

No. 18-112

**In The
Supreme Court of the United States**

VANCE D. DAY, JUDGE, CIRCUIT COURT
OF OREGON, THIRD JUDICIAL DISTRICT,

Petitioner,

v.

THE OREGON COMMISSION ON
JUDICIAL FITNESS AND DISABILITY,

Respondent.

**On Petition For Writ Of Certiorari To
The Supreme Court Of The State Of Oregon**

**RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI**

TIMOTHY R. VOLPERT
Counsel of Record
TIM VOLPERT P.C.
610 S.W. Alder Street, Suite 415
Portland, OR 97205
(503) 703-9054
tim@timvolpertlaw.com

VICTORIA BLACHLY
DARLENE PASIECZNY
SAMUELS YOELIN KANTOR LLP
111 S.W. Fifth Ave., Suite 3800
Portland, OR 97204
(503) 226-2966
vblachly@samuelslaw.com
darlenep@samuelslaw.com

Counsel for Respondent

TABLE OF CONTENTS

	Page
RESPONSE TO PETITION FOR A WRIT OF CERTIORARI	1
ARGUMENT	1
A. Introduction	1
B. Petitioner was disciplined by the court below for serious misconduct having nothing to do with same-sex marriage	2
1. Petitioner lied to the commission about being accosted at a soccer game.....	2
2. Petitioner allowed a felon probationer under his supervision to possess firearms and then lied about doing so	4
C. The state court based its decision to sanction Petitioner on his lies and conduct regarding BAS in the gun possession incidents, not on Petitioner’s conduct regarding same-sex marriage	9
D. There was no denial of due process.....	10
1. Due process did not require that all of BAS’s testimony be stricken from the record merely because he did not testify in person.....	11
2. Petitioner was not prevented from calling or cross examining any witnesses ..	13
3. Petitioner was not denied due process by being denied the opportunity to ask follow-up questions to questions asked by commission members after direct, cross and redirect had occurred.....	13

TABLE OF CONTENTS—Continued

	Page
4. Petitioner was not denied due process when the court refused to re-open the record after the court issued its decision to question a witness Petitioner called in the commission hearing	14
5. Petitioner was not denied due process by filing the first and last brief before the court.....	15
6. The applicable rules of judicial conduct put plaintiff on notice that he, as a judge, should not lie, ask staff members to lie for him, or encourage a convicted felon under his supervision to violate terms of his probation	16
E. Neither the commission nor the court disrespected Petitioner’s personal religious beliefs.....	16
F. Petitioner is not being prosecuted because of his religious beliefs or his conduct regarding same-sex marriage	22
G. The Petition should be denied	23
CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page
CASES	
<i>In re Greene</i> , 429 N.E.2d 390 (N.Y. 1981).....	24
<i>In re Koffler</i> , 412 N.E.2d 927 (N.Y. 1980).....	24
<i>Oregon v. Day</i> , Marion County Circuit Court, Case No. 16CR73159.....	23
STATUTES	
ORS 162.415	23
ORS 166.270	22

**RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
ARGUMENT**

A. Introduction

This Petition challenges the authority of a state supreme court to discipline an elected judge for lying repeatedly, instructing his employees to lie, allowing a convicted felon to possess a firearm, and paying inappropriate attention to a probationer under the judge's supervision. The Oregon Commission on Judicial Fitness and Disability ("commission") found Petitioner guilty of this misconduct after hearing the testimony of 54 witnesses (38 of whom were called exclusively by Petitioner and several more jointly called by both Petitioner and the commission) and considering over 200 exhibits received in the course of a nine-day evidentiary hearing. The commission recommended that Petitioner be removed from judicial office, the most stringent available sanction in this judicial ethics matter.

The Oregon Supreme Court ("court") carefully reviewed the commission's findings, recommendations, and the evidence on record *de novo*, and issued an 89-page per curiam decision. The commission found violations of judicial ethics rules and the Oregon constitution by clear and convincing evidence for eight counts out of the 13 originally alleged. The court dismissed two of those eight recommended counts, refused to consider any findings of a violation that the commission did not allege in its complaint, and concluded that the commission proved by clear and

convincing evidence that Petitioner engaged in the conduct referenced above on six counts. App. 7a. The court also rejected the commission's recommended sanction of permanent removal, and instead suspended Petitioner from judicial office for three years. *Id.*

Broadly speaking, the Petition creates three significant misimpressions. The first misimpression is that Petitioner was disciplined because he refused to perform same-sex marriages. The second misimpression is that Petitioner was denied due process. The third misimpression is that the commission and the court below were disrespectful of Petitioner's religious beliefs. This response is being filed primarily to address each misimpression.

