

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EUGENE FORTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court reverse *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) on the ground that the collateral bar rule violates the First Amendment by requiring criminal enforcement of unconstitutional orders?

TABLE OF CONTENTS

	<u>Page(s)</u>
QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
CONSITUTIONAL AND SATUTTORY PROVISION INVOLVED.....	1
STATEMENT OF THE CASE.....	2
1. The underlying Facts	2
2. District Court Proceedings.....	3
3. Appeal	3
REASONS FOR GRANTING THE WRIT.....	4
CONCLUSION	6
APPENDIX	
ORDER denying Petition for Rehearing and Rehearing En Banc.....	A-1
OPINION of the Ninth Circuit Court of Appeals in <i>United States v. Forte</i> , No. 17-10182 (9 th Cir. 2017)	A-2

Table of Authorities

Federal Cases

<i>Boos v. Barry</i> , 108 S.Ct. 1157, 485 U.S. 312 (1988)	5-6
<i>In re Establishment Inspection of Hern Iron Works, Inc.</i> , 881 F.2d 722 (9th Cir. 1989)	4
<i>Nebraska Press Assn. v. Stuart</i> , 427 U.S. 539, 96 S.Ct., 49 L.Ed.2d 683 (1976)	5
<i>People v. Gonzalez</i> , 910 P.2d 1366, 50 Cal.Rptr.2d 74, 12 Cal.4th 804 (Cal.,1996)	5
<i>Texas v. Johnson</i> , 109 S.Ct. 2533 (2001)	6
<i>Walker v. City of Birmingham</i> , 388 U.S. 307, 87 S.Ct., 18 L.Ed.2d 1210 (1967)	i, 4

Federal Statutes

Title 18 United States Code	
§401	2, 3, 5
§3006A	1
Title 28 United States Code	
§ 1254	1

Other Authorities

United States Constitution, Amendment I	1
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Treatises

<i>Labunski, Richard, The ‘Collateral Bar’ Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders</i> , 37 Am. U. L. Rev. 323 (1987-88).....	5
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, EUGENE FORTE, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Eugene Forte*, No. 17-10182 (9th Cir. 2018).

OPINIONS BELOW

The unpublished decision of the Ninth Circuit Court of Appeals is reproduced in the Appendix at pages A-2 to A-4. The Ninth Circuit's denial of en banc review is reproduced in the Appendix at page A-1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision of the Ninth Circuit Court of Appeals was filed on July 17, 2018. (App. Page A-2) Petitioner's timely Petition for Rehearing and Rehearing *En Banc* was denied on September 24, 2018. (App. page A-1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I of the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. §401 provides in pertinent part that “A court of the United States shall have the power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and no other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.”

STATEMENT OF THE CASE

1. The Underlying Facts

Mr. FORTE was a *pro se* litigant in a federal civil rights case who had previously been found incompetent to stand trial in a criminal case based on a diagnosis that he “was suffering from a severe mental delusional disorder of the grandiose and persecutory type.”

Thirteen days after Mr. Forte advised the civil trial judge of this diagnosis, the district judge warned Mr. FORTE not to make further disrespectful accusations by issuing the following order:

The Court will not permit any further accusations and statements of disrespect directed at the Court. If Plaintiff thinks this language is appropriate for appellate reasons, that is an issue for the Ninth Circuit.

ER 40, 48-49, 139-140, CR 44 at 21. Mr. Forte did not file an interlocutory appeal of this order, and he continued to make accusations and disrespectful written statements in his pleadings. After the trial judge received Mr. Forte’s

additional pleadings containing accusations and disrespectful language, the district court issued an order to show cause, which generated a new federal criminal case.

