No. 09-1365

In the Supreme Court of the United States

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly recused himself in the midst of petitioner's trial to preserve the appearance of impartiality under 28 U.S.C. 455(a), based on the release during trial of news reports about the judge, whose accuracy the judge did not dispute, and which led the judge to request a Judicial Council investigation into his reported conduct.

2. Whether the district court exercised sound discretion in determining that manifest necessity justified a mistrial under those circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2009 WL 5125761. The order of the district court (Pet. App. 5a-16a) is not published in the Federal Supplement but is available at 2008 WL 4346780.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. A petition for rehearing was denied on February 3, 2010 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on May 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

During petitioner's jury trial on federal obscenity charges, two news articles appeared that raised questions about the trial judge's personal conduct. Pet. App. 9a & n.3. "In light of the public controversy surrounding [his] involvement in the case," the trial judge declared a mistrial, based on his finding of manifest necessity, and he recused himself, based on his determination that he could no longer preside consistent with 28 U.S.C. 455(a). Pet. App. 17a. After the case was reassigned to a new judge, petitioner moved to dismiss the indictment on double jeopardy grounds, contending that the trial judge erred both in recusing himself and in declaring a mistrial. The district court denied petitioner's motion, *id.* at 5a-16a, and petitioner filed an interlocutory appeal. The court of appeals affirmed in an unpublished memorandum disposition. *Id.* at 1a-4a.

1. In February 2004, FBI agents investigating Internet distribution of allegedly obscene material uncovered evidence linking petitioner (operating through his Los Angeles, California-based business LA Media) to at least 20 different websites that sold movies containing graphic depictions of scenes of bondage, violence, defecation, urination, sadomasochism, bestiality, "scat" (*i.e.*, the use or ingestion of feces), and "bukakke" (*i.e.*, sex involving multiple males who ejaculate on a single female). 6/11/08 Tr. 34-40, 58-59.

In May 2004, and again in July and October of 2006, undercover FBI agents purchased several such movies from two of petitioner's websites. The movies were sent by employees of LA Media to undercover locations via United Parcel Service (UPS). Two of the movies lacked a statement identifying the location of the seller's documentation of the ages of the participants

involved in sexually explicit conduct. 6/11/08 Tr. 41-46; Gov't Exh. 24.

On January 17, 2007, agents executed a search warrant at LA Media's offices. A subsequent review of image copies of LA Media's computer hard drives revealed files indicating that petitioner "owned the business, ran it, [and] developed the movies." 6/11/08 Tr. 55. Agents also recovered master copies of three movies—entitled *Gang Bang Horse Pony Sex Show*, *Mako's First Time Scat*, and *Hollywood Scat Amateurs Number 7*—that the agents had purchased in the undercover buys. *Id.* at 55-56. During a consensual, noncustodial interview, petitioner admitted that he was the sole proprietor of LA Media and that he knew that the material he distributed ranged from voyeur movies "all the way to bestiality and scat movies." *Id.* at 58. He also acknowledged that most of his movies were purchased via the Internet, and that he would ship the movies to purchasers via UPS. *Id.* at 58-59.

2. On July 24, 2007, a grand jury in the Central District of California returned an indictment charging petitioner with four counts of selling or distributing obscene material in or affecting interstate commerce, in violation of 18 U.S.C. 1465 (Counts 1-4); two counts of transporting obscene material in interstate commerce, in violation of 18 U.S.C. 1462(a) (Counts 5 and 6); and two counts of offering for sale in interstate commerce a visual depiction of actual sexually explicit conduct without an affixed statement describing where the required age documentation records for all performers could be located, in violation of 18 U.S.C. 2257(f)(4) (Counts 7 and 8). Pet. C.A. E.R. 1-4. The indictment also included a forfeiture count pursuant to 18 U.S.C. 1467. Pet. C.A. E.R. 5-7.

The case was randomly assigned through the Central District of California's case assignment system to United States District Judge George H. King, who presided over the case for six months after arraignment. During those proceedings, the government voluntarily dismissed Counts 7 and 8. Dkt. 44.

