

No. _____

**In The
Supreme Court of the United States**

INQUIRY CONCERNING A JUDGE RE: THE HONORABLE
VANCE D. DAY, *Petitioner*,

v.

THE OREGON COMMISSION ON JUDICIAL FITNESS AND
DISABILITY, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme
Court of the State of Oregon

Petition for a Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Anita Y. Milanovich
Melena S. Siebert
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner

Questions Presented

The Oregon Supreme Court, acting as a court of original jurisdiction, suspended Judge Day from his judicial office for three years without pay. Judge Day was found guilty of violating several judicial ethics rules, including manifesting bias toward same-sex couples by refusing to perform same-sex marriages while the court refused to consider his Free Exercise and Free Speech defenses to that charge. Likewise, the Oregon Supreme Court found Judge Day violated several other rules while it again refused to consider his Free Speech defenses to those alleged violations. Finally, Oregon Supreme Court found that Judge Day had violated these rules while improperly summarily rejecting his Procedural Due Process claims related to those charges.

This case presents the following issues:

- (1) Whether it is a Due Process violation for a court of original jurisdiction to refuse to consider, or to reject without sufficient analysis, substantial constitutional defenses, while nevertheless finding the judge guilty of violating those ethical rules;
- (2) Whether the Oregon Supreme Court, and certain Oregon ethical rules, violated the Free Exercise and Free Speech clauses of the First Amendment when he declined, on the basis of his sincerely-held religious beliefs, to perform the non-mandatory judicial function of solemnizing same-sex marriages;
- (3) Whether certain Oregon ethical rules are unconstitutional under the Free Speech clause of the First Amendment for prohibiting protected speech and chilling protected speech by vagueness;

(4) Whether the Commission and the Oregon Supreme Court violated the Procedural Due Process protection of the Fourteenth Amendment when they refused to order a deposition of a key witness, used telephone testimony to determine the demeanor of a key witness, excluded impeachment evidence, and required Judge Day to submit the opening brief to a court of original jurisdiction when the Commission had the burden of proof and the duty to go forward with the evidence.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

The Honorable Vance D. Day, *Respondent*.

The Oregon Commission on Judicial Fitness and Disability, *Complainant*.

Corporate Disclosure Statement

Petitioner is an individual and so has no parent corporation and is not a publicly held corporation. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioner The Honorable Vance D. Day respectfully requests a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

Opinions Below

The opinion of the Oregon Supreme Court is at 413 P.3d 907. App. 6a. The Commission on Judicial Fitness and Disability's recommendations to the Oregon Supreme Court is unpublished. App. 127a.

Jurisdiction

The Oregon Supreme Court adopted the Commission's recommendations on March 15, 2018. App. 6a. It issued its judgment on April 24, 2018. App. 4a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I.

U.S. Const. amend. XIV.

Oregon Const., Art VII (Amended), Sec. 8 is at App. 186a.

Oregon Code of Judicial Conduct, Rule 1.1 is at App.187a.

Oregon Code of Judicial Conduct, Rule 2.1 is at App. 188a.

Oregon Code of Judicial Conduct, Rule 3.3 is at App. 189a.

Oregon Rules of Appellate Procedure, Rule 11.27 is at App. 190a.

Statement of the Case

Judge Vance D. Day is a Marion County, Oregon, Circuit Court judge who was appointed to the bench in 2011 by the Oregon Governor and successfully ran for election in 2012. In October 2012, he began presiding over the court's Veteran Treatment Docket, which transitioned into a distinct Veterans Treatment Court (VTC) a year later.¹

Judge Day is overwhelmingly viewed as an honest, fair, and hardworking judge, (Comm'n Hr'g Tr., vol. I, 114-16, 120-21, 142, 162, Nov. 9, 2015; *id.*, vol. iii, 459, Nov. 12, 2015; *id.*, vol. iv, 713, Nov. 13, 2015, & *id.*, vol. v, 1084-85, 1088, Nov. 16, 2015), with a genuine interest in helping the veterans who appeared before

¹ Veteran treatment courts are a relatively new development nationally that promote the successful civilian reintegration of veterans who commit offenses tied to their combat stress, and seek to reduce their recidivism rate into the criminal justice system. (Ex. 609, Comm'n Hr'g Tr., vol. vi, 1341, 1409, Nov. 17, 2015; vol. viii, 1875, Nov. 19, 2015.) The VTC is a unique, judicially-supervised, mentor-oriented program that includes collaboration among an interdisciplinary team of professionals to serve the individual needs of each veteran participant. (Ex. 609, Hr'g Tr., vol. viii, 1972-74.) Where the boundaries lie in the VTC context between providing a supportive relationship that addresses the particular needs of each VTC participant, and maintaining traditional standards of formal protections afforded represented individuals, is not always clear and is major topic of discussion nationally. (Hr'g Tr., vol. viii, 1928-29.) The Marion County VTC team and personnel received no training on protocols for the specialty court. (*Id.*, vol. v., 962.)

him and a deep reverence for individuals who serve our country and put their lives on the line for liberty. He is a dedicated family man who has been married for over 30 years and is the father of three adult children, all of whom live in or near Salem, Oregon.

In August 2014, Judge Day self-reported to the Oregon Commission on Judicial Fitness and Disability (“Commission”) an incident where a veteran in the VTC program, confidentially identified in this case as “BAS,” handled a gun owned by Judge Day’s son. (Ex. 94, 604.) Judge Day acknowledged he used poor judgment in this incident and more generally in establishing boundaries in his relationship with BAS. (Hr’g Tr., vol. ix, 2275, 2323-24, Nov., 20, 2015.) In response, the Commission self-initiated a sweeping investigation into multiple matters unrelated to the self-report or to Judge Day’s fitness to serve as a judge. It then charged Judge Day with 13 Counts of multiple violations of the Oregon Code of Judicial Conduct (“Code”), including the revival of a 2012, previously-dismissed complaint. App. 127a-185a. The Commission is required to establish the record, through a due process hearing, for the Oregon Supreme Court’s adjudication of any charges brought by the Commission. App. 9a. After a nine-day due process hearing that commenced on November 9, 2015, the Commission recommended that the Oregon Supreme Court find Judge Day had willfully violated the Code eight times, and recommended that the court impose the most severe possible sanction—removal of Judge Day from his judicial position. App. 184a.

Prominent among the Commission’s charges was the Commission’s claim that Judge Day discriminated

against same-sex couples by refusing to perform same-sex weddings.

