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

PETITIONERS' REPLY BRIEF

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I

INTRODUCTION

In his response to the Petition for a Writ of Mandamus or Prohibition, Respondent Joel Tenenbaum ("Respondent") devotes most of his argument to broad rhetoric about "public access" and the attempted incorporation by reference of the briefs that have been filed by the various non-party *amici* in this case. Respondent devotes only a single sentence to Local Rule 83.3 and never mentions the policy of the Judicial Conference of the United States regarding the recording and broadcasting of federal court proceedings. In a similar vein, the various *amici*—none of whom are parties to the underlying litigation—barely reference the Judicial Conference, choosing instead to devote an extraordinary amount of space to arguments regarding whether cameras in the courtroom are a good or bad idea.

But none of those arguments address the core issue presented in the Petition: whether the district court exceeded its authority when it authorized the recording and broadcasting of its proceedings. The answer to *that* question—an answer that is dictated by the district court's own Local Rules as well as Judicial Conference policy—is "yes." For that reason, this Court should issue a writ reversing the district court's January 14, 2009 order.

II

ARGUMENT

A. Local Rule 83.3 Bars the Broadcasting of Court Proceedings in the United States District Court for the District of Massachusetts.

Petitioners have explained that Local Rule 83.3 bars the broadcasting of judicial proceedings in the United States District Court for the District of Massachusetts. *See* Petition for Writ of Mandamus or Prohibition ("Petition") at 9-16. Respondent presents no detailed response to this argument—electing instead to argue in one sentence that the phrase "by order of the court" in Rule 83.3(a) grants the district court apparently limitless discretion to permit broadcasting of its proceedings whenever it chooses to do so. *See* Respondent's Brief at 2. Respondent then attempts to "incorporate by reference" the various arguments of *amici* regarding the proper construction of Local Rule 83.3. *Id.*[1]

But that response is no response at all. As an initial matter, the Respondent's effort to "incorporate by reference" the arguments of various non-parties to this case is questionable, at best. *See Lane v. First Nat. Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989) ("We know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons

[1] Three separate *amicus curiae* briefs have been submitted in this matter: (1) a brief submitted by the Electronic Frontier Foundation, *et al.* (the "EFF Brief"); (2) a brief submitted by Courtroom View Network (the "CVN Brief"); and (3) a brief submitted by the Associated Press, *et al.* (the "AP Brief").

might be, have chosen to ignore"); *see also United States v. David*, 940 F.2d 722, 737 (1st Cir. 1991) (criticizing appellant who "adopted verbatim" arguments of another appellant).[2]

In any event, the various arguments presented by *amici* regarding the proper interpretation of Local Rule 83.3 are deeply flawed. Specifically, those arguments ignore critical portions of the plain language of Rule 83.3, as well as the history of the Rule in the District of Massachusetts.

1. The Plain Language of Local Rule 83.3 Bars Recording and Broadcasting of the District Court Proceedings.

Petitioners have already explained in detail how the district court's order authorizing the broadcast of its proceedings over the Internet is barred by the plain language of Local Rule 83.3. *See* Petition at 9-13. Respondent's and *amici*'s only response to this argument is that the "by order of the court" language in subsection (a) grants to the district court broad discretion to permit whatever recording and broadcasting of its proceedings the district court deems appropriate. *See* Respondent's Brief at 2; AP Brief at 13-15; EFF Brief at 6-7; CVN Brief at 7-9. But that interpretation cannot be squared with the plain language of the Rule.

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[2] *See also Rhode Island Dept. of Env. Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) ("As a general matter, we do not consider arguments advanced only by an amicus") (citing *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 6 (1st Cir. 1996)); *Trantina v. United States*, 512 F.3d 567, 575 (9th Cir. 2008) (rejecting an appellant's effort to incorporate by reference an argument advanced by *amici*).

Indeed, it bears emphasis that part (a) of the Local Rule 83.3, upon which the district court based its decision, is entitled **"Recording and Broadcasting Prohibited."** *See* D. Mass. Local Rule 83.3(a) (original emphasis). Respondent and all of the *amici* carefully ignore the plain language of this title. A rule bearing a title specifically *prohibiting* recording and broadcasting of its proceedings cannot reasonably be read to give the district court limitless discretion to *permit* such recording and broadcasting. To the contrary, a rule's exception (if any) is to be construed narrowly such that it does not swallow the rule itself. *See, e.g., United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 101 (1st Cir. 1994) ("courts must strive to give effect to each subsection contained in a statute, indeed, to give effect to each word and phrase").

