No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court Of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HON. JUDITH S. KAYE (RET.), PROFS. STEPHEN GILLERS, CHARLES G. GEYH, AND JAMES J. ALFINI, AND MARK I. HARRISON IN SUPPORT OF RESPONDENTS

SCOTT L. WINKELMAN
ALISON L. SHARE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

CHIEMI D. SUZUKI
CROWELL & MORING LLP
590 Madison Avenue, 20th Fl.
New York, NY 10022-2544
(212) 223-4000

ETHAN P. SCHULMAN
Counsel of Record
CROWELL & MORING LLP
275 Battery Street, 23rd Fl.
San Francisco, CA 94111
(415) 986-2800
eschulman@crowell.com

THY BUI
CROWELL & MORING LLP
3 Park Plaza, 20th Fl.
Irvine, CA 92614-8505
(949) 263-8400

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae Hon. Judith S. Kaye (Ret.), Professors Stephen Gillers, Charles G. Geyh, and James L. Alfini, and Mark I. Harrison submit this *amicus curiae* brief in response to positions advanced by certain of Petitioners' *amici* that the district judge who decided this case and one of the judges of the court of appeals had a duty to recuse themselves. In the view of these *amici*, such arguments seriously misportray the ethical and professional standards governing recusal and disqualification of federal judges.[1]

Hon. Judith S. Kaye (Ret.) served as Chief Judge of the State of New York for fifteen years until her retirement in 2008, the longest tenure of any Chief Judge in New York's history. She first was appointed in 1983 by Governor Mario Cuomo as an Associate Judge of the Court of Appeals, becoming the first woman ever to serve on New York's highest court. Judge Kaye gained a national reputation for both her groundbreaking decisions and her innovative reforms of the New York court system. She is the author of more than 200 publications,

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs, in support of either party or of neither party, have been filed with the Clerk of the Court.

including articles on legal process, state constitutional law, women in law, juvenile justice, professional ethics and problem-solving courts. She has received numerous awards recognizing her judicial and scholarly accomplishments, such as the New York State Bar Association's Gold Medal, the ABA Justice Center John Marshall Award, the National Center for State Courts' William H. Rehnquist Award for Judicial Excellence, the ABA Commission on Women in the Profession's Margaret Brent Women Lawyers of Achievement Award, and the U.S. Department of Health and Human Services' Adoption Excellence Award.

Stephen Gillers is the Elihu Root Professor of Law at New York University School of Law. He has been a professor of law at New York University School of Law since 1978 and Vice Dean from 1999-2004. His research and writing concentrate on the regulation of the legal profession, including judges and lawyers. Professor Gillers has written and lectured widely on judicial and legal ethics. He is the author of *Regulation of Lawyers: Problems of Law and Ethics*, a widely used law school casebook first published by Little, Brown (now Aspen) in 1985 with a ninth edition published in 2012. With Roy Simon (and as of 2008, also Andrew Perlman), he has edited *Regulation of Lawyers: Statutes and Standards*, published annually by Little, Brown, then Aspen, since 1989. He is also the author of *Regulation of the Legal Profession* (Aspen 2009) (the "Essentials" series). In 2011, he received the Michael Franck

Award from the ABA's Center for Professional Responsibility.

Charles G. Geyh is the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. He is the author of *Judicial Disqualification: An Analysis of Federal Law* (2d ed. Federal Judicial Center 2010) and *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006). He is coauthor of *Judicial Conduct and Ethics* (Fourth ed., Lexis Law Publishing 2007) (*with Alfini, Lubet and Shaman*), and editor of *What's Law Got To Do With It?: What Judges Do, Why They Do It, and What's at Stake* (Stanford University Press 2011). His work on judicial independence, accountability, administration and ethics has appeared in over sixty books, articles, book chapters and reports. Geyh has served as Reporter or Co-Reporter to four ABA Commissions (the Joint Commission to Evaluate the Model Code of Judicial Conduct, the Commission on the 21st Century Judiciary, the Commission on the Public Financing of Judicial Campaigns, and the Commission on the Separation of Powers and Judicial Independence). He has likewise served as Director of the American Judicature Society's Center for Judicial Independence; Consultant to the National Commission on Judicial Discipline & Removal; and legislative liaison to the Federal Courts Study Committee.

James J. Alfini is Dean Emeritus and Professor at South Texas College of Law where he teaches constitutional law, mediation theory and practice, professional responsibility, and related courses. He has also served as Dean and Professor of Law at Northern Illinois University and previously was a member of the law faculty at Florida State University. He has published in the field of judicial ethics and is co-author of *Judicial Conduct and Ethics*, published by Lexis and in its 4th Edition (2007). He served on the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct. The Commission's work resulted in the 2007 Model Code of Judicial Conduct, adopted by the House of Delegates of the American Bar Association.

