PROOF VS. PREJUDICE

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We trust courts to resolve disputes over everything from whether the light was red to whether children experience better educational outcomes in diverse classrooms. As a general matter, such disputes are resolved through hard-fought adversarial testing of an evidentiary record because the American judicial system is premised on the assumption that such testing is the most effective means of reaching the truth. Nowhere is this premise more evident than in cases like those about marriage between same-sex couples, cases that inherently touch on beliefs about the nature of human identity, value judgments about human psychology and behavior, and what is in the best interest for children. Moreover, each of these is a topic on which most people, including most judges, have long-held views that (consciously or not) are based on their own personal experiences. For this reason, a careful, thorough evidentiary record, subject to cross-examination, is particularly important to help assure that a court's decision will not be grounded on assumptions or prejudice. *Perry v. Brown* exemplifies this. In *Perry*, the opponents of Proposition 8 put forward testimony from eight lay witnesses and nine expert witnesses, which the court credited extensively in its analysis.[1] The Proposition 8 proponents, on the other hand, were able to offer only two trial witnesses to support their position that the statute had rationally furthered a legitimate governmental objective.[2]

Guided in part by the record in *Perry*, in representing Edith ("Edie") Windsor in her challenge to the federal Defense of Marriage Act ("DOMA") in the Southern District of New York, we focused on amassing the best evidence for our client. In connection with expert discovery, we put forth affidavits from five experts, many of whom overlapped with the experts in *Perry*, each of whom was then subject to deposition. Each expert offered competent expert testimony concerning the factors that courts evaluate in applying heightened judicial scrutiny under equal protection analysis or whether the discrimination at issue in

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1. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 938-944 (N.D. Cal. 2010), *aff'd sub nom*. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

2. *Id.* at 944-45. One of those two witnesses was David Blankenhorn, who has since changed his position, stating in a *New York Time*s op-ed "that the time for denigrating or stigmatizing same-sex relationships is over" and that "the time has come for me to accept gay marriage and emphasize the good that it can do." David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012) http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html.

this case passes constitutional muster; their academic disciplines ranged from adult and child psychology and social psychology to history and political science.

By contrast, the Bipartisan Legal Advisory Group ("BLAG"), which is defending DOMA, offered no affirmative witnesses at all. Thus, the evidentiary record in *Windsor* was devoid of any admissible evidence of several points BLAG hoped to prove: that gays and lesbians are not as effective at parenting as straight people; that there is some advantage to children to being raised by a male and female biological parent; that homosexuality is a choice; and that gays and lesbians have meaningful political power. Although the court's scheduling order gave BLAG a full and fair opportunity to submit testimony or other competent evidence to support its assertions, it elected not to do so.

Both parties in *Windsor* moved for summary judgment and, under court rules, we and BLAG were required to submit statements of the undisputed facts in support of our motions. Because they had offered no witnesses, BLAG was faced with the unsavory prospect of relying on a record overwhelmingly against it. Instead, BLAG chose to go outside of the record. In its statement of facts, BLAG referenced a dozen assorted books and articles about technical matters of psychology and sociology. These documents alleged flaws in studies of gay and lesbian parents, discussed whether a person's sexual orientation frequently changes, and argued that children should have male and female parents who assume traditional gender roles. These are matters about which it is clearly appropriate for a court to hear expert testimony, subject to cross-examination.

One example of this documentary evidence was a book written by David Popenoe, offered in an attempt to establish that it is better for children to have both male and female parents in the home who assume traditional gender roles.[3] According to a web search (since BLAG provided no information sufficient to qualify Mr. Popenoe as an expert pursuant to Rule 706 of the Federal Rules of Evidence),[4] David Popenoe was a professor of sociology at Rutgers University. Presumably, BLAG could have submitted Mr. Popenoe's testimony in an admissible format, as opposed to simply referencing his book. Mr. Popenoe clearly supports BLAG's position and he could have been contacted so that he could have submitted an expert affidavit and have been made available for deposition, as contemplated by the scheduling order in the case. Yet BLAG did not make Mr. Popenoe or any of the other authors it referenced available for testimony. The potential danger from this is obvious—not only was Ms. Windsor denied the opportunity to challenge Mr. Popenoe's premises and conclusions, but BLAG was free to take his work out of context or misinterpret it.