Amici also fail to explain how their expansive reading of "by order of the court" in subsection (a) does not render subsection (c) of Rule 83.3 entirely meaningless. Instead, they attempt to argue that Petitioners' reading of the rule renders the "by order of the court" language in subsection (a) superfluous. *See* AP Brief at 14; CVN Brief at 9. That approach, however, ignores the impact of their own interpretation on subsection (c) of the rule—effectively rendering that subsection a nullity. That is to say, if district court judges have the unfettered discretion to allow recording and broadcasting under subsection (a), there would be no need to have a subsection (c) which describes specific instances where that

discretion may be exercised. Petitioners' interpretation of Rule 83.3 is far more logical, as it sets forth a broad general rule in subsection (a), followed by the explications of that rule in subsections (b), (c) and (d).

2. The History of Local Rule 83.3 Demonstrates That It Was Intended to Follow Judicial Conference Policy Barring the Recording and Broadcasting of District Court Proceedings.

Even if there were some ambiguity in Rule 83.3 regarding the degree of discretion afforded to district judges to permit recording and broadcasting of proceedings, that ambiguity disappears upon a review of the history surrounding the rule's adoption and use. As explained in the Petition, Rule 83.3 was adopted during the very same month (September 1990) that the Judicial Conference of the United States enacted its Policy Statement regarding the recording and broadcasting of judicial proceedings. *See* Petition at 13-16 (discussing Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. 1, Ch. 3, Part E.3 (hereinafter "*Guide*")).[3] That Policy Statement provides that federal judges may only allow recording and broadcasting of their proceedings for a limited set of purposes—purposes which are largely repeated in subsection (c) of Local Rule 83.3. *Id.* It is difficult to imagine that the United

[3] Prior to the adoption of the Policy Statement, a general prohibition against broadcasting was in place through Canon 3A(7) of the Code of Conduct for United States Judges. *See Report of the Proceedings of the Judicial Conference of the United States* (September 12, 1990) at 104 (attached to Petition at Add. 17).

States District Court for the District of Massachusetts would adopt a Local Rule that tracks, almost *verbatim*, large portions of the Judicial Conference policy regarding recording and broadcasting of judicial proceedings, while simultaneously granting district court judges broad discretion to disregard that same policy whenever they see fit. Petition at 13-16. Indeed, Petitioners' interpretation of Rule 83.3 is perhaps best supported by the fact that, to date, no judge in the District of Massachusetts has deviated from Judicial Conference policy by authorizing the recording and broadcasting of its proceedings under Local Rule 83.3—a point that neither the Respondent nor the *amici* dispute.

Amici have enthusiastically endorsed the district court's willingness to "experiment" with broadcasting in this case.[4] But the history of Local Rule 83.3 does not support the conclusion that the current local rule *allows* for such *ad hoc* experimentation. In fact, when the District of Massachusetts *did* participate in an experiment to allow recording and broadcasting of civil proceedings, it adopted an *entirely new* Local Rule. *See* Local Rule 83.3.1 (adopted September 1991; expired December 1994). That Local Rule specifically provided that broadcasting of proceedings was allowed only upon proper application and was subject to the court's discretion. *See id.* at 83.3.1(A)(2)-(3). The Rule also established specific

[4] One *amicus* brief refers to the Order as a "decision to allow this case to be an experiment in broadcasting online." *See* EFF Brief at 5. Another describes it as "but one step in an evolving process of experimentation." *See* CVN Brief at 13.

prohibitions and guidelines regarding the manner in which the recording and broadcasting of proceedings was to be conducted. *Id.* at 83.3.1(B-G).

> Perhaps most critically, Rule 83.3.1 provided in part that:
>
> The provisions of this *experimental rule* pertain only to photographing, recording, and broadcasting in the courtroom. In all other areas of the courthouse, the provisions of Local Rule 83.3 remain in full force and effect.

See id. at 83.3.1(A)(5) (emphasis added). This language clearly indicates that the judges in the District of Massachusetts who enacted this "experimental rule" understood that in all areas of the courthouse other than those where the experiment was taking place, a general prohibition on recording and broadcasting was "in full force and effect." Indeed, the final provision of the "experimental rule" says just that:

> Except as specifically provided in this rule, the *prohibitions* contained in LR 83.3 shall remain in full force and effect.

