IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1090

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC.
Petitioners.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

District Court Case No. 07-CV-11446-NG (D. Mass.)
(Consolidated in
District Court Case No. 03-CV-11661-NG (D. Mass.))
Hon. Nancy Gertner, United States District Judge, presiding

RESPONDENT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Fed. R. App. P. 35(b), Respondent Joel Tenenbaum respectfully petitions this Court to rehear en banc Petitioners' Petition for a Writ of Mandamus or Prohibition to the United States Court for the District of Massachusetts. The proceeding at issue concerns a question of exceptional importance: Does a federal district judge have the authority and the discretion to permit gavel-to-gavel internet access to a hearing in a civil case?

The panel decision prevents internet access to the oral argument of Respondent's constitutional challenges to the recording industry's charges against him. The decision uses the extraordinary mechanism of "advisory mandamus" to remove from the district court's discretion an issue rife with implications for the public interest. In doing so, the decision imposes unnecessarily upon the district judge an interpretation of her own local court rule which forecloses not only video but internet access to simple audio recording as well — a form of access identical to what this Court provides for its own public proceedings. By its decision, the panel eviscerates the Respondent's constitutional right to an open trial.

ARGUMENT

I. THE FIRST CIRCUIT PANEL INCORRECTLY EMPLOYED ADVISORY MANDAMUS JURISDICTION.

To justify a writ of mandamus or prohibition, a petitioner must ordinarily demonstrate both that she or he faces a "special risk of irreparable harm," and that the Court order in question is "palpably erroneous." United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994). Here, however, the panel instead invoked its "advisory mandamus" jurisdiction, under which it did not require Petitioners to demonstrate the possibility of irreparable harm. This Court has long recognized that "[t]he occasions for employing advisory mandamus are and should remain extremely rare; the procedure should be reserved only to address questions likely of significant repetition prior to effective review where guidance from the court will assist other judges, parties or lawyers." In re Sterling-Suarez, 306 F.3d 1170, 1172 (1st Cir. 2002) (internal quotation marks omitted); see also Horn, 29 F.3d at 769.

Respondent's request for an audio recording is not such an unusual and extreme situation that it warrants advisory mandamus. In justifying its employment of advisory mandamus jurisdiction, the panel did not give proper weight to the ease with which the lower court could amend this rule if problems due

to it arose. Given that a District of Massachusetts Local Rule can be amended or rescinded by a simple majority of the active judges of that court, or abrogated by the Judicial Council of the First Circuit, this did not present such a rare case in which advisory mandamus was required.

II. THE FIRST CIRCUIT PANEL ERRED IN GRANTING PLANTIFF'S PETITION FOR MANDAMUS.

Even if the panel was correct in exercising advisory mandamus jurisdiction, it erred in granting the petition for a writ of mandamus or prohibition by misreading the local rule in question, by withholding the appropriate deference to the trial judge's interpretation of that rule, and by failing to address the Respondent's asserted constitutional right to an open trial.

a. Judge Gertner Correctly Held That Local Rule 83.3 Grants Judges The Discretion To Permit The Recording And Broadcasting Of District Court Proceedings.

There are at least three arguments for Judge Gertner's interpretation of Local Rule 83.3: the unambiguous text of the rule, the concern for surplusage in the text of the rule, and the structure of the rule.

1. *The unambiguous text*. The text and structure of Rule 83.3 make clear that district courts have the discretion to permit broadcasting and recording of district court proceedings. Rule 83.3 comprises four separate subsections, 83.3(a) through

83.3(d). Subsection (a) bars recording and broadcasting "except" in two categorical circumstances: "Except as specifically provided in these rules [Category One] *or* by order of the court [Category Two]." (emphasis added). Subsections (b) through (d) straightforwardly enumerate the exceptions "specifically provided in these rules," none of which are at issue here. Rule 83.3(a) thus permits not only certain enumerated exceptions to the general prohibition on broadcasting and recording but also expressly provides a catch-all provision – "by order of the court" (*i.e.* the Category Two exception) — that permits the Court to exercise discretion under other circumstances. Judge Gertner's straightforward interpretation of Rule 83.3(a) is consistent with the well-recognized power of trial judges to control the administration of proceedings in their courtrooms.

