No. _____

IN THE

Supreme Court of the United States

ASHLEY ANN KRAPACS,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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November 24, 2020

QUESTION PRESENTED

The Florida Bar, an integrated Bar system under the jurisdiction of the Florida Supreme Court, has disbarred an attorney who has posted what amounts to "content-based political speech" on various social media platforms, wrote a blog and hosted a program on a YouTube channel.

The question presented is whether the state action of disbarment is unconstitutional because it violates the First Amendment as applied to the States through the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

LIST OF DIRECTLY RELATED PROCEEDINGS

Florida Supreme Court

The Florida Bar v. Ashley Ann Krapacs,

Case No.: SC19-227

Original Proceeding Filed by The Florida Bar,

File Nos.: 2018-50,829(17I) FES

2018-50,851(17I)

2018-50,081(17I)

Date of Entry of Final Judgment: July 8, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

BOOKS AND ARTICLES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ashley Ann Krapacs respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is available at 2020 WL 3869584 at *1 (Fla. July 8, 2020) and is reproduced in the Appendix at App. 1.

The Report of Referee is unpublished and is reproduced in the Appendix at App. 3.

JURISDICTION

The decision and judgment of the Florida Supreme Court was entered on July 8, 2020. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a). On March 19, 2020, the Supreme Court issued an order extending the deadline for filing a petition for a writ of certiorari due to COVID-19. On April 15, 2020, the Supreme Court issued an order revising the printing requirements for a petition for writ of certiorari due to COVID-19.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides as follows. "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." U.S. CONST. AMEND. I.

Section 1 of the Fourteenth Amendment of the United States Constitution provides as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV.

INTRODUCTION

Certain speech may be vile and abhorrent; "but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'..." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (citation omitted.) This petition presents a clear question of the extent of First Amendment protections of political speech on social media.[1] There exists a split of authority among state courts of last resort regarding the extent of First Amendment protections, freedom of speech, and freedom of the press regarding speech on social media by attorneys. As social media has become the predominate form of speech in the United States, the extent of First Amendment protections of speech and press presents unresolved questions in this Petition.

The Florida Supreme Court held that the state has the power to punish an attorney, by disbarment, for her political postings regarding the treatment of women by the state court system, specifically women who have been victims of abuse and domestic violence as the postings criticized officers of the court, licensed attorneys. While Petitioner was a litigant and not acting as an attorney representing a client when she made her content-based political speech, the Florida Supreme Court, by ratifying the report of a referee appointed by that court, found that Petitioner violated several Rules Regulating the Florida Bar. These Rules are reproduced at App. 51.

[1] This petition deals with Petitioner's right to make certain speech, the issue here, and in no way agrees with or condones the substance of the speech made. In fact, Petitioner has apologized for the language used in those posts. The issue here is the constitutionally of speech.

While the court adopted both the factual and legal findings of the referee, it did not adopt the recommendation of suspension, but imposed disbarment, preventing Petitioner from practicing law.

The referee found, which was adopted by the Florida Supreme Court, that Petitioner "repeatedly, and in a calculated manner, targeted … two members of The Florida Bar with a variety of continuous attacks and other conduct using online social media due to their representation of clients in litigation against [her]". (App. 110.) It was also stated that "(r)ather than properly utilizing the court system, [Petitioner] launched a public attack using online social media under the misguided belief that the First Amendment shielded her from scrutiny and prosecution by The Florida Bar. Specifically, the First Amendment does not protect those who make harassing or threating remarks about the judiciary or opposing counsel." (App. 113).[2]

On the merits, the Florida Supreme Court is mistaken. Precedent of this Court, as well as the original text of the First Amendment, has long held that the government cannot punish an individual for exercising her First Amendment rights of free speech and freedom of the press. The fact that one officer of the court criticizes two other officers of the court does not alter these long-standing originalist protections. There is a split among state supreme courts on this issue that needs to be resolved by this Court.

