No. _____

In The
Supreme Court of the United States

ERIC G. ZAHND,

Petitioner,

v.

OFFICE OF CHIEF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF MISSOURI,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After the conclusion of a child sexual abuse criminal case, the Prosecuting Attorney of Platte County, Missouri, Eric G. Zahnd, issued a news release accurately describing letters written by prominent community members to the trial court in support of the defendant, Darren L. Paden, with respect to his sentencing. Mr. Paden was a confessed and convicted child molester, and a diagnosed pedophile. The letters had been sent directly to the trial court, without notice to the prosecutor and placed in the court's case file without designating them as confidential. Thus, the letters were a matter of public record. In the news release, Mr. Zahnd identified the letter writers and characterized them as "appear[ing] to choose the side of a child molester over the child he repeatedly abused." The Missouri Supreme Court, without written opinion, publicly reprimanded Mr. Zahnd for issuing the news release.

The question presented is whether, consistent with the First and Fourteenth Amendments to the United States Constitution, an attorney may be disciplined as being unethical for telling the truth about information in the public record in a news release after a criminal case has been adjudicated.

PARTIES TO THE PROCEEDING

The Petitioner is Eric G. Zahnd.

The Respondent is the Office of Chief Disciplinary Counsel of the Supreme Court of Missouri ("OCDC").[1]

[1] The OCDC is an agency of the Missouri Supreme Court and thus an agency of the State of Missouri. Accordingly, 28 U.S.C. § 2403(b) and United States Supreme Court Rule 29.4 do not apply even though this case draws into question the constitutionality of a Missouri Supreme Court Rule that has the force and effect of a statute. The Attorney General of Missouri has not been served with this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eric G. Zahnd respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Missouri.

OPINIONS BELOW

The order of the Supreme Court of Missouri is unreported. The Disciplinary Hearing Panel Decision is also unreported.

JURISDICTION

On May 22, 2018, the Missouri Supreme Court rendered its final decree disciplining Petitioner under the Missouri Rules of Professional Conduct ("Missouri Rule 4" generally or "Missouri Rule 4-__.__" specifically). Missouri Rule 4 has the force and effect of law. MO. CONST. Art. V, sec. 5. Petitioner contends that Missouri Rule 4, as interpreted by the Missouri Supreme Court to discipline him, is repugnant to the Constitution of the United States. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257(a) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which is applied to the States through the

Due Process Clause of the Fourteenth Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

Missouri Rule 4-3.6, in the relevant portion, provides:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding Rule 4-3.6(a), a lawyer may state:
>
> > (1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
> >
> > (2) information contained in a public record;
> >
> > (3) that an investigation of a matter is in progress;
> >
> > (4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to Rule 4-3.6(b)(1) to (b)(6):

> (i) the identity, residence, occupation, and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time, and place of arrest; and
>
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Missouri Rule 4-4.4(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.

Missouri Rule 4-8.4, in the relevant portion, provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> . . .
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> . . .

STATEMENT OF THE CASE

The Underlying Criminal Case

The allegations against Mr. Zahnd stem from a child sex abuse case in Platte County Circuit Court, *State of Missouri v. Darren Paden*, Case No. 12AE-CR03149-01. Petitioner Eric G. Zahnd is and, at all relevant times hereto, was the duly elected Prosecuting Attorney of Platte County, Missouri. In that case, Mr. Paden confessed to sodomizing his victim over a period of 10 years, starting when the victim was five years old.

Before his confession, Mr. Paden was a well-known and respected member of his small community of Dearborn. Due to the seriousness of the crime and Mr. Paden's social standing, the *Paden* case was the subject of considerable media attention without any involvement of Mr. Zahnd.

After briefly denying his guilt to law enforcement, Mr. Paden quickly confessed to sexually abusing his victim. He then wrote a letter of apology to his wife and his children, including the victim. There was overwhelming proof of Mr. Paden's guilt. Nevertheless, while out of custody on bond for nearly three years pending the disposition of his case, Mr. Paden lied to his family and friends, claiming he was not guilty, falsely claiming that the victim had fabricated her claims of sexual abuse.

Based upon Mr. Paden's lies and community standing, the victim was ostracized and declared a liar by many in the community where she had lived her entire life. The adoption by some in the community of Mr. Paden's lies made the victim's life almost unbearable. Due to Mr. Paden's lies and community members' actions based on those lies, the victim engaged in self-harm and contemplated suicide.