Id. at 83.3.1(H) (emphasis added). If district court judges in Massachusetts were already permitted under Local Rule 83.3(a) to allow recording and broadcasting "by order of the court," there would have been no need to enact Local Rule 83.3.1, much less to call it an "experimental rule."

Furthermore, that "experimental rule" expired in December 1994, leaving Local Rule 83.3 as the only relevant Local Rule governing the issue. The reading of Local Rule 83.3 employed by the district court in this case and urged by *amici* leads to the illogical conclusion that upon termination of the carefully crafted

"experiment" in broadcasting court proceedings reflected in Local Rule 83.3.1, the District of Massachusetts reverted back to a regime allowing district court judges unfettered discretion to order broadcasting of *any* court proceeding without any of the restrictions, guidelines and safeguards in place during the 1991-1994 experiment. Such an interpretation cannot be correct.

In fact, when the pilot program ended in 1994, it was clear to all that broadcasting of the proceedings in the federal district court was banned *again* by Local Rule 83.3– just as it had been prior to the experiment. Thus, a *Massachusetts Lawyers Weekly* article written just two months before the "sunset" of the "experimental rule," announced that "Cameras will *once again* be forbidden in Massachusetts federal courtrooms." *See* "Experiment with Cameras in Mass. Federal Courts To End," *Massachusetts Lawyers Weekly*, October 3, 1994 at 1 (emphasis added). In that same article, one district court judge who was present during the enactment of *both* Local Rule 83.3 *and* Local Rule 83.3.1 reflected an understanding that Rule 83.3 effects a general prohibition on broadcasting of judicial proceedings in the District of Massachusetts. *Id.* (citing an assessment by U.S. District Court Judge William G. Young that the cameras in the federal district court "will not be missed").[5]

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[5] *See also* "Timeline", *Massachusetts Lawyers Weekly*, December 26, 1994 (stating that in August 1994 "The federal court announce[d] that cameras in Boston's federal courthouses are to be removed after a three-year experiment.").

3. Legislative Efforts to Authorize the Use of Cameras in the Federal District Courts Confirm Petitioners' Interpretation of Local Rule 83.3.

Petitioners' interpretation of Rule 83.3 is further supported by recent legislative efforts relating to cameras in the courtroom. Many of those efforts involve proposals specifically designed to grant to district court judges the discretion to permit the electronic recording, broadcasting or televising of court proceedings over which that judge presides. *See, e.g.*, "Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues," Congressional Research Service (November 8, 2006) (hereinafter the "CRS Report") at 7-10, *available at* www.fas.org/sgp/crs/secrecy/RL33706/pdf (discussing, *inter alia*, H.R. 1751, H.R. 2422, and S. 829, each of which proposed to grant discretion to the presiding district judges to broadcast proceedings in their courtroom).

One of those pieces of legislation was sponsored by a Representative from Massachusetts. *See id.* at 7 (discussing H.R. 2422, sponsored by Rep. William D. Delahunt of the Massachusetts' 10th Congressional District). In addition, the district judge in this case herself has previously testified in favor of legislation which would have granted district court judges such discretion. *See* Statement of Hon. Nancy Gertner, set forth in *Allowing Cameras and Electronic Media in the Courtroom*: *Hearing Before the Subcomm. on Administrative Oversight and the*

Courts of the Sen. Comm. on the Judiciary, 106th Cong., 2nd Sess. at 19-24 (September 6, 2000), *available at* www.access.gpo.gov/congress/senate/senate14ch106.html (discussing S. 721, which sought to grant federal trial court judges the discretion to permit the recording and broadcasting of their proceedings); *see also* Testimony of the Hon. Nancy Gertner, *Cameras in Federal Courts: Hearing on H.R. 2128 Before the H. Comm. on the Judiciary*, 110th Cong. (September 27, 2007), *available at* http://judiciary.house.gov/hearings/hear_092707.html (discussing similar bill). If judges in the District of Massachusetts already had the discretion to permit broadcasting "by order of the court" under existing Local Rule 83.3, those proposed pieces of legislation would be entirely unnecessary in Massachusetts. But of course, the proponents of those legislative initiatives apparently presumed that the local rules in the District of Massachusetts did *not* grant such broad discretion to district court judges.