When Judge Day took the oath of office in 2011, same-sex marriage was not protected by law, and, in fact, was prohibited under the Oregon Constitution and statute. *See* Or. Const., Art. XV, § 5a; Or. Rev. Stat. § 106.010. On May 19, 2014, an Oregon federal court issued an opinion holding that section of the Oregon Constitution unconstitutional under the Equal Protection Clause of the United States Constitution. *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Ore. 2014). No guidance was provided by the Oregon Judicial Department, Marion County or the Marion County Circuit Judges Association in response to the decision. (Hr’g Tr., vol. iii, 476; *id.*, vol. iv, 829-30.) A year later, in June 2015, this Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which concluded that a state’s refusal to permit same-sex marriages violates both equal protection and due process.

Judge Day is a devout Christian who believes that marriage should be confined to the union of a man and a woman. Since same-sex marriage violates the tenets of Judge Day’s faith, (Ex. 116, 117), Judge Day initially suggested in 2014 that his staff respond to wedding inquiries by checking the Oregon Judicial Case Information Network to determine the genders of the individuals requesting his service and, if they were the same gender, explain that Judge Day was not available. (Hr’g Tr., vol. iv, 786, 830; *id.*, vol. v, 948.) This happened once, (*id.*, vol. v, 948-49), when Judge Day was in fact not available, (*id.*, vol. iv, 787.) Since Judge Day’s judicial position does not require him to perform weddings, Judge Day stopped performing all marriage

ceremonies in the summer of 2014, shortly after *Geiger* was decided and nearly a year before *Obergefell* was handed down. (*Id.*, vol. v, 975-76.) There is no evidence that he has ever discriminated against gays or lesbians. (*Id.*, vol. I, 114, 116, 162.)

I. Oregon’s Judicial Disciplinary Structure.

Oregon’s Constitution authorizes the Oregon Supreme Court to remove, suspend, or censure judges as a matter of original jurisdiction. ORAP 11.27(2)(b), Or.. Rev. Stat. § 1.430, Or. Const, Art VII (Amended), § 8. To facilitate this power, Oregon statutes create the Commission, with the power to “take and preserve testimony and administer oaths to witnesses . . .” Or. Rev. Stat. § 1.415(1)(C), and, in conducting hearings, to “issue any processes necessary to compel the attendance of witnesses and the production of any books, papers, records or documents as may be required.” *Id.* at § 1.415(2). The Oregon Supreme Court has the sole authority to find facts and otherwise adjudicate judicial disciplinary actions, *id.* at §§ 1.415-1.430, and reviews the record developed by the Commission for “clear and convincing evidence of a willful violation.” *In re Complaint as to the Conduct of Schenck*, 870 P.2d 185 (Or. 1994). The Commission bears the burden of affirmatively demonstrating a willful violation and justifying its sanction recommendation to that court. *In re Miller*, 370 P.3d 1241 (Or. 2016).

By statute, the Commission, in response to a complaint from any person or at the Oregon Supreme Court’s request, conducts a due process hearing **1)** to assess the evidence of a judge’s alleged misconduct to determine if it will bring charges before the Oregon Supreme Court, and **2)** to establish a record for the

Oregon Supreme Court to adjudicate any claims brought by the Commission. Or. Rev. Stat. § 1.420(1). The due process hearing is public, with testimony and evidence given and received at the hearing becoming public record. *Id.* at § 1.420(3). “The judge shall have the right to be present at such hearing, to be represented by counsel, to present testimony and evidence and to cross-examine witnesses.” *Id.* If the Commission believes that the conduct of the judge warrants censure, suspension, or removal, it so recommends to the Oregon Supreme Court. *Id.* at § 1.420(4).

The Oregon Supreme Court reviews the record of the due process hearing and may receive additional evidence. *Id.* at § 1.430(1). Even though the Commission bears the burden of proof, Rule 11.27 requires a judge, as respondent, to begin briefing, allowing the Commission to go first only if “the judge fails to file an opening brief.” App. 190a. If the Oregon Supreme Court finds by clear and convincing evidence that a violation occurred, App. 11a, it may censure, suspend, or remove the judge. App. 8a.

II. The Commission Proceedings.

In March 2015, the Commission issued a Formal Notice under Comm’n. R. P. 7.d., advising Judge Day that a complaint would be filed against him. (Ex. 603.) In June 2015, the Commission filed its 13-Count Complaint, alleging numerous violations of Rules 2.1(A), (C), (D), Rule 3.3(B), and Rule 3.7(B) of the Code, and seeking his removal pursuant to Article VII (Amended), § 8(1) of the Oregon Constitution. One Count arose from Judge Day’s self-report (Count 4).

(ER² 6-7.) Two Counts arose from a revived 2012 soccer-referee complaint previously dismissed in February 2013 (Counts 1 and 2). (Ex. 608, 655.) The remaining ten Counts arose from the Commission's free-ranging investigation. (ER 1-21.)

In anticipation of the due process hearing on the Complaint, Judge Day sought impeachment evidence, including access to a Commission witness' electronic data and to BAS's medical records. (Hr'g Tr., vol. iv, 846-56; ER 156-160, 209-212, 233.) The Commission denied the request. App. 54a.

Judge Day also sought to depose BAS, during which the Commission's lawyer advised Judge Day's counsel of BAS's "legitimate concerns" about publicity because "he's seen what religious zealots are capable of during his numerous military tours," supporting an apparent comparison of Judge Day to ISIS and the Taliban. (ER 170.) The deposition was never secured.

The Commission held a two-week due process hearing from November 9 through November 20, 2015. The Commission called 17 witnesses and Judge Day called 43 witnesses.³ (Ex. 71.) Closing arguments were submitted in writing. (Ex. 143, 657.)

During the hearing, Commission members often asked questions directly of the witnesses after counsel's

² "ER" denotes the Excerpts of Record furnished to the Court below with Judge Day's opening brief.

³ Judge Day was not able to present the testimony of all his witnesses because the Commission, which expressed intent to use 3.5 days, used 5, leaving Judge Day the remaining 4 days to present his case.

examination of the witness was complete. (Hr’g Tr., vol. I, 207.) Judge Day’s counsel was not permitted to ask follow-up questions of the witnesses. (*Id.*, 210-11; ER 199-200.) The Commission heard testimony and received evidence on claims not charged in the Complaint. (ER 144-52, 200-05.)

Commission witness BAS was expected to appear in person but was authorized to testify at the due process hearing by phone. (Hr’g Tr., vol. v, 920.) Judge Day had tried but was denied the opportunity to depose BAS to prepare for his testimony, and so requested that opportunity at the hearing, offering to make any requisite motion. (*Id.*, 920-21, 927.) The Commission denied his request. (*Id.*, 927.) BAS did not have Judge Day’s exhibits, to be used for BAS’s cross-examination, for BAS’s phone testimony.