In the Fall of 2014, the State made a plea offer that, in exchange for Mr. Paden's guilty plea, it would recommend 30 years imprisonment and that the defense could argue for any sentence allowed by law. That offer was rejected.

On August 17, 2015, Mr. Paden pleaded guilty to two counts of statutory sodomy in the first degree of a victim under the age of twelve, pursuant to a plea agreement that the State would recommend a total of 60 years' incarceration and with the understanding that the minimum sentence would be a total of 20 years' incarceration.

The court set Mr. Paden's case for sentencing for October 9, 2015. In preparation for the sentencing, Mr. Paden's counsel, Mr. John P. O'Connor, the complainant in the disciplinary proceeding, advised Mr. Paden that he should request family, friends, and coworkers to provide the court with reference letters which detailed positive aspects of his life or character.

At the request of Mr. Paden's father and/or Mr. O'Connor, various members of the Dearborn community wrote letters in support of leniency for Mr. Paden following his guilty plea. In all, sixteen letters of support from Mr. Paden's family, friends and coworkers were sent directly to the court without prior notice to the State. Mr. O'Connor chose to have the letters sent directly to chambers rather than presented in open court because, in his words, "it has more meaning to a judge if someone is going to do that."

Despite Mr. Paden's confession, guilty plea, and overwhelming evidence of guilt, some of the letters of support expressly questioned Mr. Paden's guilt, and at least one of the letters questioned the victim's veracity.

Those writing letters on behalf of Mr. Paden included Donna Nash, former Platte County Collector;

Mrs. Nash's husband, Karlton Nash of Nash Gas; and Jerry Hagg, former President, Platte Valley Bank.

Mrs. Nash's former position as the elected Platte County Collector was information in the public record. Mrs. Nash testified at the disciplinary hearing that she was identified as Platte County Collector to every taxpayer in Platte County when she was in office in tax statements sent out to Platte County citizens. Mrs. Nash also testified that the Platte County Board of Elections maintains public records of each of her elections to the office of Platte County Collector.

When the Nashes wrote their letter (the "Nash Letter"), Mr. Paden and Mr. O'Connor had failed to disclose the true facts of Mr. Paden's crimes to the Nashes. Accordingly, the Nashes did not have a full knowledge of the conduct to which Mr. Paden had pled guilty.

The purpose of the Nash Letter was to seek leniency for Mr. Paden. Mrs. Nash learned for the first time from Mr. Zahnd that Mr. Paden had pleaded guilty. Once Mrs. Nash learned the true facts of Mr. Paden's crimes, she understood that Mr. Paden, whom her letter supported, is a child molester. The Nash Letter may have been different had Mrs. Nash known the truth before she wrote it.

Mr. Hagg's former role as President of Platte Valley Bank was information in the public record. Mr. Hagg testified at the disciplinary hearing that his former role as President of Platte Valley Bank was widely known and available from several publicly available sources. He also testified that he is listed as the

"President" of Platte Valley Bank on various publicly available filings maintained by the Missouri Secretary of State.

The purpose of Mr. Hagg's letter (the "Hagg Letter") was to seek leniency for Mr. Paden. When Mr. Hagg wrote his letter, Mr. Paden and his counsel, Mr. O'Connor, had failed to disclose to him the conduct to which Mr. Paden had pled guilty. After learning the true facts of Mr. Paden's crimes, Mr. Hagg understood that Mr. Paden, whom his letter supported, was a child molester. Even though he wrote a letter seeking leniency for Mr. Paden, Mr. Hagg testified at the disciplinary hearing that he believes "that child sex abusers like Mr. Paden" should not receive leniency in their sentencing.

The Court received 14 other letters on behalf of Mr. Paden. It was evident from the content of some of those letters that important facts about the nature and extent of Mr. Paden's criminal conduct, to which he had confessed, had not been disclosed to the letter writers, and the letters were therefore written without knowledge of the true facts of the case and the nature and extent of Mr. Paden's criminal conduct to which he had confessed. Despite Mr. Paden's guilty plea where he admitted, under oath, to sexually abusing the victim multiple times over many years and admitted that the victim had told the truth about that abuse, letters received by the Court still questioned whether the victim was being truthful. For example, one letter stated:

> I believe only [the victim], Darren and God himself know the truth in the situation. No one has encouraged me to discredit [the victim's] claims. However, from the onset, I did not believe the charges to be true because I have also known [the victim] for many years.