Mark I. Harrison is a partner in the law firm of Osborn Maledon, P.A. in Phoenix, Arizona. He served as Chair of the ABA Commission to Revise the Model Code of Judicial Conduct which was unanimously adopted by the ABA House of Delegates in 2007. Mr. Harrison is the author of several articles dealing with judicial conduct and ethics and has received many awards, including the ABA Michael Franck Award for Professional Responsibility." Mr. Harrison has also served as a member and Chairman of the ABA Standing Committee on Professional Discipline; Chairman of the Committee on Professionalism; and member of the Standing Committee on Ethics and Professional Responsibility. He has also served as President of the State Bar of Arizona and as a member of the

Arizona Supreme Court Advisory Committee on the Rules of Judicial Conduct. Mr. Harrison has represented judges and the Arizona Commission on Judicial Conduct in matters involving judicial conduct and has testified and is regularly consulted as an expert in judicial ethics.

SUMMARY OF ARGUMENT

Various of Petitioners' *amici* charge that the district judge who heard and decided this case had an obligation to recuse himself, or to timely disclose personal information that they contend would have entitled Petitioners to move for his disqualification.[2] Petitioners' *amici* base this assertion on the fact that following the trial and his retirement from the federal bench, the district judge, Chief Judge Vaughn R. Walker, disclosed that he was gay and in a long-term same-sex relationship. As a result, *amici* argue, the district judge harbored "a personal bias or prejudice" toward Petitioners that purportedly resulted in his "deliberate mishandling" of the case.[3] They urge the Court to be "especially wary of accepting at face value any assertion made by that

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[2] Br. of the Ethics and Public Policy Center ("EPP Br.") at 33-35; Br. of Citizens United's National Committee for Family, Faith and Prayer, et al. ("Citizens United Br.") at 29-31; *see also* Br. of Public Advocate of the United States, et al. ("Public Advocates Br.") at 16-18.

[3] Citizens United Br. at 30; EPP Br. at 36; *see also* Public Advocates Br. at 16 (questioning Judge Walker's "motives" and asserting that they raise "serious questions about whether this decision before the Court in this case was reached by impartial tribunals and based on the merits").

judge."[4] And they go further still, arguing that the district judge's failure to recuse himself constituted judicial "impropriety" so profound as to warrant this Court's exercise of its "supervisory power" to overturn the district court's decision.[5]

Charges as extraordinary as these, directed at a respected retired chief judge of a federal district court, should not go unanswered, particularly in a case of this magnitude. The procedural history of the issue is this. Although the fact of the district judge's sexual orientation was publicly reported at least as early as February 2010, Petitioners waited to raise the issue until April 2011—more than a year after the district court had entered judgment following trial, and four months after Petitioners first argued their appeal from that judgment before the Court of Appeals. Only then did Petitioners file a motion to vacate the district court's judgment, arguing that Judge Walker should have recused because he was gay and in a committed same-sex relationship.

Chief Judge Ware, to whom the case was reassigned following Judge Walker's retirement, denied Petitioners' motion in a lengthy and thoughtful written opinion. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011). Petitioners appealed to the Court of Appeals, which consolidated the appeal from the order denying the motion to vacate the judgment with the appeal on the merits.

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[4] EPP Br. at 2.

[5] EPP Br. at 2; Citizens United Br. at 28-29.

The Court of Appeals affirmed the order denying the motion to vacate, agreeing that "Chief Judge Walker had no obligation to recuse himself under either § 455(b)(4) or § 455(a) or to disclose any potential conflict." *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012). As the court explained,

> the fact that a judge could be affected by the outcome of a proceeding[,] in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification under Section 455(b)(4). Nor could it possibly be "reasonable to presume," for the purposes of § 455(a), that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding.

Id. at 1095-96 (citations and internal quotations omitted). Indeed, the court observed, "[t]o hold otherwise would demonstrate a lack of respect for the integrity of our federal courts." *Id.* at 1096. All three members of the panel joined in the holding. *See id.* at 1096-97 (Smith, J., concurring in part and dissenting in part) (agreeing with majority's decision on motion to vacate judgment).

Petitioners could have sought review of that ruling in their petition for certiorari. But they did not. Nor did this Court mention it in its order

granting certiorari, which directed the parties to brief and argue the additional question of Petitioners' standing. Nor, finally, did Petitioners raise the matter in their brief on the merits. The issue therefore is not properly before the Court under Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *Amici*'s attack on the district judge has no proper place in this Court's consideration of the grave and important issues before it. *See* Part I, *infra*.

Even though not before the Court, Petitioners' *amici*'s charges are so incongruent with established standards of judicial ethics as to demand a response. Neither the district judge's status as a gay man, nor his long-term same-sex relationship, constituted a substantial non-pecuniary "interest" in the outcome of the litigation within the meaning of 28 U.S.C. § 455(b)(4). Nor did Petitioners' or their *amici*'s speculation—and it remains just that—about the possibility that the district judge may have been interested some day in marrying his partner (and doing so in California rather than another jurisdiction permitting same-sex marriage) give rise to any duty on his part to disclose either his status or details of his private life. The apparent stance of some *amici* that a judge's personal status or characteristics—whether race, gender, ethnicity, sexual orientation, or marital status—may alone constitute grounds for reasonably questioning the judge's impartiality is repugnant, and long ago was correctly and conclusively rejected by the courts.