On March 10, 2008, Judge King transferred the case from his calendar to the calendar of the Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit. Dkt. 51; see 28 U.S.C. 291(b) (authorizing temporary designation of circuit judges to hold district court). Chief Judge Kozinski did not request this particular case; it was assigned to him in accordance with the district court's regular assignment procedures. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 296 (3d Cir. Jud. Council 2009). On March 13, 2008, Chief Judge Kozinski accepted the transfer by signing the transfer order. Dkt. 51. Chief Judge Kozinski presided over some additional pretrial matters and the June 2008 trial itself.

3. In June 2008, petitioner's case went to trial on Counts 1-6.

a. Jury selection began on Monday, June 9, 2008, and continued through the afternoon of Tuesday, June 10, 2008, when the jury was empaneled and sworn. 6/10/08 Tr. 70 (empaneling jury). On Wednesday, June 11, 2008, following the court's preliminary instructions and counsels' opening statements, the government began its case in chief. That morning, an FBI agent and a former employee of LA Media testified, and the government read to the jury a factual stipulation between the parties that the movies at issue were purchased online and mailed by LA Media via UPS. 6/11/08 Tr. 33-81; Gov't Exh. 24. The Court then excused the jury until

2:30 p.m. to have lunch and travel to another courthouse where it would view the films at issue. 6/11/08 Tr. 85.

b. While the morning session of trial was ongoing, the *Los Angeles Times* released an article on its Internet website reporting that Chief Judge Kozinski had, over a period of several years, maintained "a publicly accessible website featuring sexually explicit photos and videos." Scott Glover, *Judge in Obscenity Case Put Explicit Photos on Web*, L.A. Times, June 11, 2008 (*First Article*) (reproduced at Pet. C.A. E.R. 86-87).

According to the article, the "sexually explicit content" on this website, alex.kozinski.com, included "a photo of naked women on all fours painted to look like cows" and "a video of a half-dressed man cavorting with a sexually aroused farm animal." *First Article*. The article also reported that, in an interview with a reporter that took place on the evening of Tuesday, June 10, 2008, Chief Judge Kozinski "acknowledged * * * that he had posted the materials"; "conceded" that "[s]ome of the material was inappropriate" though not legally obscene; and "defended other sexually explicit content as 'funny.'" *Ibid*. The article stated that Chief Judge Kozinski told the reporter that he agreed to remove "some material" from his website, "including the photo depicting women as cows," which, the article indicated, he now viewed as "degrading . . . and just gross." *Ibid*. The article also stated that Chief Judge Kozinski had agreed to "get rid of a step-by-step pictorial in which a woman is seen shaving her pubic hair." *Ibid*. The article reported that Chief Judge Kozinski "declined to comment" when he was asked "whether the contents of his site should force him to step aside" from petitioner's trial. *Ibid*.

c. The afternoon of Wednesday, June 11, 2008, at 2:15 p.m., Chief Judge Kozinski met with counsel, outside the jury's presence, "to take up the story in the LA Times this morning." 6/11/08 Tr. 86. While declining to "comment on the story," Chief Judge Kozinski stated that he first "found out about it yesterday [Tuesday] after court," and thus "did not know about it before the jury was sworn and jeopardy attached." *Ibid.*; see *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) (jeopardy attaches when the jury is "empaneled and sworn"). Chief Judge Kozinski stated that he consequently "wanted to give the parties an opportunity to think about whether they wish[ed] to move to disqualify [him]," and he asked counsel "[w]hat would be a reasonable time for you to think about it?" 6/11/08 Tr. 86.

The prosecutor responded that he and his supervisor had been conferring with others in the Department of Justice "about what position we should take if at all," and he indicated his expectation that "we will have a response tomorrow [Thursday]." 6/11/08 Tr. 87.

