No.

In the Supreme Court of the United States

N.C. STATE BAR,
RESPONDENT,

v.

VENUS SPRINGS,
PETITIONER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2010, Springs, a black, female attorney, sued her employer *pro se* -- GMAC, now Ally Financial, the largest recipient of bailout funds in history-- for retaliatory discrimination. The case was dismissed without a trial in 2012. In 2014, right after the Department of Justice ordered Ally to pay $80 million in damages for discriminating against 235,000 minority borrowers, Springs posted the corporate deposition video on a Youtube educational channel called the ProSe Advocate with the stated purpose to train others how to represent themselves. A magistrate judge issued an *ultra vires* order that she remove the video. In a decision that was upheld by the Fourth Circuit, Springs respectfully told the court that only a district court judge could issue that order. Now the NC State Bar is using Springs' proper exercise of her constitutional rights in resisting the magistrate as a basis for punishment. The questions presented are:

I. Whether the N.C. Court of Appeals erred in holding that Springs' posting of a deposition video --long after the proceedings were concluded -- in order to educate poor, unrepresented litigants in an entertaining manner, namely through commentary on how to identify deceit, is so unflattering to Ally Financial's corporate representative that it is not protected by the First Amendment in conflict with 11 state courts of last resort and federal court of appeals that have addressed the issue.

II. Whether the failure of the North Carolina tribunal to establish any evidence at all to support their grievance against Springs rendered the discipline unconstitutional pursuant to *Thompson v Louisville*, 362 US 199, 200 [1960]

which found it a violation of constitutional due process to convict someone on a record completely devoid of evidence, although the punishment be only payment of a $10 fine.

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The order of the North Carolina Supreme Court denying review is unreported and is available at PetApp. 1a. The opinion of the North Carolina Court of Appeals is reported at *N.C. State Bar v. Springs*, 273 N.C. App. 407, 846 S.E.2d 858 (2020); see Pet.App.3a infra. The opinion of the Disciplinary Committee of the State Bar is unreported and is available at Pet.App. 17a.

JURISDICTION

The order of the Supreme Court of North Carolina was entered on March 15, 2021. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution, Section 1 provides in relevant part; "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. . . ." U.S. Const. amend. XIV, § 1.

STATEMENT

Over one million attorneys practice in the United States. Speech is at the very core of what they do. They are charged with defending the Constitution advocating zealously for their client's rights. However, when it comes to the First Amendment in North Carolina, attorneys don't have many rights --at least not according to the Court of Appeals of North Carolina. This uncertainty is like a straitjacket that inhibits the truth-seeking function and proper advocacy. The applicant for certiorari, Venus Springs, Esq. suffered a grievance complaint issued by the North Carolina State Bar on its own behalf, for having dared to defend her rights. The Supreme Court should clarify the balance between the need to regulate lawyers and the lawyers right to free expression, particularly in this case, where the attorney was acting as a private citizen and the case had closed two years prior. It cannot be doubted that no lawyer—and there exist thousands of them—would be subject to a grievance for expressing disagreement with the outcome of a jury verdict or ruling after trial. The venerable Frank S. Hogan, "Mr. District Attorney," District Attorney, New York County, frequently lashed out at opposing lawyers, parties, witnesses and judges; yet never suffered any sort of a grievance complaint for this sort of conduct; similarly, Richard Nixon, in the Charles Manson case, pronouncing the defendants guilty before trial. Johnnie

Cochran, in his public attack of the court in People v. Simpson, was spared such charges. William Kunstler was well known for speaking out during the progress of many trials, accused of soiling the jury's judgment and ability to examine the proof and untold trial lawyers resorted to the same practice. Barry Scheck, prominent attorney, who heads the "Innocence Project," at the end of the once famous nanny trial in Suffolk County, MA, issued a vicious tirade against the verdict of guilty; there were no repercussions.