During closing arguments, the Commission’s lawyer argued that “the evidence consistently showed that Judge Day is someone that marches forward with his convictions . . . [he] is fomenting disorder within the judicial system.” (Ex. 143 p.4.) Judge Day was described as “conspir[ing] with state employees to discriminate,” (Ex. 143 p. 52.) No objection from the chairman of the Commission was raised to these comments.

On January 25, 2016, the Commission issued its recommendations, designated an “Opinion,” containing twenty pages of “FINDINGS OF FACT” with none but a single, solitary record citation—an exhibit cited in a footnote. App. 139a. It then “found” Rules 2.1(A), 2.1(C), 2.1(D), 3.3(B), and 3.7(B) were applicable, App. 157-59a, asserting that Judge Day “willfully . . . violated” these Rules numerous times by clear and

convincing evidence. App. 162-74. The Commission’s recommendations included ten new Rules violations not charged in the Complaint filed before the due process hearing, *id.*, and two pages of unsupported “Miscellaneous Factual Findings.” App. 151-52.⁴

The Commission described Judge Day’s unwillingness to marry same-sex couples as “misconduct,” App. 179a, and his plan to discreetly screen-out same-sex couples as a “deplorable lack of understanding of the most basic concepts of impartiality.” App. 173a. The Commission denied Judge Day’s “assert[ion] that this proceeding is due to his religious beliefs and his refusal to perform same-sex marriages . . . [a]s not true.” App. 182a.

III. Supreme Court Proceedings.

To remedy due process violations and other errors, on March 18, 2016, Judge Day filed a motion with the Oregon Supreme Court to strike, supplement and correct the record, and to revise the briefing schedule to require the Commission, as bearer of the burden of

⁴The Commission’s responsibility is to bring charges of violations of judicial ethics rules to be adjudicated by the Oregon Supreme Court. Thus, the Commission’s role is as a Prosecutor and the Oregon Supreme Court is the adjudicator. By using phrases such as “Opinion” and “Finding of Fact,” the Commission unlawfully sought to assume the mantle of an adjudicator and, to an extent, the Oregon Supreme Court adopted procedures, such as requiring Judge Day to file the opening brief, as if he was appealing an adjudication by a lower court. Despite Judge Day’s repeated efforts to get the Oregon Supreme Court to explicitly straighten this out because it prejudiced his ability to defend himself, he was not successful.

proof, to file the opening brief. (ER 112-180.) The motion asserted that the Commission exceeded its statutory authority in assuming an adjudicatory role, and asked this Court to strike the “Opinion” as written because it far-exceeded the Commission’s limited statutory role to determine whether to move forward with charges and to create a record for use by the Oregon Supreme Court. (ER 135.) The motion also included a request to strike the “Findings of Fact,” and “findings” of judicial rule violations. (*Id.*) Judge Day also moved to strike the Commission’s evidentiary findings not relevant to the conduct charged in the Complaint, and its recommendations based on charges not included in the Complaint. (ER 142-155.) He further moved for permission to supplement the record with evidence, in accordance with ORAP 11.27 (2)(b)(ii), including the videotaped deposition of BAS and the production of BAS’s medical records. (ER 156-161.)⁵ On May 17, 2016, the Oregon Supreme Court granted the motion insofar as it sought a limited follow-up deposition of BAS, but denied the rest of the motion, without explanation and without prejudice, including the motion to revise the briefing schedule, so that the Commission went first. (ER 233-34.)

Judge Day, despite considerable effort, was never able to thereafter depose BAS, who evaded service and failed to appear for a deposition at the time and place where BAS’s attorney had agreed to at Judge Day’s expense. So on September 6, 2016, Judge Day moved

⁵ In addition, the motion asked that the Court strike the telephonic testimony and witness statement of BAS. (ER 137- 141.)

once again to strike BAS's pre-hearing witness interview and hearing testimony from the record because Judge Day had been denied a fair and adequate opportunity to confront BAS about the accusations or to impeach BAS's credibility with exhibits, and because the fact-finder had not been able to visually assess the witness. (ER 235-266.) The Oregon Supreme Court denied that motion on September 27, 2016, holding that no due process violation had occurred, but allowing respondent to raise issues about the weight or credibility of the evidence below in his brief. (ER 267.)

On January 17, 2017, Judge Day as "Respondent" filed the opening brief, disputing the Commission's "findings" and recommended sanctions, and asserting free exercise, free speech, due process, equal protection, and Title VII defenses against the Rules the Commission sought to enforce against him. (Brief - Opening, January 18, 2017.) The court below issued its opinion on March 15, 2018, adopting the Commission's factual findings and concluding that Judge Day had willfully violated Rule 2.1(A) three times, App. 83a, 91a, 98a; Rule 2.1(C) four times, App. 62a, 83a, 92a, 98a; Rule 2.1(D) two times, App. 62a, 86a; and Rule 3.3(B) once, App. 110a. It imposed a sanction of a three-year suspension from office. App. 126a. The court summarily rejected several of Judge Day's procedural due process claims, "conclud[ing] that they are without merit and that further discussion would not benefit the bench, bar, or the public." App. 53a. And it concluded that because the Rule 3.3(B) violation, regarding same-sex marriages, "would not affect [its] consideration of the appropriate sanction, [it] need not consider respondent's constitutional challenges." App. 113a.

On March 29, 2018, Judge Day sought reconsideration in light of recurring procedural due process violations that occurred throughout the process that had prejudiced him and his ability to present evidence to the Court. (Petition - Reconsideration, Mar. 29, 2018.) On April 24, 2018, the Oregon Supreme Court denied reconsideration, asserting without specifying that “procedural opportunities were available to respondent, which he did not pursue,” and enter its judgment against Judge Day. App. 1a.

Reasons for Granting the Petition

Certiorari should be granted because 1) this case presents an important federal due process question; 2) the decision below violates important Free Exercise and Free Speech rights; and 3) the decision below violates important procedural due process rights.

This appeal presents the unusual, but profoundly troubling, case where the Oregon Supreme Court found an elected state court judge guilty of several violations of state judicial ethics rules while refusing to consider, or summarily disposing of, substantial constitutional defenses, properly raised and often of first impression. These substantial constitutional defenses included Free Exercise and Free Speech defenses to the application of certain ethics rules and violations of procedural due process in adjudicating them.

Due process requires that a court consider and dispose of, with appropriate analysis, any properly raised constitutional claims or defenses, especially where, like here, the court of original jurisdiction has no court with plenary appellate review. However, the Oregon Supreme Court systematically refused to do

this and found Judge Day guilty of violating the very ethics rules which were the subject of the ignored constitutional defenses. Not only was this erroneous on the merit of the constitutional defenses asserted, it is itself an egregious violation of due process.