2. *Surplusage*. The panel rejected this construction in favor of one in which "by order of the court" is confined to the enumerated situations in Rule 83.3(c) – in other words, the only "order[s] of the court" permitted are those that may be issued to permit the proceedings listed in Rule 83.3(c). It is a familiar canon of construction that each word and phrase of a statutes or rule must be given effect. See, e.g., Aguilar v. United States Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec., 510 F.3d 1, 10 (1st Cir. 2007). The panel's interpretation, which would limit the exceptions to the

Rule's general prohibition solely to those exceptions "specifically provided in these rules," renders superfluous the phrase "or by order of the court." To avoid surplusage, subsections (b) through (d) must be interpreted to only provide a nonexhaustive list of exceptions.

3. *Structure*. The structure of the statute, which locates "order of the court" in a separate subsection from the exceptions for presentation of evidence and ceremonial proceedings, reinforces the reading that the court may issue orders *other* than those "specifically set forth in the rules." Once again, the panel's interpretation cannot be reconciled with the Rule's plain language and would require a wholesale revision to the text of Rule 83.3(a), Rule 83.3(c), or both.

b. The First Circuit Panel Should Have Deferred to the Trial Court's Interpretation of Its Own Rule.

This Court has long held that "a special degree of deference, above and beyond the traditional standards of decision-making and appellate oversight, attaches to a court's interpretation of its own local rules." In re Jarvis, 53 F.3d 416, 422 (1st Cir. 1995) (Selya, J.); see also United States v. Diaz-Villafane, 874 F.2d 43, 46 (1st Cir. 1989) (stating "the widely-accepted idea that a district court should be accorded considerable latitude in applying local procedural rules of its own making"). While the panel may have taken a different view of

the rule than Judge Gertner did, it was not free to impose its own interpretation on the district court absent such a deferential abuse of discretion. Crowley v. L.L. Bean, Inc., 361 F.3d 22, 25 (1st Cir. 2004).

Moreover, the extraordinary remedy of mandamus is only appropriate where an order is "palpably erroneous." Horn, 29 F.3d at 769. Even under the less deferential standard of advisory mandamus jurisdiction, the panel in this case announced that "application of a district court's local rule[s] is reviewed for abuse of discretion" but with "a special degree of deference." Panel Decision at 6, citing Crowley at 25. Given the plain text of the rule, Judge Gertner's determination that Rule 83.3 accords her discretion to permit recording or broadcasting could not be called an abuse of discretion, even without any special degree of deference.

c. The Appellate Panel Failed to Protect Respondent's and the Public's Constitutional Right to an Open Trial.

To deny a trial judge the basic discretion to conduct her trial in a manner that is as open as possible, within the constraints of fairness and consideration of the interests of all parties involved, unlawfully burdens a litigant's right to a public trial. While Respondent raised the issue of his right to a public trial in briefing and argument before the appellate panel, the panel did not reference this consideration in its

opinion. Instead, the panel's decision considers only "the public's right to attend trials." Panel Decision at 17. The panel summarily offers that:

> [T]he public right to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen. Because there is no hint here that any portion of the proceedings will be closed to the public, the Richmond Newspapers right is not in jeopardy.

However, it is not this Richmond Newspapers right that Respondent claimed in opposition to Petitioners' petition for a writ of mandamus or prohibition. Petitioner invoked Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), for a distinct purpose: to bring to the attention of this Court the United States Supreme Court's recognition of the historical right to a presumptively open trial.

In its Richmond opinion, the Court plainly observes: "We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' was not also an attribute of the judicial systems of colonial America." The Court further notes that, prior to the American Revolution,

> [i]n some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided: 'That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come

> into, and attend the said courts, and hear and be present . . .' Reprinted in Sources of Our Liberties 188 (R. Perry ed. 1959). See also 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971). The Pennsylvania Frame of Government of 1682 also provided '[t]hat all courts shall be open . . . ,' Sources of Our Liberties, supra, at 217; 1 Schwartz, supra, at 140, and this declaration was reaffirmed in § 26 of the Constitution adopted by Pennsylvania in 1776. See 1 Schwartz, supra, at 271. See also §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, supra, at 73, 80. Id. at 567-78.

Given that the Court has recognized this historical right to a presumptively open trial, Respondent argued that his right has been preserved by the non-enumerated rights provision of the First and Ninth Amendments to the U.S. Constitution. If the "presumptive openness of trial" was an essential quality of a court of justice at the time of our nation's founding, then the Ninth Amendment preserves the right to a presumptively open trial.

