No. 23-747

In The
Supreme Court of the United States

MARYLIN PIERRE,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MARYLAND

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICUS CURIAE*

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals engaged in constitutionally protected expression and association.[1] FALA's members practice throughout the United States, resisting government censorship and intrusion on speech in defense of First Amendment freedoms.

Given the nationwide span of their experience and the particularized nature of their practices, FALA attorneys are uniquely poised to comment on the important constitutional issues raised in this case.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Amicus curiae certifies that it has given proper notice as required by Supreme Court Rule 37.2.

SUMMARY OF ARGUMENT

Attorneys are entitled to the full protections of the First Amendment. Those rights are not limited just because attorneys hold Bar cards. Rather, unique limitations are properly imposed *only* where attorney speech interferes with the administration of justice. But even under such circumstances, the First Amendment still requires protection of speech rights in accordance with the standards adopted in *New York Times v. Sullivan*, 376 U.S. 254 (1966).

The *Sullivan* standard, set forth decades ago, has withstood the test of time: *Sullivan* requires the government to prove, by clear and convincing evidence, that the speaker was at least reckless regarding the proven falsity of the statement.

In the public imagination, lawyers are encouraged to forcefully critique (and thereby better) our political and judicial processes. But as it now stands, hundreds of thousands of lawyers[2] operate under regimes much different from what the public may believe: lawyers stand ready to lose their livelihood, in many states, if the government deems a controversial opinion to be unfounded. In those States, lawyers have an overriding self-interest to refrain from publicly stating anything that could be perceived as negative about any topic, public figure, or judicial action. This

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[2] According to the American Bar Association, there are 1.3 million attorneys in the United States. *See* American Bar Association, *ABA Profile of the Legal Profession*, https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/profile-of-the-profession-report/ (last accessed 1/18/24).

reality stifles the free exchange of ideas, chills valid criticism of government officials, and deters improvements to the administration of justice.

Lawyerly public discourse benefits the public interest. Lawyers are trained to say what others, of more timid character, might not. No less so than politics, the practice of law is—and should always remain—a contact sport. *Cf. United States v. Cronic*, 466 U.S. 648, 656 (1984) (noting the vital importance of ideas, in litigation, "to survive the crucible of meaningful adversarial testing").

Government actors seeking to punish lawyers for their expression should have to prove liability. The pre-existing First Amendment standard properly balances the competing interests of preserving public confidence in the legal system and ensuring its integrity. But a preponderance of jurisdictions have upset that balance and, as a result, chilled lawyers' protected speech. This blots out the sun and lets the rot grow.

ARGUMENT

A. The Court Should Specifically Hold that the *New York Times v. Sullivan* Standard is Applicable to Attorney Disciplinary Matters

The Court should clarify that attorney disciplinary proceedings based on protected speech must satisfy the standards in *New York Times v. Sullivan*, 376 U.S. 254 (1966). That standard would require disciplinary

boards to prove that a lawyer's statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. While the American Bar Association Model Rules of Professional Conduct ostensibly incorporate this standard, various jurisdictions have ignored it. *See* Petition at 16 n. 7.

The *Sullivan* standard must apply to speech by attorneys about the judiciary. *Sullivan* instructs that the First Amendment prohibits governments from punishing merely erroneous reports about officials. *Id.* at 279-83. Cases that hold to the contrary, as catalogued by Petitioners, "reflect the obsolete doctrine that the governed must not criticize their governors." *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

Sullivan emphasized the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Id* at 270. Soon after *Sullivan*, this Court noted the "practically universal agreement that a major purpose of" the First Amendment is "to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . ." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). "First Amendment protection is 'at its zenith'" when applied to "core political speech." *Meyer v. Grant*, 486 U.S. 414, 420, 425 (1988).

