UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIKESHA MARTINEZ, by and through her husband and next friend Carlos Martinez; et al., Plaintiffs - Appellees, v. ARNOLD SCHWARZENEGGER, Governor of the State of California; et al., Defendants - Appellants, and FRESNO COUNTY; et al., Defendants.	No. 09-16359 D.C. No. 4:09-cv-02306-CW Northern District of California, Oakland
CALIFORNIA PHARMACISTS ASSOCIATION; et al., Plaintiffs, and CALIFORNIA HOSPITAL ASSOCIATION; et al., Plaintiffs - Appellants, v.	No. 09-55365 D.C. No. 2:09-cv-00722-CAS-MAN Central District of California, Los Angeles

DAVID MAXWELL-JOLLY, Director of The California Department of Health Care Services,

Defendant - Appellee.

CALIFORNIA PHARMACISTS ASSOCIATION; et al.,

Plaintiffs - Appellees,

v.

DAVID MAXWELL-JOLLY, Director of The California Department of Health Care Services,

Defendant - Appellant.

No. 09-55532

D.C. No. 2:09-cv-00722-CAS-MAN
Central District of California, Los Angeles

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC.; et al.,

Plaintiffs - Appellees,

v.

DAVID MAXWELL-JOLLY, Director of Department of Health Care Services of the State of California,

Defendant - Appellant.

No. 09-55692

D.C. No. 2:09-cv-00382-CAS-MAN
Central District of California, Los Angeles

AMENDED ORDER

Before: REINHARDT, W. FLETCHER and M. SMITH, Circuit Judges.

On November 19, 2009, Defendant-Appellant David Maxwell-Jolly, Director of Department of Health Care Services of the State of California, (Director) asked this court to set oral argument in these four related appeals "as soon as practicable." According to the Director, the injunctions entered in these cases are costing the State $25 million per month, at a time when the State "is grappling with a financial crisis of unprecedented dimensions." The Director sought guidance from our court, arguing that "uncertainty in the law . . . has made it difficult for the State to budget for the future." We granted the Director's request, set oral argument for January 19, 2010, and have diligently prepared for oral argument in all four appeals, in which the parties' submissions total no less than five thousand pages. Now, less than a week before we are scheduled to hear argument, the Director asks that these appeals be reassigned to a different panel because he asserts that an intervening order we published calls our impartiality into question. We deny the request.

On December 21, 2009, we denied the Director's motion to vacate our opinion in *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009). *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, — F.3d —, 2009 WL 4893657 (9th Cir. Dec. 21, 2009) (order). In

the course of denying the motion, we expressed our concern over certain filings by the Attorney General's office, on behalf of the Director, and considered the Attorney General to have violated his ethical duty to this court. *Id.* at *4. Specifically, the Attorney General had filed a four-page motion to vacate, representing that the Attorney General's office only recently became aware of the jurisdictional issues on which it based its motion. Yet as we described in our order, the Attorney General failed to call our attention to the fact that he had taken the exact opposite position regarding the jurisdictional issue in a petition for certiorari, filed some five months prior. *Id.* We noted that the Attorney General's conduct gave us "*pause* about accepting the veracity of future pleadings filed by the Attorney General on behalf of the Director, if not more generally." *Id.* (emphasis added). The Attorney General now insists that our published reprimand evidences "unequivocal antagonism that would make fair judgment [in the four subsequent appeals] impossible."

Pursuant to 28 U.S.C. § 455, "[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The substantive standard for recusal, and that upon which the Attorney General relies, asks "'[w]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be

questioned.'" *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (quoting *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986)). However, the Supreme Court has counseled that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Any opinion that may have been formed "on the basis of facts introduced or events occurring in the course of . . . prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

With these principles in mind, we conclude that the Attorney General's motion clearly falls short. The grounds upon which the Attorney General bases his claims of partiality all occurred in the course of prior judicial proceedings and do not display the type of "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.* at 556. Rather, we stated that the Attorney General's actions gave us "pause" about relying on the truthfulness of factual representations he might make in the future, and noted the manner in which he had misled the court. We believe we were correct in our understanding of his actions, and we have not accepted his subsequent explanations. As the Supreme Court has stated, "[i]mpartiality is not gullibility." *Id.* at 551.

Moreover, having been less than truthful once before, the Attorney General is in no position to question this panel's impartiality for simply calling him to account for his lack of candor. The Attorney General is a frequent litigator in our court, who, we believed, required an admonition that would cause him to be more careful in his future filings. We appear to have caught his attention and expect that he now will be. We sometimes agree with the Attorney General's position, while other times we reject it. Should we accept his invitation to recuse ourselves in these appeals, he could seek the recusal of any future panel that is equally critical of the manner in which he presents his case. He could also seek our recusal in numerous other cases of all types, including direct appeals and habeas cases, for the indefinite future. Although there is no basis for the Attorney General's motion, he may rest assured that he will receive fair and unbiased treatment from the court, as will all other litigators who are willing to comply with the rules that govern their professional conduct as well as the applicable rules of court.

Further, while the Attorney General asserts that "there is an ample number of replacement judges on the Ninth Circuit," we call his attention to the more than 17,000 appeals currently pending in our circuit. *See* U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2008 and 2009,

http://www.uscourts.gov/caseload2009/tables/B00Mar09.pdf. We assure the Attorney General that there are no judges sitting idly by, prepared to dive into five thousand pages and hear oral argument in the four pending cases in less than a week.

The motion to disqualify pursuant to 28 U.S.C. § 455(a) is **DENIED.**