Furthermore, the decision below was handed down before this Court's decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, and the same bias and hostility that infected that case infected this case. No. 16-111, slip op. (U.S. June 4, 2018).

As a result, this Court should grant the petition and set the matter for briefing and argument. In the alternative, this Court should grant the petition, vacate the judgment below and remand for reconsideration in light of *Masterpiece* and for proper consideration and analysis of the constitutional issues asserted below but ignored or improperly summarily decided.

I. This Case Involves The Important Question of Law of Whether It Is a Due Process Violation for a Court of Original Jurisdiction To Refuse To Consider, or To Reject Without Proper Analysis, Substantial Constitutional Claims.

Judicial review is a bedrock of our republic for maintaining the rule of law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

In a judicial disciplinary proceeding, the Oregon Supreme Court is not an appellate court, but rather is the court of original jurisdiction. App. 9a. As the sole adjudicator of any ethics charges, it has the absolute responsibility to provide a carefully-considered opinion,

including analysis of the constitutional questions at issue. *See United States v. Taylor*, 487 U.S. 326, 336 (1988) (finding “discretionary choices” should not be left to a court’s “inclination, but to its judgment,” which must be guided by “sound legal principles”)(internal citations omitted). A court’s careful consideration and analysis ensures all parties receive an ordered judgment essential to proper judicial review. *See O’Bryan v. Estelle*, 714 F.2d 365, 407 (5th Cir. 1983) (holding no way exists for appellate court to review findings if they are not on record); *see also United States v. Martinez*, 604 F.2d 361, 364 (5th Cir. 1979) (finding situations may exist “where the trial judge must spell out his findings with adequate specificity for meaningful appellate review”).

Here, judicial review of the decision below is frustrated because the Oregon Supreme Court refused to consider or summarily rejected the constitutional defenses raised by Judge Day. Its refusal to analyze substantial constitutional claims⁶ risks arbitrary and capricious enforcement and demonstrates an ominous disregard of the important protections afforded by the United States Constitution.

The concept of procedural due process is rooted in “fundamental fairness” and includes rights such as the opportunity to be heard, the right to cross-examine,

⁶ Judicial efficiency does not require in-depth analysis of well-settled law. *Cty. Court v. Allen*, 442 U.S. 140, 153 (1979) (holding brief string citation appropriate when several prior cases ruled on same issue). But none of the constitutional defenses properly raised by Judge Day were well-settled against him and several were novel.

and the right to adequate notice. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). Thwarting meaningful judicial review, by refusing to consider, or summarily rejecting, substantial constitutional claims or defenses, runs contrary to this fundamental fairness principle. The ability to conduct judicial review has not traditionally been analyzed under due process, but rather under the standard of review applicable to a specific question of fact or law. *See infra* Part III. However, the unique procedural posture of this case creates an intersection between the fundamental fairness envisioned by procedural due process and a traditional standard of review analysis. *Id.* This intersection creates an important question of law for this Court to consider.

A. The Oregon Supreme Court, Acting as the Court of Original Jurisdiction, Found Judge Day Manifested Bias Toward Same-Sex Couples While Refusing To Consider His Free Exercise Defenses Related to the Underlying Charge, Warranting Review or Remand.

In an effort to avoid Judge Day's constitutional defenses, the Oregon Supreme Court found Judge Day violated the applicable ethical rules but that it was "unnecessary" to consider whether his Free Exercise defenses to the same-sex marriage claim were "meritorious" because it would impose a three-year suspension regardless of this violation. App. 113a. This reasoning is flawed. To adjudicate someone's guilt while completely ignoring any substantial constitutional defenses is contrary to a "judgment guided by sound legal principles" called for in *Taylor*. 487 U.S. at 336.

Moreover, the right to defend yourself on constitutional grounds exists even when no sanction is imposed. *See In re Koffler*, 412 N.E.2d 927, 929 (N.Y. 1980); *In re Greene*, 429 N.E.2d 390, 392 (N.Y. 1981). In both *Koffler* and *Greene*, lawyers found to have violated the Code of Professional Responsibility but who were not sanctioned still had a right to appeal on constitutional grounds. Like the lawyers in *Koffler* and *Greene*, Judge Day has been adjudged to have violated a code of conduct without a sanction imposed for that violation. App. 112a. Judge Day has the right to review of his constitutional defenses, regardless of the absence of a sanction.

The Oregon Supreme Court seeks to minimize or deny the impact of its judgment that Judge Day “manifested” bias toward same-sex couples. A concurrent loss of government employment, with state-caused stigmatic harm triggers the constitutional right to due process. *See Paul v. Davis*, 424 U.S. 693, 712 (1976). Here, the Oregon Supreme Court’s decision caused severe stigmatic damage to Judge Day by finding him guilty of manifesting bias toward same-sex couples. App. 112a. This “biased” label will follow Judge Day far beyond the three-year suspension.⁷ Yet the Oregon Supreme Court denies this stigma harms Judge Day because it did not attach his suspension directly to that

⁷ That Judge Day’s character and reputation have been harmed is evident in numerous news accounts following the court’s judgment. *See, e.g.,* Aimee Green, *Judge Vance Day – who wouldn’t marry same-sex couples – suspended for 3 years*, Oregon Live, (March 15, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/03/oregon_supreme_court_xxxx_judg.html

stigma. *Id.* 113a. Both the stigma and suspension impact Judge Day and cannot be separated in order to avoid a due process obligation. Judge Day lost his government employment for three years and the court’s judgment caused him stigmatic harm—the exact type of “dual” harm envisioned by *Paul*. The attempt to bifurcate the stigma from the suspension in order to avoid analyzing a properly asserted and substantial constitutional defense is fundamentally unfair.

Indeed, even without a loss of government employment, more recent cases show that severe stigmatic harm with serious collateral effects can trigger procedural due process requirements. See *GE v. Jackson*, 595 F. Supp. 2d 8, 26 (D.D.C. 2009) (holding due process may be considered when collateral consequences are “sufficiently formal or sufficiently broad” or when the injured party precluded from pursuing chosen categories of activities in a way “equivalent in every practical sense to formal debarment”); *United States v. Tillman*, 756 F.3d 1114, 1151 (9th Cir. 2014) (holding sanctions ordered without notice and hearing violated due process when it interfered with counsel’s reputation as “death penalty specialist” in way critical to his clients and his livelihood); *Cooney v. Dalton*, 877 F. Supp. 508, 515 (D. Haw. 1995) (finding collateral effects of loss of income and reputation associated with dishonorable discharge triggered need for due process analysis).

