

No. 24-704

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE; AL-HAQ;
AHMED ABU ARTEMA; MOHAMMED AHMED ABU ROKBEH;
MOHAMMAD HERZALLAH; AYMAM NIJIM; LAILA ELHADDAD; WAEIL
ELBHASSI; BASIM ELKARRA; and DR. OMAR EL-NAJJAR,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., *President of the United States*; ANTONY J. BLINKEN,
Secretary of State; and LLOYD JAMES AUSTIN III, *Secretary of Defense*, in
their official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of
California, Case No. 4:23-cv-05829-JSW

APPELLANTS' UNOPPOSED EMERGENCY MOTION TO DISQUALIFY
JUDGE RYAN NELSON PURSUANT TO CIRCUIT RULE 27-3
(Relief Needed by June 6, 2024)

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

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form16instructions.pdf>

9th Cir. Case Number(s)

Case Name

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

Relief is needed no later than (*date*):

The following will happen if relief is not granted within the requested time:

I could not have filed this motion earlier because:

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I requested this relief in the district court or other lower court: Yes No

If not, why not:

The issue did not arise in the district court when Judge White was presiding. Appellants learned of the issue yesterday, June 3, 2024, when the appellate panel was announced.

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: Yes No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: June 4, 2024

By *(method)*: Email

Position of other parties: Defendants take no position on the motion.

Name and best contact information for each counsel/party notified:

Counsel for Defendants-Appellees: Sharon Swingle, [REDACTED]; and Maxwell Baldi, [REDACTED]

Counsel for Plaintiffs-Appellants: Baher Azmy, [REDACTED]; Sadaf Doost, [REDACTED]; Katherine Gallagher, [REDACTED]; Maria C. Lahood, [REDACTED]; Astha Sharma Pokharel, [REDACTED]; Dials Shamas, [REDACTED]; Samah Sisay, [REDACTED]; Pamela C. Spees, [REDACTED]; Marc van Der Hout, [REDACTED]; Johnny Sinodis, [REDACTED]

I declare under penalty of perjury that the foregoing is true.

Signature /s/ Johnny Sinodis

Date June 4, 2024

(use "s/[typed name]" to sign electronically-filed documents)

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NOW INTO COURT, through undersigned counsel, come Plaintiffs-Appellants who respectfully request that, pursuant to 28 U.S.C. § 455, Hon. Judge Ryan Nelson recuse himself from this matter. Counsel are ethically compelled to bring this motion in light of the facts set forth below that would reasonably give rise to, at a minimum, an appearance of partiality. Defendants informed Plaintiffs that they do not take a position on this Motion, and do not intend to file a response.

As documented below, in March 2024, after the appeal in this case was docketed, Judge Nelson (as well as two other judges of this Court) participated in a delegation that brought a number of federal judges to meet with Israeli legal and military officials, and which was explicitly designed to influence U.S. judicial opinion regarding the legality of ongoing Israeli military action against Palestinians—a core question on appeal of this case. This one-sided influence on this question central to the disposition of this case seemingly brought to bear on a member of this appellate panel could lead a reasonable person to question Judge Nelson’s impartiality, requiring recusal under 28 U.S.C. § 455, even if he is committed to and personally believes he can judge the issues in this case impartially.

This case presents issues of great public concern. Impartiality of the judiciary is deemed fundamental to the system of justice in the United States. Even the appearance of bias or undue influence threatens public confidence, and is of such importance that federal judges are statutorily required to disqualify themselves from

any proceeding in which their impartiality might reasonably be questioned. In the interest of justice and to preserve public confidence in the judicial process, Plaintiffs respectfully request that Judge Nelson recuse himself from this appeal.

FACTUAL BACKGROUND

This case is brought on behalf of Palestinians in Gaza, Palestinian-Americans and Palestinian human rights organizations against President Biden, Secretary of State Blinken and Secretary of Defense Austin, alleging that these Defendants have failed in their duty to prevent, and not aid-and-abet, an unfolding genocide against the Palestinian people of Gaza. The case seeks relief in the form of a declaration that Defendants' conduct is unlawful and an injunction ordering Defendants to cease military support for Israel's genocidal actions in Gaza.