B. Petitioner was disciplined by the court below for serious misconduct having nothing to do with same-sex marriage.

There were ample, adequate and independent state grounds for sanctioning Petitioner, having nothing to do with same-sex marriage.

1. Petitioner lied to the commission about being accosted at a soccer game.

In response to a complaint filed by a veteran soccer official as to Petitioner's behavior at his son's college soccer match, Petitioner wrote a lengthy report to the director of the commission claiming that a man who met the description of the complaining official grabbed

him by his shoulders from behind without warning, whirled him around, nearly picked him up off his feet and forcefully threw Petitioner forward, such that he nearly went down on his hands and knees. As it turned out, Petitioner's representation to the commission that he was assaulted by the soccer official was made up out of whole cloth. Multiple eyewitnesses contested Petitioner's claim in sworn testimony during the hearing, including the soccer official who had filed the complaint, the athletic director of the college where the match was played, and another referee who was on the field during the game, each testifying that the official was nowhere near Petitioner during the relevant time. *See* App. 13a-16a.

In evaluating the evidence, the commission expressly found the soccer official to be a "very credible" witness, who presented as "very straightforward, honest and genuine" in his demeanor. App. 134a. By contrast, it found Petitioner's testimony to be inconsistent with "virtually every other witness" and therefore not credible. *Id.* The state court agreed with the commission's findings, pointing to the three independent witnesses contradicting Petitioner's testimony and concluding that the soccer official's recounting of his interaction with respondent "is highly probable, while respondent's is not." *See* App. 58a-62a.

The court concluded "that the commission established by clear and convincing evidence that respondent made a false statement in his responding letter," and "in turn, demonstrates that respondent violated Rule 2.1(D), which prohibits a judge from 'engag[ing]

in conduct involving dishonesty, * * * deceit, or misrepresentation.’” App. 61a-63a.

2. Petitioner allowed a felon probationer under his supervision to possess firearms and then lied about doing so.

A decorated former Navy SEAL, who was referred to in the proceedings below by his initials, “BAS,” played a significant part in these proceedings. BAS had served at least 12 deployments and had many significant needs relating to his veteran status—including Post-Traumatic Stress Disorder (PTSD), traumatic brain injury (TBI), substance abuse, and a debilitating knee injury. BAS was a participant in the Veteran’s Treatment Court (“VTC”), which Petitioner oversaw at all relevant times. BAS was also a convicted felon, having pled guilty to his felony DUII charges as a condition of his participation in the VTC. App. 17a-18a.

The commission found that, on two occasions, “while knowing that BAS was subject to a statutorily required firearms restriction, [Petitioner] affirmatively permitted BAS to handle a gun. On the second occasion, [Petitioner] told BAS that he could make adjustments to that restriction because he was responsible for overseeing BAS’s probation and added that he had no problem with BAS going target-shooting with his son.” App. 117a-118a. The court found that there was clear and convincing evidence to support those findings. App. 82a.

BAS told an individual who worked for the VTC about his firearm possession. This was alarming to the VTC employee, because of BAS's psychological state. The VTC employee took contemporaneous notes of her conversation with BAS, and testified that BAS was "very afraid of what [Petitioner] could do to him," and he "was worried weeks and months afterward that he was still going to end up in trouble" after the gun incidents, and that "he had to do whatever the judge said to do or something was going to happen." Tr. 1160-1161. BAS testified that he was still afraid of Petitioner and what he could do. Tr. 1097. That fear was justified, as Petitioner had the ultimate authority to determine whether or not BAS successfully completed the VTC probation, which allowed BAS's felony conviction to be reduced to a misdemeanor. App. 17a-18a; *see also* App. 18a ("[Petitioner's] conduct placed BAS at legal risk for being in violation of his probation and potentially subject to criminal charges.").