So what is the extent to which a lawyer can talk outside of pending litigation? Ally Financial was the recipient of the biggest bailout in history, at one point being mostly owned by the American taxpayer. It had been cited numerous times for robosigning foreclosure affidavits. Ally was required to make payments, along with other lenders, as part of the National foreclosure settlement. It had a reputation so bad, that it changed its name from GMAC to Ally. In December of 2013, In December 2013, the Department of Justice (DOJ) along with another federal agency and pursuant to a federal court order, ordered Ally Financial Inc. and Ally Bank to pay $80 million in damages to consumers harmed by Ally's discriminatory auto loan pricing policies. [1] Upon reading that, Springs created a public petition: U.S. Supreme Court and U.S. Treasury: Stop Letting Ally Financial Use Taxpayer Money to Violate Its Customers' Constitutional Rights.

[1] https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/

At bar, Petitioner, Ms. Springs, had formed her own *pro se* company to help those unable to afford counsel. In this instance, after the proceeding was concluded, Ms. Springs loaded the deposition of the corporate plaintiff onto the Youtube website with a critique on how to recognize false testimony; when this was done, the case had been concluded for two years. Nonetheless, Ally Financial and Amy Bouque sought and obtained an order under Federal Rule of Civil Procedure 26, for the plaintiff to remove all the videotaped depositions from her channel. This she did when ordered by the Article III appointed district judge and she never posted the video again. U.S. Const. art. III, § 1. It is important to note that North Carolina State Bar relies on and aims to vilify Springs by making her into a person of bad character because they completely lack evidence of the charges sustained. Indeed, this is what the Petitioner was "guilty" of in this case: Giving her opinion based on data that was verifiable as true. She did not make up the data that she relied on in identifying signs of lying. This position could not be more unjust. Yet, Petitioner was cited for unprofessional conduct which will forever scar her future and limit her ability to earn a living on the same equal footing of other lawyers.

Springs' behavior was trivialized by the Court of Appeals in two patently incorrect respects: a) Springs was not an expert in recognizing false testimony and the information she relied on was not peer reviewed; and b) to the extent Appellant was exercising her first amendment rights, that amendment was inapplicable to this case; both pronouncements were incorrect. First, the Court

of Appeals possessed no necessary knowledge or training to render an opinion whether petitioner possessed the requisite training in question. Second the court never even looked to see what Springs actually stated and evaluated whether it was opinion or a verifiable statement of fact.

The actual grievance was founded upon Appellant's failure to take down the video as required by the rules pertaining to federal magistrates; however, because the magistrate's authority was limited to a mere recommendation, his order was null and void. This whole matter suffers from a double standard. She had a constitutional right under Article III. She did not play games; she filed a notice within days of the magistrate's order explaining that she had great respect for him but her legal analysis showed that he had no jurisdiction to make the decision. She told him she would obey the order of an Article II Judge after a denovo view. *See* PetApp. 25a. She of course, was right, and that decision affirming her analysis has been cited 12 times by other courts. *See* PetApp. 28a. Thus Ally Financial's legal fees in pursuing the orders of the magistrate judge along with the magistrate judge's ultravires acts cannot be attributed to her behavior but their own. However; the North Carolina State Bar chose to blame Springs, the black, female lawyer exercising her constitutional rights.

The actual words Springs' said do not appear once in the relator's or the Court of Appeal's opinions. There is a reason for that. To support its decision, it is important that the opponent sticks to the prejudicial characterization that Springs accused Amy Bouque of a crime. That is not accurate. Nothing in the

record shows she was trying to harass Bouque. The First Amendment rights of attorneys is a difficult issue. Intelligent minds having different viewpoints are reflected most outstandingly in the multiple opinions of this Court. This issue on the free speech rights of attorneys has a widespread affect. More than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial courts. There are approximately 30,000 state judges and 1,700 federal judges. An attorney's rights to comment, criticize, train, opine, and disagree with outcomes, litigants, judges, and others, before, during and after trial can be at issue at any time in anyone of these cases, before or long after trial. It is important to address the free speech uncertainty that now exists in the bar of attorneys in this nation because how can they help their clients fully when their own status unclear?