The issues on appeal primarily concern whether Plaintiffs' claims are nonjusticiable under the political question doctrine—the basis for dismissal by the District Court—and the underlying merits of the case directly raise the factual and legal question of whether the Israeli government's military attacks and related infliction of conditions depriving people of the basic necessities for survival amount to genocide as defined by international law (and thereby implicate Defendants' duties under international law). That law distinguishes permissible forms of self-defense or military use of force from the intentional destruction of a population, in whole or in part, based on their racial, religious, ethnic or national identity which

risers to a genocide—a crime that permits no justification at law. The District Court, while ultimately dismissing the case as nonjusticiable, found Plaintiffs’ claims of genocide to be “plausible.” 1-ER-6, 8–10.

The appeal of this matter is scheduled for oral argument on June 10, 2024. On June 3, 2024, the three-judge panel assigned to preside over the appeal was announced and includes Hon. Circuit Judge Ryan Nelson (as well as Hon. Jacqueline Nguyen and Hon. Daniel Bress). Publicly available information shows that Judge Nelson traveled to Israel in March 2024 with thirteen other federal judges on a trip that was sponsored by the World Jewish Congress (WJC), a prominent organization that advocates in support of Israeli government actions.¹

The trip was reported in Bloomberg Law² as well as on ILTV.³ Bloomberg reported that two other judges from the Ninth Circuit went on this trip as well—Judge Patrick Bumatay and Judge Lawrence VanDyke.⁴ Judge Nelson’s

¹ See *About WJC*, World Jewish Cong., <https://www.worldjewishcongress.org/en/about> (last visited June 4, 2024).

² Suzanne Monyak, *Trump-Appointed Judges Lead Trip to Israel ‘Bearing Witness,’* Bloomberg Law (Mar. 21, 2024), <https://news.bloomberglaw.com/us-law-week/trump-appointed-judges-lead-trip-to-israel-bearing-witness> (Spees Decl., Ex. A).

³ ILTV (@iltv_israel), Instagram (Mar. 17, 2024), <https://www.instagram.com/reel/C4oIDIDNYKO/> (Spees Decl., Exs. E & F); see also ILTV Israel News, *WJC Brings Historic Delegation to Israel*, YouTube (Mar. 14, 2024), <https://www.youtube.com/watch?v=1wNuB11ZA7I>.

⁴ Monyak, *supra* note 2; see also Yaakov Lipszyc, *Trial by Fire*, Mishpacha (Apr. 2, 2024), <https://mishpacha.com/trial-by-fire/> (Spees Decl., Ex. C).

participation in this trip was also referenced in an announcement about an event at Harvard Law School at which he was scheduled to participate on March 28, 2024 with Judge Solomson, where, as advertised, they would discuss “a recent trip to Israel the pair took along with other federal judges.”⁵ In video footage broadcast by ILTV, Judge Nelson is shown with others touring sites in Israel as part of this WJC delegation.⁶ U.S. judges on the delegation are reported to have met with Israeli “government and judicial officials” and “members of the Israel Defense Forces.”⁷

A caption accompanying the video on ILTV’s Instagram account states:

The World Jewish Congress recently facilitated a visit for a delegation of 14 US Federal Judges to Israel. ***This invaluable experience allowed them to delve deeper into the legality of Israel’s conduct in the operation.*** Such exchanges foster

⁵ *Events Calendar: Courts in Conversation with Judge Ryan Nelson (CA9) and Judge Matthew Solomson (Fed. Cl.)*, Harvard Law Sch. (Mar. 28, 2024), <https://hls.harvard.edu/events/the-role-of-history-and-tradition-in-constitutional-interpretation/> (Spees Decl., Ex. B). Reporting suggests that judges on the trip, including Judge Solomson, have been “outspoken in their support for Israel in its war with Hamas.” Monyak, *supra* note 2.