Petitioner's counsel volunteered that he had been contacted by an individual whom he believed was "the source of what happened," at which point Chief Judge Kozinski reiterated that he did not "really have any comments on the merits of the story," but added that he "recognize[d] that this is a situation where it is confidence in judicial qualifications and [he] viewed it very seriously." 6/11/08 Tr. 87. Petitioner's counsel interjected that "[w]e would oppose any disqualification, and if the court were to do that, we would seek appellate remedy to oppose recusal. We oppose a mistrial. We want to go forward." *Ibid.* Chief Judge Kozinski responded by stating "I am very sorry" and reiterating that he "did not know about this before the jury was

sworn. And I—I have nothing else to say, and I hope we will go forward, but I will certainly understand if the parties feel otherwise." *Ibid.*

The trial then resumed with the government's visual presentation of the first movie and some of the second movie. 6/11/08 Tr. 91-93.

d. At the end of the afternoon of Wednesday, June 11, 2008, Chief Judge Kozinski held a second colloquy with counsel, again outside the jury's presence. 6/11/08 Tr. 93-94. The prosecutor began by stating that, based on "the matters that the government is aware of at this point," the government had some concerns about a "potential conflict of interest" in Chief Judge Kozinski's continued participation in the trial, inasmuch as the material reported to have been found on alex.kozinski.com was "arguably the same or similar material to what is on trial here." 6/11/08 Tr. 94. To "get a better understanding of where we are at this posture," the prosecutor requested a continuance of the trial until Monday, June 16, 2008, which, the prosecutor explained, would give the government time to "research the issues from a double jeopardy standpoint" and thereby inform the government's position. *Ibid.*

Petitioner's counsel "oppose[d] the government's request" for a continuance, 6/11/08 Tr. 96, because the article, "has suggested no wrongdoing, no criminal acts, no improper conduct on the part of the court." *Ibid.* Calling the matter a "nonissue," petitioner's counsel expressed his "confiden[ce] [that] the court can go forward and judge this case fairly and impartially," and he saw "no need for a stay" of the trial because "the court has done nothing wrong." *Ibid.*; see *id.* at 97 ("I think it is a big hoop-tee-do over nothing.").

The government reiterated its request to continue the trial until Monday, and petitioner's counsel countered that "[t]he private legal, lawful conduct of the court is not the concern of the government." 6/11/08 Tr. 98. Chief Judge Kozinski replied that "they are entitled to make a motion to disqualify, and they are entitled to make one based on research and evidence and nobody would even think about whether it is justified or not." *Id.* at 98-99. Chief Judge Kozinski noted that his "personal preference would be to walk away," *id.* at 99, and that "[i]f I thought I could [do so] responsibly, that is what I would do, but here we are and much is at stake." *Ibid.*

After further discussion and a brief consultation with his client, petitioner's counsel announced "[w]e have no objection to what the court's preference is which apparently is to halt the proceedings today for two days. My client does not object to that. So if that is the court's preference, then we will go along with that." 6/11/08 Tr. 101-102. Petitioner himself added that "I think everybody should have time to think about things, and we shouldn't rush through this, and I don't want to rush through it." *Id.* at 102.

The Court therefore granted what it termed the "joint motion to adjourn until Monday," 6/11/08 Tr. 102-103, and excused the jury, admonishing it "not [to] listen to any media reports or anything about [the trial] and don't discuss it with your family and friends," *id.* at 105.

e. On Thursday, June 12, 2008, the print edition of the *Los Angeles Times* carried an expanded article reporting that, during an interview with one of its reporters, Chief Judge Kozinski "acknowledged" that he "maintain[ed] his own publicly accessible Web site fea-

turing sexually explicit photos and videos." Scott Glover, *Judge Maintained Web Site with Explicit Photos*, L.A. Times, June 12, 2008 (reproduced at Pet. C.A. E.R. 90-93). In addition to the previous report of (1) the "photo of naked women on all fours painted to look like cows," and (2) the "video of a half-dressed man cavorting with a sexually aroused farm animal," the expanded article reported that Chief Judge Kozinski's website carried (3) "images of masturbation, public sex and contortionist sex," (4) a "slide show striptease featuring a transsexual," (5) "a series of photos of women's crotches as seen through snug fitting clothing or underwear," and (6) pictures and videos with "themes of defecation and urination," albeit not "in a sexual context." *Ibid.* According to the article, Chief Judge Kozinski "defended some of the adult content as 'funny' but conceded that other postings were inappropriate"; at the same time, the article noted that the material in petitioner's case was "considerably more vulgar than the content posted on [Chief Judge] Kozinski's website." *Ibid.*

