

No. 10-16696

CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH
ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2010

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from United States District Court
for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

APPELLANTS' MOTION FOR DISQUALIFICATION

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Pursuant to 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(5)(iii), Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com (hereinafter, “Proponents”), respectfully move for Judge Reinhardt to disqualify himself from participating in this proceeding.

STATEMENT

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”).¹ *See* Ramona Ripston, Executive Director, ACLU/SC, at <http://www.aclu-sc.org/documents/view/224>.² As Executive Director, Ms. Ripston is “responsible for all phases of the organization’s programs, including litigation, lobbying and education.” *Id.*

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>.

¹ As the citations in this motion indicate, the information we relate concerning Ms. Ripston and ACLU/SC is based on material contained in published, publicly available sources.

² ACLU/SC is “comprised of three separate corporate entities” that all “are part of the same overall organization”—American Civil Liberties Union of Southern California, ACLU Foundation of Southern California, and ACLU Foundation of Southern California, LLC. *See* Corporate Entities of the ACLU of Southern California, at http://www.aclu-sc.org/pages/tax_info. As the organization itself does on its website, we refer to these entities collectively as ACLU of Southern California or ACLU/SC. *See id.*

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. *See In re Marriage Cases*, 43 Cal. 4th 757, 768-69, 786 (2008).

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.aclu-sc.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. 46 Cal. 4th 364, 374 (2009).

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." *Statement by ACLU/SC Executive Director Ramona Ripston on California Supreme Court Decision* (May 26, 2009), at <http://www.aclu-sc.org/contents/view/8>. 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.”

Prop 8: Focusing on the Wrong Question (July 14, 2009), at http://www.aclu-sc.org/news_stories/view/102830/.

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).³

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.” *ACLU Hails Historic Decision and Urges Efforts in Other States to Ensure Success on Appeal* (August 4, 2010), at <http://www.aclu-sc.org/releases/view/103036>.⁴ 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.” *Id.* Ms. Ripston’s statement was reported in the national media. *See, e.g.,* Daniel B. Wood, *Proposition 8: Federal Judge Overturns California Gay Marriage Ban*, CHRISTIAN SCIENCE MONITOR, Aug. 4, 2010, at <http://www.csmonitor.com/USA/Justice/2010/0804/Proposition-8-federal-judge-overturns-California-gay-marriage-ban>.

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.” *ACLU Hails Historic Decision and Urges Efforts in Other States to Ensure Success on Appeal* (August 4, 2010), at <http://www.aclu-sc.org/releases/view/103036>. 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

⁴ This statement is reproduced on the ACLU/SC’s website, but on its face appears to be issued by the national ACLU organization.

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.” *Id.* (emphasis added).⁵

ARGUMENT

I. DISQUALIFICATION IS REQUIRED BECAUSE JUDGE REINHARDT’S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

Section 455(a) requires a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). “The goal of section 455(a) is to avoid even the appearance of partiality,” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quotation marks omitted), and thus “what matters is not the reality of bias or prejudice but its appearance,” *Liteky v. United States*, 510 U.S. 540, 548 (1994). In other words, so long as a judge’s impartiality might reasonably be questioned, recusal is required “even though no actual partiality exists ... because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.” *Liljeberg*, 486 U.S. at 860 (quotation marks omitted).

The standard for assessing whether section 455(a) requires disqualification is thus “an objective one” that “involves ascertaining whether a reasonable person

⁵ That colleague was “James Esseks, Director of the ACLU Lesbian, Gay, Bisexual and Transgender Project.” *ACLU Hails Historic Decision and Urges Efforts in Other States to Ensure Success on Appeal* (August 4, 2010), at <http://www.aclu-sc.org/releases/view/103036>.

with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (quotation marks omitted). And because of its "fact-driven" nature, analysis "must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (quotation marks omitted). In performing this analysis, the Court "must bear in mind that ... outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be," and in "a close case, the balance tips in favor of recusal." *Id.* at 912, 914 (quotation marks omitted).

The facts of this case would plainly lead a reasonable person to conclude that Judge Reinhardt's impartiality might reasonably be questioned. His wife and the organization she leads have not only been active in seeking to redefine marriage in California and active in opposition to Proposition 8, but they have been active participants in this very lawsuit: Plaintiffs' attorneys consulted with Ms. Ripston before filing suit; ACLU/SC represented amici and proposed intervenors in the court below urging the court to decide the case in favor of Plaintiffs; Ms. Ripston, as Executive Director of ACLU/SC, "is responsible for all phases of the organization's programs, *including litigation*," see Ramona Ripston, Executive