FACTUAL BACKGROUND

Springs sued Ally Financial Inc.("Ally") *pro se* for retaliatory discrimination after Ally fired her one week after learning she sued her previous employer for discrimination[2]. Springs lost the case against Ally Financial on summary judgment in January 2012. In and afterwards started a company called the Pro Se Advocate LLC which provided free legal education to the poor and unrepresented litigant. In connection with that purpose, two years after the

[2] The previous case was resolved out of court after Springs' succeeded on summary judgment.

case closed Springs posted excerpts of Ally's corporate (Fed R. Civ. P. 30(b)(6)) deposition video on a YouTube page called the Pro Se Advocate from January to April 2014. One of the videos specifically was labeled to train pro se litigants how to spot dishonesty in a litigant during a deposition. The video was 37 minutes with the first 3 minutes identifying gestures made by the deponent that indicated she may be lying or hiding something. The rest was the deposition with commentary from Springs through-out when the deponent said something that contradicted the facts. Below is the content posted.

> **Amy Bouque 30(b)(6) Deposition: Best Ways to Tell if a Witness is Lying**
> **Published on Mar 19, 2014**
> Sign the Petition against Ally Bank formerly GMAC ast http://chn.ge/10z4qN0. Here I have attached a 30(b)(6) deposition of Ally Executive Amy Bouque to help the pro se advocates and parties who have to go through discovery the first time and conduct and appear at depositions. I comment on the signs of deceit as explained by psychology websites in a slightly humorous and exaggerated way. It is not an exact science. This is one of the first depositions I ever conducted and it was a telephone deposition. I was no expert but I want others to learn and become even better just as I did. Here Ally says it doesn't think written policies are a good idea and HR prefers to use the subjective instead of objective measures. Courts have repeatedly said the lack of fixed standards defined in written policies and procedures give the inference of employment discrimination. 457 F.2d 1377 (4th Cir., 1972), 704 F.2d 613 (11th Cir), 457 F.2d 346, 359 (5th Cir. 1972), 720 F.2d 326, 336-7 (4th Cir. 1963).
>
> **TRANSCRIPT OF AUDIO**
>
> Hello, this is Venus Springs and I want all of my pro se advocates out there to learn how to conduct a deposition. Now this is a telephone deposition and telephone depositions are not ideal,

especially if you have a hearing deficiency but welcome to the pro-corporation fourth circuit federal court system. But I digress. This deposition was videotaped and I have included some clips for you to observe the signs so that you can tell if your witness is being insincere. So let's start with the facial and hand gestures in this first clip. This is called the mouth cover, it's in all the psychology books, it's a sign of insincerity.

This one is called the monkey speaks no evil, the deponent's subconscious mind somehow believes that if she covers her mouth when she lies, she will not be held responsible for those statements.

This here is the ear touch or the monkey hears no evil, she doesn't even want to hear her own lies. This is the sudden touch of dandruff head scratch. Here is another telltale sign, it's the nose touch.

Here we have the mouth breather or the omg whistle. This is the stare into space. This is a repeat of the nose touch. This is the furrowed brough combined with sudden whiplash, gotta hold my neck.

Ugh, this is one of the worst signs, the Pinocchio, the deponent's subconscious mind thinks her nose is growing while she, while she is lying and that everyone can see it so she tries to cover her nose so that we cannot see in growing. It's an extreme case.

This gesture is just called the liar, liar and it's sad really because this deponent may actually have a conscious and she is using her two hands up against, pressed up against her mouth to try to present, to try to prevent herself from being insincere.

So now let's observe this portion of the deposition and see what we can learn.

[Bouque for Ally Financial volunteers that she can assure that Ally Financial did not discriminate against her. Springs asks if Bouque, both employed by Ally and speaking for Ally would honestly tell her if Ally Financial did discriminate against her?

Bouque answers in the affirmative. See the exchange in PetApp. 44a-46a]

At 11:44 Springs' Commentary:

> Note how this deponent answers a question that wasn't even asked, liars will prepare canned responses without there even being a question.

[After Bouque states that there are no written guidelines on termination and supervisors are guided by past practices, then Springs' asks what if your past practices were discriminatory. See PetApp. 61a-63a]

12:02:49/7:38– Springs' Commentary:

> Note how she touches her ear, it is one of the easiest ways to tell if someone is lying or insincere.

