

No. 19-1224

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH F. MANNING,

Petitioner,

v.

LUCY J. KIM,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of California

SUPPLEMENTAL BRIEF

JEREMIAH F. MANNING
Pro Se Petitioner
781 Encina Grande Drive
Palo Alto, CA 94306
(917) 742-6157

QUESTIONS PRESENTED

I. The public record shows that Judge Susan Greenberg of the California Superior Court of San Mateo County accepted campaign contributions from Respondent's attorneys well in excess of the statutory limit (\$1500) that required her disqualification and she declined to recuse herself and failed to disclose this to Petitioner for over a year thereby depriving him of the exercise of his peremptory challenge as provided to him by California law, and then refused to recuse herself upon motion, instead striking Petitioner's disqualification motion and later entering judgment on child custody against Petitioner. The question presented is whether Judge Greenberg's refusal to recuse herself and failure to timely and accurately disclose the campaign contributions to the Petitioner violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

II. The record also shows that Judge Greenberg accepted campaign contributions from Respondent's attorneys well in excess of the \$100 that under California law required Judge Greenberg to timely and accurately disclose them, and that Judge Greenberg failed to disclose them for over a year in contravention of said statute while making ruling after ruling against Petitioner, including rulings involving the fundamental Constitutional rights to an attorney and cross-examination, and then made an incomplete, inaccurate and misleading disclosure after the child custody phase of trial had been completed and subsequent to her almost contemporaneous recusal of herself for the same reason in a similar matter also involving child custody. The question presented is whether Judge Greenberg's failure to recuse herself where she had accepted excessive campaign contributions and failed to disclose them as required by law, but did contemporaneously recuse herself in a similar matter where both parties were represented by counsel, violated the Fourteenth Amendment.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

There are no additional parties to this case other than those named in the caption, and neither party is a non-governmental corporation for which disclosure is required as specified in Rule 29.6.

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SUPPLEMENTAL BRIEF

Petitioner Jeremiah F. Manning respectfully submits this supplemental brief in support of his petition for a writ of certiorari to review the judgment of the Supreme Court of California.

OPINION/REVIEW BELOW

The denial of Petitioner's Petition for Review by the Supreme Court of California was ordered on June 26, 2019. Pet. App. A27. The Opinion of the California Court of Appeals for the First District dated April 10, 2019 is available in the Appendix. Pet. App. A2. The Court of Appeals denied Petitioner's Rehearing Petition on April 30, 2019. Pet. App. A25. Judge Greenberg's September 16, 2016 Judgment is available in the Appendix. Pet. App. A29. Petitioner includes his motion to disqualify Judge Greenberg and his Rehearing Petition to demonstrate that the Constitutional issues raised herein were raised below and for the arguments and information contained therein. Pet. App. A86 and A109, respectively.

JURISDICTION

The Supreme Court of California entered its denial of Petitioner's Petition for Review on June 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Over the last three months, during a period of unprecedented social upheaval brought on by the CoVid-19 pandemic, this Court decided three cases that addressed core elements of our Anglo-American legal system, including the right to an impartial jury/factfinder, and the right to fair and full appellate review that is guided by the parties' framing and presentation of issues. These decisions unquestionably serve to reinforce and inspire confidence in the fundamental fairness of, and confidence in, our legal system.

Petitioner's case here at bar is a similarly important case, and seeks to strengthen and inspire confidence and trust in the fundamental fairness of the state trial and appellate courts in

California, a state with the 6th largest economy in the world. This case moreover has vitally important implications for the administration of justice and appellate review throughout our 50 United States.

Petitioner seeks certiorari to vindicate a core tenet of the Anglo-American system of justice: the right to an impartial judge. Petitioner's case involves a family going through a divorce, and concerns the right of children and parents across the United States to have their custody issues decided by a neutral state court judge in compliance with bedrock Constitutional protections. With the current wave of divorces anticipated due to the pandemic, it is also more important than ever that families have the

assurance that their state court judges will be impartial and free from bias or the appearance of conflict. *See, e.g.* “*Law Firms Predict Post-Pandemic Divorce Rate Spike*,” May 11, 2020, Humboldt Journal.

