NO. 23-855

IN THE
UNITED STATES SUPREME COURT

RICHARD L. ABBOTT, ESQUIRE - PETITIONER

vs.

DELAWARE SUPREME COURT AND
DELAWARE OFFICE OF DISCIPLINARY
COUNSEL,
RESPONDENTS

REPLY TO BRIEF IN OPPOSITION

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I. Introduction

This is a highly unusual attorney disbarment case since it does not involve any of the typical circumstances in which lawyers find themselves disbarred: (1) stealing client money; (2) conviction of a felony; or (3) a psychological condition. Instead, this case involves a 9-year campaign of attacks on a 34-year veteran litigator, who got railroaded by a discriminatory Delaware Lawyer Discipline System (the "System") based upon a rigged process (the "Star Chamber Proceeding"), which included: (1) a prosecution-picked Panel Chair; (2) denial of all relevant discovery and trial witnesses and evidence; and (3) charges unsupported by any factual proof.

Abbott was charged with false "Affirmative statements," but post-trial a new charge was

concocted based upon the 2 Alleged Omissions.[1] In addition, Abbott's act in advising his client on how to potentially avoid a court judgment falls far afield from Abbott disobeying the rules of a tribunal. The last of the 3 Foundational Charges falsely alleged that Abbott made "degrading" statements in Private, Confidential, and/or Absolutely Privileged filings, even though the subjects of the statements could have never known of them (*i.e.* the veritable "Message In A Bottle That Can Never Be Found").

The "Brief In Opposition For Respondents" dated May 1, 2024 (the "BIO"), suggests that this appeal is a run-of-the-mill matter. But since the virtual professional death penalty of Disbarment is the most serious sanction available in the lawyer

[1] Abbreviated terms used herein are based upon those contained in the Petition for Writ of *Certiorari* dated February 6, 2024 ("Petition for Writ").

discipline field, the Respondents' effort to downplay the grave magnitude of what is at stake misses the mark. The BIO also copiously avoids mention that Abbott's statements were made in Non-Public proceedings. Other than in one incorrect footnote, however, the BIO does concede that Abbott raised all Constitutional issues contained in the Petition for Writ.

The BIO makes but 3 overarching arguments: (1) Disbarment would still result even if Abbott wins; (2) Abbott's Constitutional arguments do not warrant review; and (3) no conflicts or splits between the Circuit Courts of Appeal or State Supreme Courts on 2 Constitutional arguments exist. All 3 arguments are without merit.

II. The BIO Wastes Considerable Ink On Alleged "Facts," Some Of Which Are Utterly False

A. The BIO Perpetuates "The Big Lie" On Numerous Subjects & Makes Damaging Admissions

Right off the bat, the Respondents falsely represent that Abbott advised and assisted his client to violate a Court Order and made false representations. BIO at 1. Truth be told, all Abbott did was: (1) advise and assist his client to convey title to 2 houses (the "2 Houses") to his wife via valid Deeds; and (2) tell the truth. The inane foundation for the 2 Alleged Omissions – the Crystal Ball Theory (that Abbott was required to predict the future regarding what would happen with the 2 Houses) and the Hiding In Plain Sight Theory (the failure to mention a court Consent Order that was the focus of months of litigation) – were nothing but *post hoc* lawyer constructs.

Next, in a tacit admission that Abbott was not allowed to confront one of his accusers, the BIO drops a block quote regarding false statements lobbed at Abbott by the Vice Chancellor. BIO at 4. The BIO also mentions the false assertion by the Vice Chancellor that Abbott's valid transfer of title ownership to the 2 Houses by publicly recorded Deeds could constitute a "sham." *Id.*

Further, the BIO misleadingly excludes mention of the Confidential and Absolutely Privileged nature of Abbott's complaint against the Vice Chancellor and other filings and falsely alleges that Abbott contended the Vice Chancellor had mental issues. BIO at 5. All relevant filings could never be publicly disclosed. In addition, Abbott only indicated that he wanted to take discovery regarding possible issues regarding the Vice Chancellor due to the bias he exhibited.

Most importantly, the BIO falsely contends that Abbott was found to have made 2 false "Affirmative statements" in his letter to the Vice Chancellor. BIO at 8. But the 2 Alleged Omissions are not "Affirmative statements" as matter of law.

The Decision concedes that the DLRPC Rule 8.4(c) violation was based on the 2 Alleged Omissions, then pivots in an attempt a cover-up that fact. Petition App. A at *19-20.[2] Abbott could not have made any false "Affirmative statements" regarding the valid transfer of title ownership to the 2 Houses via enclosed Deeds.

[2] Citations herein to "Petition at App. __" are to the Appendix contained in the Petition for Writ.