After hearing about the gun incidents from BAS, the VTC employee confronted Petitioner, and Petitioner's conduct eventually came to the attention of Marion County Circuit Court Presiding Judge James Rhoades. She and Marion County Judge Dale Penn then confronted Petitioner about the firearm incidents. Petitioner denied having given BAS permission to handle a gun during the second incident. He also stated that he had not realized at the time that BAS was a felon—even though Petitioner was the judge who sentenced BAS and oversaw his probation. *See* App. 72a-73a; 145a. Judge Rhoades and Judge Penn expressed their views that the gun-handling incident should be

reported to the commission, and Petitioner confirmed he would self-report, which he did with minimal detail about an “interaction” with a VTC participant. App. 25a.

The commission and court found BAS to be a credible witness and disbelieved Petitioner, with the court saying that, “the record does not reflect well on [Petitioner’s] credibility.” App. 81a. The court gave “significant weight” to BAS’s testimony because:

The commission found that, “based on BAS’s demeanor and manner of testifying,” he presented genuinely and sincerely. App. 74a.

Other evidence in the record, such as 14 video recordings of BAS’s VTC appearances, showed BAS to be “an earnest and forthright communicator, regardless of whether the circumstances were favorable to him or whether he appeared in person or by telephone.” App. 75a.

The VTC deputy district attorney testified that he had observed BAS, in the context of his VTC appearances over the course of many months, to be credible and that the VTC team had found him to be very credible. *Id.*

BAS’s testimony about handling the guns was against his interest because, “BAS self-reported what appears to have been a violation of his own probation condition.” App. 75a-76a.

BAS’s description of the gun-handling incidents to the VTC employee shortly after the second incident, which she documented immediately, was the same as described in his testimony. App. 76a.

The record reveals that it is unlikely that BAS would have gone target-shooting with respondent's son without thinking that he had respondent's permission to do so. *Id.*

Pressing an inaccurate, unfavorable account about his probationary judge's involvement in the gun-handling incidents would have been counterproductive to those efforts and could have placed BAS's probationer status at risk. *Id.*

The court disbelieved Petitioner's testimony about the gun possession incidents because:

He "provided a detailed account of events at the soccer game * * * which he reiterated at his deposition in testimony introduced at the hearing," that was refuted by three eye witnesses. App. 80a.

Petitioner undertook evasive actions during his meeting with fellow judges, "clarifying or modifying his answers throughout the meeting, depending on the information that Judge Rhoades presented to him," denying the second gun-handling incident but then acknowledging remembering it after Judge Rhoades provided him with some specific information. App. 80a-81a.

Petitioner's assertions that he did not think about BAS's felon status and related firearms prohibition until after the second gun-handling incident were belied by several interactions between Petitioner and BAS in open VTC court hearings about BAS's firearms prohibition

demonstrating “an ongoing mutual understanding that a firearms prohibition applied to BAS.” App. 81a.¹

The state court ultimately found that Petitioner’s “repeated willful misstatements in the course of fact-finding inquiries, and his conduct during the gun-handling incidents” are sufficiently serious to warrant one of the most significant sanctions that this court has imposed in a judicial fitness proceeding” and concluded “primarily based on that misconduct, that a three-year suspension is appropriate.”² App. 113a.

¹ See App. 181a-182a, where the commission provided a comprehensive list of “examples of Judge Day’s untruthfulness.”

² The commission also found that clear and convincing evidence supported Count 6 of the commission’s complaint alleging that Petitioner, “singled BAS out for attention and improperly imposed himself onto BAS” putting BAS “in the position of being subject to [Petitioner’s] attentions, while being aware of [Petitioner’s] control over his probation status.” App. 27a, 98a.

Uncontested evidence established that Petitioner did such things as taking BAS to a wedding ceremony that Petitioner had agreed to officiate where he introduced BAS as a Navy SEAL and used his confidential call sign, continually texting with BAS, including while BAS was being treated for his traumatic brain injury in Texas and on Christmas evening and inviting BAS to attend a family brunch to celebrate Petitioner’s birthday, where Petitioner and his family made BAS uncomfortable by trying “to engage BAS in religious, military, and political discussions.” App. 89a.

C. The state court based its decision to sanction Petitioner on his lies and conduct regarding BAS in the gun possession incidents, not on Petitioner’s conduct regarding same-sex marriage.

