IN THE SUPREME COURT
OF THE UNITED STATES

LIBERTARIAN PARTY OF OHIO, KEVIN KNEDLER, CHARLES EARL, AARON HARRIS,

Petitioners,

v.

Case No. A_____

JON HUSTED,
in his Official Capacity as Ohio Secretary of State,

On Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit[1]

Respondent,

and

THE STATE OF OHIO,

Intervenor-Respondent.

_____/

APPLICATION FOR STAY
AND EMERGENCY RELIEF
ADDRESSED TO JUSTICE KAGAN

Pursuant to Supreme Court Rules 21, 22 and 23, Petitioners apply for a stay of the United States Court of Appeals for the Sixth Circuit's published decision in *Libertarian Party of Ohio v. Husted*, No. 15-4270 (6th Cir., Dec. 9, 2015) (*see* Attachment 1), Judge Batchelder's subsequent unpublished refusal to disqualify herself (entered on December

[1] Petitioners respectfully request that the Court take up the Sixth Circuit's decision and Judge Batchelder's refusal to disqualify herself under Supreme Court Rule 11. Given the impending primary election scheduled for March 15, 2016, it is unlikely that the case can be fully briefed beforehand. For this reason, as well as those stated below, Petitioners request this stay and emergency relief. Primary elections in Ohio not only qualify candidates for the general election, they are also the sole mechanism for registering party membership. The Ohio Supreme Court ruled in *State ex rel. Scott v. Franklin County Board of Elections*, 10 N.E.3d 697, 699 (Ohio 2014), that any relief awarded before the election is timely and may be implemented under Ohio law.

22, 2015) (*see* Attachment 2), and the Panel's and En Banc Court's refusal to rehear the case (entered on January 6, 2016). *See* Attachment 3. Petitioners respectfully ask for emergency relief in this time-sensitive election matter disqualifying Judge Batchelder, vacating the Panel's order dismissing their premature appeal,[2] and directing that the appeal be restored to the Sixth Circuit's docket to await the District Court's resolution of Petitioners' Rule 54(b) motion to certify.

Ohio's electoral primary, which is the focus of Petitioners' challenge and premature appeal, is scheduled for March 15, 2016. Petitioner-Libertarian Party of Ohio (LPO) has been excluded from this primary (and Ohio's general election) by operation of Ohio's newly enacted ballot law, S.B. 193, which is the focus of Petitioners' constitutional argument in these proceedings.

Petitioners timely moved to disqualify Judge Batchelder in the Court of Appeals by seeking Rehearing and Rehearing En Banc. Petitioners were not aware of the motion Panel's composition until its order was released on December 9, 2015. *See* Attachment 1. Petitioners' December 13, 2015 Petition for Rehearing/Rehearing En Banc, which included a Motion to Disqualify Judge Batchelder, was Petitioners' first opportunity to challenge Judge Batchelder. Judge Batchelder rejected that motion on December 22, 2015. *See* Attachment 2. The Panel and En Banc Court refused to rehear the matter on January 6, 2016. *See* Attachment 3.

[2] Petitioners lodged their appeal prematurely in the Sixth Circuit after moving the District Court to modify its partial summary judgment to state that "no just reason for delay" exists to delay an immediate appeal. *See* Fed. R. Civ. P. 54(b). As explained below, this procedure is proper under Sixth Circuit precedent; once the District Court grants the motion the premature appeal immediately ripens. Should the District Court deny the motion, Petitioners argued to the Panel below, their appeal would still be timely and proper under 28 U.S.C. § 1292 as an interlocutory appeal. The Panel, in an opinion authored by Judge Batchelder, rejected both arguments and dismissed the appeal.

Petitioners on January 6, 2016 moved the Sixth Circuit to stay its mandate pending Petitioners' seeking review in this Court. Petitioners in that same motion also requested emergency relief disqualifying Judge Batchelder and restoring Petitioners' appeal to the Sixth Circuit's docket. That motion was denied on January 8, 2016. *See* Attachment 4.

STATEMENT OF JURISDICTION

Jurisdiction in the United States District Court for the Southern District of Ohio was proper under 42 U.S.C.§ 1983 and 28 U.S.C. § 1331. Jurisdiction over the District Court's partial summary judgment effectively denying injunctive relief was proper in the Court of Appeals under 28 U.S.C. §§ 1291 and/or 1292, Rule 54(b) of the Federal Rules of Civil Procedure, and Federal Rule of Appellate Procedure 4(a)(4) (as explained in detail below). Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Because of four prior successful suits, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012); and *Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014) (the present litigation), the LPO has since 2008 remained a ballot-qualified political party in Ohio. LPO, in fact, is Ohio's third most popular political party. In 2010, for example, the LPO's slate of state-wide candidates won more votes than any other minor party. Specifically LPO's candidates won 92,116 votes (2.39% of the total) for Governor, 184,478 votes (4.91%) for State Treasurer, 182,977 votes (4.88%) for Secretary of State, and 182,534 votes (4.87%) for

State Auditor. *See* OHIO SECRETARY OF STATE, ELECTIONS & VOTING, 2010 ELECTION RESULTS. In the 2014 general election, which included the LPO because of the District Court's injunction below, *see* District Court Doc. No. 47, (Opinion and Order), its two candidates for state-wide office won 4.67% of the total vote for Secretary of State and 4.77% of the total vote for State Auditor, respectively.[3] *See* OHIO SECRETARY OF STATE, ELECTIONS & VOTING, 2014 ELECTION RESULTS. These figures practically doubled those achieved by the fourth most popular political party, the Green Party of Ohio.

On November 6, 2013, Ohio's Republican-controlled General Assembly passed legislation, which (Republican) Governor Kasich immediately signed, stripping LPO of its ballot status and its right to participate in Ohio's 2014 primary. Commonly called S.B. 193, this legislation also stripped LPO of its right to participate in Ohio's 2014 general election (as well as all future elections unless LPO complied with S.B. 193's terms and gathered tens of thousands of signatures). The breadth of this bill cannot be overstated. It not only by its terms stripped LPO of its right to ballot access, it also changed Ohio's

[3] The LPO attempted to run a candidate for Governor in 2014, but that candidate (Charlie Earl) was removed from the LPO's primary ballot by Respondent-Secretary because of a technical violation of Ohio's signature-collection law. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014) (describing Earl's removal). Earl had been restored to the ballot by the District Court just two months earlier. *See* District Court Doc. No. 47 (Opinion and Order). His removal effectively destroyed the LPO by denying it a gubernatorial candidate, which is needed to meet Ohio's vote test and maintain party status. Petitioners discovered a trove of documents in the months following Earl's removal proving that the Kasich Campaign for Governor was intricately involved in all facets of Earl's removal. *See* District Court Doc. No 335-1 (Memorandum Supporting Supplemental Evidence). Petitioners also discovered that the Ohio Republican Party (ORP) paid at least $300,000 to the lawyers who represented the protestor who challenged Earl, that a Republican official in the Secretary of State's office was involved, and that Ohio's (Republican) Chair of its State Personnel Board of Review orchestrated the efforts of all involved. The lone remaining Count pending before the District Court addresses whether this combination of efforts to remove Earl was lawful.

mechanism for achieving future ballot access.[4] Many news accounts stated that S.B. 193 was designed to remove LPO from Ohio's ballot in order to benefit the Ohio Republican Party (ORP). This sentiment is corroborated by the fact that the ORP paid at least $300,000 to finance the removal of LPO's gubernatorial candidate from the 2014 election ballot (and thereby destroy the LPO as a ballot-qualified party). *See supra* footnote 3.