Judge Day has not only been labeled as “biased” and been suspended, but as a result of these proceedings, he is now facing criminal charges and disciplinary investigation that could lead to his disbarment. *Oregon v. Day*, No. 16CR73159, (Marion Cir. Ct. Or., filed Nov.

16, 2018). (Oregon State Bar Letter Re: Vance D. Day, May 1, 2018 (on file with counsel).) Such consequences are both formal and broad, and will keep Judge Day from pursuing his chosen field in a way critical to his livelihood as detailed in *Jackson and Tillman*. Judge Day faces criminal conviction, a collateral effect more severe than those faced in *Cooney*.

The refusal to consider Judge Day's Free Exercise defense is also a violation of due process rights because it directly diminished Judge Day's opportunity to be heard in any meaningful way. The opportunity to be heard is a fundamental procedural due process right. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Commission had the burden to prove, by clear and convincing evidence, that Judge Day violated Oregon's Code. App. 11a. For the Oregon Supreme Court to rule a violation is proven without considering the constitutional defense raised by the accused fundamentally undermines this burden.

The Oregon Supreme Court's decision to refuse to consider substantial constitutional defenses not only impacts Judge Day, but also sets a dangerous precedent for other similarly-situated litigants. It violates fundamental due process and warrants review or remand.

B. The Oregon Supreme Court, Acting as the Court of Original Jurisdiction, Found Judge Day Made “Wilful Misstatements” and Carried Out Other “Misconduct” While Refusing To Consider His Substantial Free Speech Defenses Related to Those Charges, Warranting Review or Remand.

The Oregon Supreme Court based its suspension of Judge Day on the “wilful misstatements” he made during the investigation and Judge Day’s “misconduct” during the gun-handling incidents. These holdings implicate Rules 2.1(A),(C),(D) of the Code and Or. Const., art. VII, §8(1). Judge Day raised constitutional challenges⁸ to these specific rules and provisions, but the court completely ignored them.

Specifically, Judge Day asserted: (1) an overbreadth challenge to Rule 2.1(D); (2) a challenge that Rules 2.1(A),(C) and Art. VII §8(1) fail strict scrutiny; and (3) that Rules 2.1(A) and 2.1(C) are unconstitutionally vague, both facially and as applied to Judge Day. *See supra* Part II.B. Contrary to the court’s claim, Judge Day’s constitutional challenges to these codes and provisions and the court’s complete lack of analysis directly affected his suspension from the bench. The Oregon Supreme Court’s failure to address them compounds the court’s due process violation in refusing to analyze Judge Day’s Free

⁸ Judge Day also raised Equal Protection and Title VII claims, which the Oregon Supreme Court also ignored. The arguments against the court’s lack of analysis for these claims is virtually identical to the First Amendment claims raised and are incorporated by reference.

Exercise claims. The lower court's violation of Judge Day's fundamental due process warrants review or remand.

C. The Oregon Supreme Court, Acting as a Court of Original Jurisdiction, Summarily Rejected Judge Day's Substantial Procedural Due Process Claims, Warranting Review or Remand.

The Oregon Supreme Court also summarily dismissed Judge Day's procedural due process claims in one short paragraph of its 91 page opinion. App. 53a ("We have considered those challenges, but we conclude that they are without merit and that further discussion would not benefit the bench, bar, or the public."). This summary rejection not only failed to ensure Judge Day's rights were protected, but also made it impossible for this Court, as the sole appellate authority, to evaluate its reasoning on these issues. This failure warrants review or remand.

Several procedural due process claims raised by Judge Day were issues of first impression. Specifically, the order of briefing required by the court of original jurisdiction and comparing telephone testimony to live testimony in order to determine credibility and demeanor were issues of first impression. These issues, discussed more substantively below in Part II.C, were summarily dismissed with a short string citation to cases which hold that procedural due process is "flexible" and only requires the defendant receive "notice and opportunity to be heard." App. 54-55 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *In re Complaint as to the Conduct of Devers*, 974 P.2d 191, 193 (Or. 1999); and *State ex rel. Currin v. Comm'n on*

Judicial Fitness & Disability, 815 P.2d 212, 213 (Or. 1991)). This superficial analysis does not satisfy Judge Day's due process rights or ensure they are protected.

Summarily rejecting substantial constitutional claims never previously considered by a court is improper and provides no protection of the fundamental procedural due process right to be meaningfully heard discussed in *Mathews*. 424 U.S. at 333. As it stands, it is impossible for this Court, acting as the sole appellate authority, to determine if Oregon's procedural due process analysis was constitutionally correct because it is nonexistent. Adequate consideration, especially for issues of first impression, so that an appellate court can properly assess a lower court's reasoning, would reflect the "sound legal principles" in *Taylor*. 487 U.S. at 336. Other judges subject to disciplinary proceedings cannot know what the boundaries of their procedural due process rights from the decision below, as they are not adequately considered and analyzed though properly presented.

The Oregon Supreme Court summarily rejected Judge Day's procedural due process claims, even further compounding the Oregon Supreme Court's due process violation by refusing to analyze Judge Day's Free Exercise and Free Speech defenses. The lower court's violation of Judge Day's fundamental due process warrants review or remand.

II. Judge Day Raised Substantial Constitutional Defenses.

A. Judge Day Has Substantial Free Exercise Defenses.

In its recent *Masterpiece* decision, this Court made clear that the Free Exercise Clause requires not only that laws affecting sincerely-held religious beliefs be generally-applicable and neutral, but that the government must also be “neutral and respectful” of religious views at all junctures of regulation and enforcement, No. 16-111, slip op. at 12, 16, including in “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.* at 17 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993)). Even “subtle departures from neutrality” are proscribed, *Church of Lukumi Babalu Aye*, 520 U.S. at 534.

Central to Judge Day’s constitutional defense against alleged party bias under Rule 3.3(B) is that as a Christian, he holds the sincerely-held belief that marriage should be confined to the union of a man and a woman. Compelling him to solemnize a same-sex wedding—a function that is neither required of Oregon judges nor limited to Oregon judges—violates his Free Exercise rights.

Throughout the Commission’s prosecution of Judge Day is an open disdain and hostility towards the religious beliefs of those whose faith honors marriage between one man and one woman. While seeking to

depose BAS, Commission's counsel advised Judge Day's counsel of BAS's "legitimate concerns" about publicity because "he's seen what religious zealots are capable of during his numerous military tours," supporting an apparent comparison of Judge Day to ISIS and the Taliban. (ER 170.) In closing arguments, that same lawyer argued that "the evidence consistently showed that Judge Day is someone that marches forward with his convictions . . . [he] is fomenting disorder within the judicial system." (Ex. 143 p.4.) Judge Day is described as "conspir[ing] with state employees to discriminate," (Ex. 143 p. 52) As in *Masterpiece*, no objection from the Commission chairman was raised to these comments. *Masterpiece*, No. 16-111, slip op., at 14.

