No. 23-

IN THE
Supreme Court of the United States

MARYLIN PIERRE AND ASHER WEINBERG

Petitioners,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Maryland

JOINT PETITION FOR A WRIT OF CERTIORARI

Irwin R. Kramer
KRAMER & CONNOLLY
465 Main Street
Reisterstown, MD 21136
(410) 581-0070
irk@KramersLaw.com

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Counsel for Petitioners

QUESTION PRESENTED

As judges face unprecedented attacks in the court of public opinion, they must exercise restraint in punishing their most knowledgeable critics. Under Rule 8.2 of the Rules of Professional Conduct, courts may only discipline lawyers who "make a statement that the attorney knows to be false" or utters "with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

This language mirrors the "actual malice" test of *New York Times v. Sullivan*. Designed to protect free and robust debate, *Sullivan* precludes courts from punishing those who disparage public officials unless these critics knew their statements to be false or consciously doubted their truth.

Some courts have applied this test in disciplinary proceedings. But most have adopted vague standards which abandon this Court's First Amendment holdings. Shifting burdens of proof to the attorneys charged, these courts punish lawyers who fail to prove the truth of their statements or who fail to conduct a "reasonable investigation" of the merits. Protecting the reputations of their brethren, some judges have even punished criticism that may "engender disrespect" for their colleagues.

Acknowledging this split of authority, the Supreme Court of Maryland has repeatedly declined to select *any* standard. Chilling the speech of lawyers who must guess about their First Amendment rights, the cases below pose a question that divides lower courts throughout the nation:

> Does the actual malice test of *New York Times v. Sullivan* protect lawyers' First Amendment rights in disciplinary proceedings?

PARTIES TO THE PROCEEDING

The Attorney Grievance Commission of Maryland initiated the cases below by filing Petitions for Disciplinary or Remedial Action in the Supreme Court of Maryland. Marylin Pierre and Asher Weinberg were parties to the original disciplinary actions.

RELATED CASES

Pursuant to Supreme Court Rule 12.4, Petitioners Marylin Pierre and Asher Weinberg jointly file this Petition for a Writ of Certiorari to review identical questions raised in the following cases:

1. *Attorney Grievance Commission of Maryland v. Marylin Pierre*, AG No. 42, Sept. Term, 2021 – decided by the Supreme Court of Maryland on August 16, 2023. In the exercise of its original jurisdiction, the court appointed Judge Donna M. Schaeffer of the Circuit Court for Anne Arundel County to serve as its hearing examiner. Judge Schaeffer issued Findings of Fact and Conclusions of Law in Case No. C-02-CV-21-001655.
2. *Attorney Grievance Commission of Maryland v. Asher Weinberg*, AG No. 1, Sept. Term, 2022 – decided by the Supreme Court of Maryland on August 31, 2023. In the exercise of its original jurisdiction, the court appointed Judge Kathleen M. Dumais of the Circuit Court for Montgomery County to serve as its hearing examiner. Judge Dumais issued Findings of Fact and Conclusions of Law in Case No. C-15-CV-22-001132.

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PETITION FOR WRIT OF CERTIORARI

Marylin Pierre and Asher Weinberg respectfully submit this Joint Petition for a writ of certiorari to review the judgments of the Supreme Court of Maryland.

OPINIONS BELOW

1. *Attorney Grievance Commission of Maryland v. Marylin Pierre*, 485 Md. 56, 300 A.3d 201 (2023);

2. *Attorney Grievance Commission of Maryland v. Asher Weinberg*, 485 Md. 504, 301 A.3d 142 (2023).

JURISDICTION

The Supreme Court of Maryland entered judgment in *Attorney Grievance Commission of Maryland v. Marylin Pierre* on August 16, 2023 and in *Attorney Grievance Commission of Maryland v. Asher Newton Weinberg* on August 31, 2023.

On November 2, 2023, Chief Justice Roberts extended the time for filing this petition to January 13, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES

Relevant constitutional provisions and rules are reproduced in Appendix E to this petition.

STATEMENT OF THE CASE[1]

I. *Marylin Pierre*

This case arose out of a hotly contested campaign for election to the Circuit Court for Montgomery County. After unsuccessfully applying for judicial vacancies in that jurisdiction, Marylin Pierre challenged four sitting judges in the 2020 primary and general elections. App. 5a. Her rivals paid little attention to her campaign before the primary, but changed their approach after a third-place finish in the Democratic race entitled her to run against them in the November general election. App. 1a, 12a, 19a.

Concerned that they may lose one of four seats to their challenger, the incumbents fought back. Like other political campaigns, the sitting judges researched their opponent, took issue with her positions at various debates, accused her of misstating their own positions, and appealed to their "Fellow Montgomery County Lawyers" for help. App. 12a.

Writing to more than 2,000 members of the Montgomery County Bar Association, the Chairman of Elect Sitting Judges Montgomery County Slate ("Sitting Judges") accused their rival of "Deliberately Inflating Her Qualifications" and "Unprofessional Conduct as an Attorney." *Id.* Questioning her

[1] On behalf of the Attorney Grievance Commission ("AGC"), Bar Counsel filed misconduct charges against each attorney in the Supreme Court of Maryland. *See* MD. RULE 19-721(a). Exercising original jurisdiction over attorney discipline, the court appointed circuit court judges to serve as hearing examiners in each case. MD. RULE 19-722. After discovery, each judge conducted an evidentiary hearing and issued Findings of Fact and Conclusions of Law for the court's review. *Id.*; MD. RULES 19-727, 19-728. After oral arguments in each case, the court published opinions imposing sanctions in both. *See* MD. RULE 19-740.

qualifications and position on the issues, the Sitting Judges published unflattering "facts about the challenger, Ms. Marylin Pierre." App. 12a.

Rallying their constituents to combat their rival, the Sitting Judges emphasized "the Urgent Need for Action." *Id*. Within an hour of receiving this August 28, 2020 email, one of their constituents answered the call with action of her own. "As a member of the Montgomery County Bar Association," Maryland Bar Counsel Lydia Lawless launched a formal investigation "to determine whether Ms. Pierre has violated the Maryland Rules of Professional Conduct." App. 13a.