The LPO on November 8, 2013 challenged S.B. 193 under the United States Constitution. Following the State of Ohio's voluntary intervention days later to defend S.B. 193, Petitioners added a state constitutional challenge to S.B. 193. Because the District Court on January 7, 2014 preliminarily enjoined S.B. 193's retroactive application to Ohio's 2014 primary, *see* District Court Doc. No. 47 (Opinion and Order), it refrained from ruling on Petitioners' state and federal challenges to S.B. 193's future application. Of course, neither the District Court nor Petitioners anticipated that the ORP would successfully spend hundreds of thousands of dollars to once again remove LPO from the ballot. *See supra* footnote 3. But that is what happened, necessitating that the constitutionality of S.B. 193 be determined.

On October 14, 2015, almost two years after Petitioners' challenge to S.B. 193 was filed,[5] the District Court disposed of Petitioners' federal and state constitutional

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[4] *See, e.g.*, Henry J. Gomez, *National Buzz for the so-called John Kasich Re-election Protection Act*, NORTHEAST OHIO MEDIA GROUP, Nov. 1, 2013 (http://www.cleveland.com/open/index.ssf/2013/11/national_buzz_for_the_so-calle.html) (last visited Dec. 18, 2015) (reporting that "the Libertarian Party in an age where Sen. Rand Paul of Kentucky is a top-tier presidential prospect, pose a political threat to Republicans. This especially is true in Ohio for Gov. Kasich, who won narrowly in 2010 and now seeks re-election without the fervent Tea Party backing that helped him the last time.").

[5] Petitioners filed for summary judgment in regard to their challenge to S.B. 193 on October 17, 2014, almost one year to the day before the District Court dismissed their

challenges to S.B. 193. It first dismissed Petitioners state-law challenge under the Eleventh Amendment; next it ruled that S.B. 193 did not violate the federal constitution. *See* District Court Doc. No. 336 (Opinion and Order).

Because the District Court's decision did not resolve Petitioners' claim that the ORP had unconstitutionally conspired with the Kasich Campaign, the Respondent-Secretary, and others, *see supra* footnote 3, to remove LPO's gubernatorial candidate, the District Court's decision was only a partial judgment. Petitioners on October 23, 2015 moved the District Court to modify its decision and include the necessary language under Federal Rule of Civil Procedure 54(b) to support an immediate appeal from final judgment. That motion remains pending in the District Court.

A. Petitioners' Premature Appeal.

While awaiting resolution of their motion to modify the District Court's partial judgment,[6] Petitioners on November 19, 2015 noticed an anticipatory, "premature," appeal with the Sixth Circuit. Petitioners the following day sought emergency relief enjoining enforcement of S.B. 193. Petitioners in their motion for emergency relief explained that their appeal was premature and awaited resolution by the District Court of their Rule 54(b) motion to modify. If and when that happened, Petitioners explained, their appeal would ripen and be proper. Assuming that their Rule 54(b) motion was denied,

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claim under Ohio's Constitution and granted summary judgment to Respondents under the United States Constitution.

[6] Petitioners won relief in regard to two parts of their Complaint; the District Court invalidated Ohio's new circulator-residence requirement and had also restored the LPO to Ohio's 2014 ballot. Petitioners lost their challenge to S.B. 193, however. The lone claim remaining involved Petitioners' challenge to Earl's removal from the ballot by the joint efforts of the ORP, the Kasich Campaign, Ohio's Chair of its Personnel Board of Review, and at least one official in the Secretary of State's office. *See supra* note 3. This claim has yet to be resolved.

Petitioners further explained that their premature appeal arguably would be proper as an exceptional interlocutory appeal under *Carson v. American Brands, Inc*., 450 U.S. 79 (1981).

A motion Panel of the Court of Appeals (Batchelder, Rogers and Cook, JJ.) on December 9, 2015 -- without waiting for the District Court's resolution of Petitioners' Rule 54(b) motion -- dismissed Petitioners' appeal. *See* Attachment 1. It rejected Petitioners' argument that a premature appeal anticipating a favorable ruling under Rule 54(b) is proper. It rejected Petitioners' alternative argument that their timely Rule 54(b) motion to modify the partial summary judgment tolled the appellate limitation period under Federal Rule of Appellate Procedure 4(a)(4). Judge Batchelder did not voluntarily recuse herself. On December 22, 2015, Judge Batchelder rejected Petitioners' motion to disqualify her from hearing the case. *See* Attachment 2.[7] Rehearing En Banc was denied on January 6, 2016. *See* Attachment 3.

B. Speaker William Batchelder Sponsored S.B. 193.

William Batchelder, Judge Batchelder's husband, was the (Republican) Speaker of Ohio's House of Representatives at all relevant times during the consideration and enactment of S.B. 193. He supported and voted for S.B. 193. Most importantly, he formally sponsored S.B. 193 and helped shepherd it through the House.[8] His overt sponsorship did not go unnoticed.[9]

[7] Petitioners moved to disqualify Judge Batchelder on December 13, 2015 after learning of her participation in the appeal on December 9, 2015 (when dismissal was ordered). Petitioners could not have known before this date that Judge Batchelder was on the motion Panel that would dismiss their appeal.

[8] Senate Bill 193 was sponsored by five Republicans in the Ohio House of Representatives: Jim Buchy, Matt Huffman, Geraldo Stebelto, Lynn Wachtman, and Speaker Batchelder. *See* Ohio General Assembly Archives 1997-1994

Senate Bill 193 is a controversial, partisan measure; no Democrats joined Speaker Batchelder as co-sponsors, and only one Democrat in either House voted for it. In contrast, Republican support was enormous in both of the Houses it controlled. In the Ohio Senate, 20 of 23 Republicans supported it.[10] In the Ohio House, 50 of 59 Republicans voted for it.[11] Republican Governor Kasich signed it the same day it was passed. Again, in light of the hundreds of thousands of dollars spent by the ORP to remove LPO's gubernatorial candidate from the 2014 ballot, *see supra* footnote 3, it appears clear that S.B. 193 was intended to benefit Republicans.

Putting the partisanship behind S.B. 193 aside, what is most important here is the combination of Speaker Batchelder's formal involvement with S.B. 193 -- including his formal sponsorship and assistance with it in the House -- and his marriage to Judge Batchelder. Speaker Batchelder's bill, by its express terms, removed the LPO from Ohio's

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(http://archives.legislature.state.oh.us/bills.cfm?D=130_SB_193_CR) (last visited Dec. 11, 2015). Senate Bill 193's sponsorship was joined by two Republicans in the Senate: William Seitz and John Eklund. *See* Ohio General Assembly Archives 1997-1994 (http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_193_CR) (last visited Dec. 11, 2015). *See also* https://legiscan.com/OH/bill/SB193/2013 (last visited December 11, 2015). No Democrats sponsored S.B. 193.

