 that Judge Walker was in a relationship for purposes of
6 marriage?

7 **MR. COOPER:** Your Honor, this is the plaintiffs'
8 formulation --

9 **THE COURT:** I understand what they said about
10 themselves. When you said Judge Walker was in precisely the
11 same shoes, I'm asking what fact you cite to me that he was in
12 a relationship for purposes of marriage?

13 **MR. COOPER:** Your Honor, the fact that he has
14 publicly announced that he is and has been for 10 years in a
15 relationship with another person, a physician.

16 **THE COURT:** So the argument is that if you're in a
17 10-year relationship, that by definition means that it is for
18 purposes of marriage?

19 **MR. COOPER:** Your Honor, that -- that is the metric
20 that the plaintiffs have, and the parties have consistently
21 identified as the couples who -- in common sense and in the
22 context of this case, the couples who are in the kind of
23 long-term relationship that one would ordinarily and normally
24 expect to have an interest in marriage and to be, as I say, the
25 plaintiffs themselves say, similarly situated.

1 **THE COURT:** But you would concede that that is an
2 assumption; that is, it doesn't necessarily follow that a
3 long-term relationship is for purposes of marriage. You can be
4 in a long-term relationship without being in it for the
5 purposes of marriage, correct?

6 **MR. COOPER:** That's true, your Honor. There are
7 long-term relationships of a variety of kinds.

8 **THE COURT:** So what distinguishes one from the other?
9 What distinguishes a long-term relationship for purposes of
10 marriage from one that is not?

11 **MR. COOPER:** Your Honor, the very fact that two
12 individuals are in a relationship such as the one that Judge
13 Walker disclosed publicly, in a relationship --

14 **THE COURT:** I'm giving you the choice between the
15 two. If you concede that people can be in the kind of
16 relationship that you say Judge Walker had without being for
17 the purpose of marriage and you can with the purpose of
18 marriage, what distinguishes between the two?

19 **MR. COOPER:** Your Honor, there are platonic
20 friendships that, for instance, are long term in nature, and
21 that do not -- and that do not normally lead to a marriage in
22 any way.

23 **THE COURT:** What do you mean "platonic"?

24 **MR. COOPER:** But a relationship that is --

25 **THE COURT:** What do you mean "platonic"?

1 **MR. COOPER:** I mean, non-intimate, non-sexual
2 relationships.

3 The clear understanding of the media report and Judge
4 Walker's public statement --

5 **THE COURT:** Let me go back to "for purposes of
6 marriage." In other words, you're using that to mean that if
7 you're in a long-term relationship, you are enjoying, at least
8 to some extent, the same kind of commitment that is enjoyed by
9 people who are in a long-term marriage. Because there are
10 short-term marriages as well, but -- and so is that your point?
11 That the length of the relationship alone converts it into a
12 marriage-like relationship?

13 **MR. COOPER:** It bespeaks the commitment that "long
14 term" necessarily implies, your Honor, yes. It bespeaks.

15 And in this case, the formulation of "long-term
16 relationship," "serious relationship," "committed relationship"
17 have all been used interchangeably without, you know, any
18 difference in the understanding of the parties or the Court in
19 terms of what is being said on that score; that is, that these
20 are individuals that the plaintiffs themselves take pains in
21 their complaint to say they are involved in long-term
22 relationships with individuals of the same sex.

23 **THE COURT:** Now, but their relief was not sought to
24 remain in a long-term relationship. There was nothing about
25 the case that they brought to the Court that threatened their

1 long-term relationship.

2 Both they and Judge Walker could have remained in a
3 long-term relationship without it being affected by the
4 proceedings. What they were seeking to do was to change their
5 relationship in some way.

6 And so what is it? What fact would you cite to the
7 Court that Judge Walker had an interest in changing his
8 relationship as opposed to simply being in it?

9 **MR. COOPER:** Your Honor, there are several points
10 that I would make with respect to the specific question:
11 Whether or not a reasonable person with knowledge of all the
12 facts would conclude that -- would conclude that Judge Walker
13 would have, or would be expected to have, in the Supreme
14 Court's formulation in the *Liljeberg* case, an interest in
15 marrying his long-time partner.

16 Again, Judge Walker, in the plaintiffs' own words,
17 was similarly situated to the plaintiffs for the purpose of
18 marriage because he was in and has been in a long-term
19 relationship with his partner. That is the fundamental premise
20 upon which the plaintiffs have advanced their claim in this
21 Court.

22 **THE COURT:** But you're using a proposition to restate
23 the proposition. I'm asking you to tell me what fact you would
24 have the Court rely upon to suggest that Judge Walker wanted to
25 change his relationship; not maintain it, but change it.

1 To say that he wanted to maintain and had maintained
2 a long-term relationship doesn't -- doesn't put him in the
3 shoes where what the plaintiffs were doing would advance any
4 interest that he had, unless you cite to me some facts that he
5 was desirous of the relief that they were seeking.

6 **MR. COOPER:** Your Honor, the question under at least
7 455(a) is whether or not there is an appearance and whether or
8 not someone with knowledge of all the facts.

9 The key problem here is we have knowledge of one
10 fact, which the plaintiffs and which common sense tells you
11 that is -- is a premise, a common premise of those who are
12 interested and would be expected to have an interest in
13 marriage. That is a long-term relationship.

14 But we don't have the further fact -- and by the way,
15 the key point is that that was never disclosed by Judge Walker
16 at the time this case was filed or at any time during the
17 litigation of the case, that fact, a relevant fact to the issue
18 of disqualification.

19 **THE COURT:** You have gone on to another question, but
20 I will leave that question unanswered by you then as to whether
21 or not there are any facts to suggest that Judge Walker wanted
22 to change, other than the fact that it was long term.

23 **MR. COOPER:** Well, your Honor, the very fact that
24 that long-term relationship was not disclosed is a fact that
25 the Supreme Court has made very clear is itself of great

1 relevance to the question of whether one would have cause to be
2 concerned, cause to reasonably question the judge's
3 impartiality. The fact that a --

4 **THE COURT:** That's what I mean. You've gone to a
5 different question. I'm trying -- I thought that you were
6 going to respond to my question, and I said I will leave it as
7 unanswered. When you started to speak, I thought you wanted --
8 that you might challenge that as no, I have answered it. There
9 is something to indicate he wanted to change.

10 Do I understand you to say that the evidence that he
11 wanted to change his relationship is because he did not
12 disclose the relationship?

13 **MR. COOPER:** Your Honor, that is one of the facts
14 that one would -- that one -- a reasonable objective
15 observer --

16 **THE COURT:** How does the failure to disclose the
17 relationship serve as evidence that he wanted to change the
18 relationship?

19 **MR. COOPER:** The fact that he -- there are two facts,
20 your Honor, with respect to his non-disclosure.

21 The first one is he did not disclose that he was
22 standing in the same shoes as the plaintiffs with respect to a
23 long-term relationship with a member of the same sex. He did
24 not disclose that fact --

25 **THE COURT:** Okay. Let's elevate this. Let's elevate

1 this to a different level.

2 Do you accept -- since you're arguing under 455(a),
3 do you accept that the reasonableness standard under 455(a) not
4 only has the requirement that the person know all the facts,
5 but that they not make a judgment based upon speculation?

6 **MR. COOPER:** No, your Honor.

7 **THE COURT:** You don't accept that?

8 **MR. COOPER:** I do not accept that.

9 **THE COURT:** In other words, the reasonable person can
10 speculate about what the reason might be for the lack of
11 impartiality of a judge. It doesn't have to be based upon
12 reason. It could be based upon speculation.

13 **MR. COOPER:** If there is a fact that the judge has
14 not disclosed, such as in this case, any interest he may have
15 in marrying his long-time partner, then that --

16 **THE COURT:** Well, that presumes that he has an
17 interest. There has been no evidence what he had such an
18 interest.

19 So you -- the disclosure that I thought you were
20 citing to me earlier was the relationship, not the interest in
21 marrying. And so now you're suggesting to something that I
22 haven't seen in the record. Maybe you have it, but I haven't
23 seen it.

24 **MR. COOPER:** No, your Honor. There's two
25 propositions with respect to the nondisclosure here.

1 One is what we now know is a 10-year relationship
2 that Judge Walker is in and was in throughout the litigation
3 that he did not disclose. That is clearly relevant to whether
4 or not he has an interest that could be substantially affected
5 by the outcome of this proceeding.

6 The second point that he did not disclose and he
7 still has not disclosed is whether he has an interest in
8 marrying his long-time partner. If there's an answer to that
9 question -- and there is an answer to that question, maybe it
10 is no. But if the answer to that question is yes, then we
11 would submit to you it is quite clear that (b)(4) required his
12 non-waivable recusal from this case.

13 **THE COURT:** Back to (b)(4).

14 **MR. COOPER:** Yes.

15 **THE COURT:** Here is what I was about to do. I was
16 about to ask a series of questions about the reasonableness
17 test. You told me that the reasonableness test would allow
18 speculation. I thought you were going to answer that, but you
19 went someplace else.

20 Let me ask this. Under the reasonableness test, is
21 it reasonable to make a decision about the impartiality of a
22 judge based upon bias or prejudice?

23 **MR. COOPER:** I apologize, your Honor. I'm not sure I
24 follow your question.

25 **THE COURT:** In other words -- I'm always hesitant to

1 adopt the reasonable person test because it personifies the
2 reasonableness test as though it's a human being. We all know
3 that it's a hypothetical -- it's not a person. It's a standard
4 that we're using.

5 So does the standard used for judging reasonableness
6 allow bias or prejudice to play a part in that standard? In
7 other words, can you be reasonable and biased; or can you be
8 reasonable and prejudiced; or must the Court as a standard for
9 judging reasonableness, exclude any bias or prejudice? That's
10 the question.

11 **MR. COOPER:** I think when the Court looks at whether
12 or not a reasonable person in possession of all the relevant
13 facts to the disqualification issue would have a basis for
14 reasonably questioning the judge's impartiality, I don't think
15 the judge should assume that this reasonable person is somehow
16 biased.

17 But the Court has made clear that this reasonable
18 person is not a judge, is not a lawyer, is not someone who is
19 involved in the judicial process; but is, rather, a lay person,
20 a lay person.