2. District Court Criminal Proceedings

Mr. Forte was arraigned on the criminal contempt citation, found to be indigent, and appointed counsel. The criminal contempt case was tried before a different judge. Mr. Forte was convicted of contempt under 18 U.S.C. §401 for disobeying the district judge's order not to make any accusations or statements of disrespect. ER 2-18. The district judge found Mr. Forte violated the order by filing written pleadings which accused his trial judge of being a liar. ER 128, CR 44 at 109. The district judge held that truth of the accusation was not a defense in a criminal contempt case. *Id.* The district judge imposed a \$150.00 fine, which has been paid. ER 1, CR 39.

3. Appeal

Mr. FORTE filed a timely notice of appeal. Ninth Circuit Court of Appeals affirmed the Judgement in *United States v. Eugene Forte*, 17-10182 (9th Cir. 2018). (App. page A-2) The Ninth Circuit relied on the collateral bar rule in rebuffing Mr. Forte's appeal:

We reject Forte's argument that his conviction cannot be upheld

because the order he violated is unconstitutional. The collateral bar rule “permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional.” *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725 (9th Cir. 1989) (citations omitted). Thus, even if the order were unconstitutional, that fact would not bear on the validity of his conviction.

(Appendix page A-2) In denying Mr. Forte’s appeal, the Ninth Circuit relied on *In re Establishment of Hern Iron Works, Inc.*, 881 F.2d 722, 727 (9th Cir. 1989) which expressly relied on *Walker v. City of Birmingham*, 388 U.S. 307 (1967) as binding precedent in First Amendment cases. Mr. Forte filed a petition for *en banc* review, which was denied on September 24, 2018. (App. page A-1).

REASON FOR GRANTING THE WRIT

Certiorari review is needed to address the conflict between the U.S. Supreme Court’s decisions such as *Walker* which apply the collateral bar rule even when enforcing orders that violate the First Amendment, and the decisions of the California Supreme Court, which do not apply the collateral bar rule in First Amendment cases. This Court’s continued adherence to an outdated procedural rule that weakens First Amendment protections is also inconsistent with this Court’s other First Amendment jurisprudence recognizing that government-created burdens on the exercise of First Amendment freedom must be justified by proof that the interference is necessary to achieve a compelling state interest. *See*

Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

As a matter of state procedural common law, the California Supreme Court rejected the collateral bar rule in part to protect First Amendment freedoms:

We observed that our rule is “considerably more consistent with the exercise of First Amendment freedoms” than that of other jurisdictions that have adopted the so-called collateral bar rule barring collateral attack on injunctive orders.

People v. Gonzalez, 910 P.2d 1366, 1375, 50 Cal.Rptr.2d 74, 84, 12 Cal.4th 804, 819 (Cal.1996).

The collateral bar rule has been widely criticized as inconsistent with protecting First Amendment rights. Professor Richard Labunski has pointed out that the collateral bar rule would enable a judge running for re-election to issue enforceable pre-election orders to newspapers limiting coverage or endorsements.

Labunski, Richard, The ‘Collateral Bar’ Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders, 37 Am. U. L. Rev. 323, 377. (1988)

This Court has consistently held that statutes which directly restrict insulting and disrespectful speech will be struck down unless the Government proves the restriction is necessary to serve a compelling interest and that the restriction is narrowly tailored to serve the interest. *See, e.g., Boos v. Barry*, 108 S.Ct. 1157,

1165, 485 U.S. 312, 324 (1988). In *Boos v. Barry*, this Court struck down a statute which restricted the display of signs in front of embassies because the government's interest in protecting the dignity of ambassadors was not compelling. In *Texas v. Johnson*, 491 U.S. 397 (2001), this Court struck down a flag burning ordinance because criminal enforcement was not necessary to achieve any compelling purposes.

This Court's strict review of statutes restricting First Amendment speech contrasts sharply with this Court's continued adherence to the collateral order doctrine despite the clear risk that such a doctrine makes it possible for indigent civil litigants to be punished for violating unconstitutional orders.

CONCLUSION

For the foregoing reasons, Mr. FORTE respectfully requests that this Court grant his Petition for Certiorari.

Dated: December 26, 2018

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Respectfully submitted,

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