

No. 18-112

In The
Supreme Court of the United States

INQUIRY CONCERNING A JUDGE RE: THE HONORABLE
VANCE D. DAY, *Petitioner*,

v.

THE OREGON COMMISSION ON JUDICIAL FITNESS AND
DISABILITY, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme
Court of the State of Oregon

**Reply In Support of
Petition for a Writ of Certiorari**

James Bopp, Jr.
Counsel of Record
Anita Y. Milanovich
Melena S. Siebert
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com email
Counsel for Petitioner

Table of Contents

Table of Contents.	i
Table of Authorities.	iii
Introduction.	1
Argument.	3
I. The Oregon Supreme Court Violated Judge Day’s Due Process Rights When It Refused To Consider, or Summarily Rejected, Substantial Constitutional Claims.	3
A. The Oregon Supreme Court Violated Judge Day’s Due Process Rights By Finding Judge Day Manifested Prejudice Toward Same-Sex Couples While Simultaneously Refusing To Consider His Free Exercise Defenses.	3
B. The Oregon Supreme Court Violated Judge Day’s Due Process Rights By Finding Judge Day Made “Wilful Misstatements” and Carried Out Other “Misconduct” While Refusing To Consider His Substantial Free Speech Defenses Related to Those Charges.	5
C. The Oregon Supreme Court Violated Judge Day’s Due Process Rights By Summarily Rejecting Judge Day’s Substantial Procedural Due Process Claims.	6

II.	Judge Day Raised Substantial Constitutional Defenses..	7
A.	Judge Day Has Substantial Free Exercise Defenses..	7
B.	Judge Day Has Substantial Free Speech Defenses..	9
C.	Judge Day Has Substantial Procedural Due Process Claims..	10
1.	Requiring Judge Day To Submit the Opening Brief Violated His Procedural Due Process Rights... .	10
2.	Allowing BAS To Testify By Telephone Violated Judge Day's Procedural Due Process Rights...	11
	Conclusion..	13

Table of Authorities

Cases

<i>A.E.P. v. K.A.H.</i> , 381 P.3d 1052 (Or. Ct. App. 2016).....	11
<i>In re Greene</i> , 429 N.E.2d 390 (1981).....	4
<i>In re Koffler</i> , 412 N.E.2d 927 (1980).....	4
<i>Republican Party of Minnesota v. White</i> , 536 U.S.765 (2000).....	2

Rules

Oregon Code of Judicial Conduct, Rule 3.3(B).....	7
---	---

Introduction

This Petition is about the rights of an accused to have his substantial constitutional defenses considered before being found guilty. Judge Day acknowledged the authority of Oregon’s Supreme Court to discipline an elected judge for violations of the Judicial Code (“Code”), acting as a court of original jurisdiction. However, the lower court’s refusal to consider, or its summary rejection of, Judge Day’s substantial constitutional defenses, while adjudicating his guilt, was a serious error that denied Judge Day his due process rights. The Commission and the lower court seem to think that constitutional defenses are not worthy of consideration when made by a person who was exercising his religious freedom in a way that was offensive to them and who they, therefore, consider to be a “liar” and just a bad person.

The Commission exhibited this hostility throughout the proceedings and its Response. The Response is replete with derogatory references to Judge Day (he “lied” or was “lying”—9 times) and to arguments in his Petition (“false,” “misleading,” or “fabrications”—12 times). The opening sentence sets the tone: “The 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.” Resp. 1. It continues, “Petitioner *fabricates* these arguments.” Resp. 23 (emphasis added). And, as if this Court may not have already gotten the point, the final paragraph wraps it up: “Petitioner’s claims of procedural due process violations are founded on *false* and *misleading* representations of the record.” Resp. 25

(emphasis added).

The Response addresses the central issue of this Petition—whether it is a due process violation for the lower court to refuse to decide constitutional defenses, but to adjudicate guilt anyway—at the end with one dismissive, conclusory paragraph. *Id.*

This Court has repeatedly refused to heed the siren lure that the courts should refuse to consider constitutional defenses by those who have committed crimes infinitely more offensive than any “misconduct” committed by Judge Day. As this Court has consistently required, even a person charged with the most heinous acts is entitled to the protections that the Constitution affords. Judge Day is entitled to no less. The lower court’s failure to consider, or adequately explain, its legal conclusions on significant, constitutional defenses is fundamentally a denial of due process.

Given the Commission’s hostility to Judge Day’s religious beliefs, the lower court’s willingness to adopt the Commission’s recommendations, particularly its credibility determinations, while giving short shrift to Judge Day’s constitutional defenses, allows bias against a party to infect the lower court’s decision. This bias is contrary to *Republican Party of Minnesota v. White*, which expressly recognizes the compelling importance of an impartial court. 536 U.S. 765, 804 (2000).