It was uncontested that, after Oregon’s constitutional same-sex marriage ban was invalidated, Petitioner directed his staff to obtain gender information about each couple asking Petitioner to marry them and then directed them to schedule opposite-sex marriages, but to either notify him about a potential same-sex marriage request, so that he could decide how to proceed, or to tell the requesting couple that he was not available. The state court found that those directions “manifest[ed]” prejudice in the performance of judicial duties, within the meaning of Rule 3.3(B). App. 110a.

Petitioner has attempted from the very beginning of this disciplinary proceeding to use his genuinely held religious beliefs opposed to same-sex marriage as a diversion from his other numerous and serious acts of misconduct. He has represented repeatedly, as he does here, that he has fallen victim to governmental actors who seek to punish him for his religious views. Those claims are disingenuous. Petitioner has been suspended for three years because he lied repeatedly and allowed a felon on probation to handle guns in violation of his probation. As the state court said: “In light of the other, notably serious misconduct that the commission has proved by clear and convincing evidence, we conclude that—whether respondent’s constitutional challenges are meritorious or not—our

ultimate conclusion to impose a lengthy, three-year suspension remains the same.” App. 113a.

Petitioner claims: “The Oregon Supreme Court seeks to minimize or deny the impact of its judgment that Judge Day ‘manifested’ bias toward same-sex couples.” Pet. 16. He also warns that “[o]ther, similarly-situated litigants could suffer the same constitutional violations.” Pet. 37. It is difficult to conceive of there being many “other, similarly-situated litigants” who, in addition to being sincerely opposed to same-sex marriage, have lied repeatedly and allowed a felon under their direct judicial supervision to possess guns. But if any such litigant emerges, raising constitutional violations similar to those raised by Petitioner here will not protect them any more than they protected Petitioner here. Petitioner’s constitutional defenses regarding same-sex marriage are not defenses to the other misconduct that provides independent state grounds for the discipline the state court has imposed.

D. There was no denial of due process

Petitioner also claims that the commission and the court denied him due process. That is not the case. Petitioner was given due notice in the form of a complaint setting forth the alleged violations and the conduct underlying those allegations. The court rejected those findings of rule violation by the commission where, although based on the same underlying conduct, the particular rule violations were not alleged in the original complaint. *See* App. 37a-39a. Petitioner was also afforded a full evidentiary hearing at which he called

over 40 witnesses. The commission's findings and record were reviewed *de novo* by the Oregon Supreme Court based on evidence provided by 54 witnesses and over 200 exhibits during a nine-day evidentiary hearing. Petitioner had both notice and an opportunity to be heard. *See* App. 53a-55a.

1. Due process did not require that all of BAS's testimony be stricken from the record merely because he did not testify in person.

Petitioner faults the court for not striking all of BAS's testimony as well as his witness interview summary. Petitioner says the court should have done so because he "had been denied a fair and adequate opportunity to confront BAS about the accusations or to impeach BAS's credibility with exhibits, and because the fact-finder had not been able to visually assess the witness." Pet. 11.

Petitioner says that he "had tried but was denied the opportunity to depose BAS to prepare for his testimony" before the hearing. Pet. 30. That is false. Judge Day was never denied the opportunity to issue a deposition to BAS prior to the hearing. He did not even ask for a commission to issue a deposition subpoena at that time. The commission's attorneys expected BAS to appear in person at the hearing. They learned on the day scheduled for his testimony that he would not appear in person. Instead, BAS testified over the telephone. After the commission issued its decision, Petitioner complained about this, and the court, by order dated May

17, 2016 gave Petitioner's counsel a commission to obtain a subpoena in Texas, where BAS was living, to legally compel BAS's testimony. The court gave Petitioner 45 days, until July 1, to do so. When Petitioner claimed he could not secure the testimony by that deadline, the court extended the deadline to depose BAS another 35 days, to September 6, 2016. Before that second deadline, Petitioner chose to rely on representations from the witness that he would give in-person testimony voluntarily. Ultimately, and perhaps predictably, the same thing happened this time that happened at the hearing: BAS did not appear for in-person testimony.

