No. 00-277

# In the Supreme Court of the United States

JAMES HARVEY BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner's claims that the district court improperly prohibited him from making certain extra-judicial statements about his criminal prosecution have been rendered moot by his conviction and the lifting of the district court's order.

2. Whether the district court's order prohibiting petitioner from making certain extra-judicial statements about his criminal prosecution violated the First Amendment.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 218 F.3d 415. The order of the court of appeals denying petitioner's petition for a writ of mandamus (Pet. App. 29a-34a) is unreported. The order of the district court (Pet. App. 35a-48a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 2000. The petition for a writ of certiorari was filed on August 21, 2000, and was placed on the Court's docket on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana on one count of conspiring to commit mail fraud, wire fraud, insurance fraud, and witness tampering, in violation of 18 U.S.C. 371, 36 counts of mail fraud, in violation of 18 U.S.C. 1341, three counts of wire fraud, in violation of 18 U.S.C. 1343, two counts of insurance fraud, in violation of 18 U.S.C. 1033(a) and (d), one count of tampering with a witness, in violation of 18 U.S.C. 1512(b)(3), and 13 counts of making false statements to the FBI, in violation of 18 U.S.C. 1001.[1] The district court issued a pretrial order prohibiting the parties from making certain extrajudicial statements. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioner was indicted on September 24, 1999. On that day, the district court *sua sponte* issued an order prohibiting the parties, lawyers, and witnesses from making certain comments to the news media about the trial. Pet. App. 50a-52a. The prohibited comments were those that "could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice and which is not a matter of public record." *Id.* at 51a. The order specified that "[s]tatements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a

[1] Petitioner was indicted with co-defendants Edwin W. Edwards and Ronald R. Weems. Three other defendants were also named in the indictment, but all three pleaded guilty to felony offenses.

party." *Ibid.* The order further provided, however, that it does not

> prohibit any of the * * * parties from the following:
>
> (1) Stating, without elaboration or any kind of characterization whatsoever:
>
> (a) the general nature of an allegation or defense made in this case;
>
> (b) information contained in the public record of this case;
>
> (c) scheduling information;
>
> (d) any decision made or order issued by the Court which is a matter of public record.
>
> (2) Explaining, without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record in this case and any ruling made thereon to the extent that such ruling is a matter of public record.

*Ibid.*

On September 28, 1999, the district court temporarily lifted the order to allow petitioner to campaign for reelection to his position as Louisiana State Insurance Commissioner. Pet. App. 3a. On October 7, 1999, after one or more defendants released recordings of conversations relevant to the prosecution, the district court prohibited the parties from releasing recordings of conversations before trial. *Id.* at 53a-55a. The next week, the district court explained that it had entered that order "to stop an avalanche of both government

and defendants picking out tapes and start playing all these tapes on radio and television." See *id.* at 4a. The court asked the parties to suggest modifications to the order, but no one did so. *Ibid.*

On November 17, 1999, the district court reimposed the original restrictions on extrajudicial comments, effective when the polls closed on November 20. Pet. App. 49a. When petitioner objected, the district court said that it believed that the order was necessary in light of the considerable publicity surrounding the trial, but the court emphasized its willingness to modify the order. See *id.* at 4a. Petitioner moved to vacate the order, and, following a hearing on January 4, 2000, the district court asked the parties to submit proposed modifications to the order. *Ibid.* Petitioner did not suggest any ways in which the scope of the prohibited comments could be made narrower, but urged that the order be applied only to counsel, not to defendants or witnesses. *Ibid.*

The next month, the district court issued an opinion denying petitioner's request to limit the order to lawyers. Pet. App. 35a-48a. In its opinion, the court noted that there was some disagreement in the lower courts on whether an order limiting the speech of trial participants had to meet a "'clear and present danger' standard," or "whether a lower 'reasonable likelihood of prejudice' standard should be applied." *Id.* at 40a. The court did not resolve that issue because, "[e]ven under the more strict 'clear and present danger' standard, the facts of this case justify" the court's order. *Id.* at 41a. The court explained that there was a substantial threat of prejudice because of the "enormous press coverage to date"; the case was "unique" because of its interrelation with two other prosecutions involving many of the same defendants that had also generated a large

amount of publicity; and "the parties in this case have already demonstrated a desire to manipulate media coverage to gain favorable attention." *Id.* at 42a-44a. The court concluded that the order was narrowly tailored to protect the fairness of the trial because it prohibited only "statements on the merits of the case designed to influence public opinion or prejudice a party." *Id.* at 46a. It further concluded that the order could not be limited to trial counsel because "[l]ike attorneys, trial participants have access to potentially inflammatory and prejudicial information." *Id.* at 48a.