Rather than justifying the lower court’s refusal to consider, or adequately explain, Judge Day’s substantial constitutional defenses, the Response denigrates Judge Day, as if he is just not worthy of being afforded the protections the Constitution provides. This Court should emphatically reject this invitation by granting the Petition or by summary remand.

Argument

I. The Oregon Supreme Court Violated Judge Day's Due Process Rights When It Refused To Consider, or Summarily Rejected, Substantial Constitutional Claims.

The lower court found Judge Day guilty, but refused to consider Judge Day's Free Exercise and Free Speech defenses to the bias charge, his constitutional defenses to the other charges, and summarily rejected his Procedural Due Process claims. The lower court's apparent belief that constitutional defenses do not have to be considered before adjudicating a defendant's guilt belies the hostility demonstrated toward Judge Day throughout the proceedings below.

A. The Oregon Supreme Court Violated Judge Day's Due Process Rights By Finding Judge Day Manifested Prejudice Toward Same-Sex Couples While Simultaneously Refusing To Consider His Free Exercise Defenses.

Instead of declining to adjudicate the charges related to manifesting prejudice toward same-sex couples altogether, the court insisted on finding Judge Day guilty of bias, while refusing to consider his defenses. App. 110a. This is improper and a violation of Due Process.

Judge Day never manifested bias toward any person who appeared before him in court. *See* App. 112a. Judge Tripp, his colleague, stated that he never exhibited any prejudice or bias toward her, even though she is a lesbian. (*See* Comm'n Hr'g Tr., vol. i, 115-16, Nov. 9, 2015).

The First Amendment was written, in part, to protect controversial opinions like Judge Day's views on

same-sex marriage. Finding Judge Day guilty of bias without considering his First Amendment defenses demonstrates a hostility toward Judge Day's sincerely-held beliefs.

The Commission claims the "first misimpression" in Judge Day's Petition is that Judge Day was disciplined for refusing to perform same-sex marriages. Resp. 2. Judge Day acknowledged his suspension was based upon other charges—there is no confusion on that point. *See* Pet. 15-16.

The lower court itself acknowledged that, "[o]rdinarily, as part of resolving the allegation at issue, [it] would proceed to analyze respondent's constitutional challenges." App. 113a. The court "resolved" the bias charge—by finding he violated the Code against bias. Because it resolved the allegation, the lower court was obligated to do what it "ordinarily" would do to resolve an allegation—analyze Judge Day's constitutional challenges.

The Commission argues the two New York cases Judge Day cited only concern the right to appeal and do not support the proposition that constitutional challenges can be considered when not directly related to a sanction. Resp. 24, n. 7; *see also, In re Koffler*, 412 N.E.2d 927 (1980); *In re Greene*, 429 N.E.2d 390 (1981).

The Commission's reasoning is flawed in two ways. First, the Commission asserts "there is no doubt that an appeal could be taken from the commission's recommendations." Resp. 24, n. 7. The lower court was not acting as an appellate court, but as the court of original jurisdiction. Review of constitutional defenses is fundamental in an original adjudication—they need to be duly considered before a defendant can be pro-

nounced guilty and before any appeal is ripe.

Second, the state bar in *Koffler* and *Greene* argued the lack of sanctions negated the right to appeal—a notion clearly rejected by the statute and the court. Both attorneys appealed solely on constitutional grounds, regardless of sanction. The court supported this principle in both cases.

The lower court was more than willing to find Judge Day violated the Code related to bias but was completely unwilling to consider his constitutional defenses to that charge. The Commission still obstinately refuses to acknowledge that finding Judge Day guilty of manifesting bias is in fact a direct “outcome” of the lower court’s decision. Both the lower court and Commission demonstrate continued hostility toward Judge Day’s constitutional defenses to “manifesting prejudice” by ignoring them altogether.

B. The Oregon Supreme Court Violated Judge Day’s Due Process Rights By Finding Judge Day Made “Wilful Misstatements” and Carried Out Other “Misconduct” While Refusing To Consider His Substantial Free Speech Defenses Related to Those Charges.

From the outset, Judge Day has asserted a variety of constitutional challenges to nearly all of the Rules in the Code and the Oregon Constitution that led to his suspension—all of which were completely ignored by the lower court. *Infra* Part II.B. The lower court should have analyzed his constitutional defenses as it “ordinarily” would. *Supra* 4.

Perhaps because the “lack of sanction” reasoning cannot be asserted on these charges, the Response ignores Judge Day’s constitutional claims to these Rules. The lower court’s refusal to consider constitutional

challenges it would “ordinarily” analyze is yet another example of the pervasive hostility exhibited toward Judge Day.