The only due process argument Petitioner makes regarding the testimony is that the commission was unable to watch BAS testify in person. Due process does not require in-person testimony in every instance. The court was able to decide whether to believe Petitioner or BAS based on the numerous factors described in greater detail at pages six through eight above.

Due process did not require striking all of BAS's testimony and evidence of his statements to investigators. The court properly denied Petitioner's motions to strike all of BAS's hearing testimony and (pre-hearing) witness statement.³

³ Sixteen written pre-hearing witness statements were received in evidence by the commission (Ex. 71). Of those, half of the witnesses were never deposed. Three did not testify at the hearing at all. Yet Petitioner sought to strike only BAS's witness statement.

2. Petitioner was not prevented from calling or cross examining any witnesses.

Petitioner says: “Judge Day was not able to present the testimony of all his witnesses because the Commission, which expressed intent to use 3.5 days, used 5, leaving Judge Day the remaining 4 days to present his case.” Pet. 7. This is misleading. In addition to opening statements taking up part of the first day of the hearing, several of Petitioner’s witnesses were taken out of turn during the commission’s case, and Petitioner himself returned to the witness stand several times during the course of the hearing. Petitioner called the vast majority of his pre-identified potential witnesses.⁴ The commission did not say that additional testimony could not be offered after the initial time set aside for the hearing. Petitioner never asked to put on any “additional witnesses” or for more hearing time when the hearing was concluding.

3. Petitioner was not denied due process by being denied the opportunity to ask follow-up questions to questions asked by commission members after direct, cross and redirect had occurred.

Petitioner says:

During the hearing, Commission members often asked questions directly of the witnesses after counsel’s examination of the witness was complete. Judge Day’s counsel was not

⁴ Of the few pre-identified witnesses not called at the hearing, Petitioner elected not to call his son who brought the gun into BAS’s home during one of the gun-handling incidents.

permitted to ask follow-up questions of the witnesses.

Pet. 7-8; record citations omitted.

The commission allowed direct, cross and redirect of all witnesses. To avoid stalling the proceedings with an endless cycle of questioning each witness, however, neither side was allowed to ask follow-up questions to questions asked by the commission members. TR 210-211. Yet the commission Chair routinely asked if witnesses could be released from their subpoenas, before letting them go, inviting either party to reserve the right to recall witness to ask additional follow-up questions. Petitioner was never precluded from recalling a witness. In particular, Petitioner's counsel continued Petitioner's testimony at multiple times during proceedings over two weeks, and could have referred back to commissioner questions at any time.

4. Petitioner was not denied due process when the court refused to re-open the record after the court issued its decision to question a witness Petitioner called in the commission hearing.

Petitioner says:

On March 29, 2018, Judge Day sought reconsideration in light of recurring procedural due process violations that occurred throughout the process that had prejudiced him and his ability to present evidence to the Court. (Petition—Reconsideration, Mar. 29, 2018.) On April 24, 2018, the Oregon Supreme Court

denied reconsideration, asserting without specifying that “procedural opportunities were available to respondent, which he did not pursue,” and enter [sic] its judgment against Judge Day. App. 1a.

Pet. 12. That is misleading because the court’s reference to “procedural opportunities were available to respondent, which he did not pursue” had nothing to do with “recurring procedural due process violations that occurred throughout the process.” The court was referring solely to Petitioner’s post decision motion, after the court had issued its opinion, to reopen the record to allow him to ask more questions of a witness (Petitioner’s expert) that Petitioner called as a witness at the commission hearing.

5. Petitioner was not denied due process by filing the first and last brief before the court.

Petitioner complains that he was required to file the first brief to the court. Pet. 34. He claims that was “severely prejudicial” because he “filed an opening brief with only an ‘Opinion’ lacking any record citations to guide him.” Pet. 35. It is true that the commission’s decision did not include record citations.⁵ The nine-volume transcript, covering 2,357 pages, had not yet been prepared when that decision was issued. But thanks largely to Petitioner’s numerous, post-hearing motions

⁵ The commission’s finding did specifically refer to certain witness testimony and described specific exhibits. The commission attorneys’ written closing argument referred specifically to exhibits by number.

and extensions granted for filing his opening brief, Petitioner's opening brief was not filed with the state court until January 17, 2017. By then, the transcript had been available to Petitioner for nearly a year. Petitioner had ample time to match the commission's finding with the record.