Director, ACLU/SC, at <http://www.aclu-sc.org/documents/view/224> (emphasis added); and Ms. Ripston publicly “rejoice[d]” over the district court decision that is before this Court for review, praise that was tempered only by the concern that “it’s a long road ahead until final victory.” *ACLU Hails Historic Decision and Urges Efforts in Other States to Ensure Success on Appeal* (August 4, 2010), at <http://www.aclu-sc.org/releases/view/103036>. That “road” obviously passes through this Court, and Ms. Ripston’s colleague emphasized the importance of working “to give this case the best possible chance of success as it moves through the appeals courts.” *Id.*

It is instructive that section 455(b) (which also requires disqualification here, as we explain below), contains several provisions mandating recusal on the basis of the connection of a judge’s spouse to a case. *See, e.g.*, 28 U.S.C. § 455(b)(5)(i) (mandating recusal when spouse “[i]s a party to the proceeding, or an officer, director, or trustee of a party”); *id.* § 455(b)(5)(ii) (mandating recusal when spouse “[i]s acting as a lawyer in the proceeding”); *id.* § 455(b)(5)(iii) (mandating recusal when spouse “[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding”). These *per se* recusal rules “provide[] examples of situations in which a judge’s ‘impartiality might reasonably be questioned’ pursuant to section 455(a),” *Herrington v. County of Sonoma*, 834 F.2d 1488, 1502 (9th Cir. 1987), *overruled on other grounds, Nitco*

Holding Corp. v. Boujikian, 491 F.3d 1086, 1090 (9th Cir. 2007), and demonstrate that a spouse's actual participation in a case amounts to such a situation.

Finally, it is of no moment that neither Ms. Ripston nor ACLU/SC is a named party to this litigation, for the “Supreme Court has never limited recusal requirements to cases in which the judge’s conflict was with the parties named in the suit. Rather, the focus has consistently been on the question whether the relationship between the judge and an interested party was such as to present a risk that the judge’s impartiality in the case at bar might reasonably be questioned by the public”—a risk that is manifestly present here. *Preston*, 923 F.2d at 735 (citation omitted). Indeed, the Advisory Committee Notes to this Court’s rules recognize that participation as an amicus will give rise to the need to recuse. *See* Circuit Advisory Committee Note to Rule 29-2 (“The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.”).

II. DISQUALIFICATION IS REQUIRED BECAUSE THE INTERESTS OF JUDGE REINHARDT'S SPOUSE COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THIS CASE

As is often the case, disqualification is required under section 455(b) as well as section 455(a). *See Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir. 1987) (“Frequently, an overlap will occur—an act will appear to create a conflict [under section 455(a)] and will fall within the per se rule [of section 455(b)].”). In particular, Judge Reinhardt must recuse because “his spouse ... [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(5)(iii); *see also id.* § 455(b)(4) (similar). Ms. Ripston is “responsible for all phases of [ACLU/SC’s] programs,” *see* Ramona Ripston, Executive Director, ACLU/SC, at <http://www.aclu-sc.org/documents/view/224>, and under her direction the organization has put Proposition 8 “at the forefront of [its] civil-rights agenda, sparing no effort to defeat Prop. 8 [and] challenge its passage,” *see* ACLU/SC 2008-2009 Annual Report 8, at <http://www.aclu-sc.org/documents/view/223>. Most importantly, as we have explained, the ACLU/SC’s effort to invalidate Proposition 8 has extended to advocating that result in this very case.

It is thus plain that Ms. Ripston has an avowed interest in seeing Proposition 8 invalidated, an interest that unquestionably will be substantially affected by the outcome of this proceeding. Because this is so, it is immaterial whether or not Ms.

Ripston's interest is financial, and Judge Reinhardt must recuse. *See* 28 U.S.C. § 455(b)(4) (requiring recusal when judge knows spouse "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") (emphasis added); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980) (holding that interest under section 455(b)(5)(iii) need not be financial and recognizing that "[t]he outcome of any proceeding handled by a law firm may affect partners' ... noneconomic interests, including the reputation and goodwill of the firm"); *see also* CHARLES ALLEN WRIGHT ET AL., 13D FED. PRAC. & PROC. § 3547 (3d ed., current through 2010 update).

CONCLUSION

Judge Reinhardt frequently and properly recuses himself from cases that involve ACLU/SC. *See, e.g., Khatib v. County of Orange*, 622 F.3d 1074 (9th Cir. 2010); *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 913, 914 n.1 (9th Cir. 2003); *Valeria v. Davis*, 320 F.3d 1014, 1015 n.** (9th Cir. 2003). For the reasons we have explained, we respectfully submit that the same result must obtain here. Accordingly, Proponents' motion should be granted.

Dated: December 1, 2010

Respectfully submitted,

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9th Circuit Case Number(s) 10-16696

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