In its recommendations, the Commission describes Judge Day's unwillingness to marry same-sex couples as "misconduct," App. 179a, and his 2014 plan to discreetly screen-out same-sex couples as a "deplorable lack of understanding of the most basic concepts of impartiality." App. 173a. The post-*Obergefell* Commission assumed Judge Day was refusing to follow the law, even though he was solely governed by his sincerely-held beliefs, which he ought to keep to himself: "the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty." *Id.* Indeed, not once does the Commission acknowledge the nationally-controversial and constitutionally-unsettled nature of same-sex marriage at the time in question, nor the fact that Rule 3.3(B) was adopted at a time when same-sex marriage was expressly prohibited in Oregon. And not once in its "Opinion" does the Commission acknowledge Judge

Day's Free Exercise rights or religious accommodations acknowledged in *Obergefell*.

While it is true that Judge Day at all times was honoring his sincerely-held religious beliefs, he did so within a reasonable understanding of the law, including the United States Constitution. Neither Judge Day's approach to same-sex marriage, nor his understanding of impartiality, was "deplorable," it was considered and consistent with his oath of office. His ultimate decision to entirely discontinue marriages allowed him to continue to honor both his sincerely-held beliefs and the U.S. Supreme Court's later constitutional resolution of the issue.

The Commission disavows this hostility towards Judge Day's sincerely-held beliefs, suggesting that Judge Day's "assert[ion] that this proceeding is due to his religious beliefs and his refusal to perform same-sex marriages . . . is not true." App. 182a. Instead, it argues, it is about Judge Day's dishonesty. *Id.* But Judge Day's alleged dishonesty is part and parcel with the same-sex discrimination allegations. If Judge Day had posted a placard regarding his unwillingness to perform same-sex marriage in the courthouse, the Commission's charges would remain the same. The Commission is simply attempting to deflect from its hostile mission.

This hostility toward Judge Day due to his religious beliefs permeated the entire process, from the Commission's investigation, discovery, and hearing to the Commission's ultimate "findings" regarding Judge Day's truthfulness, integrity, and demeanor as it related to other years-old charges. Judge Day was denied access to a key witness, BAS, and to impeach-

ment evidence regarding BAS, and has never had direct access to him to this day. In its “Opinion,” the Commission rejected at every turn the testimony of Judge Day, finding he lacked credibility on account of “facial expressions and responses” allegedly “tinged with sarcasm” and smug smiles, App. 134a, and finding other witnesses more credible, including BAS, who appeared by phone. The Commission describes BAS’s demeanor as “genuine, sincere, heartfelt,” with “authentic emotion at appropriate times.” App. 138a.

This hostility towards Judge Day is perpetuated when the Oregon Supreme Court adopted credibility determinations of the Commission and refused to consider *any* of Judge Day’s Free Exercise and Free Speech defenses, and summarily rejected his procedural due process claims. Indeed, the court—which relies on two factors to assess the merit of an allegation: witness credibility and whether the evidence is otherwise clear and convincing, App. 58a—gave considerable weight to the hostile Commission’s “findings” on witness demeanor to conclude Judge Day’s testimony was not “highly probable.” App. 85a. Once it concluded this for one Count, the court used that finding to find Judge Day’s testimony not credible on other Counts. App. 73a (using Judge Day’s lack of credibility as to Count 2 as grounds for lack of credibility on Counts 3 and 4); App. 81a (using acceptance of a witness’ testimony on Counts 3 and 4 to reject Judge Day’s credibility on Count 5). The Oregon Supreme Court gave weight to a hostile Commission’s “factual findings” to find repeated violations of the Code and ignored or summarily rejected substantial constitutional defenses. This hostility to Judge Day’s religious

beliefs infected the whole proceeding and violated Judge Day's Free Exercise rights under *Masterpiece*.

The Oregon Supreme Court's decision is contrary to *Masterpiece*—a decision the court below acknowledged was pending and premised its deflection of constitutional analysis on. App. 112-13a. In light of *Masterpiece*, this Court should grant certiorari and set briefing and argument or, alternatively, vacate the judgment below and remand this matter back to the Oregon Supreme Court, as it did in *Arlene's Flowers, Inc. v. Washington*, No. 17-108, 2018 U.S. LEXIS 3950 (June 25, 2018), to conduct a neutral and respectful constitutional review of the claims against Judge Day.

B. Judge Day Has Substantial Free Speech Defenses.

1. Rules 2.1(A), 2.1(C), 2.1(D), 3.3(B), and Art. VII (Amended) § 8(1)(b) and (e) Fail Strict Scrutiny Review And Are Overbroad.

As discussed above, the Oregon Supreme Court unconstitutionally declined to consider and decide the Free Speech defenses Judge Day properly asserted against certain ethics rules charges for which he was found guilty. *See supra* Part I.B. Under Free Speech analysis, certain provisions that Judge Day was charged with violating are unconstitutionally overbroad.

This Court in *Republican Party of Minnesota v. White*, 536 U.S. 775 (2000) and *Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015), requires the regulation of judicial speech to be narrowly tailored to a compelling state interest—strict scrutiny. *White*, 536 U.S. at 774; *Yulee*,

135 S. Ct. at 1665. Oregon’s state interest in impartiality—bias for or against a party, *White*, 536 U.S. at 775-76—is derived from due process, with the goal of preventing an advantage given to one adversary over the other simply by virtue of who they are. *Id.* at 776.

Such due process rights are not implicated in the marriage solemnizing context—there is no adversarial relationship among the parties. And unless a couple is denied access to marriage entirely—which cannot occur here, since marriage ceremonies are non-mandatory and non-exclusive services that Oregon judges can perform, OR. REV. STAT. 106.120⁹—no due process rights are implicated. *See Obergefell*, 135 S. Ct. at 2607 (“The Constitution . . . does not permit the State to *bar* same-sex couples from marriage . . .”) (emphasis added). Judicial impartiality is not implicated here. Judge Day has never refused to perform a specific same-sex marriage because of his beliefs and adopted an approach consistent with the state of the law on the issue at all times. Simply announcing as a judge that one disagrees with same-sex marriage on religious grounds cannot erode public confidence in the integrity of the judiciary. *Yulee*, 135 S. Ct. at 1670. Judge Day’s unwillingness to conduct same-sex marriages on religious grounds neither affects his ability to be impartial, *White*, 536 U.S. at 775-76, nor his ability to administer justice without fear or favor. *Yulee*, 135 S. Ct. at 1666. So Judge Day cannot constitutionally be held in violation of Rule 3.3(B) and Or. Const., art. VII (Amended) § 8(1)(b) and (e) as the Oregon Supreme Court concluded. App. 111-12a.