6. The applicable rules of judicial conduct put plaintiff on notice that he, as a judge, should not lie, ask staff members to lie for him, or encourage a convicted felon under his supervision to violate terms of his probation.

Petitioner raised a number of largely undeveloped due process attacks on the rules pertaining to judicial conduct. None of them have merit because Petitioner's conduct here did not fall in any "gray area" where a judge would not know what he was doing was wrong. The applicable rules of judicial conduct put plaintiff on notice that he, as a judge, should not lie, ask staff members to lie for him, or encourage a convicted felon under his supervision to violate terms of his probation.

E. Neither the commission nor the court disrespected Petitioner's personal religious beliefs.

Petitioner asserts that, "[t]hroughout the Commission's prosecution of Judge Day is an open disdain and hostility towards the religious beliefs of those whose faith honors marriage between one man and one woman." Pet. 22.

Yet Petitioner cannot provide a single, legitimate example of disrespect of his religious views by the commission or the court. It is telling the extent to which Petitioner grasps for straws in trying to show disrespect. Every instance Petitioner cites is misleading.

Petitioner says:

Judge Day also sought to depose BAS, during which the Commission's lawyer advised Judge Day's counsel of BAS's "legitimate concerns" about publicity because "he's seen what religious zealots are capable of during his numerous military tours," supporting an apparent comparison of Judge Day to ISIS and the Taliban. (ER 170.)

Pet. 7. The commission's lawyer did not compare Judge Day to ISIS and the Taliban. Her exact words in an email to Petitioner's counsel were:

"Do you have an objection to BAS appearing at the hearing by real time video for direct and cross examination? As you know, he's out of state. Additionally, he has legitimate concerns about the heightened press related to this case after Judge Day released the entire complaint and response; he's seen what religious zealots are capable of during his numerous military tours; he was told by his former criminal counsel not to get involved because of the probation violations; and Judge Day's interactions with him were so unpredictable that he fears retaliation in the form of a warrant or some other legal action that may have adverse consequences." ER 170.

BAS was genuinely afraid of Petitioner. He testified during the hearing:

“Q: Are you anxious about testifying today?

A: [BAS] Yeah, I—I don’t have—I don’t have a good feeling at all. [* * *] [T]here is a man with great power that I’m afraid of, I’m afraid of—I’m afraid of Vance Day.” [* * *] Hearing Tr. at 1097.

Petitioner says that “the Commission described Judge Day’s unwillingness to marry same-sex couples as ‘misconduct’ * * * * .” Pet. 9. The commission was not referring to Petitioner’s unwillingness to marry same-sex couples as “misconduct.” The commission was referring to Petitioner “[m]aking public statements in pre-hearing publicity to create the impression that this proceeding was solely regarding his religious beliefs and his refusal to conduct same-sex marriages in order to deflect public attention away from other misconduct.” App. 152a. A number of such statements, many by Petitioner himself and others by his identified spokesperson, are part of the underlying record.⁶ In

⁶ For example, Exhibit 116 (video clip) beginning at 4:55, Petitioner states in a television interview on September 9, 2015: “Well the Commission came down and somebody here talked to them about Judge Day not marrying gay couples. And I think from there, that was the catalyst to bring about a lot of things which I think when somebody really reads the complaint and knows who I am, knows how I handle my court, how I treat people, they have to stand back and say, wait, what’s this about. So we’ll answer those questions in November.”

Exhibit 116 beginning at 5:40, Petitioner states: “I can’t judge the intent of folks, I don’t know who’s behind it[. . .] There are some jurisdictions in the United States[. . .] Some District

fact, the commission only became aware of Petitioner’s plan and instructions to staff regarding same-sex marriages when, while the commission’s investigator was speaking with witnesses regarding the gun-handling issues, court employees volunteered that information to her. App. 32a.

Similarly, Petitioner says “the Commission denied Judge Day’s ‘assert[ion] that this proceeding is due to his religious beliefs and his refusal to perform same-sex marriages . . . [a]s not true.’” Pet. 9. That did not happen either. The cited passage from the commission decision is as follows:

“Judge Day has been dishonest to the public at large when asserting that this proceeding is due to his religious beliefs and his refusal

Attorneys offices who will file a whole bunch of charges, they are really after one, but they just load up the charging document because then it makes it difficult for the criminal defendant. Again we don’t do that here in Marion County, but when I look at that Complaint, that’s what comes to mind.”