21 **THE COURT:** Where do you get that? I'm sorry. You
22 said something that I -- did you answer my question? You
23 believe that you cannot be biased or prejudiced and be a
24 reasonable person? I never got a straight answer. I was
25 trying to get that down, because it's important to me to

1 understand your position on this.

2 Is there such a thing -- let me ask it this way -- as
3 a reasonable bigot, or a reasonably biased person, or a
4 reasonably prejudiced person, or a bias or prejudice
5 inconsistent with reasonableness? That's what I'm trying to
6 ask.

7 **MR. COOPER:** I have never seen a Court or a decision
8 speak to --

9 **THE COURT:** I haven't either. I'm asking you.

10 **MR. COOPER:** Yes. And I haven't seen any
11 jurisprudence that addresses this question.

12 **THE COURT:** I haven't either. I'm asking you.

13 **MR. COOPER:** Well, my view of it would be that, no,
14 the reasonable person should be someone who is not in some
15 fashion biased one way or another on this.

16 **THE COURT:** All right. Now, let's take it another
17 step.

18 If the reasonable test would not include bias or
19 prejudice, does the reasonable test also incorporate the
20 constitution anywhere? In other words, although the reasonable
21 test is one that is based on facts, must it also be consistent
22 with the Constitution?

23 In other words, if people on the street thought it
24 was okay to take away the civil rights of people, would that be
25 reasonable, even though it's inconsistent with the

1 Constitution?

2 **MR. COOPER:** Your Honor, I think the question is
3 whether or not the reasonable person, lay person, would have a
4 reason to question the judge's impartiality.

5 **THE COURT:** I understand that. But in doing so does
6 the -- do the requirements of the Constitution bind what is
7 judged as reasonable? That's why I have trouble with the
8 reasonable person.

9 There's lots of people who might ignore the
10 Constitution in their daily lives, but that's not the test that
11 we should use, is it? The test is reasonableness, objective
12 reasonableness, and doesn't it require that we follow the
13 Constitution in that judgment?

14 **MR. COOPER:** Your Honor, I think -- I don't think I
15 see any -- any consideration where that would be relevant to
16 the reasonable person's judgment, taking all of the facts and
17 circumstances --

18 **THE COURT:** So if the reasonable person thought that
19 a black judge should recuse him or herself from a civil rights
20 case, that would be sufficient to recuse the judge?

21 **MR. COOPER:** No, your Honor.

22 **THE COURT:** Why not?

23 **MR. COOPER:** Because, your Honor, a -- a reasonable
24 person would not consider that a black judge any more than a
25 white judge was for that reason alone somehow biased or

1 impartial.

2 **THE COURT:** Why not?

3 **MR. COOPER:** Because that would not be a reasonable
4 person, your Honor. And it would not be admissible for that
5 reasonable --

6 **THE COURT:** I agree with you. Although they might
7 not articulate their judgment by reference to the Constitution,
8 what I hear you saying is that -- because there are some
9 societies where those precepts may not be applicable. There
10 are caste systems. There are class systems. There are other
11 circumstances where people might be reasonable under those
12 circumstances.

13 But our test of reasonableness that we use in our
14 country will not allow us to discriminate on the basis of race,
15 or gender or sexual orientation, correct?

16 **MR. COOPER:** It will not allow us to assume that
17 people who have any of those characteristics are for that
18 reason somehow biased or impartial -- or partial, excuse me.

19 **THE COURT:** Is there anything with being in a
20 same-sex relationship which by definition would cause a
21 reasonable person to believe that a judge would be incapable of
22 being unbiased?

23 **MR. COOPER:** There is only -- it depends upon the
24 question, your Honor. It depends upon the question.

25 **THE COURT:** My question, or what other question are

1 you talking about?

2 **MR. COOPER:** It depends upon what the issue is before
3 this judge. If the issue before this judge is *Don't Ask, Don't*
4 *Tell*, it's hard to imagine how a judge who is -- who is gay or
5 lesbian or a judge who is gay or lesbian and is in a long-term
6 relationship with their partner somehow has any particular
7 interest in the outcome of that case or would otherwise --
8 their partiality, their impartiality would otherwise be
9 questioned.

10 **THE COURT:** I'm sorry. There were so many parts of
11 that, I didn't follow how *Don't Ask, Don't Tell* ended up in
12 that.

13 Would a reasonable person assume that just because a
14 judge is gay, that judge would be incapable of being impartial
15 in a *Don't Ask, Don't Tell* case?

16 **MR. COOPER:** No, your Honor.

17 **THE COURT:** So that would a reasonable person assume
18 solely because a judge is not in a relationship that the judge
19 is partial toward relationships or not -- or no relationships?

20 In other words, is there anything automatic about any
21 of these assumptions or must it appear by something other than
22 status? I think that that's what the cases say, that you
23 simply can't assume that a judge who takes an oath to uphold
24 the law and to decide fairly is incapable of doing so.

25 **MR. COOPER:** Right. Exactly, your Honor, yes.

1 **THE COURT:** So what is it that you cite to the Court
2 that would be a basis for the Court finding that a reasonable
3 person would find Judge Walker incapable of following his oath?

4 **MR. COOPER:** Your Honor, the question isn't whether
5 he's incapable of following his oath. In fact, the question of
6 actual bias is not relevant --

7 **THE COURT:** I said a reasonable person. I'm not back
8 to before. I'm still at (a).

9 What is it that would lead a reasonable person to
10 assume that Judge Walker was incapable of following his oath?

11 **MR. COOPER:** Your Honor, if a reasonable person knew
12 that Judge Walker was in a long-term relationship with his
13 same-sex partner and that Judge Walker had an interest in
14 marrying his same-sex partner, a reasonable person would have a
15 reasonable basis on which to question whether Judge Walker was
16 impartial in sitting on a case that his decision would impact
17 directly in a "yes" or "no" way his own interest.

18 So the question is, from the continuum of a person
19 who is gay, to a person who is in a same-sex long-term
20 relationship, just like the one that the plaintiffs have
21 premised their arguments on, and is interested in being
22 married, that continuum is a very large continuum; but the
23 closer you get --

24 **THE COURT:** Here is what I want to highlight for you.
25 I find it significant that you have added each time you've

1 stated that proposition that the knowledge that the judge has
2 an interest in marrying the partner, and you must be doing that
3 decidedly because you have done it several times. I want to
4 highlight that for you so you can say no that's not the
5 assumption.

6 But if that is a part of your argument, that that
7 must appear, then I want to tell you I'm going to hold you to
8 that.

9 **MR. COOPER:** Well, your Honor, it is not my argument
10 that that must appear. I'm simply making the point that in our
11 submission to you, is no one could reasonably dispute in our
12 judgment or deny that an individual who is in precisely the
13 same shoes as the plaintiffs -- that is, in a long-term
14 same-sex serious relationship -- and that is interested in
15 getting married, that someone who is those shoes could not sit
16 on this case under either (b)(4) or (a).

17 **THE COURT:** And, again, you repeated that same
18 situation, right? And I don't know whether or not -- I think I
19 hear me. I recognize my voice, but I'm not sure you hear you.

20 Now, you have each time repeated that "interest in
21 marrying," correct?

22 **MR. COOPER:** And so, well, then, let's back up and
23 let's look at what we do know. Let's look at what we do know
24 and what we don't.

25 We do know now since April of this year that Judge

1 Walker has now publicly disclosed that he is in a 10-year
2 relationship with his partner. That is something that is very,
3 very relevant, we submit, your Honor, to whether or not Judge
4 Walker is in the same shoes as the plaintiffs. And we would
5 submit to you that Judge Walker was bound, because of its
6 relevance, to disclose that when the case was assigned to him.

7 He was also bound, your Honor, we submit, to disclose
8 as well the necessary question which follows from that, which
9 follows from an admission that he is similarly situated, to use
10 the plaintiffs' own words, to the plaintiffs in terms of the
11 existence of a long-term serious relationship.

12 He must also then --

13 **THE COURT:** Let me -- let me -- let me interrupt you
14 because you have raised the disclosure question several times
15 and so I want to ask a direct question on that, because it
16 seems to me that you read 455 as requiring disclosure.

17 Now, I haven't seen that in the language, so I want
18 to ask: Where do you get the requirement that the judge
19 disclose? And I want to ask it as a hypothetical.

20 In a case where race is involved, sometimes
21 disclosure is not discussed by the cases because there is often
22 an obvious racial characteristic of the judge. In our society
23 we still are burdened by the classifications that were imposed
24 upon us in an earlier generation, which I believe are largely
25 inadequate and irrelevant.

1 But, let's assume that race is obvious, so that
2 you're dealing with a situation such as a judge, a female judge
3 who has been -- who has suffered sexual assault, been raped.
4 Not obvious. Does that judge under 455 have an obligation to
5 disclose in a case that involves sexual assault that she has
6 suffered that in her past?

7 **MR. COOPER:** Your Honor, that's a tough question. I
8 don't -- I don't, obviously, see how the judge's own personal
9 interests could be substantially and directly affected by
10 the -- by the outcome of the proceeding before her --

11 **THE COURT:** No. 455(a) is not a direct interested
12 effect. It's if a reasonable person. If a reasonable person
13 knew that the judge had herself been raped, would a reasonable
14 person question her impartiality?

15 **MR. COOPER:** And, your Honor, I was making a point
16 under (b)(4).

17 But under (a), the question would be, I would
18 certainly submit, significantly closer and --

19 **THE COURT:** "Significantly closer." Meaning, yes, a
20 reasonable person would; or, no, a reasonable person would not?
21 I don't know which side you're closer to.

22 **MR. COOPER:** Your Honor, I think it is a closer call
23 whether or not a reasonable person that was in possession of
24 all the relevant facts would conclude that the judge's
25 impartiality could be reasonably questioned if those facts were

1 disclosed, and I believe those facts would need to be disclosed
2 to the parties.

3 **THE COURT:** So you would have me rule that in the --
4 in keeping with 455, judges have an obligation to disclose
5 intimate details about their background, such as -- I've given
6 you, as an example, being abused as a child, any of those
7 matters which pertain to a case that is on trial, and should
8 not be presumed to be capable of setting their own personal
9 background aside and deciding the case on the merits. That
10 would be a -- that's the rule that you would have me establish?

11 **MR. COOPER:** Your Honor, the rule that I would have
12 you establish is the one that the Courts of Appeals have
13 articulated, and it is that the judge must disclose any
14 information that the judge thinks that the parties or the
15 lawyers would consider relevant to the question of
16 disqualification.