That afternoon, Chief Judge Kozinski issued a statement on official letterhead: "I have asked the Judicial Council of the Ninth Circuit to take steps pursuant to Rule 26 of the Rules Governing Judicial Conduct and Disability, and to initiate proceedings concerning the article that appeared in yesterday's Los Angeles Times. I will cooperate fully in any investigation." http://www.ce9.uscourts.gov/misconduct/orders/CJA_6-12-08.pdf (reproduced at Pet. C.A. E.R. 96).[1]

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[1] On June 16, 2008, the Ninth Circuit Judicial Council entered an order pursuant to Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, interpreting Chief Judge Kozinski's statement as a complaint of possible judicial misconduct and asking the Chief Justice to transfer the complaint to another circuit's judicial council for

Later that afternoon, Chief Judge Kozinski's courtroom clerk telephoned the prosecutor to convey Chief Judge Kozinski's request that the government file any written submission on the matter by noon on Friday, June 13, 2008, to afford petitioner and the court time to review the submission and, possibly, hold a hearing. A few minutes later, the courtroom clerk placed a second call directing the prosecutor to make any written submission under seal. See Pet. C.A. E.R. 106.

f. On the morning of Friday, June 13, 2008, the courtroom clerk convened a three-way conference call with the prosecutor and petitioner's counsel so that the government could update the court, via the courtroom clerk, on any plans to file a written submission. The prosecutor stated that the government was planning to make a submission and that the government did not perceive any justification for filing under seal, as the courtroom clerk had directed the day before, but that the government would abide by a court order directing such a submission. See Pet. C.A. E.R. 106-107.

Shortly before noon, and before the government filed any papers, Chief Judge Kozinski issued an order in peti-

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review and disposition. See *In re Complaint of Judicial Misconduct*, No. 08-90035 (9th Cir. Jud. Council), http://www.ce9.uscourts.gov/misconduct/orders/08_90035.pdf (reproduced at Pet. C.A. E.R. 98-99). The same day, the Chief Justice granted the Judicial Council's request and transferred the complaint to the Judicial Council of the Third Circuit. See *id.* at 101. In a Memorandum Opinion dated June 5, 2009 and made public by separate order dated July 2, 2009, the Judicial Council of the Third Circuit concluded its proceedings. As relevant here, that body dismissed, as a merits-based matter beyond its authority to decide, the complaint to the extent it involved the propriety of the judge's decision to recuse himself from further participation in petitioner's case. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 296-297 & n.13 (3d Cir. Jud. Council 2009).

tioner's case, captioned "Order Recusing." Pet. App. 17a-18a. That order stated: "In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case and will ask the chief judge of the district court to reassign it to another judge." *Id.* at 17a.

That afternoon, Chief Judge Alicemarie H. Stotler of the district court ordered petitioner's case reassigned to Judge King, Dkt. 67, who in turn ordered the case set for a "Status Conference and trial setting." Dkt. 68.

4. On June 20, 2008, petitioner objected to the "trial setting" aspect of Judge King's scheduling order, asserting that "the double jeopardy clause of the Fifth Amendment precludes a retrial of this matter." Dkt. 74 at 1. In response, Judge King ordered briefing on whether to dismiss the indictment on double jeopardy grounds. Dkt. 75.