In fact, BLAG did just that with another expert's work. In support of its

3. DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996).

4. FED. R. EVID. 706 ("Court-Appointed Expert Witnesses").

claim that sexual orientation is not an immutable characteristic,[5] BLAG cited an article by Professor Lisa Diamond, a professor at the University of Utah and a leading expert on the nature and development of same-sex sexuality.[6] We reached out to Professor Diamond, and—for no compensation—Professor Diamond agreed to submit an affidavit in our case. In that affidavit, she stated unequivocally that "BLAG misconstrues and distorts my research findings," and that the research cited did not relate to the immutability of sexuality.[7]

Moreover, it is far from clear that several of the individual hearsay declarants BLAG relied upon would even have qualified as experts under Federal Rule of Evidence 702.[8] For instance, one of the documents cited by BLAG in opposition to Ms. Windsor's motion for summary judgment was a then-forthcoming law review article in the *Ave Maria Law Review* purportedly criticizing the methodology of the social science studies that have been done on gay and lesbian parents.[9] The article was written by a law professor at Case Western Law School who, according to the law school's website, teaches classes at the law school on Business Associations, Mergers & Acquisitions, and Business Planning.[10] BLAG also relied upon a 2004 article from the online magazine *Slate* to support its contention that the consensus opinion seven years ago, among both those who supported marriage equality and those who opposed it, was that the "existing science is methodologically flawed and ideologically skewed."[11] The author of this article on *Slate*, Ann Hulbert—although she is a successful contributor to publications such as *New Republic* and *New York Review of Books*—likely does not have the requisite scientific background and training to be qualified as an expert under Federal Rule of Evidence 702 to

5. This inquiry is relevant because in assessing whether discrimination against a group is subject to heightened scrutiny, courts sometimes consider whether the characteristic defining the group is immutable or "so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change [it] . . . in order to avoid discriminatory treatment." *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

6. *See* Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development,* 32 J. CLINICAL CHILD AND ADOLESCENT PSYCHOL. 492 (2003).

7. Declaration of Lisa M. Diamond at ¶ 4-5, Windsor v. United States, 833 F. Supp. 2d 394, No. 10-CIV-8435 (S.D.N.Y. 2012), ECF No. 74.

8. FED. R. EVID. 702 ("Testimony of Expert Witnesses").

9. Intervenor-Defendant's Local Rule 56.1 Response to Plaintiff's Statement of Material Facts at 7, Windsor, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435); Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 24, Windsor, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435).

10. George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting*, AVE MARIA L. REV. (forthcoming 2011) (cited in Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 24, Windsor, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435)).

11. Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, SLATE (Mar. 12, 2004), http://www.slate.com/id/2097048/ (cited in Intervenor-Defendant's Local Rule 56.1 Response to Plaintiff's Statement of Material Facts at 7, Windsor, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435)).

testify about such matters.[12]

As a general matter, it is black-letter law that a party contesting summary judgment cannot rely on hearsay materials like these that are not otherwise admissible under the Federal Rules of Evidence. And BLAG did not dispute that the documents it sought to rely upon were inadmissible hearsay.[13] Instead, BLAG argued that the court should disregard the time-tested rules of evidence because *Windsor* is a case that presented an issue of constitutional law (which it surely is).

To the lay person, or even most practicing lawyers, this might seem remarkable. However, under the doctrine of "legislative" or "constitutional facts," a court is permitted to rely on facts outside the record in certain circumstances. As the Second Circuit has observed, the "so-called 'constitutional facts,' [are] a concept that has confounded courts and commentators alike."[14]

Loosely defined, because the courts and commentators have reached no consensus as to what these concepts mean, the doctrine distinguishes between "adjudicative" facts, which are those relevant to only the dispute between two adverse parties, and "legislative" or "constitutional" facts which help a court make decisions about the broader application of legal doctrine.[15] Pursuant to this doctrine, a court, while confined by evidentiary rules as to adjudicative facts, is freed from them when determining legislative or constitutional facts. Thus, under the doctrine, when determining issues of broad applicability – such as whether homosexuality is an innate characteristic which thus supports strict scrutiny of any classifications on this basis—a court is not confined to the record before it.