Despite the fact that Mr. Paden confessed to his crimes within two hours, another letter to the trial court stated:

> Only God, Darren and [the victim] know what truly happened. I feel Darren may have admitted to things he did not do after hours of interrogation and all the pressure to admit guilt.

Yet another letter stated:

> I realize there are only three who know the full truth of a case – the victim, the defendant, and God. I know Darren was raised in a Christian home and taught Christian values and I find it hard to believe that he would forsake them. I have never had an occasion to doubt his integrity.[2]

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[2] Mr. Zahnd or his one of his assistant prosecutors spoke with nearly all of the letter writers in separate meetings prior to the sentencing hearing. In those discussions, the prosecutors confronted the letter writers with Mr. Paden's confession, diagnosis by a defense expert as a pedophile and guilty plea. The prosecutors inquired as to whether the letter writer's opinion had changed in light of this new information. Each letter writer said that their opinion had not changed. At the end of each meeting, the prosecutors informed the letter writers that their testimony

At the sentencing hearing, the victim discussed the impact of being disbelieved and testified that she believed that letter writers like the Nashes and Mr. Hagg had chosen the side of her abuser over her. At sentencing, she said:

> I will, hopefully, have a family of my own one day and I will have to explain to them about why I don't trust really anyone to be alone with them; which is why I am terrified to have a child. I couldn't bear the thought of my own off-spring enduring the same or similar horrific scenario. It is horrific. I can't go a day without wanting to cry over all the flashbacks

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would be necessary and that there had been intense media scrutiny of the case which was likely to continue.

Petitioner characterizes these meetings as informing the letter writers of the true facts of the case and the likelihood of publicity. The Respondent characterizes these meetings as threats and intimidation. However, both Petitioner and the Respondent agree that the meetings are immaterial as to whether Petitioner's subsequent news release violated Missouri Rules 4-4.4 and 4-8.4. Respondent explicitly argued exactly that at oral argument before the Missouri Supreme Court:

> Court [1:56]: The question is: pretend none of the early stuff happened. You just had the press release as it is . . . exactly as it is. I think that is what the Chief Justice is asking.
>
> Chief Disciplinary Counsel [2:05]: I think it violates 4-4.4(a) and 8.4(d) to issue that press release regardless of the prior contact.

The question presented in this case deals exclusively with the news release, which Respondent argued below was, standing alone, prohibited by Missouri Rule 4 regardless of any prior contact between Petitioner or his staff and the letter writers.

and dreams I had for playing or what had gone on.

I know many people think there is no way he could do this – he could do this or he was too good a man to have done something like this. Nobody knows what happens behind closed doors.

. . .

I battled to keep myself alive. I have cut myself so many times I am amazed the scars have healed. I contemplated so many times how I could end my life but couldn't imagine how distraught my loved ones would feel. I had to go to doctors and therapists that told me if I didn't change I was going to wind up in a mental institution. I wanted to die.

I sincerely and unapologetically wanted to be off this earth. I want everyone to know that I didn't cut myself because I was going through some phase or that I was just following a fad. I deeply desired to be gone. I wanted to be free from the memories of what had happened.

. . .

I was genuinely terrified to go into our new café in town because I was scared someone was going to yell at me or refuse to serve me. I was even scared they would tamper with my food. I feel so unwelcome in the town that I have grown up in. I feel like an outsider that has just strolled in and everybody is giving their own analysis on and making up gossip

> that people believe instead of just coming up and talking to me.
>
> . . .
>
> The first thing I remember being proud of as a little kid is performing oral sex on my father and being able to swallow his semen. I knew the act would make him happy and smile. That's all I ever wanted growing up was to make my parents happy. I thought every child was doing these things with a parent.
>
> . . .
>
> To some of the citizens in my town and any onlookers, to say you support someone who has done this sort of thing makes me wonder how some would react if a son/daughter told you they were a victim of these behaviors. Would you sign a petition then? Would you write letters of support still? I have little faith some would [cease] support of these acts, even if it was to their own flesh and blood.

Assistant Prosecuting Attorney Myles Perry argued for the State at sentencing. Among other things, Mr. Perry argued, without any objection from the defense, that the letter writers had supported Mr. Paden instead of the victim. Among his comments:

> The defendant unleashed this monster and it won't stop. He started it. He fed it lies. And the community that surrounded [VICTIM] and him, strengthened it through willful ignorance; perhaps because they would rather see a young child consumed by it than to face the truth themselves. . . .