17 **THE COURT:** So if the judge doesn't think that it be
18 relevant, the judge need not disclose it?

19 **MR. COOPER:** If the judge doesn't think that the
20 parties and their lawyers would consider that relevant to
21 disqualification, then the judge wouldn't have to disclose it.

22 But the point is, it is a broad standard. It
23 includes information that the judge might believe himself or
24 herself and conclude would not support a meritorious recusal
25 motion, but nonetheless it gives the parties the opportunity to

1 consider it and to -- if they believe it would support a
2 warranted recusal motion, make that motion and, also, make
3 their arguments on appeal.

4 The cases are really quite clear that the judge's
5 responsibility is really very broad in that respect, and the
6 judge doesn't have --

7 **THE COURT:** So in this case Judge Walker need not
8 have disclosed his sexual orientation because the plaintiffs --
9 the defendant-intervenors have taken the position that that was
10 irrelevant to them. They don't base this motion on that,
11 correct?

12 **MR. COOPER:** That is correct, your Honor. And we
13 have made that clear from the beginning when the first news
14 reports started to surface on that question; that that is not
15 something we regard as being relevant to the issue of
16 disqualification.

17 But in conjunction with a long-term relationship with
18 his partner, we believe that, your Honor, is clearly relevant
19 to the issue, and its relevance comes right out of the pages of
20 the plaintiffs' own papers.

21 **THE COURT:** But it would be only if it were a
22 relationship where he was interested in marrying, wouldn't it?

23 **MR. COOPER:** No, your Honor.

24 **THE COURT:** I thought that was your point; that if he
25 thought that the lawyers would take the matter seriously

1 because it was in the same shoes as the plaintiffs who wanted
2 to marry, the fact that he's gay or in a relationship wouldn't
3 be the need to disclose. It would be the fact of -- the
4 long-term relationship is your marker for wanting to marry, as
5 I hear your argument.

6 **MR. COOPER:** We believe that that would be a fact and
7 was a fact that he did have an obligation to disclose.

8 **THE COURT:** But if he did not regard it as a desire
9 to marry, he would not need to disclose it, correct?

10 **MR. COOPER:** If he -- if he concluded that he did not
11 have a desire to marry?

12 **THE COURT:** Well, he wouldn't have to conclude it.
13 He would know.

14 **MR. COOPER:** Yes.

15 (Laughter.)

16 **THE COURT:** So if that was his feeling, no
17 requirement to disclose, since his sexual orientation is not an
18 issue and the long-term relationship is only a surrogate for
19 desire to marry, if he made the reasoning, that, "Well, I don't
20 have any desire to marry. Sexual orientation is irrelevant to
21 the case. There is nothing to disclose."

22 **MR. COOPER:** No, your Honor. Our submission is that
23 he would have to disclose.

24 **THE COURT:** What?

25 **MR. COOPER:** Whether he had an interest in marrying

1 his partner --

2 **THE COURT:** Right, but if he would --

3 **MR. COOPER:** (Continuing) -- he has to disclose that.

4 **THE COURT:** That he would have to disclose. Anything
5 short of that, he would not have an obligation to disclose.

6 **MR. COOPER:** No. If he had no interest in marrying
7 his partner, he would have to disclose that.

8 **THE COURT:** The lack of interest?

9 **MR. COOPER:** Yes. Yes, your Honor.

10 (Laughter.)

11 **THE COURT:** Stay in order, please.

12 **MR. COOPER:** He would have to disclose the fact of
13 his interest, whether it was that he had no interest or that he
14 had an interest in getting married. That would be -- he would
15 not have the discretion not to disclose that plainly relevant
16 fact.

17 **THE COURT:** I saw you had three minutes left. You
18 might want to reserve some of that for rebuttal, unless you
19 already have.

20 **MR. COOPER:** I don't believe that I have.

21 **THE COURT:** And I don't want the closeness of my
22 questions or my attitude in asking questions to be a signal to
23 you or those of you who are watching this of any cavalier
24 attitude toward these. These are important questions and I
25 regard them as important, and I really appreciate the struggle

1 that you're having in answering them. There was probably the
2 same kind of struggle earlier when race or gender were raised
3 in this context.

4 This is, as far as my research shows, the first case
5 where a same-sex relationship is the subject of the question
6 with respect to disqualifying a judge. So it is important that
7 we treat it seriously and get it right.

8 **MR. COOPER:** I believe that you are right, and I
9 appreciate those remarks.

10 But I will take at least a few seconds out of this
11 rebuttal time to say that in the case that the plaintiffs, I
12 think, trumpet as one of their lead cases, what we believe is
13 one of ours, *United States against Alabama*, where Judge Clemon
14 sat on a case involving desegregation of higher education. The
15 judge recognized that his knowledge with respect to his
16 children's interest in attending one of the colleges at issue
17 there in Montgomery was something that he had to disclose. He
18 had to disclose, and he disclosed that he was aware of no
19 interest by his children in attending those schools. But that
20 was the critical --

21 **THE COURT:** This was a case -- I know Judge Clemon.
22 This with a case involving university. His children at that
23 point, I don't even think had gotten to high school. So it
24 was -- so I'm not sure that the case clearly is an indication
25 as to whether or not he disclosed one way or the other about

1 the interest of his children in college.

2 I take judicial notice that the interest that
3 children have with respect to college is often very elusive.
4 You might not know it until the day they tell you where they
5 want to go to college. So it doesn't surprise me that in that
6 case the issue was not well met as to whether or not there was
7 an obligation for disclosure.

8 And so I will allow you some brief time to comment at
9 the end. Thank you very much for your argument.

10 **MR. COOPER:** Thank you, your Honor.

11 **THE COURT:** Let's take a break at this point. It's
12 about 20 of the hour. We'll come back in about 15 minutes, so
13 about five of the hour.

14 (Whereupon there was a recess in the proceedings
15 from 10:34 a.m. until 10:52 a.m.)

16 **THE COURT:** All right. Mr. Boutrous?

17 **MR. BOUTROUS:** Thank you, your Honor.

18 Your Honor, this motion is frivolous, offensive and
19 deeply unfortunate. But I guess it shouldn't come as any
20 surprise because throughout the history of civil rights
21 litigation in this country, there has always been an attempt by
22 a litigant seeking to stop recognition of equal rights for
23 everyone, to challenge judges who are members of the minority
24 group that is litigating. And there is a solid wall of
25 authority dating back decades. Every single time that this

1 kind of issue has been raised, whether it be race, ethnicity,
2 gender, religion, the courts have rejected it.

3 The other facet that I'm going to address today, your
4 Honor, is two-fold. In addition to the merits of this
5 argument, is the standard which the Court raised, the standard
6 of review, which Mr. Cooper did not address.

7 And, also, that dovetails with the complete
8 untimeliness of this motion. It's plainly untimely under Rule
9 62.1, which is how this motion arrived back in this Court,
10 under Rule 60(b), which establishes extraordinarily high
11 standards for upending a judgment.

12 And I think the Court referenced at the end of the
13 last session that this was an important issue, and we agree
14 with that, your Honor. We hope that this Court will deny the
15 motion and make clear that the Federal Courts will not tolerate
16 this sort of baseless challenge to the authority and integrity
17 of federal judges in the Federal Courts.

18 First, I think Mr. Cooper's argument based on his
19 complete inability to respond to the Court's question about the
20 evidence concerning the fact that they have premised their
21 motion on, this intent to marry, makes absolutely clear that no
22 matter what they say in their motion or what Mr. Cooper said
23 today, their motion is targeting Judge Walker's sexual
24 orientation. No matter how they try to camouflage it, no
25 matter how they try to dress it up, they are challenging his

1 sexual orientation.

2 The fact is that Judge Walker is gay, it should not
3 be any surprise that he has a relationship. And, in fact, it
4 makes no sense. That's how -- one of the defining features of
5 being gay is having relationships with people of the same
6 gender. And, in fact, that was one of the proponent's big
7 arguments during the trial. So it's not some news flash that
8 the judge was having a relationship. That would have been
9 expected, assumed as a matter of common sense.

10 They're challenging Judge Walker because he's gay.
11 There is no question about it. And this notion that they say,
12 "Well, it's not because he's gay. It's because he has a
13 relationship and he didn't disclose it." That's exactly the
14 kind of argument that litigants have made in gender cases, in
15 race cases. There is always an effort to sort of say, "Well,
16 we're not attacking the judge because of their status. It's
17 something else."

18 Judge Higginbotham in the famous *Pennsylvania* case
19 that we have cited, where he explains the litigants challenged
20 him because he gave a speech to a particular group. There is
21 always something else that's added into the mix to try to
22 deflect from the fact the litigants are challenging a judge
23 based on their status as a member of the group whose rights may
24 be affected by the case.

25 Judge Mukasey, future Attorney General, but then

1 Judge Mukasey when litigants challenged him, basically because
2 he was Jewish, called it the same rancid wine in a different
3 bottle.

4 And that's what we have here, your Honor. There is
5 no support, for this motion whatsoever.

6 **THE COURT:** Now, let me -- you would agree that
7 although relationships can be a feature that gay and lesbian or
8 bisexual people have, it is not necessary that they be in a
9 relationship to be gay, lesbian or bisexual?

10 **MR. BOUTROUS:** That's correct, your Honor, at any
11 given point.

12 **THE COURT:** So intellectually it is possible to make
13 the distinction, and it would be error on the part of the Court
14 to -- I would be making the same error you're accusing the
15 plaintiff of, is to presume that because of your sexual
16 orientation you are in a relationship, wouldn't it?

17 **MR. BOUTROUS:** I'm not asking -- you're exactly
18 right, your Honor. There is no presumption either way.

19 In fact, one of the problems I think with
20 Mr. Cooper's argument was he's basically assumed -- he kept
21 saying that Judge Walker, without any evidence, is similarly
22 situated. He is in exactly the same shoes as the plaintiffs.

23 Well, just because people are gay and in
24 relationships doesn't mean they are all alike. He's just
25 engaging in this stereotyping like everyone is the same.

1 As your Honor was pointing out, people can be in a
2 relationship, short-term, long-term; maybe they want to get
3 married, maybe they don't, maybe they like the relationship
4 they are in. Relationships are evolving, fleeting. That's why
5 this notion that there was some disclosure requirement, where
6 would it stop? What level of disclosure would have to occur?