C. The Oregon Supreme Court Violated Judge Day’s Due Process Rights By Summarily Rejecting Judge Day’s Substantial Procedural Due Process Claims.

The lower court stated that discussion of Judge Day’s procedural due process claims would not “benefit the bench, bar, or the public,” App. 53a, despite the fact that several of Judge Day’s procedural due process claims were issues of first impression and directly impacted the admissibility of key witness testimony.

The Commission states that Judge Day has created a “misimpression” that he was denied due process. Resp. 2. The Commission asserts that Judge Day was “given due notice” of the alleged violations but then acknowledges that the court rejected the Commission’s findings not alleged in the original complaint. Resp. 10. Judge Day does not argue that he received *no* due process—he argues that the process he received was inadequate in several key respects. *See infra* Part II.C.

The court summarily dismissed Judge Day’s procedural due process claims. Now, this Court is faced with a lower court record containing no analysis of the important questions of law at stake.

The lower court’s pervasive hostility to Judge Day’s constitutional defenses underscores the need for this Court to either review the claims, as the only appellate court authorized to do so, or to remand for proper analysis.

II. Judge Day Raised Substantial Constitutional Defenses.

Judge Day raised substantial questions of Free Exercise, Free Speech, and Procedural Due Process. Though meritorious, the lower court ignored or summarily rejected all of them, extending the Commission's hostility towards Judge Day to be its own.

A. Judge Day Has Substantial Free Exercise Defenses.

Because Judge Day holds sincerely-held religious beliefs supporting traditional marriage, he temporarily initiated a screening process that made him unavailable to perform marriage ceremonies for same-sex couples. App. 30a-31a. His "unavailability" was always based upon his beliefs, not upon a concocted lie about his schedule. Pet. 4.

The Commission now attempts to characterize the Rule 3.3(B) bias violation as simply being about Judge Day forcing his clerks to "lie" about his availability. Resp. 13, 20. But Rule 3.3(B) is about bias, not truth telling. The Code has provisions that deal with lying—in fact, they have been used in this very case against Judge Day. *See* Pet. 19. The lower court did not apply any of those provisions of the Code to the temporary screening process. Instead, it found Judge Day violated Rule 3.3(B) by holding he "manifested prejudice against same-sex couples, based upon their sexual orientation," App. 110a, even though no same-sex couple was ever impacted by this temporary screening process, App. 3a.

The Commission claims Judge Day "cannot provide a single, legitimate example of disrespect of his religious views by the commission or the court." Resp. 17. The Commission then expounds on an email sent by

the Commission’s lawyer referenced in Judge Day’s Petition. *Id.* This email was sent as an inquiry about BAS testifying via video, discussed *infra* 12-13. As the Commission’s full quote of the email demonstrates, the Commission believed BAS’s comparison of Judge Day to “religious zealots” such as ISIS and the Taliban was legitimate—nothing in the reference was misleading. Considering BAS’s military experience included multiple military tours as a Navy SEAL during the War on Terror, an “apparent comparison of Judge Day to ISIS and the Taliban” is not a misleading stretch, but an accurate reflection of the email’s implication. *See* App. 137a-38a.

The Commission also attempts to divert attention away from its hostility towards Judge Day because of his religious beliefs on marriage by emphasizing other charges. Resp. 6, 13. It strains credulity to believe Judge Day’s self-report of the gun-handling incidents, without his religious beliefs regarding one of the most contentious legal issues of the day, would have spawned an ever-widening investigation, including the resurrection of years-old, previously-dismissed allegations from a soccer game, accusations of supporting Hitler via WWII wall art, and wholly-unfounded accusations of adultery based upon a misleading picture on a dating website. *See generally* App. 129a-35a, 151a, 177a.

The Commission’s prosecution of Judge Day exhibited an open disdain and hostility towards Judge Day because the Commission viewed him as a “religious zealot.” The Commission repeatedly uses hyperbolic language, calling Judge Day a liar, *see, e.g.*, Resp. 1, 2, 4, 9, 16, and overstating the facts, *see, e.g.*, Resp. 16 (stating that Judge Day “*encouraged* a convicted felon

under his supervision to violate terms of his probation.”) (emphasis added). Even the lower court did not go that far—it simply found that witnesses were “credible” in comparison to Judge Day (albeit by improperly relying on the Commission’s findings). App. 58a-62a. The Commission’s hyperbole demonstrates the Commission’s open hostility towards Judge Day.

The lower court incorporated this hostility by adopting credibility determinations of the hostile Commission. It then compounded this hostility by refusing to consider, or summarily rejecting, Judge Day’s constitutional claims. Hostility prejudiced the proceeding against Judge Day and is unconstitutional under *Masterpiece*, which requires neutral review. Pet. 22.

