Supreme Court, U.S.
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No. 25A1450

In the

Supreme Court of the United States

PHILLIP B. LEISER,

Applicant,

v.

CLEO E. POWELL,
(sub. nom. S. Bernard Goodwyn)
In her official capacity as Chief Justice of the Commonwealth of Virginia
***et. al.*,**

Respondents.

To the Honorable John G. Roberts, Jr., in his official capacity as Chief Justice of the United States and Circuit Justice for the Fourth Circuit

On Application from the United States Court of Appeals for the Fourth Circuit (No. 25-2450)

EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

Immediate Relief is Requested

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I. QUESTIONS PRESENTED

1. Whether Virginia Rule of Professional Conduct ("VRPC") or ("Rule") 8.2 is patently and flagrantly unconstitutional on its face because it is overbroad and vague, in violation of the 1st and 14th Amendments, thereby creating an exception to application of the *Younger* abstention doctrine?

2. Whether this Court's reversals of the Supreme Court of Virginia ("SCV"), itself, in both *NAACP v. Button* and *Landmark Communications, Inc. v. Virginia*, lead ineluctably to the conclusion that Rule 8.2 is patently and flagrantly unconstitutional on its face, thereby rendering SCV's continued efforts to enforce the rule "in bad faith" and "in a harassing manner" *as a matter of law*, because those efforts merely serve to intimidate into silence lawyers who are critical of the judiciary, but cannot reasonably be expected to result in *valid* "convictions," thereby rendering application of the *Younger* abstention doctrine inappropriate?

3. Whether there exist "other extraordinary circumstances" surrounding SCV's enactment, enforcement, and assessment of the constitutionality of Rule 8.2, which render application of the *Younger* abstention doctrine inappropriate?

4. Whether SCV's repeated rejections in other cases, of some of the same 1st Amendment challenges to Rule 8.2 advanced by Applicant in his federal complaint, render futile his state-court challenges to the rule's constitutionality, thereby effectively depriving him of an adequate opportunity to raise his constitutional challenges in the state-court proceedings and rendering *Younger* abstention inappropriate?

5. Whether the lower federal courts ("LFCs") erred, as a matter of law, when the U.S. District Court for the Eastern District of Virginia (Alexandria Division) ("EDVA") dismissed Applicant's First Amended Complaint ("FAC") and denied his motions for a preliminary injunction ("P.I.") and for reconsideration of those decisions, based upon its conclusion that *Younger* deprived the court of subject matter jurisdiction ("SMJ") over the case, and similarly, when the U.S. Court of Appeals for the 4th Circuit ("CA4") exercised its discretion to deny Applicant's motion for an Injunction Pending Appeal ("I.P.A.") and his petition for panel rehearing ("PRH")?

6. Whether Applicant is entitled to a preliminary injunction pending appeal of the dismissal of his FAC?

II. PARTIES

1. **Applicant, Phillip B. Leiser**, *pro se* Plaintiff and Appellant below, is a VA-licensed attorney who filed a federal complaint in EDVA under 42 U.S.C. § 1983, seeking a declaratory judgment that VRPC 8.2 is unconstitutional both on its face and as applied to him, in violation of the 1st Amendment, made applicable to the States through the 14th Amendment. **(App. 19, 110).** Applicant also sought both permanent and preliminary injunctive relief prohibiting enforcement of the Rule against him, along with an I.P.A., all of which relief was denied by the LFCs. **(App. 7, 15-17).**

Respondents—Defendants and Appellees below:

2. **Cleo E. Powell** (hereafter, "SCV") is sued in her official capacity as Chief Justice of the Commonwealth of Virginia.[1] **(App. 19-20, ¶¶ 4, 5).**
3. **Virginia State Bar ("VSB")** is a state administrative agency of SCV, responsible for enforcing disciplinary rules including VRPC 8.2. **(App. 20, ¶6).**
4. **Renu Brennan, Esq.** is Bar Counsel to VSB who twice prosecuted Leiser for violating Rule 8.2. **(App. 20, ¶ 7).**

III. PROCEEDINGS BELOW AND RELATED PROCEEDINGS

1. *Leiser v. S. Bernard Goodwyn, et. al.,* 1:25-cv-405 (EDVA 2025); 9/17/25 order denying motion for P.I. and dismissing FAC (2025 WL 3567869) (slip

[1] Upon the 12/31/25 retirement of Chief Justice S. Bernard Goodwyn, Chief Justice Powell was substituted in by operation of law pursuant to FRAP 43(c)(2). See also, Sup. Ct. Rule 35(3); 2/12/26 CA4 Order substituting Powell for Goodwyn. (Dkt. No. 15).

copy) **(App.1-7)**; 12/4/25 order denying motion for reconsideration. **(App. 8-15)** (unpublished).

2. *Leiser v. Powell (sub. nom. S. Bernard Goodwyn)* Case No. 25-2450 (CA4 2025); appeal pending; 2/24/26 order denying motion for I.P.A. **(App. 16)** (unpublished); 3/31/26 order denying Petition for Panel Rhrng ("PRH") (unpublished). **(App. 17)**.

3. *Leiser v. VSB* (Record No. 251120) (SCV 2025), a related proceeding, is his currently pending appeal before SCV, of a three-judge panel's 9/26/25 final order suspending his law license for three years, in *VSB v. Leiser*, CL-2025-6240 (Fairfax County 2025). **(App. 138-141)** (9/22/25 Summary Order).

IV. CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

None of the parties is a corporation; all are either private individuals or government officials sued in their official capacities, as well as the VSB—a government agency of SCV. Therefore, none of the parties has a parent entity or issues stock. */s/ Phillip B. Leiser*

V. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend I, cl. 2

"Congress shall make no law . . . abridging the freedom of speech, or of the press..."

U.S. Const., Amend XIV, § 1, cl. 3

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

VRPC 8.2 "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."

VI. JURISDICTION

EDVA exercised subject matter jurisdiction ("SMJ") over this action pursuant to 28 U.S.C. §§ 1331 ("federal question" jurisdiction), 1343(a)(3) and (a)(4), and denied Applicant's motion for a P.I. and his FRCP 59(e) motion seeking reconsideration thereof. **(App. 1-7, 8-15)**. He timely appealed to CA4 which exercised appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1) and denied his motion for an I.P.A. and also denied his subsequent petition for panel rehearing ("PRH"), which it treated as a motion to reconsider. **(App. 16, 17)**. Since this Court will ultimately have jurisdiction under 28 U.S.C. § 1254(1) to grant *certiorari* to review the final decision of CA4, it has the authority to grant an injunction pending appellate review under 28 U.S.C. § 1651(a), the "All Writs Act." Such an I.P.A. would be in aid of the future jurisdiction of this Court, to review decisions below that permit the ongoing irreparable harm consisting of, *inter alia*, the deprivation of Applicant's 1st Amendment right to engage in political speech that is critical of the judiciary. This Court also possesses jurisdiction to award an I.P.A. pursuant to S. Ct. Rule 22. This appeal is timely under 28 U.S.C. § 2101(c).

VII. STATEMENT OF THE CASE

Leiser respectfully requests that this Honorable Court issue an I.P.A., prohibiting Respondents from enforcing VRPC 8.2 against him during the pendency of appellate proceedings, whether directly, or indirectly—through application of VRPC 8.4(b). On 6/18/24 Associate SCV Justice Thomas P. Mann submitted a

"Complaint Form" to VSB, (**App. 22, ¶¶ 22-23; 112-116**), opining that a pleading Leiser had filed with SCV violated VRPC 8.2 which provides,

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer. *Id.*[1]

On 3/5/25, while VSB "investigated" the bar complaint, Leiser filed in EDVA a complaint, later supplanted by his FAC as the operative initial pleading (**App. 18-111**), challenging on 1st Amendment grounds the constitutionality of VRPC 8.2 both on its face as overbroad and vague, and as applied to his statements at issue. He sought both a declaratory judgment and a permanent injunction prohibiting its enforcement. (**App. 19, 110**). On 3/12/25, before any proceedings on the merits had occurred in the federal action, VSB issued a Certification (**App. 117-137**), demarcating the formal initiation of state disciplinary proceedings against Leiser, who subsequently filed a motion for a P.I., which EDVA denied in its 9/17/25 final order, (**App. 1-7**), as a necessary by-product of its decision to dismiss his FAC for lack of SMJ under FRCP 12(b)(1), after erroneously concluding that abstention was required under the doctrine enunciated by *Younger v. Harris*, 401 U.S. 37 (1971).

