NO. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,

v.

KRISTIN M. PERRY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL OR VACATUR

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INTEREST OF AMICUS CURIAE[1]

The Ethics and Public Policy Center is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy. Our program on The Constitution, the Courts, and the Culture aims to promote a sound understanding of the limits on the proper role of the courts in construing the Constitution. We have a strong interest both in defending marriage and in preventing judicial intrusion on the legitimate power of citizens in each state to determine their marriage laws (and on the complementary power of Congress to determine what "marriage" means for purposes of provisions of federal law).

SUMMARY OF THE ARGUMENT

For the reasons explained by petitioners, this case cannot properly be decided on grounds unique to California's Proposition 8. It instead presents the general question whether the Constitution forbids a state from embracing the perennial definition of marriage as the union of a man and a woman.

This brief has two purposes. First, we document the egregious course of misconduct by the district judge below in order to alert this Court to the

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[1] The parties have provided blanket consents to the filing of amicus briefs, and their consents are on file with the Clerk of the Court. As required by Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part and that no person other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

fact that it should be especially wary of accepting at face value any assertion made by that judge. In Part I, we show how the district judge defied this Court's January 2010 order blocking broadcasting of the trial—and nearly succeeded in having his video recording of the entire trial made public. In Part II and Part III, we expose in detail two of the district judge's characteristic distortions. In Part IV, we survey the extraordinary series of other errors by the district judge that benefited plaintiffs.

Second, we explain that, if the Court is not inclined to reverse the judgment below outright (the disposition we believe to be correct), it should exercise its supervisory power to vacate the judgments below in their entirety. In Part V, we show that the author of the Ninth Circuit opinion should have disqualified himself from taking part in the appellate proceedings because his wife consulted in advance with plaintiffs' counsel about the very decision to file the lawsuit, because she authorized the ACLU affiliate that she led to file amicus briefs supporting plaintiffs in the trial proceedings, and because she publicly celebrated the very ruling that the Ninth Circuit was to review. In Part VI, we explain that the district judge's failure to disclose that he was in the midst of a long-term same-sex relationship improperly deprived the parties of the information necessary to assess whether he was sitting in judgment of his own case and should therefore be disqualified. Together with the district judge's egregious course of misconduct outlined in Parts I through IV, these considerations would warrant the Court's vacatur of the judgments below.

ARGUMENT

I. THE DISTRICT JUDGE DEFIED THIS COURT'S ORDER BLOCKING BROADCASTING OF THE TRIAL.

In January 2010, when this Court entered an order blocking the district judge's illegal effort to broadcast the trial in this case, it could hardly have imagined the remarkable series of steps that the district judge would take to evade, undermine, and violate the Court's order. In particular: Notwithstanding this Court's order, and over the objections of petitioners, the district judge proceeded to record the entire trial. In public speeches both before and after his February 2011 retirement from the bench (including one speech broadcast on C-SPAN), he played an excerpt of the recording that consisted of the cross-examination of one of the witnesses testifying in support of Proposition 8. And, with his support and encouragement, the district judge's successor as presiding judge in the case entered an order making the entire trial recording public—an order that was thwarted only when the Ninth Circuit reversed it on appeal.

A fuller account of the district judge's misconduct is even more damning.

In its January 2010 order, this Court observed that the district court "attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in order "to allow broadcasting of this high-profile trial without any considered standards or guidelines in

place." *Hollingsworth v. Perry*, 558 U.S. ____, 130 S. Ct. 705, 713 (2010) (per curiam). This Court recognized that "[s]ome of [petitioners'] witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment." *Id.* In blocking the district judge's plan to broadcast the trial, this Court soundly concluded:

> The District Court attempted to change its rules at the eleventh hour to treat this case differently than other trials in the district. Not only did it ignore the federal statute that establishes the procedures by which its rules may be amended, its express purpose was to broadcast a high-profile trial that would include witness testimony about a contentious issue. If courts are to require that others follow regular procedures, courts must do so as well.

Id. at 714-15.

The Court issued its order on January 13, 2010. The very next day, over the objections of petitioners, the district judge stated that he would continue to record the trial. The recording, he declared, would be "simply for use in chambers," because it "would be quite helpful to [him] in preparing the findings of fact." *Perry v. Schwarzenegger*, No. 3:09-2292-VRW (N.D. Cal.), Trial Tr. 754:18-19, 755:4, ECF No. 464 [hereinafter docket entries for court documents electronically filed under No. 3:09-2292-VRW shall be referred to by their names and ECF numbers]. On January 15, counsel for petitioners informed the district judge

that petitioners had withdrawn four of his witnesses on the first day of trial (January 11) because they "were extremely concerned about their personal safety, and did not want to appear with any [video] recording of any sort, whatsoever." Trial Tr. 1094:21-23, ECF No. 505.

The district judge proceeded to record the entire trial. Notwithstanding his previous assurance that the recording was for his own use in chambers, he then invited the parties "to use portions of the trial recording during closing arguments," and he offered to make "a copy of the video . . . available to the part[ies]," subject to a protective order. Order 2, ECF No. 672 (order inviting access to trial recordings). Respondents Perry et al. requested and received a copy of the entire trial recording, portions of which they played during closing argument. Notice to Ct. Clerk re Pls.' Request for a Copy of the Trial Recording 1, ECF. No. 675; Trial Tr. 2961, ECF No. 693. Respondent City and County of San Francisco requested and received portions of the trial recording. Notice to Ct. Clerk from Pl.-Intervenor City and County of S.F. re Use of Video 1, ECF No. 674.

After closing argument, petitioners asked the district judge to order the trial recordings to be returned to the court. In his opinion on the merits, issued on August 4, 2010, the district judge denied their request. Instead, he directed the court clerk "to file the trial recording under seal as part of the record" and permitted respondents to retain their copies, subject to the protective order. Findings of Fact and Conclusions of Law 4-5, ECF No. 708.