[9] *See, e.g.*, https://legiscan.com/OH/sponsors/SB193/2013. *See also* ACLU of Ohio, Voting Rights Legislation http://www.acluohio.org/legislation/2013-2014-sb-193; Citizen's Courier http://www.cpofohio.org/Newsletter/archives/2014/2014.08.pdf.

[10] *See* Ohio Senate Journal, Nov. 6, 2013, at 1289 (http://archives.legislature.state.oh.us/JournalText130/SJ-11-06-13.pdf) (last visited Dec. 11, 2015) (officially reporting votes); https://legiscan.com/OH/rollcall/SB193/id/304024 (identifying votes by parties) (last visited Dec. 11, 2015).

[11] *See* Ohio House of Representatives Journal, Nov. 6, 2013, at 1326 (http://archives.legislature.state.oh.us/JournalText130/HJ-11-06-13.pdf) (last visited Dec. 11, 2015) (officially reporting votes); https://legiscan.com/OH/rollcall/SB193/id/372340 (identifying votes by parties) (last visited Dec. 11, 2015).

ballot. The LPO challenges its removal and S.B. 193 under the United States Constitution and the Constitution of the State of Ohio. Judge Batchelder, writing for the motion Panel, dismissed LPO's challenge.

LEGAL ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. Judge Batchelder's Participation Violates 28 U.S.C. § 455(a).

Section 455(a) of Title 28 of the United States Code requires federal judges to disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned." This Court has concluded that the standard under § 455(a) is an objective one; what matters "is not the reality of bias of prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). "[R]ecusal [is] required whenever impartiality might reasonably be questioned." *Id.* (citations omitted). Scienter is not required; a judge who inadvertently sits in violation of § 455(a) must disqualify herself and vacate her action. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988). According to many courts, moreover, "if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal." *Patterson v. Mobil Oil Corp*., 335 F.3d 476, 484 (5th Cir. 2003) (citations omitted); *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 767 (6th Cir. 1966) ("Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.").

Judge Batchelder's husband formally sponsored, as Speaker of Ohio's House, the legislation that Petitioners challenge. His name is on S.B. 193. He is one of six formal sponsors. Judge Batchelder's dismissal of Petitioners' case is akin to allowing an appellate

judge to dismiss a challenge to her trial-judge spouse's judgment. Allowing one spouse to review the decisions of another appears strikingly unfair. The appearance of bias and/or prejudice is manifest. This is particularly true in the realm of politics and elections. Here, for example, Republicans in Ohio have made a concerted effort to remove LPO from the ballot. These efforts have been well-publicized. Speaker Batchelder helped lead the effort. Now, Judge Batchelder has dismissed LPO's challenge to her husband's action. Petitioners reasonably (and understandably, they believe) question Judge Batchelder's impartiality.

B. Judge Batchelder's Participation Violates § 455(b).

Section 455(b)(5) requires disqualification when a judge's 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). "A party may not waive section 455(b) as it is a *per se* rule requiring recusal in particular circumstances." *Sullivan v. Chesapeake & Ohio Railway*, 947 F.2d 946 at *4 (6th Cir. 1991) (citation omitted). *See generally Ohio Republican Party v. Brunner*, 544 F.3d 711, 736 (6th Cir. 2008) (en banc) (Martin, J., dissenting), *majority ruling vacated*, 555 U.S. 5 (2008).

Legislators likely attach their names to bills for myriad reasons. One of those reasons most certainly is to use their influence to steer bills through the legislative process. Speaker Batchelder's formal sponsorship, for example, was a huge benefit to what everyone understood was a Republican bill. That Senate Bill 193 received overwhelming Republican support, with the vote of only one Democrat, proves that it was understood to be a partisan measure. Having a Republican Speaker support a bill in a Republican House helps insure (and hasten) its success.

Senate Bill 193 was introduced and passed in less than six weeks. It was hurried along in order to insure its application to the February 2014 primary.[12] It was passed and signed by the Governor on the very last day required to guaranty the removal of LPO candidates from the 2014 ballot.[13] Speaker Batchelder's formal sponsorship must have been helpful in organizing the needed Republican support.

No one can say with certainty, of course, whether this is true, just as no one knows exactly why Speaker Batchelder added his name to S.B. 193. It could be, as hypothesized above, that he hoped to hurry it along. It could be, too, that he sought the recognition that comes with sponsoring legislation. Or he could have sought to cement political connections and reap immediate benefits within the Republican Party. In the event, whether a legislator is seeking re-election, legislative help, or future business, attaching one's name to a bill is important. It is not a meaningless or trivial act.

Speaker Batchelder has now left the House, but his political resume, which includes seeing to the enactment of S.B. 193, continues to carry benefits. Petitioners cannot say with certainty that S.B. 193 played a part, but news reports indicate that just after leaving the House Mr. Batchelder's new business was hired by a prominent Republican lobbyist.[14]

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[12] In the end, this proved for naught, as the District Court rejected S.B. 193's application to the 2014 primary election on due process grounds. *See* District Court Doc. No. 47 (Opinion and Order) (finding that it would be unfair to apply S.B. 193 to 2014 primary).

[13] Legislation in Ohio takes effect in ninety days; passing S.B. 193 on November 6, 2013 insured that it would go into effect the day before the February 2014 filing deadline.

[14] Mr. Batchelder's new business, according to its web page, is lobbying. His firm, "The Batchelder Company," advertises that it engages in "Lobbying & Government Affairs." *See* The Batchelder Company (http://www.thebatchco.com) (last visited Dec. 22, 2015). This "lobbying firm that bears his name," according to one news report, "was hired by ECOT to water down any reform bill that might clear the General Assembly." Brent

Having a continuing financial interest in a matter under review, of course, is not required by § 455(b). Any interest will suffice so long as it might be "substantially affected by the outcome of the proceedings." 28 U.S.C. § 455(b)(5). Cementing political connections by identifying oneself with partisan legislation is sufficient. Winning recognition from one's political party necessarily creates an interest in the joint endeavor.

Simply put, adding one's weight to legislation has meaning. Placing one's name on a legal document is important. If nothing else, formal sponsorship creates a "right of attribution," much like that enjoyed by authors, artists, and scientists. *See*, *e.g.*, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) ("The right of attribution generally consists of the right of an artist to be recognized by name as the author of his work"). Those who draft and sponsor political documents, including declarations, constitutions, and legislation, enjoy this right as much as authors and artists. They rightly possess pride in their work.[15]

Attribution, moreover, does not end with one who molds clay or works bronze. Sponsors of artworks also take pride in their works. Walt Disney, for example, is credited

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Larkin, *When it comes to facing down Ohio's well-heeled Charter school lobbyists, will state lawmakers be leaders -- or lapdogs*, July 24, 2015, NORTHEAST OHIO MEDIA GROUP (http://www.cleveland.com/opinion/index.ssf/2015/07/when_it_comes_to_facing_down_o.html) (last visited Dec 22, 2015). *See also* Doug Livingston, *Former House Speaker William Batchelder joins lobbying firm for Ohio's largest charter school*, ECOT, Feb. 21, 2015, AKRON BEACON JOURNAL (http://www.ohio.com/news/break-news/former-house-speaker-william-batchelder-joins-lobbying-firm-for-ohio-s-largest-charter-school-ecot-1.568549) (last visited Dec. 13, 2015).