On 9/18/25 Leiser was tried by a three-judge state disciplinary panel ("tribunal") convened pursuant to VA. CODE ANN. § 54.1-3935, which determined that he

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[1] Justice Mann's "Complaint Form" (**App. 114-115**) did not identify any particular statement contained within Leiser's pleading that he deemed in violation of Rule 8.2. (**App. 22, ¶ 24**). Neither he nor VSB identified any jurist who was the supposed target or victim of Leiser's criticisms. (**App. 23, ¶ 25**). Leiser's statements at issue are set out in VSB's Certification at (**App. 120-137**).

violated VRCP 8.2 and 8.4(b) **(App. 137-141)**.[2] Leiser's appeal of that decision is now pending before SCV and awaiting its decision. After his state "conviction" for violating those disciplinary rules, Leiser filed in EDVA a motion under FRCP 59(e) requesting the court reconsider its decision dismissing his FAC and denying his motion for a P.I. EDVA denied that motion on 12/4/25. **(App. 8-15)**. On 10/8/25 he timely appealed to CA4 EDVA's 9/17/25 dismissal of his FAC and denial of his motion for a P.I., and on 12/22/25 he timely appealed EDVA's order denying his FRCP 59(e) motion. On 2/9/26 he filed a motion for an I.P.A., which CA4 denied on 2/24/26. **(App. 16)**. On 3/10/26 he filed a Petition for Panel Rehearing ("PRH") which CA4 treated as a motion to reconsider and subsequently denied on 3/31/26, **(App. 17)**, leading to his filing this Application.

VIII. SUMMARY OF ARGUMENT

Because EDVA erroneously concluded that the *Younger* abstention doctrine deprived it of SMJ over Leiser's case, its decisions dismissing his FAC without prejudice, denying his motion for a P.I., and denying his subsequent FRCP 59(e) motion constituted abuses of its discretion as a matter of law. CA4 provided no explanations for its decisions denying his motion for an I.P.A. and his PRH.[3] Those decisions, too, constituted abuses of discretion as a matter of law, as follows.

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[2] VRPC 8.4(b) provides, "It is professional misconduct for a lawyer to: . . . (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law . . . ." Leiser's purported violation of Rule 8.2 served as the sole underlying predicate for a finding that he also violated Rule 8.4(b), which the tribunal asserted as the justification for its imposition of a three-year suspension of his license to practice law. This Court's determination that Rule 8.2 is unconstitutional on its face would necessarily deprive the disciplinary tribunal of any legitimate basis for finding Leiser in violation of Rule 8.4(b).

[3] To the extent it was because Leiser filed his request for relief in EDVA pursuant to FRCP 59(e) rather than FRCP 62, Leiser explained to CA4 in his PRH that he selected the former because re-

First, Rule 8.2 is patently and flagrantly unconstitutional on its face, as violative of the 1st Amendment, made applicable to the States through the 14th Amendment, because it is overbroad and vague. Its constitutional infirmities consist of the following: **(i)** it does not confine the statements subject to its penalties to statements o*f fact*—the only type of statement that is susceptible to objective proof of its truth or falsity; **(ii)** it does not require proof that the statement at issue is *false*; **(iii)** instead, it shifts the burden of proof ("BoP") to the respondent; **(iv)** to prove that he published his statement in good faith and had an objectively reasonable basis for doing so, thereby rejecting this Court's decision in *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964) ("*NYT*"), requiring that the plaintiff/government prove the publisher of the statement either knew or else *subjectively* believed that his statement was probably false; **(v)** since under Rule 8.2, establishment of the falsity of the statement at issue is not required, a tribunal cannot ascertain whether the statement was published with *NYT* malice—knowledge of its falsity or reckless disregard for its truth or falsity; instead, it necessarily *presumes* the existence of *NYT* malice; and **(vi)** it does not require an assessment of the particular statement at issue, either as a matter of law or as a matter of fact, to ascertain whether it *could* and whether it ultimately *did in fact* create a substantial likelihood of material prejudice to the fair administration of justice. Instead, SCV has

arguing *the merits* of his motion for an I.P.A. under Rule 62 would have been futile, unless he could first persuade EDVA that it had erroneously applied *Younger* abstention and therefore wrongly concluded that it lacked SMJ over his FAC. Absent EDVA's reversal of its erroneous decision concerning its lack of SMJ, it could not and therefore would not have reached the merits of the four-factor test employed to determine entitlement to an I.P.A.

interpreted Rule 8.2 such that *any* public statement, about a judge's qualifications (to include his competence)[4] or integrity, is not protected speech under the 1st Amendment because it creates a substantial likelihood of material prejudice to the fair administration of justice *as a matter of law.*

In addition to being patently and flagrantly unconstitutional on its face, Rule 8.2 has been twice enforced against Leiser in bad faith and in a harassing manner, **(App. 6)** since the government's enforcement of a law it knows or reasonably should know—and has no excuse not to know—is patently and flagrantly unconstitutional on its face, deprives the government of any *reasonable* expectation that its enforcement efforts will lead to a *valid* "conviction," and therefore, those efforts to enforce are pursued in bad faith and in a harassing manner *as a matter of law.*

Moreover, there are other unusual or extraordinary circumstances that render application of *Younger* inappropriate. *On its face*, Rule 8.2 was enacted to protect judges from criticism of their official conduct. Therefore, the judiciary possesses a strong self-interest and tribal interest in enacting and enforcing the rule and upholding its constitutionality. That self-interest, combined with the fact that SCV has eliminated the demurrer—the procedural device by which to challenge the constitutionality of a disciplinary rule at the trial level—means that SCV has retained the *exclusive* authority (other than SCOTUS) to assess the constitutionality of a rule *it enacted* for the purpose of protecting the judiciary's self-interest in insulating itself from unwanted scrutiny and unwelcome criticism of its

[4] Although the text of the rule does not expressly refer to a judge's "competence," it seems clear, in view of SCV's opinions interpreting the rule, that it is subsumed within the word, "qualifications."

decisions. That coupled with the fact that a tiny group consisting of the majority (four out of seven) of SCV Justices possesses the sole authority to enact and determine the constitutionality of such a rule, as well as enforce it, create unusual circumstances that warrant an exception to application of *Younger* abstention.

Finally, the third step in the *Younger* analysis requires a determination that the pending state court proceedings will afford the respondent an adequate opportunity to raise his constitutional challenges. SCV eliminated the availability of the demurrer and failed to identify any alternative procedural mechanism by which to raise constitutional challenges to disciplinary rules at the trial level, reserving to itself the exclusive authority to assess a rule's constitutionality on appeal of an adverse disciplinary decision. That, along with SCV's previous rejections, in other cases, of some of the same constitutional challenges asserted by Leiser below, render his attempts to raise them in the state court proceedings an exercise in futility. For the foregoing reasons, Leiser has been and will almost certainly continue to be deprived of an adequate opportunity to raise his constitutional claims in the state-court proceedings. Therefore, EDVA's application of *Younger* was inappropriate and its denials of Leiser's motion for a P.I. and his FRCP 59(e) motion, along with CA4's denials of Leiser's motion for an I.P.A. and his PRH, constituted abuses of discretion as a matter of law.

IX. ARGUMENT—REASONS TO GRANT THIS APPLICATION

A. Factors to consider in deciding whether to award preliminary injunctive relief

An applicant clearly establishes his entitlement to relief pending appellate review when he demonstrates: **(1)** his 1st Amendment claims are likely to prevail; **(2)** denying him relief would lead to irreparable injury; and **(3)** granting relief would not harm the public interest. *Roman Cath. Diocese of Brooklyn* v. *Cuomo,* 592 U.S. 14, 16 (2020), citing *Winter v. NRDC,* 555 U.S. 7, 20 (2008).[5] Several factors govern a single Justice's consideration of an application. Namely, "[i]f there is a 'significant possibility' that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction." *Am. Trucking Ass'ns, Inc. v. Gray,* 483 U.S. 1306, 1308 (1987).[6]

As to the 2nd factor, SCOTUS has recognized that "loss of [1st] Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Leiser's law license was suspended for three years on the basis of the content of his statements that were critical of the judiciary, resulting in not only the continuing infringement of his 1st

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[5] In *Winter v. NRDC,* 555 U.S. 7 (2008), this Court articulated what a petitioner must establish to justify the issuance of a P.I.: (1) his likelihood of success on the merits; (2) his likelihood of suffering irreparable harm that is both great and immediate in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.* at 20. But "when the Government is the opposing party," the "harm to the opposing party" and "the public interest" factors "merge." *Nken v. Holder,* 556 U.S. 418, 435 (2009).