Exhibit 116 beginning at 6:45, Petitioner states: “Sometimes there’s a strategy in politics to go after somebody and kind of do that shotgun approach.”

Exhibit 117 (video clip) beginning at 7:36, Petitioner states in a television interview on September 14, 2015, regarding the commission: “When you have a body that investigates, decides to prosecute a complaint, makes the rules about how they’re gonna prosecute the complaint, they become the prosecutor and the jury at the same time. It’s a little troubling to think about fairness and neutrality when you look at all these allegations and you say to yourself, I’ve given answers on every single one of those and given them evidence, you know, what are they after. It does seem to be a little bit like they’re throwing everything at me and the kitchen sink.”

to perform same-sex marriages. That is not true.”

App. 182a. The commission was again referring to Petitioner repeatedly creating the false impression in public statements that he was being disciplined primarily because of his religious view.

Petitioner says that the commission referred to “his plan to discreetly screen-out same-sex couples as a ‘deplorable lack of understanding of the most basic concepts of impartiality.’” Pet. 9. This is a misleading framing of the commission’s ultimate findings after the conclusion of the hearing and review of written closing arguments. The commission was not talking about the screening process in this reference. It was referring to Petitioner’s claim that he was essentially doing same-sex couples a favor by telling court staff to lie to them. The commission said in its written Opinion:

“Furthermore, the idea that a discriminatory practice is a positive ‘accommodation’ to those being discriminated against shows a deplorable lack of understanding of the most basic concepts of impartiality.”

App. 173a.

Petitioner says: “During closing arguments, the Commission’s lawyer argued that “the evidence consistently showed that Judge Day is someone that marches forward with his convictions . . . [he] is fomenting disorder within the judicial system.” Pet. 8. This refers to the commission’s attorney’s written closing argument, submitted to the commission after the

public hearing had concluded. The commission’s lawyer’s statement characterized the full panoply of Petitioner’s misbehavior:

“This case is not about religion. The First Amendment allows for freedom of speech, but it does not erase the consequences when one chooses to speak or act in a way that violates the Oregon Code of Judicial Conduct, or state and federal law. A judge takes an oath to uphold the law, without an opt-out box to pick and choose which laws to abide by.

This is not a case of one or two simple missteps into violations of the ethical rules for judges in Oregon. Rather, the evidence consistently showed that Judge Day is someone that marches forward with his convictions—without remorse, accountability, or humility.”

Petitioner also says that he “was described as ‘conspir[ing] with state employees to discriminate.’” Pet. 8. This is also taken from the commission attorney’s written closing argument. In a list of “aggravating factors,” the commission’s closing argument states: “(4) Judge Day sought to conspire with state employees to discriminate by asking if certain staff were ‘safe,’ as in whether or not they shared his religious beliefs (Exhibit 71, p. 1a).” During the hearing, court staff Christine Brown testified that Petitioner had asked her if another court staff member, Megan Curry, was “safe,” which Ms. Brown understood to mean, “would Miss Curry be ok screening same sex couples.” Ms. Brown and Ms. Curry were the two staff members that Petitioner instructed to screen same-sex applicants for weddings by telling the applicants that Petitioner was unavailable,

even if his calendar allowed it. Calling that “conspiring” is an accurate statement of how Petitioner tried to seek out court employees who would cooperate in his secretive plan to screen out same-sex couples. It was not an attack on Petitioner’s religious beliefs.

As Petitioner’s purported examples discussed above illustrate, in nine days of evidentiary hearings, hundreds of pages of briefing, the commission’s 48-page decision and the court’s 89-page opinion, Petitioner cannot find a single, legitimate example of the commission or the court acting disrespectful toward Petitioner or his religious beliefs.