[15] Comparing S.B. 193 to any great legal work -- especially the Declaration of Independence -- would indeed be "plainly preposterous." Petitioners have never sought to confuse Mr. Batchelder's efforts with those of Mr. Jefferson (or anyone else). Well-known examples of statutes and political documents (like the Declaration of Independence) merely illustrate the point; authors of legal documents are identified with their works. Put another way, the works are attributed to them.

for all sorts of animated features even though he did not draw or direct them. Consequently, whether Speaker Batchelder manually drafted[16] S.B. 193 cannot be controlling. Adding his name as one of a handful of sponsors attributes S.B. 193 to him.[17]

Senate Bill 193 was not a minor legislative measure. It was followed by the press and its partisan nature was frequently reported. It forever changed Ohio's ballot law, disqualified the LPO, and benefited the Republican Party. *See, e.g.*, OHIO HOUSE OF REPRESENTATIVES, MINORITY CAUCUS BLOG, *Reps. Clyde, Foley Call on Gov. Kasich to Sign S.B. 193 Next Week*, Nov. 7, 2013;[18] Jeremy Pelzer, *Ohio legislature passes new ballot access rules for minor parties; Libertarians promise lawsuit*, NORTHEAST OHIO MEDIA GROUP, Nov. 6, 2013;[19] Jeremy Pelzer, *Libertarians file legal challenge against Ohio's new rules for minor political parties; Greens may follow suit*, NORTHEAST OHIO

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[16] In fact, it appears that Speaker Batchelder may have been directly involved in the details of S.B. 193. *See* Jim Provance, *Kasich dodges ballot bill*, TOLEDO BLADE, Nov. 1, 2013 (http://www.toledoblade.com/State/2013/11/01/Kasich-dodges-ballot-bill.html#WLCVuqoRxAI8vSV5.03) (last visited Dec. 22, 2015) (stating that Batchelder was aware of at least three amendments to the bill).

[17] Judge Batchelder attempts to trivialize her husband's involvement with S.B. 193 by arguing that he "never claimed authorship, ownership, or responsibility for Senate Bill 193 ...." Attachment 2 at 5. Sponsorship, however, necessarily implies responsibility. Merriam-Webster's Online Dictionary, for instance, defines "sponsor" as "one who assumes responsibility for some other person or thing." *See* http://www.merriam-webster.com/dictionary/sponsor (last visited Dec. 24, 2015).

[18] http://www.ohiohouse.gov/democrats/press/reps-clyde-foley-call-on-gov-kasich-to-sign-sb-193-next-week (last visited Dec. 24, 2015). The MINORITY BLOG observed: "SB 193 would make it harder for third party candidates to qualify for the 2014 ballot if it is signed into law by Gov. Kasich within the next two days. The legislation has become known by many as the John Kasich Re-election Protection Act, as it seems to be an attempt to disqualify Libertarian candidate Charlie Earl from the 2014 gubernatorial race." *Id.*

[19] http://www.cleveland.com/open/index.ssf/2013/11/ohio_legislature_passes_new_ru.html (last visited Dec. 24, 2015).

MEDIA GROUP, Nov. 8, 2013;[20] Joe Vardon, *Ruling opens path for Libertarian challenge to Kasich*, COLUMBUS DISPATCH, Jan. 8, 2014.[21]

Speaker Batchelder's adding his sponsorship to S.B. 193 was not a trivial, de minimus, or meaningless act.[22] It was important to him and the Republican Party. He plainly had an interest in its success. Judge Batchelder's sustaining S.B. 193 substantially affects that interest.[23]

C. Judge Batchelder's Participation Violates Due Process.

This Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), announced how disqualification is assessed under the Due Process Clause:

> The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.

Consequently, the modern analysis under the Due Process Clause mirrors that under 28 U.S.C. § 455. A judge with a financial interest must recuse herself. *See Tumey v. Ohio*, 273 U.S. 510, 520 (1927). A judge who was a plaintiff in an almost identical case is disqualified. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986). A judge who accepts "significant and disproportionate" campaign contributions from

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[20] http://www.cleveland.com/open/index.ssf/2013/11/libertarians_file_federal_laws.html (last visited Dec. 24, 2015).

[21] http://www.dispatch.com/content/stories/local/2014/01/07/0107-libertarian-earl-ballot-access-injunction.html (last visited Dec. 24, 2015).

[22] ABA Model Code of Judicial Conduct Rule 2.11 (2011) states that a "judge shall disqualify himself or herself" when "the judge's spouse or domestic partner" "has more than a de minimis interest that could be substantially affected by the proceeding."

[23] Petitioners, of course, could not name Speaker Batchelder as a defendant in this case because of his absolute legislative immunity. *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

litigants cannot hear their case. *See Caperton*, 556 U.S. at 884, 887. A judge who participated in the indictment of an accused cannot try that case. *In re Murchison*, 349 U.S. 133, 136 (1955).

The principle that no person should be "a judge in his own case" is well-known. *Murchison*, 349 U.S. at 136. Due Process prohibits it. Petitioners submit that Due Process also prohibits any person from being a judge in her spouse's own case. If Speaker Batchelder could have been sued for passing S.B.193, Petitioners would have done so. It is his bill. As much as Ohio's, it is his case. His wife cannot consistent with Due Process resolve it. She should be disqualified and her decision vacated.[24]

D. Dismissal Conflicts With Decisions of the Sixth Circuit and Sister Circuits.

1. Every Other Circuit To Address the Matter Has Ruled That Subsequent Certifications Under Rule 54(b) Ripen Premature Appeals.

Judge Batchelder dismissed Petitioners' appeal because, she said, it was late. In fact, it is early. It is "premature," a not uncommon procedure in emergency matters where appellants are anticipating final judgments. Petitioners filed their Rule 54(b) motion to certify in the District Court on October 23, 2015, the week following its entry of partial summary judgment. Because Ohio's election deadlines are closely approaching,

[24] Under Sixth Circuit precedent, Judge Batchelder's disqualification requires that the Panel's decision be vacated. *See American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 767-68 (6th Cir. 1966) (holding that Commission's decision had to be set aside even though the disqualified Commissioner's vote "was not necessary for a majority"). Whether the Sixth Circuit is correct in this regard presents a question that is apparently now on this Court's docket. In *Williams v. Pennsylvania*, 136 S. Ct. 28 (2015), the Court granted certiorari to consider whether a state supreme court justice who participated as a prosecutor in a criminal case should have disqualified himself, and whether his failure to do so requires that the petitioner's sentence be vacated.

Petitioners on November 19, 2015 appealed prematurely in order to place an emergency motion immediately before the Court of Appeals. Upon resolution of their Rule 54(b) motion, the Court of Appeals could then immediately consider emergency relief.