Amici's attempt to broaden recusal doctrine would also render unworkable a body of rules that must be readily understood and applied. Recusal is serious business, and judges must know the standards by which this extreme measure is triggered—and, as here, when it is not. *Amici* do not indicate how "long-term" or "committed" a same-sex relationship must be to warrant disclosure and disqualification. So amorphous and undefined a recusal principle cannot be countenanced—which may explain why *amici* offer not a single salient authority or precedent for their novel proposition. *See* Part II, *infra*.

Separately, and raised for the first time at this stage of the proceedings, some *amici* encourage this Court to consider the propriety of Judge Reinhardt's service on the panel for the Ninth Circuit Court of Appeals. This question, like that regarding Judge Walker, is not properly before this Court, and serves only to distract from the important issues actually presented.

It also misconstrues recusal doctrine. In a case about marriage, Judge Reinhardt is faulted in effect for his own marriage. *Amici* claim that he is disqualified not because of his own actions or views but rather those of his spouse, Ramona Ripston. Ms. Ripston served as Executive Director of the American Civil Liberties Union of Southern California, and she publicly expressed her views on Proposition 8 and this matter. Neither that affiliation, nor those views, are "interests" as envisioned by 28 U.S.C. § 455

warranting Judge Reinhardt's recusal. Nor is her meeting with a portion of the potential legal team during the early assessment stage of filing the lawsuit that would ultimately become this case. Ms. Ripston, who is not a lawyer, never appeared as counsel for a party in this case, and the organization she led merely appeared as an *amicus curiae* in the district court and not at all in the Court of Appeals. A century ago, notions like those advanced against Judge Reinhardt might have resonated (although wrongfully so). In this day and age, however, a spouse's views and actions, however passionately held and discharged, are not imputed to her spouse, and Judge Reinhardt is not presumed to be the reservoir and carrier of his wife's beliefs. Judge Reinhardt was faithful to his oath in sitting on the Ninth Circuit panel that heard the *Perry v. Schwarzenegger* appeal. *See* Part III, *infra*.

ARGUMENT

I. *AMICI'*S CLAIM THAT THE DISTRICT JUDGE AND ONE OF THE APPELLATE JUDGES WERE REQUIRED TO RECUSE IS NOT PROPERLY PRESENTED.

As a threshold matter, Petitioners' *amici*'s attack on the district judge and one of the appellate judges who heard the matter below is outside the scope of the issues that the Court granted certiorari to decide.

Rule 14.1(a) of the Court's Rules provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." An issue is not "fairly included" if it is "distinct, both analytically and factually," from the question presented in the petition for certiorari. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam). Even if an issue is "related" to the one presented in the petition, or "complementary" to that issue, it is not "fairly included therein." *Yee v. Escondido*, 503 U.S. 519, 537 (1992) (emphasis omitted).

As the Court has explained, Rule 14.1(a) "serves two important and related purposes." *Id.* at 535. *First*, it provides respondent with notice of the grounds upon which petitioner seeks certiorari, enabling the respondent to argue whether those grounds are worthy of review, and thereby relieving respondent of "unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Id.* at 535-36.

Second, Rule 14.1(a) "assists the Court in selecting the cases in which certiorari will be granted." *Id.* at 536. To expend and direct its resources efficiently, the Court grants certiorari only in "those cases that will enable [it] to resolve particularly important questions." *Id.* Were the Court

> routinely to entertain questions not presented in the petition for certiorari,

> much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted.

Id.

The Court's "faithful application of Rule 14.1(a)" helps ensure that it is not "tempted to engage in ill-considered decisions of questions not presented in the petition." *Izumi Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 34. It also serves to "inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.'" *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion of Jackson, J.)).

For these reasons, Rule 14.1(a) creates a "heavy presumption" against the Court considering any point not fairly included in the questions presented in the petition for certiorari. *Id.* at 32. To this end, this Court has stated on "numerous occasions" that it will disregard Rule 14.1(a) and consider issues not raised in the petition "only in the most exceptional cases." *Id.* (citations and internal quotations omitted).

Here, *amici* belatedly seek to inject into this appeal issues of judicial recusal that Petitioners did not raise in their petition and that are not "fairly included" in either of the issues presented in this case. The petition for certiorari presents a single question: "Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman."[6] In its order granting the petition, the Court specified a second issue: "Whether petitioners have standing under Article III, § 2 of the Constitution in this case." Whether either judge in question should have recused himself is not remotely included in those issues. Petitioners—who unsuccessfully raised these issues of recusal below—might have altered this equation by raising recusal in their petition for certiorari, but chose not to do so. This Court likewise could have directed the parties to address the issue, but it likewise did not do so.

Under this Court's longstanding application of Rule 14.1(a), the recusal issue *amici* advance is not properly before the Court.

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[6] Contrary to *amicus* Citizens United's suggestion (Citizens United Br. at 32), "the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review." *Wood v. Allen*, 130 S. Ct. 841, 851 (2010) (citation and internal quotation omitted).

II. THE DISTRICT JUDGE WAS NOT REQUIRED TO RECUSE.

Petitioners' *amici* resurrect Petitioners' arguments below that the district judge was required to recuse himself on two separate grounds, arguing that his sexual orientation and long-term same-sex relationship constituted substantial non-pecuniary interests in the outcome of the case sufficient to require recusal, 28 U.S.C. § 455(b)(4), and would have led a reasonable person to question his impartiality. *Id.* at § 455(a).[7] The courts below correctly rejected both arguments, as courts before them have done in comparable circumstances.

A. The District Judge Had No Personal Interest In The Litigation Requiring Disqualification Under Section 455(b)(4).

Section 455(b)(4) requires recusal where a judge knows he has an actual, substantial interest in the outcome of the litigation. 28 U.S.C. § 455(b)(4) (requiring recusal if a judge "knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding"). By its plain terms, this provision requires both the existence of a personal interest on

[7] EPP Br. at 34-35.

the judge's part in the outcome of the litigation, and the judge's actual knowledge of that interest. *See Liteky v. United States*, 510 U.S. 540, 553 & n.2 (1994). *Amici*'s contention that the district court was required to recuse himself under this provision misapprehends the rule.

At the outset, neither the district judge's sexual orientation nor the fact of his same-sex relationship constituted a substantial non-pecuniary "interest" that could be affected by the outcome of the case before him. Section 455(b)(4) does not require recusal of judges who share a generalized interest with the public in securing widely shared constitutional or other rights. As the Court of Appeals explained, "the fact that a judge 'could be affected by the outcome of a proceeding[,] in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification under Section 455(b)(4)." *Perry v. Brown*, 671 F.3d at 1095-96 (citations omitted).

This Court's decision in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), while decided under the Due Process Clause rather than under Section 455, illustrates the distinction between a specific individualized interest in the outcome of litigation sufficient to require recusal and a speculative, generalized interest such as that involved here. There, the Court held that a justice of the Alabama Supreme Court violated a litigant's due process rights by failing to recuse in an insurance bad faith refusal-to-pay case where, at the time the

justice cast the deciding vote and authored the court's opinion, he had pending at least one very similar bad faith lawsuit against an insurer in another Alabama court; thus, his opinion for the Alabama Supreme Court had "the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 824. As such, his interest in the case was "direct, personal, substantial, and pecuniary." *Id.* (citations, alterations, and internal quotations omitted). In contrast, however, any interest the other justices may have had, as prospective members of the first justice's putative class action, was "clearly highly speculative and contingent," and did not require their recusal. *Id.* at 826-27.

Similarly, the lower federal courts consistently have held that "where federal judges have possessed speculative [non-pecuniary] interests as members of large groups . . . these interests [are] too attenuated to warrant disqualification" under § 455(b)(4). *United States v. Alabama*, 828 F.2d 1532, 1541-42 (11th Cir. 1987) (per curiam), *superseded by statute on other grounds*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 6, 102 Stat. 28, 31. For example, a black judge in Alabama cannot be disqualified from a case challenging racial discrimination in the state's public colleges, even though the judge's children are members of the plaintiff putative class and share a personal interest in the outcome of the litigation, because "[a]ny potential interest" they have "is shared by all young black Alabamians." *Id.* at 1541. Likewise, a black

judge does not recuse from a voting rights class action in which the judge is a member of the class, since the judge "has no greater or lesser an interest than any other federal judge who votes" in the affected city. *In re Houston*, 745 F.2d 925, 930 (5th Cir. 1984).

This authority speaks directly and forcefully to *amici*'s argument that "[b]y taking part in the case, then-judge Walker was . . . deciding whether Proposition 8 would bar him and his same-sex partner from marrying." EPP Br. at 34. While Judge Walker may have had in common with the public a generalized interest that all persons, regardless of their sexual orientation, be allowed to exercise the fundamental right to marry, he had no greater or lesser an interest in that issue than any other federal judge. Petitioners themselves concede in this Court that "[r]edefining marriage would affect not only same-sex couples *but all members of society*." Pet. Br. at 14 (emphasis added). Interests shared by "all members of society" do not warrant recusal.

A contrary ruling "would be an offensive precedent against judges who are members of minority groups." *In re Houston*, 745 F.2d at 930 (footnote omitted). Indeed, *amici*'s contention that the district judge should have recused "would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions." *Alabama*, 828 F.2d at 1542; *see also Perry*, 790 F. Supp. 2d at 1125 ("Requiring recusal because a court issued an injunction that could

provide some speculative future benefit to the presiding judge solely on the basis of the fact that the judge belongs to the class against whom the unconstitutional law was directed would lead to a Section 455(b)(4) standard that required recusal of minority judges in most, if not all, civil rights cases.").

Not only would such an outcome be socially and morally intolerable, it would contradict the presumption of integrity and impartiality to which all judges are entitled. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (there is a "presumption of honesty and integrity in those serving as adjudicators"). As Senior Judge Winter of the Second Circuit observed,

> A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group. Such an accusation is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.

MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 138 F.3d 33, 37 (2d Cir. 1998) (affirming imposition of sanctions on counsel for calling district judge's impartiality into question based on his being Asian-American); *see also Pennsylvania v. Local Union 542,*

Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974) (opinion of Higginbotham, J. denying defendant's motion to disqualify him in a race discrimination class action on the basis of his race).

The same reasoning applies to a judge's sexual orientation. Judge Walker's orientation, and same-sex relationship, no more give rise to a substantial non-pecuniary "interest" in the outcome of the litigation than would the race, ethnicity, or religion of a judge hearing a case that happened to involve one of those broad topics, or litigants sharing such a characteristic.[8] *Cf. Caperton v. AT Massey Coal Co., Inc.*, 556 U.S. 868, 892-93 (2009) (Roberts, C.J., dissenting) ("In any given case, there are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a 'probability of bias.'").

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[8] *Amicus* protests that this is a "red-herring objection," insisting that its argument "does not imply broader disqualification obligations for other judges in different circumstances." EPP Br. at 35. However, it fails to offer any meaningful distinction between its claim that the district judge should have recused because of his sexual orientation and claims that other judges were disqualified because of their race, ethnicity, or religion.

Perhaps recognizing that a judge's sexual orientation alone cannot warrant recusal, some *amici* pivot, and focus instead on Judge Walker's failure to disclose whether he wished to marry his same-sex partner. EPP Br. at 34 (asserting that Judge Walker had a "legal duty to disclose all the relevant facts bearing on the question of disqualification"). But there can be no duty to disclose personal characteristics that cannot properly serve as the basis for a disqualification motion. "The ordinary standards of conduct of the legal profession reflect judgments about the likelihood of actual impropriety in a particular case. Unless the conduct is substantially out of the ordinary, it is unnecessary to pursue the further question whether the conduct presents the appearance of impropriety . . . ." *U.S. v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985); *see also U.S. v. Salerno*, No. 98 C 3980, 2000 WL 821713, at *4 (N.D. Ill. June 23, 2000) ("The judge . . . must first believe that a reasonable question exists regarding her impartiality before making a disclosure on the record.") (citing *Murphy*, 768 F.2d at 1537).

Amicus contends conditionally that "*if* Judge Walker had such an interest [in marrying his same-sex partner]," that would have constituted a non-financial interest that would have warranted his disqualification. EPP Br. at 34 (emphasis added); *id.* at 35 (arguing that duty to disqualify "possibly" flowed from § 455(b)(4)). Notably, *amicus* offers no *evidence* to support its conjecture that the district judge *did*, in fact, have any such interest. As discussed below, such bare speculation falls far short

of the showing necessary to mandate disqualification, and, if indulged, would turn recusal doctrine into an unworkable morass.

B. No Reasonable Person Could Question The District Judge's Impartiality So As To Require Recusal Under Section 455(a).

Section 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Recusal is appropriate under this section only if there is an *objective* likelihood of bias. *Liteky v. United States*, 510 U.S. 540, 548, 553 n.2 (1994) (emphasizing that subsection (a) requires facts to be evaluated on an objective basis and deals with the objective appearance of partiality); *id.* at 564 ("Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.") (Kennedy, J., concurring).

A "high threshold" governs § 455(a). *Id.* at 558 ("[U]nder § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.") (Kennedy, J., concurring). The test turns on the actual facts and circumstances in context, not

on unfounded assertions or conjecture. *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 914 (2004) (memorandum of Scalia, J. denying motion to recuse) ("The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, as not as they were surmised or reported." (citing *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., respecting recusal)).[9]

Thus, in *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc.*, 535 U.S. 229 (2002) (per curiam), the district court judge's name had appeared, prior to his appointment to the bench, on a motion to file an *amicus* brief in a similar suit against some of the same defendants as in the case before him. *Id.* at 230. The district judge had, in fact, taken no part in the preparation or approval of the brief, having retired six months earlier as president of the trial lawyers association that submitted the motion. *Id.* The court of appeals nevertheless held that the fact that the judge's name