[6] Under S. Ct. Rule 10(a) and (c), Leiser is likely to obtain *certiorari* review leading to a reversal of the decisions below, especially in view of the fact that many states have adopted disciplinary rules identical to or virtually so with Rule 8.2, including: CT, DE, FL, ID, IN, KY, MA, MD, MN, MO, MS, NE, NY, OH, RI and TN. Leiser's legal rights are "indisputably clear" as is Respondents' patent and flagrant violation of those rights, and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Lux v. Rodrigues,* 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers).

Amendment rights, but also the concomitant loss of valuable business opportunities and severe economic and reputational harm, among other deleterious consequences. As to the **3rd** and **4th** factors, SCV and VSB are "in no way harmed by issuance of a preliminary injunction preventing the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction . . . [and] upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason* at 303 F.3d 507, 520-21 (CA4 2002). As to the **1st** factor, because the "irreparable harm" that Leiser has alleged is "inseparably linked to [his] claim of violation of [1st] Amendment rights [the] [d]etermination of irreparable harm requires analysis of [his] likelihood of success on the merits." *Id.* at 511. But before proceeding with the analysis, a threshold question must be considered—was Leiser's FAC improperly dismissed for lack of SMJ based upon the LFCs' erroneous application of *Younger* abstention?

B. To the extent *Younger* would otherwise apply, each of its judicial exceptions renders its application inappropriate

Under the *Younger* abstention doctrine, a federal court should abstain from hearing a case over which it otherwise has jurisdiction

> if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit. *Moore v. City of Asheville*, 396 F.3d 385, 390 (CA4 2005) (internal citations omitted).

The disciplinary proceeding initiated against Leiser meets the first two *Younger* criteria. *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 432-37 (1982). However, as will be addressed *infra.*, at § IX(H) at pp. 25-27, the state court proceedings *do not* provide Leiser with an adequate opportunity to raise his constitutional questions at issue in his pending federal action.

But even assuming, *arguendo*, the state courts would provide Leiser with an adequate forum in which to litigate his constitutional claims, abstention was nevertheless inappropriate because each of the judicial exceptions to application of *Younger* is relevant here. **First**, Rule 8.2 is flagrantly and patently unconstitutional on its face. **Second**, if the state court proceedings are allowed to continue Leiser will suffer irreparable injury that is both great and immediate, to include the loss of his 1st Amendment rights as well as severe reputational and economic harm that naturally flow from the suspension of his license to practice law. **Third**, Rule 8.2 has been twice enforced against Leiser in bad faith and in a harassing manner. **Fourth**, there are additional "unusual circumstances" in this case that call for equitable relief. See generally, *Younger v. Harris*, 401 U.S. 37, 45, 53-54 (1971). Since the establishment of: **(i)** the inapplicability of *Younger*; **(ii)** the existence of irreparable harm that is both great and immediate; and **(iii)** the likelihood of success on the merits; are all dependent, to a significant degree, upon demonstrating the unconstitutionality of VRPC 8.2, Leiser now turns to that issue.

C. Relevant 1st Amendment principles

Importantly, the speech that Rule 8.2 purports to regulate involves criticism of government officials and their official conduct, and is therefore political speech which is entitled to the highest level of 1st Amendment protection. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-35 (1991). In its seminal decisions in both *NYT* and *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), SCOTUS articulated the prerequisites the government must establish before it can impose either civil or criminal sanctions against a person based purely upon the content of his political speech, without any accompanying disruptive conduct. Those requirements are: **first**, a court must determine, as a question of law, that the statement at issue is a statement *of fact*—the only type of statement that is susceptible to objective proof of its truth or falsity; **second**, the court must determine, as a question of law, that the statement under consideration *could be* actionable. At issue here is an attorney disciplinary rule which prohibits criticism of the qualifications, competence or integrity of judicial officials. In the context of attorney disciplinary proceedings, the "actionability" of a statement requires a determination by the court, as a question of law, that it is *capable of* creating a substantial likelihood of material prejudice to the fair administration of justice. *Gentile* at 1036-37.

If and only if a court answers both legal inquiries in the affirmative, then and only then is the fact-finder permitted to proceed to ascertain, ***first***, considering all of the competent evidence and testimony admitted during the proceeding, whether the statement at issue is in fact *false.* Through its *NYT* and *Garrison* decisions, SCOTUS clarified that, as a matter of federal constitutional law, and in particular,

as dictated by the 1st Amendment, and whether in a civil or criminal case, a *true* statement of fact can *never* serve as the predicate for the imposition of either civil or criminal sanctions, based purely upon its content, without any accompanying disruptive behavior. It necessarily follows, before the government can impose civil or criminal sanctions, the statement's falsity must be affirmatively established and the burden of proving its falsity is upon the shoulders of the plaintiff/government seeking to impose those sanctions.

Second, if and only if the factfinder concludes that the statement is false, does it next proceed to ascertain whether the evidence established *NYT* malice—that the publisher either knew it was false or else held a high degree of subjective awareness that the statement was probably false—the very definition of reckless disregard for truth or falsity necessary for a finding of either criminal culpability or civil liability based strictly upon the content of speech. If and only if that second factual inquiry is answered in the affirmative does the factfinder next proceed to consider all of the circumstances surrounding the publication of the statement, to answer the **third** factual inquiry—whether the statement *did in fact* create a substantial likelihood of material prejudice to the fair administration of justice. If and only if all three factual inquiries are answered in the affirmative, then and only then can the publisher of the statement be subjected to sanctions either criminal or civil in nature. *NYT* at 376 U.S. 254, 271-73, 279-80; *Garrison* at 379 U.S. 64, 74-75. The government bears the burden of proof as to each of the three factual inquiries by clear and convincing evidence. These bedrock 1st Amendment principles have been

settled law for many decades; yet, SCV has repeatedly rejected and ignored them in the context of attorney disciplinary proceedings involving Rule 8.2.[7]

The overarching principles behind the 1st Amendment free speech guarantee are **first**, that political speech, alternatively characterized as speech about matters of public concern—that which is critical of government: policies, officials, decisions, or reasoning offered in support of those decisions—is afforded the highest level of 1st Amendment protection—greater than that afforded artistic expression or commercial speech. **Second**, 1st Amendment free speech guarantees are delicate and need "breathing room" to survive.

D. Rule 8.2 is subject to "strict scrutiny" under the 1st Amendment

"[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based. . . ." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015). A law ". . . imposes more than an incidental burden on protected expression" when, ". . . on its face and in its practical operation," it "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Under Rule 8.2 speech that is critical of the judiciary is prohibited and lawyers are singled out from the population at large, for government-imposed sanctions based upon the content

[7] Although SCOTUS has given its imprimatur to the application of a less demanding standard governing the regulation of attorney speech in disciplinary as opposed to criminal proceedings, *Gentile* at 1074-75, (adopting the substantial likelihood of material prejudice versus the clear and present danger standard), there has been no indication, in SCOTUS's implementation of that less demanding standard, that it has tacitly approved of abandoning fundamental principles of its own 1st Amendment jurisprudence, by which, regarding political speech, only statements *of fact* that are *proven to be false,* and *proven* to have been published with either knowledge of or reckless disregard for their truth or falsity, can be the subject of adverse governmental action—whether civil (including disciplinary sanctions) or criminal.

of their speech. Because what is at issue is purely political speech, which Rule 8.2 targets in order to repress disfavored viewpoints, the rule is subject to strict scrutiny. That necessarily requires a determination that the rule promotes a compelling state interest and is narrowly tailored to ensure the least restrictive means of promoting that interest. *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981). But *on its face*, a rule such as VRPC 8.2, that declares *any* public statement about a judge's qualifications, (competence) or integrity is not protected speech because it creates a substantial likelihood of material prejudice to the fair administration of justice, fails, as a matter of law, the "narrowly tailored" and "least restrictive means" tests required under a "strict scrutiny" analysis.