There is an ongoing debate concerning the wisdom of the *Sullivan* Court's federalization of libel law. *See, e.g., McKee v. Cosby*, 139 S.Ct. 675, 675-676 (2019)

(Thomas, J., concurring in denial of certiorari, citing several post-*Sullivan* concurrences of Justice White). But one thing is beyond cavil: State governments, including Bar associations, have a definite obligation, to observe First Amendment constraints in at least in *some* meaningful manner. Government censorship, in the name of inculcating lawyers with civility, strains the golden thread of self-government. That thread depends upon the unfettered expression of *honest opinions*—often in courts and about courts, by and through *lawyers*.

Courts themselves rely on such candor. Hence the tradition of publishing opinions, which dates to at least the medieval era. *See* Henrici Bracton, *De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England") (c. 1235). This continuing tradition promotes integrity of results and, in turn, supports public confidence in the judges who serve the public. Not all published judicial comments are positive; some are decidedly negative: "I believe judges need to say more, not less, to the political branches about the serious deficits in our criminal justice system." *United States v. Adams*, 788 F. 3d 115, 117 (4th Cir. 2015) (Davis, Sr. Cir. J., concurring). Lest we forget, sitting judges—full of opinions, and eager to publicize them—are nearly all lawyers too. With time, other outspoken, opinionated lawyers will eventually fill the ranks of the judiciary.

While revered for his honesty[3] as a humble

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[3] The Great Emancipator was quoted as saying: "If in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation…." Abraham Lincoln, "Fragment from a Law Lecture," Collected Works of Abraham Lincoln (Univ. of Mich. 1953), Vol. 2, p. 59-60.

country lawyer. Abraham Lincoln, was not above the political fray and could throw a few sharp elbows when needed. One ponders whether, under current jurisprudence, Lincoln's Illinois Bar license would have survived the Lincoln-Douglas debates. After all, Lincoln repeatedly called incumbent Senator Stephen Douglas "The Judge," and impertinently accused Douglas of seeking to make slavery legal throughout the United States. Douglas refused to argue whether slavery was right or wrong and went on to defeat Lincoln in the 1858 Illinois United States Senate election. *See generally* Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery (2011) (winner of the 2011 Pulitzer Prize - History).

Should we, like Lincoln, have "confidence in the power of free and fearless reasoning?" *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). One should hope so. "If liberty means anything at all, it means the right to tell people what they do not want to hear." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321 (2023) (internal quotation and citation omitted).

Justice Brandeis spoke eloquently on this subject, in relation to lawyers:

> [T]he paramount reason why the lawyer has played so large a part in our political life is that his training fits him especially to grapple with the questions which are presented in a democracy…. His profession rests upon the postulate that no contested question can be properly decided until both sides are heard….
>
> The ordinary man thinks of the Bar as a body of men who are trying cases….

> But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters….

Louis D. Brandeis, *The Opportunity in the Law, Address Before the Harvard Ethical Society at Phillips Brooks House*, Cambridge, Massachusetts (May 4, 1905) (available at http://www.minnesotalegalhistory project.org/assets/Brandeis%20-%20%20(1905).pdf) (last visited January 21, 2024).

Society benefits when lawyers make their well-informed perspectives known. That is no less true when attorneys speak about the actions and competency of the Judiciary and the legal system. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034–35 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment…. The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.").

Our method of self-government requires toleration of different viewpoints. This Court has long held that "sitting in judgment on" a supposedly "misbehaving lawyer" calls for forbearance. *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.").

The *Sullivan* standard, no more and no less, frames the appearance of justice in the context of lawyers' free expression.

1. Bar punishments are government penalties

When a Bar grievance committee issues a punishment, it has engaged in a government-backed penalty. When that punishment implicates speech rights, lawyers merit First Amendment protection. All such government-backed penalties for speech "must be measured by standards that satisfy the First Amendment." *Sullivan* at 269. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. Government has almost no valid interest in suppression of professional speech

The First Amendment protects "professional" speech. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). This Court has consistently reaffirmed that First Amendment rights of professionals may be limited only in two narrow contexts:

> [T]his Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals. This Court… has been especially reluctant to exemp[t] a category of speech from the normal

> prohibition on content-based restrictions…. afford[ing] less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial speech. Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech.

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371-72 (2018) (internal citations and quotations omitted).