[Bouque and Springs have an exchange about written policies. Bouque states that she believes that written policies are not a good idea. Springs asks how Bouque knows if policies changed if she has nothing in writing – See PetApp. 69a-71a.]

12:05:16/10:13 Springs' Commentary:

> Research shows that when people lie, they tend to touch the base the base of their nose, that's a dead giveaway.

[Bouque states every termination decision is reviewed by an attorney after previously stating that some termination decisions are not reviewed by an attorney. See PetApp. 72a-74a]

12:14:11 Springs' Commentary:

> Note how she will touch her nose in her answer, her entire testimony is contradictory and incredible.

Springs was never accused by Ally Financial or Amy Bouque, the designated officer, of defamation. Ally Financial requested a court order to have

Springs remove the video. Springs ultimately removed the video in June 2015 and it is undisputed that she never republished it. The federal judge wrote in his July 7, 2015, opinion that the ProSe Advocate Youtube channel was checked and Springs was in compliance with his order. The federal judge's determination that Springs was in compliance with the court order should be binding on the state. The State Bar's witness, Brinson, testified to that fact.

PROCEDURAL HISTORY

The North Carolina State Bar opened a grievance against Springs, as its own complainant on April 8, 2015. It did not provide Springs notice of this complaint or grievance. On 11 October 2017, the State Bar sent a Letter of Notice with the grievance dated April 8, 2015 to Springs alleging violations of the North Carolina Rules of Professional Conduct 3.3(a)(1), 3.4(c) and 8.4(a), (c) and (d). The State Bar filed a complaint 16 April 2018 before the Disciplinary Hearing Commission (DHC) against Springs. The complaint alleged that:

> (a) By publishing material obtained in discovery in a manner that served no substantial purpose other than to humiliate or embarrass a participant in the judicial process, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
>
> (b) By engaging in a persistent course of action which the Court described as "playing games," thereby protracting litigation on this issue, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and
>
> (c) By maintaining a link to a video containing material from Bouque's video deposition on her YouTube page at least eleven months after the U.S. District Court's final protective order,

> Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c).

The hearing was held on March 8, 2019. The DHC dismissed one alleged violation as alleged in paragraph (b) of the complaint. The DHC found that

> (a) By publishing material obtained in discovery in a manner that served no substantial purpose other than to humiliate or embarrass a participant in the judicial process, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); [*See* PetApp. 22a] and
> (b) By having a link on her YouTube Page that led to a third-party's posting of a video containing material from Bouque's video deposition on August 15, 2017, at least eleven months after the U.S. District Court's final protective order, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3A(c). *See* PetApp. 23a.

The DHC did not make any findings of fact as to whether Springs statements were truth, opinion or false. In fact the tribunal did not even consider the matter relevant. No evidence at all was presented by the State Bar in support of the finding that Springs made the video with no other purpose than to embarrass Ally Financial and Amy Bouque. Neither Ally Financial nor Amy Bouque appeared. Springs appealed argued that the discipline violated her First Amendment rights because her statements were not shown to be false or made with actual malice. Neither were her statements shown to be a clear and present danger nor having a substantial likelihood of material prejudice to the administration of justice. The NC Court of Appeals rejected the First Amendment argument with little analysis.

With respect to Springs' arguments that she was disciplined with no evidence the NC Court of Appeals said the following:

> Defendant argues that her sole intent was to show pro se litigants how to identify signs a deponent may be lying. [S]he does not refute that she is not an expert on how to tell if someone is lying and admitted that it "is not an exact science[.]" Furthermore, the online articles defendant relied on to support her assertions Bouque's gestures indicated she was lying were not peer-reviewed, did not come from any scientific journal, and did not cite to any scientific research. Thus, defendant, who is not an expert, had no legitimate evidence. . . . There are many other ways defendant could have trained pro se litigants without publicly humiliating and accusing a former legal adversary of a crime. . . The record is replete with evidence of defendant ignoring and trying to find ways around the magistrate judge's protective order before it was vacated, despite the fact that there was no stay of the order pending appeal. As a result, Ally Financial was forced into prolonged litigation of the matter, which lead to substantial legal costs and fees. *State Bar v. Springs*, 273 N.C. App. 407 [*22-23], 846 S.E.2d 858 (2020) [Here again punishing Springs for exercising her constitutional rights despite the other side's improper insistence on use of the magistrate].
>
> ****
>
> Springs does not reasonably argue that she had a First Amendment interest in the kind of speech at issue, and nor can she. . . . In contrast, the State Bar has a legitimate interest in protecting the integrity of the judicial system and ensuring the fair administration of justice through its regulation of the legal profession, an interest which is recognized in Rule 8.4(d). *N.C. State Bar v. Springs*, 273 N.C. App. 407, 846 S.E.2d 858 (2020).