B. The BIO Ignores Three (3) Petition Arguments

Lastly, the BIO glazes over 3 fundamental infirmities in the Decision: (1) that the Burden of Proof on the Rule 3.5(d) charge was improperly shifted to Abbott and that the one-part legal standard of a "factual basis" for statements contravenes the two-part Proof of Falsity and Actual Malice standard; (2) even though Abbott did not knowingly disobey an obligation under any Court Rules or Order, the Delaware Supreme Court may engage in a wholesale rewrite of Rule 3.4(c) *post hoc* to nail Abbott; and (3) Abbott was denied his rights to confront his accusers and take discovery, despite the prosecution's reliance upon evidence that arose from the witnesses and documents subpoenaed by Abbott. *See* BIO at 12-13.

First, Abbott's 1st Amendment right to Freedom of Speech in the Star Chamber Proceeding and other strictly Confidential proceedings, along with his role therein as a *Pro Se* litigant and not as a "lawyer," entitled Abbott to full 1st Amendment protections from prosecution for his criticisms of judicial officers.

Second, uncontested record evidence based upon Abbott's testimony and trial exhibits established the truth of fact-based statements made by Abbott and the valid grounds supporting the statements that were matters of litigation strategy or opinion.

Third, the uncontraverted record evidence established that there was no Court of Chancery Order violated by Abbott; he was not the subject of any Order that he could have violated.

Fourth, the BIO tacitly admits that the Decision failed to address Abbott's argument that he was entitled to confront his accusers under both the 6th Amendment and the 14th Amendment.

This Court has held that it is "zealous to protect these [confrontation] rights from erosion," including "in all types of cases where administrative and regulatory actions were under scrutiny." *Greene v. McElory*, 360 U.S. 474, 496-97 (1959). This Court has also held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). The Decision overlooked the reality that Abbott was Unconstitutionally denied his right to confront his judicial accusers regarding facts.

III. A Finding In Abbott's Favor On Constitutional Questions Raised Would Lead To His Total Exoneration

The Respondents posit that Abbott would still be disbarred even if this Court finds in his favor. *See* BIO at 13-15. No so.

Constitutional challenges to: (1) the entire System; (2) the Retaliatory nature of the Decision; and (3) the denial of all relevant discovery and trial evidence, would each result in a wholesale reversal of the Decision.

Abbott's Fair Warning arguments would eliminate 2 of the 3 Foundational Charges. And the denial of Abbott's Free Speech rights would invalidate the 3rd Charge.[3]

[3] The 2 Catch-All Charges fall automatically once the 3 Foundational Charges are reversed.

IV. All Of The Constitutional Questions Raised Are Appropriate For Review & Decision

A. The Issue Of The Burden Of Proof & Legal Standard To Discipline A Person For Exercising 1st Amendment Rights To Freedom Of Speech Are Of The Utmost Importance

The BIO conclusorily submits a litigant bears the burden to prove his statements are true. BIO at 15-19. But the Petition for Writ pointed to decisional law authority from numerous jurisdictions that hold to the contrary. Petition for Writ at 22-25.

The Decision placed the Burden of Proof on Abbott to prove himself innocent, which is cause for reversal standing alone. Petition App. A at *24-25. And the denial of all relevant discovery, trial witnesses, and evidence Abbott was entitled to receive handcuffed him from being able to present a full and fair defense at the Soviet Style Show Trial.

More importantly, the BIO completely ignores Abbott's argument that his *Pro Se* litigant status cloaked him with full 1st Amendment Free Speech rights. At all relevant times, Abbott was not acting as a "lawyer" in the private practice of law in a public venue.

Many case decisions apply the legal standard that a lawyer may not make statements "the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the…integrity of a judge… ." That is because Rule 8.2(a) of the American Bar Association Model Rules of Professional Conduct, which has been adopted *verbatim* in DLRPC Rule 8.2(a), expressly contains that legal standard. But Rule 3.5(d), which proscribes "conduct that is degrading to a tribunal," only has a standard provided by the modifiers "undignified or discourteous" – a highly subjective, standardless guidepost. So the

Proof of Falsity and Actual Malice standard should be required of the prosecution.

Some jurisdictions have held that the Proof of Falsity and Actual Malice dual standard is applicable to lawyer speech. *In re Disciplinary Action Against Graham*, 453 N.W. 2d 313, 321-22 (Minn. 1990); *Matter of Marshall*, 528 P.3d 653, 662-663 (N.M. 2023) (both based on the ABA Model Rule 8.2(a) corollary). And the case of *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1994), which was relied upon in part in the BIO, held that "the disciplinary body bears the burden of proving falsity [of a statement alleged to impugn the integrity of a judge]." Although only a minority of State Supreme Courts have applied a subjective Actual Malice standard, numerous State High Courts have adopted an Actual Malice standard that is objective in nature. *See e.g. Disciplinary Counsel v.*

Gardner, 793 N.W. 2d 425, 431-32 (Ohio 2003) (citing to Supreme Court decisions in Colorado, Tennessee, Oklahoma, and Alabama that have adopted an Actual Malice test).

This Court should establish a uniform national standard regarding Freedom of Speech protections for lawyers who proceed *Pro Se* in Private, Confidential matters and lawyers who act in their professional capacity in public. Where a lawyer lives should not determine 1st Amendment Free Speech rights.

B. A Mere Footnote & Single Sentence Argument Are Unavailing

The argument presented in the BIO at footnote 13 makes an inaccurate assertion that Abbott failed to preserve his argument on the Void For Vagueness Doctrine regarding Rule 3.5(d). But Abbott's Eleventh Affirmative Defense found at paragraph 57 in his "Answer To Petition For Discipline" dated July

1, 2020 expressly provides that "[t]he claims contained in the Petition are barred based upon violation of Abbott's right to be free from the invalidity of the Rules relied upon based upon the Constitutional Void for Vagueness Doctrine." In addition, Abbott made numerous Due Process arguments in the Star Chamber Proceeding, and the Doctrine is founded upon such 14th Amendment Fair Warning requirements.

A similar abbreviated reference - regarding this Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) - is likewise inadequate to rebut the argument in the Petition for Writ. *See* BIO at 21. In fact, the *Becerra* decision covers lawyer speech since it is a subset of "professional speech." Indeed, this Court recognized as much, indicating that "this Court's precedents have long protected First Amendment rights of

professionals" including application of "strict scrutiny to content-based laws that regulate the non-commercial speech of lawyers." *Becerra* at 771.

The content-based regulation of lawyer speech contained in Rule 3.5(d) – *i.e.* speech regulated based on its communicative content – may only withstand Constitutional scrutiny "if the government proves that [it is] narrowly tailored to serve compelling state interests." *Becerra* at 766. Here, there can be no compelling interest served by taking away a lawyer's license because he criticized judges in private proceedings not before them.

C. The Fair Warning Question Is Squarely Presented And Dispositive Of 2 Charges

As noted hereinbefore: (1) the predicate acts in the Rule 8.4(c) charge were not proven, so the Panel and Decision made up a new charge; and (2) Abbott

was charged with disobeying "the rules of a tribunal" but did not violate anything.

The circumstances in *In re Ruffalo*, 390 U.S. 544 (1968) are, accordingly, spot-on with the facts here present. *See* BIO at 22. As in *Ruffalo*, the Respondents composed a new charge and new Rule after trial.

D. Abbott's Right To Confront His Accusers Is Also An Important Question For This Court's Review

Whether Confrontation is a right pursuant to the 6th Amendment or the 14th Amendment, Abbott possessed a right to confront his accusers. At trial, the prosecution was permitted to admit a litany of false hearsay statements launched at Abbott by the Vice Chancellor. Abbott had the right to show that the Vice Chancellor had no factual basis for his *ad hominem* attacks.

Additionally, a motion filed with the Board supposedly degraded Members of the Supreme Court, but Abbott was foreclosed from calling them to establish that they never heard of them. And the Panel surmised that 2 Board Chairs were bothered by Abbott's written statements, but neither Board Chair ever indicated such and Abbott was blocked from calling them at trial.

Abbott was also denied the right to call witnesses that would have assisted in further establishing the hastily called nature of the Sham Gathering (for the Vice Chancellor to doctor up a record to build a *faux* ethics case against Abbott). Nor could Abbott call the Board Administrator to show how the prosecution was allowed to hand pick the Panel Chair, who was a known Abbott-hater.

Abbott did not seek to call any witnesses to probe into their mental processes. Abbott just wanted to get to the facts.

E. The Request For Invalidation Of The System And The Unconstitutionally Retaliatory Decision Both Raise Significant 1st And 14th Amendment Issues

Abbott was prosecuted based upon his associational status; the fact that he was a solo practice lawyer and was disfavored by a judicial officer. That is a violation of the 1st and 14th Amendments. It also establishes a "class of one" theory for purposes of Equal Protection.

Additionally, Abbott's right to petition the Courts pursuant to multiple lawsuits challenging the Constitutionality of the System and bringing State and Federal Racketeering and 42 U.S.C. § 1983 claims was vindictively punished by the Decision. The 1st Amendment right to petition government

includes the right to pursue litigation in the Courts. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

CONCLUSION

Based upon the foregoing, Abbott respectfully requests that the Court grant his Petition for Writ of *Certiorari* and consider the weighty Constitutional questions presented.

Respectfully submitted,

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