In his opinion on the merits, the district judge refused to credit the statement by petitioners' counsel that four witnesses had withdrawn from testifying because they were concerned that the video recording of the trial would jeopardize their personal safety. Instead, he maintained that "the potential for public broadcast in this case had been eliminated" by this Court's stay order. *Id.* at 35-36.

As the Ninth Circuit would find, that "unequivocal statement" amounted to a second "promise by Chief Judge Walker that the recording would not be released to the public." *Perry v. Brown*, 667 F.3d 1078, 1085 (9th Cir. 2012). Events, however, would fully vindicate the witnesses's distrust of the district judge.

On February 18, 2011, at an event recorded by C-SPAN, Judge Walker[2] delivered a speech at the University of Arizona in which he advocated allowing trial proceedings to be broadcast. In the course of that speech, despite the fact that the trial recording remained under seal and despite his own assurance that the recording was "simply for use in chambers," Judge Walker played, on a large projection screen, a three-minute excerpt from the trial recording of the cross-examination of one of petitioners' witnesses. C-SPAN broadcast that speech, including the excerpt, four times in late March 2011, and it continues to make that speech available for public viewing on its website. *See Judge Vaughn Walker on Cameras in the Courtroom* (C-SPAN Video Library, Feb. 18,

[2] Judge Walker's tenure as chief judge terminated at the end of 2010.

2011), http://www.c-spanvideo.org/program/Vaugh (follow "DETAILS" hyperlink; then follow "Airing Details: Show" hyperlink).

When he retired from the bench on February 28, 2011, former judge Walker took a copy of the video recording with him—again, notwithstanding the fact that it remained under seal. He then used the same excerpt of the recording in at least two or three more public presentations. *Perry v. Brown*, No. 10-16696 (9th Cir.), Walker Letter 1-2, ECF. No. 339 [hereinafter docket entries for court documents electronically filed under No. 10-16696 shall be referred to using "*Perry*, No. 10-16696" followed by their names and ECF numbers].

When they learned of Judge Walker's public use of the recording, petitioners filed a motion to compel him and respondents to return their copies of the recording to the court clerk.[3] Former judge Walker submitted a letter in response. In that letter, he somehow deemed it noteworthy that the case "involved a public trial," yet he failed to make any mention of this Court's stay order, of his own assurance that the recording was "simply for use in chambers," or of the fact that the recording remained under seal. *See id.* In response to an order, former judge Walker also lodged his copy of the recording with the court clerk pending a ruling on the motion. Chief Judge Ware, who, following Judge Walker's retirement, had taken over as the presiding judge in this case, denied petitioners' motion. Even more

[3] Petitioners initially filed their motion in the Ninth Circuit, which transferred it to the district court.

remarkably, three months later he granted the cross-motion by plaintiffs Perry et al. to unseal the recording and to make it publicly available. He also directed that the copy of the recording that former judge Walker had taken with him be returned to him. *See Perry v. Brown*, 667 F.3d at 1083.

On appeal, the Ninth Circuit, in a stinging condemnation of Chief Judge Walker's misconduct, reversed the order unsealing the recording. This passage captures the court's core reasoning:

> [T]he district court abused its discretion by ordering the unsealing of the recording of the trial notwithstanding the trial judge's commitment to the parties that the recording would not be publicly broadcast. The trial judge on several occasions unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast. He made these commitments because the Supreme Court had intervened in this very case in a manner that required him to do so. Thus, his commitments were not merely broad assurances about the privacy of judicial records in the case; they could not have been more explicitly directed toward the particular recording at issue.

Id. at 1081 (citation omitted). The Ninth Circuit specifically directed that Chief Judge Ware "shall not return to former Chief Judge Walker the copy of the recording that he has lodged with the court." *Id.* at 1089 n.7.

II. THE DISTRICT JUDGE'S USE OF THE STATEMENT BY PETITIONERS' COUNSEL THAT "YOU DON'T HAVE TO HAVE EVIDENCE" OF THE STATE'S PROCREATIVE INTEREST IN MARRIAGE IS DISTORTING AND MISLEADING.

As petitioners demonstrate, the traditional definition of marriage reflects the elementary biological reality that only opposite-sex unions naturally generate children. As has long been understood and acknowledged by jurists, philosophers, historians, and social scientists, the essential reason for governmental recognition of marriage is to encourage the generation of children in the optimal context of marriage and to discourage their generation in socially harmful non-marital contexts.

The district judge dismissively treated society's procreative interest in marriage: "The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry." Findings of Fact 113, ECF No. 708. We will ignore in this brief the illogical connection between the two clauses of the district judge's sentence, as petitioners amply demonstrated below that the district judge's reliance on the absence of Orwellian fertility tests is frivolous. *Perry*, No. 10-16696, Def.-Intervenors-Appellants' Opening Br. 60-64, ECF No. 21. We will also not undertake to repeat petitioners' showing of the ample evidence in the record—and the overwhelming

authorities presented to the district judge of which he should have taken judicial notice—demonstrating the state's, and society's, procreative interest in marriage.

We would instead like to call attention to an assertion by the district judge that purportedly supported his claim that the "evidence did not show any historical purpose for excluding same-sex couples from marriage." Specifically, the district judge, in summarizing petitioners' defense of Proposition 8 stated: "During closing arguments, proponents again focused on the contention that 'responsible procreation is really at the heart of society's interest in regulating marriage.' When asked to identify the evidence at trial that supported this contention, proponents' counsel replied, '*you don't have to have evidence of this point*.'" Findings of Fact 9-10, ECF No. 708. (emphasis added; citations omitted).