That is not the clear and present danger test or the substantial likelihood of material prejudice test. The standard used by the North Carolina Court is not accepted by any other state.

REASONS FOR GRANTING THE PETITION

This petition presents a longstanding unresolved conflict among the highest

courts of various states and three courts of appeals on the First Amendment rights of attorneys.

I. The North Carolina Court Rendered a Decision that Conflicts with Each State and Federal Court that Considered the Extent of Advocacy Permitted to an Attorney.

A. The Decision Goes Against the Reasoning of Supreme Court Precedents.

The N.C. Court of Appeals concluded that Springs had no First Amendment right in her speech at all. There was no finding of fact related to the truth or falsity of her statements. Her actual words were only characterized in a conclusory fashion and never once quoted. They rejected the First Amendment as having any bearing on the outcome of this case. The mention of the balancing test of Gentile was surplusage because they never applied it. In its deminimus discussion of the First Amendment, the N.C. Court of Appeals purports to follow *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, (1975) and *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070-71 (1991). We have found no case where a mere training session has been the subject of a disciplinary action. Springs' statements were entitled to First Amendment protection because those statements were on matters of public concern to a public figure, were not provably false, and were expressed solely through hyperbolic rhetoric. *Snyder v. Phelps*, 562 U.S. 443, 450-51 (2011). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Yet the N.C. Court of Appeals is in stark

contrast to rulings by this Court on speech unrelated to a pending case.

While the Supreme Court has not directly decided a case of an attorney that is disciplined for speech outside of pending litigation, there are principles of law in seven cases that in combination or in isolation, dictate that the N.C. Court of Appeals should be overturned. These cases have been interpreted in various conflicting ways by the state courts and courts of appeals in their application of the First Amendment.

- *Craig* v. *Harney,* 331 U.S. 367, 372, 91 L. Ed. 1546, 67 S. Ct. 1249 (1947). This Court held that press statements relating to judicial matters may not be restricted unless they pose a "clear and present danger" to the administration of justice.

- *New York Times Co.* v. *Sullivan*, 376 U.S. 254: In *New York Times v Sullivan*, the Court held that in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 279-280.

- *Garrison v. Louisiana*, 379 U.S. 64, 67, 85 S. Ct. 209, 212 (1964). *Garrison*, applies the *New York Times Co. v Sullivan* standard to a criminal defamation case where an attorney is charged with defaming judges. *Garrison*, 379 U.S. at 78-79.

- *Gertz v. Robert Welch*, 418 U.S. 323, 94 S. Ct. 2997 (1974) The private defamation plaintiff who establishes liability under a less demanding

standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury. A public figure is either an individual who achieves such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts, or an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues; in either case such persons assume special prominence in the resolution of public questions. *Gertz v. Robert Welch*, 418 U.S. 323, 325, 94 S. Ct. 2997, 3000 (1974).

- *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 3, 110 S. Ct. 2695, 2697 (1990) The *New York Times* test, requiring a public official to show actual malice in order to recover in a defamation suit, applies to criticism of public figures as well as public officials. The constitutional privilege protects defamatory criticism of nonpublic persons who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
- *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1070-71, 111 S. Ct. 2720, 2742-43 (1991). The clear and present danger standard does not apply to attorneys who are participants in pending cases. Nevada's standard of a "substantial likelihood of material prejudice" test constituted a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials and such a standard (i) was a limited regulation which, applying equally to all attorneys participating

in a pending case, was neutral as to points of view, and (ii) merely postponed the attorney's comments until after the trial.