4. Local Rule 83.3 Should Not Be Interpreted In a Manner That is Inconsistent With Judicial Conference Policy.

Finally, there is no dispute that the district court's order is flatly inconsistent with the Judicial Conference policy that prohibits the broadcasting of court proceedings except in a limited set of circumstances. *See Guide*, Vol. 1, Ch. 3, Part E.3 (attached to Petition at Add. 13-15). Indeed, the district court's order concedes as much. *See* Order at 7-8.

But the district court's decision to disregard Judicial Conference policy regarding the recording and broadcasting of its proceedings gives insufficient weight to the position of that important body. *See United States v. Merric*, 166 F.3d 406, 412 (1st Cir. 1999) ("the views of the Judicial Conference are entitled to respectful attention on any matter"); *accord In re Cargill*, 66 F.3d 1256, 1267 (1st Cir. 1995) (Campbell, J., dissenting) (explaining that the Judicial Conference's adoption of certain ethical rules gives those rules "great persuasive weight"); *cf. United States v. Abreu*, 202 F.3d 386, 390 (1st Cir. 2000) (relying in part upon the Judicial Conference *Guide* to interpret an allegedly ambiguous statutory provision).

Moreover, the Judicial Conference itself believes that its policy regarding cameras in federal courtrooms is binding. *See* "Judicial Conference Convenes Biannual Meeting," News Release, Administrative Office of the U.S. Courts, March 10, 1998 *available at* http://www.uscourts.gov/Press_Releases/jc398.htm (announcing adoption of a Judicial Conference policy stating that "if a federal judge uses a state facility to conduct a federal proceeding, the judge remains bound by Judicial Conference policies, *including the policy on cameras in the courtroom*") (emphasis added); *accord Kitzmiller v. Dover Area School Dist.*, 388 F. Supp. 2d 484, 488 (M.D. Pa. 2005) (declining to "derogate from the clear policy mandate of the Federal Judicial Conference" regarding broadcasting).

To the extent that there is *any* ambiguity in Rule 83.3, this Court should construe the rule in a manner that is consistent with Judicial Conference policy regarding the recording and broadcasting of proceedings in the federal trial courts.[6]

B. No Showing of Irreparable Harm is Required Under This Court's Advisory Mandamus Authority.

Several of the *amici* devote space to arguments claiming that Petitioners have failed to demonstrate that they will suffer the "irreparable harm" required to support an extraordinary writ. *See, e.g.,* AP Brief at 8-13; EFF Brief at 9-14. But under this Court's power of advisory mandamus, there is *no* formal requirement for Petitioners to show a likelihood of irreparable harm. *United States v. Green*, 407 F.3d 434, 439 (1st Cir. 2005); *see also In re United States*, 426 F.3d 1, 5 (1st Cir. 2005); *In re Atlantic Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002); *United States*

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[6] For that reason, little weight should be afforded to CVN's argument that Petitioners' interpretation of Rule 83.3 would somehow bar the district court from employing "routine uses of technology" in the District Court. *See* CVN Brief at 11. Many of the "routine uses" cited by CVN do not necessarily implicate Rule 83.3. *See In re Sentencing*, 219 F.R.D. 262, 265 (E.D.N.Y. 2004) (explaining that "video recording kept in and under the control of the trial court does not constitute a broadcast"). Moreover, most of the examples cited by CVN fall within the confines of what the Judicial Conference permits for the purposes of "judicial administration" or for "security purposes." *See Guide* at Vol. 1, Ch. 3, Part E.3(c),(d). Actions by district courts that are *consistent* with Judicial Conference policy cannot be equated to the order at issue here, which interprets the Local Rule in a manner that *conflicts* with that policy. *Cf. United States v. Cicilline*, 571 F. Supp. 359, 363-364 (D.R.I. 1983) (explaining that the scope of a rule barring recording and broadcasting in district court is governed by its purpose, which can be derived from the "substantial family resemblance" between the Rule and, *inter alia*, a Judicial Conference recommendation).

v. Horn, 29 F.3d 754, 769 (1st Cir. 1994); *see also* Petition at 20 (citing *Horn* and explaining that "issues that present important questions that are 'likely of significant repetition prior to effective review' merit special consideration by this Court when considering whether to exercise its mandamus power").