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[9] Section 455 was amended in 1974 to broaden and clarify the grounds for judicial disqualification and to conform with Canon 3C of the 1972 ABA Code of Judicial Conduct. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). While the ABA Model Code of Judicial Conduct has been revised over the years, the pertinent language of what is now Rule 2.11(A) of that Code closely parallels Section 455(a) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."). Numerous states have adopted codes of judicial conduct based on the ABA Model Code.

was listed on the motion, even if erroneously, might lead a reasonable person to doubt his impartiality, and that the trial judge's assertions that he did not participate in the brief "do not dissipate the doubts that a reasonable person would probably have about the court's impartiality." *Id.* at 232. This Court reversed, holding that the case was "easily disposed of" on the ground that the decision whether the judge's impartiality might reasonably be questioned should have been made in light of *all* of the facts, "and when they are taken into account we think it self-evident that a reasonable person would not believe he had any interest or bias." *Id.* at 232-33.

Here, Petitioners' *amici* maintain that had Judge Walker disclosed that he was in a longstanding same-sex relationship, Petitioners would have had a "compelling case" for his disqualification under § 455(a). EPP Br. at 34. *Amici* apparently contend that either the fact of the district judge's sexual orientation, or his same-sex relationship, could constitute grounds for a reasonable person to question his impartiality. The law is otherwise.

It is categorically unreasonable to question a judge's impartiality merely because that person is a member of a minority group whose rights are implicated in a case before the court. As discussed above, a venerable line of authority conclusively rejects efforts to compel recusal of judges based on their identity as a member of a minority group. "To disqualify minority judges from major civil rights

litigation solely because of their minority status is intolerable." *Alabama*, 828 F.2d at 1542. "The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: 'that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.'" *Id.* (quoting *Pennsylvania*, 388 F. Supp. at 163); *see also, e.g., Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) ("Judges routinely decide hostile environment sexual harassment cases involving plaintiffs of the opposite sex."); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659-60 (10th Cir. 2002) ("[G]roup membership alone is insufficient to create the appearance of bias.") (in a case against Episcopal diocese alleging sexual harassment by homosexual youth minister, the fact that district judge was Episcopalian did not require recusal).

As then-District Judge Higginbotham eloquently remarked in rejecting a defendant's motion to disqualify him in a race discrimination class action because of his race and public advocacy of civil rights,

> It would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their nonpolitical community affairs, in their

> universities. So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters where Protestants and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.

Pennsylvania, 388 F. Supp. at 181; *see also Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (Motley, J.) ("The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.").

Nor is Judge Walker's "longstanding same-sex relationship" a reasonable foundation for questioning his impartiality. *Amicus* reasons that "[b]y taking part in the case, then-Judge Walker was . . . deciding whether Proposition 8 would bar him and his same-sex partner from marrying." EPP Br. at 34.

However, in cases involving fundamental rights, recusal has never turned on the conjectural prospect that the judge may one day exercise the right at issue. *See, e.g., In re City of Houston*, 745 F.2d 925, 926 (5th Cir. 1984) (rejecting recusal in a voting rights case even though judge "was a registered voter in the City"); *Alabama*, 828 F.2d at 1541 (rejecting recusal in a case involving school segregation even though judge had "children who are eligible to attend . . . the public institutions of higher education" that were at issue in the case (internal quotations omitted)). Under § 455(a), the test is whether the judge has some personal connection to the case that gives rise to an objective appearance of partiality, not whether the judge has life experiences or even life hopes in common with a segment of the general public that a given ruling may affect. *See, e.g., Liljeberg*, 486 U.S. at 858 (finding an appearance of partiality where judge served on board of university involved in negotiations with party to litigation, especially because outcome of negotiations turned on party's success in the litigation).

Worse still, speculation that the district judge might have wished to marry his partner is just that—speculation—entirely lacking in evidentiary support. For all that the record reveals, it is false, since during the pendency of the case before him the district judge reportedly was in a long-term relationship and yet never sought to marry either in California (during the window of time when the

State was performing same-sex marriages[10]) or in any of the other states that increasingly have authorized such marriages.

Amici ultimately condemn the district judge on pure conjecture—the hypothesis that the district judge might someday wish to marry. They say so, and can only say so bereft of evidence, for the reason that the district judge admitted to being in a "long-term" relationship. *E.g.*, EPP Br. at 34; Citizens Br. at 30. But recusal based on pure inference and speculation is not countenanced. As the district court below stated:

> Defendant-Intervenors contend that Judge Walker had an interest in the case because if he were to decide that Plaintiffs were entitled to have their right to marry restored, even though there was no evidence that Judge Walker intended to marry, the sole fact that he was in a same-sex relationship placed Judge Walker in the position of deciding a case that could affect him if he were to desire to marry.

Perry v. Schwarzenegger, 790 F. Supp. 2d at 1124 (citation omitted). It correctly deemed the speculative nature of a future theoretical endeavor of

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[10] *See Strauss v. Horton*, 46 Cal. 4th 364, 385 (Cal. 2009) (an estimated 18,000 marriages of same-sex couples were performed in California before Proposition 8 was adopted in November 2008).

a judge too attenuated to serve as a basis for disqualification. *Id.* at 1124-26, 1130-31.

A contrary ruling would render recusal doctrine unworkable. Judges must know when and why to recuse. *Amici*'s unorthodox rendition of recusal doctrine offers no guidance or guideposts in this regard. *Amici* do not explain how "long-term" a same-sex relationship must be to warrant disqualification. Nor do they have a thing to say about how "committed" is sufficiently "committed." "[D]isqualifying Judge Walker based on an inference that he intended to take advantage of a future legal benefit made available by constitutional protections would result in an unworkable standard for disqualification." *Id.* at 1126.

The courts are rightly and persistently focused on ensuring that disqualification rules work—that they are understandable and administrable. *See, e.g.*, *Liljeberg*, 486 U.S. at 870 (Rehnquist, C.J. and White & Scalia, JJ., dissenting) ("The Court's decision in this case [on disqualification under § 455(a)] is long on ethics in the abstract, but short on workable rules of law."); *Cheney*, 541 U.S. at 916 (eschewing recusal rule interpretations that would be "utterly disabling" and observing that a no-friends rule "would have disqualified much of the Court"); *Houston*, 745 F.2d at 932 (noting "the practical problems that would be created by a misdirected application of the recusal statute") & n.9 (discussing the Rule of Necessity and noting that "where all are disqualified, none are disqualified" (citation

omitted)). Moreover, courts should be extremely reluctant to adopt recusal rules that would "encourage [others] to suggest improprieties, and demand recusals, for other inappropriate . . . reasons." *Cheney*, 541 U.S. at 927. The sheer impracticality of *amici's* focus on crystal-balling the district judge's potential interest, some day down the road, in perhaps marrying (against all evidence to date), is itself fatal to their attack.[11]

Recusal, as noted, is serious business. Those urging it, especially in the maelstrom of a case of this profile and significance, should have a firm leg to stand on. Courts should look askance at recusal attacks when the movant "gives not a single instance

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[11] *Amici* finally contend that various rulings and comments the district judge made during the course of the bench trial before him constituted such an "egregious course of misconduct" that the Court should vacate the judgment below. EPP Br. at 1, 2; *see also id.* at 36. That contention merits only the briefest of responses. As this Court observed in *Liteky*, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal." 510 U.S. at 555.

Thus, in *Liteky*, petitioners based their first recusal motion on "rulings made, and statements uttered, by the District Judge during and after" the trial. *Id.* at 556. This Court unanimously found such grounds "inadequate" to warrant the district judge's recusal: None of those rulings and admonishments, all of which "occurred in the course of judicial proceedings," "displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.*; *see also id.* at 568 ("Nothing in those rulings or comments raises any inference of bias or partiality.") (Kennedy, J., concurring). Regardless of the depth of Petitioners' disappointment with the outcome of the trial below or Judge Walker's rulings, precisely the same conclusion follows here.

in which, under even remotely similar circumstances, a Justice [or judge] has recused or been asked to recuse." *Id.* at 922. That is this case.

III. JUDGE REINHARDT WAS NOT REQUIRED TO RECUSE.

Amici finally seek to cast doubt upon the worthiness to serve of a member of the Court of Appeals below, Judge Reinhardt. *E.g.*, EPP Br. at 26-28. Ironically, in a case about marriage, *amici* question Judge Reinhardt's integrity in essence because he is married. *Amici*'s grievance is not with Judge Reinhardt *per se*, but with the fact that his spouse, Ramona Ripston, (a) held a non-legal leadership position with the American Civil Liberties Union of Southern California, an organization that has spoken out against Proposition 8 and for marriage equality, and (b) had peripheral, early interaction in what ultimately became this case. EPP Br. at 26-27. Judge Reinhardt was correct to deny the motion below seeking his recusal. *Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011).

It is the case that Ms. Ripston once served as Executive Director of the ACLU of Southern California. That the ACLU is involved and interested in Proposition 8, and hence in the lower court proceedings that led to this case, is not a surprise. This does not, however, automatically equate with Ms. Ripston having an "interest" in the case beyond endorsing an outcome favoring equality.

Amici nonetheless imply that Ms. Ripston's views should be imputed to her spouse, Judge Reinhardt. EPP Br. at 28-29. The law is to the contrary. We are long past the day when a wife's opinions are assumed to be the same as her husband's, and in which spousal views and activity are categorically imputed to one's spouse. No authority requires a judge to recuse based alone on the opinions of his or her spouse; only an "outmoded conception of the relationship between spouses" would hold otherwise. *Perry*, 630 F.3d at 912. Judge Reinhardt, in denying the motion for his recusal, correctly observed that his wife "has the right to perform her professional duties without regard to whatever my views may be" just as he "should do the same without regard to hers." *Id.* at 912.

Section 455(a) calls for judicial disqualification from "any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Ms. Ripston's opinions, views, and public pronouncements of support for the district court decision below do not trigger any reasonable basis to question Judge Reinhardt's ability to honor his oath of office. A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a disabling marriage penalty.

Beyond the general provisions of § 455(a), the two sections germane to *amici*'s contentions are §§ 455(b)(5)(ii), (iii):

> (b) [A judge] shall disqualify himself in the following circumstances:
>
> > (5) He or his spouse, or a person within a third degree of relationship to either of them . . .
> >
> > > (ii) Is acting as a lawyer in the proceeding;
> > >
> > > (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .

Id.

These provisions did not mandate recusal of Judge Reinhardt. Ms. Ripston's interests in the case were not "substantially affected" by either of the lower court decisions beyond the effect that any supporter of same-sex marriage might have experienced. Her public persona and interviews, EPP Br. at 31-32, do not change that fact. "[M]y wife has no 'interest' in the outcome of this case that might be substantially affected its outcome, over and beyond the interest of any American with a strong view concerning the social issues that confront this nation." *Perry*, 630 F.3d at 915. Section 455(b)(5)(iii) did not mandate Judge Reinhardt's disqualification.

Relying again on § 455(b)(5)(ii), *amici* suggest that Ms. Ripston, in her capacity with the ACLU, was "actively involved" in the case at the district court level. EPP Br. at 27. This vastly overstates her involvement. The ACLU joined, but did not even draft or sign, "two amicus briefs and an unsuccessful intervention motion" in the district court. *Perry*, 630 F.3d at 913. Nowhere is it alleged that Ms. Ripston authored or was even consulted on the briefs. *Amici* appear as friends of the court—and their briefs are specifically not submissions of the parties in interest.

The ACLU of Southern California's early consulting role transpired before a legal team was fully chosen or a complaint even drafted. While Ms. Ripston was reported to be included in those talks, that is a far cry from being a member of the legal team or actually representing a party. The news article on which *amici* rely nowhere discuss any involvement by Ms. Ripston in any of the further actions by the ACLU. EPP Br. at 27 (citing Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, California Lawyer (Jan. 2010)).

According to the Statement of Recusal Policy endorsed by seven justices,

> [t]he provision of the recusal statute that deals specifically with a relative's involvement as a lawyer in the case requires recusal only when the covered relative '[i]s acting as lawyer in the proceeding.'. . . It is well established

> that this provision requires personal participation in the representation, and not just membership in the representing firm . . . .

Statement of Recusal Policy, Nov. 1, 1993.

Ms. Ripston's involvement falls well short of this standard. By *amicus's* own account, she did not act "as lawyer in the proceeding." This can be the only result, as Ms. Ripston is, in fact, not a lawyer. Moreover, even the action the organization took was confined to the district court phase of this matter, and concluded months before the case was appealed and a Ninth Circuit panel selected. "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative . . . acted as a lawyer at an earlier stage." Statement of Recusal Policy. The same policy, which is based on § 455 and not on the unique needs of this Court, logically should apply to the courts of appeals.

In the end, *amici* urge what amounts to a multiplier standard, somehow combining Ms. Ripston's "interest" in Proposition 8 with a pre-lawsuit meeting to equate to grounds for recusal. And, again, they do so without citation to any precedential authority even nearly on point.

The facts remain. Neither Ms. Ripston nor the organization she headed ever acted as a lawyer for a party in the district court case. Indeed, the

organization was asked to support the intended lawsuit before it was filed and specifically declined to do so. *Perry*, 630 F.3d at 913. She was not involved in the filing of the *amicus* briefs in the district court. Her interest was that of executive director, not counsel, as *amici* grudgingly admit. EPP Br. at 26-27. To now declare that Judge Reinhardt should have disqualified himself both overestimates Ms. Ripston's involvement in the district court and underestimates Judge Reinhardt's capacity to even-handedly tend to his judicial duties.

CONCLUSION

The presumption in recusal doctrine is one in favor of integrity. It assumes that judges behave as professionals and adults, and are able to distinguish their personal predilections from their solemn duty impartially to mete out justice. In other words, the law assumes the best in people. *Amici* assume the worst.

Respectfully submitted,

SCOTT L. WINKELMAN
ALISON L. SHARE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

CHIEMI D. SUZUKI
CROWELL & MORING LLP
590 Madison Avenue, 20th Fl.
New York, NY 10022-2544
(212) 223-4000

ETHAN P. SCHULMAN
Counsel of Record
CROWELL & MORING LLP
275 Battery Street, 23rd Fl.
San Francisco, CA 94111
(415) 986-2800
eschulman@crowell.com

THY BUI
CROWELL & MORING LLP
3 Park Plaza, 20th Fl.
Irvine, CA 92614-8505
(949) 263-8400

Counsel for Amici Curiae

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