The clear—and, as we shall show, grossly misleading—implication of the italicized quotation in this passage is that Proposition 8's proponents offered no evidence or other authority in support of society's procreative interest in marriage. The effect of this implication was to create the false impression that the district judge had little or no choice but to rule as he did, for Proposition 8's proponents supposedly failed to muster any real defense of Proposition 8. That false implication just happened to comport with plaintiffs' public-relations offensive: As one of plaintiffs' counsel put it in sowing confusion in a national television interview, "they [Proposition 8's proponents] said during the course of the trial they didn't need to prove anything, they didn't have any

evidence, they didn't need any evidence."[4] That false implication was also regurgitated by commentators assessing the district judge's opinion.[5]

Let's put the passage highlighted by the district judge in its proper context.

At closing argument, counsel for petitioners began by stating that "the historical record leaves no doubt . . . that the central purpose of marriage in virtually all societies and at all times has been to channel potentially procreative sexual relationships into enduring stable unions to increase the likelihood that any offspring will be raised by the man and woman who brought them into the world." Trial Tr. 3028:13-19, ECF No. 693. Petitioners' counsel cited numerous Supreme Court (and other) cases that reflect this understanding. *Id.* at 3027-3028.

When petitioners' counsel stated that "the *evidence* shows overwhelmingly that . . . responsible

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[4] *Ted Olson on Debate Over Judicial Activism and Same-Sex Marriage* (Fox News Sunday, Aug. 8, 2010), http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/transcript/ted-olson-debate-over-judicial-activism-and-same-sex-marriage#p//v/924499914001.

[5] *See, e.g.*, Editorial, *Proposition 8 ruling changes the debate over same-sex marriage* forever, Los Angeles Times (Aug. 4, 2010), http://articles.latimes.com/2010/aug/04/opinion/la-ed-prop8-20100805; Lisa Bloom, *On Prop 8, it's the evidence, stupid*, CNN.com (Aug. 18, 2010), http://www.cnn.com/2010/OPINION/08/17/bloom.prop.8/index.html; Jacob Sullum, *Is It Crazy to Call Californians Irrational?*, Reason.com (Aug. 11, 2010), http://reason.com/archives/ 2010/08/11/ is-it-crazy-to-call-california.

procreation is really at the heart of society's interest in regulating marriage," *id.* at 3038:5-8 (emphasis added), the district judge asked, "What was the witness who offered the testimony? What was it and so forth?" *id.* at 3038:14-15. Counsel began his response:

> The *evidence before you* shows that sociologist Kingsley Davis, in his words, has described the universal societal interest in marriage and definition as social recognition and approval of a couple engaging in sexual intercourse and marrying and rearing offspring.

Id. at 3038:17-21 (emphasis added).

Counsel then cited William Blackstone's statements—which were also in evidence submitted at the trial—that the relation of husband and wife and the "natural impulse" of man to "continue and multiply his species" are "confined and regulated" by society's interests; that the "principal end and design" of marriage is the relationship of "parent and child"; and that it is "by virtue of this relation that infants are protected, maintained, and educated." *Id.* at 3038-3039.

As petitioners' counsel proceeded to work his way through "[e]minent authority after [e]minent authority"—all in evidence submitted at the trial—the district judge interrupted him to ask the peculiar question, "I don't mean to be flip, but Blackstone didn't testify. Kingsley Davis didn't testify. What *testimony* in this case supports the proposition?" *Id.* at 3039:14-18 (emphasis added). (We address this

peculiar question, and related confusion, in Part IV below.) Counsel responded to the district judge's question:

> Your Honor, these materials are before you. They are evidence before you.… But, your Honor, *you don't have to have evidence for this from these authorities. This is in the cases themselves. The cases recognize this one after another*. [*Id.* at 3039:19-3040:1 (emphasis added).]

The district judge then said: "I don't have to have evidence?" *Id.* at 3040:2. Counsel's response: "*You don't have to have evidence of this point if one court after another has recognized*—let me turn to the California cases on this." *Id.* at 3040:3-5 (emphasis added).

Only the underlined portion of the passage is what the district judge quotes—utterly out of context—in his opinion.

Counsel then proceeded to present California cases stating that the "first purpose of matrimony by the laws of nature and society is procreation," that "the institution of marriage serves the public interest because it channels biological drives . . . that might otherwise become socially destructive and it ensures the care and education of children in a stable environment," and that (in a ruling just two years ago) "the sexual procreative and child rearing aspects of marriage go to the very essence of the marriage relation." *Id.* at 3040:6-21.

Thus, in context it is clear that petitioners' counsel cited extensive evidence in the record, as well as relevant legal authorities, in support of the proposition that "responsible procreation is really at the heart of society's interest in regulating marriage." *Id.* at 3038:7-8. Indeed, the evidence that petitioners submitted (and cited in their proposed findings of fact) in support of this heretofore obvious and noncontroversial proposition was overwhelming.

When counsel stated that "you don't have to have evidence for this [that is, the procreative purpose of marriage] *from these authorities*"—sociologist Kingsley Davis and Blackstone and the other "[e]minent authorities" that counsel was ready to discuss when the district judge interrupted him—and that the "cases themselves" "recognize this one after another," it is crystal clear in context that he was not contending that he had not provided evidence or that he did not need to provide evidence *or other authority*. He was merely making the legally sound observation that the many cases recognizing the procreative purpose of marriage were an alternative and additional source of authority for the proposition.

Exactly the same is obviously true for counsel's immediate follow-up: "*You don't have to have evidence of this point if one court after another has recognized*—let me turn to the California cases on this." *Id.* at 3040:3-5 (emphasis added). Yet the district judge stripped the first nine words of counsel's statement from its context, distorted its meaning, and created the patently false impression that Proposition 8's proponents had refused to offer

evidence and other authority in support of society's procreative interest in marriage.