Like it Sister Circuits, the Sixth Circuit has in the past ruled that a subsequent grant of a timely motion to certify under Rule 54(b) ripens what otherwise would be an untimely, premature appeal. *See Good v. Ohio Edison Co*., 104 F.3d 93, 95 (6th Cir. 1997) ("a premature notice of appeal ripens upon the entry of a proper Rule 54(b) certification"); *Bonner v. Perry*, 564 F.3d 424, 429 (6th Cir. 2009) (same). In *Clausen v. Sea-3*, 21 F.3d 1181, 1184 (1st Cir. 1994), for example, the First Circuit observed that "[t]he majority of circuits that have addressed jurisdictional quagmires similar to this one have held that a belated Fed. R. Civ. P. 54(b) certification ripens a premature notice of appeal as of the date of the certification." The Federal Circuit, *see State Contracting & Engineering Corp. v. Florida*, 258 F.3d 1329, 1335 (Fed. Cir. 2001), District of Columbia Circuit, *see Tidler v. Eli Lilly & Co.*, 824 F.2d 84, 85 (D.C. 1987), Third Circuit, *see Dawson v. Chrysler Corp.*, 630 F.2d 950, 955 n.4 (3d Cir. 1980), Fifth Circuit, *see Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008), Seventh Circuit, *see Martinez v. Arrow Truck Sales*, 865 F.2d 160, 161 (8th Cir. 1988), Ninth Circuit, *see Kersh v. General Council of the Assemblies of God*, 804 F.2d 546, 547 n.1 (9th Cir. 1986), and Tenth Circuit, *see Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (en banc).[25]

[25] Tardiness has nothing to do with premature appeals taken before the resolution of Rule 54(b) motions for certification. A partial summary judgment, after all, cannot be appealed under 28 U.S.C. § 1291 until it is certified. The § 1291 clock, one might say, does not begin ticking until certification. With certification, "[a] grant of partial summary

Judge Batchelder's published holding conflicts with these decisions. The panel below acted rashly in dismissing Petitioners' premature appeal. It should have awaited the outcome of Petitioners' Rule 54(b) motion. As explained by the cases cited above, nothing is served by immediately dismissing a premature appeal that has been filed in anticipation of Rule 54(b) certification. Certiorari is proper to resolve this conflict. Immediate relief is needed in order to restore Petitioners' appeal in time for the 2016 primary election.

2. Circuits Agree That Any Motion to Modify a Judgment Tolls Time for Taking an Appeal.

Assuming the District Court were to deny Petitioners' Rule 54(b) motion to certify, jurisdiction over their premature appeal would need to find different ground. This alternative ground, arguably, would be an interlocutory appeal under 28 U.S.C. § 1292 and the logic of *Carson v. American Brands, Inc*., 450 U.S. 79, 84 (1981). *Carson* authorizes an interlocutory appeal under § 1292 from an order effectively denying injunctive relief under exceptional circumstances.[26] The time for taking this interlocutory appeal, in the absence of tolling, would run from the date of the effective denial of injunctive relief -- in this case the entry of partial judgment.

The panel below rejected Petitioners' claim that their timely Rule 54(b) motion to certify lodged in the District Court (nine days after the entry of partial judgment) tolled

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judgment merges into a final judgment and can be reviewed upon appeal of the final judgment." *Bonner v. Perry*, 564 F.3d 424, 427 (6th Cir. 2009).

[26] Appellate courts have often instructed appellants to first seek Rule 54(b) certification before attempting an extraordinary interlocutory appeal under *Carson*. *See, e.g*., *Cuomo v. Barr*, 7 F.3d 17, 20 (2d Cir. 1993); *Huminski v. Rutland City Police Department*, 221 F.3d 357, 361 (2d Cir. 2000); *Hutchinson v. Pfeil*, 105 F.3d 566, 570 (10th Cir. 1997).

the time for taking an interlocutory appeal.[27] Notwithstanding that courts have uniformly agreed that Rule 4(a)(4)'s tolling mechanism applies to interlocutory appeals, *see, e.g.*, *Lichtenberg v. Besicorp Group, Inc*., 204 F.3d 397, 401 (2d Cir. 2000), the panel instead ruled that Federal Rule of Appellate Procedure 4(a)(4) does not embrace certain kinds of motions to modify. In particular, it does not embrace motions to certify under Rule 54(b).[28] In so holding, this published holding contradicts the meaning of Rule 4(a)(4), the spirit of Rule 54(b), *see Gelboim v. Bank of America Corp*., 135 S. Ct. 897, 902-03 (2015) (stating that Rule 54(b) "aimed to augment, not diminish, appeal opportunity"), and rulings in several Circuits (including, perhaps, the Sixth).

As explained in the Advisory Notes to Rule 4(a)(4)'s 1993 amendment, Rule 4(a)(4), as amended, "comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4)." *Id*. (emphasis added). Even before the 1993 amendment, "[m]any courts had sensibly developed a bright-line rule: any motion to change the judgment made within ten days after entry of judgment—other than a motion under Rule 60(a) to correct a clerical error—would be treated as a Rule 59(e) motion, and therefore would extend the time for appeal, no matter how the motion was labeled." 16A

[27] Under this theory, Petitioners' notice of interlocutory appeal would take effect when their tolling motion was resolved by the District Court. *See* Fed. R. App. P. 4(a)(4)(B)(i).

[28] There exists no other Rule under which a motion to certify might be made. Indeed, Rule 54(b) itself does not authorize such a motion; rather, the practice has simply evolved. *See* 10 C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2660 (3d ed. 2015) ("There is no specific procedure for obtaining the certification prescribed in Rule 54(b). In most cases a party simply will file a motion requesting the court to make the determinations required by the rule.").

C. WRIGHT, ET AL., FED. PRAC. & PRO. § 3950.4 (4th ed. 2015) (emphasis added). "The [1993] amendment confirmed and simplified this practice." *Id.*

Following the 1993 amendments, courts have uniformly ruled that any timely motion to alter, amend or modify a judgment tolls the time for taking an appeal. This is true regardless of the change requested and regardless of the Rule that is used to seek the change. "The universal rule is that, regardless of its label, any motion made within ten days of entry of judgment which seeks a substantive change in the judgment will be considered a Fed. R. Civ. P. 59(e) motion." *Maxus Energy Corp. v. United States*, 31 F.3d 1135, 1139 (Fed. 1994) (emphasis added). The District of Columbia, Fifth, Seventh, and Ninth Circuits have taken a similar approach; so long as the motion is filed within the time prescribed by Rule 59(e), they are treated under Federal Rule of Appellate Procedure 4(a)(4) as tolling motions. *See Moy v. Howard University*, 843 F.2d 1504, 1506 (D.C. 1988); *Mangieri v. Clifton*, 29 F.3d 1012, 1015 n.5 (5th Cir. 1994); *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994); *Sierra On-Line, Inc. v. Phoenix Software, Inc*., 739 F.2d 1415, 1418-19 (9th Cir. 1984). The Second and Eleventh Circuits appear to support this approach. *See Finch v. City of Vernon*, 845 F.2d 256 (11th Cir. 1988); *Rados v. Celotex Corp*., 809 F.2d 170 (2d Cir. 1986); *Skagerberg v. Oklahoma*, 797 F.2d 881 (10th Cir. 1986).