Since 1982, California’s statutory scheme for ensuring impartial judges and remedying judicial conflicts has afforded litigants the right to a judicial peremptory challenge. This right must be exercised soon after the Judge comes on the case, but in no event after the beginning of trial. Interwoven with this peremptory challenge right is the more recent requirement (also codified in law) that all California Superior Court trial judges disclose to the parties any campaign contributions over \$100 that are made by counsel in a particular matter.

But what if the trial judge does not disclose campaign contributions by opposing counsel, as she is required to do, and instead continues presiding through pre-trial practice and the trial itself, thereby foreclosing a party's peremptory challenge right?

This is exactly what happened in the case at bar. Here, the clear law of California required the judge, Hon. Susan Greenberg, to recuse herself because she accepted campaign contributions from one party's attorneys, and not the other's, in excess of the state statutory amount that triggered disqualification. Significant for this Court's Fourteenth Amendment review, Judge Greenberg did not advise the Petitioner of the campaign contributions given to her by opposing counsel until after trial was well

underway, even though she was required by law to do so. This both denied Petitioner the right to an impartial judge in the first instance, and because of Judge Greenberg's disclosure delay, precluded Petitioner from exercising his peremptory challenge and bringing a successful writ or other appeal prior to trial so that he could have this error reviewed. By withholding this information until past the commencement of trial, Judge Greenberg foreclosed any successful writ or other appeal because California law does not permit litigants to utilize their peremptory challenge right after trial has begun. As a result of Judge Greenberg's conduct, Petitioner was deprived of his California state right to peremptory challenge in violation of the

due process and equal protection clauses of the Fourteenth Amendment.

To add insult to injury, neither the California Supreme Court nor the lower appellate court addressed these Federal Constitutional deprivations, even though Petitioner raised the issue with precision in a timely manner and gave each court ample opportunity to do so. The appellate courts of California simply refused to entertain Petitioner's arguments about his Fourteenth Amendment rights in any manner, and clearly did not make a "plain statement" regarding this issue that would necessitate denial of this writ, if such a statement rested on adequate and independent state grounds (whether substantive or procedural).

As this Court described in *Ramos v. Louisiana*, 590 U.S. ___ (2020), the

right to an impartial jury is clearly embedded in the United States Constitution. And, as described further in Petitioner's Petition, this Court has time and time again held that all parties are entitled to an impartial trial judge/factfinder and it is a Constitutional defect if this basic requirement is not met. Pet. at 3-4.

Moreover, as this Court has recently held in *Davis v. United States*, 589 U.S. __ (2020), appellate courts must not ignore, but instead must address a Petitioner's arguments. This principle is even more crucial where fundamental due process and equal protection rights are denied at the trial level, such as in this case.

And most recently, in *United States v. Sineneng-Smith*, 590 U.S. __ (2020), this Court again reinforced the

principle that to be constitutionally-valid, appellate review must abide by fundamental due process rules.

Petitioner submits this supplemental brief to share with the Court the applicability of these recent cases to the case at hand, and to highlight the constitutional defects present in this case. Granting this writ will both enable this Court to reinforce the Constitutional requirement for an independent and impartial trial judge/factfinder, and to make clear that constitutionally-valid appellate review is the law of the land and must be conducted in accord with constitutional principles, regardless of whether the appellate review is conducted by a Federal or state appellate court. It will also give this Court an opportunity to assure all those families and parties

who are going through divorce that they should have confidence that their trial court judges will follow the law in their states by disclosing conflicts of interest in a timely manner in accord with the law, and by recusing themselves when legally-required.