III. BEYOND HIS UNWARRANTED CERTITUDE ABOUT THE LONG-TERM EFFECTS OF SAME-SEX MARRIAGE, THE DISTRICT JUDGE DISTORTED THE MEANING OF THE MODEST ACKNOWLEDGMENT BY PETITIONERS' COUNSEL THAT THE EFFECTS CANNOT BE PREDICTED WITH CERTAINTY.

Among the district judge's many baseless contentions is his claim that "the evidence shows *beyond debate* that allowing same-sex couples to marry has at least a neutral, if not a positive effect, on the institution of marriage." Findings of Fact 125-26, ECF. No. 708 (emphasis added). For starters, such an assertion is simply beyond the capacity of the social sciences to sustain. It is precisely for that reason that Jonathan Rauch, a leading *supporter* of same-sex marriage (and author of the book *Gay Marriage: Why It Is Good For Gays, Good For Straights, and Good For America*), has condemned the district judge's ruling as "radical." As Mr. Rauch states, "that kind of sweeping certainty" about the future effects of "social policy" simply does not fit in "an unpredictable world." Jonathan Rauch, *The radical gay rights ruling: Leading supporter of same-sex marriage challenges Prop. 8 decision*, New York Daily News (Aug. 11, 2010), http://www.nydailynews.com/opinion/radical-gay-rights-ruling-leading-supporter-same-sex-marriage-challenges-prop-8-decision-article-1.204302.

Further, the district judge's extravagant claim rests almost entirely on the testimony of a single expert witness for plaintiffs, Professor Letitia Peplau, who specifically *disclaimed* that her limited statistics on marriage and divorce rates in Massachusetts were "necessarily serious indicators of anything." J.A. 523; Trial Tr. 655-656, ECF No. 454. The district judge's claim also simply ignores the admission by another of plaintiffs' expert witnesses, Professor Nancy Cott, that it is "impossible" to know what the consequences of same-sex marriage would be because "no one predicts the future that accurately." Trial Tr. 266:17-22, ECF No. 453. And the district judge's claim also fails to acknowledge, much less address, evidence in the record about negative trends in the Netherlands—on marriage rates and nonmarital childrearing—that were exacerbated in the aftermath of that country's adoption of same-sex marriage. *See Perry*, No. 10-16696, Opening Br. 101-02, ECF No. 21.

The district judge's misplaced certitude about the long-term impact of same-sex marriage stands in sharp contrast to the modest acknowledgment by petitioners' counsel at the summary-judgment hearing in October 2009 that he didn't "know" what the long-term impact of same-sex marriage would be. In his opinion, the district judge clips counsel's comment out of context in a manner that distorts his message by falsely suggesting that counsel's epistemological modesty amounted to some sort of concession that same-sex marriage did not pose any significant potential harmful effects:

> At oral argument on proponents' motion for summary judgment, the court posed to proponents' counsel the assumption that "the state's interest in marriage is procreative" and inquired how permitting same-sex marriage impairs or adversely affects that interest. Counsel replied that the inquiry was "not the legally relevant question," but when pressed for an answer, counsel replied: "Your honor, my answer is: I don't know. I don't know."
>
> *Despite this response*, proponents in their trial brief promised to "demonstrate that redefining marriage to encompass same-sex relationships" would effect some twenty-three specific harmful consequences.

Findings of Fact 125-26, ECF. No. 708 (emphasis added; citations omitted). Here again, the district judge's distortion mirrors plaintiffs' own distortion in their public-relations messaging. *See, e.g.*, Theodore B. Olson, *The Conservative Case for Gay Marriage*, Newsweek (Jan. 8, 2010, 7:00 PM), http://www.thedailybeast.com/newsweek/2010/01/08/the-conservative-case-for-gay-marriage.html ("when the judge in our case asked our opponent to identify the ways in which same-sex marriage would harm heterosexual marriage, to his credit he answered honestly: *he could not think of any*") (emphasis added).

The district judge misrepresented both counsel's comment and the entirely compatible position taken by petitioners in their trial brief. At the summary-judgment hearing, the district judge

asked counsel how same-sex marriage "*would harm* opposite-sex marriages." J.A. 307 (emphasis added). It was in response to that seeming request for an ironclad prediction that counsel stated, "Your Honor, my answer is: I don't know. I don't know." *Id.* Counsel then explained:

> [T]he state and its electorate are entitled, *when dealing with radical proposals for change, to a bedrock institution such as this* to move with incrementally, to move with caution, and to adopt a wait-and-see attitude.
>
> Keep in mind, your Honor, this same-sex marriage is a very recent innovation. *Its implications of a social and cultural nature, not to mention its impact on marriage over time, can't possibly be known now*.

Id. at 308 (emphasis added).

A few minutes later, when the district judge stated that "I understand your answer to that question"—the question of the harm that same-sex marriage would inflict on the institution of marriage—"is you don't know," Trial Tr. 28, ECF No. 228, counsel responded:

> Well, your Honor, *it depends on things we can't know*. This is a — this is a — that's my point.
>
> And the people of the State of California were entitled to step back and watch this experiment unfold in Massachusetts and the other places where it's unfolding, and to assess

> whether or not — oh, our concerns about this – about this new and — and heretofore unknown marital union have either been confirmed by what's happening in marriage in Massachusetts, or perhaps they've been completely allayed; but my point is: California was entitled not to follow those examples, and to wait and see. That's the whole purpose of federalism.

J.A. 309 (emphasis added).