Informing the Sitting Judges of the urgent action she was taking to support their campaign, Ms. Lawless asked their campaign manager for "any information or documentation in your possession that supports any allegation that Ms. Pierre made false or misleading statements." *Id*. Sharing his entire dossier of information, Mr. McAuliffe claimed to have "thoroughly investigated" their challenger and pledged his support for the probe. *Id*.

Unwilling to let the political process run its course, Ms. Lawless used her official position to demand that this candidate address the incumbents' accusations as the election drew near. Acting as the "complainant" in this case, Bar Counsel copied the points raised in the Sitting Judges email and insisted that Ms. Pierre respond to each one within 14 days. App. 13-14a.

With the general election only weeks away, Petitioner had to attend to the demands of a powerful state official rather than focus on the concerns of Montgomery County voters. Unable to devote all of her energy to the campaign itself, Ms. Pierre finished a distant fifth and lost the November 3, 2020 election. *See* App. 19a n.15.

The election was over. But Bar Counsel's campaign against Ms. Pierre had only just begun. Placing her past campaign activity under a microscope, Bar Counsel accused this candidate of impugning the Sitting Judges' integrity on the campaign trail, including a tweet that her campaign manager posted on her behalf. App. 15a, 50a.

Protesting the mistreatment of certain litigants, the Pierre campaign's Twitter account claimed that "some sitting judges who are only English speakers send people to jail because they could not speak English and discriminate against people based on skin color, country of origins, religious backgrounds or sexual orientations." App. 104-05a. The post never named a specific judge or candidate for judicial office.

Although her views on such discrimination were subject to political debate, Ms. Pierre had the post removed when an erroneous reference to incarceration was called to her attention. Hardly a malicious effort to slander her opponents, the hearing judge attributed the error to a lapse in memory. App. 121a. "Without the benefit of a transcript" of sealed proceedings, Petitioner relied upon "incorrect memory" of a traumatic hearing before an irascible judge who scolded her client for failing to learn English more than 18 years before. App. 121a.

Rather than require Bar Counsel to prove that this tweet was posted with knowledge of its falsity or conscious doubts as to its truth, the trial judge shifted this burden to the defense. Confusing negligence with malice, the judge erroneously held that Petitioner's "failure to verify what she claims was a mistaken recollection demonstrates that the tweet was published with reckless disregard for its truth or falsity." App.105-06a.

Without articulating any legal standard for doing

so, Maryland's highest court sustained this finding and reprimanded Ms. Pierre for impugning the integrity of judges. Acknowledging that a "high standard is embedded within [Rule 8.2(a)]" so that such sanctions do "not infringe on core speech rights," App. 33a, the court conceded that "'reckless disregard' demands more than just a conclusion that a reasonable person would have refrained from making the comment or performed additional investigation. That standard demands that the plaintiff produce 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the defendant's] publication.'" App. 34a, *quoting New York Times v. Sullivan*, 376 U.S. 254 (1964).

In "the First Amendment context," the court conceded that "reckless disregard for truth or falsity evokes" this "subjective test," but stopped short of applying it to disciplinary proceedings. App. 33-34a (cleaned up). Observing "disagreement among the states concerning whether an objective or subjective test should apply in attorney discipline cases," App. 34a n.17, the court claimed that it "need not resolve that disagreement here because it would not be dispositive as to the statements at issue." *Id.*

By refusing to adopt any standard, the court effectively rejected *Sullivan*'s subjective test and applied a more restrictive objective test to punish this lawyer. Though its hearing examiner attributed her error to bad memory, the court nonetheless reprimanded Ms. Pierre for failing to investigate the accuracy of "a statement of fact, subject to demonstrable verification." App. 36a. Lacking any evidence that Ms. Pierre composed the tweet, knew of the error when it was posted, or entertained conscious doubt about its accuracy, the court blithely concluded

"that Ms. Pierre, at a minimum, acted with reckless disregard for the truth or falsity of her statement at the time she made it." *Id*.

II. *Asher Weinberg*

When a passionate criminal defense lawyer voiced grievances over his clients' treatment in court, his blunt assessment prompted Bar Counsel to bring a grievance of her own. Defending a young woman accused of robbery in an apparent case of mistaken identity, Asher Weinberg protested what he believed to be a miscarriage of justice by judges who sided with a familiar prosecutor, improperly disqualified him as counsel, and removed the only advocate his client had.

Working the graveyard shift on October 15, 2019, a 7-Eleven cashier found herself alone at one of its stores when an unknown woman approached the counter to buy a pack of cigarettes. App. 144a. As the cashier turned to retrieve the item, the assailant leapt over the counter, held a knife to her throat, and took $180.00 from the cash register before fleeing on foot. *Id*.

Describing the robber as a "White female with olive toned skin," AGC Exh. 1, Record 254, the cashier recalled her assailant wearing black leggings and a black hoodie covering her head. Standing at 5'1", the victim recalled that the suspect was "like a head taller than me," Hearing Tr. Vol. 1 at 74, and told responding officers that "[t]he suspect was 5-7 to 5-8 with a thick build." AGC Exh. 1, Record 254; AGC Exh. 10, Record 882; App. 145a.

Acting on a tip from a "confidential informant" who later disappeared, *see* AGC Exh. 1, Record 720, police arrested a woman with no prior convictions who resided more than two hours from the crime scene. *See*

App. 145a, 203a. Only 5'5" tall, Megan Lemons failed to match the victim's description of her assailant. In fact, when the victim finally met Megan, she failed to recognize her as the robber shown on security camera footage. *See* App. 208a.

Unlike the olive-skinned robber, the victim remarked that the accused "had very light eyes, like a crystal blue" and "did not have broad shoulders." AGC Exh. 10, Record 882. Compared with a robber shown on video as "at least a head taller" than the cashier, *id*. at 857, Megan was much closer to the height of her alleged victim.

Without eyewitness identification, the State planned to call "witnesses" who never witnessed any part of this incident. Shown a crude screenshot of security footage, two people thought it may have resembled Megan. But each took a different view when shown different views on the video itself. AGC Exh. 1, Record 445, 553.