7 But I agree with your Honor that there shouldn't be
8 presumptions here. There has to be evidence.

9 And this goes to the point -- the Court asked Mr.
10 Cooper this a number of different ways and the question was
11 left unanswered. There is no evidence that Judge Walker
12 intended to get married, none whatsoever.

13 In the Second Circuit, in the case that was brought
14 against Judge Chinn and ultimately resulted in a sanction
15 order, where the litigants tried to recuse or disqualify Judge
16 Chinn in the Second Circuit in the District Court, Second
17 Circuit said: When you come into court and part of your
18 argument hinges on the status of someone as being part of a
19 minority group, then you better have really strong factual
20 evidence. There is a very high burden when you say somehow
21 that is connected to the disqualification motion.

22 Here they don't have any. And this goes, your
23 Honor -- I'm going to come back to the timeliness point.

24 **THE COURT:** Let me see what your response is to "they
25 don't have any." I suppose the more charitable way of saying

1 it would be, they don't have any direct evidence.

2 But what I hear from the defendant-intervenors is now
3 they say that this is circumstantial evidence of an intent to
4 marry by virtue of being in a marriage-like relationship.

5 What do you say to that as circumstantial evidence?

6 **MR. BOUTROUS:** Your Honor, these disqualification
7 motions are not meant to put federal judges on trial, that
8 they -- the proponents come in here, you know, a year or more
9 after the fact and say they have circumstantial evidence that
10 the judge might have wanted to get married because he was in a
11 relationship. That is not the standard.

12 And that's why I -- I hesitate to use too many
13 adjectives and adverbs here, but I find it really outrageous
14 that they have come into court after all this time. It was
15 publicly reported that Judge Walker was gay in February of
16 2010.

17 **THE COURT:** Well, there were public speculations.
18 There weren't reports.

19 **MR. BOUTROUS:** It was reported in the *San Francisco*
20 *Chronicle*. A judge who was a close friend of -- reported in
21 the article, talked about Judge Walker's sexual orientation in
22 regard to this particular case. It's on the record. And
23 proponent's counsel, Mr. Pugno, commented in the record,
24 saying, "We're not going to mention anything about that."

25 I'm going to come back to the merits because I

1 could -- I don't want to make this all about timeliness,
2 because I think this goes to a really fundamental issue for our
3 court system.

4 But then in June, this is -- February was before the
5 judgment, right after the trial ended. Then in June we had
6 closing arguments, full day of closing arguments. And on
7 June 16th, a year ago this Thursday, five days later the *L.A.*
8 *Times* reported that -- again, talked about how Judge Walker was
9 openly gay and that he had a companion who attended events with
10 him.

11 So that was on the record. This news flash of a
12 relationship was in the news in June of 2010. And then in
13 April, your Honor, this -- I've got to read this quote. After
14 it was, again, reported in August after the judgment, two days
15 after the judgment from Judge Walker, this is a quote from the
16 proponent's lawyer, who put on a witness in this case:

17 "The bottom line in this case from our
18 perspective is and always will be about the
19 law and not about the judge who decides it,
20 Campbell said." This was James Campbell.

21 "It's just something that collectively as
22 a legal team we have decided in going up
23 that's what this case is. The appellate
24 courts are going to focus on the law."

25 So they had decided as a legal team not to raise this

1 issue almost a year ago, before the case went up on appeal.
2 Then when they got to the Ninth Circuit and saw that the Court
3 and the judges had serious questions about standing and the
4 matter sent over to California, they raised this -- they, I
5 think, decided to take the low road and throw this Hail Mary
6 pass and try to recuse Judge Walker after he was off the bench,
7 when he couldn't address these issues. It is, I think, really
8 not worthy of the federal courts and not worthy of this case.

9 The other thing about their arguments in terms of
10 this disclosure --

11 **THE COURT:** Let me look down that road, not that I
12 would wish to go there. But if this motion were to be granted
13 and the judgment vacated, if the judgment is supported by the
14 record and the law, what would be the harm?

15 In other words, you would get a new judgment by a
16 different judge who would not be burdened by what the
17 defendant-intervenors claim to be a threat to the integrity of
18 the judicial process and presumably everybody would be in the
19 same position they are in now, but for the delay.

20 **MR. BOUTROUS:** I think there would be a number of
21 harms, your Honor.

22 First, it would -- it would do great damage to our
23 legal system and society in trying the notion that gay judges,
24 unlike judges from different races and ethnic backgrounds and
25 genders and religions, can't sit fairly in a case that involves

1 issues that might have a bearing, where there is an equality
2 issue that might affect them. In case after case the courts
3 have rejected that argument, and it would be a horrible
4 development.

5 And that's why I hope this Court will make clear --
6 not only deny this motion, but make clear that gay and lesbian
7 individuals stand in the same footing as other individuals in
8 minority groups and can be trusted, when they put on that robe,
9 to be fair and impartial and to adhere to their oaths, and it
10 can't be based on speculation and innuendo.

11 **THE COURT:** The key to your argument, though, is I
12 have to find that it's because Judge Walker is gay, that is the
13 real basis of this motion.

14 Would you make the same argument with respect to the
15 question I put to you about what's the harm? We just simply go
16 back and reset, if I conclude that the defendant-intervenors
17 are genuine in their pointing to the long-term same-sex
18 relationship as their sole basis?

19 **MR. BOUTROUS:** I think it would still foster that
20 perception, your Honor, that the proponents and their allies
21 have been making an issue out of the fact that the judge is
22 gay. It would hurt the public's confidence in the judicial
23 system even if this Court -- and I don't think -- I think even
24 if the Court rejects or doesn't reach my argument, that they
25 are attacking the judge because of his same-sex relationship

1 and because he's gay. That it still will be perceived that
2 that's the reason, and that would be terrible.

3 This is the first case. This is a case that has
4 gotten enormous attention. We had a three-week trial. We had
5 summary judgment briefings, full-day hearings. For the
6 proponents now to come into this Court and try to disrupt that
7 based on this utterly flimsy speculation and these assaults on
8 Judge Walker's integrity, is -- it's over the top. It does not
9 meet any standard.

10 And, your Honor, on this point about the
11 relationship, they knew Judge Walker had a relationship based
12 on these reports in June. They had an obligation to look Judge
13 Walker in the eye and say, "Your Honor, we understand this is
14 not a secret, but we wanted to raise this issue." If they were
15 going to wait until the case was on appeal and the judge
16 retired to raise this issue, that is -- it's --

17 **THE COURT:** Where do you find their obligation? I
18 haven't found any obligation. There is a 144 proceeding, if
19 they believe the judge is biased or prejudiced. Is that what
20 you're referring to?

21 **MR. BOUTROUS:** There's a couple places. 144, but,
22 also, your Honor, the *Liljeberg* case from the U.S. Supreme
23 Court, which is a Rule 60(b) case. Their big case. It doesn't
24 support them at all. But there the Court said that was not a
25 case where there was neglect or lack of diligence.

1 And in that case the disclosure that the Court was
2 talking about there wasn't the kind of disclosure that Mr.
3 Cooper is talking about where a judge has to get up on the
4 bench and basically say, "Here's what I think. Here, this is
5 what happened to me. This didn't happen to me." Those sorts
6 of disclosures. But the Court said under 60(b) there is a
7 very, very strong diligence requirement.

8 In the *Gallo* case, also from the Ninth Circuit which
9 we cited, makes clear you can't lay in wait, lay in the weeds
10 until you are a disgruntled litigant and you've lost and then
11 raise these issues.

12 So Rule 60(b) has a timeliness requirement. We have
13 got a final judgment here. And they've showed extreme lack of
14 diligence. They not only knew about these facts and the key
15 facts here a year ago, but they disavowed that they would ever
16 raise this issue in this Court. If that doesn't sink them in
17 terms of timeliness and lack of diligence under *Liljeberg*,
18 Rule 60(b), Rule 144, basically every rule in the book, I don't
19 think anything would.

20 I think this is just the classic kind of case, your
21 Honor. They -- their backs are against the wall. They don't
22 see another way out. They put on two witnesses during the
23 trial. They think they're going to lose.

24 **THE COURT:** I am not inclined to use timeliness as a
25 basis. I will consider that, but I am not inclined to not

1 reach the merits of this motion on the grounds that it's too
2 late.

3 I sense -- there is this Rule 62, which allows the
4 motion that is before the Court. It also says it must be
5 timely. It seems to me prudent, given the importance of this
6 issue as you're pointing out, not to simply say, "Well, this is
7 too late."

8 And then the question would be on appeal from that
9 decision, the question would become whether or not it's
10 reasonable to come to a decision on timeliness, and I'm just
11 not willing to do that.

12 You said you were going to address the standard of
13 review I should be using. Maybe that would be the first thing
14 I should have you do.

15 **MR. BOUTROUS:** Yes. Let me go back to that and go
16 back to the merits, your Honor. Absolutely.

17 The standard of review, I think there are two
18 components to it. First, because the proponents -- and this is
19 maybe where the timeliness point comes in. Because the
20 proponents did not raise this issue before Chief Judge Walker
21 the way they should have, there is no factual record here
22 that -- the factual records in the other cases that they --
23 that all the parties cite, those came out when a recusal motion
24 was made and the judge explained things in his or her opinion
25 about their background, their activity. They didn't give Judge

1 Walker a chance to do that. So there is no factual record
2 here.

3 And I think the City's brief, City of San Francisco's
4 brief does an excellent job on Pages 5 and 6 of talking about
5 how -- here we're talking about plain error. This has to be
6 just, you know, absolutely obvious conflict. No question. No
7 bones about it.

8 We are very far from that. It's the opposite of
9 that. So I think it's an extraordinarily difficult standard
10 for them to meet because they didn't raise it before Judge
11 Walker and didn't obtain factual findings.

12 Secondly, I think the Rule 60(b) standard. Rule
13 60(b) -- when we're talking about Rule 60(b)(6), which is a
14 very high standard, extraordinary circumstances. To be able to
15 come into court after a judgment has been entered and after it
16 has been appealed and seek relief, when you could have sought
17 it before, it's a very high standard of proof. There's got to
18 be a grave injustice, and they don't meet those standards in
19 the least.

20 So I think that's the standard of review, your Honor.
21 The proponents do not meet it. They admit in their briefs that
22 they cannot rely on speculation, conjecture and the like.

23 **THE COURT:** What would be the difference between my
24 reviewing this matter for plain error and denovo?

25 **MR. BOUTROUS:** Well, I think -- I guess in this case

1 since there is no factual record it, I think the Court could
2 deny it on, you know, denovo --

3 **THE COURT:** It's not on a factual record. The motion
4 is based on a factual showing. Namely, their claim is that the
5 2011 interview was their first knowledge of the long-term
6 relationship upon which they base their motion. And so the
7 timeliness issue is whether that was -- that made the motion
8 timely or not.

9 But let's assume I've gotten beyond that and I'm now
10 looking at the motion and I am trying to decide, and I'm
11 honestly asking for help here, whether or not this is denovo
12 reviewed -- and I'm not quite sure, quite frankly, what I would
13 be doing in a denovo review -- or a plain error review, since
14 the only error would be the failure to recuse. I wonder what's
15 the difference between the two?

16 **MR. BOUTROUS:** Your Honor, in the denovo review the
17 Court would be interpreting Rule 455 and the legal standards
18 that are there and applying them to the facts here.

19 And in terms of the legal question, maybe I can --
20 No. 1, they don't meet those legal standards. Denovo --
21 assuming all the evidence they've put in, everything that
22 they've got, which is basically nothing, that the judge was in
23 a relationship, and apply those standards denovo to that
24 factual record.

25 The plain error rule would be, look, you know, they

1 don't have a single case that supports them. They don't have a
2 single case that suggests disclosure should have been made
3 here. They don't have a single case that comes close to
4 establishing the disclosure requirements or the recusal
5 requirements they want.

6 So, clearly, even if they -- if plain error applies,
7 they lose right away. The Court doesn't even have to apply
8 Rule 455(a), Rule 450(b)(4). It's just such a stretch that it
9 doesn't meet the plain error rule and the Court could resolve
10 it that way.

11 But on the merits -- and I know this Court has made
12 clear. As I said at the outset, I do think it would be helpful
13 for this Court to clearly and forcefully say that this motion
14 does not meet the 455 standard.

15 And let me start, if it's okay, with Rule 455(a).

16 **THE COURT:** I will let you go on that. It just seems
17 to me problematic. I'm not frequently put in a position, as a
18 district judge, to review the decisions of my colleagues. And
19 so the standard is something that's important for purposes of
20 articulating how this issue should be handled in the future.

21 It's frequently not the subject -- if it is a 144
22 situation and it goes to another judge, that judge is reviewing
23 it denovo. There is no record. You're just looking at the
24 problem.

25 And it seems to me that probably the better way to do

1 it would be denovo, and that way there is no occasion to argue
2 that the lower standard might have resulted in a different
3 result.

4 **MR. BOUTROUS:** I think that may be right, your Honor.
5 But on the plain error, I think you raise a very good point.

6 I think here Judge Walker is presumed. He's not
7 presumed to have wanted to get married. They keep saying that.
8 That's the opposite. Judges are presumed to follow their oaths
9 and to act impartially, No. 1.

10 No. 2, Judge Walker was bound by Rule 455.

11 No. 3, Judge Walker determined that there was no
12 basis for disclosure or recusal --

13 **THE COURT:** Well, that's implicit, but not on the
14 record.

15 **MR. BOUTROUS:** But I think we can presume that he
16 followed the law. That's what --

17 **THE COURT:** Of course, but you can't presume anything
18 beyond that.

19 **MR. BOUTROUS:** That's correct, your Honor. But I
20 think that presumption, without more, in this context where the
21 proponents did not raise these issues explicitly themselves
22 before the judge, is entitled to a great degree of deference as
23 well.

24 But that said, your Honor, I hear what you're saying
25 with just looking at these issues. We're not afraid of what

1 they put forward, the facts they put in order or the legal
2 principles they put forward. They are wrong as a matter of law
3 and as a matter of fact.

4 And let me start with Rule 455(a). Your Honor asked
5 Mr. Cooper about whether a biased person could be a reasonable
6 person, and -- for purposes of Rule 455(a). And the answer is,
7 no. And that is because I think, as your Honor was suggesting,
8 reasonableness is infused with and informed by constitutional
9 standards and equal protection.

10 That's why in cases of race, ethnicity, gender,
11 religion, the courts have said that someone's status as a
12 member of a minority group -- and they can't get away from that
13 here, because it would be relevant to them that Judge Walker
14 was gay if he was in a relationship. It would be irrelevant if
15 he was heterosexual, if he was in a relationship. The only
16 reason it matters to them is that he's gay.

17 But courts have said, when we look at 455(a), it's
18 unreasonable to assume that a member of the minority group
19 would not act partially, and impartially and without bias
20 simply because they might have some benefit that a larger group
21 of the same group would get. That's what the courts hold and
22 that principle alone refutes and defeats this argument.

23 That's what their argument comes down to; that Judge
24 Walker, as a member of the class, the group of people before
25 the Court, might get a benefit because equal protection would

1 strike down discriminatory laws that might affect him. Those
2 are the kind of issues that courts have said over and over do
3 not warrant recusal and disqualification under Rule 455(a).

4 And I think, again, the fact that Mr. Cooper was not
5 able to produce any evidence --

6 **THE COURT:** I think most of those cases have been
7 under (b)(4), however. They mix both. In fact, that's why I
8 was trying to get your opponent to be more precise.

9 I think as the courts have discussed these matters,
10 there are circumstances where the motion is made -- well,
11 lawyers make motions on every ground they can think of,
12 including their motions under (b)(5), as well as (b)(4).

13 But the (b)(4) analysis having to do with the
14 diminimus nature of the interest and the fact that judges who
15 are members of the society, who might benefit as a member of
16 society are mostly (b)(4) kind of analysis.

17 But your argument, which is an interesting one, is
18 that that same should be applied to (a); that a reasonable
19 person would not presume that a judge who is a member of
20 society, who enjoys a benefit collateral to just being a member
21 of society, is not presumed to be partial in any way. But I
22 haven't seen that direct connection made in the cases. If you
23 can cite a case to me that does that, I would be pleased.

24 **MR. BOUTROUS:** I think -- I think Judge
25 Higginbotham's in the *Commonwealth of Pennsylvania* case talks

1 about that.

2 **THE COURT:** Now, that case is interesting. It's an
3 earlier case. It's before they amended the statute.

4 **MR. BOUTROUS:** Correct.

5 **THE COURT:** And I do -- there is some language there
6 that might bring it into the (a) context, but I'll review that
7 to see whether or not I can rely upon that case.

8 **MR. BOUTROUS:** And I'll go back and look, too, as
9 well, your Honor, because there is sort of a -- as Mr. Cooper
10 was doing, a melding together of the two standards.

11 But I think it's absolutely compelled by the
12 Constitution that if it would be unreasonable as a matter of
13 law -- and here, I must say, the proponents of Proposition 8
14 are unreasonable. They are taking an unreasonable position.
15 No reasonable person would call into question a judge's
16 partiality, impartiality and lack of bias because of their
17 gender in the case, just as 455(a) would not countenance doing
18 that in any other case involving a minority group.

19 So I think that has to be the right rule. And I'll
20 go back and look and just see which cases tie it most closely
21 to that standard.

22 And I do want to go back. Proponents do not cite one
23 single case, not one, under any factual scenario where the
24 status of the judge is being part of the minority group. Even
25 cases where the judge was part of the class, in the *City of*

1 *Houston* case, actually part of the class that was being
2 adjudicated, no Court has ever held that a judge should be
3 recused under any standard because of that.

4 They have taken this -- they are advocating a new
5 standard that is extraordinarily extreme and would really do
6 damage to the notion that our federal judges make their
7 decisions based on the law, not on who they are, not on their
8 personal beliefs, not on their personal desires or intentions
9 or thoughts. And I think that's why Courts have refused to go
10 down this road that they are trying to take this case down.

11 On Rule 455(b)(4), your Honor is exactly right.
12 Courts have used that language in the *City of Houston* case, the
13 *Alabama* case --

14 **THE COURT:** Let me -- I do this just to make sure I
15 understand the limits and the breadth of your argument.

16 In other words, you're correct. There are judges who
17 have not been disqualified even if they are members of the
18 class. This is not a class action in this case that we have
19 before the Court.

20 But would your argument go so far to say if the Court
21 did accept that Judge Walker was intending to marry and,
22 therefore, was on all fours with the plaintiffs' here, that
23 that would lead -- that would not lead a reasonable person to
24 question his impartiality?

25 **MR. BOUTROUS:** I don't think it would or that it

1 should, your Honor. And it would not meet the standards of
2 455(a). It think it has to be more direct.

3 The proponents keep sayings Judge Walker was sitting
4 as a judge in his own case. Judge Walker didn't have his own
5 case. He didn't have any indications in the external world
6 that he had sought to get married and was rebuffed.

7 **THE COURT:** Okay. Let's stay with this. Okay. So,
8 say that again. In other words, if the Court found that under
9 different facts -- because I agree with you that I don't see
10 the facts here are direct evidence of an intent.

11 But if there were facts that the Court accepted as
12 proving that Judge Walker intended to marry his partner and now
13 was assigned this case, a reasonable person would not call into
14 question his impartiality? That's your argument.

15 **MR. BOUTROUS:** That's our argument, your Honor.

16 **THE COURT:** And so where would it -- in other words,
17 it sounds to me like the next statement you would make is,
18 "There are no set of circumstances that would cause Judge
19 Walker's impartiality to be questioned in this case."

20 **MR. BOUTROUS:** No, your Honor. I would not say that.
21 I think it's a great example. See if you do.

22 It occurred to me because the proponents kept saying,
23 "The judge was sitting in his own case." The *Aetna versus*
24 *Lavoie* case from the U.S. Supreme Court, which the proponents
25 cited, I think, in their brief and it's cited in some of the

1 others. It was a due process recusal case. In there the judge
2 who had written an opinion recognizing a cause of action in
3 Alabama for a certain tort, it turned out that judge was the
4 named plaintiff in a class action asserting that very claim.
5 So the judge had recognized a cause of action that directly
6 helped the judge in his own case that was pending before the
7 courts.

8 That's the kind of situation we're talking about,
9 either that or where there is a financial interest. It turns
10 out the judge has a direct financial interest in a commercial
11 dispute and is deciding the case. Those kind of things.

