No. 21-230

In The

Supreme Court of the United States

William H. Viehweg,
Petitioner

v.

Sirius XM Radio, Inc.
Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
Seventh Circuit

REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONSE TO STATEMENT OF THE CASE

Respondent states that "The basis for asserting the common interest privilege was that they feared Petitioner might sue them as well". Respondent does not address the following. Only weeks earlier both Married Viehwegs had been deposed and had stated under oath that they had no fear of Petitioner suing them. Both Married Viehwegs conveniently changing their position begs the question - who influenced them? It would appear that they were wrongfully influenced by their attorney and Respondent advising them to fear the Petitioner because of the Petitioner's current and history of *pro se* litigation. That induced fear became the basis for claiming common interest. That claim became the vehicle for presenting Petitioner's history of *pro se* litigation to the court, for

the wrongful purpose of attempting to bias and prejudice the court against Petitioner.

RESPONSE TO ARGUMENT I – MISSTATEMENTS

SERVICE. Petitioner asserted that per Fed. R. Civ. P. 5(b)(2)(E), Petitioner chose to not consent to service by electronic means. Respondent argues that said rule "is silent about the ability of *pro se* litigants to refuse electronic service". Respondent is incorrect. Said Rule states "A paper is served under this rule by: sending it by electronic means if the person consented in writing". Therefore, said Rule expressly addresses electronic service, and, when such means of service is requested by an opposing party, expressly addresses a party's ability to refuse electronic service. Petitioner addressed this matter of not consenting to electronic service because the issue was raised by Respondent's claim of common interest, which stated

that Petitioner "will not accept service via fax". [Petition, Appendix pg. 16, 17]

DIALOGUE. Regarding a transcript of a telephone conversation, Respondent argues that contrary to Petitioner's statement that the transcript "ends with" the quoted dialogue, that "In fact, there is significant additional dialogue which Petitioner omitted". Below is said additional dialogue. This Court can decide its true significance, and Respondent's intent in contesting this matter.

> SIRIUS: Not a problem but again all of our calls are being recorded so if that's your option you can always give us a call back and we can, we will be more than happy to assist you. Alright?
>
> WIFE: Thank you.
>
> SIRIUS: Is there anything else that I can assist you with?

WIFE: Nope that's it.

SIRIUS: Well, thank you so much for calling Sirius XM and you have a great day.

TERMINATION/CURSING. Respondent argues that "Respondent rejects the idea that it unilaterally terminated contact with Petitioner, but that in fact he ended his final call with customer service by cursing at the representative". The telephone call Respondent refers to took place the day after the telephone call that gave rise to the complaint for defamation, with the Petitioner calling the Respondent due to discontinuance of services.

A transcript of said call reveals that though Respondent identified Petitioner's account number and last name, Respondent found inconsistent Petitioner's first name, address, lack of email, type of

credit card, type of car, and radio ID, and therefore did not recognize Petitioner as a customer. Respondent has not contacted Petitioner since.

Both the transcript and the recording of said call explain Petitioner's use of vulgarity at the end of the call. Petitioner opened by stating "And I just got called from the police". Petitioner stated seven times that he could not understand the operator, who spoke with an accent. When Petitioner stated "Maam, I can't, Maam, I can not understand you, Can you ... give me somebody I can understand", the operator replied "Well there isn't somebody else here, Sir". When Petitioner stated "But I need to talk to a manager, I need to talk to somebody to get this squared away", Respondent replied "Well, Sir, me and my manager are going to do the same here, We can not assist you farther unless you can give here the information".

Petitioner, having just days earlier had his credit card billed for new services, receiving no new services, and now disclaimed by the Respondent as a customer, is understandably frustrated. Said incident of cursing may be relevant to attack Petitioner's character as a witness, but it is irrelevant and improper to attack Petitioner's character as a litigator. This Court can come to its own conclusions as to Respondent's intent in mentioning the Petitioner's cursing at the end of said phone call.

QUOTE. Respondent is correct that Petitioner misquoted *Bordenkirker*. But the quote from *Goodwin* is preceded by the following: "In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkirker v. Hayes*, the Court has recognized this basic - and itself uncontroversial - principle". And *Bordenkirker* itself states: "To punish a person because he has done what the law plainly

allows him to do is due process violation of the most basic sort".

Respondent further argues that "Petitioner claims that the quoted language pertains to interpretation of 28 U.S.C. §1654". Petitioner made no such claim. Petitioner used the language "certainly" to argue that the statutory right per 28 U.S.C. §1654 should be included in the rights protected by the Court's holding in *Bordenkirker*.

RESPONSE TO ARGUMENT II – QUESTION

Regarding the Petitioner's Question Presented For Review, Respondent argues that "Petitioner's failure to meet this burden for both Respondent and the Court should result in denial of the Petition".

As to the "understanding of the points requiring consideration", Respondent was clearly able

to respond in its Brief to all the points Petitioner presented.

Respondent's statement that "Petitioner seemingly seeks for the Court to establish an unspecified new rule of law that was not considered by the courts below", explains the difficulty of articulating the Question. Petitioner, a non-attorney, is raising new and complex issues heretofore avoided by the lower courts. Petitioner is attempting to both narrow their application and to establish the court's responsibility.

This Court could reformulate the Question prior to briefing.

RESPONSE TO ARGUMENT III

Section A

Respondent argues that it is not responsible for statements made by the Other Viehwegs. But the

statements, in their entirety, and put in context, prove otherwise.

The claim of common interest is not unilateral. Both Respondents and the Other Viehwegs agreed to claim common interest on the basis of Petitioner's previous litigation history causing the fear of litigation. There was a meeting of the minds, an understanding between them, as to their roles and purpose. The statements made were for joint purpose and benefit. Respondent has not disclaimed, but rather, has incorporated said statements into its own defense. Liability is joint.

Respondent argues that said statements are relevant and proper. But the statements, put in the context of a claim of common interest based on fear of litigation by a pro se litigant, prove otherwise.

The common interest privilege applies where clients share a common legal interest but are

represented by separate attorneys. Respondent and the Other Viehwegs argue that their common interest is Petitioner's previous litigation history and current status as a *pro se*. Respondent's claim for common interest states: "It is understandable, then, that the Other Viehwegs would be concerned about the Plaintiff and his conduct .... Sirius' interest is to defend this case and bring it to a conclusion as soon as possible. Their interests are aligned". [Petitioner's Brief - Appendix page 12]

While Respondent has the same interest as any party in defending itself and bringing this case to a conclusion as soon as possible, the Other Viehwegs, as witnesses, do not.

The rules provide for a party to bring a case to an early conclusion by moving for summary judgment. Such a motion supported by the testimony of a material witness could be expected to be successful.

There can be no justifiable fear of another person's exercise of a legal right or privilege. There can be no justifiable allegation of such a fear as the basis for a claim of common interest privilege. The exercise of Petitioner's rights, past, present, or future, cannot be the legal interest underlying a claim of common interest privilege without diminishing Petitioner's said rights, thereby oppressing Petitioner's exercise of said rights.

Section B

Respondent argues that Petitioner is litigious because he has filed ten lawsuits in thirty years. How many times may a person exercise his right to seek relief in the courts without being considered litigious? If Petitioner, represented by an attorney, filed ten lawsuits, each successful, would that be considered litigiousness warranting fear?

Respondent argues that Petitioner is litigious because he aggressively litigated this case. By that standard, Respondent is litigious because it aggressively litigated its defense. And the Other Viehwegs are litigious because they aggressively obtained legal counsel, opposed their depositions, and claimed common interest.

Respondent states that it "took extra steps and incurred added expense to accommodate Petitioner, who refused to use email or other routine electronic communication methods to ease the burden of litigation". Respondent does not support its statement with facts, and Petitioner denies said statement. As discussed above, Petitioner was compliant with court rules regarding filing and service of papers. Respondent could not have incurred "added expense", as Respondent would have only

incurred normal expenses in a case involving a party not receiving electronic service.

Respondent's use of the term "routine electronic communication methods" refers only to the legal profession. Electronic service is not routine for all *pro ses*, who come from all financial, religious, and social backgrounds. Respondent knew from its communications with Petitioner as a customer that Petitioner did not have email. Respondent knew throughout this case, that Petitioner did not have personal internet service.

Respondent states that "Respondent offered no character evidence in this case". Yet Respondent, mutually, submitted ten case titles of Petitioner's previous litigation. Further, Respondent states that "Petitioner, unlike most *pro se* individuals, has a history of being a litigious person". [Page 10]

Respondent's attorney's legal opinion appears to be subjectively based on bias and prejudice.

The term "litigious" is defined by Black's Law Dictionary as "fond of litigation". The term "fond" indicates character. Respondent's attorney's statement, coupled with the listing of the previous ten cases, were intended to be, and are, character evidence.

SECTION C.

Respondent argues that there was no evidence of actual judicial bias against Petitioner and that the Petitioner was allowed to represent himself. But Respondent argues for the wrong standards.

Respondent discusses, and includes in its appendix, the court's order denying Petitioner's motion to recuse and to vacate a prior order to seal

Petitioner's response to Respondent's motion for summary judgment.

The factual basis for that order is important here. Petitioner requested production of documents regarding emails, transactions, and company policy and training. Respondent produced said documents unprotected by court order or agreement between the parties. Respondent subsequently obtained a court order allowing redaction of minor personal information. Some of said documents were used as exhibits in court filings. Some of said document were used as exhibits in the Wife's deposition.

Respondent moved for summary judgment and included the transcript of the Wife's deposition. Petitioner responded and included some of said documents as circumstantial evidence. Respondent, after being granted additional time, replied, and moved to seal Petitioner's response "in part or whole".

Respondent argued that Petitioner "did not seek leave to file them under seal". Respondent did not support its motion with an affidavit. Respondent did not claim urgency.

The next day, the court, without hearing from Petitioner, granted Respondent's motion to seal, for good cause shown, resulting in Petitioner's response being sealed in its entirety. The court's text order had no further articulation.

Petitioner moved to recuse the judge and to vacate the order to seal. The court took Petitioner's motions under consideration for twelve months, denying them on the same day the court granted Respondent's motion for summary judgment. A reasonable person could conclude that the court, due to bias and prejudice, believed Respondent's unsupported allegation that Petitioner had a duty to file said documents under seal, and therefore

summarily denied Petitioner's right to be heard on the issue.

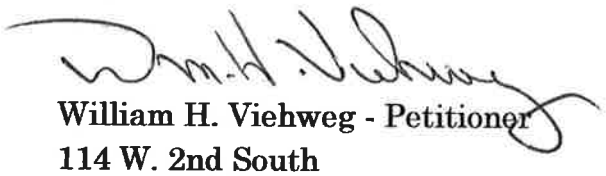
Respondent's conduct is consistent with conduct prohibited by the following federal criminal codes, all of which are based on conspiracy, intent, endeavor, or attempt, and are punished by imprisonment of ten years or more. 18 U.S.C. §1512 - tampering with a witness. 18 U.S.C. §1503 - influencing an officer of the court. 18 U.S.C. §241 - conspiracy against rights.

In this case, the Other Viehweg's made statements in support of their claim for common interest privilege that were contrary to their statements under oath only weeks earlier. The standard should be the Respondent's wrongful intent and attempt.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted.



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