

PROP 8 JUDGE TELLS H8TERS TO GET LOST; DENIES MOTION TO DISQUALIFY



Liberty & Justice by Mirko Ilic

As you know from my report Monday when the three member appellate panel in the 9th Circuit was announce for the Prop 8 case of *Perry v.*

Schwarzenegger, one of the judges assigned was Judge Stephen Reinhardt. Steve Reinhardt is one of the finest judges you will find anywhere, and he is an old school principled and unabashed liberal whose veins carry the lifeblood of social justice, fundamental fairness and equal protection for all citizens.

So, of course the hating bigots that comprise the pro-Proposition 8 Defendant-Intervenors filed a motion last night to disqualify Reinhardt. Here is the full motion to disqualify brief, it is only 18 pages (10 of text) long and gives a very good glimpse of just how the haters tried to attack Reinhardt here because – gasp! – his wife has spent her career at the ACLU who - gasp! – actually is in favor of marriage equality. In a nutshell, D-Is argue:

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.

...

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...

...

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.

The D-I argument is, of course, ginned up baloney. Reinhardt's wife, Ramona Ripston, was never an attorney of record in the case, has no pecuniary interest in the outcome, and the ACLU is not part of the appeal. But H8ters are gonna hate, and that is what these folks do best.

Steve Reinhardt wasted no time telling them where to place their hate. The D-I motion was filed early last night, and Reinhardt has already issued his order tersely denying the motion:

Filed order (STEPHEN R. REINHARDT) 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.

Well, that will take care of that. That is what the entire *raison d'être* of the D-I is though, if *you* are not like them and believe as they do, *you* are not equal, not worthy and biased; be it being gay, atheistic/agnostic or liberal you are just simply not fit. Judge Reinhardt told them where to go with that rubbish. It is interesting to note that although there are some very substantial questions that could be asked about the staunch conservative judge appointed to the *Perry* panel, N. Randy Smith, the appellees have not thrown up unsupported and scurrilous motions to disqualify Smith because, without substantial factual support to do so it would be wrong. That is the qualitative difference in the attorneys and people on the two respective sides.

Now here is where it gets interesting and we move away from silly hate and back to the merits of the appeal. When you hear stories about how the Supreme Court frowns on the liberal Ninth Circuit and takes glee in reversing decisions from the 9th, Steve Reinhardt is the poster child for that meme. An appeal to the Supremes on a decision authored by Reinhardt is like waving a red flag in front of a bull, you are going to get their attention.

And to double the fun here, the threshold

question, and really a huge issue that many people discussing the Perry appeal still do not grant enough weight, is the issue of standing on the part of the appellants. Lyle Denniston at SCOTUSBlog has a post from back in August giving a very thorough and easy to understand discussion of the standing issue in Perry. The entire post is worth the read if you are not familiar with the standing issue, but the gist is this:

In both the Ninth Circuit and, if the case goes further, in the Supreme Court, it is now apparent that the resolution of the issue of standing to appeal will turn on how those courts interpret the Supreme Court's 1997 decision in *Arizona for Official English v. Arizona*, casting doubt on whether initiative sponsors may appeal to defend a ballot measure when state officials refuse to do so, and the Court's 1985 ruling in *Karcher v. May*, suggesting that state legislators may sometimes do so when other state officials refuse, provided state law allows for that. The proponents of the ban on gay marriage, in direct conflict with Judge Walker's interpretation of California law, argue that state law does give them the right to be in court. California law, they said, makes their case different from the Arizona English initiative case.

And here is where the fun really starts. As I previously indicated, on the merits, you would expect a 2-1 decision upholding Walkers decision in favor of marriage equality and striking down the appeal of the Prop 8Haters. But, before you get to the merits, there is the problem of the standing issue and, as Denniston pointed out, the critical case for that determination will be the Supreme Court decision *Arizona for Official English v. Arizona*. Know who wrote the circuit court opinion in *Arizona for Official English v. Arizona* that the Supreme Court slapped down and

reversed? Yep, Steve Reinhardt.

So, we have a Circuit Court judge predisposed to find standing in such cases, a Supreme Court predisposed to not care much for said judge's opinion and a case that may, or may not, be able to be distinguished. Whatever the ruling is in the 9th, the opinion will almost certainly be written by either Reinhardt or Mike Hawkins. Reinhardt has the seniority over Hawkins and the lifetime of work on social justice opinions, if he wants to author the opinion, I think Hawkins will defer to him. The question is, might they decide to have Hawkins author the opinion to pull back on the red flag in front of the SCOTUS bull?

Get your popcorn, and remember that Emptywheel will be covering the oral argument in the 9th Circuit Monday morning December 6th at 10:00 am PST/FDL time and the proceedings will be carried live by CSPAN and other networks.

[The absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Mirko is an artist par excellence in New York who also teaches illustration and design. Please visit Mirko and check out his stock of work, it is really superb.]