12 The -- Section 455(a) doesn't go beyond that. I
13 think there is a good argument --

14 **THE COURT:** All right. Let's go to Judge Clemon's
15 situation. That was a case where the judge who was sitting on
16 a case having to do with integration of the traditionally white
17 institutions in Alabama. The case was being brought by the
18 Alabama State University, which was the traditional black
19 college system, by faculty, students from that institution had
20 served as the appointing authority or been involved in
21 appointing the members of the board, had been involved in some
22 of the facts that led up to what was being cited in the course
23 of the case. And at least in that case one judge concluded
24 that that would be a basis of his disqualification.

25 What's your position on whether that was sufficient

1 for disqualification?

2 **MR. BOUTROUS:** I think, if I remember right, the
3 ultimate ruling was because Judge Clemon had been involved in
4 litigation that exposed him to factual and evidence in the
5 case --

6 **THE COURT:** Among the things that I cited, yes.

7 **MR. BOUTROUS:** I think that, you know, that's
8 different.

9 But the other things, participating -- and Judge
10 Higginbotham talked about this. Participating in litigation of
11 a similar type, in organizations, on litigation on similar
12 issues, discrimination issues.

13 As Judge Constance Baker Motley noted in the case --
14 the Sullivan and Cromwell case, where judges -- judges come
15 from the world and the bench and they are involved in issues.
16 We want them to be involved in society so they understand
17 what's happening. Again, some of our greatest judges were
18 great lawyers who participated in cases.

19 So I think it's very, very, very, very strict
20 standard before we start taking judges out because of
21 participation in organizations or cases before they became
22 judges.

23 I think there, it was just a unique situation. I
24 think, kind of on top of everything else, was the fact that
25 there was some overlap with the evidentiary record that was

1 obtained outside the courtroom. I think that --

2 **THE COURT:** I'm still struck by your argument that
3 even if there were evidence accepted by the Court that Judge
4 Walker desired or intended to marry, that he could under (a)
5 remain.

6 Now, (b) might be a closer question, but (a) is this
7 abstract reasonable standard. And so I perhaps don't need to
8 go there, but it is -- it is an argument that bears close
9 examination.

10 **MR. BOUTROUS:** Your Honor, if I could just address
11 that briefly? Because it's something that I've thought about a
12 lot here.

13 One of the problems is the notion of what a person at
14 any given moment desires or intends or thinks. Under their
15 view, well, what would happen? Let's think about it, Judge
16 Walker. So the judge was there. On day one of the trial
17 they're thinking, you know, I don't really want to get married.
18 Day four, marriage sounds pretty good, I think I'll get
19 married. End of the trial, I don't know.

20 When we're talking about these things about a judge's
21 thought process and intentions and beliefs, it gets too
22 difficult. It gets too intrusive.

23 **THE COURT:** But (a) requires us to take a broad
24 approach. It is clearly not an interest, but as I think about
25 the 455(a) standard, it says -- it starts out with: Even if

1 there is no interest, then we want to avoid the appearance of
2 impartiality and we want to do that in a way -- as your
3 opponent emphasized when he opened his argument, it's where it
4 might be questioned. Not whether it is or whether it is right
5 to be, but where it might be questioned.

6 And so, as I said, I believe that the argument you're
7 making unnecessarily, I think, bears closer scrutiny.

8 **MR. BOUTROUS:** Your Honor, I guess one of the things
9 I would just say -- because you don't have to go there. There
10 is no evidence. They have no evidence. They are speculating.
11 They say they couldn't make their motion sooner because they
12 didn't want to speculate. They are speculating now completely.
13 They say they couldn't make their argument earlier because
14 things were appearing in newspapers.

15 We know they are willing to make recusal motions
16 against judges based on news articles. They tried it against
17 Judge Reinhardt. They filed a motion to recuse in this case on
18 appeal to knock Judge Reinhardt out of the case based in
19 significant part on news reports about his spouse.

20 So the Court does not need to go there, but I do
21 think this notion of drawing these lines when we're talking
22 about civil rights, when we're talking about the rights of
23 citizens to equality and fairness, the ability of a gay judge
24 sitting or a judge from another minority group, and the
25 question is equality. And all citizens have an interest in

1 that.

2 And if we start going down the road and slicing it
3 too thin and focusing on what the judge might be thinking or
4 feeling, then I think there are going to be people in society
5 who are going to convert that into something that suggests bias
6 and that suggests that judges will not be allowed to hear cases
7 where they are a member of a group whose rights are at stake.
8 And I think that's just a very, very, very, very dangerous
9 path. And the Court's have never gone there. Proponents have
10 come up with a whole new standard of recusal, a whole new
11 standard of disclosure.

12 And Rule 455 -- if I can just segue to disclosure for
13 a moment. The only mention of disclosure in Rule 455 is Rule
14 455(e). And Rule 455(e) only applies where the judge
15 determines that there is a basis for disqualification and then
16 asks the parties, the litigants, if they are willing to waive
17 that disclosure -- I mean, that basis for disqualification.

18 There is no pre-floating deposition of the judge,
19 disclosure, disavowal requirement, which is what the proponents
20 are suggesting; that you not only have to say: Here is what I
21 don't -- here is what I want to do. Here is what happened to
22 me. Here is what didn't happen to me. Here is what I don't
23 want to do. None of that is in Rule 455.

24 Some Courts have fleetingly mentioned judges should
25 put things on the record, but there is no requirement in Rule

1 455. Again, I think it would be very dangerous to go down that
2 road.

3 To go back, your Honor. I think, if I'm remembering
4 this right, the *McDraw* case from the Second Circuit, the
5 example, the Judge Chinn case where the partiality of the judge
6 was being challenged based on his ethnicity and his
7 participation in organizations and the like. And the Court
8 said, a suggestion that a judge -- well, first, the Court said:
9 Courts have repeatedly held that matters such as race or
10 ethnicity are improper bases for challenging a judge's
11 impartiality. So I think they were talking about the Second
12 Circuit's --

13 **THE COURT:** The disclosure is not as important to me
14 in the context of those cases because many times it's obvious.
15 I draw a lot of my analysis from the case, for example, where
16 the judge is Episcopal. There is no way to look at a person
17 and know that they're Episcopal, I assume. So there in those
18 cases the judge did disclose that he was Episcopal.

19 **MR. BOUTROUS:** I don't think so, your Honor. I think
20 that cases where the judges are of a particular religious
21 background, this -- I mean, same would go for Mormons. This
22 case --

23 **THE COURT:** And I think there is a case involving
24 Judge Noonan, where he disclosed that he was Catholic -- maybe
25 he didn't disclose it, but it was on the record that he was

1 Catholic.

2 So those are the cases that I'm mindful of with
3 respect to this disclosure issue. In other words, is there a
4 different process that should be used when recusal is based on
5 something that is not obvious?

6 **MR. BOUTROUS:** No, your Honor, not in this area,
7 where it goes to the status of the judge. The presumption is
8 that the judge will follow the law and be fair and impartial no
9 matter what their personal views are. And I think the
10 religious example is a good one.

11 This case, there's all sorts of evidence about
12 the Mormon Church's fighting to get Proposition 8 passed,
13 and its funding the campaign, and the statements about why
14 Proposition 8 was necessary.

15 And under a proponent's theory, I guess, that would
16 mean -- and how it would be bad for the world and religion and
17 religious liberty and First Amendment rights and all those
18 sorts of things. But we never argued, and we never would
19 argue, that the judges need to disclose their religious
20 affiliation, their religious beliefs, their personal beliefs.
21 That chips away in a terrible way --

22 **THE COURT:** I won't require you to speculate about
23 what you would have done if this case had been assigned to a
24 Mormon judge.

25 **MR. BOUTROUS:** I understand, your Honor. And I'm not

1 even going to go down that road, but I think it's the same sort
2 of thing. Courts do not require that, that -- disclosures like
3 that, even if it's not obvious.

4 And I think it's just a dangerous thing. We assume
5 all federal judges will decide cases based on the law, no
6 matter who they are and no matter what their background is.

7 **THE COURT:** If that's the presumption, when does it
8 get set aside? How would you articulate the kind of fact that
9 would reasonably bring the judge's impartiality into question?

10 **MR. BOUTROUS:** Well, I guess I gave one example where
11 you had a judge who had the exact same claim pending and then
12 recognized the claim. Very direct. Where the judge had an
13 extraordinarily close relationship with a party or a litigant
14 that may -- and some of the rules suggest familial
15 relationships, but I think there could be situations where the
16 relationships were so close with the actual litigant before the
17 Court.

18 **THE COURT:** Well, that's governed by (b)(5), right?
19 I mean, that relationship test is already in the rules. You
20 don't have to rely upon (a) for that.

21 But is your argument that beyond (b)(5), there would
22 be a room for a 455(a) challenge?

23 **MR. BOUTROUS:** I think there probably could be, your
24 Honor. If there was just some set of circumstances that would
25 create -- for a reasonable observer, some set of circumstances

1 that made it seem that one side had a huge advantage over the
2 other, I think that could create an issue.

3 Another example would be in the *Caperton* case, in the
4 U.S. Supreme Court, where the Court held under the due process
5 clause -- but I think this could go under Rule 455(a) --
6 campaign contributions to a judge that were so sizeable, even
7 though that wouldn't necessarily -- that wouldn't fall under
8 the (b)(4), and we don't have campaign contributions in federal
9 court.

10 But for a judge, things of that nature that are
11 objective and that don't require an examination of the judge's
12 personal views and thoughts and personal life and the like.
13 Because I just think it's just really -- it's bad for the
14 federal courts. It's bad for federal judges. It's not
15 justified here.

16 Judge Walker conducted an extraordinarily fair
17 proceeding, your Honor.

18 Again, kind of going back to the videotape issue,
19 it's -- if people -- people watched the trial and if people saw
20 how the trial was conducted, it was extraordinarily fair to
21 everyone. And it was a lengthy process, but done expeditiously
22 and fairly. So it's really demeaning to bring this motion.

23 **THE COURT:** Let me make a comment about that and
24 perhaps ask a question.

25 My assumption is that this motion by the intervenors

1 is a motion that requires me to test whether or not Judge
2 Walker should have recused himself upon assignment of the case.
3 And although they have cited to me various things that happened
4 during the trial, I had thought to confine myself to that
5 question and not to consider what happened during the course of
6 the trial because there is an appeal. That will examine the
7 merits of the case and what happened during the trial. That
8 would not be the subject of this consideration, and that I
9 would not look to to support their motion or to oppose the
10 motion what happened during the trial, but merely the fact that
11 he was in a same-sex relationship when the case was assigned to
12 him and, as they add, didn't disclose that during the course of
13 the trial.