Further, there are grave due process considerations raised by preemptively closing down the proceedings of the trial court. The practical effect of the panel's decision is to close down what would have been open video and audio internet access to the oral argument of Respondent's substantive constitutional challenges to what he claims to be misuse of federal process against him. This forced closure of the proceedings is hugely, perhaps irreparably, damaging to Respondent. It is damaging individually, because the internet generation is his base of

economic and moral support. It is also damaging to all defendants who claim a right to open public trial and to the First Amendment right of citizens not to be blocked by the arbitrary imposition of a judge-made rule from following the proceedings. See Kleindienst v. Mandel, 408 U.S. 752 (1972).

Lawsuits, such as the present underlying action, brought by Petitioners to recover statutory damages pursuant to 17 U.S.C. § 504(c), have so far resulted in tens of thousands of settlements negotiated completely out of public view. The mechanisms of federal law and the power of the federal judiciary have been systematically deployed by Petitioners in cases that have settled, and they have been deployed against Respondent Joel Tenenbaum, who has been subjected to an ongoing barrage of harassment by Petitioners for over five years. The virtual secrecy of this litigation in the form of inaccessibility to the internet makes this situation possible: the public does not know the extent or the abusiveness of the Petitioners' litigation against Respondent and against other defendants generally.

Public awareness and involvement in the trial process is an essential element of the due process guaranteed by the Fifth Amendment to the U.S. Constitution:

> "[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must

> satisfy the appearance of justice.' . . . [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions . . . ." Richmond Newspapers at 574, quoting Levine v. United States, 362 U.S. 610, 616 (1960).

As Judge Lipez observed in the panel decision, "[w]hen the motions hearing at issue occurs, only those physically present in the courtroom will hear the parties debate the merits of the motion before the district court." Panel Decision at 23.

Virtually all of the members of the American public with an interest in this case will be excluded without reason. As Judge Gertner carefully explained in her order permitting the internet broadcast of this hearing:

> "Public" today has a new resonance, especially in this case. The claims and issues at stake involve the internet, file-sharing practices, and digital copyright protections. The Defendants are primarily members of a generation that has grown up with the internet, who get their news from it, rather than from the traditional forms of public communication, such as newspapers or television. Indeed, these cases have generated widespread public attention, much of it on the internet. Under the circumstances, the particular relief requested -- "narrowcasting" this proceeding to a public website -- is uniquely appropriate. Capitol Records, Inc. v. Alaujan, 593 F.Supp.2d 319, 323.

The public is not the several dozen individuals who can physically make it to Judge Gertner's courtroom at the time of the hearings. Nor is the public the news media, who may or may not report on the hearing but who are certainly not capable of transmitting the full detail of the hearing to the rest of the

public. The public for this hearing is a national public that informs itself about political and social events by using the internet. Exclusion of this public is wholly in conflict with this Court's observation that "[c]ourts have long recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'" In re Providence Journal Co., 293 F.3d 7, 9 (1st Cir. 2002) (quoting Siedle v. Putnam Inv., 147 F.3d 7, 10 (1st Cir. 1998)).

The panel's vision of a public trial is at odds with both the historical understanding of a public trial as set out in Richmond Newspapers and the current technological ability to provide unfettered public access to trials. With the flip of a switch on recording equipment already installed in the courtroom, the motions hearing at issue in this case could be fully accessible to the public. The proposition that a trial judge has no power to allow the switch to be flipped is an affront to the ideal of a public trial. The panel decision envisions our public hearing as one that may be heard only within the Moakley Courthouse, a lovely building but hardly a model of accessibility, under constraint against any recording except stenographic transcript, which must be purchased at a price Respondent and the public — including defendants in similar actions — cannot afford. The public at large, beyond

those few who attend in person, will receive their understanding only through the reports of media outlets subject to the demands of cost considerations, time constraints, and commercial interests.

In declining to recognize this situation, the panel fails to acknowledge the important constitutional and public policy concerns raised by Respondent.

CONCLUSION

At least to the extent of permitting audio internet access, this Court should grant Joel Tenenbaum's petition for rehearing en banc and reinstate the District Court's order permitting internet access to the motion hearings in this case.

Dated: April 28, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles R. Nesson, hereby certify that on April 28, 2009, I caused the foregoing document, viz., the RESPONDENT'S PETITION FOR REHEARING EN BANC, to be served on:

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The Honorable Nancy Gertner
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by Federal Express. All of the abovementioned parties have been served with electronic copies of the foregoing documents.

Dated: April 28, 2009

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