> Instead, this victim, [VICTIM] was forced to stand up to the very people who should be kneeling down to provide her comfort and support. Instead, they [the letter writers] drove a girl deserving of every kindness they could extend, right out of their own town.

The entire sentencing, including everything that the victim and Mr. Perry said, was "information contained in the public record." Mo. Sup. Ct. R. 4-3.6(b)(2). The victim and assistant prosecutor Myles Perry asserted that the letter writers had supported Mr. Paden and ostracized the victim. Mr. Zahnd, using only slightly different words, expressed the same sentiment in his office's news release concerning the case. After the sentencing was complete, Mr. Zahnd issued a news release that stated in part:

> [M]any members of the Dearborn community wrote letters on Paden's behalf following his guilty plea. Prosecutors met with most of them to make sure they understood that Paden had fully confessed to his crimes, yet many of these community leaders continued to . . . stand behind Paden.
>
> Those writing letters or testifying on behalf of Paden included:
>
> . . .
>
> Donna Nash, Former Platte County Collector
>
> Karlton Nash, Nash Gas
>
> Jerry Hagg, Former President, Platte Valley Bank

> Mr. Zahnd said, "it is said that we can be judged by how we treat the least of those among us. It breaks my heart to see pillars of this community – a former county official, a bank president, . . . appear to choose the side of the child molester over the child he repeatedly abused."

Mr. Zahnd read Missouri Rule 4-3.6(b)(2) as allowing him to repeat and paraphrase the public information from the sentencing "without fear of discipline." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991). Prior to issuing the news release, Mr. Zahnd conferred with Mr. Perry to ensure that the substance of the news release would match the substance of the sentencing argument made without objection by defendant. In drafting the news release, Mr. Zahnd relied on the safe harbor provisions of Missouri Rule 4-3.6(b) believing that anything said in open court was information in the public record and could be re-stated truthfully.

The news release contained only true information. Retired Judge Abe Shafer, counsel for Mr. Hagg, testified at the disciplinary hearing that "I don't see anything in Exhibit 9 [the news release] that I know to be inaccurate." Likewise, Mrs. Nash testified that she didn't "see anything" that was "factually untrue" in the news release. There was no evidence or testimony that the news release contained any untrue statements.[3]

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[3] The Respondent did not allege in its petition that there was any false statement in the news release. The Respondent never sought discipline against Petitioner for a violation of Missouri Rule 4-8.4(c) due to conduct involving "dishonesty, fraud, deceit,

The news release only contained truthful information in the public record. There was no evidence or testimony that any part of the press release was not information in the public record. The Hagg Letter and the Nash Letter were received by the Platte County Circuit Judge presiding in the *Paden* case and placed in the Court's file. Thus, they became public records. The fact that Mr. Hagg had served as President of the Platte Valley Bank was commonly known in the Dearborn community and was information in the public domain that existed prior to, or separate from, the investigation and prosecution of the *Paden* case. It was also contained in public documents filed by Platte Valley Bank with the Missouri Secretary of State. The fact that Mrs. Nash had served as Platte County Collector was commonly known in the Dearborn community and was information in the public domain that existed prior to, or separate from, the investigation and prosecution of the subject criminal matter. It was also contained in public documents of the Platte County Election Board and the Collector's Office.

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or misrepresentation." The Respondent did not argue to the Disciplinary Hearing Panel that the news release contained any false statements. After the disciplinary hearing, the Respondent filed its Proposed Findings of Fact, Conclusions of Law and Recommendation for Discipline which did not propose a finding that anything in the news release was untrue. The Disciplinary Hearing Panel made no such finding. To the contrary, the Disciplinary Hearing specifically found that Petitioner violated Missouri Rule 4-4.4(a) "*because* the statements are true" (emphasis in original). Only at oral argument before the Missouri Supreme Court did the Respondent assert for the first time that "the press release was false" [2:13]. That assertion is unsupported by the record.

The letters supporting Mr. Paden had a "significant impact" on the victim. Due in part to the letters of support for her abuser, the victim contemplated suicide and tried to harm herself. The victim viewed Mr. Zahnd's office "as the one group of people she could count on to support her." The news release had a positive effect on the victim and "put an end to some of the untruths that had been spread around."