> "At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases. *Gentile v. State Bar* of Nev., 501 U.S. 1030, 1054, 111 S. Ct. 2720, 2734 (1991) [Part IVB].

- *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 1219 (2011). Speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."
- The disciplinary body bears the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

B. **This Court Should Act Now to Decide an Acknowledged Clear Split among the State's Highest Courts and the Federal Courts of Appeals.**

While the North Carolina Court of Appeals declined to use either of the standards set forth in this section, at least four states [Oklahoma, Colorado,

Alabama and Tennessee] have used the actual-malice standard in attorney discipline cases, framing the issue as whether the lawyer uttered the statement with knowledge that the statement was false or with reckless disregard as to its truth. If no knowledge or recklessness is found, these courts have declined to discipline lawyers for accusing judges in public of bias. *See In re Green* 11 P.3d 1078, 1085 (Colo.2000); *Oklahoma Bar Assn. v. Porter*, 1988 OK 114, 766 P.2d 958; *Ramsey v. Bd. of Professional Responsibility* (Tenn.1989), 771 S.W.2d 116, certiorari denied (1989), 493 U.S. 917; *Butler v. Alabama Judicial Inquiry Comm*. (Ala.2001), 802 So. 2d 207 (modifying an overbroad judicial canon and incorporating the actual-malice test for judicial campaign speech).

Ohio has expressly recognized the conflict and along with Ohio, a majority of courts adopt "an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or disregard of its falsity." *Office of Disciplinary Counsel v. Gardner*, 2003-Ohio-4048, ¶ 32, 99 Ohio St. 3d 416, 423, 793 N.E.2d 425, 432. This standard assesses an attorney's statements in terms of what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances and focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." *United States Dist. Court., E. Dist. of Wash. v. Sandlin* (9th Cir. 1993), 12 F.3d 861, 867. *Accord In re Chmura* (2000), 461 Mich. 517, 608 N.W.2d 31; *In re Disciplinary Action Against Graham* (Minn.1990), 453 N.W.2d 313, 321-322,

certiorari denied sub nom. Graham v. Wernz (1990), 498 U.S. 820; *In re Westfall* (Mo.1991), 808 S.W.2d 829, 837; and *In re Holtzman* (1991), 78 N.Y.2d 184, 192-193, 573 N.Y.S.2d 39, 577 N.E.2d 30, *certiorari denied sub nom. Holtzman v. Tenth Judicial Dist. Grievance Commt.* (1991), 502 U.S. 1009, 112 S. Ct. 648, 116 L. Ed. 2d 665. *Gardner*, 2003-Ohio-4048, ¶ 26, 99 Ohio St. 3d 416, 422.

In both sides of the split, the Disciplinary agency has the burden of proof. *Gardner*, 2003-Ohio-4048, ¶ 32, 99 Ohio St. 3d 416, 423. Under the objective standard, an attorney may still freely exercise free speech rights and make statements supported by a reasonable factual basis, even if the attorney turns out to be mistaken. *Id.*

The Ninth Circuit of Appeals along with the Sixth Circuit Court of Appels have been the two federal appellate courts to use the objective standard above to address statements by attorneys that did not involve pending cases which is the situation at play in this case. Based on *Milkovich*, *supra*, the 9th circuit said statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, (1990); *Lewis v. Time, Inc.*, 710 F.2d 549, 555 (9th Cir. 1983); Restatement (Second) of Torts § 566 (1977) (statement of opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be

interpreted as stating actual facts about their target. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." *See National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (use of word "traitor" could not be construed as representation of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (use of word "blackmail" could not have been interpreted as charging plaintiff with commission of criminal offense). *Standing Comm. on Discipline of the United States Dist. Court v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995).