Advisory mandamus is appropriate in this case because the issues presented in the Petition involve "critical questions of law that affect multiple cases and warrant immediate resolution." *In re United States*, 426 F.2d at 5. Indeed, in this case, just as in *In re United States*, the "central issue is one of judicial authority." *Id.* at 5. This case squarely presents the question of whether the district court's decision to permit the broadcast of its proceedings "contravenes or unlawfully supplements" a Local Rule which was adopted by the district court as a whole. *Id.*

Respondent does not address—much less dispute—these legal points. Instead, it has been left to non-party *amici* to argue that this Court should not exercise its advisory mandamus power in this case. Specifically, the AP argues that this Court's advisory mandamus power should not be exercised because Petitioners could pursue an appeal at some later date. *See* AP Brief at 9. But a later appeal would not be able to undo the impact of a broadcast of the proceedings. Nor would a later appeal provide a better opportunity to address the issues presented in this Petition, issues that necessarily "affect multiple cases and warrant immediate resolution." *In re United States*, 426 F.3d at 5.

In *Atlantic Pipe*, *supra*, this Court held that it had jurisdiction over a petition for mandamus seeking to challenge the district court's authority to compel an unwilling party to participate in non-binding mediation conducted by a private mediator. 304 F.3d at 138. While acknowledging that the petitioner would not suffer "irreparable harm" as a result of the district court's order, this Court concluded that it had authority to address the issue under its "advisory mandamus" powers. *Id.* at 139-140. The Court explained that the case was appropriate for advisory mandamus "because the extent of a trial court's power to order mandatory mediation presents a systematically important issue as to which this court has not yet spoken." *Id.* at 140. Indeed, the Court noted that the issue presented in the petition was "an issue of importance to judges and practitioners alike." *Id.* at 138.

So too here. The issue presented in this Petition—whether a judge in the District of Massachusetts has the authority to permit the broadcasting of its proceedings—is potentially relevant to every district court judge and every practitioner in the District of Massachusetts, the largest and busiest district court in this Circuit. Moreover, insofar as the district court has taken this step in connection with a pre-trial hearing, it is unclear when and if this so-called "experiment" (*see* EFF Brief at 5; CVN Brief at 13) will be subject to any effective review. *See Atlantic Pipe*, 304 F.3d at 140 (citing authorities discussing that, "as a practical matter, lawyers are often unable to challenge pretrial innovations even

when they may be invalid"). That fact, as the *Atlantic Pipe* court explained, "militates in favor of advisory mandamus." *Id.* (citing *Horn*, 29 F.3d at 770).

C. Regardless, Petitioners Have Established a Sufficient Likelihood of Irreparable Harm to Support the Issuance of a Writ.

In any event, Petitioners *have* demonstrated a sufficient likelihood of harm to support the exercise of this court's mandamus power. Indeed, Respondent does not contend—either directly or indirectly through an "incorporation by reference" argument (*see supra* at 2-3 & n.2)—that Petitioners have failed to establish a likelihood of harm that justifies the issuance of a writ. *See* Respondent's Brief at 2 (incorporating by reference *only* the statutory construction arguments advanced by the various *amici*).

As discussed in the Petition, there can be little doubt that there is a likelihood that harm will result from the district court's decision. *See* Petition at 21-27 (discussing the threat of harm to Petitioners posed by the district court's order). Indeed, the Judicial Conference has consistently opined that the broadcasting of district court proceedings poses a significant risk to a party's right to a fair trial. *Id.* at 21 (citing testimony by representatives of the Judicial Conference). In this Circuit, as noted above, the views of the Judicial Conference are entitled to significant deference. *Merric*, 166 F.3d at 412. The Judicial Conference has repeatedly noted that the broadcasting of proceedings in the federal trial courts poses significant and serious risk of "irreparable harm" to citizens'

right to a fair and impartial trial. Petition at 21 (quoting testimony by Judicial Conference representatives). Thus, the Conference has already determined that there is a likelihood of harm resulting from a broadcast of any district court proceedings—a conclusion that the Respondent has declined to rebut. *Id.*[7]

Nor does it matter that the district court (at least for the time being) has limited its decision to the broadcast of a pre-trial hearing. The district court's order left for a later date a determination of whether and how to broadcast further proceedings, including the trial in this case. Plainly, the likelihood of such a broadcast would necessarily increase if the district court's interpretation of Local Rule 83.3 were to stand. Moreover, many of the concerns expressed by the Judicial Conference about broadcasts of federal proceedings are directly applicable to the type of pre-trial proceeding to which the district court's order in this case applies. *See Allowing Cameras and Electronic Media in the Courtroom: Hearing on S. 721 Before the Sen. Subcomm. on Administrative Oversight and the Courts of the Sen. Comm. on the Judiciary*, 106th Cong., 2nd session, 13-17 (September 6, 2000), *available at* www.access.gpo.gov/congress/senate/senate14ch106.html