SUMMARY OF THE ARGUMENT

Petitioner's argument is that this Court should grant certiorari in this case because, like in *Davis*, Petitioner has been denied appellate review of issues he raised. Here, the lower appellate court in California did not address his Federal Constitutional claims, and clearly did not make a "plain statement" that its decision rested on a state procedural bar to those claims. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *Harris v. Reed*,

489 U.S. 255, 261 n.7 (1989) (collecting cases); *Coleman v. Thompson*, 501 U.S. 722 (1991). Instead, as was the case in *Davis*, the lower appellate court simply elected to ignore Petitioner's Federal Constitutional arguments. The California Supreme Court then declined to review this case, and thus the lower appellate court's decision is the only appellate decision in this case where we can look for a "plain statement" that Petitioner's Federal Constitutional claims were expressly precluded by California state law. There is no such plain statement in the lower court's opinion, and should this Court extend *Davis* to this defective state court appellate review, as Petitioner requests, the result is clear: the

failure to review the denial of a state peremptory challenge ought to be remedied. For these reasons, Petitioner respectfully requests that this Court grant certiorari, and either hear this case now or vacate the judgment as it did in *Davis*, and remand to the California Supreme Court, directing it to consider and provide appropriate appellate review of Petitioner's case and his Federal Constitutional arguments.

ARGUMENT

In the years since *Long*, this Court has required a "plain statement" of adequate and independent state grounds by the lower state court in order to deny a writ of certiorari. *Long*, 463 U.S. 1032 (1983). In *Ake v. Oklahoma*, 470 U.S. 68 (1986), this

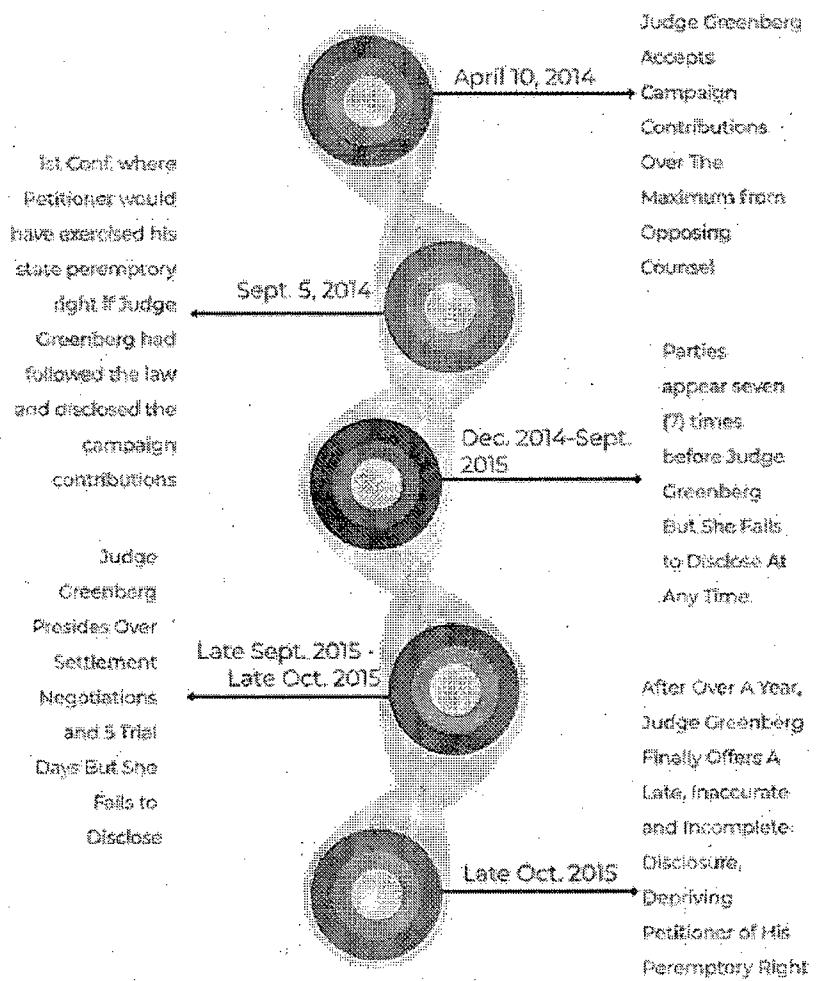
Court recognized that a state ground that rests on a Federal Constitutional ruling cannot be independent. *Ake*, at 75, citing *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 243 U.S. 164 (1917) (“But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain”).