[2] The two attorneys in question were not "opposing counsel" in the traditional sense as Petitioner was a litigant and not acting as an attorney with a client.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Referee made extensive finding of fact. (See App. 3.) Petitioner began posting around February 2018 when she moved to South Florida to escape an abusive relationship. Unfortunately, she suffered a series of attacks from an ex-boyfriend who was hiring attorneys to, as she felt, threaten and intimidate her. Due to this, Petitioner filed for a domestic violence injunction in Broward County, Florida.

Petitioner started her social media posts, blog and YouTube channel because she felt it was important as the #MeToo Movement was growing to help average people understand the struggles and the barriers that happen to women who've experienced sexual assault and domestic violence. The posts did involve speech that involved criticism of the attorney representing her ex-boyfriend in the capacity of officer of the court.

Petitioner spent approximately seven months attempting to secure an evidentiary hearing for the injunction. Realizing the effort was futile, Petitioner voluntarily withdrew her injunction case. She was sued for defamation by the attorney representing her ex-boyfriend who was represented by a second attorney, a female.

Petitioner felt quite shocked that given the circumstances, a female attorney who claimed, publicly, to support women's rights would file that particular lawsuit. Petitioner's posts once again voiced support of women's rights and those victims of domestic violence. Petitioner voiced her political speech questioning, in her opinion,

how an officer of the court, who claims to advocate for women, could file a lawsuit under the circumstances knowing the underlying situation.

Petitioner posted on social media, wrote a blog and produced a YouTube channel as a way, she believed, of attempting to protect herself and others from what she perceived to be unfair treatment of women and victims of abuse.

Later, the female lawyer filed a petition for an injunction against Petitioner based upon Florida's cyberstalking law. The trial court granted a permanent injunction that was later reversed by a Florida appellate court. *Krapacs v. Bacchus,* ___ So.3d ____, 4D19-641, 2020 WL 4668046 (Fla. Dist. Ct. App. Aug 12, 2020).

In addition, the two attorneys involved filed affidavits with The Florida Bar which lead to the filing of the underlying grievance action against Petitioner ultimately leading to her disbarment. The position of Respondent is stated in *The Florida Bar's Answer Brief and Initial Brief on Cross Appeal* that was filed with the Florida Supreme Court and is reproduced at App. 52.

II. Legal Background

The underlying action commenced when two attorneys filed affidavits with The Florida Bar claiming that Petitioner's posts violated various Rules Regulating The Florida Bar. This led to the Bar filing an Emergency Petition for Suspension with the Florida Supreme Court as that court has exclusive jurisdiction over attorney discipline in Florida pursuant to Art V, 15 Fla. Const.

The Florida Supreme Court granted the emergency suspension and appointed a referee to make findings of fact and conclusions of law regarding discipline of

Petitioner. Full blown litigation then commenced. Petitioner first raised the federal question, the First Amendment, in her Answer and Affirmative Defenses to the Bar's Petition, reproduced as App. 158. The First Amendment was later specifically addressed by the report of the referee that was adopted by the Florida Supreme Court as part of its final decision. (App. 113).

This Petition follows.

REASONS FOR GRANTING THE WRIT

This case meets all the conventional requirements for certiorari. *See* Supreme Court Rule 10(b) and (c). The Florida Supreme Court's decision that a state may regulate freedom of speech and of the press through the use of the punishment of disbarment either directly or indirectly conflicts with the decisions of other state courts of last resort and either directly or indirectly conflicts with several decisions of this Court regarding how far the government can go regarding the regulation of speech and press. This is especially true, as here, when dealing with content-based political speech. This case is the ideal vehicle to decide the issue, regarding the regulation of speech and press on social media because this appeal cleanly presents the question. There is no guarantee that the next opportunity to decide this question will arise in such a straightforward and direct fashion. Finally, on the merits, the Florida Supreme Court's position that a state may sanction an individual for exercising First Amendment rights is at odds with the plain text, structure, and original meaning of the Constitution, as well as the history of precedent of this Court.

This Court should grant the petition and, upon hearing the case on the merits, reverse.

I. The Decision Below Decides An Important Federal Question That Directly Conflicts With Applicable Decisions Of Other State Courts of Last Resort.