F. Petitioner is not being prosecuted because of his religious beliefs or his conduct regarding same-sex marriage.

Petitioner again misleads the Court when, in argument for why it should consider the “impact” of the Oregon court’s findings, he claims that “as a result of” the commission and court proceedings, he is facing criminal charges and attorney disciplinary investigation. Pet. 17-18. To the extent this suggests that Petitioner is being prosecuted in Oregon as a result of his views regarding same-sex marriage, this is false. The Court should be aware that the charges alleged in the criminal case have to do with Petitioner’s conduct regarding BAS and the gun-handling incidents. The criminal charges alleged by a Grand Jury of the County of Marion, State of Oregon, are two counts of aiding and abetting Felon in Possession of a Firearm (C Felony), ORS 166.270, and two counts of Official

Misconduct in the First Degree (A Misdemeanor), ORS 162.415. The 11-day jury trial on these criminal charges is set to begin October 22, 2018. *Oregon v. Day*, Marion County Circuit Court, Case No. 16CR73159.

G. The Petition should be denied.

The Oregon Supreme Court had the authority to suspend Petitioner, then a state court judge, for three years based solely on the violations the court considered most significant: lying to the commission about the soccer incident, allowing a felon on probation to handle guns and lying about doing so when confronted by his presiding judge and others. Petitioner asserts no First Amendment Free Exercise and Free Speech defenses to those violations. The sanction at issue, a three-year suspension from the judicial bench, was based on adequate and independent state grounds.

Petitioner presents no issue of importance justifying review by this Court. Due process does not mandate that state supreme courts addressing constitutionally based defenses in judicial disciplinary proceedings must address those defenses in detail in written decisions or provide what the Petition calls “sufficient analysis.” Nor does due process mandate that state supreme courts in judicial disciplinary proceedings must address constitutionally based defenses when the court concludes that other misconduct to which such defenses do not apply is sufficient, in and of itself, to justify the result. Petitioner fabricates these arguments. Petitioner points to no lower court that has

ever required either degree of specificity or even addressed such an issue.⁷ There certainly is no split of authority for this Court to resolve. Moreover, these issues were not properly preserved. Petitioner did not argue to the commission or the state court that due process requires any particular degree of analysis in a written decision disposing of the case.

Petitioner asserts that the state court violated his First Amendment rights “because he declined * * * to perform the non-mandatory judicial function of solemnizing same-sex marriages.” But the state court here was not presented with a refusal to marry same-sex couples. On one particular count, the court was presented with Petitioner’s demonstration of bias against same-sex couples by requiring court employees to lie

⁷ Petitioner cites two New York state court cases, *In re Koffler*, 412 N.E.2d 927, 929 (N.Y. 1980) and *In re Greene*, 429 N.E.2d 390, 392 (N.Y. 1981), for the proposition that “the right to defend yourself on constitutional grounds exists even when no sanction is imposed.” In those lawyer disciplinary cases, the argument was made that the disciplined parties *could not appeal* from the underlying disciplinary proceedings because they were not sanctioned. The courts relied on a New York statute granting appellate jurisdiction that said, in relevant part, that an appeal may be taken to the court of appeals as of right, “from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.” Here, by contrast, there is no doubt that an appeal could be taken from the commission’s recommendations. The proposition for which Petitioner cites these cases is once the appeal is filed, an appellate court must consider defenses the resolution of which would have no bearing on the outcome of the case. For good reason, neither these cases nor any other case so holds.

to same-sex couples. In any event, Petitioner's other misconduct to which his constitutional defenses do not apply provided adequate and independent grounds for the suspension imposed.

Finally, the litany of supported procedural due process violations set forth in the Petition simply did not occur. Petitioner's claims of procedural due process violations are founded on false and misleading representations of the record. Petitioner was plainly given notice of the charges against him, and to the extent he was at risk of being disciplined for conduct or violations that were not alleged, the lower court rejected those recommendations. Petitioner was also afforded ample opportunity to be heard—in the commission hearing process itself, in pre-briefing motions to the lower court, in briefs submitted to the lower court, and in post-decision motions to reconsider.



CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY R. VOLPERT

Counsel of Record

TIM VOLPERT P.C.

610 S.W. Alder Street, Suite 415

Portland, OR 97205

(503) 703-9054

tim@timvolpertlaw.com

VICTORIA BLACHLY

DARLENE PASIECZNY

SAMUELS YOELIN KANTOR LLP

111 S.W. Fifth Ave., Suite 3800

Portland, OR 97204

(503) 226-2966

vblachly@samuelslaw.com

darlenep@samuelslaw.com

Counsel for Respondent