14 Is it your argument that I should, almost as an
15 evidentiary matter, now watch the trial and use the trial as a
16 basis for deciding whether or not he should have recused
17 himself under (a) or (b)(4)?

18 **MR. BOUTROUS:** Two points, your Honor.

19 One, the proponents do argue that the Judge's rulings
20 show impartiality.

21 **THE COURT:** Partiality or impartiality.

22 **MR. BOUTROUS:** Partiality. Thank you.

23 They argue -- that argument, I think, as the Court is
24 suggesting, is really foreclosed by the *Liteky* decision from
25 the Supreme Court, which says rulings during the case are for

1 appeal. They are not for recusal motions, but they do make
2 that argument. We think it's baseless. And your Honor is
3 correct, that shouldn't be part of the inquiry.

4 That said, since they've raised it, the Court has the
5 videotape of the trial. It shows how fair -- how the judge let
6 the proponents make all their arguments. It was a very civil
7 proceeding. It was a very cordial proceeding, given the nature
8 of the issues, I think, on both sides. Judge Walker treated
9 everyone with a great deal of respect. Let in all sorts of
10 evidence on both sides. Considered the evidence thoroughly.

11 The reason I raise that is because proponents do
12 challenge his rulings, including his ruling that Proposition 8
13 is unconstitutional.

14 **THE COURT:** Well, I asked the question because at
15 this point I don't intend to go back. I intend to adhere to
16 the notion that that is the subject of appeal and that my
17 judgment would be based on the grounds stated and should not be
18 influenced by what happens during the trial.

19 But if I go the other way and I use (a) as the
20 standard, is your argument that I should use the reasonable
21 person sitting watching that trial to see what that reasonable
22 person would think of the trial?

23 **MR. BOUTROUS:** I don't think you would have to do
24 that, your Honor. I think that -- that the analysis would be
25 looking at the rulings, looking at the nature of the arguments

1 that they made. The Court could look at the actual -- it is
2 evidence, what happened at the trial, in terms of analyzing
3 that.

4 But, I guess, let me back up. The Court could look
5 at it that way. I think a reasonable person looking at how
6 Judge Walker conducted the trial, watching the videotape of the
7 trial would absolutely reject the notion that he was anything
8 but impartial and fair.

9 **THE COURT:** Well, so that -- I might need to clarify
10 whether or not I regard the reasonable person test as one that
11 continues to operate throughout the trial, as opposed to at the
12 point of the random assignment of the case to the judge and the
13 obligation to recuse. Because there would be no difference in
14 Judge Walker's -- at least so far as what I hear as the basis
15 for the motion. There wouldn't be any difference in the fact
16 of his being in the relationship as the trial proceeded and,
17 therefore, the recusal obligation, if it existed at the
18 beginning, it existed throughout. But it does seem to me that
19 in a different case, that might be important.

20 Let me ask another question having to do with the
21 reasonable person now that we're on it. What's your position
22 with respect to whether the reasonable person knows the law?
23 Sometimes it's articulated in the cases as someone who's
24 knowledgeable about the facts. Does the reasonable American
25 know the law?

1 **MR. BOUTROUS:** I think in this context we have to
2 assume it's a reasonable person who understands the law,
3 including the Constitution, and that -- because otherwise this
4 goes back to a point you made with Mr. Cooper. Then what if we
5 determine, well, people just don't understand these issues and
6 then we're at sort of the mercy of a majority who doesn't
7 understand that the Constitution precludes getting judge's
8 thrown off cases because of their sexual orientation.

9 So I do think it is infused with the law and the
10 cases, I think, take that approach; that that's --

11 **THE COURT:** I haven't found one. I was looking for
12 that language. So I understand the argument. I'm actually
13 inviting your position on it because it seems to me that
14 knowledge of the facts is clearly a basis that the Courts talk
15 about, but knowledge of the law is something that is often
16 discussed in terms of what lawyers or judges do.

17 And so part of my -- part of the motive for my
18 question is to say -- to respond to the argument that I heard.
19 Is the reasonable person someone who is judging for purposes of
20 disclosure what the lawyers would wish the judge to disclose or
21 is it a standard that's independent of what the lawyers think
22 or would wish to have disclosed?

23 **MR. BOUTROUS:** I guess I look at it this way, your
24 Honor. When we look at a reasonable person in tort law, for
25 example, we look at what the laws are in informing whether

1 someone acted reasonably.

2 And it seems to me we would do the same thing here;
3 that we would look at the framework of the laws in a society
4 and how things operate and determine whether impartiality would
5 be reasonably questioned. We think here the answer is clearly
6 no. Judge Walker is a respected jurist.

7 The bottom line is proponents are challenging him in
8 the judgment because he is gay and is in a gay relationship.
9 That is an improper basis for disqualification. The argument
10 comes far too late. The fact that they didn't make this
11 argument earlier shows that they know it never had any basis.

12 And maybe I'll just close. I think my time is now
13 gone.

14 But one point, your Honor. They have admitted they
15 have known about these issues for a long time. Now Mr. Cooper
16 said it was in the newspaper and they decided not to raise the
17 fact that the judge was gay, but throughout the case they have
18 made arguments publicly and in their briefs that I have never
19 seen anybody make in a court before, in a federal court, based
20 on discovery rules and other rules calling the judge biased.
21 And even though they weren't attacking Judge Walker at that
22 point because of his sexual orientation, I think that they
23 were -- they were attacking his rulings in that way, trying to
24 get that point across in that manner, which I find improper and
25 offensive.

1 I hope the Court will deny this motion today and make
2 clear that this is not a proper basis for a motion in the
3 federal courts.

4 **THE COURT:** Well, it does seem to me that once you
5 start trying a case, it's okay to be biased because that's what
6 is going on. They are trying to persuade you to one side or
7 the other. It's that bias that is not based on the merits that
8 we are always concerned with.

9 Thank you very much for your argument.

10 **MR. BOUTROUS:** Thank you, your Honor.

11 **THE COURT:** And I was hopeful that the last 45
12 minutes wouldn't all be used, but the floor is yours.

13 **MS. STEWART:** Thank you, your Honor. I don't think
14 they will be.

15 I want to jump right into your distinction between
16 Section 455(a) and the (b) subsections. In a number of the
17 cases -- and I can't cite you one off the top -- but have made
18 the observation that the (b) subsections are really sort of
19 specific instances in which a reasonable person would be likely
20 to have a concern about bias.

21 And so I think the reason that the cases often focus
22 on the more specific rules is that when the pattern fits the
23 interest kind of rule, they discuss it in terms of the specific
24 example. But when they hold that judges, for example, can't be
25 disqualified on the basis of an interest that's held in common

1 with many others in a public matter, they are necessarily --
2 the reasoning of those cases would not -- would be
3 counter-veiled if the Court were to hold that Subsection (a)
4 would require recusal.

5 And I want to again mention the *US v Alabama* and the
6 *In Re Houston* cases, which, as the Court knows, one was about
7 the children of the judge in part. That was one of the grounds
8 for recusal. And in the *City of Houston* case, it was about the
9 judge and her husband having, at one point in the beginning of
10 the case, been voters in the City of Houston, and
11 African-American voters, and it was a Voting Rights Act case.

12 In both of those cases the courts ruled in a way that
13 was broader than just the question of how clear was it that the
14 children might some day attend the university, or how clear was
15 it that the particular votes of the judge and her husband might
16 be diluted.

17 And the courts said, you know, the problem with the
18 ruling that would disqualify based even upon children who might
19 well go to the university is that it threatens to -- it's too
20 close. It comes dangerously close, I think, is what the
21 Eleventh Circuit said, to disqualifying any minority judge and
22 that a rule that would do that is intolerable. And if the
23 Court were to simply sort of switch gears and say, "But we'll
24 disqualify under Subsection (a) because a reasonable person
25 might find that interest too significant and want

1 disqualification," it would circumvent the entire reasoning of
2 those two cases.

3 I also wanted to mention on the 455(a). I don't
4 remember specifically very many of the cases that -- which ones
5 specifically talked about Subsection (a), apart from Subsection
6 (b), but one is the *Feminist Women's Health Center* case. That
7 was a Ninth Circuit case in which Judge Noonan was asked to
8 recuse and he says in his -- it's a very brief opinion, but
9 that he's applying an objective reasonable person standard. It
10 sounds to me very much like that was a 455(a) case.

11 And you know, it was a religion case and the claim
12 was not just that he was a Catholic and that the case
13 involved -- I think it was contraception or abortion, and that
14 his religious beliefs might get in the way, but that his
15 beliefs were fervently held.

16 And I think that case is significant because it
17 really is -- goes to the issue of how subjective do we get?
18 What are we supposed to disclose about our beliefs or our views
19 and is that a workable standard?

20 That sort of takes me to another point that I wanted
21 to address. That was this idea that a judge has a duty to
22 disclaim any interest in the case, which is really what the
23 proponents here are saying; that the judge had to disclaim any
24 intent to marry. And that if he doesn't disclaim it, he will
25 be presumed to have that interest. And that kind of a test,

1 you don't find that in any of the cases.

2 If that were the test, we would inspect to see,
3 again, you know, one of the best examples is contraception.
4 And I want to also remind the Court that the Subsection (b)
5 provisions also require recusal not only if the judge has an
6 interest, but if his spouse, his in-laws, his siblings, his
7 parents or his children have an interest.

8 So let's just take a case involving mortgage
9 foreclosure standards. So if the judge or his children or his
10 parents or his brother-in-law own a house, does he have to
11 disclaim that if he issues a ruling that favors borrowers as
12 opposed to lenders, that none of them will benefit by that? Or
13 in a contraception case, does he have to disclaim that he and
14 his wife engage in family planning or don't? I mean, say that
15 they don't? Or that his children won't use contraceptives?

16 I mean, these kinds of inquiries into people's
17 intimate lives are not required. There is no disclaimer
18 requirement.

19 And I think it's not just unworkable. It turns the
20 standard, the standard of being a presumption that a judge will
21 carry out their duties and that they will recuse themselves, if
22 they -- if there is a subjective reason they can't be fair.
23 And to say, "Well, if you don't disclaim an interest, we'll
24 presume that you're biased" flips that presumption. And there
25 is just no law to support that.