Counsel also stated that "there appear to be a number of adverse social consequences in The Netherlands from" same-sex marriage, including that "the effort to channel procreative activity into the institution [of marriage] has abated quite a bit." Trial Tr. 30:14-19, ECF No. 228. Counsel's larger point *at the summary-judgment stage* was of course that his clients' entitlement to summary judgment did not depend on such matters, so it is hardly meaningful that he did not see fit to use the occasion to identify all the foreseeable potential harms.

Further, contrary to the district judge's suggestion in his opinion, there is no tension between counsel's statements at the summary-judgment hearing and petitioners' position in their trial brief. The district judge asserts that "proponents in their trial brief promised to 'demonstrate that redefining marriage to encompass same-sex relationships' *would effect* some twenty-three specific harmful consequences." Findings of Fact 9, ECF. No. 708 (emphasis added). But the "would effect" phrase, with its supposed certitude, is the district judge's

own invention. What petitioners actually say in their trial brief in the passage that the district judge clips from is:

> Although they are not required to do so [because they are entitled to judgment in any event], Proponents will further demonstrate that redefining marriage to encompass same-sex relationships *would very likely harm* [23 listed] interests.

Def.-Intervenors' Trial Mem. 8-9, ECF No. 295 (emphasis added).[6]

The probabilistic phrasing of "would very likely harm" is obviously completely compatible with counsel's epistemological modesty at the summary-judgment hearing as well as with his concern about "radical proposals for change, to a bedrock institution." Trial Tr. 24:2, ECF. No. 228. And the relevant question under the rational-basis review that the district judge purported to apply is (at most) merely whether it is reasonable to be concerned that same-sex marriage *might* have adverse consequences.

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[6] The district judge cites trial brief pages "13-14" in his Findings of Fact. The passage he quotes is actually on trial brief pages *numbered* 8 and 9, which, counting unnumbered pages, are the 13th and 14th pages of the document.

IV. THE DISTRICT JUDGE MADE AN EXTRAORDINARY SERIES OF ERRORS THAT BENEFITED PLAINTIFFS.

Beyond his broadcasting shenanigans, the district judge made a remarkable series of decisions, all of which were legally erroneous and all of which predictably operated to benefit plaintiffs and the ideological cause of same-sex marriage.

First: The district judge decided to have the parties proceed to factual discovery in a case that, to the extent that it involved any facts at all, involved *legislative* rather than *adjudicative* facts—facts that are the proper stuff of documentary submissions, not of live trial testimony. That decision surprised even plaintiffs' lawyers: When the district judge declared to plaintiffs' counsel at the case-management conference, "There certainly is some discovery that is going to be necessary here, isn't there?," plaintiffs' counsel offered this appropriately puzzled reply, "Well, I'm not sure. . . . Is there discovery necessary? If there is, what is it? What form would it take?" Proceedings Tr. 22:25-23:5, ECF. No. 78.

Second: Penalizing petitioners for defending a law that state officers irresponsibly refused to defend, the district judge authorized plaintiffs to undertake remarkably intrusive discovery into the *internal campaign communications* of Proposition 8's sponsors, discovery that was grossly underprotective of their First Amendment associational rights. The district judge's discovery order was overturned in substantial part by an extraordinary writ of mandamus issued by the Ninth Circuit, which

declared that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment" and that the discovery order "would have the practical effect of discouraging the exercise of First Amendment associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009) (as amended Jan. 4, 2010). But the portion of the district judge's order that survived enabled plaintiffs to conduct scorched-earth discovery. And the sweeping judicial invasion of the core political speech rights and associational rights of Proposition 8 supporters had the added effect of intimidating opponents of same-sex marriage from ever daring to exercise those rights again.

Third: The district judge decided to proceed to trial rather than to resolve the case on summary judgment, as nearly all other courts have done in similar cases. Even plaintiffs' counsel, Mr. Olson, acknowledged in his closing argument post-trial that "I thought we didn't need the trial" (even as he praised the trial, evidently for its public-relations impact, as "an enormously enriching and important undertaking"). Trial Tr. 2986:16-18, ECF No. 693; *see also id.* at 2983:23-24, (Mr. Olson's statement, "I believe that this case could be decided on whatever Mr. Cooper means by legislative facts . . . .").

Fourth: The district judge uncritically embraced those portions of the testimony of plaintiffs' experts that run contrary to centuries of understanding of what marriage is and what marriage is for—and he neglected their concessions. *See, e.g.*, *Perry*, No. 10-16696, Opening Br. 38-43, 51-

61, 85-93, ECF No. 21. The trusting reader would have no idea from the district judge's opinion how deeply invested plaintiffs' experts are in the cause of same-sex marriage and how many of them would directly benefit from the very ruling they were testifying in support of.[7] We do not mean to suggest

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[7] Here is some information on the bias of plaintiffs' experts:

Gregory Herek is a former president of the Association of Lesbian and Gay Psychologists, *see* Pls.' Ex. 2326 at 2, Trial Tr. 2021, ECF No. 525, and he and his same-sex partner are registered domestic partners in California (according to California domestic partnership records produced in discovery by California's Secretary of State). On his blog Beyond Homophobia, he advocated for same-sex marriage and against Proposition 8. *See, e.g.*, Gregory Herek, *Field Poll: Proposition 8 May Have a Photo Finish*, Beyond Homophobia, http://www.beyondhomophobia.com/blog/2008/10/31/field-poll-toss-up (last visited Jan. 17, 2013).

Gary Segura contributed money to the campaign against Proposition 8. Trial Tr. 1657:17-19, ECF No. 507. He has emphasized the personal financial interest that he and other gays in California have in same-sex marriage: "Gays not being able to get married costs a ton, as I can attest, because what you can do for a $15 marriage license cost me thousands of dollars." *See Presidential Politics: Lecture 5* (Stanford University lecture Nov. 10, 2008, uploaded Nov. 12, 2008), http://www.youtube.com/watch?v=KVAus_2hk4A (starting at 1:39:30); *see also* Findings of Fact 70, ECF No. 708 (stating that "[m]aterial benefits . . . resulting from marriage can increase wealth").