B. Judge Day Has Substantial Free Speech Defenses.

From the beginning, Judge Day has asserted meritorious Free Speech defenses, including overbreadth, vagueness, and tailoring claims against the Rules sought to be enforced against him. (*See* Opening Br. 125-45.)

The Commission claims that “Petitioner asserts no . . . Free Speech defenses to those violations.” Resp. 23. This is not true, as even a cursory glance at Judge Day’s Opening Brief shows. (*See* Opening Br. 125-45.) The lower court steadfastly refused to consider any of these constitutional defenses, but did not refuse to find Judge Day violated the Codes in question. The court’s hostility toward Judge Day’s substantial constitutional defenses cannot be allowed to stand, warranting this Court’s review or remand.

C. Judge Day Has Substantial Procedural Due Process Claims.

Throughout the proceedings against him, Judge Day has been denied procedural due process in several substantial and outcome-determinative ways. Pet. 29-34.

1. Requiring Judge Day To Submit the Opening Brief Violated His Procedural Due Process Rights.

The Commission has the burden of proof for disciplinary proceedings in the lower court, which is the sole adjudicator of such proceedings. Pet. 5. So the court below violated Judge Day's due process rights by requiring him to submit the opening brief. This violation goes far beyond the Commission's failure to provide record cites, going to the fundamental understanding of due process in the context of a plaintiff or prosecutor presenting its case first as the bearer of the burden.

The Commission contends Judge Day was not prejudiced by having to file the opening brief based on its summary "Opinion" with only one citation to the record. Resp. 15. It acknowledges the hearing produced a nine-volume, 2,357 page transcript and over 200 exhibits. *Id.* But it blames Judge Day for a "nearly one year delay," suggesting Judge Day's motions attempting to preserve his constitutional rights were merely a litigation strategy to delay adjudication, during which he could be matching the "Opinion" to the record. *Id.* 16. Placing the burden on the defendant to mine the record and guess which evidence supports the Commission's findings is not a solution to the due process problem. The burden of "matching" the Commission's findings to the specific charges alleged fell entirely on the

entity with the burden of proof—the Commission.

2. Allowing BAS To Testify By Telephone Violated Judge Day’s Procedural Due Process Rights.

The Commission asserts telephone testimony does not violate due process because “in-person testimony [is not required] in every instance.” Resp. 12. But under Oregon law, if a witness’s testimony will be outcome-determinative, telephonic testimony violates due process. *A.E.P. v. K.A.H.*, 381 P.3d 1052, 1058 (Or. Ct. App. 2016). BAS was the Commission’s star witness, and the lower court adopted the Commission’s findings on these charges because of BAS’s “credible” testimony and demeanor. Pet. 25. Judge Day was entitled to not only BAS testifying in person, he was entitled to meaningfully cross-examine BAS, which was denied because BAS did not receive Judge Day’s exhibits for cross-examination.

Judge Day made exhaustive but unsuccessful efforts to secure follow-up testimony of BAS when it became apparent that the Commission would not be calling him in person as represented. *See* Pet. 31. Follow-up testimony would not have been needed had the Commission simply insisted that BAS testify in-person, as due process demands in that circumstance.

The Commission has an amorphous view of its role, which contributed to the violation of Judge Day’s due process rights. In its Response, the Commission states it “found Petitioner guilty,” Resp. 1, even though the Commission lacks any such authority to make such findings. Pet. 5. It then refers to the Commission attorney’s closing argument as though the argument is an extension of its own recommendations, Resp. 15 n.5, suggesting that the due process hearing is really no

more than a Commission formality of putting its conclusions on record. Then it claims “an appeal could be taken from the commission’s recommendations,” Resp. 24, n. 7, mischaracterizing the original adjudication as an appeal. Pet. 13. In light of the Commission’s mistaken perceptions, it is little wonder that it thinks BAS’s in-person testimony (whom they already decided was credible) is unnecessary, Resp. 11, and that follow-up questions simply “stall[] the proceedings,” Resp. 14. It also makes the lower court’s adoption of the Commission’s “findings” that much more improper and underscores Judge Day’s due process violations.

The denial of Judge Day’s due process rights, the Commission’s tone in its Response, and the lower court’s refusal to consider, or summary rejection of, Judge Day’s substantial constitutional claims all demonstrate the hostility exhibited toward Judge Day throughout these proceedings. This hostility underscores the need for this Court, as the sole appellate authority in this case, to grant certiorari and review the merits, or to remand for proper analysis.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari, set the case for briefing and argument or summarily remand to the Oregon Supreme Court with instructions to analyze and decide Judge Day's properly raised constitutional claims and defenses.

Respectfully submitted,
James Bopp, Jr.
Counsel of Record
Anita Y. Milanovich
Melena S. Siebert
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner