

The Volokh Conspiracy » Motion Asking Judge Reinhardt to Recuse Himself from the Prop. 8 Case

<http://volokh.com/2010/12/02/motion-asking-judge-reinhardt-to-recuse-himself-from-the-prop-8-case/> February 21, 2011

[UPDATE: See below for Judge Reinhardt's preliminary response.]

Orin [blogged yesterday](#) about the suggestion that Judge Reinhardt recuse himself from the Prop. 8 case, so I thought it would be helpful to post [the just-filed motion that makes such a request](#). Here's the Statement from the start of the motion (with most citations omitted), which summarizes the argument, though please read the whole thing if you're interested in the issue:

On November 28, 2010, this Court identified Circuit Judges Reinhardt, Hawkins, and N.R. Smith as the members of the panel assigned to this case. Judge Reinhardt is married to Ramona Ripston, the long-time Executive Director of the ACLU of Southern California (hereinafter, "ACLU/SC"). As Executive Director, Ms. Ripston is "responsible for all phases of the organization's programs, including litigation, lobbying and education." Under Ms. Ripston's leadership, "ACLU/SC has taken a lead role" in what it calls "the fight to end marriage discrimination" in California. ACLU/SC 2007-2008 Annual Report 24, at <http://www.aclu-sc.org/downloads/9/204927.pdf>. ACLU/SC represented several same-sex couples and organizations in *In re Marriage Cases*, in which the California Supreme Court held that California's pre-Proposition 8 statutory definition of marriage as the union of a man and a woman violated the State Constitution.

Following that decision, ACLU/SC put Proposition 8 "at the forefront of [its] civil-rights agenda, sparing no effort to defeat Prop. 8 [and] challenge its passage." ACLU/SC 2008-2009 Annual Report 8, at <http://www.aclusc.org/documents/view/223>. After Proposition 8's passage ACLU/SC represented petitioners before the California Supreme Court in *Strauss v. Horton*, the unsuccessful state-law challenge to the validity of Proposition 8. The same day the California Supreme Court issued its decision in *Strauss*, Ms. Ripston issued a public statement on behalf of ACLU/SC, vowing that "[a] renewed effort to overturn Proposition 8 begins today." Ms. Ripston later signed a letter on behalf of ACLU/SC explaining that as part of that effort, "LGBT people and our closest allies are first going to have to talk to close friends and family about ... why this fight [for same-sex marriage] matters. Even if those people are already on our side, we need to talk to them to convince them to join the fight."

ACLU/SC has taken an active role in this litigation. It appears that Plaintiffs' attorneys engaged in "confidential discussions" with Ms. Ripston and ACLU/SC's legal director before filing this lawsuit. See Chuleenan Svetvilas, Challenging Prop 8: The Hidden Story, CALIFORNIA LAWYER, Jan. 2010, at <http://www.callawyer.com/story.cfm?eid=906575&evid=1>. And ACLU/SC has been actively involved in this very case. Indeed, it represented, as counsel in the court below, parties seeking to intervene as plaintiffs, see *Our Family Coalition et al. Motion to Intervene as Party Plaintiffs*, Doc. No. 79 at 2 (July 8, 2009), and amici urging the court to decide the case in favor of Plaintiffs and to rule that Proposition 8 is unconstitutional. See

Brief of Amici Curiae American Civil Liberties Union et al., Doc. No. 62 at 2 (June 25, 2009); Brief of Amici Curiae American Civil Liberties Union et al., Doc. No. 552 at 2 (Feb. 3, 2010). [footnote 3]

[Footnote 3:] Indeed, in the accompanying motions for leave to file these amicus briefs, the statement of amici interest specifically lists ACLU/SC as an affiliate of an amicus curiae. See Motion for Leave to File Brief of Amici Curiae American Civil Liberties Union et al., Doc. No. 61 at 3 (June 25, 2009) (identifying “the ACLU Foundation of Southern California” as one of “the three California affiliates of the ACLU”); Motion for Leave to File Brief of Amici Curiae American Civil Liberties Union et al., Doc. No. 551 at 3 (Feb. 3, 2010) (same).

When the district court issued the ruling under review in this Court, the ACLU issued a public statement praising the decision and emphasizing that the ACLU, along with two other groups, had “filed two friend-of-the-court briefs in the case supporting the argument that Proposition 8 is unconstitutional.” The press release quoted Ms. Ripston as “rejoic[ing]” in the decision striking down Proposition 8, asserting that it “affirms that in America we don’t treat people differently based on their sexual orientation.” Ms. Ripston’s statement was reported in the national media. At the same time, Ms. Ripston stated that the district court’s ruling was not the end of the matter, emphasizing that “it’s a long road ahead until final victory.” Specifically, as one of her colleagues put it in the same public statement, “[i]n order to give this case the best possible chance of success *as it moves through the appeals courts*, we need to show that America is ready for same-sex couples to marry by continuing to seek marriage and other relationship protections in states across the country” (emphasis added).

Naturally, if there’s a response filed (or some rebuttal published by someone who is not a party), I’d be delighted to link to it as well. I don’t have a fixed view on what the right result is, since I’m not an expert on this aspect of judicial recusal law, but I thought it was worth linking to the legal argument.

UPDATE: Judge Reinhardt just denied the motion, with a detailed explanation to come. Here’s the text of [the order](#):

I have before me defendants-intervenors-appellants’ motion to disqualify myself from this appeal. I have not hesitated to recuse from cases in the past when doing so was warranted by the circumstances. See *Khatib v. County of Orange*, 622 F.3d 1074, 1074 (9th Cir. 2010); *Mohamed v. Jeppesen Dataplan, Inc.*, 586 F.3d 1108, 1109 (9th Cir. 2009); *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 913, 914 (9th Cir. 2003); *Valeria v. Davis*, 320 F.3d 1014, 1015 n.** (9th Cir. 2003); *Alvarez-Machain v. United States*, 284 F.3d 1039, 1039 n.1 (9th Cir. 2002); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997).

Here, for reasons that I shall provide in a memorandum to be filed in due course, I am certain that “a reasonable person with knowledge of all the facts would [not] conclude that [my] impartiality might reasonably be questioned.” *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983); see also *Sao Paulo State of the Federated Republic of Brazil v. Am. Tobacco*

Co., 535 U.S. 229, 233 (2002) (per curiam). I will be able to rule impartially on this appeal, and I will do so. The motion is therefore DENIED.