2. Petitioner petitioned the court of appeals for a writ of mandamus to vacate the district court's order restricting extrajudicial comments by trial participants. The court of appeals denied the petition, on the ground that petitioner's appeal of the order had been expedited and that "the requisite clear and indisputable abuse of discretion [by the district court] is *not* present." Pet. App. 30a.

3. The court of appeals affirmed the district court's denial of petitioner's motion to modify or vacate the order. Pet. App. 1a-28a. After determining that it had jurisdiction to consider petitioner's appeal under the collateral order doctrine, *id.* at 5a-10a, the court of appeals rejected petitioner's claim that the order violated his First Amendment rights. The court stated that, "[w]hile this case presents a somewhat close call, we conclude that the gag order is constitutionally permissible because it is based on a reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn." *Id.* at 11a. The court of appeals observed that the "district court

applied the correct legal principles in entering such an order[,] and its factual conclusions are adequately supported by the record." *Ibid.*

Because the district court's order was directed at trial participants rather than the press, the court of appeals held that it was unnecessary to show a "clear and present danger" to a fair trial in order to justify the order. Pet. App. 14a-19a. The court relied (*id.* at 19a) on *Gentile* v. *State Bar*, 501 U.S. 1030, 1076 (1991), and determined that a district court may "impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. The court of appeals held that the district court correctly limited the rights of petitioner, as well as his attorneys, to make public statements because "[t]he mischief that might have been visited upon the three related trials—primarily, jury tainting—would have been the same whether prejudicial comments had been uttered by the parties or their lawyers." *Id.* at 20a.

The court of appeals also concluded that the district court had identified a "substantial likelihood" that trial participants' extrajudicial comments would prejudice the court's ability to conduct a fair trial in petitioner's case and two related trials. Pet. App. 21a. The court of appeals pointed out that, before the district court entered its order, petitioner's case and two related cases "had attracted intense and extensive media attention." *Id.* at 22a. The court of appeals concluded that the district court was rightly concerned that the parties' unrestricted statements would increase the level of pretrial publicity and would taint the jury panels in related trials as well as the jury pool from

which petitioner's own jury would be drawn. *Ibid.* Based on the actions of the parties when the restriction on extrajudicial comments was temporarily lifted, the court below also determined that the district court had reasonably determined that the parties were "prepared to 'try this case in the press' and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted." *Id.* at 23a.

The court of appeals further found that the restriction on extrajudicial comment was sufficiently narrow, that it still allowed the parties to comment on matters in the case, and that the order provided sufficient guidance as to what was prohibited. Pet. App. 23a-25a. Finally, the court of appeals determined that the district court's order employed the least restrictive means to achieve the necessary end of protecting the trials of petitioner and the related trials. *Id.* at 25a-28a.

4. On October 11, 2000, petitioner was convicted on seven counts of making false statements to an FBI agent, in violation of 18 U.S.C. 1001. The jury acquitted him on all other counts, and the jury also acquitted his co-defendants on all counts. The district court lifted its order restricting extrajudicial comment after the jury's verdict.

**ARGUMENT**

1. Petitioner contends (Pet. 14-30) that the decision below improperly permitted a prior restraint on his First Amendment rights. Petitioner's arguments have been rendered moot by the completion of his trial and the district court's elimination of the order restricting extrajudicial comment. Because that order is no longer in place, and because that order had no collateral consequences that could be remedied by a decision by

this Court, there is no longer a live controversy regarding the propriety of that order.

This Court has recognized that the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review," *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), may apply to cases involving restrictions on the press. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); see also *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986). The "capable of repetition" doctrine, however, is limited to cases in which "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). This case does not satisfy those requirements, because there is no likelihood that the same kind of restriction on extrajudicial comments will again be imposed on petitioner. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983).

Petitioner was a defendant in a criminal case, not a member of the press whose access to court proceedings had been restricted. Only if petitioner's convictions are reversed on appeal would the possibility of a renewed restriction on extrajudicial comments arise at a second trial. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 546. If petitioner's convictions are affirmed, he will not be retried and there would be no occasion for a renewed restriction on extrajudicial comments. Moreover, even if his convictions are reversed, a retrial would involve a very limited factual setting because his convictions involve only seven Section 1001 counts, a retrial would involve no co-defendants (and, in particular, it would not involve former Governor Edwards) because all

were acquitted, and a retrial would not pose the serious problems faced by the district court below of managing three inter-related multi-defendant criminal trials in which there was very great press interest. In addition, because the evidence and arguments of petitioner and the government in this case are now a matter of public record, there would likely be no need in the event of a retrial for a similar order limiting extrajudicial comments. In short, even should petitioner's convictions be reversed, there would likely be no need for a similar restriction on extrajudicial comments. Consequently, this case is not saved from mootness under the "capable of repetition" doctrine.

2. Even if this case were not moot, further review would be unwarranted.

a. The court of appeals held that "a district court may * * * impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. See also *id.* at 20a (not reaching the question "whether a trial court may also impose a similar gag order based on a 'reasonable likelihood' of prejudice"). Petitioner asserts (Pet. 14) that "the courts of appeals are sharply divided on the showing necessary to impose restrictions on the extrajudicial speech of criminal defendants and witnesses." Petitioner concedes (Pet. 14-15) that the standard applied by the court of appeals is consistent with decisions of the Second, Fourth, and Tenth Circuits. See, *e.g.*, *In re Morrissey*, 168 F.3d 134, 138 (4th Cir.), cert. denied, 527 U.S. 1036 (1999); *United States* v. *Cutler*, 58 F.3d 825 (2d Cir. 1995); *United States* v. *Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969). He argues (Pet. 15-19), however, that it is

inconsistent with "more stringent tests, requiring either a showing of 'clear and present danger' or 'serious and imminent threat' of prejudicing a fair trial" that are applied in the Third, Sixth, Seventh, and Ninth Circuits. Pet. 15 (quoting Pet. App. 18a). None of the cases on which he relies was decided since this Court's decision in *Gentile* and his claim of a conflict does not warrant review.[2]

(i) Petitioner cites (Pet. 17) the Seventh Circuit's decision in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (1975), cert. denied, 427 U.S. 912 (1976). In that case, the Seventh Circuit held that a local court rule violated the First Amendment by prohibiting attorneys from making extrajudicial statements "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." 522 F.2d at 249. The Seventh Circuit held that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." *Ibid.*

In *Gentile*, sixteen years later, this Court noted that some jurisdictions had adopted the "serious and imminent threat" standard, see 501 U.S. at 1068 n.3, and it characterized that standard as one that "arguably approximate[s] 'clear and present danger.'" *Id.* at 1068. The Court then rejected the argument that extrajudicial comments may be regulated only if they satisfy that "clear and present danger" test, holding that "the

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[2] In addition, it is not clear that adoption of a higher, "clear and present danger" standard would be of assistance to petitioner. The district court explicitly concluded that "[e]ven under the more strict 'clear and present danger' standard, the facts of this case justify" the court's order. Pet. App. 41a.

speech of lawyers representing clients in pending cases may be regulated under a less demanding standard." *Id.* at 1074. Because *Gentile* explicitly rendered the holding in *Bauer* obsolete, the Seventh Circuit has not cited *Bauer* for the proposition that a "reasonable likelihood" standard is unconstitutional since this Court decided *Gentile*. There is accordingly no present conflict between the decision below and any decision of the Seventh Circuit.[3]

(ii) Petitioner argues (Pet. 15-16) that the decision of the court of appeals conflicts with the Sixth Circuit's decision in *United States* v. *Ford*, 830 F.2d 596 (1987). In *Ford*, the Sixth Circuit reversed a district court's order severely restricting the extrajudicial speech of a criminal defendant who was a sitting congressman. The restriction was exceptionally broad, prohibiting the congressman from *any* extrajudicial discussion of the case, with exceptions for a bare denial of guilt and for statements on the floor of the House or in committee. *Id.* at 597. In analyzing the case, the court of appeals held that the district court's order could be affirmed only if the forbidden statements would present a "clear and present danger." *Id.* at 600.

As petitioner notes, the Sixth Circuit applied the "clear and present danger" standard because that is the standard that this Court applied to restraints on the press in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), and the court "s[aw] no legitimate reasons for a lower threshold standard for individuals, including

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[3] For the same reason, the Ninth Circuit's decision in *Levine* v. *United States District Court*, 764 F.2d 590, 595 (1985), cert. denied, 476 U.S. 1158 (1986), that a restriction on extrajudicial comments may be imposed on attorneys only on a showing of "a clear and present danger or a serious and imminent threat" to the right to a fair trial was also superseded by this Court's decision in *Gentile*.

defendants, seeking to express themselves outside of court than for the press." 830 F.2d at 598. In *Gentile*, however, this Court expressly rejected the application of *Nebraska Press* to at least some trial participants, holding squarely that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press*." 501 U.S. at 1074. The Sixth Circuit has not had the opportunity to decide whether its views in *Ford* survive this Court's decision in *Gentile*. Accordingly, it cannot be said that the Sixth Circuit's decision in *Ford* represents that court's current views or that the decision of the court of appeals in this case conflicts with the Sixth Circuit's position.[4]

(iii) Petitioner also claims (Pet. 17) that the decision of the court of appeals conflicts with the Third Circuit's decision in *Bailey* v. *Systems Innovation, Inc.*, 852 F.2d 93 (1988). In *Bailey*, a trial court had entered an order restraining civil litigants from making certain extrajudicial statements that would likely be disseminated by the press "if there is reasonable likelihood that such dissemination will interfere with a fair trial." *Id.* at 96.

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[4] The uncertainty regarding the continued authority of *Ford* is also reflected in the fact that two of the three judges on the panel in that case wrote concurring opinions. Judge Krupansky wrote an opinion in which he "concur[red] in [the court's] conclusion that the order issued by the trial court in the instant case is overbroad and fails to satisfy the clear and present danger standard that has been enunciated by this circuit." 830 F.2d at 603. See also *id.* at 605 (concluding that he "concur[red] in the disposition of this case"). Judge Nelson wrote an opinion in which he "concur[red] in the judgment vacating the trial court's order," *ibid.*, and in which he did not discuss whether the trial court's order was subject to the "clear and present danger" test.

The Third Circuit held that the order violated the First Amendment, finding that such restrictions were prohibited "unless there is a clear threat to the seventh amendment right" to a fair jury trial. 852 F.2d at 100.

In requiring a "clear threat" to the fair trial right, the Third Circuit's standard does not substantially differ from the court of appeals' determination in this case that a restriction in this context is permissible if there is a showing of a "'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. Certainly the modest difference in verbal formulation is insufficient to establish that the Third Circuit would have decided this case differently. Indeed, the Fifth Circuit's standard, like that of the Third Circuit, would likely not have been satisfied in *Bailey*, where the Third Circuit found that the district court's order was not predicated on "such massive prejudicial publicity as would threaten [the defendant's] right to a fair trial." 852 F.2d at 99. Similarly, both the Fifth Circuit's standard and that of the Third Circuit would likely have been satisfied in this case, in which the district court's restriction was premised on its well-supported finding "that both the government and the defendants are prepared to 'try this case in the press' and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted." Pet. App. 23a.[5]

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[5] Even if the Third Circuit's standard were equivalent to a "clear and present danger" standard, there would still be no conflict with the decision below, for the same reasons discussed above with respect to *Ford*. The Third Circuit in *Bailey*, like the Sixth Circuit in *Ford*, relied to some extent on this Court's decision in *Nebraska Press*, see 852 F.2d at 99, although the Third Circuit did not cite *Nebraska Press* specifically in connection with its "clear threat" standard. Like the Sixth Circuit, the Third Circuit has not

(iv) Finally, the fact that none of the allegedly conflicting circuits has addressed the standard of review issue since this Court's decision in *Gentile* in 1991 suggests that petitioner is incorrect in asserting (Pet. 13) that there is an "increasing 'trend towards gagging trial participants'" that warrants this Court's review. Moreover, the paucity of recent case law on the subject also suggests that any difference in verbal formulations among the various circuits regarding the proper standard by which to assess restraints on trial participants' speech has not in practice had a substantial effect on the extent to which such restraints are imposed.

b. Petitioner also asserts (Pet. 24) that the decision of the court of appeals conflicts with decisions of other circuits regarding "whether courts must *explicitly* consider less-restrictive alternatives before imposing prior restraints" on trial participants. The court of appeals stated that "[w]hile it is undoubtedly good judicial practice for district courts to explicitly set forth on the record their consideration of such matters, we do not believe that this shortcoming requires us to vacate the present order." Pet. App. 26a. The court noted that the district court had reached a "clearly implied conclusion that the other measures * * * would be inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity on this case and the two related cases" and that "[t]he record sufficiently supports" that conclusion. *Id.* at 27a. As the court explained, "[i]n light of the parties' and attorneys' demonstrated enthusiasm for

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had the opportunity since *Bailey* to address whether a "clear and present danger" standard applicable to participants in the trial—rather than members of the press—is appropriate after this Court's decision in *Gentile*.

using the press to their utmost advantage, the district court made a reasoned and reasonable decision to focus its prophylactic attempt to avoid prejudicing the three related trials on the trial participants." *Ibid.*

In light of the court of appeals' treatment of the issue, including its stated preference for explicit findings regarding the adequacy of alternatives and its recognition of the district court's "clearly implied conclusion" that those alternatives would be inadequate, it can be expected that district courts in the Fifth Circuit will in the future make the explicit findings sought by petitioner. Accordingly, even if there were a conflict in the circuits regarding the narrow question of whether the district court must make such explicit findings, that conflict would likely affect very few cases in the future, and it would accordingly not be of sufficient continuing importance to warrant this Court's review.

In any event, the Fifth Circuit's decision stands at most for the proposition that a district court's order restricting extrajudicial comments will not be automatically reversed merely because the district court has not made explicit findings regarding alternatives. None of the cases cited by petitioner establishes that other circuits would treat a case like this under any different rule. For example, in *United States* v. *Salameh*, 992 F.2d 445 (2d Cir. 1993) (per curiam), the trial court "orally and sua sponte, without notice or opportunity for argument," *id.* at 446, issued a very broad order restricting attorneys in a criminal case from making any statements that "have anything to do with this case or that even *may* have something to do with the case," *id.* at 447 (internal quotation marks omitted; emphasis added by court of appeals). The court of appeals reversed the order, noting that "[t]he court did not make a finding that alternatives to this

blanket prohibition would be inadequate to protect defendants' rights to a fair trial before an impartial jury," that "[t]here is no indication in the record that the court explored any alternatives or at all considered imposing any less broad proscription," and that "indeed the court discouraged counsel from even proffering possible alternatives." *Ibid.* The court concluded that "[t]he record does not support a conclusion that no reasonable alternatives to a blanket prohibition exist," and it vacated the district court's order. *Ibid.* There is nothing in *Salumeh* that suggests that the Second Circuit would similarly reverse a district court order in a case like this, in which the restriction is narrower, in which the trial court reached a "clearly implied conclusion" that alternatives would be inadequate, and in which "[t]he record sufficiently supports" that conclusion.

The other cases cited by petitioner similarly fail to support the proposition that a district court's failure to make express findings regarding the adequacy of alternatives is sufficient, alone, to require reversal of an order limiting the extrajudicial comments of trial participants. In each of the cases cited by petitioner (Pet. 26-27), the court of appeals found that there were substantive defects in the order under review, not merely a failure to make express findings that were implicit in the district court's action. See *Bailey*, 852 F.2d at 99 ("[E]ven devoid of specific findings, the record here convinces us that the first amendment is violated by the district court's order."); *United States* v. *Ford*, 830 F.2d at 600.[6] None of the cases establish that

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[6] The other case cited by petitioner, *CBS* v. *United States District Court*, 729 F.2d 1174 (9th Cir. 1984), involved an injunction against the broadcast of a tape by a television network, not a

the failure to make express findings is alone sufficient to require reversal.

c. Finally, petitioner asserts (Pet. 28) that "the gag order approved by the Fifth Circuit is unconstitutionally overbroad." Further review would not be warranted to address the particular application of the court of appeals' legal standard to the facts of this case. In any event, none of the cases cited by petitioner suggests that the order in this case would have been viewed as overbroad in any other circuit. Unlike most of the cases cited by petitioner, which involved orders that prohibited "any statements to members of the news media," *Levine* v. *United States District Court*, 764 F.2d 590, 598 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986), or any statements that "have anything to do with this case or that even *may* have something to do with the case" *Salameh*, 992 F.2d at 447 (internal quotation marks omitted; emphasis added by court of appeals), the order in this case provided both a much narrower prohibition of statements that "could interfere with a fair trial or prejudice any defendant" and a road map of the types of statements that the parties

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limitation on the extrajudicial comments of trial participants. In addition, the court of appeals in that case vacated the injunction on the ground that it rejected "both the district court's contention that dissemination of the tapes was likely to prejudice the defendant's right to a fair trial and its contention that traditional means of dealing with such prejudice—voir dire and jury instructions, for instance—were inadequate." *Id.* at 1183. Even with respect to the adequacy of the alternatives, the court's ultimate conclusion was that "a showing has not been made that 'there is absolutely no method . . . to remove the taint upon the minds of potential jurors' which could possibly result from release of the government tapes.'" *Ibid.* In this case, by contrast, the court of appeals noted that the "[t]he record sufficiently supports" the conclusion that the available alternatives were inadequate.

could make, including statements giving "the general nature of an allegation or defense," "information contained in the public record," and "the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record." Pet. App. 51a. Moreover, as the court of appeals explained, petitioner's "complaints that the order is overbroad or too vague are weakened by the fact that he did not take the district court up on its invitation to submit suggested modifications of the order," but instead merely "insisted that he be completely exempt from any restrictions on extrajudicial comments." *Id.* at 25a. The court of appeals correctly held that "[i]f [petitioner] had been so concerned about the scope of the order, he should have communicated those concerns to the district court as he was given ample opportunity, and indeed invited, to do." *Ibid.*

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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