The failure of Judge Greenberg to timely disclose her acceptance of campaign contributions in an amount that required her recusal makes the state law necessarily interwoven with Federal Constitutional questions. By failing to follow the clear law on disclosure, Judge Greenberg was, *de jure, not impartial*, and Petitioner was

therefore denied Federal Constitutional protection in the first instance. And this defect persisted, and merged with other violations of law, dating from when Judge Greenberg failed to disclose the campaign contributions at the first status conference in September 2014 through the trial over one year later in October 2015. It pervaded every aspect of the proceedings and resulted in the denial of a state peremptory challenge right. As a result, this defect is so “interwoven” with state procedural law that this violation cannot be independent.

In the figure on the next page, Petitioner displays graphically for the Court the length of time that this condition persisted during pre-trial proceedings and trial.

Judge Greenberg's Failure to Disclose Campaign Contributions Despite Numerous Opportunities Deprived Petitioner of California State Peremptory Right



As set forth in Petitioner's Appendix F, by failing to disclose the campaign contributions at the "earliest reasonable opportunity", Judge Greenberg violated several provisions of California state law, including California Code of Civil Procedure § 170.1, § 84211 of the California Government Code, and Canon 3E of the California Code of Judicial Ethics, which is codified in the California Code of Civil Procedure at § 170.1(a)(9)(D). California Code of Civil Procedure at § 170.1(a)(9)(D). Pet. App. at 124-145. These violations deprived Petitioner of Federal Constitutional due process and equal protection guarantees because as Judge Greenberg she secreted and withheld information crucial information that was essential to the

exercise of Petitioner's state peremptory challenge right. Starkly, only the Petitioner was in the dark, as both the Judge and opposing counsel knew that campaign contributions had been made and Petitioner's rights had been and were being violated.

Both the lower appellate court and the California Supreme Court refused to address or discuss these or any Federal Constitutional questions in their decisions. Petitioner respectfully submits that under *Davis*, *Ramos* and *Sineneng-Smith*, this represents grave constitutional error that requires reversal and remand because of the egregious nature of the constitutional violations and failure of the California appellate courts to consider Petitioner's Federal Constitutional arguments.

I. THE CALIFORNIA SUPREME COURT'S REFUSAL TO ADDRESS PETITIONER'S FEDERAL CONSTITUTIONAL ARGUMENTS CONFLICTS WITH THIS COURT'S DECISIONS IN *DAVIS* AND *SINENENG-SMITH*

In its *Davis* and *Sineneng-Smith* decisions, this Court held that Federal appellate courts cannot simply ignore the arguments of a party that they find inconvenient (*Davis*), or invent arguments to suit the court's agenda (*Sineneng-Smith*). Rather, an appellate court must address the arguments presented by the parties, and not unduly limit or enlarge the scope of the parties' arguments.

In *Davis*, this Court vacated a Fifth Circuit judgment where that Court “refused to entertain” the Petitioner’s arguments at all. *Davis*, at

2. Reinforcing a bedrock rule of appellate jurisprudence, this Court noted that every other Court of Appeals in the country would consider Petitioner’s arguments, whether they were of a factual or legal nature.

Id. (citing cases). In conclusion, this Court made clear that the Fifth Circuit’s failure to conduct such an appellate review was an “outlier practice.”

While there is no question that *Davis* concerned a criminal matter, within a statutory framework, before a Federal Circuit Court of Appeals, Petitioner asks this Court to apply the rule to this case.

Although a constitutional right to appeal does not exist, this Court has repeatedly made clear over the years that it will grant certiorari where a party argues during a state appeal that Federal Constitutional issues are at stake and the lower courts refuse or decline to address the Federal issues.

Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934); *Williams v. Kaiser*, 323 U.S. 471, 477 (1945); *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Wood v. Chesborough*, 228 U.S. 672, 676-80 (1913). More recently, this Court has required the lower state court to make a "plain statement" of adequate and independent state grounds. *Long*, at 1037-1042.

In the case at bar, the Supreme Court of California and the lower California appellate court have engaged in an “outlier practice” by refusing to even consider or address Petitioner’s Federal Constitutional arguments. As this Court noted, in *Davis* there was “no legal basis” for the Fifth Circuit to decline to consider the Petitioner’s arguments. *Davis*, at 3. Such is also the case at bar.