Lee Badgett is a lesbian and is party to a same-sex marriage. M.V. Lee Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* x (2009). She contributed money to the campaign against Proposition 8, Trial Tr. 1370:21-23, ECF No. 506, and has written a book, *When Gay People Get Married*, advocating same-sex marriage.

that those facts suffice to discredit their testimony. But a sober factfinder would consider a witness's partiality in assessing the witness's testimony.

Fifth: The district judge suffered from the deeply confused belief that the live trial testimony on matters of legislative fact had an exclusive, or highly

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She was awarded a fellowship for persons "engaged in advocacy work focused on LGBTQ equality and liberation." *See* M.V. Lee Badgett, Curriculum Vitae 12, http://works.bepress.com/lee_badgett/cv.pdf (last visited Jan. 17, 2013); Rockwood Leadership Institute, *Fellowship for Lesbian, Gay, Bisexual, Transgender and Queer Advocacy,* http://www.rockwoodfund.org/article.php?id=183 (last visited Jan. 17, 2013). The *Advocate* magazine ("The World's Leading Gay News Source") named her "one of our best and brightest activists." Badgett, Curriculum Vitae 12, http://works.bepress.com/lee_badgett/ cv.pdf (last visited Jan. 17, 2013).

George Chauncey, chair of Yale University's LGBT studies program, is gay and has been in a long-term same-sex relationship. *See* George Chauncey, *Why Marriage?* 169 (2004). His book *Why Marriage?* advocates same-sex marriage. *Id.* at 1-169.

Ilan Meyer describes himself as "a gay affirmative advocate." Trial Tr. 891:18-22, ECF No. 464. He contributed money to the campaign against Proposition 8. *See id.* at 891:24-892:1.

Nancy Cott has called herself "somewhat between a neutral party and an advocate." *See* Trial Tr. 255:15-16, ECF No. 453. She has donated her time and money to fighting traditional marriage. *See id.* at 256; Alternatives to Marriage Project, *2002 Annual Report* 13 (2002), http://www.unmarried.org/annual-reports.html (last visited Jan. 17, 2013). She joined amicus briefs supporting same-sex marriage in cases in the New York, New Jersey, and Washington courts. *See* Trial Tr. 255-256, ECF No. 453.

privileged, claim on his consideration. That misunderstanding is most sharply captured in his comment (presented in fuller context above), "I don't mean to be flip, but Blackstone didn't testify. Kingsley Davis didn't testify. What *testimony* in this case supports the proposition [that society has a procreative interest in marriage]?" Trial Tr. 3039:16-18, ECF No. 693 (emphasis added). The district judge's question—"What *testimony* in this case supports the proposition?"—wasn't just flip. It was obtuse. Even if one indulges the mistaken assumption that there was any need for a trial in the case, live witness testimony is merely one form of trial evidence. Exhibits submitted in evidence at trial are another form. And a judge is of course free to, and expected to, take judicial notice of various factual matters.

Sixth: While little more need be said here about the district judge's many unsupported or highly contestable factual findings or about his attempt to insulate them from review by mischaracterizing the record and treating them as though they were adjudicative facts, it is worth highlighting that some of the district judge's pivotal purported "findings of fact" are not factual findings at all but rather the district judge's (highly contestable) *predictions*. Take, for example, purported finding of fact 55: "Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." Findings of Fact 83-84, ECF No. 708. Apart from the fact (discussed above) that the certitude of this prediction is not supported by

plaintiffs' own experts, this is plainly a matter on which reasonable people can and do hold a broad range of forecasts and is the very stuff of policymaking.

Seventh: The district judge denied petitioners' motion for a stay of his judgment pending appeal. Order 10-11, ECF No. 727. As the district judge well understood, immediate implementation of his radical ruling would have dramatically altered the status quo on marriage in California before any court had the opportunity to review his manifest errors. The Ninth Circuit properly stayed the district judge's judgment—the remarkable third time that one of his rulings in this case was reversed. *Perry*, No. 10-16696, Order 1-2, ECF No. 14.

V. THE JUDGE WHO WROTE THE NINTH CIRCUIT OPINION SHOULD HAVE DISQUALIFIED HIMSELF FROM TAKING PART IN THE MATTER BECAUSE OF HIS WIFE'S INVOLVEMENT IN THE CASE.

When he was assigned to the Ninth Circuit panel in this case in late 2010, Judge Stephen Reinhardt had been married for some two decades to Ramona Ripston. *See Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011) (memorandum of Judge Reinhardt regarding motion to disqualify). Ms. Ripston was the longtime Executive Director of the ACLU of Southern California ("ACLU/SC").[8] *See id.*

[8] Ms. Ripston retired as Executive Director in February 2011, *id.*, (after the actions that provide the basis for Judge

In that capacity, she was "responsible for all phases of the organization's programs, including litigation." *See* ACLU/SC, *Ramona Ripston*, http://www.aclu-sc.org/about/bios/ramona-ripston/ (last visited Jan. 17, 2013). Under her leadership, ACLU/SC took "a lead role" in what it called "the fight to end marriage discrimination" in California. ACLU/SC, *2007-2008 Annual Report*, 24, http://www.aclu-sc.org/annual-report-directory/2007-2008/ (last visited Jan. 17, 2013).

Before filing the lawsuit in this very case, plaintiffs' lawyers engaged in "confidential discussions" with Ms. Ripston in an apparent effort to win her support for their strategy. *See* Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, California Lawyer (Jan. 2010), http://www.callawyer.com/clstory.cfm?pubdt=201001&eid=906575&evid=1. Under Ms. Ripston's direction, ACLU/SC was actively involved *in this very case*. It represented, as counsel in the district court, amici urging the court to decide the case in favor of plaintiffs and to rule that Proposition 8 is unconstitutional. Indeed, its briefs were devoted entirely to the same narrower theory of Proposition 8's purported constitutional validity that Judge Reinhardt ultimately adopted in his divided opinion for the Ninth Circuit panel. *See* Br. of Amici Curiae Am. Civil Liberties Union et al., ECF No. 62.;

Reinhardt's disqualification). She remains affiliated with the ACLU of Southern California: the organization's 2012 annual report identifies her as its "Executive Director Emeritus." ACLU/SC, *Annual Report 2011-2012* (2012), http://www.aclu-sc.org/annual-report-directory/annual-report-2011-2012/ (last visited Jan 17, 2013).

Br. of Amici Curiae Am. Civil Liberties Union et al., ECF No. 552.

When the district court issued its ruling against Proposition 8, the ACLU/SC issued a public statement praising the decision and emphasizing that it had "filed two friend-of-the-court briefs in the case supporting the argument that Proposition 8 is unconstitutional." ACLU/SC, *ACLU Hails Historic Decision and Urges Efforts in Other States to Ensure Success on Appeal* (August 4, 2010), http://www.aclu-sc.org/releases/view/103036. The press release quoted Ms. Ripston as "rejoic[ing]" in the decision striking down Proposition 8 and as asserting that it "affirms that in America we don't treat people differently based on their sexual orientation." *Id.* At the same time, Ms. Ripston stated that the district court's ruling was not the end of the matter, emphasizing that "it's a long road ahead until final victory." *Id.*

When petitioners moved to disqualify Judge Reinhardt, he immediately denied the motion. One month later, he issued an opinion that sought to justify his denial. *See Perry*, 630 F.3d at 911-916. But that opinion is an unpersuasive exercise in obfuscation and distortion, misrepresenting or omitting inconvenient points.[9] For example, nowhere in his opinion did Judge Reinhardt acknowledge that Ms. Ripston publicly celebrated ("rejoice[d]" over) the district-court ruling against Proposition 8—the very ruling under review in the Ninth Circuit. When Judge Reinhardt did acknowledge unwelcome facts,

[9] We address the defects of Judge Reinhardt's opinion more fully at www.EPPC.org/ReinhardtDisqual.

he raced to minimize them. Somehow he found it significant to point out that the amicus briefs that Ms. Ripston's organization submitted were filed "by six civil rights organizations and signed by the lawyer for one of the other groups," that they were "among twenty-four amicus briefs filed in the district court on behalf of 122 organizations and private individuals," and that the district judge did not cite the briefs in his ruling. *Id.* at 914.

Judge Reinhardt determined that 28 U.S.C. § 455(a), which requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," simply did not come into play because "none of § 455(b)(5)'s criteria for recusal based on a family member's involvement in a case applies here." 630 F.3d at 915. His determination rested on his expansive reading of a brief passage in the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540, 553 (1994). *See* 630 F.3d at 915. But, as we will show, that expansive reading is inconsistent with the reasoning of *Liteky* itself. It is also a reading that all five members of the *Liteky* majority contemporaneously rejected. 510 U.S. at 552-55. And the Judicial Conference of the United States, in its Code of Conduct for United States Judges (which closely tracks section 455), has also rejected that reading.

At issue in *Liteky* was the interplay between section 455(a) and section 455(b)(1), which provides that a judge shall recuse himself where "he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). It had long been settled that section 455(b)(1) is limited by what is called the

"extrajudicial source" doctrine. As the *Liteky* majority explained, under that doctrine a judge need not recuse himself under 455(b)(1) for bias or prejudice "properly and necessarily acquired in the course of" a trial (as, for example, from dealing with a defendant who "has been shown to be a thoroughly reprehensible person"). 510 U.S. at 550-551. The defendants in *Liteky* had moved to disqualify the trial judge under section 455(a) for allegedly biased behavior, all of which involved routine judicial proceedings, and the question for the Court was whether section 455(a) was also limited by the extrajudicial-source doctrine. All nine justices agreed that it was, but they divided 5-4 on their reasoning.

The majority opinion in *Liteky* (in a passage that Judge Reinhardt quotes from) states:

> As we have described, § 455(a) expands the protection of § 455(b), but duplicates some of its protection as well—not only with regard to bias and prejudice but also with regard to interest and relationship. Within the area of overlap, it is unreasonable to interpret § 455(a) (unless the language *requires* it) as implicitly eliminating a limitation explicitly set forth in § 455(b). It would obviously be wrong, for example, to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge. Section 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the *third* degree of relationship, and that should

> obviously govern for purposes of § 455(a) as well.

510 U.S. at 552-553 (emphasis in original).

Judge Reinhardt read the four subparts of section 455(b)(5) as setting forth an *exhaustive* list—an explicit "limitation," within the meaning of *Liteky*—of the circumstances in which a relative's involvement in a proceeding requires the judge's recusal. Based on that reading (and on what he saw as the absence of any "special factors or unforeseeable circumstances"), he concluded that petitioners have no available claim for disqualification under section 455(a). 630 F.3d at 915-916.

Judge Reinhardt's reasoning is badly flawed. The *Liteky* discussion that he relied on is limited to a situation in which *all* of the allegedly disqualifying conduct was within the scope of 455(b)(1). Thus, for example, when the Court states that it "would obviously be wrong . . . to hold that 'impartiality could reasonably be questioned' *simply because* one of the parties is in the fourth degree of relationship to the judge," 510 U.S. at 553 (emphasis added), it is clearly leaving open the possibility that other facts, *in combination with*, say, a distant relative's "acting as a lawyer in the proceeding," § 455(b)(5)(ii), could require disqualification under section 455(a).

Here, similarly, petitioners presented a slew of facts beyond Ms. Ripston's alleged "interest" under section 455(b)(5)(iii)—e.g., her public celebration of Judge Walker's ruling, her confidential consultation

with plaintiffs' counsel, and her organization's self-proclaimed "lead role" in combating Proposition 8. The totality of those facts, in combination with the facts alleging giving rise to Ms. Ripston's "interest," must therefore be addressed under section 455(a).

It is noteworthy, moreover, that on November 1, 1993—two days before the oral argument in *Liteky*—seven justices of the Supreme Court, including all five members of the *Liteky* majority, issued a joint Statement of Recusal Policy that expressly reasons that section 455(a) remains available as a "less specific" basis of recusal when a relative covered by 455(b)(5) previously acted, but is no longer acting, as a lawyer in the proceeding. In other words, these justices determined that section 455(a) continues to apply even when all of the allegedly disqualifying conduct is addressed by a subpart of 455(b)(5). Supreme Court of the United States, *Statement of Recusal Policy* (Nov. 1, 1993), http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf.

In *Liteky*, neither the majority opinion nor the opinion concurring in the judgment (which disagreed with the majority's discussion of the interplay of 455(a) and 455(b) opinion) argued that there was any tension between the *Liteky* holding and the Statement of Recusal Policy. Nor has that Statement of Recusal Policy been modified in the intervening years.

The Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, has a disqualification provision—Canon 3C—

that is virtually identical to section 455. The Judicial Conference's official commentary on Canon 3C(1)(d)(ii)—a provision that parallels section 455(b)(5)—expressly states that even if conduct falling under that subpart does not require disqualification, disqualification might separately be required under the 455(a) analogue "if 'the judge's impartiality might reasonably be questioned.'" United States Courts, *Code of Conduct for United States Judges* Canon 3 (June 30, 2009), http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx. The Committee on Codes of Conduct, in an opinion as recent as June 2009, cites that commentary. *See* Committee on Codes of Conduct, *Advisory Opinion No. 38*, 38-1 (June 2009), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf. In the nearly two decades since *Liteky*, the Judicial Conference has never determined that *Liteky* requires a different conclusion.

In sum, there was no sound basis for Judge Reinhardt's refusal to disqualify himself.

VI. THE DISTRICT JUDGE'S FAILURE TO DISCLOSE THAT HE WAS IN THE MIDST OF A LONG-TERM SAME-SEX RELATIONSHIP IMPROPERLY DEPRIVED THE PARTIES OF THE OPPORTUNITY TO MOVE FOR HIS DISQUALIFICATION.

In April 2011, nearly two years after the complaint in this case was filed, eight months after he issued his final judgment, and weeks after his

retirement from the bench, former judge Walker publicly disclosed for the first time that he was in a decade-long same-sex relationship. The complaint in the case sought a permanent injunction against all enforcement of Prop. 8. J.A. 72. Former judge Walker is a longtime resident of California. By taking part in the case, then-judge Walker was thus deciding whether Proposition 8 would bar him and his same-sex partner from marrying.

Had Judge Walker disclosed at the outset of the case that he was in a longstanding same-sex relationship, petitioners would have had a compelling case for his disqualification under 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Whether Judge Walker had any interest in marrying his same-sex partner is immaterial under the objective standard of section 455(a). But if Judge Walker had such an interest, he would also have faced disqualification under 28 U.S.C. § 455(b)(4) (judge must disqualify himself when he knows that he has a non-financial "interest that could be substantially affected by the outcome of the proceeding").

Judge Walker had a legal duty to disclose all the relevant facts bearing on the question of disqualification. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988) (federal judges have a duty to "carefully examine possible grounds for disqualification and to promptly disclose them when discovered"). He failed to carry out that duty.

We will not attempt to recapitulate here, but will instead incorporate by reference, the extensive arguments made by petitioners in support of their April 2011 motion to vacate the district-court judgment and in their Ninth Circuit appeal of the denial of that motion. Def.-Intervenors Mot. To Vacate J. 1-18, ECF. No. 768; *Perry*, No. 10-16696, Opening Br. 1-113, ECF No. 21. Among other things, those arguments answer the red-herring objection that recognition of Judge Walker's obligation to disqualify himself would somehow broadly require that a judge of a particular ethnicity, national origin, gender, or sexual orientation not decide any case involving those issues. Here, Judge Walker was deciding whether or not he had a legal right on a matter that a reasonable person would think was very important to him personally—a right that he may well have had (undisclosed) interests, financial or otherwise, in exercising. His duty to disqualify flows directly from section 455(a) and possibly (depending on information that Judge Walker failed to disclose) from section 455(b)(4) as well, and it does not imply broader disqualification obligations for other judges in different circumstances.

CONCLUSION

The metaphor of judges as umpires succinctly captures the judicial duty of impartiality. It is thus quite telling that, in an article obviously written to justify his remarkable course of misconduct in this case, former judge Walker contests this use of the metaphor. Rather, he contends, what judges "must do" is "take account of the pitcher and the batter in the legal arena, watch the windup, the throw, the

curve, and the delivery and then, *where they believe appropriate, move the strike zone*." Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. Ill. L. Rev. 1207, 1223 (2012) (emphasis added). Former judge Walker's mistaken extension of the umpire metaphor speaks volumes about his deliberate mishandling of this case, even as it dramatically understates the one-sided measures that he and Judge Reinhardt took to deliver a victory for the party they favored.

The judgment below should be reversed or, in the alternative, both the appellate judgment and the judgment of the district court should be vacated.

Respectfully submitted,

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