Indeed, Art. VII § 8(1)(b) and (e) has been applied in this case in an unconstitutionally overbroad manner. The Oregon Supreme Court has suspended Judge Day for violating judicial rules like Rules 2.1(A) and 2.1(C), which serve “aspirational and precautionary purposes,” *State v. Pierce*, 333 P.3d 1069, 1075 (Ore. 2014), rather than address specific circumstances where speech is either prohibited or required. *See* Code Rule 1.1. App. 187a. And even where, as in Rule 2.1(D), specific circumstances are provided, the scope is broader than necessary to serve Oregon’s impartiality and public confidence interests. *See* Rule 2.1(D) (prohibiting speech and conduct “involving” dishonesty, fraud, deceit, or misrepresentation). App. 188a. These are substantial constitutional claims that the Oregon Supreme Court failed to consider.

2. Rules 2.1(A), 2.1(C), 2.1(D), and 3.3(B) Are Unconstitutionally Vague.

The Oregon Supreme Court did not consider Judge Day’s Free Speech challenges to the Rules. Where Free Speech rights are at stake, judicial rules must also sufficiently define their terms so that the boundary between permissible and impermissible speech is clearly marked. *Buckley v. Valeo*, 424 U.S. 1 (1976); *see Spargo v. New York State Comm’n on Jud. Conduct*, 244 F. Supp. 2d 72, 90 (D.N.Y. 2003), *vacated on abstention grounds*, 351 F.3d 65 (2d Cir. 2003) (“[A] rule that impedes basic First Amendment freedoms, if vague, leads those whose conduct is affected to more severely limit their conduct in order to avoid a violation.”).

Rule 3.3(B) is being applied to Judge Day because he briefly recused himself from the possibility of

performing same-sex marriage ceremonies. He was not provided fair warning that his unwillingness to perform non-mandatory, non-exclusively judicial services in accordance with the law because of his sincerely-held religious beliefs would violate Rule 3.3(B).

Likewise, terms like “public confidence in the judiciary” (found in Rule 2.1(A)), “reflect adversely” (found in Rule 2.1(C)), and “involving” (found in Rule 2.1(D)) lack any meaningful definition or criteria to guide a judge for meeting these Rules’ aspirational goals. *See Spargo*, 244 F. Supp. 2d at 90-91.

These are substantial constitutional claims that the Oregon Supreme Court also failed to consider.

C. Judge Day Has Substantial Procedural Due Process Claims

Judge Day also claimed Oregon violated his procedural due process in several specific ways, all of which were summarily rejected by the Oregon Supreme Court: **1)** the Commission’s rulings regarding BAS’s deposition and testimony; **2)** the Commission’s exclusion of impeachment evidence; and **3)** the court of original jurisdiction’s requirement that Judge Day submit the opening brief. Each of these claimed violations of procedural due process are substantial and the Oregon Supreme Court’s refusal to properly consider and decide them warrant reversal and remand.

1. **The Commission’s Rulings Regarding BAS’s Deposition and Testimony Violated Judge Day’s Due Process Rights.**
 - a. **The Commission Refused To Order BAS’s Deposition, Which Violated Judge Day’s Procedural Due Process Rights.**

BAS was the Commission’s key witness in the gun-related charges leading to his suspension. To prepare his defense, Judge Day sought to depose BAS in advance of the hearing. The Commission had the authority to order BAS’s deposition, Comm. R. P. 11.c., but it refused to do so. As is common with an opposing party witness, without an order to appear for a deposition, BAS evaded and thwarted all of Judge Day’s independent attempts to depose BAS. *See Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d 1218, 1219 (9th Cir. 2018) (finding that if a party seeking deposition suspects that opposing party is “bottleneck[ed]—either directing or encouraging its witness not to appear—an order directed at the opposing party may be fruitful”).

Because the Commission refused to order BAS to appear at a deposition, Judge Day could not properly prepare his defense. Such refusal directly affected Judge Day’s opportunity to be heard and thus violated his due process rights.

b. The Commission Proceeded with BAS's Telephone Testimony, Despite BAS's Inability To See Exhibits, Which Violated Judge Day's Procedural Due Process Rights.

Up to and including the day of BAS's testimony at Judge Day's hearing, BAS was scheduled to testify in person. Knowing this, Judge Day planned on using several exhibits during his cross-examination of BAS. When the Commission found out BAS would not be testifying in person, it then authorized testimony by "video or telephone, preferably video." (Hr'g Tr., vol. v, 925.) The Commission's attorney e-mailed Judge Day's exhibits to BAS, but BAS informed the Commission before his testimony that he never received the exhibits. (*Id.*, 1144). Despite this, the Commission allowed the telephone testimony and cross-examination of BAS to proceed without BAS's access to the exhibits. (*Id.*)

The inability to secure testimony through exhibits and the overall lack of ability to assess BAS's demeanor on the stand prevented Judge Day's counsel from effectively cross-examining BAS. This lack of effective cross-examination violated Judge Day's procedural due process rights.

c. The Commission Compared BAS's Telephone Demeanor to Judge Day's In-Person Demeanor, Which Violated Judge Day's Procedural Due Process Rights.

The comparison of telephone "demeanor" from one critical witness to the in-person demeanor of another key witness is improper. Telephone testimony should

be limited, especially when determinations of witness demeanor and credibility are critical to the adjudication. Nonverbal factors are critical to a proper assessment of any communication, which Oregon recognizes. *State ex rel. Anderson v. Miller*, 882 P.2d 1109, 1113 (Or. 1994). (acknowledging that video deposition can have “significant impact” because finder of fact often will gain greater insight from the manner in which an answer is delivered). Reliance on telephone testimony is especially egregious when the telephone demeanor of one witness is compared to the in-person demeanor of another. This “demeanor” determination by the Commission was critical to the Oregon Supreme Court’s judgment in the gun-related incidents and was part of its assessment of Judge Day’s overall credibility as it related to the other charges. App. 74a.