The petition presents a direct split in legal authority between state courts of last resort and Florida's court of last resort. Florida, as well as all states, have rules regulating lawyers practicing in the state. The primary purpose of these rules is to protect the public, as well individual clients. While these rules are particularly important, they cannot be used as a basis to deny First Amendment rights, even for abhorrent, repulsive, or hated speech.

This direct split in legal authority between state courts of last resort is divided into two separate camps: the *Michigan Approach* and the *Virginia Approach*. The Michigan Approach is an activist approach whereby the meaning and text of the First Amendment is altered to achieve certain social and political goals.[3] The Virginia Approach is an originalist approach following the text of the First Amendment without regard to political and social goals. Florida follows the Michigan Approach, which is an activist approach focusing on political and social goals. Petitioner asserts that the Virginia Approach is the proper and sound approach as it comports with the Constitution.

[3] Petitioner does not contest that these political and social goals are laudable and desirable.

Michigan Approach. The Michigan Approach is set forth in *Grievance Administrator v. Fieger*, 719 N.W. 2d 123 (Mich. 2006). In *Fieger*, the Supreme Court of Michigan constructed a balancing test whereby misleading name-calling and vulgar statements made by a lawyer that damage the public perception of the judicial system are weighed against the First Amendment rights of the speaker. *Id.* at 132. The court further found that epithets or personal abuse has little weight as it was not campaign speech or what that court considered to be political speech. *Id.* at 139-140. The court found justification for this balancing test in this Court's opinion in *Gentile v. State Bar of Nevada*, 561 U.S. 1030 (1991), which is further discussed in Section II of this Petition. *Id.* at 141. Using this subjective weighing or balancing test the court concluded as follows. "We conclude that such coarseness in the context of an officer of the court participating in a legal proceeding warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process." *Id.* at 142 (citation omitted). "The limited restriction placed by the rules on Mr. Fieger's speech is narrowly drawn and is no greater than necessary to maintain this state's longstanding and legitimate interests in the integrity of the legal system." *Fieger* at 143. This balancing test has been adopted by Maryland, Louisiana and Florida.[4] See generally *Attorney Grievance*

[4] Reading the Referee's Report and the Order of the Florida Supreme Court, it appears that Florida has abandoned the old "reasonable attorney" standard used previously as it was unmentioned and not applied. *See The Florida Bar v. Ray*, 797 So.2d 556, 559 (2001) ("standard to be applied is whether the attorney had an objectively reasonable factual basis for making the statements.")

Commission of Maryland v. Frost, 82 A.3d 264 (Md. 2014); *In re McCool*, 172 So.3d 1058 (La. 2015).

This balancing test did not go unchallenged in the *Fieger* court. A reasoned and thoughtful dissent followed the opinion. The dissent reasoned that the speech at issue was clearly classic political speech as it criticized the exercise of state power and addressed matters of public importance and that the fact that there was no election at issue is of no import. *Fieger* at 167-168. Therefore, the dissent asserted that when dealing with political speech a simple balancing test cannot be used but the "state interest [must be] so significant that it fully justifies the otherwise forbidden endeavor of silencing those who desire to publicly find fault with the way in which the government conducts its affairs… [and be] narrowly tailored that there is *no unnecessary interference* with First Amendment freedom." *Id.* at 168 (citations omitted) (emphasis in original).

Virginia Approach. The Virginia Approach is set forth in *Hunter v. Virginia State Bar*, 744 S.E. 2d 611 (Va. 2013). Unlike Michigan, Virginia, when dealing with the less protected commercial speech as opposed to political speech as in this case, adopted more of a traditional "heightened scrutiny" test, whereby the courts must determine if there is a substantial governmental interest and if the regulation in question directly advances that governmental interest. Also, a court must determine if the regulation is no more restrictive than necessary. *Hunter* at 499-501. The dissent did differ and found that the speech at issue should be considered political speech. *Id.* at 507. While in a different context, North Carolina seems to be in general

accord. *See generally State v. Taylor*, 841 S.E. 2d 776 (N.C. Ct. App. 2020). Wisconsin, albeit looking at judicial discipline, seems to have an inconsistent approach. *See Judicial Disciplinary Proceedings Against Gableman*, 784 N.W. 2d 605 (Wis. 2010) and *Judicial Disciplinary Proceedings Against Gableman*, 784 N.W. 2d 631 (Wis. 2010). In addition, see Lucille A. Jewel, *I Can Has Lawyer? The Conflict Between the Participatory Culture of the Internet and the Legal Profession*, 33 Hastings Comm. & Ent. L.J. 341 (2011).