Moving a court to change its judgment to include the necessary language under Rule 54(b) (including "no just reason for delay") calls for a change. Indeed, the District Court below understood that Petitioners sought to alter the judgment. It described Petitioners' Rule 54(b) request as a "motion to modify" when it fixed its expedited briefing schedule. *See* District Court Doc. No. 343 at PAGEID # 8746 (Order)

("Secretary Husted and the State of Ohio's response to Plaintiffs' motion to modify shall be filed November 6, 2015") (emphasis added).

No court -- before the panel rendered its decision below -- had ever ruled that a motion to certify under Rule 54(b) cannot qualify as a tolling motion under Federal Rule of Appellate Procedure 4(a)(4). Indeed, the Sixth Circuit's decision in *Gillis v. United States Department of Health and Human Services*, 759 F.2d 565, 569 n.4 (6th Cir. 1985), which included Rule 54(b) motions to certify with other Rule 4(a)(4) tolling motions, suggested the opposite. This Court in *Gelboim v. Bank of America Corp*., 135 S. Ct. 897, 902-03 (2015), moreover, recently observed that Rule 54(b) "aimed to augment, not diminish, appeal opportunity." Exiling Rule 54(b) certification motions from the scope of Rule 4(a)(4) diminishes the appeal opportunities that Rule 54(b) was aimed to create.

The panel below cited *Cobell v. Jewell*, 802 F.3d 12 (D.C. Cir. 2015), to support its conclusion. *Cobell* did not involve a motion to modify, let alone a motion to certify under Rule 54(b). It did not even hold that motions for reconsideration -- which were at issue -- filed under Rule 54(b) cannot toll appellate limitation periods under Rule 4(a)(4). The *Cobell* court ruled that Rule 54(b) motions for reconsideration may qualify for tolling when treated by the District Court as post-judgment motions. *Id*. at 20.

There is scant, if any,[29] precedent holding that a timely motion for reconsideration filed under Rule 54(b), post-judgment, cannot qualify as a tolling event under Rule

[29] *Cobell* cited two cases to support the proposition that a Rule 54(b) motion for reconsideration does not toll appellate limitation periods. Although the point was pure dicta, the cited authority is not supportive. *Schaeffer v. First National Bank of Lincolnwood*, 465 F.2d 234 (7th Cir. 1972), said no such thing. It ruled that a Rule 54(b) motion filed one year after an appealable order did not toll the appellate limitation period. This result is proper because a tolling post-judgment motion must be timely. *Goodman v. Johnson*, 471 Fed. Appx. 114 (4th Cir. 2012), a pro se action, dismissed an appeal

4(a)(4). There is no authority holding that a timely motion to modify a judgment under Rule 54(b) cannot qualify as a tolling event. And there is absolutely no authority supporting the proposition that a motion to modify a judgment in order to certify an immediate appeal under Rule 54(b) cannot qualify under Rule 4(a)(4).

The panel's interpretation of Federal Rule of Appellate Procedure 4(a)(4) is novel. It contradicts the view of every other Circuit that any timely motion to modify qualifies for tolling under Rule 4(a)(4). Certiorari is proper to resolve this conflict. Immediate relief is needed to preserve Petitioners' right to access Ohio's 2016 primary ballot.

II. LPO Risks Irreparable Injury.

Petitioner-LPO is threatened with irreparable injury. It has been removed from Ohio's primary ballot and cannot participate in Ohio's 2016 election. The primary election is less than ninety days away. Political parties that do not participate in Ohio's primary are not guaranteed access to Ohio's general election ballot. Any impediment to the assertion of First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Dismissing Petitioners' appeal without awaiting the District Court's resolution of their Rule 54(b) motion only further delays review of S.B. 193. In the context of First Amendment freedoms, delay is prejudice. Delay causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

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because the appellant filed late and "his motion seeking reconsideration, filed under Fed. R. Civ. P. 54(b), did not qualify to toll the thirty-day time limit." *Id.* at *1. The short, unpublished per curiam opinion did not explain why; it could have just as easily been because the motion was filed late.

Under the Sixth Circuit's internal operating procedures, subsequent appeals in this case will be returned to Judge Batchelder's panel. *See* 6 Cir. I.O.P. 34(b)(2). Consequently, once the District Court resolves Petitioners' Rule 54(b) motion and/or enters final judgment, Petitioners renewed appeal will be directed to Judge Batchelder. Because she has once refused, it is unlikely she will recuse herself in the future. Disqualification should be addressed at this time; both to insure that the present panel was objectively fair, and to insure that the future appeals in this case will be addressed by objectively impartial panels.

III. Ohio Will Suffer No Harm.

Ohio will suffer no injury or prejudice should the Court stay the Panel's dismissal, disqualify Judge Batchelder, and remand this case for further proceedings. This relief will simply afford Petitioners their right to timely present their appeal to an objectively impartial tribunal.

IV. The Public Will Benefit.

Disqualifying Judge Batchelder and staying the Panel's dismissal will reinforce public confidence in the federal judiciary. In close cases, disqualification alleviates the appearance of impropriety. This is especially true in election settings.

CONCLUSION

For the foregoing reasons, Petitioners' Application should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Application were mailed, with first-class postage affixed, and were also electronically mailed, to Eric E. Murphy, c/o Ohio Attorney General's Office, 30 East Broad Street, 16th Floor, Columbus, OH 43215, eric.murphy@ohioattorneygeneral.gov, and Michael J. Hendershot, c/o Ohio Attorney General's Office, 30 East Broad Street, 16th Floor, Columbus, OH 43215, michael.hendershot@ohioattorneygeneral.gov, counsel for Respondent-Secretary and Repondent-State of Ohio, this 11th day of January, 2016.

Mark R. Brown

ATTACHMENT 1

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0289p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF OHIO; KEVIN KNEDLER; AARON HARRIS; CHARLIE EARL,
Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,
Defendant-Appellee,

STATE OF OHIO,
Intervenor-Appellee.

No. 15-4270

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00953—Michael H. Watson, District Judge.

Decided and Filed: December 9, 2015

Before: BATCHELDER, ROGERS, and COOK Circuit Judges.

ORDER

ALICE M. BATCHELDER, Circuit Judge. This appeal is the latest episode in the Appellants' (whom we refer to collectively as "the Party") long struggle to end what they contend is a pattern of unequal treatment under Ohio's election laws. The district court recently granted partial summary judgment in favor of Appellees John Husted, Ohio's Secretary of State, and the State of Ohio (collectively "Ohio"). That order concluded in relevant part that the Ohio statutes at issue did not violate the First or Fourteenth Amendments and that sovereign immunity barred the Party's state constitutional claims. This ruling effectively denied the Party's request for a preliminary injunction.

Such denials are immediately appealable under 28 U.S.C. § 1292(a)(1), but the Party instead filed a Rule 54(b) motion, asking that the relevant portions of the decision be made final (and thus appealable) because there was "no just reason for delay." The district court has not yet ruled on this motion. And the Party filed its notice of appeal thirty-five days after the district court issued its partial summary judgment order.