The Disciplinary Case

On August 1, 2017, the Respondent filed an Information against Petitioner alleging violations of Missouri Rules 4-3.4(f), 4-3.8(f), 4-4.4(a), 4-5.1(b), and 4-8.4(d).[4] The Respondent did not allege any statement by Petitioner was false and did *not* allege a violation of Missouri Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The exclusive basis pleaded in the Information for the violation of Missouri Rule 4-4.4(a) was the October 30, 2015, news release. The Missouri Rule 4-4.4(a) claim was not based on any conduct other than the issuance of the news release.

Petitioner raised the federal question sought to be reviewed – whether his speech was protected by the First Amendment – immediately and repeatedly.

[4] Ultimately, the Missouri Supreme Court found no violation of Rule 4-3.4(f) and 4-5.1(b). The Respondent abandoned its claims under Missouri Rule 4-3.8(f) after the disciplinary hearing, but before the Disciplinary Hearing Panel had rendered its decision. The only surviving violations are of Rules 4-4.4 and 4-8.4.

Petitioner answered the Information on August 16, 2017. In his Answer, Petitioner stated that the news release was protected speech under the First Amendment to the United States Constitution.

Petitioner raised the First Amendment question with the Disciplinary Hearing Panel in his Pre-Trial Brief, devoting at least two pages to the issue. The decision of the Disciplinary Hearing Panel does not address the First Amendment question at all. Petitioner raised the First Amendment question in his briefing to the Missouri Supreme Court, devoting at least 16 pages to the issue. The Missouri Supreme Court did not issue an opinion when it reprimanded Petitioner.

REASONS FOR GRANTING THE WRIT

1. The court below wrongly decided that a lawyer may be censored from telling the truth based on public information about the functioning of the government on a matter of public concern after the conclusion of a criminal case.

This case involves core First Amendment rights, including the right of the public to hear true information about matters of public concern – concluded criminal cases – from those in the best position to speak knowledgeably on those matters. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 270-271 (1948) (cited with approval in *Gentile*, 501 U.S. at 1035 (Kennedy, J., concurring)).

In this case, the Missouri Supreme Court's order conflicts with this Court's long-standing decision that "truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964). While the Missouri Supreme Court failed to provide a written opinion explaining its decision, the Disciplinary Hearing Panel opined that Petitioner should be sanctioned "*because*" he told the truth. The petition should be granted and this Court should review the decision of the court below to vindicate Petitioner's right to speak and the public's right to hear the truth about the functioning of the government, particularly in the conduct of criminal cases.

It appears that, until this case, no lawyer in any American jurisdiction has ever been disciplined for reciting truthful, public information about a court case after the case has concluded. Petitioner contends that under the First Amendment, a lawyer cannot be disciplined for recounting truthful, public information regarding a judicial proceeding that has concluded.

Those involved in a criminal case are not immune from criticism. Indeed, the courts and the public are equally subject to criticism outside the courtroom. *See Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 463 (1907) ("When a case is finished, courts are subject to the same criticism as other people. . . .") (cited with approval in *Gentile*, 501 U.S. at 1070).

When an attorney criticizes a judge outside the courtroom, truth is an absolute defense. *See id.; see also Standing Comm. on Discipline of the United States Dist. Court for the Central Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) ("To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense."). Expressive activity on matters relating to the functioning of the government, in general, and the conduct of criminal trials, in particular, is "plainly at the center of the protective umbrella of the First Amendment." *See State ex rel. Oklahoma Bar. Ass'n v. Porter*, 766 P.2d 958, 966-967 (Okla. 1988).

Further, it is not just Petitioner's right to speak that is implicated, it is also the public's right to hear. "The counterpoint of the right to speak is the right of the listener to receive a free flow of information. . . . [I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.* at 967 (citations omitted). Silencing attorney speech about judicial proceedings "directly inhibit[s] the public's right to receive this

information from those who under ordinary circumstances are most calculated to be intimately familiar with this aspect of the government process." *Id.* Because the right of the public to receive information about the workings of its government functionaries "occupies a critical citadel of the First Amendment rights," it is difficult to "conceive[] of an interest sufficiently imperative to justify such a restriction of core First Amendment rights, at least where the statements made are not shown to be incorrect statements of fact." *Id.*

Simply stated, just as the First Amendment protects an attorney's right to level truthful criticism at a judge, so, too, does it protect an attorney's right to recount truthful, public information about a judicial proceeding after it concludes, even if it is critical of participants in that proceeding.

