

ORAL ARGUMENT HELD APRIL 11, 2024

No. 23-5140

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff-Appellant,

v.

THE CENSUS BUREAU, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

No. 1:21-cv-3045-CJN-JRW-FYP

The Honorable Judges Justin R. Walker, Florence Y. Pan, and
Carl J. Nichols

**PLAINTIFF-APPELLANT'S MOTION FOR
DISQUALIFICATION**

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Today, Citizens for Constitutional Integrity are moving for panel rehearing and rehearing en banc. Judges Justin Walker and Florence Pan presided as two of the judges that made the three-judge district-court decision that this Court is reviewing. App-1 (docket). Therefore, under 28 U.S.C. § 47 and 28 U.S.C. § 455(a), Citizens for Constitutional Integrity respectfully request them to disqualify themselves from consideration of Citizens' petition. *See* 28 U.S.C. § 47 (“No judge shall hear or determine an appeal from the decision of a case or issue tried by him.”); *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989) (Posner, J.) (recognizing that, when “the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X . . . it is considered improper—indeed is an express ground for recusal, *see* 28 U.S.C. § 47—in modern American law for a judge to sit on the appeal from his own case.”); *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978) (same). Counsel for Citizens contacted counsel for Appellees the Census Bureau, the U.S. Department of Commerce, Secretary of Commerce Gina Raimondo, and Census Bureau Director Robert Santos (the Census Bureau). The Census Bureau's counsel informed Citizens' counsel that the Census Bureau takes no position on this motion.

If any judges are disqualified, Federal Rule of Appellate Procedure 35(a) requires a lower threshold for determining the majority vote in favor of a petition for rehearing en banc. That rule allows this Court to count only judges “who are not disqualified.” It would therefore preclude counting two judges in the denominator for determining a majority vote for en banc review. Thus, implementing Rule 35(a) would require only five votes to reach a majority of active judges voting to grant the petition for rehearing en banc.

For the foregoing reasons, Citizens request Judges Walker and Pan to disqualify themselves.

Dated: October 25, 2024,

/s/ Jared S. Pettinato
Jared S. Pettinato
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

This brief complies with the type-volume limitations of Federal Rule of Civil Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), it contains 312 words. I counted the words using MS Word 365. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5), and it complies with the type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(6) because it uses a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: October 25, 2024,

/s/ Jared S. Pettinato
Jared S. Pettinato
Attorney for Appellant

CERTIFICATE OF SERVICE

On this day, I served Plaintiff-Appellant's Petition for Panel Rehearing and Rehearing En Banc on the following counsel via CM/ECF on the following counsel:

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Dated: October 25, 2024,

/s/ Jared S. Pettinato
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ADDENDUM

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Citizens for Constitutional Integrity state that the entity has no stock. The incorporators organized it as a Montana nonprofit corporation, and the IRS recognizes it as a 501(c)(3) charitable corporation. Therefore, no corporation owns 10% or more of its stock. As Circuit Rule 26.1(b) requires, Citizens state that, among the organization's purposes, Citizens seek to improve democratic elections.

Dated: October 25, 2024,

/s/ Jared S. Pettinato
Jared S. Pettinato
Attorney for Appellant

CERTIFICATE OF PARTIES AND AMICI

Under Circuit Rules 27(a)(4) and 28(a)(1)(A), Citizens hereby list all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici in this Court.

Plaintiff-Appellant:

- Citizens for Constitutional Integrity.

Defendants-Appellees (collectively, the Census Bureau):

- The Census Bureau;
- The Department of Commerce;
- Gina Raimondo, Secretary of Commerce, in her official capacity; and
- Robert Santos, Census Bureau Director, in his official capacity.

No amici or intervenors appeared before the district court or in this Court.

Dated: October 25, 2024,

/s/ Jared S. Pettinato
Jared S. Pettinato
Attorney for Appellant

STATUTES

I. 28 U.S.C. § 47

Section 47 - Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

II. 28 U.S.C. § 455

Section 455 - Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He 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;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(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;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.