Having "reviewed the videos thoroughly" at Mr. Weinberg's request, one of these "witnesses" found the "posture, face, movement, and size of the person seen committing the robbery to not match any pictures, videos, or memories of Megan Lemons in any way." *Id*. at 445. The other reached the same conclusion. "[N]ow that I've seen the videos, I would say that this is definitely NOT Megan." *Id*. at 553.[2]

Without witnesses competent to identify her, the State would have difficulty proving Megan to be the blurred image captured on low-resolution cameras. As

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[2] As the State's case collapsed, its "confidential informant" disappeared as well. Having previously declined a detective's request that he sign a document identifying Megan as the suspect depicted, Orion Fletcher a/k/a Orrin Fletcher "advised he didn't want to say for sure." Comm'n Exh. 1, Record 411. He then went missing and failed to appear at trial. *Id*. at 720.

Mr. Weinberg prepared several witnesses to testify otherwise at her October 8, 2020 trial, the State did not prepare for trial at all.[3]

Unprepared that morning, a desperate prosecutor tried to derail the defense by accusing his adversary of tampering with the State's witnesses. Outraged that two of "his" identification witnesses "flipped" their testimony after Mr. Weinberg contacted them, the prosecutor claimed that, "when every witness that winds up speaking with Mr. Weinberg, winds up doing a 180 degree turn," it "just generally integrates him as a factor in the case." *Id*. at 751.

Without any basis for calling his adversary as a "necessary witness," the State never moved to disqualify Megan's chosen lawyer. But this did not stop trial Judge Pamela Alban from proposing this very "solution." *Id*. at 744.

Stepping into the prosecutor's shoes, Judge Alban asked the prosecutor whether he would like his opponent "struck as counsel? Is ... that what your ask is?" *Id*. Seizing the opportunity before a judge with whom he was "certainly friendly" after spending five years together in the State's Attorney's office, Hearing Tr. Vol. 1 at 148-49, the prosecutor accepted her offer. AGC Exh. 1, Record 744, 746.

Ambushed on the morning of a trial he was poised to win, Mr. Weinberg argued in vain to a judge that failed to respect his client's choice of counsel. When Megan objected to her lawyer's removal, *id*. at 769, the judge told a distraught defendant that she "can't just leave that up to you because unfortunately, his actions created a scenario that the State may need to call him" as a witness. *Id*. "And that compromises his ability to

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[3] Unlike Mr. Weinberg, the prosecutor did not even submit *voir dire* questions or jury instructions prior to trial.

just be a lawyer in this case. He has inserted himself as a factor in this case." *Id.*

Disregarding Megan's Sixth Amendment right to counsel of her choice, Judge Alban rejected Mr. Weinberg's request that she examine two witnesses waiting in the hall to testify at trial. Refusing to bring either into the courtroom, the judge quipped, "[t]hat is me being a prosecutor. That is not my job." *Id.* at 767.

But it *was* her job. Before stripping the accused of her chosen counsel, Maryland trial judges must hold hearings to "scrutinize closely ... whether there is 'actual or serious potential for conflict' that overcomes the presumption the defendant has to his or her counsel of choice." *State v. Goldsberry*, 419 Md. 100, 123-24, 18 A.3d 836, 850 (2011).

Unwilling to make the required "evidence-based findings" to decide whether Mr. Weinberg was "likely to be a necessary witness," *Id.* at 125, 18 A.3d at 850-51; MD. RULE 3.7(a), Judge Alban disqualified him on the word of a former colleague who found it "a little hard to determine how that would unfold right now," confessed that "no one has a crystal ball," and thought it might depend on the testimony of the very witnesses that the judge refused to question. AGC Exh. 1, Record 751, 764. "I don't know exactly what they are going to wind up saying." *Id.* at 751, 764.

Making no effort to find out, Judge Alban disqualified Mr. Weinberg as counsel on nothing more than the prosecutor's speculation that he "*might* call him as a witness." *Id.* at 756. Rather than articulate how his adversary's testimony would favor the State, Judge Alban struck defense counsel's appearance on the "*potential possibility*" that "he *may* need to call [Mr. Weinberg]." *Id.* at 768-69 (emphasis added). Shutting down Mr. Weinberg's arguments to the contrary, she boldly proclaimed, "*I am not changing*

my mind." *Id*. at 774 (emphasis added).

Keeping this vow while breaking her oath to uphold the Constitution, Judge Alban defiantly refused to hold an evidentiary hearing even after being presented with case law requiring it. *See id.* at 624-33. Without further hearing, Judge Alban summarily denied the request. *Id*. at 639.

Robbed of her Sixth Amendment rights, and a trial that could have exonerated her, Megan was soon remanded back to the custody of the State to wait for the pandemic to lift on a future trial date. *Id*. at 788. Stripped of her only true defender against the power of the State, Megan succumbed to the pressures of a flawed system, and pled to two misdemeanors in return for a suspended sentence, credit for time served, and probation. *See id*. at 658-62.

Considering Judge Alban's complete disregard for the law and for the fundamental rights of his client, Mr. Weinberg moved for her recusal to prevent a similar miscarriage of justice months later in another criminal case. AGC Exh. 6, Record 989. Asked for the basis of his request, he dispensed with diplomacy to express his unfiltered views of her prior performance:

> You are a liar, you are biased, you have demonstrated bias, you have stepped into the shoes of the State's Attorney on occasion, you refuse to apply the law when it doesn't suit your purposes or when you don't agree with it. You are complicit in kidnapping and basically you are corrupt for a judge. So, I have to ask you that you recuse yourself.

AGC Exh. 6, Record 989, 991. Taking offense to his remarks, Judge Alban denied his request and reported him to Bar Counsel. *Id*.

Questioning Mr. Weinberg's view "that Bar Counsel had the burden of proving by clear and convincing evidence that the statements were false," App. 219a, the hearing examiner complained that "he offered no proof of the statements." App. 218a. But rather than examine the basis of his rebuke, the trial judge refused to question the performance of her circuit court colleague.

Claiming that questions surrounding "Judge Alban's authority to strike his appearance" were "not before the Court," App. 216a, Judge Kathleen Dumais ignored the merits of his complaint. Focusing instead on the provocative *tone* of his comments, she presumed falsity and found that Mr. Weinberg "failed to provide any competent evidence that ... his statements were true." App. 224a.

Sustaining these findings, the Supreme Court of Maryland likewise attended to the tone of his comments rather than to the miscarriage of justice which prompted them. Refusing "to determine whether [Mr. Weinberg's] criticisms of that ruling and Judge Alban were warranted," App. 168a, the court took offense to his hyperbole and held that his "misconduct does not turn in any way on the correctness of Judge Alban's ruling." *Id.*

Like its opinion two weeks earlier in *Pierre*, the court observed that "there is disagreement among the states concerning whether an objective or subjective test should apply in attorney discipline cases." App. 177a n.27. But rather than articulate any standard for punishing the expression of lawyers, the court did "not resolve that disagreement here because it would not be dispositive." *Id.*

Leaving lawyers to wonder about the extent of their First Amendment rights, the court believed that his remarks and a flyer critical of the Anne Arundel

County bench "tend[ed] to bring the legal profession into disrepute." App. 187a. Finding that Mr. Weinberg's "conduct certainly reflects negatively on the legal profession, impairs public confidence in the legal system, and had the potential to engender disrespect for the courts throughout the State," App. 188a, the court also found that he engaged in conduct "prejudicial to the administration of justice" in violation of Rule 8.4(d). *Id.*[4]

REASONS FOR GRANTING THE WRIT

Within a two week span in August of last year, the Supreme Court of Maryland decided Attorney *Grievance Comm'n v. Pierre*, 485 Md. 56, 300 A.3d 201 (2023), and *Attorney Grievance Comm'n v. Weinberg*, 485 Md. 504, 301 A.3d 142 (2023). In each case, the justices sanctioned lawyers for impugning the integrity of their colleagues in violation of the Rules of Professional Conduct. *See* MD. RULES 8.2(a), 8.4(d).[5]

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[4] Tinged with hyperbole, this flyer was never shown to the public at large. But contemplating a more public protest, Mr. Weinberg "accused Judge Alban of refusing to apply the law when it did not fit the results she wanted, ignoring laws and rules she does not like, and unlawfully depriving a woman of counsel." App. 186a. He also criticized another judge of similarly poor performance. "Although some of those statements, if made on their own, might not rise to the level of supporting an 8.2(a) violation," the court nonetheless "view[ed] the statements on the flyer in their totality, including the statements accusing [these judges] of lawless and criminal behavior," as grounds for his suspension from the practice of law. *Id.*

[5] Without evidence that either lawyer threatened the adjudication of pending cases, the justices cited Rule 8.4(d) as authority for sanctioning any comments which bring the legal profession into "disrepute" or "negatively impact" the "public's perception." App. 57a, 163a, 188a. This Court requires much more to justify the punishment of critics. *See*, *infra*, at 23-24.

Enacted in all but two jurisdictions, Rule 8.2(a) of the Model Rules of Professional Conduct was designed to preserve, rather than curtail, the First Amendment rights of lawyers. Replacing the strictures of older disciplinary rules, the drafters lifted its language directly from *Sullivan*. Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1587 (2009).

Importing *Sullivan*'s "actual malice" test, the rule only punishes speech which the lawyer knows to be false, or which was uttered with serious doubts as to the truth. Like *Sullivan*, the drafters refused to impose more restrictive standards which would punish lawyers for errors committed during robust debate. Rather than punish the expression of sincere beliefs, the drafters cited *Sullivan* to explain that "[t]he Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is 'false or with reckless disregard of whether it is false or not.'" Tarkington, *infra*, at 1587, *quoting* MODEL RULES OF PROF'L CONDUCT R. 8.2 Legal Background at 206 (Proposed Final Draft 1981). By reciting this language verbatim, "Rule 8.2 is consistent with that limitation." *Id*.

This has not stopped states from exceeding this constitutional limitation. Placing the reputations of their colleagues above the First Amendment rights of those appearing before them, a majority have abandoned this Court's "subjective" test in favor of an "objective" standard which punishes their haste. Sanctioning lawyers for negligence alone, these judges expect them to conduct "reasonable investigations" before engaging in debate.

Faced with conflicting tests employed in various state and federal courts, the Supreme Court of

Maryland declined to endorse either. By failing to apply *Sullivan*'s actual malice test, Maryland has abandoned this Court's First Amendment principles to the same extent as those courts which have done so expressly.

Without clear standards for punishing such criticism, lawyers in Maryland and in most other states must guess about their constitutional freedoms. Subjected to vague, inconsistent, and non-existent standards, lawyers who dare to criticize judges must risk their careers for speaking truth to power.

As this Court watched in silence, judges have silenced their critics by deviating from its First Amendment principles. After 40 years of errant case law, the time has come for this Court to establish national uniformity and reaffirm the principles set forth in *Sullivan*. Arising both within and outside of the election context, *Pierre* and *Weinberg* provide this Court with ideal opportunities to clarify the First Amendment rights of all lawyers in all situations.

I. Rather than Apply *Sullivan*'s Actual Malice Test in Disciplinary Cases, Most States Have Abandoned this Court's First Amendment Principles

The constitutional rights of lawyers should not vary by the jurisdiction in which they are licensed. But in a four-decade span, judges have gradually gutted the freedom of those who criticize their colleagues. This issue has arisen in countless cases, generating more than 50 published opinions reflecting the diverse views of more than 30 jurisdictions.

Only a handful of courts continue to use *Sullivan*'s subjective standard to protect an attorney's freedom of speech. *In re Green*, 11 P.3d 1078 (Colo. 2000); *In re*

Nadeau, 2007 Me. 21, 914 A.2d 714 (2007); *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex.Civ.App. 1974); *accord Eisenberg v. Boardman*, 302 F. Supp. 1360, 1362-64 (W.D. Wis. 1969) ("no doubt" that *Sullivan*'s "protection against imposition of civil or criminal liability extends on the same terms to lawyers").[6]

The remaining states have rejected this Court's jurisprudence to a greater or lesser degree. At one extreme, courts have found lawyers' remarks too repugnant to dignify with constitutional standards. *See*, *e.g.*, *In re Evans*, 801 F.2d 703, 703-04 (4th Cir. 1986) ("discretion" to punish "discourteous, and degrading" attacks); *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 967-68 (Utah 2007) (power to punish "accusatory, offensive, and disrespectful" comments); *In re Riley*, 142 Ariz. 604, 612-13, 691 P.2d 695, 703-04 (1984) (no right to "question decisions of the court … except on appeal"); *In re Frerichs*, 238 N.W.2d 764, 767-68 (Iowa 1976) (criticism that undermines "the public's belief in the integrity of the court" is unethical).

Putting its brethren on a pedestal, one court described "the judicial process as … a sacred proceeding," declaring that critics who bring it "into scorn and disrepute" are not protected by the First Amendment. *In re Shimek*, 284 So. 2d 686, 689-90

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[6] Since most misconduct charges are prosecuted at the state level, federal courts rarely publish formal opinions in disciplinary cases. The most notable exception comes from the Ninth Circuit, which nominally deviated from this Court's actual malice standard, but has nonetheless shown great tolerance for lawyer criticism and requires disciplinary boards to meet stringent evidentiary burdens. *United States Dist. Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); *but see Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (dismissing caustic rhetoric as protected hyperbole); *see*, *infra*, at 22-23.

(Fla. 1973). Giving far less deference to the lawyers appearing before them, many judges believe that lawyers trade their "right to openly denigrate the court in the eyes of the public" in return for a license to practice law. *In re Raggio*, 87 Nev. 369, 487 P.2d 499, 500 (1971); *see also In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979) (privilege to practice law curtails expression). Placing its own ethics rules above the Bill of Rights, one court made "it clear that a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct." *Committee on Professional Ethics & Conduct v. Hurd*, 360 N.W.2d 96, 105 (Iowa 1985).

Ironically, while Rule 8.2(a) expressly adopts *Sullivan*'s actual malice test, most of the states enforcing it have not. Rather than follow this Court's precedent, dozens of states have created precedent of their own.[7] In fact, as this body of case law evolved, at

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[7] *Butler v. Alabama Judicial Inquiry Comm.*, 802 So.2d 207 (Ala. 2001); *Florida Bar v. Ray*, 797 So. 2d 556 (Fla. 2001); *Idaho State Bar v. Topp*, 129 Idaho 414, 925 P.2d 1113 (1996), *cert. denied*, 520 U.S. 1155 (1997); *In re Dixon*, 994 N.E.2d 1129 (Ind. 2013); *In re Terry*, 271 Ind. 499, 502, 394 N.E.2d 94 (1979), *cert. denied sub nom Terry v. Indiana Supreme Ct. Disciplinary Comm'n*, 444 U.S. 1077 (1980); *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002), *modified*, 782 N.E.2d 985, 987 (Ind. 2003); *In re Atanga*, 636 N.E.2d 1253 (Ind. 1994); *Supreme Court Attorney Disciplinary Bd. v. Kennedy*, 837 N.W.2d 659 (Iowa 2013); *Supreme Court Attorney Disciplinary Board v. Weaver*, 750 N.W.2d 71 (Iowa 2008); *In re Jordan*, 518 P.3d 1203 (Kan. 2022); *In re Arnold*, 56 P.3d 259 (Kan. 2002); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *Kentucky Bar Ass'n v. Nall*, 599 S.W.2d 899 (Ky. 1980); *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky.1996), *cert. denied*, 519 U.S. 1111 (1997); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 178 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981); *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406 (La. 1983); *In re Mire*, 197 So.3d 656 (La. 2016); *In re Cobb*, 445 Mass. 452, 838 N.E.2d 1197 (2005); *In re Chmura*, 461 Mich. 517, 608

least two states which once respected this Court's jurisprudence later joined the crowd of those who abandoned it.[8]

Though *Sullivan* set the standard for speech critical of government officials, lower court judges drew sharper lines when defending their colleagues. "Where an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of [a] judge or legal officer

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N.W.2d 31 (2000); *Grievance Adm'r v. Fieger*, 476 Mich. 231, 719 N.W.2d 123 (Mich. 2006), *cert. denied*, 549 U.S. 1205 (2007); *In re Graham*, 453 N.W.2d 313 (Minn.), *cert. denied sub nom. Graham v. Wernz*, 498 U.S. 820 (1990); *In re File No. 17139*, 720 N.W.2d 807 (Minn. 2006); *Mississippi Bar v. Lumumba*, 912 So.2d 871 (Miss. 2005); *Matter of Westfall*, 808 S.W.2d 829 (Mo. 1991); *State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017); *State ex rel. Nebraska Stale Bar Ass'n v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982); *In re Marshall*, 528 P.3d 653 (N.M. 2023); *Matter of Holtzman*, 573 N.Y.S.2d 39, 78 N.Y.2d 184, 577 N.E.2d 30 (1991), *cert. denied*, 502 U.S. 1009 (1991); *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425 (2003); *State ex rel. Oklahoma Bar Ass'n v. Porter*, 1988 OK 114, 766 P.2d 958 (1988); *Office of Disciplinary Counsel v. Price*, 557 Pa. 166, 732 A.2d 599 (1999); *Bd. of Prof'l Responsibility v. Parrish*, 556 S.W.3d 153 (Tenn. 2018); *Ramsey v. Bd. of Prof'l Responsibility*, 771 S.W.2d 116 (Tenn. 1989); *Lawyer Disciplinary Bd. v. Hall*, 234 W.Va. 298, 765 S.E.2d 187 (2014); *Office of Lawyer Regulation v. Riordan*, 345 Wis.2d 42, 2012 WI 125, 824 N.W.2d 441 (2012); *Matter of Pangman*, 216 Wis.2d 440, 574 N.W.2d 232 (1998); *Bd. of Prof. Responsibility v. Davidson*, 2009 WY 48, 205 P.3d 1008 (2009).

[8] *Compare Ramsey*, 771 S.W.2d 116 (Tennessee followed subjective test in 1989) *with Parrish*, 556 S.W.3d 153 (switching to objective test in 2018); *compare Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (subjective test in 1988) *and Farber*, 185 W.Va. 522, 408 S.E.2d 274 (same in 1991) *with Hall*, 234 W.Va. 298, 765 S.E.2d 187 (switching to objective test in 2014).

adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment." *Graham*, 453 N.W.2d at 322. Touting "the compelling state interests served" by shielding their image, these courts see no constitutional impediment to sanctioning lawyers whose "unreasonable" criticism "exhibits a lack of judgment." *Westfall*, 808 S.W.2d at 837.

This Court has repeatedly considered and rejected this rationale for the repression of speech. As its "prior cases have firmly established," neither a state's "interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts" provide grounds "'for repressing speech that would otherwise be free.'" *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978), *quoting Sullivan*, 376 U.S. at 272-73.

One of these cases involved a state's effort to punish an outspoken prosecutor for impugning the integrity of local judges in *Garrison v. Louisiana*, 379 U.S. 64 (1964). Attributing a large backlog of criminal cases to the jurists' "inefficiency, laziness, and excessive vacations," Jim Garrison raised "interesting questions about the racketeer influences on our eight vacation-minded judges" when accusing them of obstructing vice investigations. *Id*. at 66.

Finding it "inconceivable" that this attorney "could have had a reasonable belief" in the truth of these accusations, the trial judge found him guilty of criminal libel. Regardless of his *subjective* belief, the Louisiana court affirmed his conviction. *Id*. at 67, 78.

In reversing his conviction, this Court refused to let Louisiana circumvent *Sullivan*'s actual malice test. Observing that "[t]he reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard," this Court held

that "only those false statements made with the high degree of awareness of their probable falsity … may be the subject of either civil or criminal sanctions." *Id*. at 74. Such sanctions may not be based on "mere negligence, but on reckless disregard for the truth." *Id*. at 79.

Although this Court has yet to address the issue in attorney discipline cases, its First Amendment analysis hardly hinges on the nature of the action or of the sanction imposed. Indeed, this Court has applied the actual malice test to criminal charges, civil defamation cases and a range of other claims. *See id*.; *see*, *e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) ("knowing or reckless falsehood" required to recover for infliction of emotional distress).

As this Court considers the imposition of attorney discipline to be a "quasi-criminal" sanction, *In re Ruffalo*, 390 U.S. 544, 551 (1968), it is hard to fathom a greater chilling effect on the freedom of lawyers than the risk of losing their livelihoods.

II. By Subjecting Lawyers To Vague, Overbroad, Inconsistent or Non-Existent Standards, Judges Have Chilled the Speech of Their Most Knowledgeable Critics

Hardly improving upon this Court's jurisprudence, courts that have abandoned the actual malice test have replaced it with a hodgepodge of vague, overbroad and conflicting restrictions that leave lawyers to guess the contours of their First Amendment rights. As errors are "inevitable in free debate," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), this Court has long rejected regulations which place expression under a microscope and punish those who misspeak.

Lest we "induc[e] a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech," *id*. at 340, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id*. at 341; *Sullivan*, 376 U.S. at 271-72. Chilling speech that matters to those concerned about justice, many judges have replaced this Court's strict scrutiny of speech *regulation* with strict liability for speech.

Declining to endorse any standard, the Supreme Court of Maryland showed little tolerance for judicial criticism in *Pierre* and in *Weinberg*. In *Pierre*, the court reprimanded a judicial candidate for a May 20, 2020 tweet that its own hearing examiner attributed to "incorrect memory." App. 121a. Reflecting Ms. Pierre's erroneous recollection of a traumatic 2004 hearing before a combative judge, her campaign posted that some judges "send people to jail because they could not speak English." App. 16a.

Accepting the tweet as "an accurate representation of her memory in 2020," *see* App. 121a, the court recognized that "there inevitably is some imprecision in language used during the heat of a political campaign" that provides "limited time to vet language." App.32a (cleaned up). But "[k]eeping in mind that we are addressing core political speech entitled to the highest level of First Amendment protection," App. 52a, the majority punished her lapse in memory anyway. Sustaining its hearing judge's finding that "a reasonably prudent attorney, running for judicial office, would not have published the May 20, 2020 statement," App. 130a, the court applied an objective test without overtly adopting one. App. 36a.

The court showed even less tolerance for the impassioned rebuke of a prosecution-friendly judge in *Weinberg*. Rather than respect his client's Sixth

Amendment right to choose her counsel, Judge Alban struck Asher Weinberg's appearance on the morning of a trial he was poised to win. AGC Exh. 1, Record 744, 746, 769. Without any motion to disqualify him as Megan Lemons' lawyer, the judge took the initiative to remove him on the "*potential possibility*" that the State "*may* need to call [him]" at trial. Defying controlling case law, Judge Alban refused to hold an evidentiary hearing and boldly proclaimed, "*I am not changing my mind*." *Id*. at 774 (emphasis added).

Months after Megan Lemons' nightmare ended with an *Alford* plea, Mr. Weinberg encountered the same judge in yet another case. Wishing to spare his new client a similar fate, he moved to recuse Judge Alban. App. 156a. Asked for his grounds, Mr. Weinberg shared his unfiltered feelings of her qualities as a judge. App. 156-57a.

Judge Alban did not like his answer. Nor did a fellow circuit court judge presiding over disciplinary proceedings, or the seven justices voting to suspend him from the practice of law.

Like so many other courts, the justices and their hearing examiner improperly relieved Bar Counsel of her evidentiary burden. App. 219a. Shifting it to Mr. Weinberg instead, they made it impossible for him to meet this burden by refusing to examine the miscarriage of justice which prompted his rebuke.

Believing such questions were "not before the court," App. 216a, the hearing judge attended to the provocative *tone* of his comments rather than to their substance and deemed them to be false. Sustaining her findings, the justices also refused "to determine whether [his] criticisms of that ruling and Judge Alban were warranted." App. 168a. Erroneously holding that his "misconduct does not turn in any way

on the correctness of Judge Alban's ruling," the justices took offense to his hyperbole, punished his tone, and suspended him from practice. App. 168a.

A lawyer's tone prompted the same sanction for even more caustic comments in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1994). Accusing a federal trial judge of blatant antisemitism and being "drunk on the bench," Stephen Yagman called this "ignorant, dishonest, ill-tempered ... bully" the "worst judge in the central district" and "probably ... one of the worst judges in the United States." *Id*. at 1434.

Following a Ninth Circuit case which purported to reject *Sullivan*'s subjective test in favor of an objective standard, *see Sandlin*, 12 F.3d at 867, three of the judge's district court colleagues diverged even more by shifting the burden of proof to the lawyer himself. Finding that "[a]necdotal evidence regarding the experiences of several is insufficient given the gravity of the charge," *Yagman*, 856 F. Supp. 1384, 1391 (C.D. Cal. 1994), "the Panel presume[d] that these charges are false and that Petitioner lacked an objectively reasonable basis for expressing them." *Id*. Concerned "that verbal attacks tend to discredit the courts and weaken the effectiveness of the judicial process," the Panel punished him for failing to express himself "in a proper tone and through the appropriate channels." *Id*.

"By presuming falsity," the Ninth Circuit held that the Panel "unconstitutionally relieved the Standing Committee of its duty to produce evidence on an element of its case." *Yagman*, 55 F.3d at 1441. While the Ninth Circuit "share[d] the district court's inclination to presume, '[i]n the absence of supporting evidence,' that the allegation is untrue, the fact remains that the Standing Committee bore the

burden of proving Yagman had made a statement that falsely impugned the integrity of the court." *Id.* (cleaned up).

Beyond the Committee's failure to prove the falsity of Mr. Yagman's attacks, the Ninth Circuit followed this Court's pronouncement that such statements "may not be restricted ... unless they pose a 'clear and present danger' to the administration of justice." *Id.* at 1441, *quoting Craig v. Harney*, 331 U.S. 367, 372 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 348 (1946); *Bridges v. California*, 314 U.S. 252, 260-63 (1941). "The standard announced in these cases is a demanding one: Statements may be punished only if they 'constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'" *Yagman*, 55 F.3d at 1442, *quoting Craig*, 331 U.S. at 376; *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991) ("substantial likelihood of material prejudice" required).

No such peril resulted from Mr. Yagman's statements or from those of Mr. Weinberg. Although their vitriol "was harsh and intemperate, and in no way to be condoned," *id.* at 1443, the First Amendment compels judicial restraint. Rather than censor speech which judges find offensive, "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." *Id.* at 1438.

Though Mr. Weinberg's words were certainly provocative, we do not punish critics who punctuate their points with "a vigorous epithet" or "rhetorical hyperbole" – regardless of how much that may offend judges and other public officials. *Greenbelt Co-op.*

Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) ("blackmail" accusation not construed as factual allegation of crime); *Cohen v. California,* 403 U.S. 15, 23 (1971) (profanity); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (label of "traitor" not factual allegation); *Stevens v. Tillman*, 855 F.2d 394, 401-02 (7th Cir. 1988) (calling plaintiff a "racist" not actionable). Nor may courts punish their critics for comments which may hurt their public image.

"[E]xpression ... may not be prohibited merely because ... [it is] offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). No matter how offended Maryland judges may have been, concerns that Petitioners may "bring discredit" upon judges or "negatively impact the perception of the legal profession" do not justify sanctions. Nor do vague references to rules against "conduct prejudicial to the administration of justice." *See* MD. RULE 8.4(d); App. 57-58a, 188a.

Lacking *any evidence* that Ms. Pierre or Mr. Weinberg acted with actual malice or posed an immediate peril to the administration of justice, the lower court lacked any constitutional basis for repressing their speech.

III. Unable to Resolve Conflicts Among Various Jurisdictions, *Pierre* and *Weinberg* Illustrate the Need for Uniform Standards

Twice in as many weeks, the Supreme Court of Maryland protected the image of their colleagues without adopting any standards to protect the fundamental rights of their critics. Observing "disagreement among the states concerning whether an objective or subjective test should apply in attorney discipline cases," the court buried its indecision in

identical footnotes which did "not resolve that disagreement." App. 34a n.17, 177a n.27. Having faced this recurrent issue four times in nine years, the justices have left lawyers to guess the parameters of First Amendment freedoms. *See also Attorney Grievance Comm'n v. Frost*, 437 Md. 245, 266 n.11, 85 A.3d 264, 276 n.11 (2014) ("we need not and do not address the issue of whether a subjective or objective standard is appropriate in this context"); *Attorney Grievance Comm'n v. Stanalonis*, 445 Md. 129, 139, 126 A.3d 6 (2015) ("need not resolve that question for purposes of deciding this case").[9]

Ignoring this persistent problem won't make it go away. Nor will leaving fundamental freedoms to the unfettered discretion of indecisive and conflicting courts.

"[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile*, 501 U.S. at 1051. To paraphrase this Court in another case involving vague restrictions on lawyer speech, in "the absence of a clarifying interpretation," the current state of the law "fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility." *Id.* at 1030.

Nowhere is this more apparent than in the prosecution of one lawyer who dared to challenge the incumbency of four sitting judges in Montgomery County, Maryland. Less than an hour after receiving a campaign email seeking urgent action to support the Sitting Judges, one of their most powerful constituents took urgent action against their political

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[9] Without *any evidence* that either lawyer harbored conscious doubts as to the truth of their assertions, the court lacked any basis for sanctions under *Sullivan*'s subjective test and no basis for avoiding this constitutional issue.

rival. App. 13a, 48a ("immediate response to a campaign email that expressly solicited urgent action from the legal community").

Working with the incumbents' campaign manager on a formal investigation of Marylin Pierre, Bar Counsel flooded her with urgent demands. App. 2a. "In the waning weeks of the election," the challenger "was asked to divert attention from her campaign to justify, in writing and with supporting documentation, several of her campaign statements." App. 48a. Forced to meet the demands of a powerful government official rather than the interests of Montgomery County voters, Ms. Pierre lost the election. App. 19a, 65a.

Given "Bar Counsel's close connection to the Judiciary," App. 72a, the majority expressed concern that the actions of its top ethics official "will be perceived as an attempt to interfere in the election to favor the sitting judges." App. 2a. Questioning the apparent abuse of judicial resources, a dissenting justice even called "for the appointment of special counsel … to investigate the circumstances of the investigation and issue a report as to its compliance with the Maryland Rules." App. 73-74a n.3 (Watts, J.).[10]

Though Bar Counsel resigned two days after oral argument, the only lawyer punished for bringing "disrepute" on the Judiciary was Marylin Pierre – reprimanded for an erroneous tweet posted amid a hotly-contested campaign. Unless and until this Court

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[10] Writing separately, another justice found Bar Counsel's collaboration "with an avowed antagonist to Ms. Pierre in the campaign process" to be "deeply regretful to me as reflecting poor judgment by an individual in whom the Court invested the authority to investigate and enforce the rules governing our profession." App. 66a (Battaglia, J.).

sets uniform standards, which place First Amendment interests above the image of self-conscious judges, any "reasonable lawyer" would be wise to remain silent.

IV. Taken Together, *Pierre* and *Weinberg* Present an Ideal Opportunity To Clarify The First Amendment Rights Of All Lawyers

Even courts that have abandoned *Sullivan*'s subjective test have questioned whether it should nonetheless be applied to speech uttered during judicial campaigns. Faced with a "constitutional challenge to the objective standard we have read into Rule 8.2(a)," *File No. 17139*, 720 N.W.2d at 814, the Minnesota Supreme Court raised, but did not decide, whether the First Amendment requires "that the subjective actual malice standard instead must be applied." *Id.* Having "never held that an objective standard applies under Rule 8.2(a) to statements made during a political campaign," the court declined to do so in the context of that case and left "decision of the issue for another day." *Id.* at 814 n.6.

Although Maryland has yet to decide the appropriate standard in any context, it has recognized heightened First Amendment concerns in connection with campaigns. "[E]ven if a court would normally favor an objective test in assessing the 'reckless disregard' prong of [Rule] 8.2(a), there is a significant argument that a subjective test should be applied in an election context, in light of the 'core' First Amendment values at stake." *Stanalonis*, 445 Md. at 144, 126 A.3d at 15. Where judges must run for election, states "cannot opt for an elected judiciary and then assert that its democracy, in order to work as

desired, compels the abridgment of speech." *Republican Party of Minnesota v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

By granting a writ of certiorari to review *Pierre* and *Weinberg* together, this Court may clarify the First Amendment rights of all lawyers to express themselves, both within judicial campaigns and outside of the political arena. While this Court may afford Ms. Pierre's political posts the highest level of First Amendment protection, Mr. Weinberg's concerns over his client's mistreatment are equally important. Indeed, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

The "operations of the courts and the judicial conduct of judges are matters of utmost public concern" on election day and every day. *Landmark*, 435 U.S. at 839. The First Amendment interests at stake here are not only the rights of lawyers to speak freely, but also the rights of citizens to hear what lawyers have to say. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Since lawyers are "specially situated" to assess the performance of the judges they encounter, "both constitutional law and sound social policy require that lawyers have broad latitude in criticizing such officers." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 114, comment b (2000). Just as this Court requires actual malice before imposing sanctions in other cases, "[s]imilar considerations should also lead to application of the standard in *New York Times v. Sullivan* in lawyer-discipline cases." *Id.*; *see also* Hazard & Hodes, 2 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL

CONDUCT, § 8.2:101 at 932-35 (2d Ed. Supp. 1998) ("same stringent standard should apply").

Ironically, those who are best equipped to critique the judicial system are the least likely to do so. Seeking the approval of judges to protect their clients' interests, lawyers are understandably reluctant to question their intellect, temperament, or integrity. If anything, lawyers hoping to curry their favor are more likely to lavish them with undue praise than to alienate them with unfair criticism.

When lawyers like Marylin Pierre and Asher Weinberg overcome these inhibitions and share candid concerns, judges should listen. Lest they "forget their common human frailties" and abuse "the paraphernalia of power" to uphold their self-proclaimed "dignity," one legendary jurist counseled his brethren to stay "mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

Though the Preamble to the Rules of Professional Conduct encourages members of the Bar to "further the public's ... confidence in ... the justice system," MD. RULE 19-300.1[6], lawyers should not serve as judicial cheerleaders who may only speak out when they have nice things to say. A healthy respect for the rule of law does not require that "Officers of the Court" gratify the "chain of command." As active participants in the system of justice, attorneys should have the latitude to expose its flaws. When courts punish their most effective critics, pick at their manner of expression, or fail to set clear standards for protecting their speech, they impede the critical information needed to improve justice for all.

Seeking justice for all, Asher Weinberg was not

prosecuted for disregarding the truth about certain judges, but for his brutal honesty in exposing their shortcomings and saying exactly what was on his mind. Speaking his mind may have been imprudent, but the "freedom to think as you will and to speak as you think" is "indispensable to the discovery and spread of political truth" and is essential both to "stable government" and to "political change." *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis & Holmes, JJ., concurring).

Contrary to the opinions of judges who have concocted an "objective" standard, First Amendment protection should not be limited to "reasonable attorneys" alone. Given the ease with which courts punish their critics, prudent lawyers do not "speak as they think" about the shortcomings of powerful judges.

First Amendment freedoms must protect the *im*prudent – those who dare to challenge a slate of incumbent judges, to expose flaws in the system, or to challenge a jurist on her mistreatment of an accused. Calling attention to injustice, these "unreasonable lawyers" fulfill "a special responsibility to exercise fearlessness in doing so." *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting). They should not have to risk their careers at the hands of judges who protect their colleagues from statements they deem unflattering, disrespectful or "unreasonable." That is precisely why this Court rejected such vague criteria and why it must reaffirm the actual malice standard once and for all.

CONCLUSION

Over the course of four decades, most courts have rejected *Sullivan*'s actual malice standard in opinions which are hard to reconcile with those of this Court. As state after state suppressed speech by abandoning its constitutional principles, this Court has only responded with two terse words – "*cert. denied*."[11] This Court has let them deviate for far too long. With more and more lawyers facing sanctions for their exercise of First Amendment freedoms, the time has come for this Court to speak.

Respectfully submitted,

Irwin R. Kramer
KRAMER & CONNOLLY
465 Main Street
Reisterstown, MD 21136
(410) 581-0070
irk@KramersLaw.com

Counsel for Petitioners

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[11] *In re MacDonald*, 906 N.W.2d 238 (Minn.), *cert. denied*, 138 S.Ct. 2681 (2018); *Fieger*, 719 N.W.2d 123, *cert. denied*, 549 U.S. 1205 (2007); *Gardner*, 99 Ohio St.3d 416, *cert. denied*, 540 U.S. 1220 (2004); *Ray*, 797 So.2d 556, *cert. denied*, 535 U.S. 930 (2002); *Topp*, 129 Idaho 414, *cert. denied*, 520 U.S. 1155 (1997); *Waller*, 929 S.W.2d 181, *cert. denied*, 519 U.S. 1111 (1997); *Holtzman*, 78 N.Y.2d 184, *cert. denied*, 502 U.S. 1009 (1991); *Westfall*, 808 S.W.2d 829, *cert. denied*, 502 U.S. 1009 (1991); *Graham*, 453 N.W.2d 313, *cert. denied sub nom. Graham v. Wernz*, 498 U.S. 820 (1990); *Heleringer*, 602 S.W.2d 165, *cert. denied*, 449 U.S. 1101 (1981); *Terry*, 271 Ind. 499, *cert. denied sub nom. Terry v. Indiana Supreme Ct. Disciplinary Comm'n*, 444 U.S. 1077 (1980).