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IN THE SUPREME COURT
OF MARYLAND

ATTORNEY GRIEVANCE COMM'N	*	
Petitioner,	*	
		Misc. Docket AG No. 01
v.	*	
		September Term, 2022
ASHER N. WEINBERG	*	
Respondent.	*	

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Respondent Asher N. Weinberg, by undersigned counsel, respectfully submits this Supplemental Memorandum for this Court's consideration.

SUPPLEMENTAL EXCEPTION[*]

Following well-established pronouncements of the United States Supreme Court, federal appellate courts as diverse as the Fourth and Ninth Circuits have recognized the need for judicial restraint when asked to sanction lawyers for criticizing the Judiciary. Quite recently, the Fourth Circuit invalidated a criminal statute with some of the same constitutional infirmities contained in MARPC 8.2(a).

Sharing similar language to this rule, N.C. GEN. STAT. ANN. § 163-274(9) imposed criminal sanctions upon those who "circulated derogatory reports with reference to any

[*] Based upon a very recent decision from the United States Court of Appeals for the Fourth Circuit, there appears to be growing concern over the constitutional validity of ethical rules used to sanction judicial critics. This concern has prompted Respondent to raise this supplemental exception.

candidate in any primary or election, *knowing such report to be false or in reckless disregard of its truth* ***or*** *falsity*." *Id*. (emphasis added). "[B]y its plain terms," the Fourth Circuit observed that "this statute also criminalizes *truthful* derogatory statements so long as the speaker acts 'in reckless disregard of [a statement's] truth or falsity.'" *Grimmett v. Freeman*, 59 F.4th 689, 692 (4th Cir. 2023). Considering the Supreme Court's repudiation of similar rules which "direct[ed] punishment for true statements made with actual malice," *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964), the "chilling effects on truthful speech" imposed through language that would penalize "at least some truthful statements" required the same treatment. *Grimmett*, 59 F.4th at 692.

Beyond this key defect, a statute or rule implemented by certain public officials to punish derogatory statements against them "raises the 'possibility that official suppression of ideas is afoot.'" *Id*. at 695-96, *quoting R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Observing the statute's "careful limitation to only a subset of derogatory statements" to which these "officials may be particularly hostile," *id*. at 695, the court held that "the Act's limitation to speech addressing only certain topics" or public officials amounts to "textbook content discrimination" which "renders it facially unconstitutional." *Id*. at 694-96.

The same is true for identical language in MARPC 8.2(a). Adopted by judges to penalize lawyers who may impugn "the qualifications or integrity of a judge," this particular rule discriminates against their critics while commenting that "attorneys are

encouraged to continue traditional efforts to *defend judges* and courts." MARPC 8.2(a), Comment [2] (emphasis added). That is textbook content discrimination. *Cf*. *Grimmett*, 59 F.4th at 694.

The danger of "official suppression of ideas" is particularly strong given the content of the rule itself. Applied by judges who may identify with colleagues under attack, courts must exercise enormous restraint when passing judgment on their critics. Rather than examine the merits of their complaints, judges react instead to their tone and often presume the falsity of statements critical of their colleagues.

Like the court below, one lower court did the same in response to a similar string of invective uttered by the respondent in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1994). Describing a federal judge's "penchant for sanctioning Jewish lawyers" as "evidence of anti-semitism," StephenYagman voiced "criticism more pungent than judges are accustomed to":

> It is an understatement to characterize the Judge as "the worst judge in the central district." It would be fairer to say that he is ***ignorant***, ***dishonest***, ***ill-tempered***, and a ***bully***, and probably is ***one of the worst judges in the United States***. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this ***buffoon*** that they would run for cover. One might believe that some of the reason for this ***sub-standard human*** is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend ..., like the Judge, is ***a right-wing fanatic***.

Id. at 1434 nn. 3, 4 (emphasis added). After telling a reporter for the *Los Angeles Daily Journal* that this jurist was also "drunk on the bench," Mr. Yagman even placed an

advertisement in this legal newspaper for the purpose of "gathering evidence concerning sanctions imposed" by U.S. District Judge William D. Keller. *Id*. at 1434.

Disturbed by these inflammatory statements, Judge Keller believed that the lawyer's "campaign of harassment and intimidation challenges the integrity of the judicial system" and claimed to have "clear evidence that Mr. Yagman's attacks upon me are motivated by his desire to create a basis for recusing me in any future proceeding." *Id*. at 1435. In his view, "[t]he Standing Committee on Discipline should take action to protect the Court from further abuse." *Id*.