Ohio now moves to dismiss this appeal, arguing that the notice of appeal was untimely and that this court thus lacks jurisdiction to hear this case. The Party contends that its Rule 54(b) motion should be construed as Rule 59(e) motion to "alter or amend" a judgment and that this motion tolled the time within which to appeal. *See* Fed. R. App. P. 4(a)(4); *see also Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 401 (2d Cir. 2000).

While we agree that a motion to modify does not need to specifically invoke Rule 59 in order to toll the time to appeal, *see* Fed. R. App. P. 4(a)(4), 1993 advisory committee's notes; *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419–20 (9th Cir. 1984), the Party's Rule 54(b) motion does not fit the bill. According to Rule 54(b), rulings that do not dispose of an entire case do not end the action; but if the district court "expressly determines that there is no just reason for delay," it may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b). On its own terms, a Rule 54(b) motion cannot request that a judgment be altered; granting the motion serves only to make a non-appealable order an appealable judgment. *See Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015). Unlike a Rule 59(e) request, the Party's motion does not seek a modification of the order's substance, but asks only that it be made appealable. Moreover, since the relevant portions of the order were immediately appealable under § 1292, those portions were *already* a "judgment" as defined by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes . . . any order from which an appeal lies.").[1] Rule 54(b) and § 1292 are discrete paths by which litigants can pursue an appeal earlier than would otherwise be permissible—the former by allowing the court to create an appealable judgment

[1]If, conversely, the Party correctly assumed that it could not immediately appeal the Ohio constitutional claim under 28 U.S.C. § 1292(a)(1), the Party needed to obtain a Rule 54(b) certification before appealing. The Party appealed *without* receiving that certification and *after* the thirty-day window for appealing the denial of an injunction. Either way, we lack jurisdiction.

when other parts of the case remain unresolved, the latter by defining certain types of rulings as eligible for interlocutory appeal.

This appeal is late, and this court has no jurisdiction to hear this case. We therefore grant Ohio's motion to dismiss and deny the Party's pending motions as moot.

ATTACHMENT 2

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

CASE NO. 15-4270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 22, 2015
DEBORAH S. HUNT, Clerk

LIBERTARIAN PARTY of OHIO, *et al.*,

Plaintiffs-Appellants,

v.

JON HUSTED, Ohio Secretary of State,

Defendant-Appellee,

and

The STATE of OHIO,

Intervenor Defendant-Appellee.

ORDER

ALICE M. BATCHELDER, Circuit Judge.

I have before me the "*Appellants' Motion to Disqualify Judge Batchelder*," which they submitted contemporaneously with a separate petition for rehearing or rehearing *en banc*, in reply to the panel's order dismissing their appeal as untimely. I will address this as a motion to recuse, directed to me individually, and explain why I cannot recuse. The appellants also indicate that they would have moved earlier had they known the panel assignment. But for the same reasons, I could not have recused earlier either. Therefore, I must DENY the motion.

Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal judges and has two distinct subsections. Section 455(a) contains the general declaration that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Although it "is not the reality of bias or prejudice but its appearance" that matters, *Liteky v. United States*, 510 U.S. 540, 548, the "inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."

Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., denying recusal); *see also Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 914 (2004) (Scalia, J., denying recusal) ("The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported.").

Section 455(b) lists specific instances in which disqualification is required, including those instances in which the judge's spouse "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." § 455(b)(5)(iii). This reference "to 'an interest' does not require that the interest of the judge's [spouse] be financial," *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980), but when the interest "is not direct, but is remote, contingent or speculative, it is not the kind of interest which reasonably brings into question a judge's partiality," *Sensley v. Albritton*, 385 F.3d 591, 600 (5th Cir. 2004) (citing *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

But a federal judge also has a "duty to sit." *Switzer v. Berry*, 198 F.3d 1255, 1257 (10th Cir. 2000); *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (emphasizing that "a judge has [just] as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require"); *United States v. Angelus*, 258 F. App'x 840, 842 (6th Cir. 2007) (same). Section 455 "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice," nor may it be applied to "give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *Id.*; *Nichols*, 71 F.3d at 351.

When I received this appeal as part of this panel assignment, I determined that there was no objectively reasonable basis by which I could recuse and, therefore, I had a "duty to sit" and decide this appeal. Because the appellants' motion argues that I was mistaken—that I should

have recused then and must recuse now, or else deny them due process—I will incorporate my earlier reasoning into my analysis of their specific fact-based assertions and legal arguments.

Stated succinctly, the appellants contend that I must recuse because my husband, as a state representative, sponsored the legislation which they challenge in this lawsuit. Because the appellants state a rather specific factual premise, I will begin there. They claim:

> William Batchelder, Judge Batchelder's husband, was the Speaker of the Ohio's House of Representatives at all relevant times during the consideration and passage of Senate Bill 193. He supported and voted for S.B. 193. Most importantly, he formally sponsored S.B. 193 in Ohio's House. It was his bill.

Apt. Mtn. at 1 (underlining in original).

> To be sure, Appellants are not arguing that Judge Batchelder is disqualified merely because her husband was a member of the General Assembly that passed S.B. 193. Nor are they arguing that she is disqualified simply because he voted for it and spoke in favor of it. She is disqualified because he did all of those things while also formally sponsoring S.B. 193 as Ohio's Speaker of the House. Sponsorship conveys a stake in the measure. Why else place one's name on a bill?

Apt. Mtn. at 13 (underlining in original).

Both passages begin with an assertion of objective (and true) facts and conclude with an inference (i.e., "It was his bill." "Sponsorship conveys a stake in the measure."). Because recusal determinations must proceed "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances," *Microsoft*, 530 U.S. at 1302, "in light of the facts as they existed, and not as they were surmised or reported," *Cheney*, 541 U.S. at 914, the preliminary question here is whether the true facts support the appellants' inferences. I cannot agree that they do. Though I am doubtful that the ordinary Ohio citizen would attribute Ohio Senate Bill 193 to my husband, or know that he was a named sponsor, or specifically associate *that* bill with him in any way different from any other Ohio legislation, I realize that is not the standard. The standard is the reasonable observer who is informed of the true facts, which here include the sponsorship of Senate Bill 193 and my husband's role in the legislature.

On September 19, 2013, State Senator William Seitz introduced Ohio Senate Bill 193 to the Ohio Senate. Shortly thereafter, Sen. John Eklund joined the bill as a co-sponsor. On October 8, 2013, the Ohio Senate passed an amended version. On October 10, 2013, five Representatives (including my husband) co-sponsored the introduction of Senate Bill 193 in the State House of Representatives. On October 30, 2013, the House passed an amended version. On November 6, 2013, a committee reconciled the two versions and sent the final bill to the Governor, who signed it, with an effective date of February 2, 2014. The final version of the bill had a primary sponsor (Sen. Seitz) and six secondary or co-sponsors, including my husband. To my knowledge, my husband has never claimed authorship, ownership, or responsibility for Senate Bill 193, and the appellants have not pointed to or produced any such claim.

During the three months at issue here, my husband was indeed the Speaker of the Ohio House of Representatives. In fact, he was the Speaker from January 2011 until December 2014, and a state legislator for 38 years, between 1969 and 2014. During that time, he sponsored countless bills. Some passed, others did not. He also worked in committees, drafted legislation, and spoke and voted for and against legislation. He is no longer in the legislature and is now effectively retired from government service. He is not a lobbyist and does no work as such.[1]

In September 2013, the appellants had filed a federal lawsuit against the Ohio Secretary of State, challenging certain Ohio election laws. On November 8, 2013, they amended their complaint to include a challenge to Senate Bill 193. They did not name my husband as a defendant in their complaint, in either his personal or official capacity. Nor did they implicate him in any way as being particularly or specifically responsible for Senate Bill 193.

[1] Lobbying is strictly regulated under Ohio law; including registration, record keeping and reporting, and compliance requirements. *See* Ohio Rev. Code §§ 101.70 *et seq*. Thus, I repeat, my husband is not a lobbyist.

Thus, to the reasonable observer informed of the true facts, my husband was not the initial or primary sponsor of this bill, which was not even a "House Bill"; it is notably *Senate Bill* 193. The initial and primary sponsor was Sen. Seitz. To be sure, my husband was one of five named sponsors of the bill before the House, but he has sponsored countless bills and there is no suggestion that this one is any more important to him than any other, particularly now that he is retired from the legislature. Consequently, a reasonable observer would not draw the inference from these facts that "it was his bill." Certainly, Sen. Seitz would disagree with that, as would my husband. Moreover, a reasonable person would not necessarily infer that co- "sponsorship conveys a stake in the measure" beyond that of any other legislator voting for the bill.

Under the § 455(a) prong of their claim, the appellants argue that my impartiality might reasonably be questioned because "all of America recognizes that one cannot be expected to be objectively fair when reviewing the work of a spouse." Apt. Mtn. at 8. Obviously, this pre-supposes—incorrectly, as was just explained—that Senate Bill 193 was my husband's work (it was not) and that I view it as such (I do not). But this theory further relies on the premise that the only or most *reasonable* presumption is that one spouse cannot not think or act independently or critically of the other spouse. That is not reasonable. *See Perry v. Schwarzenegger*, 630 F.3d 909, 912 (9th Cir. 2011) (Reinhard, J., denying recusal) ("Proponents' contention that I should recuse myself due to my wife's opinions is based upon an outmoded conception of the relationship between spouses."); *see also In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001) (emphasizing that "the grounds asserted in a recusal motion must be scrutinized with care, and judges should not recuse themselves solely because a party claims an appearance of partiality").

Under the § 455(b) prong of their claim, the appellants argue that my husband has an interest in the perpetuation of Senate Bill 193; in fact, they claim two distinct interests. The first interest, according to the appellants, is a "pride of authorship" or "attribution." They claim:

> Legislators attach their names to bills for . . . the recognition that comes with successful and difficult work. A sponsor possesses pride of authorship, the prestige that goes with successfully sponsoring major legislation, the popularity it entails, the political connections its insures [sic], and the posterity it creates. McCain-Feingold, Sarbanes-Oxley, Glass-Steagall, the Sherman Anti-trust Act all come to mind. All of these legislators can rightly take pride in their accomplishments. The sponsors of these bills all have interests in their end results.

Apt. Mtn. at 9.

> Those who draft and sponsor significant political documents, including declarations, constitutions, and legislation, all bask in attribution. Thomas Jefferson and his Declaration of Independence comes [sic] immediately to mind. So does James Madison's drafting of the Virginia Plan, which laid the foundation for the 1787 Constitution, as well as his drafting of the Bill of Rights two years later. These gentlemen would certainly be offended were their great works deformed, mutilated, or declared to be illegal. 'Integrity' would be questioned.
>
> The same is true of Speaker Batchelder. He placed his reputation on the line by sponsoring S.B. 193. He succeeded in having the bill passed. Were it to be invalidated under the First Amendment or the Ohio Constitution, his moral rights in his work would be compromised. Sustaining his legislation, meanwhile, affirms his moral rights.

Apt. Mtn. at 11.

This is not reasonable. Given that Senate Bill 193 contains no name, would be codified into law under an unassociated statutory number, and would be most reasonably attributed to its original and primary sponsor, Sen. Seitz, *if it were* assigned a person's name (i.e., it would not reasonably be named after all seven of its co-sponsors), this comparison to these landmark federal statutes and is inapt. In fact, this comparison disproves the appellants' claim more than it proves it. Similarly, comparing my husband's role in the passage of Ohio Senate Bill 193 with Thomas Jefferson's drafting of the Declaration of Independence is plainly preposterous.

The appellants also contend that my husband has an interest because he "has now landed a job as a lobbyist," Apt. Mtn. at 9, from which they further surmise that:

> Judge Batchelder's participation in this appeal therefore not only 'could' substantially affect her husband's interest, it certainly will. Whether she sustains his bill or overturns it, his moral rights will be affected. Further, his continuing political connections—and the business they now generate—will be compro-

> mised. If Judge Batchelder were part of striking down S.B. 193, Mr. Batchelder would be hard-pressed to explain to his clients why his spouse acted as she did.

Apt. Mtn. at 11-12. But this claim, like the others, is based on false factual premises: that my husband is a lobbyist (he is not), that Senate Bill 193 was his bill (it was not), and that there would be some reason for my ruling other than strict adherence to the law (there would not).

Apparently recognizing the fallacy of their claims, the appellants insist: "Whether this is true is not the point. It is the appearance that matters." Apt. Mtn. at 10 n.7. But that is not the law. "[T]he appearance [of partiality] must have an objective basis beyond the fact that claims of partiality have been well publicized." *In re Aguinda*, 241 F.3d at 201. "Judicial inquiry may not . . . be defined by what appears in the press." *Id*. at 202 (citation omitted). The law is based on the reasonable observer informed of all the surrounding facts and circumstances," *Microsoft*, 530 U.S. at 1302, and an interest that "is remote, contingent or speculative, is not the kind of interest which reasonably brings into question a judge's partiality," *Sensley*, 385 F.3d at 600.

Based on all of the foregoing, I must conclude now—as I concluded previously—that I have no objectively reasonably basis to recuse and instead have a "duty to sit." *See Switzer*, 198 F.3d at 1257; *In re Aguinda*, 241 F.3d at 201 (asserting that "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited").

The motion is DENIED.

ATTACHMENT 3

No. 15-4270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 06, 2016
DEBORAH S. HUNT, Clerk

LIBERTARIAN PARTY OF OHIO, ET AL.,

Plaintiffs-Appellants,

v.

JON HUSTED, SECRETARY OF STATE,

Defendant-Appellee,

STATE OF OHIO,

Intervenor-Appellee.

O R D E R

BEFORE: BATCHELDER, ROGERS, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

ATTACHMENT 4

Case No. 15-4270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

LIBERTARIAN PARTY OF OHIO; KEVIN KNEDLER;
AARON HARRIS; CHARLIE EARL

Plaintiffs - Appellants

v.

JON HUSTED, Secretary of State

Defendant - Appellee

STATE OF OHIO

Intervenor - Appellee

BEFORE: BATCHELDER; ROGERS and COOK, Circuit Judges.

Upon consideration of the appellants' motion to stay mandate,

It is therefore **ORDERED** that the motion be and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: January 08, 2016