A. The reasoning and conclusions of the various state courts of last resort are irreconcilable.

There is simply no way to reconcile the *Michigan Approach* and the *Virginia Approach*. They look at attorneys and the First Amendment in very different ways. A balancing test and a heightened scrutiny test are applied in very different ways and will, potentially, lead to very different results.

B. This case is the best possible vehicle to resolve this issue.

Due to the nature of this case, which involves political speech by an attorney, it is the best vehicle to resolve the dispute among the states. A decision by this Court would give clear guidance to both attorneys and state bars as to what is acceptable under the First Amendment. This would save an immeasurable amount of judicial resources in the future by giving a clear standard that everyone, including attorneys and states, must follow.

II. The Decision Below Decides an Important Federal Question that Directly Conflicts With Applicable Decisions Of This Court.

The petition also presents a direct split in legal authority between this Court and Florida's court of last resort. Florida, as well as all states, have rules regulating lawyers practicing in the state. The primary purpose of these rules is to protect the public, as well individual clients. While these rules are particularly important, they cannot be used as a basis to deny legitimate First Amendment rights. Only this Court can reconcile these conflicting decisions.

A. The reasoning and conclusions of the Florida Supreme Court and this Court are irreconcilable.

The decision of the Florida Supreme Court and those of this Court are opposed on every material point.

Free Speech and Free Press. The Florida Supreme Court understood that First Amendment rights of free speech and free press were at issue in its decision below. These issues were raised in Petitioner's pleadings and were considered by the referee appointed by the Florida Supreme Court. Aside from increasing punishment to disbarment, the court adopted the report and recommendation of the referee which stated that "(r)ather than properly utilizing the court system, [Petitioner] launched a public attack using online social media under the misguided belief that the First Amendment shielded her from scrutiny and prosecution by The Florida Bar. Specifically, the First Amendment does not protect those who make harassing or threating remarks about the judiciary or opposing counsel." App. 113. This decision directly conflicts with five First Amendment decisions of this Court.

Specifically, the Florida Supreme Court's decision conflicts with five decisions of this Court; *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Meyer v. Grant*, 486 U.S. 414 (1988); *Gentile v. State Bar of Nevada*, 561 U.S. 1030 (1991); *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010); and, *Nat'l Inst. of Family & Life Advocates v. Becerra ("NIFLA")*, ___ U.S.___, 138 S.Ct 2361, 201 L.Ed.2d 835 (2018).

New York Times. In *New York Times*, the Court considered the extent in which the constitutional protection of speech and press limited the powers of a state. First the Court determined that First Amendment protections, through the Fourteenth Amendment, apply to state "civil actions" as it does not matter the form in which state power is applied. *New York Times* at 265. Here, the state power is that over lawyer regulation.

This is where the agreement between this Court and that of the Florida Supreme Court ends. The Florida Supreme Court determined that the First Amendment as applied through the Fourteenth Amendment allows the state to regulate the content-based political speech of a citizen because she is a lawyer and the political speech violated various Rules Regulating the Florida Bar. This formalistic approach fails to use measurable standards that satisfy the First Amendment. *Id.* at 269. The Florida Supreme Court did not examine or recognize the established constitutional principle of the unfettered exchange of ideas with regard to political and social change and the public duty of political discussion. *Id.* at 269-270.

The Florida Supreme Court also incorrectly focuses on the alleged injury to other attorneys and the legal system as well as allegedly uncivilized and outrageous conduct, rather than to the political assertions of Petitioner. "Injury to official reputation affords no more warrant for repressing free speech that would otherwise be free than does factual error." *New York Times* at 272. "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate." *Id.* at 273.

Meyer. In *Meyer*, the Court reaffirmed that any case involving limitations upon speech is subject to "strict scrutiny." *Meyer* at 420. Nowhere in its opinion, or the referee report that it adopted, does the Florida Supreme Court subject any bar rule to the strict scrutiny test before it abridges Petitioner's rights to freedom of speech and freedom of the press. *Id.* at 420-421.

Gentile. In *Gentile*, the Court examined a state bar rule in relation to political speech. *Gentile* at 1033-1035. There is no indication that the Florida Supreme Court made its own inquiry balancing the magnitude of danger flowing from Petitioner's speech with the need for free and unfettered expression. *Id.* at 1036. Appellate courts have the obligation to make an independent review of the entire record, including the statement at issue, in order to make sure that the judgment does not improperly intrude upon free expression protected by the First Amendment and adopted by the Due Process clause of the Fourteenth Amendment. *Gentile* at 1038-1039; *See also Citizens United* at 340-341.

In any event, unlike *Gentile*, which dealt with a lawyer representing a client, Petitioner, while being a lawyer, was exercising her speech and press rights as a litigant and a citizen. This was not addressed by the Florida Supreme Court.

Citizens United. In *Citizens United* the Court reaffirmed the "strict scrutiny" test with regard to political speech. *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010). The case also held that the government may not base restrictions on the identity of the speaker. *Id.* This is where the agreement between this Court and the Florida Supreme Court ends. The Florida Supreme Court undertook no detailed analysis of the relevant constitutional text, but its decision made clear that the court believed that speech and press, on social media and otherwise, may be regulated and suppressed based upon Petitioner's status as a lawyer, even though she was not representing any client and was making her own personal content-based political speech. "Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Id.* at 327. "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Id* at 350.

Focus on the media used and the identity of the speaker is what the Florida Supreme Court did in this case. It focused on Petitioner's use of social media, a blog and YouTube and her status as a lawyer. Here, the Florida Supreme Court did not

give the benefit of the doubt to protecting rather than stifling speech. *Citizens United* at 327.

In addition, the Florida Supreme Court not taking into consideration Petitioner's blog and YouTube activities as press is violative of this Court's policy that the institutional press does not have any greater constitutional privilege than others. *Citizens United* at 352. "The Framers may have been unaware of certain of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment Protection than those types of speakers and media that provided the means of communicating ideas when the Bill of Rights was adopted. *Id.* at 353-354, 364.

NIFLA. In *NIFLA*, the Court reaffirmed that the First Amendment is applicable to the states via the Fourteenth Amendment as well as the more stringent test regarding regulating speech based upon its communicative content, otherwise known as content-based speech. *NIFLA* at 2371. Such regulation is subject to a strict scrutiny test whereby the state must prove that the regulation is narrowly tailored to serve a compelling governmental interest. *Id.* The Florida Supreme Court did not apply this test, and if it did, the regulation on Petitioner's speech would have failed the test.

In addition, Petitioner's speech is no less protected by the First Amendment because it is speech by a professional as there is no separate category for "professional speech." It is true that commercial speech and professional conduct are subject to state regulation, but only to the extent that such regulations only impose incidental

burdens upon speech. This is opposed to the strict scrutiny applied to content-based speech, including noncommercial speech of lawyers. In the uninhibited marketplace of idea, the truth will prevail through the competition of the market. *NIFLA* at 2371-2375.

B. Improper reading of original text.

In addition to the Florida Supreme Court's decision being in direct conflict with the applicable decisions of this Court, the Florida Supreme Court ignores the clear text of both the First and Fourteenth Amendments.

The government may not take any official action "abridging the freedom of speech, or of the press…" U.S. CONST. AMEND. I. This includes state governments, such as state courts as "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. There is simply no way to reconcile the actions of the Florida Supreme Court with these short and plain statements by the drafters of these two amendments to the Constitution, i.e. originalism.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to establish the proper test for attorney content-based political speech and the First Amendment.

Respectfully submitted,

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