On its face, this is more than a little troubling. Where a court is tasked with

12. FED. R. EVID. 702 (discussing the admission of opinions by an individual who is "qualified as an expert by knowledge, skill, experience, training, or education"). Nor were the hearsay materials admissible under the learned treatise exception to the hearsay rule. FED. R. EVID. 803(18). BLAG failed to even attempt to show as to the hearsay materials "a proper foundation as to the authoritativeness of the text . . . laid by an expert witness." Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987). *See also* Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982); United States v. Mangan, 575 F.2d 32, 48 (2d Cir. 1978).

13. *See* Intervenor-Defendant's Opposition to Motion to Strike, Windsor, 833 F. Supp. 2d 394, ECF No. 69.

14. United States v. Cutler, 58 F.3d 825, 834 (2d Cir. 1995). *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 238 (1985). *See also* Siderius v. M.V. Amilla, 880 F.2d 662, 666 (2d Cir. 1989) ("The federal rules give no guidance on how to distinguish law from adjudicative fact for purposes of judicial notice, and noted commentators have called the question 'baffling.'") (quoting 21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5103 (2d ed. 1977)).

15. *See* FED. R. EVID. 201(a) (articulating in the notes that "adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.").

making a factual determination of indisputably broad impact, the court is freed from the traditional constraints of the time-tested rules of evidence and procedure, which have been developed over the centuries for good reason—to assure that the facts on which courts rely permit them to ascertain the truth and make just determinations.[16] Moreover, the court need not have the benefit of adversarial testing of any material on which it relies. As a general rule, Americans do not rely on their courts to make policy determinations. Yet when, in the course of their duties, courts are called upon to do so in constitutional cases, they are freed from doing that which they are most institutionally situated to do—adjudicate a record fully fought by adverse parties.

It is thus perhaps unsurprising that the "constitutional facts" doctrine developed in a context wholly apart from its current incarnation, judicial review of administrative action.[17] The doctrine originally sought to ensure that courts reviewing agency action could go beyond the agency record so as to satisfy Article III. Nothing in these early cases suggests that a federal court was freed from the traditional rules that would govern its own record. And even as to the review of agency fact-finding, the doctrine of legislative and constitutional facts has been largely abrogated.[18]

To the extent there is any continuing legitimate purpose to the "constitutional facts" doctrine, it is to assure that where a lower court evidentiary record is infirm, an appellate court reviewing that record is not constrained to that record in making determinations of policy that would have impact beyond the resolution of the case at bar. One can certainly imagine instances in which it would be laudable, necessary even, for a court to reach beyond the available record to render its judgment. But it is clearly preferable that rather than leaving the court to itself find factual support for its conclusions the parties build a complete record that can be tested through the traditional processes.[19]

It was with this in mind that we built the evidentiary record in *Windsor*. Particularly as to issues about which passions can run high, and reasonable

16. FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

17. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 64 (1932) (holding that as to constitutional rights "the federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it"); Monaghan, *supra* note 14, at 247–63 (summarizing development of doctrine).

18. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982) ("*Crowell*'s precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases.").

19. *See* John F. Jackson, *The Brandeis Brief—Too Little Too Late: The Trial Court As a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993); Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, at 96, 102 (noting fear that "the trial of legislative facts" would "hamper [the court's] own investigation" and concluding such fear is "unfounded" in part because of "obvious value of cross-examination" of "live testimony by [an] expert").

people can reach intuitive conclusions that are in fact belied by scientific or historical evidence, it is critical that courts be given cognizable evidence from which to render a judgment. The one alternative—for the court to undertake its own independent research—is obviously not ideal.[20] Even worse, a court may rely on its own pre-existing notions, however accurate or inaccurate they may be. In litigating issues like marriage for same sex couples it is only through offering proof that lawyers can mitigate against such pitfalls.

