No. 18-226

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 A Writ Of Certiorari
To The Missouri Supreme Court

BRIEF OF THE MISSOURI PRESS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JEAN MANEKE
Counsel of Record
THE MANEKE LAW GROUP, L.C.
2345 Grand Blvd., Ste. 1600
Kansas City, MO 64108
(816) 753-9000
jmaneke@manekelaw.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Bridges v. California, 314 U.S. 252 (1941) 4

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 1, 3, 6

In re Oliver, 333 U.S. 257 (1948) 3

Pennekamp v. Florida, 328 U.S. 331 (1946) 6

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 2, 5

RULES

Sup. Ct. R. 37 1

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae The Missouri Press Association serves some 250 newspapers throughout the State of Missouri. Organized in 1867 to support morality in the newspaper field, the journalism profession, and to emphasize to citizens the need for good journalism, it was incorporated in Missouri in 1922 as a not-for-profit corporation.

Its members cover local, regional, statewide and national news, on a daily or weekly news cycle. Among the most important areas of coverage are their local courthouses and the officials that work within. These media entities believe strongly in the system of justice that operates within the State and in the public's interest in the operation of that system of justice.

SUMMARY OF ARGUMENT

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035 (1991), holds that the public has a right to knowledge of what happens in a criminal proceeding. When a prosecutor makes truthful statements about matters in the public record once a case is finally adjudicated,

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or part, and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus curiae*, in accord with Supreme Court Rule 37.2(a) affirms that it has written consent of all parties to the filing of this brief. *Amicus curiae* gave timely notice to Petitioners and Respondents of its intent to file this brief.

that speech allows journalists to advise the public of the outcome of the proceeding and encourages public acceptance and support of the judicial process. Ultimately, these actions serve to support the fair administration of justice. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). This Court should accept certiorari in this matter and, ultimately, overturn the holding of the Missouri Supreme Court affirming the disciplinary action against the Petitioner for truthful statements he made under his First Amendment rights about matters in the public record in regard to a case after it was finally adjudicated.

ARGUMENT

First Amendment protection of speech is a foundation of this country. What truly makes America great is the ability of its citizens to state truth freely and openly about all subjects, including the subject of its judicial system. And for many citizens, their most frequent exposure to the judicial system is within the context of enforcement of state laws by the criminal division of the court system, as this Court recognized in the case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980), where it said, "Plainly it 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. . . ."

This Court has spoken repeatedly about the issue of public observation of the judicial system:

> The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. . . . 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". *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991), citing *In re Oliver*, 333 U.S. 257, 270-271 (1948).

Fair administration of justice is a foundation of citizens' freedom in this country. The judiciary itself, understandably restrained in discussing particular cases in its role as arbiter of such cases, relies on attorneys to help the public understand this judicial process. In particular, it depends on prosecutors to provide the information necessary to explain the criminal court process to citizens. And prosecutors, in turn, use journalists to accomplish that goal, giving the public the framework of information needed to understand the judicial system. All three of these elements support each other and are necessary to ensure the confidence of citizens in our country's criminal justice system.

Coverage of the criminal judicial system by the media allows citizens to engage in public vigilance of

the process. Journalists, using their First Amendment rights, depend upon knowledge gained from others' speech – from sources – to assist them in interpreting the activities within the criminal judicial system. The 24-hour news cycle and the financial constraints that now challenge the news industry complicate the task of covering legal activities. Reporters rely on prosecuting attorneys who are able to speak about the civil justice system, within the ethical guidelines imposed upon all attorneys and upon them in particular, to bring important factual information to their readers. Indeed, since most reporters are not trained in the law, it is critical for them to obtain expertise of prosecutors in understanding the charges that are brought and the outcome of the court's judgment once the trial is completed.

Reporters recognize, as do prosecuting attorneys, that there are limitations on such speech, in particular the rules in place to provide for the fair administration of justice within the courtroom. As this Court stated earlier, "trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper." *Bridges v. California*, 314 U.S. 252, 271 (1941). Ethical rules are imposed upon lawyers involved in the judicial process which clearly limit their First Amendment rights.

But once that process has concluded, the balancing of those interests should swing back to protect the prosecutor's, and in turn the public's, constitutional rights.

Reporters depend on the prosecuting attorney as they cover the judicial process and interpret the result for their readers. That interpretation of the outcome is critical to the public's understanding and support of the system. In *Richmond*, *id.*, this Court points to the "early history of open trials" in its observation that "people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond*, at 571.

Today, it is reporters, rather than the personal "experience and observation" noted in *Richmond* above, that brings this important information to citizens through their newspapers and other media.

> . . . [A]ttendance at court is no longer a widespread pastime . . . Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. *Id.*, at 572-573.

The decision of the Missouri Supreme Court, telling Mr. Zahnd that he cannot speak truthful statements about information contained in the public record, at a time when the case he spoke about was finished, will stifle the truthful speech of prosecuting attorneys in Missouri and could lead other states to adopt similar interpretations of the Model Rules of Professional Conduct. Making the truthful statements

he made, when he made them, could not have affected the outcome. But it could influence citizens to push for changes in the system. It is exactly the kind of speech the *Richmond* case ultimately seeks to support.

The Missouri Supreme Court's finding that Mr. Zahnd should be disciplined for his truthful speech is a clear abridgement of his First Amendment rights. It is important that this holding be addressed by this Court.

When a court examines the speech of an attorney in the context of judicial proceedings, the court is

> "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946), as cited in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038 (1991).

Here, we have a prosecutor who spoke truthful statements contained in the public record of this case at a time when the matter was judicially terminated. He should not be punished for those statements.

This *amicus curiae* does not take any position regarding any other issues which might be contained within the finding of the Missouri Supreme Court or

presented by Mr. Zahnd in his Petition for Certiorari. It seeks only to focus this Court on the narrow issue that a court cannot, once a matter is adjudicated, limit the truthful speech of a prosecuting attorney about the process which occurred, based upon documents in the public record. Such a limitation is a violation of his First Amendment rights and should be overturned.

CONCLUSION

For the reasons stated herein, this *amicus curiae* urges this Court to grant the Petitioner's Petition for Certiorari.

Respectfully submitted,

JEAN MANEKE
Counsel of Record
THE MANEKE LAW GROUP, L.C.
2345 Grand Blvd., Ste. 1600
Kansas City, MO 64108
(816) 753-9000
jmaneke@manekelaw.com

Counsel for Amicus Curiae