Judge Solomson also posted to LinkedIn a reference to his Harvard Law School appearance with Judge Nelson and gratitude for accompanying him on their delegation, thanking “Judge Ryan Nelson for his friendship and willingness to publicly bear witness to the barbaric and indefensible attacks of Hamas against the Jewish people — something we both learned about firsthand on our recent judicial education mission to Israel.” Judge Matthew Solomson (@Matthew S.), LinkedIn, <https://www.linkedin.com/posts/matthew-s-b673aa8-thank-you-to-the-harvard-law-school-fedsoc-activity-7179329756482424832-GqeN> (last visited June 4, 2024) (Spees Decl., Ex. D).

⁶ ILTV, *supra* note 3.

⁷ Monyak, *supra* note 2.

understanding and cooperation between nations, paving the way for *informed decision-making*.⁸ (emphasis added)

The legality of “Israel’s conduct in the operation”—whether it constitutes genocide, or presents a serious risk of genocide—implicates Defendants’ duties under international law and is thus a central underlying issue in this case.

In addition, according to organizers, the trip’s “mission” included meetings with “Israeli legal experts and stakeholders,” to provide U.S. judges with “a better understanding of the impact of the October 7th attacks and the *subsequent response of Israel’s legal system*. This visit held special significance as Israel *continues to fight consistent backlash and criticism worldwide*.”⁹ The March 2024 delegation occurred following the District Court’s decision concluding that Israel’s actions “plausibly” constituted a genocide and after Plaintiffs lodged their appeal in this Court.¹⁰ Given that this litigation could be seen as part of that “criticism” of Israeli actions that the delegation organizers sought to counter, a reasonable person could

⁸ ILTV, *supra* note 3.

⁹ *Id.* (Emphasis added).

¹⁰ This delegation also followed an order by the International Court of Justice critical of Israel’s actions in Gaza as they constituted a “plausible” genocide and violations of the Genocide Convention. Application of Convention on Prevention and Punishment of Crime of Genocide in the Gaza Strip (*S. Afr. v. Isr.*), Order, ¶ 54 (Jan. 26, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

perceive this sponsored trip as an attempt to influence jurists' view about the legality of Israel's actions in a manner bearing on the merits of this case.¹¹

Judge Matthew Solomson, reportedly one of the organizers of the delegation, who later appeared on a panel alongside Judge Nelson to discuss the trip, suggested that, by bringing these federal judges, he shared the organizers' goal of influencing legal opinion in the United States:

We thought it necessary or important for judges to have an up-close view of what happened in Israel on October Seventh, and their society's reaction to it, to be able to adequately and accurately *report back to those various legal communities upon our return.*¹²

Judge Solomson is also quoted in an interview as saying: "I think it's helpful for influential legal scholars to have a fulsome understanding of what Israel is dealing with. *Will it have some impact on kind of the broader legal community when we go home? I hope so.*"¹³ In this case, a reasonable person could believe that the prominent delegation not only would have a *general* impact on the "broader legal community," but that the delegation could have a *specific* impact on a *particular* participating

¹¹ As part of the delegation, participants visited sites relevant to understanding the history and prevalence of antisemitism as well as the horrors of the Holocaust. To be clear, that is in no way the basis of Plaintiffs' concerns; rather, their concerns stem directly from the appearance that delegation attendees were being influenced on legal and factual questions related to Israeli government-military actions, which are at issue in this litigation.

¹² Monyak, *supra* note 2. (Emphasis added).

¹³ ILTV, *supra* note 3. (Emphasis added).

jurist—Judge Nelson—who is now concretely being called upon to adjudicate this contested legal and factual dispute.

Echoing the goal of influencing U.S. legal opinion, the chief marketing officer for the World Jewish Congress reportedly said the group sponsored the trip “to bring individuals considered to be ‘influencers’ to Israel,” and that “[j]udges are ‘the most influential people we can find because they’re not coming at it from a political agenda,’ but rather from a fact-finding role.”¹⁴

ARGUMENT

The federal recusal statute requires that a judge “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Recusal will be justified either by actual bias or appearance of bias and is appropriate where a reasonable person with knowledge of all the facts could conclude that the judge’s impartiality might reasonably be questioned. *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993) (internal quotations omitted). “If it is a close case, the balance tips in favor of recusal.” *United States v. Holland*, 519 F.3d 909, 912–13 (9th Cir. 2008) (“Disqualification under § 455(a) is necessarily fact-driven and . . . 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.”) (internal quotations omitted).