E. SCOTUS must construe VRPC 8.2 precisely as SCV has interpreted it

The federal courts considering the constitutionality of a state statute or rule of court must read its text precisely as it has been authoritatively interpreted by the highest state appellate court to have reached that issue. As noted by SCOTUS in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), "It is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *Id.* at n.9 (internal citations omitted). In *Gooding v. Wilson*, 405 U.S. 518 (1972), SCOTUS held federal courts must follow authoritative state court holdings, explaining, "[o]nly the [State] courts can supply the requisite construction [of a State statute], 'since . . . [SCOTUS] lack[s] jurisdiction authoritatively to construe state legislation.'" *Id.* at 520 (internal citations omitted). Accord, *Wainwright v. Stone*, 414 U.S. 21 (1973) (holding that "[f]or the purpose of

determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Id.* at 21-23 (internal citations omitted).

F. Rule 8.2 is patently and flagrantly unconstitutional

The omissions, from both the text of Rule 8.2 (see pp. ix and 2, *supra.*) and the authoritative SCV decisions interpreting it, of both the adjective, "*false,*" and the prepositional phrase, "*of fact,*" as modifiers of the "*statement*" at issue, render the rule unconstitutionally overbroad and vague on its face. In the seminal case of *Pilli v. VSB,* 269 Va. 391 (2005) SCV held, in order to prove a violation of Rule 8.2, VSB must ***first*** establish that the respondent made *a statement* about a judge or other judicial officer involving his or her qualifications or integrity; ***second***, it must prove the statement was made with knowledge of its falsity or with reckless disregard of its truth or falsity. *Id.* at 396. Neither the text of Rule 8.2 nor SCV's decisions construing it require either a judicial determination that the statement at issue is one *of fact*, or that it be *proven false*. SCV's only mention of the alleged falsity of the statement is its oblique reference in the second prong of its prescribed analysis—establishment of the publisher's knowledge of his statement's falsity. However, SCV fails to explain how the state of a respondent's knowledge of the supposed falsity of his statement can be discerned, without first—or indeed, *ever*—establishing the statement's falsity—a logically necessary prerequisite to determining whether the statement was published with either knowledge of or with reckless disregard for its truth or falsity.

Yet, SCV conveniently sweeps those threshold requirements under the rug and either ignores those constitutional imperatives or else effectively *presumes* the statement is one *of fact*; *presumes* its falsity; and *presumes* the attorney published it with *NYT* malice. SCV has effectively staked out the position that *any* statement that a judge finds demeaning, derogatory or disparaging, of his decision, his reasoning, or even critical of the judiciary writ large, is *ipso facto* and *per se false*, as a matter of law. The *Pilli* court stated, "[t]he very content of these accusations refutes Pilli's argument that he made objectively reasonable statements concerning Judge Cassidy's integrity or qualifications." *Id.* at 397. In other words, according to SCV, the statements, themselves, establish their own falsity—or at least, the lack of good faith and objective reasonableness in publishing them. Both the text of Rule 8.2 and SCV's authoritative construction thereof compel the conclusion that it is the mere publication of statements critical of or insulting to a judge, that is without more, sufficient to find an attorney in violation of Rule 8.2.

About six months after issuing its *Pilli* opinion, SCV decided *Anthony v. VSB*, 270 Va. 601 (2005), in which Anthony argued, in order to establish a violation of Rule 8.2, VSB had the BoP as to whether his various statements concerning the judges were in fact *false*. SCV, relying on its then-recent *Pilli* decision, disagreed, echoing the *Pilli* court's holding (see p.14, *supra*.). *Anthony* at 608. Like the *Pilli* court, the *Anthony* court declined to address the truth or falsity of the statements at issue, and, as a threshold matter, declined to characterize them as statements *of fact*, or otherwise. However, it demanded to know what "factual basis" Anthony had

for his statements, *Id.*, thereby effectively presuming his statements were "of fact," and then shifting the BoP to Anthony, to prove his statements were, if not true, at least, "objectively reasonable." *Id.* In so doing, SCV ignored settled law, that,

> Authoritative interpretations of the [1st] Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. . . . The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NYT* at 376 U.S. 254, 271 (internal citations omitted).

The court that tried Anthony's disciplinary violation "found, by clear and convincing evidence, indeed by unrefuted evidence, that Anthony had made *statements* about a number of judges involving their qualifications and integrity and he made those statements with reckless disregard for their truth or falsity." *Anthony* at 609 (emphasis added). Announcing a heightened standard of protection afforded to Virginia's judges, to insulate them from the harsh winds of criticism which other public officials are routinely expected to endure, the *Anthony* court held,

> . . . [A] *derogatory* statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, tends to diminish the public perception of the qualifications or integrity of the judge. Such a statement creates a substantial likelihood of material prejudice to the administration of justice *as a matter of law* and is not, therefore, constitutionally protected speech. *Id.* at 610 (emphases added).

Once again, SCV ignored settled 1st Amendment principles established through various SCOTUS precedents, including *NYT*, *Garrison*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For example, the *NYT* court held,

> Criticism of official conduct of government officials does not lose its constitutional protections for speech and press merely because it is effective criticism and hence diminishes their official reputations. If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. . . . *Id.* at 273.

Similarly, the *Gertz* court held,

> An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. . . . [T]he public's interest extends to 'anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . . .' *Gertz* at 344-45, quoting *Garrison* at 77.

Finally, the *Garrison* court held, "The [*NYT*] 'public official' rule protects the paramount public interest in a free flow of information to the people concerning public officials, *their servants*." *Id.* at 77 (emphasis added).

The *Anthony* court also eschewed SCOTUS's repeatedly emphasized imperative that a civil or criminal tribunal adjudicating an action predicated on the content of speech must, in the first instance, analyze the statements to determine whether they are actionable. SCV has rejected that command and has decided, as a blanket rule of law, that *any derogatory statement* about a judge's qualifications, competence or integrity is *per se* actionable under Rule 8.2. The *Anthony* court

declined to explain *generally*, how statements which are critical of a judge, his decision or his reasoning, and which are contained within a pleading filed with the clerk's office of a court, could be expected to pose a "substantial likelihood of material prejudice to the [fair] administration of justice," and how the attorney who files such a pleading could be construed as having breached his "obligation to abstain from *public* debate *that will obstruct* the administration of justice." *Anthony* at 609 (emphases added) (quoting *Gentile* at 1074). Nor did the court explain, *specifically*, how Anthony and his particular statements had done so.

In 2010 SCV decided *Moseley v. VSB*, 280 Va. 1 (2010), in which it upheld a six-month suspension of Moseley's law license for violating Rule 8.2. The *Moseley* court held, "*public statements* by attorneys, concerning the integrity of judges and judicial officers *are not protected speech* because they create a 'substantial likelihood of material prejudice' to the administration of justice." (*Moseley* at 3, quoting *Gentile* at 1074) (emphases added). Thus, an attorney's license to practice law can be suspended or revoked, for making *any public statement*, whatsoever, about a judge's integrity—whether of pure opinion or even a true statement of fact. In adopting that blanket rule, SCV ignored its reversal by this Court in *Landmark Communications,* 435 U.S. 829, which held,

> Deference to a legislative finding cannot limit judicial inquiry when [1st] Amendment rights are at stake. . . . [Instead, SCOTUS] is compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the [1st] Amendment, as adopted by the

Due Process Clause of the [14th] Amendment, protect. . . . It was thus incumbent upon [SCV] to go behind the legislative determination and examine for itself 'the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.' . . . Whenever the fundamental rights of free speech . . . are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. *Id.* at 843-44. . . . [T]he law gives 'judges as persons or courts as institutions . . . no greater immunity from criticism than other persons or institutions.' . . . The operations of the courts and the judicial conduct of judges are matters of utmost public concern. *Id.* at 839. . . . [S]peech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.' *Id.* at 842. '. . . [A] major purpose of [the 1st] Amendment was to protect the free discussion of governmental affairs[,]' . . . [and this includes] the operation of the courts and the judicial conduct of judges . . . *Id.* at 838-39. . . . [N]either the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts, is sufficient to justify the subsequent punishment of speech. . . . [I]njury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' . . . [T]he clear-and-present-danger test[,] . . . [p]roperly applied, . . . requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed. *Id.* at 841-43 (internal citations omitted).

Most recently, in *Jenkins v. VSB*, 303 Va. 332 (2024), Jenkins was charged with making statements that were alleged to be not only false, but also "insulting" and "offensive," *Id.* at 335. SCV found Jenkins' ". . . many scurrilous statements impugning the integrity of the judge" violated Rule 8.2. *Id.* at 339. The *Jenkins* court noted, ". . . the disciplinary proceeding was based on the statements and the method that [Jenkins] used to communicate the dissent that [he] had with the Judge and the language that [he] used . . . ." *Id.* at 337-38. The opinion did not discuss the truth or falsity of the statements at issue, echoing the absence of such discussion or analysis in the *Pilli, Anthony* and *Moseley* opinions. Instead, the *Jenkins* court emphasized, "[l]itigation is to be conducted . . . with civility and courtesy. Baseless insults and accusations are the antithesis of the decorum necessary for effective representation. Zealous representation can and should proceed with dignity and respect towards opposing counsel and the court. . . ." *Id.* at 338.

SCV's decisions interpreting and applying Rule 8.2 have uniformly rejected this Court's 1st Amendment guardrails, and have instead insisted that the statement under consideration need not be evaluated for its susceptibility to proof of truth or falsity, and its falsity need not be proven. Since the attorney's statement: **(i)** need not be a statement of fact; **(ii)** need not be proven false, and **(iii)** therefore cannot be proven to have been published with either knowledge of its falsity or with *NYT* malice; **(iv)** need not be evaluated, on a case-by-case basis, to assess whether it does in fact create a substantial likelihood of material prejudice to the fair

administration of justice—because it is presumed to do so; effectively then, VSB's *only* burden is to prove the attorney published *a statement*, of and concerning the qualifications, competence or integrity of a judge. If the statement is critical of a judge, or even, as in Leiser's case, critical of judicial decisions and reasoning, but without identifying any specific jurist, the lawyer who published it must prove that he had an "objectively reasonable" and "good faith" basis for doing so, or else face disciplinary consequences.[8] As authoritatively interpreted by SCV, Rule 8.2 does not merely proscribe the publication of *false* statements *of fact*, published with knowledge of or with reckless disregard for their falsity; it prohibits *any criticism* whatsoever, of judges, their judicial decisions, or reasoning. By enacting and enforcing Rule 8.2, SCV has demonstrated its willful defiance of this Court's settled 1st Amendment jurisprudence. In *Wood v. Georgia*, 370 U.S. 375 (1962) SCOTUS explained,

> . . . [T]he purpose of the [1st] Amendment includes the need: '. . . to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, *and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. Id.* at 370 U.S. 375, 392 (emphasis added).

In *Members of City Council of City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789 (1984), SCOTUS proclaimed, "'. . . regulation on speech [must be] reasonable and not an effort to suppress expression merely because public officials

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[8] As if any judge would ever find that criticism of one of his colleagues, or even of the judiciary as an institution of government, was "objectively reasonable" and published "in good faith."

oppose the speaker's view.'" *Id.* at 466 U.S. 789, 815 (internal citations omitted).

SCOTUS further explained, in *Rosenblatt v. Baer,* 383 U.S. 75 (1966),

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. *Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. . . .* *Id.* at 383 U.S. 75, 85 (emphasis added).

G. Rule 8.2 is unconstitutionally overbroad and vague

SCOTUS applied strict scrutiny in confronting the vagueness, uncertainty, and overbreadth, concerning the scope of a Virginia attorney disciplinary rule, in *NAACP v. Button,* 371 U.S. 415 (1963), in which it reversed SCV's decision upholding the constitutionality of a statute, after concluding that it violated Petitioners' constitutionally protected rights of free speech and association. *NAACP* involved both a Virginia statute and the then-applicable Virginia Canons of Professional Ethics, both of which purported to regulate attorney speech, and both of which the *NAACP* court struck down as unconstitutionally vague and overbroad, in violation of the 1st Amendment. In so doing, it rejected SCV's contention that ". . . the purpose of these regulations was merely to insure [sic] high professional standards and not to curtail free expression," *Id.* at 438-39, and held,

> . . . [A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. *Id.* at 439. . . . [T]he activities of the NAACP . . . are modes of expression and association protected by the [1st] and [14th] Amendments which Virginia *may not prohibit,* under its power to regulate the legal profession, as . . . violative of . . . the Canons of Professional Ethics. *Id.* at 428-29 (emphasis added).

Significantly, the High Court noted that whether the claimed source of the NAACP's violation was the statute at issue or the Canons of Professional Ethics made no difference because the Court's holding that the activity at issue is constitutionally protected "applies equally whatever the source of Virginia's attempted prohibition." *Id.* at n.11. The *NAACP* court couched its decision in terms of vagueness and overbreadth, explaining,

> [t]he objectionable quality of vagueness and overbreadth . . . depend[s] . . . upon the danger of tolerating, in the area of [1st] Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. *The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.* . . . Because [1st] Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Id.* at 432-33. (emphasis added). . . . Lawyers on the legal staff or even mere NAACP members . . . would understandably hesitate . . . to do what the decree purports to allow. . . . For if the lawyers . . . [engaged in conduct regulated by the statute] they plainly would risk . . . disbarment proceedings and . . . criminal prosecution for the offense of 'solicitation,' to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. . . . In such circumstances, a statute broadly curtailing [the protected activity at issue] may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such [protected] activity . . . . *Id.* at 434-36. . . . [S]tandards of permissible statutory vagueness are strict in the area of free expression. *Id.* at 432. . . . Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . '[R]egulatory measures . . . no matter how sophisticated, cannot be

> employed in purpose or in effect to stifle, penalize, or curb the exercise of [1st] Amendment rights.' *Id.* at 438-39 (internal citations omitted throughout).

In *Taxpayers for Vincent*, SCOTUS explained,

> There are *two quite different ways in which a statute or ordinance may be considered invalid 'on its face'*—either because it is unconstitutional in every conceivable application, *or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'* *Id.* at 796. . . . [SCOTUS] recognize[s]. . . an exception . . . from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the [c]ourt. . . . [That] exception . . . [is] for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. This 'overbreadth' doctrine . . . [recognizes] that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. [SCOTUS] has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on a 'judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Id.* at 798-99. . . . [T]he requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself—the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court. . . . [T]here must be a realistic danger that the statute itself will significantly compromise recognized [1st] Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds. *Id.* at 800-01. . . . [T]he [substantial overbreadth] 'doctrine asserts that an overbroad regulation of speech or publication may be subject to facial review and invalidation, even though its application in the instant case is constitutionally unobjectionable. . . . [T]he issue under the overbreadth doctrine is whether a government restriction of speech that is arguably valid as applied to the case at hand should nevertheless be invalidated to avoid

> the substantial prospect of unconstitutional application elsewhere.' . . . However, where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack. *Id.* at 466 U.S. 789 at n.19 (emphasis added) (internal citations omitted).

Through its *Pilli, Anthony, Moseley* and *Jenkins* decisions, SCV has, over the course of more than two decades, expansively interpreted Rule 8.2 to exclude from the protection of the 1st Amendment speech that is of and concerning the qualifications, competence or integrity of a judge. Under the *NAACP* court's analysis, *any* of the constitutional infirmities of the rule, and certainly all of them taken together, compel the conclusion that Rule 8.2 is on its face patently and flagrantly unconstitutionally vague and overbroad, and must therefore be struck down as violative of the 1st Amendment.

H. The state court proceedings will not afford Leiser an adequate opportunity to raise his constitutional challenges

1. SCV eliminated the demurrer as a procedural device in attorney disciplinary hearings, rendering a respondent unable to challenge his "prosecution" on constitutional grounds

In their initial disciplinary hearings, Both Pilli and Anthony raised constitutional challenges to Rule 8.2, which were rejected by SCV in its 2005 Opinions. The following year, SCV decided *Barrett v. VSB*, 272 Va. 260 (2006), in which it held that a disciplinary tribunal cannot dismiss a complaint on a demurrer, which it labeled an improper procedural device in an attorney disciplinary proceeding, *Id.* at 266, even one, as in Leiser's case, presided over by a panel of three state circuit court judges, all of whom routinely adjudicate demurrers. Thus, although Pilli and Anthony were technically able to raise their constitutional

challenges during the "trial" phase of their disciplinary proceedings, in 2006, the year following SCV's disposition of their cases, it decided *Barrett*, which, without identifying any alternative procedural mechanism for raising, pre-trial, constitutional challenges to disciplinary rules, seems to have foreclosed a respondent's ability to do so, since SCV has apparently divested disciplinary tribunals of the authority to consider the constitutionality of the rules it enacts.

Instead, the respondent must suffer the consequences of a "conviction," based upon his exercise of his 1st Amendment right of free speech, and the resulting suspension or revocation of his law license. Only through an appeal of such a decision can he then raise his constitutional challenges before SCV. Indeed, although Leiser filed a demurrer to VSB's Certification, raising the same 1st Amendment challenges to Rule 8.2 as he advanced in his FAC filed below, the tribunal, relying upon *Barrett*, denied his demurrer.[9] Thus, apparently, SCV is the *only* Virginia tribunal that has the authority to assess the constitutionality of its own disciplinary rules. That is problematic on several fronts.

2. **In its *Pilli* and *Anthony* opinions, SCV tacitly rejected, without ever directly addressing, some of Leiser's 1st Amend. challenges to Rule 8.2**

Pilli argued that Rule 8.2 could not be constitutionally applied to statements of opinion. *Pilli* at 395-96. SCV dodged that objection, insisting that Pilli's statements were statements *of fact*. *Id.* at 397. Anthony argued that Rule 8.2 required VSB to

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[9] Although the disciplinary tribunal purported to adjudicate the merits of Leiser's 1st Amendment challenges, it is unclear how it asserted the authority to do so, in view of its decision "denying" Leiser's demurrer, which, under *Barrett* should have been *dismissed* rather than denied. How, then, did it purport to rule upon the *merits* of Leiser's 1st Amendment challenges?

prove his statements were false. SCV disagreed. *Anthony* at 608. In *both* cases, respondents appear to have raised both facial and as-applied challenges to Rule 8.2.[10] But SCV declined to address the former, opting instead to address only the latter. In so doing, SCV abdicated its responsibility to *first* conduct a "strict scrutiny" analysis, to determine whether the rule is unconstitutional *on its face*, by examining the rule in a vacuum, to determine whether it sweeps within its purview constitutionally protected speech, or whether it is sufficiently narrowly tailored to survive strict scrutiny.

Both SCV decisions declined to directly address, but tacitly rejected, some of the same constitutional challenges to Rule 8.2 raised by Leiser below, and there is no indication SCV has changed or will change its view—held for 26+ years—that the rule passes constitutional muster. Under these circumstances, Leiser should not be forced to run the gauntlet of futile legal proceedings before that court, especially while his license remains suspended. Leiser lacks an *adequate* or meaningful opportunity to be heard in state court regarding his constitutional challenges.[11]

I. Rule 8.2 has been enforced in bad faith and in a harassing manner

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[10] An inference drawn from review of SCV's opinions, but without having read the underlying pleadings.

[11] Under similar circumstances other federal courts have declined to invoke *Younger*. See, *e.g.*, *Cobb v. Green*, 574 F.Supp. 256 (W.D. MI 1983) ("Cobb I"); *Mastin v. Fellerhoff*, 526 F.Supp. 969 (S.D. OH 1981). See also, *Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 336 (CA4 2022) (admonishing that "abstention may not be appropriate where confining plaintiffs to state courts would in practice 'den[y them] an opportunity to be heard that was theirs in theory."). *Id.* at 336 quoting *Moore v. Sims*, 442 U.S. 415, 431 (1979). *Middlesex* does not support the LFCs' conclusion that the state-court proceedings provide *Leiser* with an adequate opportunity to raise his federal constitutional challenges to Rule 8.2. The *Middlesex* respondent had ". . . failed even to *attempt* to raise any federal constitutional challenge [to the disciplinary rules] in the state proceedings." Moreover, unlike Leiser's case, the respondent "point[ed] to nothing existing at the time the [disciplinary proceeding was commenced] to indicate that the [tribunal] . . . would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees." *Id.* at 457 U.S. 423, 435 (emphasis in original). Indeed, see fn. 14, *infra.*, p.35. *Middlesex* is therefore inapposite.

Bad faith or harassing enforcement of a statute or rule occurs when the government lacks a *reasonable* expectation of securing a *valid* conviction. *Timmerman v. Brown*, 528 F.2d 811, 815 (CA4 1975), citing *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). Neither VSB nor SCV can *reasonably* expect to secure a *valid* "conviction" under Rule 8.2 because when the government attempts to enforce a law that is patently and flagrantly unconstitutional, despite having been apprised of its constitutional infirmities, and without squarely addressing them, it does so in bad faith and in a harassing manner, as a matter of law.

J. There exist other unusual or extraordinary circumstances that render application of the *Younger* abstention doctrine inappropriate

1. Members of the judiciary are the direct—and *only*—beneficiaries of the enactment, enforcement, and upholding of the constitutionality of Rule 8.2

On its face, Rule 8.2, which broadly prohibits attorneys from criticizing judges in *any* public forum, is designed to benefit judges. SCV has risibly proclaimed that the purpose of the rule is not to protect incompetent and corrupt judges, but rather to protect *the People* from losing confidence in the integrity of our justice system. In the "Editor's Notes" accompanying Rule 8.2, SCV explained, "False statements by a lawyer concerning the qualifications or integrity of a judge can unfairly undermine public confidence in the administration of justice." That sentiment was likely lifted from *Bradley v. Fisher*, 13 Wall. 335 (1872) and *Pierson v. Ray*, 386 U.S. 547 (1967), both of which held that the doctrine of absolute judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions

with independence and without fear of consequences." *Pierson* at 386 U.S. 547, 554, quoting *Fisher* at 13 Wall. 335, 349, 350. Both cases dealt with absolute judicial immunity from *lawsuits seeking damages.*

Without a doubt, it is an eminently reasonable proposition that affording absolute judicial immunity from suits seeking money damages is not designed to protect corrupt judges, but instead, to protect the public, by ensuring independence of the judiciary. But from acceptance of that proposition, it does not follow that, in order to ensure independence of the judiciary, judges must not only be immune from civil lawsuits for money damages, but they must also be absolutely shielded from *any criticism by lawyers, whatsoever.* That is a bridge too far; yet, that is the bridge SCV tries to sell Us—that judges cannot be expected to act independently and with fidelity to the rule of law if they have to face any criticism, whatsoever, from lawyers. Effectively then, the judicial branch of government has been declared by SCV to be that branch of government which thou shalt never criticize.

While broadly speaking, SCV has a legitimate state interest in promulgating and enforcing disciplinary rules that ensure lawyers conduct themselves ethically, the specific rules it enacts must themselves advance *legitimate* state interests. Rule 8.2 does not protect litigants; it does not protect the integrity of our justice system; and it certainly does not protect the public; instead, it serves judges' personal and tribal interests in insulating themselves and their colleagues from criticism of their decisions by lawyers—the very people who can credibly expose incompetence, mendacity, chicanery, misconduct and rank corruption among

judicial officials—*public servants.* SCV has attempted to gaslight Us into believing its purpose in enacting Rule 8.2 is to protect *the People* rather than the judiciary—a fatuous and specious attempt to blind us to its *real* objective in enacting and enforcing a rule, which on its face and as authoritatively interpreted by SCV, represses political speech based purely upon its content, in the undeniable self-interest of the very same public officials whom the rule serves by silencing their would-be critics.

2. **The enactment, enforcement, interpretation and analysis for constitutional infirmity, of typical legislation or administrative regulations, involve a diffusion of power among different branches of government**

A typical *Younger* abstention situation involves a pending state court criminal prosecution, which the state court defendant seeks to enjoin on constitutional grounds, as a plaintiff in a federal lawsuit. Abstention is justified in such circumstances because there have been and there remain in place many checks and balances to maximize the likelihood that the statute—under which the federal plaintiff is being prosecuted in state court, and which he seeks to challenge in federal court—has been and will continue to be carefully scrutinized by all three *branches* and various *levels* of state government, to ensure it passes constitutional muster.

Statutes are typically the product of bicameral legislation that results from compromises, in the form of amendments to a proposed bill, in order to win the approval of the majority of members of both Houses of the legislature, who hail from different political parties and who represent diverse factions and multifarious

interests which, presumably, had to be carefully balanced in order to secure the approval of a bicameral majority in favor of the bill, sometimes by persuading legislators to cross party lines, as a *quid pro quo* for compromises on certain aspects of the bill. Once the bill has been passed, it then receives an additional layer of scrutiny—presumably, including constitutional scrutiny—from the Executive branch, before being signed into law by the Governor—the State's Chief Executive Officer. Such statutes, when sought to be enforced, are often challenged and receive a third layer of review, in the form of state court judicial determinations as to their constitutionality. Thus, the typical statute undergoes multiple layers and levels of review, by all three branches of state government.

Additionally, in the typical case, a state court adjudicates a controversy involving the enforcement, by the executive branch, of a statute enacted through the mutual consent of the legislative and executive branches, whose members have been duly elected by the voters who retain the power to vote their representatives out of office if they disagree with the legislation they have enacted and enforced. Moreover, there is a distinct separation among the authorities that enact, enforce, and adjudicate a statute's constitutionality. In a typical case, a state court is asked to adjudicate the executive branch's efforts to enforce a statute which the judiciary had no hand in drafting, and the judicial determination of the unconstitutionality of which would not impair the state courts' or judicial officials' reputations, standing or credibility.[12]

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[12] Acknowledging the applicability of *Younger* to civil proceedings adjudicated through state administrative agency hearings, consider typical agency rule-making and enforcement procedures. →

3. **The one-dimensional process for enacting, interpreting and enforcing Rule 8.2 stands in sharp contrast to those usual democratic processes**

The processes discussed above, for enacting, enforcing and adjudicating legislation, involve multiple levels of checks and balances among the three branches of state government, and that separation of powers also typically suffuses agency rule-making, enforcement, and adjudicatory functions. Contrast that diffusion of power with the one-dimensional process by which Rules of SCV, and in particular, Rule 8.2, become governing law. All of Virginia's legislative power to regulate attorneys has been delegated to SCV. [*SCV*] *v. Consumers Union of U.S., Inc.,* 446 U.S. 719, 734 (1980). The formal adoption and promulgation of SCV's disciplinary rules presumably requires the vote of a mere simple majority, consisting of four (of the seven) Justices of SCV, whose self-interests, in shielding themselves and their colleagues from any criticism by attorneys, are perfectly aligned.

SCV Justices, themselves, not only promulgate the rules, they enforce them, they interpret them, they determine their constitutionality—as the court of first resort and usually—except in the rare instances when SCOTUS grants review—as the court of last resort; and they act as the final arbiters of alleged violations of those rules. Thus, there is a concentration of power in a small handful of unelected SCV Justices. This consolidation of roles and concentration of power in such a

Government agencies typically engage in rule-making functions (*i.e.*, legislative), as well as enforcement activities (executive) and adjudicatory proceedings (judicial). The same agency fulfills all three functions. However, there is a bright line of division of labor between the technocrats who promulgate the regulations, the agency officials who prosecute their violations, and the administrative law judges who not only adjudicate disputes concerning alleged violations; but also proclaim the ultimate meaning, scope, and reach of the regulation, and resolve initial constitutional challenges.

small handful of unelected officials distinguishes judicially-created rules from typical legislation, and from other agency rule-making, enforcement decisions and adjudications of alleged violations. The same discrete group of individuals (SCV Justices) who enacted Rule 8.2—an act performed in SCV's legislative capacity—has reserved to itself the exclusive authority to assess the constitutionality of the very rule it enacted—a rule that just so happens to advance jurists' own personal self-interest in insulating themselves and their colleagues from criticism—political speech that is at the heart of the 1st Amendment's concerns.

Without offering any analysis of or rebuttal to Leiser's arguments, EDVA simply proclaimed, "[Leiser] has failed to establish 'bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'" **(App. 6-7, 13)**. Its decision ignored the reality that the concentration of so much power in such a small group of officials, who not only promulgated Rule 8.2, but who also have a personal interest in its continued enforcement, and therefore, in upholding its constitutionality; who have previously rejected some of the same constitutional challenges raised by Leiser in this case; who have previously enforced the rule against Leiser in bad faith and in a harassing manner and are attempting to do so again; who have eliminated the demurrer and thereby relegated exclusively to themselves the authority to assess the constitutionality of the rule; collectively constitute exceptional circumstances that deprive Leiser of an adequate opportunity to have his constitutional claims adjudicated in the state court proceedings, thereby justifying a decision by this Court to decline to abstain under *Younger*, and instead,

to direct the LFC's to adjudicate Leiser's federal constitutional claim that VRPC 8.2 is flagrantly and patently unconstitutional under the 1st and 14th Amendments.[13]

K. In support of its decision to invoke *Younger*, EDVA cited inapposite cases

The *Middlesex* court invoked *Younger* and dismissed the attorney's federal complaint, finding he had failed to establish bad faith, harassment, or other "extraordinary circumstances" that would justify federal intervention, such as a finding that the state bar rule at issue was "flagrantly and patently" unconstitutional. *Id.* at 437, quoting *Younger* at 401 U.S. 37, 53. But in view of the disparities between: the time, place, and circumstances of Leiser's statements—published within appellate pleadings, and the speech at issue in *Middlesex*—published at a press conference during the pendency of ongoing criminal proceedings; the interests protected by the disciplinary rules at issue in the two cases (*see infra.*, fn. 16 at p.37); coupled with the extraordinary circumstances of Leiser's case; as well as the "flagrant and patent" unconstitutionality of Rule 8.2 because of its overbreadth; *Middlesex* is not controlling. The judicial exceptions to application of the *Younger* abstention doctrine, which were absent in *Middlesex*, are properly invoked in this case. No legitimate state interest is advanced by enforcing an unconstitutional law. And unlike Leiser's case, in which SCV, since 2005 has consistently upheld the constitutionality of Rule 8.2; in *Middlesex,* the

[13] SCV's relegation to itself, of the exclusive authority to assess the constitutionality of the very rules it enacts, is tantamount to a state legislature enacting a statute, but divesting the state's judiciary of jurisdiction to determine the statute's constitutionality, instead reserving to *the legislature, itself,* the exclusive authority to assess the constitutionality of the very statute it enacted *for its own benefit*—a clear violation of the doctrine of separation of powers that undergirds our constitutional architecture.

constitutionality of the rules at issue had not been previously addressed by the State's highest court.[14]

L. The cases relied upon by EDVA to support its conclusion that Rule 8.2 survives strict scrutiny under the 1st Amendment are inapposite

EDVA rejected Leiser's constitutional arguments, stating simply, "As a fundamental matter, Leiser has not shown that Rule 8.2 is 'flagrantly and patently unconstitutional. . . .'" **(App. 5)** (internal citations omitted). It declined to conduct a strict scrutiny analysis of the rule, choosing instead to stitch together disembodied sentences from various SCOTUS decisions that are inapposite. Quoting from *In re Snyder*, 472 U.S. 634, 644-45 (1985), EDVA noted, "[T]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." **(App. 5-6)**. *Snyder* reversed CA8's decision suspending an attorney from practice for six months for "refusal to show continuing respect for the court." *Id.* at 472 U.S. 634, 644-45. His suspension, based upon his criticism of the court's administration of the Criminal Justice Act, was held by SCOTUS to be unwarranted.

EDVA next quoted *Sacher v. United States*, 343 U.S. 1 (1952), stating,

> [I]f the ruling is adverse, it is not counsel's right to resist it *or to insult the judge*—his right is only respectfully to preserve his point for appeal . . . . These are such obvious matters that we should not remind the bar of them were it

[14] During the pendency of the federal case, the State Supreme Court ". . . adopted a rule allowing for an aggrieved party in a disciplinary hearing to seek interlocutory review of a constitutional challenge to the proceedings." *Middlesex* at 457 U.S. 423, 430-31. EDVA also cited *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), where the federal challenge was initiated 23 days after the ordinance took effect. *Id.* at 924. Similarly, in *Hicks v. Miranda,* 422 U.S. 332 (1975), when the federal suit was initiated there had not yet been an authoritative determination as to the constitutionality of the statute at issue by either the State's highest court or by SCOTUS. *Id.* at 336, n.3.

> not for the misconceptions manifest in this case. *Id.* at 9 (emphasis added). **(App. 6)**.

The italicized language from the *Sacher* quote encapsulates the crux of this case. The underlying basis for Leiser's prosecution by VSB is the fact that a Justice of SCV felt "insulted" by Leiser's pleadings. But *Sacher* is not relevant because it did not involve a bar disciplinary hearing, but rather a contempt of court proceeding arising from an ongoing criminal trial, at which defense counsel, *during the course of the trial*, provoked the judge "by useless bickering, . . . offensive slights and insults, . . . [and] interminable repetition." *Sacher* at 343 U.S. 1, 4. (emphasis added). These "insults" occurred in open court, presumably, in the presence of the jury. The circumstances of *Sacher* are completely inapposite to Leiser's case, which involves statements that are critical of judicial decisions, contained within written pleadings, filed in appellate proceedings, after the conclusion of *civil* cases.

EDVA next copied and pasted to its opinion the following sentence from *United States v. Cooper*, 872 F.2d 1 (CA1 1989), "Nor may an attorney seek refuge within his own [1st] Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults which raise doubts as to a judge's impartiality." *Id.* at 3. **(App. 6)**. The *Cooper* court reversed and vacated the disciplinary sanctions against the attorney because it found "*insufficient evidence* that [the] affidavit was made in bad faith." *Id.* at 872 F.2d 1, 4, 5. (emphasis added).[15]

[15] *Cooper* involved an appeal from a disciplinary proceeding, in which the respondent was found to have violated certain rules of professional conduct, (one of which is very similar to VRPC 8.2) based upon statements contained in an affidavit in support of a motion to recuse he had filed on behalf of his client—a criminal defendant. Notably, the court ended its opinion stating that lawyers should not be apprehensive of punishment "for having the advocative courage to raise such a sensitive issue

EDVA cited a number of other SCOTUS opinions, including *Gentile*; *Middlesex,* and *In re Sawyer*, 360 U.S. 622 (1959), none of which is on point because each of them involved attorney disciplinary proceedings premised on *extra-judicial* statements critical of the judiciary, published by attorneys *at press conferences* about *pending criminal* cases. The concern of those courts was that *extra-judicial* statements published under such circumstances, presumably, to a very wide audience, could interfere with the fair administration of justice by *improperly* influencing veniremen, *petit* jurors or potential witnesses, since such statements are not subject to the evidentiary and other gatekeeping functions routinely performed by the judiciary during judicial proceedings.[16]

Contrast Leiser's statements, which, although critical of decisions of the state trial and appellate courts, were contained within *appellate pleadings* filed in the clerk's office and related to *concluded civil* proceedings. Although pleadings are available to the public for review upon request, in the typical case, their only likely audience consists of the parties, their counsel, the judges and their law clerks, rather than newspaper readers, television watchers, and the potential veniremen, jurors or witnesses included therein. Nor does there exist a credible concern that Leiser's statements critical of the judiciary, contained within his appellate

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[as a court's alleged bias] to assure the client's right to a fair trial and the integrity of our system for administering justice." *Id.* at 872 F.2d 1, 5. It also admonished that, "[t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Id.* at 3, quoting *In re Little,* 404 U.S. 553, 555 (1972), in turn quoting *Brown v. United States*, 356 U.S. 148, 153 (1958).

[16] The disciplinary rules at issue in *Middlesex* bear this out. At issue was a rule stating, "[a] lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice," and a second rule prohibiting "*extrajudicial statements by lawyers associated with* the prosecution or defense of *a criminal matter*." *Id.* at 457 U.S. 423, 428 (emphases added).

pleadings, pose a risk of creating an *improper* influence on the fair administration of justice. After all, criticisms of judicial decisions and the reasoning supporting those decisions are most appropriately published in legal pleadings—in particular, motions to reconsider, appellate briefs and petitions for rehearing—which are precisely the right form published in precisely the appropriate forum that is responsible for correcting judicial errors.

The lesson SCV's fallacious *Pilli* and *Anthony* opinions teach is *context matters.* Statements published in written pleadings filed with the clerk's office do not implicate the same concerns as statements published at a press conference. It is undeniable that the court, itself, always serves as the appropriate forum in which to advocate a client's position, and to raise criticisms of erroneous rulings, decisions or judicial reasoning. That is the very function of legal pleadings. And those criticisms are directed at the very institution that can evaluate and either refute or remedy them.

Moreover, despite the risk that the extra-judicial statements at issue in *Gentile* and *Sawyer* purportedly posed to the fair administration of justice, SCOTUS reversed those state-court disciplinary decisions, and held that the attorneys' statements were protected speech under the 1st Amendment.[17] In light of those reversals, *a fortiori*, the imposition of sanctions against Leiser for statements

[17] The *Sawyer* court found it significant that the speech at issue did not mention the judge by name. *In re Sawyer*, 360 U.S. 622, 634. That is also true of Leiser's statements at issue. Even the DISSENT, in *Sawyer*, which would have upheld the disciplinary sanction imposed, conceded, "[c]ertainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." *Id.* at 669. The *Middlesex* court abstained under *Younger* and therefore did not reach the merits of the constitutional challenge presented in that case.

contained within appellate pleadings, concerning already-concluded civil lawsuits, cannot be upheld consistently with the dictates of the 1st Amendment.

EDVA observed that "courts around the country" have adopted rules analogous to Rule 8.2 ". . . and [Leiser] points to no decision finding the rule to be unconstitutional." **(App. 6)**. It cited to *In re Evans*, 801 F.2d 703 (CA4 1986), an appeal of a disbarment proceeding in which a MD disciplinary rule rather than a VA rule was at issue. *Evans*, which predated by 14 years Virginia's adoption of Rule 8.2, is not dispositive of Leiser's case, notwithstanding EDVA's overly-simplistic reasoning that, because it was decided by CA4, *Evans* is binding authority for this case. **(App. 14)**.

It is telling that the *Evans* court cited not a single decision of SCOTUS in support of its reasoning that the MD disciplinary rule at issue there was constitutional. Nor did it conduct a strict-scrutiny constitutional analysis of the rule. Instead, it relied on various sister *state* appellate court decisions from IL, KY NM and NY.[18] Its sole rationale for upholding the constitutionality of the MD rule at issue appears to have been that, since its sister states' appellate courts had held their own disciplinary rules prohibiting criticism of judges constitutional, CA4 should hold MD's rule constitutional as well. Glaringly absent from the *Evans* court's opinion was any analysis of the various state appellate courts' authoritative constructions of their disciplinary rules, in order to conduct an apples-to-apples

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[18] None of which was binding authority, and the majority of which are more than 100 years old and therefore decided before SCOTUS's *NYT* and *Garrison* decisions, and thus could not have analyzed their rules within the jurisprudential framework mandated by those seminal 1st Amend. decisions.

comparison with the MD rule then under consideration. In addition to that analytical failure, the *Evans* court declined to consider that the appellate courts of the other states whose rules it relied upon had precisely the same self-interest as those in MD (and VA): to insulate those states' judges from criticism by the attorneys who practice before them.

Nor did the *Evans* court discuss the threshold question of law—whether the challenged statements were statements *of fact*. Likewise, there was no discussion of the "evidence" supporting the conclusion that the statements at issue there were *false*. Instead, the *Evans* court emphasized the absence of evidence produced *by the respondent*, to establish the truth of his statements. It also fell silent when it came to addressing the constitutional imperative that the statements must be evaluated on a case-by-case basis, in order to ascertain whether they did in fact create a substantial likelihood of material prejudice to the fair administration of justice.[19]

X. CONCLUSION

WHEREFORE, Applicant, PHILLIP B. LEISER, respectfully moves this Honorable Court for entry of an injunction pending appeal, prohibiting Respondents from enforcing VRPC 8.2 against him—whether directly, or indirectly through its enforcement of Rule 8.4(b)—until such time as this Court has had the opportunity to consider whether to grant *certiorari*.

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[19] Respondents also improperly relied upon *ACLU v. Bozardt*, 539 F.2d 340 (CA4 1976), which did not involve political speech, but rather, largely commercial speech coupled with conduct—solicitation of prospective clients for legal business. Similarly, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) is inapposite because it involved a 1st Amendment challenge to a town ordinance prohibiting nude dancing, which qualifies as artistic expression and commercial activity—speech that occupies lower rungs on the 1st Amendment ladder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip B. Leiser, *pro se*, do hereby certify that I am a member of the Bar of this Court and that I have, on the 22nd day of June 2026, caused a copy of Applicant's **Emergency Application for Injunction Pending Appellate Review**, along with the **Appendix** thereto, to be served by email and through USPS, by Priority two-day mail, postage pre-paid, to:

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Dated 6/22/26

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COPY

No. ____

In the
Supreme Court of the United States

PHILLIP B. LEISER,

Applicant,

v.

CLEO E. POWELL, *et. al.*,
(sub. nom. S. Bernard Goodwyn)
In her official capacity as Chief Justice of the Commonwealth of Virginia

Respondents.

CERTIFICATE OF SERVICE

I, Phillip B. Leiser, *pro se*, do hereby certify, pursuant to S. Ct. Rule 29.5, that I am a member of the Bar of this Court and that I have, on the 22nd day of June 2026, caused a copy of Applicant's **Emergency Application for Injunction Pending Appellate Review**, along with the **Appendix** thereto, to be served by email and by USPS Priority two-day mail, postage pre-paid, to:

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Additional material from this filing is available in the Clerk's Office.