1 I also just want to touch quickly on kind of the
2 narrowness of the issue before the Court. I agree with
3 everything my colleague said, but I think we're really not here
4 to talk about whether the judge is gay. Because Mr. Cooper, in
5 his reply brief and in his arguments today, conceded that being
6 gay wasn't grounds for disqualification. And as we know, he
7 couldn't have contested, he couldn't argue otherwise because
8 the case law is really clear; that intrinsic personal
9 characteristics don't work.

10 And we're also not really here to discuss the fact
11 that he had a relationship, because that was disclosed in
12 earlier articles; that he had a companion who was a physician
13 who attended events with him. And that didn't put the
14 proponents on notice of any kind of concern about bias. So it
15 really does boil down to -- and I think your Honor focused on
16 it in some of your questioning -- this 10-year duration.

17 But it's also not about the nature of the
18 relationship, because there is nothing in the earlier articles
19 or in the April 2011 article that talks about, for example,
20 whether Judge Walker even lives with this partner, whether they
21 have financial commitments to each other, whether they -- they
22 have a domestic partnership or some kind of contractual
23 arrangement. We don't even know if they are married in the
24 half dozen states that allow it or in California before the
25 passage of Prop 8 or in the dozen or so countries that allow

1 same-sex couples to marry.

2 All we know -- and this motion is based entirely on
3 the notion that duration of a relationship alone, you know,
4 means that it leads to an interest in marriage.

5 You know, the plaintiffs say that -- that it's not
6 being gay. It's not being in a relationship. It's the length.
7 But they also concede that speculation doesn't work. You can't
8 speculate. You can't rely on innuendo. And, yet, that's
9 exactly what they are doing. They are asking this Court to
10 speculate because Judge Walker had a relationship of some
11 duration, those facts alone, that he intended to marry; that he
12 didn't marry his partner in 2008; that he didn't marry under
13 the laws of the other states or countries that allow it; and
14 that the main impediment to him marrying is Proposition 8.

15 So I would submit to the Court whether the
16 relationship is two years, five years, ten years or thirty
17 years, it doesn't matter. The Court can't speculate about
18 what's the nature of the relationship and what's the intent.
19 And if it infers anything, it has to infer from the fact that
20 the judge didn't disqualify himself and didn't disclose things,
21 full opposite of what Mr. Cooper would have the Court infer;
22 that he doesn't have an interest in the case that would lead
23 him be unable to hear it in a fair way.

24 I think... Last, I just want to mention again the
25 cases have a rule, and it's the *Alabama* case and the *Houston*

1 case, but also a case called *Christianson* and a case called
2 *Exxon* that are cited in our briefs. You know, in a number of
3 different contexts, that having an interest that is shared in
4 common with a large number of people in a public matter
5 isn't disqualifying. And that's really the rule that governs
6 this case, and it's really the rule that is the beginning and
7 the end to that analysis.

8 And the reasons for that rule are good reasons and
9 they have, in part, to do not only -- not only, but in part to
10 do with the desire to have a diverse bench and people that have
11 different life experiences and not to -- not recuse people
12 based on personal characteristics or the kinds of associations
13 that go along with those personal references. And I think
14 that's the rule that the Court should apply and deny the
15 motion.

16 Thank you, your Honor.

17 **THE COURT:** Thank you, counsel. And thank you for
18 shortening your argument.

19 I would allow you a brief rebuttal, five minutes?

20 **MR. THOMPSON:** Thank you very much, Chief Judge Ware.
21 I appreciate that. I have a few quick points to make.

22 First of all, Mr. Boutrous spent most of his time in
23 his argument here, as he has in his brief, attacking an
24 argument that not only do we not make, but we have disavowed,
25 as counsel for San Francisco has noted. We have disavowed that

1 our motion or our submission to the Court is founded on Chief
2 Judge Walker's sexual orientation or, for that matter, on any
3 beliefs or values that he might have.

4 This is not a case like Judge Noonan. We recognize
5 that Judge Higginbotham, Judge Noonan, Judge Motley, all of
6 these judges that brought their own experiences and their own
7 values and beliefs to the bench can be and are expected to be
8 trusted to put those to the side. This isn't about values or
9 beliefs. This is about whether or not the judge, when he did
10 disclose publicly a long-term same-sex relationship with his
11 partner, disclosed something that should have been disclosed
12 earlier, your Honor, because it was relevant to the question of
13 his potential interest in the case.

14 The Court -- and --

15 **THE COURT:** I hesitate given the short time I have
16 given you, I see a difference between a case brought before a
17 Court because a judge has failed to disclose, and I'm not sure
18 what statute or rule that would be in that issue, in the
19 failure to disclose context, and a motion to set aside a
20 judgment because the judge was disqualified.

21 Now, it seems to me that failure to disclose might be
22 appropriate in some sanctioned way or something of that kind,
23 but it doesn't seem to me that I read 455 as saying: A judge
24 shall be disqualified, if the judge fails to disclose.

25 Seems to me the disclosure becomes irrelevant if

1 you're allowed to bring the motion, because you're here. You
2 know what it is that you are seeking to base it on, as long as
3 I'm not denying you a hearing. I can see if I denied your
4 hearing, you could say "I'm prejudiced because the failure to
5 disclose didn't give me a hearing." But once you have a
6 hearing, what relevance does the failure to disclose have?

7 **MR. THOMPSON:** Your Honor, the failure to disclose,
8 the fact that was not disclosed now makes clear that Judge
9 Walker was in the shoes or very close to being in the same
10 shoes as the very plaintiffs that were before him.

11 **THE COURT:** How does that follow from the failure to
12 disclose? It seems to me that would follow from what he might
13 have failed to disclose, but not the newer to disclose.

14 **MR. BOUTROUS:** It does. But, your Honor, the failure
15 that he disclosed that, and its relevance to the
16 disqualification issue, is recognized in *Liljeberg* by the
17 Supreme Court as an independent reason, an independent reason
18 that the judge didn't disclose something that the reasonable
19 person would recognize as relevant to the issue, didn't
20 disclose it. That's an independent reason for concluding that
21 the judge's impartiality might reasonably be questioned, the
22 fact of the failure to disclose.

23 **THE COURT:** But both things have to be there. In
24 other words, the failure to disclose isn't an independent
25 basis. It's the failure to disclose and what is disclosed is a

1 basis, correct?

2 **MR. COOPER:** Yes, your Honor.

3 **THE COURT:** All right. But I'm willing to -- I don't
4 know what I would do if I were merely being asked by you to
5 take some action for failure to disclose. That ceases to be of
6 moment to me at this point.

7 I'm now looking at what he failed to disclose and
8 the -- whether that constitutes a basis of disqualification.

9 **MR. COOPER:** Your Honor, that is correct. What it is
10 that he failed to disclose is a fact, and the fact that he
11 didn't disclose it is a fact. Both of which -- both of which
12 go to whether a person in possession of all the facts might
13 question his impartiality.

14 And the third issue, again, to come back to the
15 question of his failure to disclose his interest, if any, in
16 marriage. If he had disclosed his long-term relationship with
17 his partner, it would have been incumbent upon him to also then
18 disclose whether or not he has an interest in marriage.

19 Just as it was incumbent upon Judge Clemon in *United*
20 *States against Alabama* to disclose what his knowledge, his
21 knowledge, his state of mind was with respect to his kids; his
22 son's, in particular, interest in attending one of the
23 Montgomery area schools. And he disclosed that he had no
24 knowledge of any such interest. It was incumbent upon him to
25 do that.

1 He could not have said, just as Judge Walker could
2 not have said here, that, "Maybe I have interest and maybe I
3 don't. I don't have to disclose it." He could not have said
4 that, your Honor, because that is a fact critically relevant to
5 the question of his -- of his disqualification in the case.

6 Mr. Boutrous says the only way that Judge Walker
7 would have been disqualified in this case is if he had his own
8 case on file. Your Honor, 455 is not that liberal, let's say,
9 to what a judge can sit on as he sits in his own case.

10 My time -- would the Court indulge me in light of,
11 perhaps, the fact --

12 **THE COURT:** How much indulgence are you asking for?

13 **MR. COOPER:** Just a couple moments, your Honor.

14 **THE COURT:** All right. A couple minutes.

15 **MR. COOPER:** Thank you so much, your Honor.

16 With respect to the timing -- and I know the Court
17 has said it's not going to rule on timing. We would not be
18 here today, but for the disclosure of the long-term
19 relationship. We weren't here before that. We had all of the
20 incentives that they say we had. We never came here. And it's
21 my representation to the Court we wouldn't be here today, but
22 for that. So that explains the timing with respect to our
23 motion here.

24 The Court asked about standard of review. I think
25 the Court is right. This is denovo. This is as if the case

1 had come to you under 144. That is our position. I'm sorry.
2 I don't think I fully understood your question earlier.

3 And with that, your Honor, I will thank you for your
4 indulgence for the extra time and thank you for your attention
5 here today.

6 **THE COURT:** Well, I really appreciate the quality of
7 the briefing and the quality of the argument that has been
8 presented with respect to this issue. I understand this is an
9 important case to the parties given the amount of litigation
10 that you've done, if that's any measure of it. It's an
11 important issue to the courts whenever a question of whether or
12 not a judge should have recused him or herself is brought
13 before the Court.

14 It is my intent to give you a written decision. It
15 is my intent to give you a written decision quickly, quite
16 frankly. I would like to say by in about 24 hours, but you
17 know how that goes. Sometimes -- and you've cited a couple of
18 cases to me that I haven't paid attention to. I want to look
19 at those and see whether or not they would require greater
20 consideration.

21 The problem has occupied me since the motion was
22 first made. I have been thinking about it as your briefs have
23 been filed. Of course, I have been looking at this issue. So
24 I do find that I am in a position where I can give you a quick
25 ruling so that you can move beyond this and go back to the

1 other matters in this case that occupy your attention.

2 So, this is all now electronic, so I'll post it as
3 quickly as I can. Thank you all for your argument.

4 **THE CLERK:** All rise.

5 (Whereupon at 12:01 p.m. further proceedings
6 in the above-entitled cause were adjourned.)

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 JW, **Kristin M. Perry, et al. vs. Arnold Schwarzenegger, in his official capacity as Governor of California, et al.**, was reported by me and was thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Monday, June 13, 2011