In *Sineneng-Smith*, this Court vacated and remanded the Ninth Circuit’s appellate decision where that Court, in contrast with the Fifth Circuit in *Davis*, impermissibly enlarged (as opposed to impermissibly limiting) its appellate review. Again without legal basis, the Ninth Circuit disregarded the arguments of Petitioner Evelyn Sineneng-Smith, and instead sought to

create new arguments for her by appointing a committee of *amicus curiae* to birth new issues. *Sineneng-Smith*, at 6-8. Since Ms. Sineneng-Smith had originally raised issues relating to Federal Constitutional rights, this Court intervened to correct the error and vacated and remanded the judgment. *Id.* at 8.

While *Sineneng-Smith*, like *Davis*, can also be distinguished as a case arising in Federal court, in both cases this Court reiterated the same basic principle: where Federal issues are argued, this Court will intervene. *Davis*, at 1; *Sineneng-Smith*, at 9; See also *Long*, at 1037.

Because he has raised Federal issues and Constitutional arguments as set forth in detail in Appendix F, Petitioner respectfully requests that

this Court also intervene in this case and grant certiorari. Pet. App. A139-A145.

II. AS IN *RAMOS*, THE CONSTITUTIONAL ARGUMENTS PRESENTED BY PETITIONER RAISE FUNDAMENTAL CONSTITUTIONAL ISSUES THAT OUGHT TO RECEIVE SUITABLE AND APPROPRIATE APPELLATE REVIEW

In *Ramos*, this Court has very recently reinforced the principle that an accused in a criminal trial must be tried by an impartial jury, and after cogent hermeneutical analysis, held that the words “impartial jury” mean a

unanimous jury. *Ramos*, at 4-7. In making its ruling, this Court made clear that the right to an impartial, unanimous jury had been made manifest since the dawn of our democracy, but it is only now after the *Ramos* decision that it will be fully and completely implemented in each of our 50 states.

Similarly, if one examines this history of this Court's rulings on impartial factfinders, the right to an impartial judge has also been emphasized by this Court for many, many years, and the lack of an impartial judge has been held to be a *prima facie* Federal Constitutional violation. *Ward v. Village of Monroeville*, 409 U.S. 47 (1972); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Mistretta v. United States*, 488

U.S. 361, 407 (1989); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

Such a fundamental *prima facie* Federal Constitutional violation exists in the case at bar. As set forth in the Petition and in this Supplemental Brief, Judge Greenberg committed violations of law that deprived Petitioner of an impartial judge in the first instance.

Pet. at 1-33; Pet. Supplemental Brief at 17. Moreover, Judge Greenberg made rulings on key fundamental issues, including the constitutional right to attorneys' fees and the constitutional right to full and fair cross-examination that always went against Petitioner.

Pet. at 1-33. While the lower appellate California court never addressed the denial of Petitioner's right to cross-examination, it sought to wash the attorneys' fees violations away with a

repeated statement that Petitioner should have appealed using a writ procedure during trial. Pet. App. A12-A14.

However, the lower court refused to entertain the Federal Constitutional argument that Petitioner was denied his state peremptory challenge right. Petitioner did not have the information required to appeal or otherwise challenge, prior to the commencement of trial, the *prima facie* violation of impartiality that had existed since the point Judge Greenberg came on the case. This was critical because that state peremptory challenge right is extinguished early in the proceedings and not after trial has commenced. Pet. App. A134 (referring to California Code of Civil Procedure §170.6(a)(2)).

Instead, the lower court limited its decision to whether the striking of a statement of disqualification was appealable by writ. Pet. App. A15.

Because the *prima facie* violation of impartiality present in this case is such a core constitutional violation that pervaded the proceedings, because it denied Petitioner his state right to peremptory challenge that is afforded all other California litigants, and because these constitutional right violations were interwoven with the denial of other bedrock constitutional rights to attorneys' fees and cross-examination, Petitioner requests that the Court grant certiorari to address and remedy these denials of core constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the judgment vacated and the matter remanded to the California Supreme Court for further proceedings and consideration of Petitioner's Federal Constitutional arguments, or the case accepted for review on the merits by this Court.

Respectfully submitted,

JEREMIAH F. MANNING
Pro Se Petitioner
781 Encina Grande Drive
Palo Alto, CA 94306
(917) 742-6157

May 14, 2020