Past victories well illustrate the advisability of this approach. For instance, in *Romer* v. *Evans*, the Supreme Court affirmed the lower court's holding that an amendment which prohibited any governmental action taken to protect individuals on the basis of their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" was unconstitutional.[21] Specifically, the Court held that the law was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."[22] This was based on an extensive record below. The trial court heard numerous witnesses as to the question of whether the amendment served a compelling state interest, including testimony as to "the 'homosexual agenda' and the homosexual push for 'protected status'" who "urged that this Amendment protected Colorado's political functions from being overrun by such groups."[23] Similarly, witnesses testified as to whether the amendment would lead to "dilution of protections afforded to existing suspect classes," whether the amendment furthered "the prevention of governmental interference with personal, familial and religious privacy," and whether the amendment would promote "the physical and psychological well-being of children."[24] As to each of these, the court heard competing (admissible) evidence and found that the government could not meet its burden.

In *Perry*, "[t]he parties were given a full opportunity to present evidence in support of their positions" and "engaged in significant discovery, including third-party discovery, to build an evidentiary record."[25] The court noted that "Plaintiffs presented eight lay witnesses . . . and nine expert witnesses . . . . Proponents presented two expert witnesses and conducted lengthy and thorough cross-examinations of plaintiffs' expert witnesses but failed to build a credible factual record to support their claim that Proposition 8 served a legitimate

20. *See* Karst, *supra* note 19, at 95 (describing the Supreme Court's deciding of cases "on the basis of its own research" as "unhappily typical," and noting preferred approach of "remand for further consideration of the legislative facts in the lower courts").

21. Romer v. Evans, 517 U.S. 620, 635–36 (1996).

22. *Id.* at 635.

23. Evans v. Romer, No. 92-7223, 1993 WL 518586, at *4 (Colo. Dist. Ct. Dec. 14, 1993).

24. *Id.* at *5–6, 9.

25. Perry, *supra* note 1, at 932. *See also* Perry, *supra* note 1, Transcript of Oral Argument, at 81, Perry (Oct. 14, 2009) (No. 09-2292) ("[E]mbedded within such a legislative fact are certain assumptions about human behavior and relationships" and "the presentation of evidence . . . is essential to the resolution of the issues").

government interest."[26] This record thus led the court to its conclusion that Proposition 8 could not stand.

In *Windsor*, we argued that the district court should strike the hearsay materials put forward by BLAG.[27] While the court declined to do so, the court did grant our alternative request to put forth additional affidavits and rebuttal evidence in response to BLAG's hearsay.[28] Based on the record, then, the court declared DOMA unconstitutional. By stipulation, the same record was used in two other challenges to DOMA, *Golinski* and *Pedersen*. In both cases, the courts also declared DOMA unconstitutional.[29] In *Pedersen* in particular, the court relied heavily on the evidentiary record. For example, the court relied on the expert testimony of historian George Chauncey to conclude that lesbians and gay men "have suffered a long history of discrimination," an important factor in the court's decision to apply heightened scrutiny in its analysis of DOMA's constitutionality.[30] The expert affidavit and deposition testimony of psychologist Letitia Anne Peplau, including her synthesis of the relevant academic literature and studies, similarly assisted the court in determining that sexual orientation is an enduring characteristic fundamental to a person's identity, not something that a person should be required to suppress or attempt to change to escape discrimination.[31]

These decisions are all powerful evidence of the power of evidence. But the real test of the evidence in these cases is yet to come. When the Supreme Court considers the constitutionality of discrimination against married same-sex couples, it will face a thorough, well-tested record supporting the invalidation of such laws. Evidence in support of the constitutionality of these laws is, as courts across the country have now found, scant at best. Faced with these lower court records, when the Supreme Court renders a decision, proof, not prejudice, should carry the day.

26. Perry, *supra* note 1, at 932

27. *See* Motion to Strike Documents Referenced by Defendant-Intevenor in Opposition to Plaintiff's Motion for Summary Judgment, Windsor, 833 F. Supp. 2d 394, ECF No. 66.

28. Order, Windsor*,* 833 F. Supp. 2d 394, ECF No. 75.

29. Golinski v. U.S. Office of Pers. Mgmt.*,* 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012); Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (VLB), 2012 WL 3113883, *48- *49 (D. Conn. July 31, 2012).

30. Pedersen*,* 2012 WL 3113883, at *18.

31. *Id.* at *24-*27.