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[7] The Judicial Conference is not the only representative of the federal judiciary that has articulated concerns about the harm inherent in broadcasts of district court proceedings. Several Supreme Court Justices have also expressed deep concern over proposals that federal civil proceedings be broadcast. *See, e.g.*, CRS Report at 3 (quoting Chief Justice Roberts as stating that "there's a concern about the impact of television on the functioning of the institution, both the civil trial and the Supreme Court argument").

(summarizing the Judicial Conference's concerns regarding the broadcasting of federal court proceedings, including that cameras in the courtroom, *inter alia*, (1) increased security concerns for judges and court personnel, (2) increased the threat of privacy concerns resulting from the possible "indiscriminate dissemination of information on the Internet," (3) caused attorneys to be "more theatrical" in their presentations, and (4) caused judges "to change the emphasis or content of their questions at oral argument"); *see also* CRS Report at 12 (discussing concern that if broadcasting is permitted "judges might alter their mode of questioning which, in turn, could change the argument process"); *Id.* at 13-14 (same).[8] Those very real concerns are perhaps best reflected by the fact that, despite permission from the Judicial Conference to do so, only two of the thirteen United States Courts of Appeals have allowed their proceedings to be televised. *Id.*

[8] *See also* Statement of John C. Richter, United States Attorney for the Western District of Oklahoma on behalf of the Department of Justice, from *Cameras in Federal Courts: Hearing on H.R. 2128 Before the H. Comm. on the Judiciary*, 110th Cong. (September 27, 2007), *available at* http://judiciary.house.gov/hearings/hear_092707.html (discussing the Department of Justice's opposition to broadcasting of all district court proceedings, including federal civil trials).

D. In the Alternative, This Court May Properly Treat the District Court's Ruling as a Collateral Order.

Finally, Petitioners have separately filed a protective Notice of Appeal from the district court's order and have requested that that separate appeal (Appeal No. 09-1091) be docketed and consolidated with the Petition. *See* Petition at 3. In the event that this Court were to decline to invoke its mandamus authority to address the issues presented in the Petition, it may separately take jurisdiction over these same issues under the collateral order doctrine. That doctrine applies to a judicial ruling, like the one at issue in this case, "that conclusively determines an important legal question, which is completely separate from the merits of the underlying action and is effectively unreviewable by means of an archetypal end of case appeal". *See Green*, 407 F.3d at 438; *Rhode Island v. U.S. EPA*, 378 F.3d 19, 25 (1st Cir. 2004).

The district court's order in this case easily satisfies these criteria. The order conclusively determines (*albeit* erroneously) that the district court has the authority to permit the broadcasting of its proceedings. It addresses an important legal question (whether broadcasting of proceedings is permitted) that is completely separate from the merits of Plaintiffs' underlying claims of copyright infringement against the Defendant. And, as discussed above, it is effectively unreviewable through an end-of-case appeal.

Thus, even if this Court were to conclude that mandamus were not appropriate here, this Court may properly address and resolve the issues presented in the Petition through Petitioners' simultaneously-filed appeal. *See In re Providence Journal Co.*, 293 F.3d 1, 9 & n.3 (1st Cir. 2002) (discussing simultaneously filed petition for mandamus and protective notice of appeal and explaining that "all roads lead to Rome").

III

CONCLUSION

For the foregoing reasons, as well as those set forth in our Petition, Petitioners respectfully request that this Court issue the requested writ and reverse the district court's order of January 14, 2009.

Respectfully submitted,

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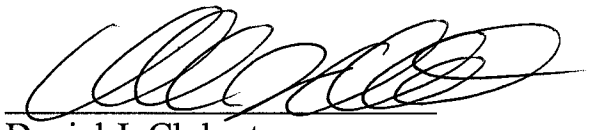

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February 2, 2009

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies and states as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) because the brief contains 4,620 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type for text and footnotes.

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CERTIFICATE OF SERVICE

I, Daniel J. Cloherty, attorney of record for Petitioners hereby certify that on Monday, February 2, 2009, before 12:00 p.m., copies the foregoing Petitioners' Reply Brief were served, via hand delivery, upon the following persons:

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