¹⁴ Monyak, *supra* note 2.

Critically, what matters is not whether Judge Nelson personally believes he can judge this case fairly—a point Plaintiffs do not seek to question; the issue is an objective one, regarding the mere public appearance of impropriety.

In light of the details and facts contained in the reporting above, an objective view of Judge Nelson’s participation in the delegation—a delegation which appears designed to influence U.S. judicial opinion regarding the legality of Israeli government actions that are a core issue in this case—raises an appearance of impropriety; that is, a reasonable person with knowledge of all the facts might have reason to question Judge Nelson’s impartiality in this case.

In addition, the statute requires disqualification of a judge when “he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1). A judge should disqualify himself on this basis only when the knowledge is obtained from an extrajudicial source. *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980); *Liteky v. United States*, 510 U.S. 540, 554 (1994) (defining “extrajudicial source” as “an opinion held by a judge [that] derives from a source outside judicial proceedings”). The trip reported on by Bloomberg Law and ILTV was an extrajudicial source of information, which was avowedly designed to influence “disputed evidentiary facts” that are at issue in this case. Judge Nelson’s co-panelist at a forum at Harvard Law School reporting on the trip expressed “hope” that the

trip would “have some impact on kind of the broader legal community” in the United States, and the Bloomberg Law article further noted that the judges traveled in their “personal capacities.”¹⁵ The trip’s aim to influence U.S. jurists would appear to a reasonable person to have an impact not only on “the broader legal community,” but upon a particular judge who participated in the delegation who is adjudicating the very questions that the delegation was designed to influence.

Further, according to Canon 2 of the Code of Conduct for United States Judges, related to “Outside Influence”:

A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.¹⁶

Yet, as described, an avowed goal of the organizers of the delegation of which Judge Nelson was a part was to bring “‘influencers’ to Israel,” and that “[j]udges are ‘the most influential people [they could] find,’”¹⁷ and to thereby influence “informed

¹⁵ ILTV, *supra* note 3; Monyak, *supra* note 2.

¹⁶ Canon 2(B), *Code of Conduct for U.S. Judges*, 2 Guide to Judiciary Policy Pt. A (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

¹⁷ Monyak, *supra* note 2.

decision-making” by federal judges on a highly contested question about the “legality of Israel’s conduct in the operation.”¹⁸

Because the reported purpose of the WCJ delegation avowedly was to “delve deeper into the legality of Israel’s conduct” in its operations via one-sided meetings with Israeli officials and soldiers, and because the “decision-making” in this appeal involves the very questions trip organizers sought to influence, a reasonable person with knowledge of the facts might question whether Judge Nelson’s participation in this delegation could make him impartial. Recusal in this important case is necessary to ensure the appearance of fairness to the parties and promote the integrity of our legal process.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully submit that Hon. Judge Ryan Nelson should be disqualified from this matter and a new judge assigned to the appellate panel.

Dated: June 4, 2024

Respectfully submitted,

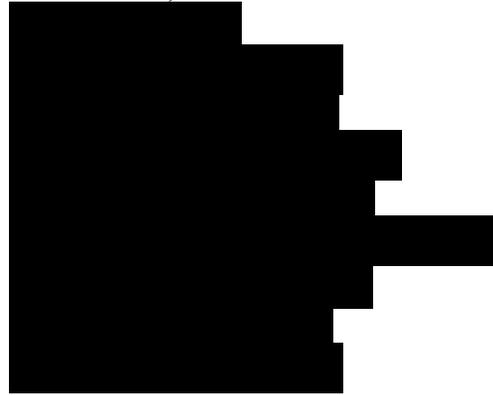
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¹⁸ ILTV, *supra* note 3.



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27-1(1)(d) because it is 10 pages long and contains 2,758 words.

This brief complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)–(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

Dated: June 4, 2024

Respectfully submitted,

/s/ Baher Azmy
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