Petitioner's statements in the news release were truthful. Counsel for Mr. Hagg testified, "I don't see anything in Exhibit 9 [the news release] that I know to be inaccurate." Likewise, Mrs. Nash testified that she didn't "see anything" that was "factually untrue" in the news release. There was no evidence or testimony that the news release contained any untrue statements. Indeed, the Disciplinary Hearing Panel concluded that Mr. Zahnd should be disciplined "*because* the statements are true." Ignoring the precedent of this Court, the Panel wrongly concluded that "the truthfulness of a statement, therefore, cannot be an absolute defense to an alleged violation of Rule 4-4.4(a)." In the absence of a written opinion explaining its decision, the

Missouri Supreme Court presumably adopted the flawed rationale of the Disciplinary Hearing Panel in reaching the same conclusion.

The Respondent and Amici below, the National Association of Criminal Defense Attorneys and the Missouri Association of Criminal Defense Attorneys, harshly criticized Petitioner's statement that those writing letters for the purpose of seeking leniency for the Defendant "appear[ed] to choose the side of a child molester over the child he repeatedly abused." Nonetheless, Amici below characterize the letters as "letters of support." In an adversarial proceeding, to support one side is necessarily not to support the other. Mr. Paden was a child molester and the letter writers, including Mr. Hagg and the Nashes, chose to seek leniency for him with letters of support. To argue that the letter writers did not choose the child molester's side is illogical. Certainly, from the undisputed facts and the victim's perspective, by not writing a letter in support of the victim and urging the Court to impose the severe punishment requested by the victim, the letter writers chose the child molester's side and gave him their support. It is simply a true and undeniable fact that Mr. Hagg and the Nashes, in writing letters supporting the defendant as to sentencing, chose the side of the child molester and not the child he repeatedly abused.

Mr. Hagg extolled the virtues of the Defendant in the hope that the Defendant would receive less punishment than the victim believed was justified. Hence,

it cannot seriously be argued that he did not take the side of the Defendant with regard to sentencing.

In their letter, the Nashes called the Defendant a "caring adult[ ]" and beseeched the sentencing court to give him a chance to "prove that he can be a valuable member of his community," which is a plea for leniency. They also told the court that Mr. Paden had their "unlimited . . . support." Being a caring adult and sodomizing a child for the better part of a decade are mutually exclusive. Seeking the return of a child molester to the community where he sexually abused his victim and giving the child molester your "unlimited . . . support" is obviously taking the side of the child molester.

That Mr. Hagg and the Nashes had taken the side of Mr. Paden and not the victim was clear to Assistant Prosecuting Attorney Perry, who argued at sentencing, without objection, "they [the letter writers] drove a girl deserving of every kindness they could extend, right out of their own town." It was also clear to the victim who, in her statement to the Court at sentencing, specifically called out the Defendant's supporters for adding to her suffering. And it was clear to Kansas City Star reporter Glenn Rice, who wrote a story describing the two sides at the sentencing: the Defendant and his supporters, including the letter-writers, on one hand and the victim on the other. Glenn E. Rice and Eric Alder, *Favored son's decade-long sexual abuse of girl divides small Missouri town*, KANSAS CITY STAR, October 30, 2015 (accessed at http://www.kansascity.com/news/local/crime/article41940072.html#storylink=cpy).

Everything in the news release was completely true, including that Mr. Hagg and the Nashes "appear[ed] to choose the side of a child molester over the child he repeatedly abused." According to the decisions of this Court, truth may not subject a lawyer to sanctions. Accordingly, Petitioner had an absolute right to tell the public the truth after the proceeding concluded and cannot "be the subject of either civil or criminal sanctions" for his truthful discussion of public affairs. *Garrison*, 379 U.S. at 73-74.

Protecting the right to repeat truthful public information is an important federal question and the decision of the Missouri Supreme Court conflicts with the relevant decisions of this Court. Failing to review the decision of the Missouri Supreme Court will let stand a wall of silence built around the attorneys of Missouri and particularly its prosecutors. The public will be deprived of truthful information essential to determine the propriety of the administration of criminal justice. To settle this question and vindicate the First Amendment, the writ should be allowed.

2. The court below wrongly decided that embarrassment to a third party permits the indefinite silencing of attorney speech even after the adjudicative proceeding has concluded.

All citizens, including lawyers, have an absolute, constitutional right to repeat truthful, public information on matters of public concern. However, during

the pendency of a case, lawyer speech may be more heavily regulated than the speech of other citizens. "The speech of lawyers representing clients in *pending* cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)." *Gentile*, 501 U.S. at 1074 (emphasis added). The "substantial likelihood of material prejudice" standard is constitutionally permissible to regulate lawyer speech during the pendency of a case. *Id.* at 1075.