The Court should now clarify that such protection includes attorneys' speech. Lawyers' public utterances often address their professional activities—which necessarily revolve around public policy itself. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 256 (concluding that the First Amendment protects "the official expression of a self-governing man's judgment on issues of public policy," a freedom that "must be absolutely protected"). "The guarding of the freedom of public discussion is a preliminary step in the unending attempt of our nation to be intelligent about its own purposes." Alexander Meiklejohn, Free Speech and its Relation to Self-Government 106 (1948).

3. The Judiciary regularly and rightly exercises Free Speech without sanction

Very recently, a sitting federal judge, Roy Altman, wrote and gave speeches regarding the current Israel-Hamas war. He took pains to do so only in his personal capacity, but he also alluded to his service as a lawyer—and as a judge—to establish that his professional experience informed his opinions.

The media reported on the public controversy. *See* Jacqueline Thomsen, Outspoken Federal Judge Condemns Antisemitism's 'Moral Rot' Bloomberg Law (Nov. 9, 2023, 10:20 AM EST; Updated: Nov. 9, 2023, 6:26 PM EST), https://news.bloomberglaw.com/us-law-week/outspoken-federal-judge-condemns-antisemitisms-moral-rot. But as Judge Altman rightly commented, "when federal judges are sworn in, they 'didn't give up [their] First Amendment right to talk about—maybe even shed light on—the important issues of our time.'" *Id.*

Justice Brandeis and Professor Meiklejohn would both say that Judge Altman appropriately, and meaningfully, contributed to public discourse. In doing so, Judge Altman articulated perhaps-controversial views. But his *choice* to express himself is controversial only to those who expect only pablum from a practicing lawyer or a sitting judge. Is Judge Altman's speech sanctionable by government, without regard to First Amendment protection? That is what the Court should clarify here.

Free Speech is no less expansive for lawyers (and others) who are *not* judges. Thus, "the centuries-old maxim *cogitationis poenam nemo patitur* (no one is

punishable solely for his thoughts) permeates our law." *United States v. $11,500.00 in United States Currency*, 869 F. 3d 1062, 1075 (9th Cir. 2017). "Even in its capacity as educator the State may not assume an Orwellian 'guardianship of the public mind'…. ." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 286 (1988) (Brennan, J., with whom Marshall, J., and Blackmun, J., join, dissenting) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

The Petitioners in the instant case are not the only outspoken attorneys who have faced Bar ethics sanction for controversial statements on matters of public interest. Attorney Marla Brown, who FALA member Krista Baughman represented, was forced to defend herself in a recent Bar proceeding for political statements having nothing to do with any ongoing case or court proceeding:

> "A Los Angeles attorney who posted 'shoot the protesters' on social media during racial justice demonstrations …. has persuaded a California judge that she should not be sanctioned. Judge Dennis Saab of California's state bar court on Tuesday said state bar prosecutors had not established that Marla Brown meant to incite violence or a riot with a series of posts she made…. Krista Baughman… who represented Brown, said in a statement that Saab's decision is a victory for 'all California attorneys who wish to exercise their free speech rights without fear of punishment.' … The state bar in March

> charged Brown with four counts of professional misconduct, including moral turpitude…. Saab found that Brown's social media posts were 'unbecoming of an attorney,' but also that she posted 'in her capacity as a private citizen' and that her posts were 'completely unrelated to the practice of law.'"

David Thomas, *Lawyer who said George Floyd protesters should be shot wins ethics trial*, Reuters (October 4, 2023, 2:55 PM), https://www.reuters.com/legal/legalindustry/lawyer-who-said-george-floyd-protesters-should-be-shot-wins-ethics-trial-2023-10-04/.