The district court (Judge King still presiding) denied petitioner's motion to dismiss. Pet. App. 5a-16a. As relevant here, the district court first found that Chief Judge Kozinski had properly recused himself from further participation in petitioner's case. The district court concluded that a reasonable person with knowledge of all the relevant facts and circumstances—including the contents of the June 11 and June 12 *Los Angeles Times* articles, the statements attributed to Chief Judge Kozinski in those articles, Chief Judge Kozinski's on-the-record colloquies with counsel, and Chief Judge Kozinski's self-initiated June 12 request for a Judicial Council investigation—would conclude that Chief Judge Kozinski's impartiality might reasonably be questioned, thus requiring his recusal under 28 U.S.C. 455(a). Pet. App. 8a-11a.

The district court also rejected petitioner's claim that Chief Judge Kozinski erred in declaring a mistrial. Rather, it concluded that "[Chief] Judge Kozinski acted with sound discretion in finding manifest necessity for a mistrial." Pet. App. 15a. In particular, the district court found (1) that Chief Judge Kozinski gave the parties an adequate opportunity to be heard and consider their options, and he was aware of petitioner's opposition to a mistrial, *id.* at 12a; (2) that Chief Judge Kozinski issued his order "not [as] an abrupt reaction to emerging events," but instead as "the result of calm deliberation," *id.* at 14a; and (3) that "the appointment of another judge to complete the trial was not a viable alternative to a mistrial" because the Ninth Circuit had previously held in *United States* v. *Jaramillo*, 745 F.2d 1245, 1248-1249 (1984), cert. denied, 471 U.S. 1066 (1985), that a criminal trial judge's midtrial recusal under Section 455(a) cannot be remedied by the appointment of a new judge to complete the trial but instead requires that a mistrial be declared, Pet. App. 13a-14a.

5. Petitioner took an interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals[2] affirmed in an unpublished memorandum disposition. Pet. App. 1a-4a. It first found that the district court "did not err in ruling that [Chief] Judge

[2] The government alerted the court of appeals that petitioner's appeal implicated, to some extent, the actions of its Chief Judge (in his capacity as the trial judge), which were the subject of the then-pending Third Circuit Judicial Council investigation. The notice was intended to allow the judges of the court of appeals to make an informed decision whether they should recuse themselves, and it outlined the procedure under 28 U.S.C. 291(a) for requesting the appointment of out-of-circuit judges to hear and decide petitioner's appeal. Gov't Notice (Oct. 30, 2008). No recusals were noted, see, *e.g.*, Pet. App. 19a-20a, and the appeal was decided by three judges of the Ninth Circuit, see *id.* at 2a.

Kozinski properly recused himself from [petitioner's] case under 28 U.S.C. § 455(a)." *Id.* at 2a. Applying the governing standard—"'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned'"—the court of appeals found that "a well-informed observer may reasonably have questioned [Chief] Judge Kozinski's ability to act as an impartial judge in [petitioner's] trial." *Ibid.* (quoting *Clemens* v. *United States Dist. Court*, 428 F.3d 1175, 1178 (9th Cir. 2005) (per curiam)).

The court of appeals likewise agreed with the district court's conclusion that Chief Judge Kozinski acted within his discretion in determining there was manifest necessity to declare a mistrial. Pet. App. 3a-4a. The court noted that in *United States* v. *Bates*, 917 F.2d 388 (9th Cir. 1990), it had identified several "indicators to examine in determining whether a judge has exercised sound discretion in declaring a mistrial." Pet. App. 3a n.1 (citing *Bates*, 917 F.2d at 395-396). But more importantly, it found that its earlier precedent, *Jaramillo*, *supra*, spoke directly to the manifest necessity of declaring a mistrial following a trial judge's recusal in light of mid-trial revelations (in *Jaramillo*, the indictment of the trial judge). *Id.* at 3a.

In particular, the court of appeals rejected petitioner's argument that a new judge could have continued the trial in Chief Judge Kozinski's stead under Federal Rule of Criminal Procedure 25(a). It explained that just as it had found in *Jaramillo* that "'the designation of another judge * * * would not remove the appearance of partiality concerning all prior rulings and all actions of the [judge],'" so too "[i]n this case, the designation of another judge half way through the proceedings would

not have removed the appearance of partiality concerning [Chief] Judge Kozinski's previous actions in the case." Pet. App. 3a (quoting *Jaramillo*, 745 F.2d at 1249). In summary, the court of appeals agreed that just as in *Jaramillo*, "the extraordinary circumstances of this case required that a mistrial be declared." *Id.* at 4a.

ARGUMENT

Petitioner first contends (Pet. 16-23) that the lower courts erred in determining that Chief Judge Kozinski reasonably recused himself under Section 455(a). Next, he contends (Pet. 23-30) that Chief Judge Kozinski abused his discretion in determining that manifest necessity justified a mistrial. The court of appeals correctly rejected those claims in a factbound unpublished decision. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. Before 1974, federal law required a judge to recuse himself only when it was "improper, in his opinion, for him to sit." 28 U.S.C. 455 (1970). Congress revamped this provision in 1974 "to broaden and clarify the grounds for judicial disqualification." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609; see S. Rep. No. 419, 93d Cong., 1st Sess. 1 (1973) (*1973 Senate Report*); H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974) (*1974 House Report*). In particular, the newly enacted Section 455(a) provided, for the first time, a statutory obligation for a judge to recuse himself from "any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a).

Section 455(a) thus replaced the subjective "in his opinion" standard for recusal with an objective standard

that, "[q]uite simply and quite universally, recusal [i]s required whenever impartiality might reasonably be questioned." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994) (citation omitted). In simplest terms, "if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." *1973 Senate Report* 5; *1974 House Report* 5; see *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (purpose of Section 455(a) was to "promote public confidence in the integrity of the judicial process").

b. Applying these principles (see Pet. App. 8a-11a), the district court correctly concluded that a reasonable, fully informed observer with knowledge of all of the relevant facts and circumstances—*viz.*, the nature of the proceeding, the two news articles, the statements attributed to Chief Judge Kozinski in those articles without dispute, his on-the-record colloquies with counsel, and the fact that he requested a Judicial Council investigation of his conduct—would "conclude that [Chief Judge Kozinski's] impartiality might reasonably be questioned in this case." *Id.* at 11a. The decision to recuse was therefore proper under Section 455(a), and it served to preserve the appearance of impartiality so essential to the criminal justice system. See generally *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). The court of appeals readily reached the same conclusion. Pet. App. 2a.

Petitioner agrees that the question presented is simply "whether or not recusal was mandated by Section 455(a)" on these facts. Pet. 18. While "[p]etitioner submits it was not," *ibid.*, his only legal argument is that the lower courts should have applied a legal standard that (1) fluctuates "depending upon whether the case is a

criminal case or civil case"; (2) requires "a district court judge during the middle of a criminal trial [to] exercise more restraint with respect to self recusal than [in other contexts]"; (3) commands "the trial court judge [to] be more reluctant to recuse himself if the effect of the recusal is a retrial"; and (4) constructs "a continuum with respect to partiality and impartiality." Pet. 17. But nothing in Section 455's text, history, or purpose endorses such distinctions. Rather, the courts below correctly asked the precise question that Section 455(a) poses, and the factbound application of that correct legal standard warrants no further review. Cf. *Sao Paulo State of the Federative Republic of Braz.* v. *American Tobacco, Inc.*, 535 U.S. 229, 232-233 (2002) (per curiam) (summarily reversing when court of appeals erred in concluding that recusal under Section 455(a) was required without considering what "a reasonable person, *knowing all the circumstances*, would [conclude]") (quoting *Liljeberg*, 486 U.S. at 861).

Petitioner suggests that Chief Judge Kozinski's recusal was due merely to his receiving "'a good deal of embarrassing criticism and adverse publicity'" from "the largest newspapers" in the country. Pet. 22 (quoting *Cheney* v. *United States Dist. Court*, 541 U.S. 913, 929 (2004) (memorandum of Scalia, J., denying motion to recuse)). But as both courts below concluded (Pet. App. 2a, 11a), Chief Judge Kozinski's recusal was made—and justified—because a reasonable, fully informed observer considering not only the articles, but also their substance, Chief Judge Kozinski's statements, and his request for a Judicial Council investigation, would conclude that the appearance of impartiality was no longer met in this case.

This Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). There is no such "obvious and exceptional showing" here, and not two, but *three* courts (Chief Judge Kozinski in the first instance, then Judge King on review, and then again the Ninth Circuit on appeal) have reached identical conclusions about the facts here.

2. Petitioner also contends (Pet. 23-30) that declaring a mistrial was not a manifest necessity because, in his view, a replacement judge could have been appointed under Federal Rule of Criminal Procedure 25(a) to complete the trial. The court of appeals correctly held that Chief Judge Kozinski exercised sound discretion in determining there was manifest necessity to declare a mistrial, and its decision does not conflict with any decision of this Court or of another court of appeals.

a. A retrial following a mistrial entered over the defendant's objection is consistent with the Double Jeopardy Clause if there was "manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated." *Illinois* v. *Somerville*, 410 U.S. 458, 461 (1973) (quoting *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). "[T]he key word 'necessity' cannot be interpreted literally"; rather, "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona* v. *Washington*, 434 U.S. 497, 506 (1978). "The 'manifest necessity' standard" reflects a balance of competing in-

terests by "provid[ing] sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.'" *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982) (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)).

The phrase "manifest necessity" "do[es] not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Washington*, 434 U.S. at 506. Accordingly, this Court has "consistently reiterated" that "[t]he decision whether to grant a mistrial is reserved to the 'broad discretion' of the trial judge," *Renico* v. *Lett*, No. 09-338 (May 3, 2010), slip op. 6, and that decision is entitled to substantial deference, *id.* at 7.

This Court's opinions suggest a number of considerations bearing on the trial judge's exercise of discretion. See, *e.g.*, *Washington*, 434 U.S. at 507-510, 514-516. With that guidance, lower courts have often considered whether the trial judge "(1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chose[] the alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and (4) properly determined that the defendant would benefit from the declaration of mistrial." *United States* v. *Bates*, 917 F.2d 388, 395-396 (9th Cir. 1990); accord *United States* v. *Berroa*, 374 F.3d 1053, 1058 (11th Cir. 2004), cert. denied, 543 U.S. 1076 (2005); *United States* v. *Allen*, 984 F.2d 940, 943 & n.5 (8th Cir. 1993); *United States* v. *Cameron*, 953 F.2d 240, 246 (6th Cir. 1992); see also Fed. R. Crim. P. 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to

comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."). Those inquiries bear on whether the court exercised sound discretion because a trial court that has considered these factors "is much more likely to have exercised sound discretion in concluding that manifest necessity for a mistrial existed." *United States* v. *Elliot*, 463 F.3d 858, 864 (9th Cir.), cert. denied, 549 U.S. 1021 (2006).

b. Those considerations reveal that Chief Judge Kozinski exercised sound discretion in finding manifest necessity to declare a mistrial. Although it is "not certain whether the mistrial benefitted [petitioner]," Pet. App. 15a, there is no question that Chief Judge Kozinski "heard [petitioner's counsel's] position that he opposed any mistrial," *id.* at 12a, and that Chief Judge Kozinski declared a mistrial only after taking two days for reflection and deliberation.

Petitioner focuses on the existence of alternatives to a mistrial—arguing that his case could have been reassigned to a new judge mid-trial under Rule 25(a). That Rule provides that "[a]ny judge regularly sitting in or assigned to the court may complete a jury trial if * * * the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and * * * the judge completing the trial certifies familiarity with the trial record." Fed. R. Crim. P. 25(a)(1)-(2). Petitioner argues that *United States* v. *Sartori*, 730 F.2d 973 (4th Cir. 1984), holds that Rule 25(a)'s phrase "or other disability" includes the trial judge's inability to proceed because of recusal, while *United States* v. *Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985)—which the court of appeals fol-

lowed here, see Pet. App. 3a-4a—holds that it does not. See Pet. 25-26.

Jaramillo and *Sartori*, however, are factually dissimilar. In *Jaramillo*, the trial judge was himself indicted during the defendant's criminal trial; he declared a mistrial and recused himself from further proceedings. 745 F.2d at 1246-1247. The court of appeals concluded that the Double Jeopardy Clause did not bar the defendant's retrial because there was manifest necessity for the mistrial. *Id.* at 1247-1249. The court rejected the defendant's argument that Rule 25(a) reassignment provided a "less drastic alternative[]" to a mistrial under the circumstances. *Id.* at 1249. Contrasting recusal to the sort of disabilities explicitly addressed in the Rule, the court explained that "neither death nor disabling sickness necessarily affects the integrity of all prior proceedings in the trial" in the way the trial judge's indictment "directly implicate[d] [his] character and integrity" and created "the appearance of partiality concerning all prior rulings and all actions" by the judge. *Ibid.*

By contrast, in *Sartori* the trial judge fully disclosed at an early stage his possible reason for recusal (a leadership role in a non-profit organization related to the subject matter of the defendant's allegedly illegal activities). 730 F.2d at 974. He offered at arraignment to recuse himself, but "neither party * * * objected to his continued participation." *Ibid.* Midway through trial, the judge nonetheless recused himself and declared a mistrial, over all parties' objections. *Id.* at 975. The court of appeals concluded that there was not manifest necessity for a mistrial because "substitution pursuant to Rule 25(a) was a viable alternative in this case." *Ibid.* The court further explained that, given the parties' continuing willingness to consent to the trial judge's partici-

pation despite grounds for his disqualification (a practice approved by 28 U.S.C. 455(e)), "[t]he inquiry was no longer whether his impartiality might reasonably be questioned but instead became whether the risk of an appearance of judicial impropriety constituted manifest necessity for declaring a mistrial." *Sartori*, 730 F.2d at 977. Under the circumstances, that "risk was simply not great enough to constitute manifest necessity." *Ibid.*

In light of their different facts, *Jaramillo* and *Sartori* do not create a conflict warranting this Court's review. As an initial matter, *Jaramillo* is not so categorical as petitioner claims; at most, it holds that Rule 25(a) substitution is not available "[w]here * * * the 'disability' directly implicates the character and integrity of the judge" such that "the designation of another judge would not remove the appearance of partiality concerning all prior rulings and all actions" of the judge. 745 F.2d at 1249. While the circumstances prompting Chief Judge Kozinski's recusal were not as dramatic as in *Jaramillo*, the appearance problem had the same effect of tainting prior rulings, which is why the panel found that "*Jaramillo* is controlling." Pet. App. 3a. By contrast, *Jaramillo* would not control a case with *Sartori*'s facts because the "crux of [*Jaramillo*]," *i.e.*, the inability of reassignment to cure the taint of the recused judge's prior rulings, *ibid.*, was absent in *Sartori*, where the parties had consented all along to the judge's participation.

But even if *Jaramillo* and *Sartori* did diverge on whether Rule 25(a)'s phrase "or other disability" embraces recusal in the abstract, that disagreement would have no relevance in this case. The ultimate constitutional question is whether declaring a mistrial is a manifest necessity in a particular case. In that respect, *Jara-*

millo and *Sartori* are consistent: when reassignment will not clear the cloud over the recused judge's prior rulings, declaring a mistrial is a manifest necessity (*Jaramillo* and this case); but when there is no such concern about prior rulings, reassignment is a complete cure and there is no call for a mistrial (*Sartori*). Whether or not reassignment under Rule 25(a) would be a permissible alternative in some other recusal case, it would not have avoided the need for a mistrial here. Thus, the putative split on the interpretation of Rule 25(a) that petitioner raises is not outcome-determinative in this case, and it does not warrant review. The court of appeals correctly found that manifest necessity existed on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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