The Standing Committee obliged and so did Judge Keller's District Court colleagues. Suspending the lawyer's privilege to practice before that court, a three-judge panel expressed "the concern that verbal attacks tend to discredit the courts and weaken the effectiveness of the judicial process." *Standing Committee on Discipline v. Yagman*, 856 F. Supp. 1384, 1389 (C.D. Cal. 1994). "[W]hile a lawyer may, *in a proper tone* and *through the appropriate channels*, attack the integrity or competence of a court or judge," the panel punished Mr. Yagman for what they presumed to be "unfounded charges." *Id*. (emphasis added).

Rather than require the Committee to prove the falsity of his remarks, the panel shifted the burden of proof to the respondent. Despite his direct experience with Judge Keller, and similar experiences on the part of other lawyers, the lower court felt that "[a]necdotal evidence regarding the experiences of several is insufficient given the

gravity of the charge." *Id*. at 1391.

"In the absence of supporting evidence, the Panel presumes that these charges are false and that Respondent lacked an objectively reasonable basis for expressing them." *Id*. Though conceding the "overbreadth" of a local rule which "sweeps within its coverage protected activities" by punishing "any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice," the lower court used it anyway. *Id*. at 1389.

"By presuming falsity, the district court 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 the Supreme 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.

No such peril resulted from Mr. Yagman's statements. Although his vitriol "was harsh and intemperate, and in no way to be condoned," *id*. at 1443, the appellate court exercised the restraint mandated by the First Amendment. Rather than censor speech which the court found 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.

Loose lips may sink ships, but using "language in a 'loose, figurative sense,'" "rhetorical hyperbole," and nasty "name-calling" are not sanctionable. *Id*. at 1438, 1440 n.17, *quoting 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); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 1537, 1541 (1970) ("blackmail" accusation not construed as factual allegation of crime).[2]

As offensive as they may be, even "lusty and imaginative" expressions of contempt for a "dishonest" judge may constitute protected speech. *Letter Carriers*, 418 U.S. at 286. Used within a "string of colorful adjectives," the Ninth Circuit took Mr. Yagman's

[2] This is precisely the type of loose language Mr. Weinberg used when stating that Judge Alban was "complicit in kidnapping" and "corrupt."

allegations of "dishonesty" to mean "intellectually dishonest"—"an accusation that Judge Keller's rulings were overly result-oriented. Intellectual dishonesty is a label lawyers frequently attach to decisions with which they disagree." *Yagman*, 55 F.3d at 1441. Far from posing a "clear and present danger" to the administration of justice, the court found the lawyer's allegations to be "constitutionally immune from sanctions" and dismissed the case against him. *Id*.

This result is even more appropriate in Mr. Weinberg's case. Rather than spread his views as widely as Mr. Yagman, Mr. Weinberg limited his loose language to an insular group of lawyers and judges that were far less likely to take it literally. *See* Conclusions at 35; Respondent's Exceptions at 39 (sharing views with "a group of reasonably prudent lawyers and judges hardly impaired anyone's confidence in the judicial system").

Although his tone was harsh, intemperate, and should not be condoned, *cf. Yagman*, 55 F.3d at 1443, the record below provides far greater grounds for Mr. Weinberg's rebuke than those introduced on behalf of Mr. Yagman. But like the hearing judges in *Yagman*, Judge Dumais presumed falsity, shifted the burden of proof to the party charged, and failed to examine the merits of his complaint. Erroneously concluding that such questions were "not before the Court," Conclusions at 16, she attended to the reckless *tone* of his comments and ignored their substance.

Unlike Mr. Yagman, who took his complaints to the largest legal newspaper in the

State of California, Mr. Weinberg directed his grievances to much more appropriate channels – the chief administrative judge of the Circuit Court and the judges themselves. *Cf. Yagman*, 856 F. Supp. at 1389 (failed to go "through the appropriate channels" to "attack the integrity or competence of a court or judge"). Though he thought about launching a more public campaign, the fact remains that he *did not do so*. T2:57, 148.

At bottom, judges must exercise great restraint when asked to punish those who brazenly attack their brethren. As Justice Douglas once wrote, the law was "not made for the protection of judges who may be sensitive to the winds of public opinion" or even to the criticism of the lawyers appearing before them. *Craig*, 331 U.S. at 376. "Judges are supposed to be [people] of fortitude, able to thrive in a hardy climate." *Id*. They must also follow the law to protect speech which they may personally disdain. To do otherwise would, indeed, be prejudicial to the administration of justice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2023, a copy of the foregoing was served via MDEC upon:

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