Certain remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false. *Cf. In re Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441 (N.Y. 1973) (reversing sanction against attorney who criticized trial judges for not following the law, and appellate judges for being "the whores who became madams"); *State Bar v. Semaan*, 508 S.W.2d 429, 431-32 (Tex. Civ. App. 1974) (attorney's observation that judge was "a midget among giants" not sanctionable because it wasn't subject to being proved true or false). "If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

The 6th Circuit followed the objective standard in *Berry v. Schmitt*, 688 F.3d 290, 302 (6th Cir. 2012) finding the special considerations identified

by *Gentile* are of limited concern when no case is pending before the court. When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Moreover, a speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges - whether their statements are true or false. Much speech of public importance - such as testimony at congressional hearings regarding the temperament and competence of judicial nominees - would be permanently chilled if the rule in *Gentile* were extended beyond the confines of a pending matter. The Berry court concluded that lawyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice. *Id* at 302.

A court should "determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." "The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." *Berry v. Schmitt*, 688 F.3d 290, 294 (6th Cir. 2012). Whether Ohio or Oklahoma sets the governing standard, North Carolina did not comply with either standard.

II. **There was Absolutely No Evidence of Misconduct by Springs**

In *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960), this Court overturned a conviction of loitering against Thompson finding it was a violation of due process to convict and punish a person without evidence of guilt. Here without any evidence the same result should obtain. The order that the lower court relies on for the finding of fact that Springs was playing games, was overturned and vacated by the Fourth Circuit Court of Appeals. *Springs v. Ally Fin. Inc.*, 657 F. App'x 148 (4th Cir. 2016). Yet for the N.C. Bar to interpret the court's order such that she was not only prohibited from posting the video but that she was also prohibited from telling others how to legally find the video, is an illegal prior restraint under *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976). The North Carolina Court upheld the disciplinary order not based on any evidence but a) on the incorrect position that Springs disobeyed the order of the magistrate, which was no order at all [*See* 28 U.S. Code § 636; PetApp. 28a], and b) their own subjective perceptions of the attorney's conduct, which never meets the threshold to impose a grievance.

The suppression of thought calls to mind a law review article which said;

> At critical periods in the nation's 20th Century history, bar machinery has been used as a tool of repression and preservation of homogeneous thought. Political actions and views that are out of conformity with those currently in power, particularly in times of perceived national crisis, have been costly for lawyers. By contrast, bar discipline machinery has moved slowly, if at all, against the politically well-connected. In some of these historical instances of political use of the bar admission and disciplinary machinery, the bar itself was both the instigator and the decision-maker. James E. Moliterno, Politically Motivated Discipline, 83 Washington Law Review 3, 730-1 (2005).

A federal judge is master of the enforcement of his or her own order. It is a fiction that Springs disobeyed the order. Even Ally Financial's attorney Brinson testified that when he checked, Springs was in compliance with the order. It is well established that the federal judge that wrote the order is in the best position to determine compliance. "We have previously observed that we will defer to a district court's interpretation of its own order." *Colonial Auto Ctr. v. Tomlin (In re Tomlin)*, 105 F.3d 933, 941 (4th Cir. 1997) citing *Anderson v. Stephens*, 875 F.2d 76, 80 n.8 (4th Cir. 1989); *Simmons v. South Carolina State Ports Auth.*, 694 F.2d 63, 66 (4th Cir. 1982). A court is in the 'best position to interpret its own orders. *In re Smith*, 247 N.C. App. 479, 787 S.E.2d 464 (2016).

The need to regulate the legal profession should not be confused with the right of arbitrary suppression of unpopular ideas. That standard was violated here no matter which side of the conflict this Court finds itself. Not only does the First Amendment allow unimpeded speech under reasonable restrictions to protect fairness of trials but this is also necessary for clients to be properly represented. Springs' behavior was channeled to help the unrepresented and nothing more. The use of the video was purely instructional and had only been viewed by a handful of people before the Ally Financial defendants started viewing it. It was meant to help people who could not afford counsel. It served no other hidden purpose. And indeed there were some who benefited from its instructions. It is undeniable on this record that there is not even an iota of conduct that can be justified as deserving a grievance. It cannot be denied, when

the record is examined, that the conduct of petitioner in no way went beyond the bounds of proper behavior and in no sense was the behavior made to embarrass, mock or make fun of anybody. Certiori is important for another reason. This case is an excellent vehicle for the Supreme Court to clarify for the bar that it expects nothing but the most zealous form of advocacy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2021