Missouri Rule 4-4.4(a), as interpreted by the Missouri Supreme Court, regulates speech without the showing of a substantial likelihood of material prejudice to an adjudicative proceeding. To the extent that Missouri Rule 4-4.4 regulates attorney speech, as the Missouri Supreme Court necessarily held in its order in this case, it does so only on a showing of potential embarrassment, burden or delay of a third party. That is not a constitutionally permissible basis to regulate speech.

While *Gentile* permits greater regulation of lawyer speech during a case, it did not discuss the standard required to regulate lawyer speech *after* a case concludes. A writ should be allowed in this case to resolve whether a lawyer's post-proceeding speech may be censored because of potential embarrassment to a participant due to a true statement in a concluded case even though there is no substantial likelihood of material prejudice to any adjudicative proceeding.

Potential embarrassment is not generally a constitutionally sufficient justification for censorship. As this Court has held:

> "(T)he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able . . . to satisfy the judge that the (matter is) true and . . . published with good motives . . . his newspaper or periodical is suppressed. . . . This is of the essence of censorship."

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931) (cited with approval in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557 (1976)); *see also* 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954) ("In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . .") (cited with approval in *Nebraska Press Ass'n*, 427 U.S. at 548).

In the case at bar, the Missouri Supreme Court, in order to reach its decision, necessarily held that the mere possibility of embarrassment is sufficient to limit a lawyer's First Amendment rights. The writ should be

allowed to clarify the extent to which potential embarrassment can curtail truthful speech.

3. The Missouri Supreme Court's construction of Missouri Rule 4 is unconstitutionally vague and chills protected speech.

Missouri Rule 4-3.6(b)(2) provides, "a lawyer may state . . . information contained in the public record." This Court has characterized a similar provision as a "safe harbor" within which a lawyer may speak "without fear of discipline." *Gentile*, 501 U.S. at 1048. Petitioner's statements contained exclusively public information within the safe harbors of Missouri Rule 4-3.6(b). "Information contained in a public record" includes anything in the public domain, including public court documents, media reports, and comments made by police officers. *See Attorney Grievance Comm'n of Md. v. Gansler*, 835 A.2d 548 (Md. 2003). "If the matter the prosecutor discusses with the media is already in the 'public record,' it does not constitute an ethical violation for the prosecutor to repeat the matter to the press." R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS., 67-92, 83 (Fall 2008). As discussed above, all of the information in the news release was in the public record and within the safe harbor of Missouri Rule 4-3.6(b)(2). Petitioner understood Missouri Rule 4-3.6's safe harbors to permit him to repeat truthful, public information after the case was concluded because that is exactly what it says.

The Missouri Supreme Court's order without a written opinion[5] necessarily held that the safe harbors of Missouri Rule 4-3.6, which governs extrajudicial attorney speech, does not apply in this case seeking to discipline an attorney for extrajudicial speech. In other words, the Missouri Supreme Court must have held that Missouri Rule 4-3.6 does not mean what it says and Missouri Rules 4-4.4 and 4-8.4 prohibit speech that is categorically permitted by Missouri Rule 4-3.6. This construction flies in the face of basic tenets of statutory construction[6] and creates the type of

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[5] The Missouri Supreme Court's abdication of its obligation to explain the legal basis for its decision to reprimand Petitioner creates uncertainty about attorneys' obligations under Missouri Rule 4. As Justice Brennan argued:

> [A] court may not simply announce, without more, that it has adopted a rule to which all must adhere. That, of course, is the province of the legislature. Courts derive legal principles, and have a duty to explain why and how a given rule has come to be. This requirement serves a function within the judicial process similar to that served by the electoral process with regard to the political branches of government. It restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful.

William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986).

[6] Missouri Rule 4 must be construed as a single rule that is internally consistent. "[E]ach part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed." "Whole statute" interpretation, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:5

unconstitutionally vague "trap for the wary as well as the unwary" that this Court found unconstitutional in *Gentile*. 501 U.S. at 1031.

A restriction of extrajudicial attorney speech is void if it is so vague that it fails to provide fair notice

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(7th ed.) (citations omitted); *see also Devine v. Robinson*, 131 F. Supp. 2d 963, 971 (N.D. Ill. 2001) (holding this principle is "well-established" and applies to the ethical rules).

Further:

> Where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. But if two statutes conflict, the general statute must yield to the specific statute involving the same subject, regardless of whether it was passed prior to the general statute, unless the legislature intended to make the general act controlling, the general act deals comprehensively with a subject, or expressly contradicts the specific act and that construction is absolutely necessary for all the words of the general statute to have any meaning at all.

General and special acts, 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:5 (7th ed.); *see also State v. Williams*, 548 S.W.3d 275, 280 n. 5 (Mo. 2018), reh'g denied (July 3, 2018) ("this Court must attempt to harmonize the provisions, giving effect to each, or if this is not possible, to determine which should take precedence in a given circumstance using standard cannons [sic] of construction, e.g., by applying the more specific or more recently enacted provision").

The order of the Missouri Supreme Court ignores these well-established principles of statutory construction and fails to harmonize the two parts of Missouri Rule 4. This is an improper attempt to confine interpretation to the one section to be construed while ignoring the remainder of Missouri Rule 4. In the context of the First Amendment, construing Missouri Rule 4 as internally inconsistent creates unconstitutional vagueness by failing to give fair notice of what is permitted and what is proscribed.

to those to whom it is directed or is so imprecise that discriminatory enforcement is a real possibility. "[V]ague laws are particularly odious in the realm of freedom of expression." Suzanne F. Day, *The Supreme Court's Attack on Attorney's Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1376 (1993). Missouri's expansive interpretation of Missouri Rule 4 in this case requires Missouri Rule 4 to become so broad that it would fail the Constitutional prohibition against unreasonably vague laws. Indeed, the Respondent's contention below that "Rule 4-4.4 regulates conduct not speech," is an implicit admission that Rule 4-4.4 is too vague to have placed Mr. Zahnd on notice that his pure speech in the form of a news release would somehow violate Missouri Rule 4. The law must give fair notice of what is permitted and what is proscribed. A law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

> The vagueness doctrine has special bite in the first amendment area because uncertain rules induce self-censorship of protected speech and precise rules give assurance that the lawmaker has focused on reconciling speech and governmental interests supporting regulation. As a result, the Supreme Court has required more specificity for rules potentially applicable to first amendment speech than to other areas. The rule should be voided unless

> it "conveys sufficiently definite warning as to the proscribed conduct."

Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 899–900 (1990) (internal citations omitted).

The Missouri Supreme Court's construction of Missouri Rule 4 is necessarily internally inconsistent, with the Rule giving with one hand and taking with the other. More importantly, it is inconsistent with the due process requirement of fair notice. As construed by the Missouri Supreme Court, Missouri Rule 4 is so imprecise it inevitably fails to give fair notice.

Restrictions on extrajudicial attorney speech are also void if they are overbroad (*i.e.*, not narrowly tailored to serve a compelling state interest).

> Traditionally courts have determined the constitutionality of a law as it is applied to facts on a case-by-case basis. The first amendment overbreadth doctrine, on the other hand, tests the constitutionality of a law in terms of its potential applications. To be invalid, a law must pose a significant likelihood of deterring protected speech. A law is void if it does not aim specifically at evils within the allowable area of government control but sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protected first amendment rights. The problem with such a law is that it hangs over people's heads like a Sword of Damocles. That judges will ultimately rescue those whose conduct in

> retrospect is held protected is not enough, for the value of a sword of Damocles is that it hangs – not that it drops, thereby deterring protected speech.

Id. (internal citations omitted).

In the case at bar, Missouri imposed discipline for speech that occurred after the criminal case was completed. There is no compelling state interest in silencing lawyers forever regarding the conduct of criminal cases. The potential embarrassment of a participant in a criminal case is not a constitutionally sound basis to censor speech. To hold otherwise would largely render the First Amendment a nullity. *See* 9 Papers of Thomas Jefferson 239 ("In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . .") (cited with approval in *Nebraska Press Ass'n*, 427 U.S. at 548).

Perhaps even worse, the Respondent's veritable Sword of Damocles hangs over the heads of Missouri's prosecutors and other attorneys. They are left to guess as to what extent they are permitted to repeat truthful, public information about matters of public concern (especially given the Missouri Supreme Court's failure to explain the rationale for its decision). The order of the Missouri Supreme Court is unconstitutionally chilling

speech and depriving the public of information that it has a constitutional right to receive. The writ should be allowed to permit review of this unconstitutional limitation on speech.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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