In Brown's court case, the headings in the State Bar of California's brief made its constitutional interpretation quite clear: "The First Amendment does not Shield Respondent's Misconduct . . . Statements Imbued in Falsity do not Enjoy Constitutional Protection." In the Matter of Marla A. Brown, The State Bar Court of the State Bar of California, Case No. SBC-23-O-30270-DGS [State Bar's Closing Brief, 7/28/23 at 15] accessible on-line at https://discipline.calbar.ca.gov/portal/DocumentViewer/Index/YTjKffwuS2oU93--UibgyIboxlfr8yT1mHrQPpN9wBVkVhBbnXMUuwjxqb__h2_gaLYH5TTlfAjwEqcpBY4jqO7E8sknOH3gPVDblOvij-w1?caseNum=SBC-23-O-30270&docType=Pleading&docName=Brief&docTypeId=269&isVersionId=False&p=0

In support, the California Bar's brief cited *In the Matter of Dixon* (1999) 4 Cal. State Bar Ct. Rptr. 23.

And though *Dixon* never adopted anything like an "imbued with falsity" standard, decisions like *Dixon* are readily subject to misinterpretation. For example, the Missouri Supreme Court, in *In re Westfall*, 808 S.W.2d 829, 366-67 (Mo. 1991), stated that "an attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary." *Id.*

If regulators silence expression of the informed opinions of lawyers—which is lawyering itself—they silence justice. Attorneys speak, associate, and petition to invoke law, enable judicial power, and obtain justice.

This Court consistently shows humility about what the future may hold, and willingness to revisit and refine its rulings: "I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'" *Denver Area Ed'l Telecomm's Consortium, Inc. v. FCC*, 518 U.S. 727, 777 (1996) (Souter, J., concurring) (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L. J. 1743, 1745 (1995)).

Here, something important remains unresolved. "The Supreme Court has addressed numerous First Amendment issues involving lawyers, of course, but in all of them has declined to consider directly the central conceptual issue of whether lawyers possess diminished free expression rights, as compared with ordinary, non-lawyer citizens." W. Bradley Wendel, "Free Speech for Lawyers," 28 Hastings Const. L.Q. 305, 305 (2000-2001). Thus, remaining "unanswered... is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys

acting in their official capacity." *Id.; see generally* Margaret Tarkington, Voice of Justice: Reclaiming the First Amendment Rights of Lawyers (Cambridge Univ. Press 2018); Margaret Tarkington, "A Free Speech Right to Impugn Judicial Integrity in Court Proceedings," 51 B.C. L. Rev. 363 (2010); Margaret Tarkington, "The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation," 97 Geo. L.J. 1567 (2008-2009); Terri Day, "Speak No Evil: Legal Ethics v. the First Amendment," 32 J. Legal Prof. 161 (2008); Brian E. Mitchell, "An Attorney's Constitutional Right to Have An Offensive Personality - United States v. Wunsch and Section 6068(f) of the California Business and Professions," Code 31 U.S.F. L. Rev. 703 (1996-1997); Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action, 12 ALR3d 1408; Lindsey Keiser, "Lawyers Lack of Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights," 28 Geo. J. Legal Ethics 629 (2015).

Professor Tarkington explains, in A Free Speech Right to Impugn Judicial Integrity in Court Proceedings (citations removed), at 365-66:

> Notably, in…. cases where attorneys have been sanctioned for their speech, the arguments the attorneys made, though perhaps inartful and sometimes exaggerated, were relevant to a claim, argument, or motion before the court. Attorneys have been sanctioned in both criminal and civil cases for impugning judicial integrity for…. seeking recusal or disqualification…. claims filed against

> judges, arguments that a litigant or criminal defendant was denied due process… and arguments regarding judicial incompetence…. [S]anctions imposed have been severe [and sometimes] imposed on the client as well…. Indeed, citing one such case, the Utah Supreme Court warned criminal defense attorneys to be wary of the "pitfalls" that accompany making arguments that a criminal defendant was denied due process because of a biased judge.

CONCLUSION

Legal ethics sanctions for attorneys expressing sincere but controversial ideas violate the First Amendment. Lawyers must not be subject to such speech-chilling ethics regimes as now exist, which deny First Amendment protection for attorneys' individual opinions expressed about matters of public interest. This Court should clarify that such sanctions regimes have no place in a nation committed to open discourse.

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