Telephone testimony can cause due process concerns. *See generally, A.E.P. v. K.A.H.*, 381 P.3d 1052, 1058 (Or. Ct. App. 2016) (holding that an underlying statute “. . . evinces a policy judgment that, if a witness’s testimony will be outcome-determinative, the opposing party has a right to face-to-face cross-examination, period.”); *De Rojas v. Gonzales*, No. 04-74682, 2007 U.S. App. LEXIS 5511 (9th Cir. Mar. 6, 2007) (holding telephone testimony is inappropriate in immigration administrative proceeding when opposing party given no notice witness would be testifying via telephone). BAS, the key witness on four of the violations found against Judge Day, was allowed to testify via telephone. BAS was scheduled to appear in person, and Judge Day had no idea until the day of the scheduled testimony that he would only be available via telephone. Despite counsel’s vigorous objections, the

Commission allowed BAS's telephone testimony to proceed. Such telephone testimony of an outcome-determinative witness violated Judge Day's right to face-to-face cross-examination and violated the procedural due process rights the *A.E.P.* Court found vitally important. The comparison of telephone "demeanor" from one critical witness to the in-person demeanor of another key witness is improper.

The Commission's refusal to order BAS's deposition, the lack of exhibits during cross-examination, and the effect of BAS's outcome-determinative telephone testimony violated Judge Day's procedural due process rights.

2. The Commission's Exclusion of Impeachment Evidence Violated Judge Day's Procedural Due Process Rights.

The Commission excluded impeachment evidence offered against BAS, including evidence showing his unreasonable and unfounded mental state as it related to his perception of the consequences of testifying at the hearing. App. 54a. Other critical impeachment evidence, such as BAS's medical records and evidence of inconsistent, untruthful statements regarding BAS's social media use were also excluded. *Id.* These exclusions deprived Judge Day of his right to be meaningfully heard, the right to confront, and the right to a fair trial. Taken together, the Oregon Supreme Court denied Judge Day his rights to procedural due process.

3. The Oregon Supreme Court's Requirement That An Accused Judge Submit the Opening Brief Violated Judge Day's Due Process Rights.

Oregon's appellate rules require a judge facing disciplinary action to file the opening brief in the Oregon Supreme Court. ORAP 11.27. This places the burden on the judge as the accused, rather than the Commission as the prosecutor. It suggests an adjudication has already occurred and the judge is appealing. In fact, no such adjudication has occurred as the Commission is strictly non-adjudicatory and the accused judge is entitled to a presumption of innocence. *In re Jordan*, 665 P.2d 341, 349 (Or. 1983).

When this Court acts as the court of exclusive, original jurisdiction and questions of fact are at issue, it will often appoint a Special Master. *Mississippi v. Louisiana*, 346 U.S. 862 (1953). This Special Master acts as a fact finder, but this Court does not limit itself to the facts established by the Special Master. *New Jersey v. New York*, 523 U.S. 767 (1998). If needed, this Court will investigate facts and historical evidence in order to properly adjudicate an issue. *Id.*

Likewise, eight states have a two-tiered judicial disciplinary system. Cynthia Gray, *Judicial Conduct Commissions How Judicial Conduct Commissions Work*, Vol. 28, Number 3, JUST. SYS. J., 405, 414-15. In these systems, an intermediary court acts as the court of original jurisdiction and the state's highest court acts as a true appellate court. *Id.* In all of these cases, the order of briefing and presentation of facts at both the intermediary court and appellate level proceeds as

would normally be expected, with the state presenting its case first and the judge responding.

That Oregon Supreme Court does not follow proper briefing procedures was severely prejudicial to Judge Day, who filed an opening brief with only an “Opinion” lacking any record citations to guide him. This was fundamentally unfair to Judge Day, violating his procedural due process rights.

The Oregon Supreme Court has violated Judge Day’s procedural due process in several specific ways and then summarily rejected any required analysis of those violations. Future similarly-situated litigants will not know their rights under Oregon’s law. These procedural due process concerns are substantial and warrant review or remand.

**III. The Oregon Supreme Court Violated
Judge Day’s Due Process Rights In Its Refusal
To Consider and Its Summary Rejection of
Judge Day’s Substantial Constitutional Claims,
Warranting Review or Remand.**

The unique procedural posture inherent to this proceeding creates an ability for this Court to review the constitutional claims de novo or to remand for further analysis. The Oregon Supreme Court acted as the court of original jurisdiction in the judicial disciplinary proceeding below. App. 8a. Since the Oregon Supreme Court was the original adjudicator of the charges, this Court is the sole appellate authority authorized for judicial review of this matter. 28 U.S.C. § 1257(a).

This Court’s own rules give priority to writs of certiorari sought to address important questions of

federal law. S. Ct. R. 10(c). Judge Day asserts that the lower court's lack of analysis does create an important question of federal law. *Supra* Part I. The nature of this jurisdiction and the unique procedural posture makes this case one of particular importance.

As discussed above, the ability to conduct judicial review has not traditionally been analyzed under due process, but rather under the standard of review applicable to a specific question of fact or law, with questions of law reviewed de novo, questions of fact reviewed for clear error, and matters of discretion reviewed for an abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). However, Judge Day's constitutional claims were either ignored or inadequately analyzed by the court of original jurisdiction and no appellate authority exists outside this Court. This creates a question central to due process' "fundamental fairness" concerns and underscores the need for this Court to either review the claims as the only appellate court authorized to do so or to remand for proper analysis.

Judge Day raised substantial questions of constitutional law, which would warrant de novo review by this Court. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008). However, the Oregon Supreme Court's refusal to consider or to improperly summarily reject those constitutional defenses frustrates this Court's review.

So, in the alternative, because all of the constitutional issues raised and the corresponding lack of analysis by the Oregon Supreme Court created a lack of due process, remand is warranted. Indeed, the Oregon Supreme Court based its refusal to review Judge Day's constitutional claims on the fact this

Court had not yet decided *Masterpiece*. In addition, the Oregon Supreme Court summarily rejected Judge Day's Procedural Due Process claims. Given the timing and the procedural posture of this case, this Court may decide that the Oregon Supreme Court should have the opportunity to remedy this refusal by requiring it to fully analyze and decide all of Judge Day's constitutional claims and defenses.

Judge Day has lost his livelihood for three years and has suffered significant harm to his reputation. Other, similarly-situated litigants could suffer the same constitutional violations. The fact that Judge Day's substantial constitutional claims have been ignored or not properly analyzed underscores the need for this Court to review, as the sole appellate authority in this case, or to remand for proper analysis.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari, set the case for briefing and argument or summarily remand to the Oregon Supreme Court with instructions to analyze and decide Judge Day's properly raised constitutional claims and defenses.

Respectfully submitted,
James Bopp, Jr.
Counsel of Record
Anita Y. Milanovich
Melena S. Siebert
THE BOPP LAW FIRM
The National Building
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner