No. 17-54

In The
Supreme Court of the United States

STEPHEN O. CALLAGHAN,

Petitioner,

v.

WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Rule 4.1(A)(9) of the West Virginia Code of Judicial Conduct and Rule 8.2(a) of the West Virginia Rules of Professional Conduct violate the First Amendment right to free speech on their face or as applied to Petitioner Callaghan by the Supreme Court of Appeals of West Virginia.

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The decision of the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court" or "State Supreme Court") giving rise to the Petition is reported in *In the Matter of Callaghan*, 238 W. Va. 495, 796 S.E.2d 604 (2017). It is also attached to the Petition for Writ of Certiorari as Appendix ("P. App.") A and B. The case was filed with the State Supreme Court and heard by the West Virginia Judicial Hearing Board ("JHB"). The JHB's recommendations to the West Virginia Supreme Court are unreported but are reproduced in P. App. E.

JURISDICTION

The State Supreme Court filed its opinion on February 9, 2017 (P. App. A, B). This Court has jurisdiction to review the final judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1257(a) provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the

> validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The First Amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech."

West Virginia Code of Judicial Conduct ("WVCJC") 4.1 provides in part:

> (A) Except as permitted by law, or by Rules 4.2, 4.3 and 4.4, a judge or a judicial candidate shall not: . . .
>
> (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement; . . .

WVCJC 4.2 provides in part:

> (A) A judge or candidate subject to public election shall:
>
> (1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary; . . .
>
> (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule

> 4.4, that the candidate is prohibited from doing by Rule 4.1; and . . .

West Virginia Rule of Professional Conduct ("WVRPC") 8.2 states:

> (a) 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

STATEMENT OF THE CASE

On May 11, 2015, Petitioner filed pre-candidacy papers with the West Virginia Secretary of State's Office ("WVSOS") to run for Judge (11/21/16 JHB Hearing Transcript ("Tr.") 11; 11/21/16 JHB Joint Exhibit No. "Exhibit" 18). On November 24, 2015, Judicial Investigation Commission ("JIC") Executive Assistant Mary Pamela Schafer sent a letter to all non-judge candidates, including Petitioner, advising them of the State Supreme Court's adoption of WVCJC Rule 4.1 (Exhibit 23).

On January 14, 2016, Petitioner filed his candidacy papers with the WVSOS to run for judge (Tr. 11; Exhibit 18). His opponent was the Honorable Gary L. Johnson, Judge of the 28th Judicial Circuit. Judge Johnson was the incumbent, having served as circuit

judge for 24 years. On May 10, 2016, Petitioner defeated Judge Johnson 3,472 votes (51.69%) to 3,245 votes (48.31%) (Tr. 11-12; Exhibit 19).

On June 24, 2016, the JIC unanimously voted to issue a formal statement of charges against Petitioner (P. App. F). The charges were filed on July 15, 2016, and centered on a campaign flyer ("Obama flyer") issued by Petitioner (P. App. A at 75a-76a). The JIC charged Petitioner with six WVCJC violations, the most serious of which were Rules 4.1(A)(9), 4.2(A)(1) and 4.2(A)(4).[1] Petitioner was also charged with violating two provisions of WVRPC 8.2, the most serious of which was 8.2(a).[2]

Paragraph 13 of the charges outlined in exhaustive detail a description of the Obama flyer. (P. App. F 147a-148a). In his August 15, 2016 verified answer, Petitioner admitted the contents of the flyer but denied that it was "wrongful," "intended to deceive," or that it was designed to convey that Judge Johnson and Barack Obama were "conniving with one another to kill coal mining jobs in Nicholas County" (Exhibit 3). Petitioner also denied violating the WVCJC or WVRPC

[1] Petitioner was also charged with violating Rule 4.1(B) which was dismissed by the JHB as being redundant. He was also charged with violating Rule 4.2(A)(5) which the JHB dismissed for insufficient evidence. Judicial Disciplinary Counsel ("JDC") did not contest these rulings on appeal to the West Virginia Supreme Court. Finally, he was charged with violating Rule 4.2(A)(3), a charge which was dismissed by the JHB at hearing upon Motion of Judicial Disciplinary Counsel.

[2] A Rule 8.2(b) charge was dismissed by the JHB at hearing as redundant, and JDC did not contest this ruling.

(Exhibit 3). Instead, Petitioner generally asserted that the content of the flyer was speech that was protected by the First Amendment (Exhibit 3).

Paragraph 14 addressed the Obama flyer's posting on Petitioner's personal and campaign Facebook pages (P. App. F 148a). Petitioner admitted in his verified answer the allegations contained in this paragraph but denied any violations of the WVCJC or WVRPC (Exhibit 3).

Paragraph 15 discussed opposition research conducted by Rainmaker, Inc., for Petitioner and the news article and press release it found concerning Judge Johnson's attendance at the D.C. conferences (P. App. F. 148a-149a). Petitioner admitted the contents of Paragraph 15 in his verified answer and again denied any violation of the WVCJC or WVRPC (Exhibit 3). Petitioner admitted that "while he used Rainmaker, Inc., to assist him in his campaign, Petitioner personally is responsible for the content of all advertising materials paid for by his election committee" (Exhibit 3).

Paragraph 16 addressed the Obama flyer's falsity by utilizing information from the actual attendees to the CIP and child trafficking conferences (P. App. F. 149a-150a). In his verified answer, Petitioner claimed that he was without sufficient information to admit or deny the allegations and therefore denied them (Exhibit 3). However, just prior to hearing, Petitioner stipulated that the JDC testimony of Nikki Tennis, former Director of Children's Services for the West Virginia Supreme Court; West Virginia State Police Lt. D.B.

Swiger; Cortney Simmons; and Sue Hage supported the contentions contained in Paragraph 16 (Exhibits 21, 22, 24-26). The joint stipulations were admitted into evidence.

Paragraph 17 discussed Judge Johnson's non-involvement in any loss of coal mining jobs in Nicholas County (P. App. F 150a). Petitioner said he was without sufficient information to admit or deny the allegations and therefore denied them (Exhibit 3). Judge Johnson then testified at the hearing concerning the statements. Judge Johnson testified that the statements in the Obama flyer were "patently false" (Tr. 119). No evidence was introduced at hearing that Judge Johnson had any involvement in the loss of coal mining jobs in Nicholas County; that he had any involvement in policymaking decisions by President Obama concerning coal; or that Judge Johnson had ever taken any public position regarding any policies by President Obama having any impact on the coal industry. Additionally, evidence was presented that Judge Johnson never publicly supported or opposed President Obama's policies because he would then be in violation of WVCJC Rule 2.10(B), which states that "[a] judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office" (Tr. 109-110, 121-122).

Brad Heflin from Rainmaker, Inc., also testified at hearing. Mr. Heflin has been an account executive at Rainmaker for four years and worked on Petitioner's

judicial campaign from December 2015 through May 10, 2016 (Tr. 68, 71). Mr. Heflin testified that he conducted opposition research on Judge Johnson and found a press release from the State Supreme Court about his attendance at a child trafficking conference sponsored by the Federal Administration for Children and Families in Washington, D.C. on June 10, 2015 (Tr. 74; Exhibit 7). He also found an online news article about Judge Johnson's attendance at the conference[3] (Tr. 74-75; Exhibit 8). Neither the press release nor the online news article mentioned President Obama being in attendance at the conference or that Judge Johnson met him there (Tr. 74-75; Exhibits 7, 8). Mr. Heflin also said that he obtained President Obama's schedule from the Chicago Sun Times for June 10, 2016 (Tr. 75). Mr. Heflin said that the schedule had the President at the White House on the day in question, but it did **not**

[3] On page 4 of his Petition, Petitioner states that "[t]he child trafficking event was 'at the White House,' as described on official government websites by Valerie Jarrett, then-Senior Advisor and Assistant to the President, and ACF's then-Acting Assistant Secretary." This evidence was never adduced below and is not part of the information found in the record nor was it part of the opposition research considered by Petitioner in formulating the poll question or the Obama flyer. Petitioner has engaged in a disturbing trend of continuing to attempt to introduce evidence into a closed record. For example, in his brief before the State Supreme Court, Petitioner attached an affidavit from Mark Mellman, President of the Association of Political Consultants, and two articles in an effort to establish that Exhibit 6 was not a push poll as was found by the JHB. However, like the Jarrett information, the affidavit and articles were never disclosed, introduced into evidence, or properly considered by the JHB (Callaghan 12/28/16 State Supreme Court Brief).

state that he would be in attendance at the child trafficking conference (Tr. 75-76) (emphasis added).

Neither Mr. Heflin nor Petitioner ever talked to the authors of the press release,[4] nor did they speak about the trip with Judge Johnson, Lt. Swiger, or Sue Hage, both of whom are mentioned in the release and news article (Tr. 76-77). Mr. Heflin also found a press report regarding the loss of 558 coal jobs in Nicholas County between 2011 and 2015 (Tr. 99; Exhibit 5). Mr. Heflin and Petitioner discussed the idea of linking Judge Johnson to President Obama after gathering the documents (Tr. 80).

Petitioner and Mr. Heflin then seized two wholly unrelated facts: (a) Judge Johnson's mandatory[5] attendance at a D.C. child trafficking conference in June 2015; and (b) the press report regarding the loss of coal jobs and developed a telephone questionnaire to test how linking the two might further Petitioner's efforts to defeat Judge Johnson in the election (Tr. 77, 80; Exhibit 5, 6:4). Although Mr. Heflin drafted the poll questions, they could not be used until they were approved by Petitioner (Tr. 85-86). Petitioner reviewed the

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[4] Nikki Tennis and Jennifer Bundy stated that they were the co-authors of the press release. They also stated that Petitioner and Mr. Heflin never contacted them about the press release. Additionally, no one from Rainmaker or Mr. Callaghan's campaign committee ever contacted them about the press release (Exhibits 21, 22).

[5] Participation in this seminar and the CIP seminar was required as a condition of federal grants received by the WVCIP Board (Exhibits 7, 21, 21E:10).

questionnaire and made revisions to the draft (Tr. 87; Exhibits 13, 14).

The poll was conducted over a three-day period beginning January 28, 2016 and over 22,000 calls were made (Tr. 82; Exhibit 6:9). Each phone number was called just once (Tr. 83). Of those, 11,261 calls went unanswered, 6,881 were answered by a machine, and 3,919 were actually answered by someone (Exhibit 6:9). While a total of 834 people answered the first poll question, callers kept dropping out before completing the survey so that only 320 people answered the last question (Tr. 83-84; Exhibit 6:27, 31). Thus, only 320 people completed the entire poll (Exhibit 6:31).

After asking generally about how people intended to vote in the judicial election, the poll then asked a series of three negative questions about Judge Johnson to test responses, including the following:

> Q9 Now I am going to mention a few reasons that OPPONENTS of Gary Johnson might give for why he should NOT be elected Circuit Judge. Please tell me whether this gives you major concerns, some concerns, or no real concerns about supporting Gary Johnson for Circuit Judge.
>
> . . .
>
> Q9B Gary Johnson is lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West

> Virginia judge invited by the Obama White House to participate in a junket highlighting issues of importance to President Obama.

(Exhibit 6:4). The total results of the poll for that question were:

Major concerns	174	49.15%
Some concerns	59	16.67%
No real concerns	97	27.40%
Don't know	24	6.78%
Total	354	100%

(Exhibit 6:4, 29). Mr. Heflin testified that Question 9B was crafted using the research he collected (Tr. 80; Exhibits 5, 7, 8). Mr. Heflin said he did not mention anything about Judge Johnson attending the CIP conference, the child trafficking conference or that the trip was work-related because he did not think it was relevant to what he was trying to test. While Petitioner made changes to other questions contained in the poll before it was conducted, he did not make any modifications to question 9B and approved it as written (Exhibits 11-14).

In a February 4, 2016 email, Mr. Heflin sent Petitioner documents relating to the poll results (Exhibit 15). Mr. Heflin advised Petitioner, "I can tell you that this race is very winnable, but we have a couple of vulnerabilities we need to work on" (Tr. 31, 88; Exhibit 15). Based on the results of Question 9B, Mr. Heflin drafted the Obama flyer (Tr. 85). Mr. Heflin and Petitioner testified that Petitioner had to approve the flyer before it

went out (Tr. 40, 86-87). On March 21, 2016, Mr. Heflin sent Petitioner a draft of the flyer by email and told him, "[t]his piece won't run until the very end of the campaign" (Exhibit 16). In a same-day email, Petitioner replied that "[t]he direct mail looks good – again the only thing I don't know about is whether the event was 'expense paid.' I wouldn't say that if it is not true" (Exhibit 16). Mr. Heflin and Petitioner testified that Petitioner approved the flyer's release after "expense paid" was removed (Tr. 39-40, 87).

Mr. Heflin testified that he only worked on four judicial campaigns including Petitioner's race (Tr. 69). He never took any classes regarding judicial campaigning (Tr. 69-70). Mr. Heflin and Petitioner testified that Petitioner never talked to Mr. Heflin about the WVCJC (Tr. 57, 100).

Judge Johnson received the Obama flyer in his P.O. Box on Thursday, May 5, 2016, just five days before the election (Tr. 119). In emotional testimony, Judge Johnson said that he literally "threw up" after seeing the Obama flyer because he knew he wasn't "going to overcome this"[6] (Tr. 119). The flyer was also posted to

[6] Judge Johnson testified that he was not able to take any real action to overcome the Obama flyer (Tr. 118-120). The only newspaper in Nicholas County was a weekly that ran only on Wednesdays (Tr. 118-120). Judge Johnson testified that there wasn't time to print something and get it in the mail to the electorate (Tr. 119). Judge Johnson testified that he called the Charleston Gazette to see if they could do a story, and the political editor (Phil Kabler) did place a blurb in the Sunday paper (Tr. 120; Exhibit 5).

Petitioner's personal and campaign Facebook pages the same day (Tr. 63).

During the evening of May 5, 2016, JDC contacted Petitioner, who agreed to take down the posts and place a disclaimer on the Facebook pages (Tr. 52; Exhibit 4). Petitioner also ran radio ads between May 7 and 9, 2016, to counter the false flyer[7] (Tr. 52; Exhibit 17).

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[7] Petitioner makes much of the fact that he took the action at the JDC's behest. Respondent did not advise that a complaint would never be opened against Petitioner – only that JDC would not personally open one if he mitigated the effects of the Obama flyer by taking out radio ads and placing a disclaimer on his campaign and personal Facebook pages. Respondent very clearly told Petitioner that if a member of the public subsequently filed a complaint it would be investigated and the JIC would be free to take whatever action it deemed appropriate but that evidence of his cooperation could be used as mitigation. Petitioner never challenged the JIC's right to proceed (Exhibits 4, 5).

Respondent addressed this very issue in Footnote 1 of Paragraph 18 of the charge (P. App. F 150a-151a). In his verified answer, Petitioner admitted the allegations and "acted very promptly once a concern about his First Amendment protected political flyer was raised." Petitioner never raised this issue before the JHB. In fact, Petitioner acknowledged in an email that he was advised that an investigation would occur and the JIC could act:

> When we talked you indicated that these actions would be an acceptable manner to resolve this issue informally. I am taking these actions [in] order to resolve this issue. If a complaint is filed despite my corrective actions I do not intend these actions to be taken as any admissions and I reserve all defenses. You indicated that unless this action is taken it would result in a formal complaint.

Importantly, the false statements contained in the Obama flyer were not isolated. In other campaign fliers, Petitioner falsely indicated that Nicholas County did not have a drug court (Exhibits 28, 29). However, on December 16, 2015, Judge Johnson requested and received authority to start an adult drug court in Nicholas County[8] (Tr. 114). Moreover, Petitioner was aware as early as January 21, 2016, that the adult drug court had already been established by Judge Johnson when he emailed Mr. Heflin on that date:

> Gary has recently made an effort to set up a drug court which is clumsy in an election year. The statute authorizing drug courts was passed in 2009. He could have made efforts beginning then – a year after he was last elected in '08. The statute requires drug courts in all counties by July 2016. He waits until months before the election and deadline to take action.

(Exhibit 11). The Nicholas County Drug Court Probation Officer was hired on March 1, 2016. In a January 25, 2016 email, Petitioner told Mr. Heflin that he would "share the results of my FOIA on probation officers when I receive it. Within six months of the election we have gone from 3 to 5 probation officers" (Exhibit 13).

(Exhibit 5C). Respondent also included Petitioner's mitigation in the Formal Statement of Charges (Exhibit 2:6-7).

[8] At one point, Petitioner testified that he understood the drug court had been established in July 2015, and implied that Judge Johnson began one at that time because Petitioner had "started talking about drug court in May 2015" (Tr. 50-51).

Petitioner acknowledged at hearing that a drug court probation officer had been hired[9] (Tr. 51-52).

In another campaign flyer, Petitioner falsely indicated that "despite being a line item on court fees, the juvenile drug court has never been established" (Exhibit 27). In yet another flyer and newspaper ad, Petitioner falsely indicated that Nicholas County Courts were collecting a $5.00 fee for "programs that do not exist" like juvenile drug court (Exhibits 30, 31).

By Order entered January 29, 2014, Judge Johnson, pursuant to W. Va. Code § 49-5-13(d), authorized the collection of "a mandatory fee of $5.00 to be assessed to the defendant on a judgment of guilty or a plea of nolo contendere for each violation committed to the County on any felony, misdemeanor, traffic violation or municipal court ordinance" (Tr. 116-117). The fees were given to the Sheriff to be deposited into an account specifically for the operation and administration of a teen court program which is run by the Family Resource Network (Tr. 117). In September 2016, the Network hired a Coordinator for the program after accumulating enough fees to do so (Tr. 116-119). Even more importantly, Petitioner knew as early as January

[9] Prior to taking the bench, Petitioner had done "lots of criminal work – mostly court-appointed" (Tr. 8). The majority of criminal work involved state felony and misdemeanor cases in Nicholas and surrounding counties (Tr. 9). Petitioner also testified that he handled "lots" of drug cases in Nicholas County including some between March and November 2016 (Tr. 9). Petitioner also served as Summersville municipal judge from 2008 to 2015 and Richwood City Attorney through three mayors – having resigned after he was elected judge (Tr. 9-10).

26, 2016, that the $5.00 fee was being collected for Teen Court. In an email to Mr. Heflin, Petitioner stated:

> A magistrate assistant prepared the attached documents. It explains the costs assessed for each magistrate court conviction and the category for each. You'll notice the last item is labeled "Teen Court" for $5.00. I asked the assistant how long this cost has been assessed and her response was "over a year." Nicholas County has never had a "Teen Court" and supervision over the "Teen Court" money seems to have been ignored or overlooked – by the top judicial official in Nicholas County.

(Exhibit 12).

Petitioner was argumentative and lacked candor while testifying at hearing. For example, in his May 5, 2016 campaign Facebook post, Petitioner blamed his campaign committee for producing an advertisement depicting a visit to the White House by Judge Johnson (Tr. 54; Exhibit 4). Petitioner testified that his committee had absolutely no involvement in the creation or dissemination of the Obama flyer (Tr. 54-55). However, Petitioner also admitted at hearing that the flier was not produced by his committee but by Mr. Heflin and himself (Tr. 54-55).

He showed little to no remorse except for having been prosecuted for judicial misconduct. Petitioner said that he would not have run the flyer in hindsight, but he did not acknowledge that it was wrong. Instead, he seemed to indicate that it was because of the aggravation of having to defend the content of the flyer and

because he thought it may have cost him votes. Petitioner stated, "I think I would've beat Judge Johnson by more votes without that flier because of the negative reaction that it got and the negative comments that were created from it" (Tr. 65). He also stated, "If I had to do it again, I probably would not approve the flier going out just because it's not enjoyable – politics is not enjoyable in a lot of different ways, but when you cause outrage in somebody, that I regret" (Tr. 66).

Just before the hearing, the JHB denied Petitioner's Motion to Dismiss the charges under WVCJC 4.1(A)(9) and WVRPC 8.2(a) on constitutional grounds. Petitioner argued that WVCJC 4.1(A)(9) and WVRPC 8.2(a) were unconstitutional on their face because they were "written so broadly that First Amendment speech necessarily is implicated, they are not limited to false or misleading statements of material facts, and they cannot be applied to expressions of opinion" (Callaghan 10/17/16 Motion to Dismiss 8). The JHB disagreed:

> [W]hether on its face or applied, the provisions of Rule 4.1(A)(9) of the Code of Judicial Conduct violate the First Amendment to the extent that they prohibit a judicial candidate from making misleading statements that are not materially false, but that only where a statement is both materially false and made with knowledge of its falsity or with reckless disregard for its truth or falsity may a judicial candidate be subject to discipline under Rule 4.1(A)(9) consistent with the First Amendment.

(11/18/2016 JHB Order 11). The JHB also stated:

> [T]he provisions of Rule 8.2(a) of the Rules of Professional Conduct do not violate the First Amendment to the extent that they prohibit a lawyer who is a candidate for judicial office from making a materially misleading statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a candidate for election or appointment to a judicial office.

(11/18/2016 JHB Order 13). By Order entered November 30, 2016, the JHB found that Petitioner violated both provisions. The Board stated that there was clear and convincing evidence that:

a. The statement "Barack Obama & Gary Johnson Party at the White House" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as Respondent had no facts upon which to base this statement nor did Respondent reasonably do anything to verify this statement;

b. The statement "While Nicholas County loses hundreds of jobs" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal

employment in Nicholas County and (ii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar; and

c. The statement, "While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda" was materially false and misleading and was made knowingly and/or with reckless disregard for its truth as the facts upon which Respondent contends he relied indicate that (i) the sole subject matter of the White House seminar attended by Judge Johnson was child trafficking; (ii) there was no connection between the subject matter of the White House seminar attended by Judge Johnson and coal employment in Nicholas County; and (iii) the coal jobs lost in Nicholas County had already been lost over a four year period prior to the seminar.

(P. App. E 119a-120a).

On appeal to the West Virginia Supreme Court, Petitioner argued that the Obama flyer was parody or rhetorical hyperbole and therefore protected free speech. Petitioner brazenly claimed that the flyer's facts were mostly true (Callaghan 12/28/16 State Supreme Court Brief 23-37). The State Supreme Court disagreed and held that he violated the three WVCJC

Rules and WVRPC 8.2(a). *Callaghan*, *supra.* Petitioner received the following: censures for each of his WVCJC violations; a reprimand for his WVRPC violation; a two-year suspension without pay from his judgeship, and a total of $15,000.00 in fines. He was also ordered to pay the costs of the proceeding. *Id.*

Both the JDC and the State Supreme Court relied in part on an Ohio judicial campaign case called *Disciplinary Counsel v. Tamburrino*, 2016 WL 7116096 (OH 12/7/2016). The case, which is discussed in more detail in Respondent's argument *infra*, is strikingly similar to the one at hand. The judicial candidate who lost on appeal to the Ohio Supreme Court filed a Petition for Writ of Certiorari to this Court seeking a determination on "whether core political speech made in a judicial campaign should be afforded the same protection under the First Amendment as core political speech made in a legislative or executive campaign" *Tamburrino Petition for Writ of Certiorari*, 2017 WL 1244425 (OH 3/30/17 at 3). Tamburrino discussed at least eight cases that are also addressed in Petitioner's brief including *Callaghan*, *supra.* On May 22, 2017, this Court denied Tamburrino's Petition for Writ of Certiorari in *Tamburrino v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 137 S. Ct. 2170 (2017).

REASONS FOR DENYING THE PETITION

I. WVCJC 4.1(A)(9) AND WVRPC 8.2(a) DO NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE SPEECH EITHER ON THEIR FACE OR AS APPLIED TO PETITIONER CALLAGHAN BY THE WEST VIRGINIA SUPREME COURT.

A. Introduction.

WVCJC Rule 4.1(A)(9) comes from the American Bar Association's ("ABA") 2007 Model Code version of the Rule. The ABA spent many years crafting the Rule to ensure its validity. It was written to comply with this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and is based upon case law that provides safeguards for First Amendment rights in the context of libel and slander (*see* Reporter's Explanation of Changes, ABA 2007 Model Code of Judicial Conduct 60).

The West Virginia Supreme Court adopted the new WVCJC in November 2015 after receiving public input, and it went into effect on December 1, 2015. The State Supreme Court used great care to ensure the constitutionality of the Rules before adopting them. For example, the Clerk's Notes on Rule 4.1 advise that "[t]he restrictions on partisan activities that are contained in Paragraphs (A)(5) through (7) of Model Rule 4.1 are not included, because they are subject to invalidation under First Amendment principles."

Comment [7] to WVCJC Rule 4.1(A)(9) states that "judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees." Comment [11] provides:

> **The role of a judge is different from that of a legislator or executive branch official even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.**

(emphasis added).

WVRPC 8.2 is identical to the ABA's Model Rules of Professional Conduct. Comment [1] to this Rule states that "[f]alse statements by a lawyer can unfairly undermine public confidence in the administration of justice." Comment [2] notes that "when a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity."

B. West Virginia's Rules Survive Strict Scrutiny.

This Court has consistently held that untruthful speech has never been protected for its own sake.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748 (1976). This Court has also held that "false statements are not entitled to the same level of First Amendment protection as truthful statements." *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). Public officials can recover damages for defamation upon a showing that a false statement was made with knowledge[10] of falsehood or with reckless disregard of whether the statement is false or not. *Id.*

Freedom of speech is not absolute. Restrictions have been applied to control speech "of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964), the Court acknowledged that defamatory statements against public officials and public figures were not constitutionally protected when made with actual malice, which was defined as "knowledge that it was false or with reckless disregard of whether it was false or not." As the Petitioner has often recognized when quoting Syl. Pt. 2, *Matter of Hey*, 192 W. Va. 221, 452 S.E.2d 221 (1994), West Virginia judges and judicial candidates are not entitled to unfettered free speech:

> The State may accomplish its legitimate interests and restrain the public expression of

[10] Both the terminology sections of the WVCJC and WVRPC define "knowingly" and "knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

> its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests.

Id.

The appropriate test for determining the constitutionality of restrictions on core political speech in judicial discipline cases is strict scrutiny. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). The Court opined that states may restrict judicial candidates' speech when the limitations are "narrowly tailored to serve a compelling interest." *Id.* at 1665. The Court made clear that the application of strict scrutiny did not mean that all limitations on judicial election speech are unconstitutional. *Id.* In upholding Florida's judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds, the Court explained that states are entitled to regulate judicial elections differently than elections for legislative or executive positions. *Id.*

This Court also stated that the First Amendment does not require a judicial canon to be "perfectly tailored," which is impossible "when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." *Id.* at 1671. The Court made clear that judicial candidates do not have to be treated like politicians and that preserving public confidence in the judiciary is a compelling state interest. *Id.* In fact, this Court declared Florida's compelling interest to protect the public's perception of judicial integrity to be "a state interest of the highest order." *Id.* at 1666,

quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009). This is because the judiciary maintains its legitimacy through the public's willingness to comply with its orders. *Id.* In addition, this Court has held that a party should be ensured that "the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White* at 775-776. The Court also stated that a fair trial in front of a fair judge is a basic requirement of due process. *Caperton* at 876.

C. West Virginia's Rules are Narrowly Tailored.

There is no question that West Virginia has a compelling interest in preserving the integrity of the judicial election process and protecting the process from distortions caused by deliberately false or misleading statements. *See Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000). The only question then is whether the rule is narrowly tailored so as not to be overbroad. In *Weaver*, a judicial candidate brought a challenge against the Georgia Code of Judicial Conduct after being sanctioned for making false and misleading statements. Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct prohibited statements that the candidate knows or reasonably should know are false. The Eleventh Circuit Court of Appeals struck the rule as being too broad, reasoning that the rule went too far by restricting statements that were negligently made, because negligent misstatements must be given "breathing space." *Id.* at 1320. Because the rule did not stop at prohibiting

statements made with knowing falsity or reckless disregard for the truth, it was overbroad and unconstitutional. *Id.*; *see also Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224 (M.D. Ala. 2000); *In re Chmura*, *supra*.

In *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016), the Sixth Circuit Court of Appeals addressed various provisions of the Kentucky Code of Judicial Conduct including Canon 5(B)(1)(c), which prohibited judicial candidates from knowingly or recklessly making false statements that are material to a campaign. The Appeals Court found the clause "constitutional on its face." *Id.* at 693. The Court stated:

> The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: "Don't want to violate the Canon? Don't tell a lie on purpose or recklessly." Given the *mens rea* requirement, a judicial candidate will necessarily be conscious of violating the canon.

Id. (citations omitted).

However, the Court did not uphold the "misleading" portion of the provision. The Court stated:

> If "misleading" adds anything to "false" it is to include statements that, while technically true or ambiguous, create false implications or give rise to false inferences. But only a ban

> on conscious falsehoods satisfies strict scrutiny. . . . "[E]rroneous statement is inevitable in free debate," and "[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with [an] atmosphere of free discussion." "Negligent misstatements," in contrast to knowing misstatements, "must be protected in order to give protected speech the 'breathing space' it requires," even in judicial elections. . . . Unknowing lies do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement "more than offsets the danger of a misinformed electorate. . . . This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment."

Id. at 694.

At the time of the decision *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014), Rule 4.3(A) of the Ohio Code of Judicial Conduct was in effect and provided:

> During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

> (A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

In *O'Toole*, a former judge who had not served on the bench since February 2011 decided to run for judicial office in 2012 and won a six-year term on the Court of Appeals. *Id.* Subsequently, a complaint was filed against the judge alleging various violations of the Code of Judicial Conduct. The matter went to hearing and the Board found that the Judge had violated Rule 4.3(A) by posting "misleading statements on her campaign website that were worded to give the impression that she was an incumbent judge" during the 2012 campaign. *Id.* at 1119. The Board also found that a badge that the former judge wore during the same campaign "would lead a reasonable person to believe that she was still a sitting judge" in violation of the same Rule. *Id.*

The judge challenged the Board decision on appeal alleging that Rule 4.3(A) violated her right to free speech. *Id.* The Supreme Court of Ohio held:

> [T]he portion of [the Rule] that prohibits a judicial candidate from conveying information concerning the judicial candidate or an opponent from knowing the information to be false is not an overbroad restriction on speech and

> is not unconstitutionally vague. We also hold that the portion of [the Rule] that prohibits a judicial candidate from knowingly or recklessly conveying information about the candidate or the candidate's opponent that, if true, would be deceiving or misleading to a reasonable person is unconstitutional as a violation of the First Amendment to the United States Constitution. We therefore sever this portion of the rule and find that O'Toole committed one rather than two violations. We still agree with the commission that a public reprimand is appropriate, however, and affirm the commission's order in part.

Id. at 1118. The provision the Court upheld involved the campaign's website statements. The Court found that the "state has a compelling government interest in ensuring truthful judicial candidates." *Id.* at 1122. The Court also found that the provision was narrowly tailored:

> Lies do not contribute to a robust political atmosphere. . . . The portion of Jud. Cond. R. 4.3(A) that limits a judicial candidate's *false* speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowing or with reckless disregard) and with a specific mental state as to the information's accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity) is constitutional. That portion of the rule applies to specific

> communications made by judicial candidates under narrowly defined circumstances.

Id. at 1126.

Likewise, in *In re Chmura*, *supra*, although the Michigan Supreme Court invalidated the "misleading" portion of a comparable judicial campaign ethics rule, it nevertheless permitted the disciplinary proceedings to continue based upon the saving construction of the rule:

> Today, we narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false. We therefore amend Canon 7(B)(1)(d) to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false. . . ."
>
> We conclude that limiting the reach of Canon 7(B)(1)(d) to known false public communications and false public communications made with reckless disregard for their truth or falsity renders the canon narrowly tailored to serve the state's interest in preserving the integrity of elections and the judiciary. False statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown*, *supra* at 60, 102 S. Ct. 1523. By limiting the scope of the canon to known and reckless false public statements, the canon provides the necessary "breathing

> space" for freedom of expression. *Id*. at 61, 102 S. Ct. at 1523.

Id. at 43-44.

In *In re Renke*, 933 So. 2d 482 (Fla. 2006), a successful judicial candidate was removed from office in part for "knowingly and purposefully" making material misrepresentations in his campaign brochures that he was an incumbent judge, held public office, was endorsed by the local firefighters, and had much more legal experience than his opponent. The Supreme Court of Florida stated:

> [T]o allow someone who has committed such misconduct during a campaign to attain office to then serve the term of the judgeship obtained by such means clearly sends the wrong message to future candidates; that is, the end justifies the means and, thus, all is fair so long as the candidate wins. Today we make clear that those warnings cannot be ignored by those who seek the trust of the public to place them in judicial office. . . .
>
> In our decision to remove Judge Renke, we have concluded that the series of blatant, knowing misrepresentations found in Judge Renke's campaign literature and in his statements to the press amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench. Furthermore, as found by the JQC, the payments from Judge Renke's father, though disguised as compensation, were clearly illegal donations to a judicial campaign in obvious violation of our state

> campaign finance laws. In essence, Judge Renke and his cohorts created a fictitious candidate, funded his candidacy in violation of Florida's election laws, and successfully perpetrated a fraud on the electorate in securing the candidate's election. . . . It is not enough to point to Judge Renke's successes as a judge if he only attained that position through his own fraudulent and illegal campaign misconduct. . . . [W]e hold that regardless of Judge Renke's present abilities and reputation as a judge, one who obtains a position by fraud and other serious misconduct, as we have found Judge Renke did, is by definition unfit to hold that office.
>
> In determining the discipline appropriate in cases of judicial wrongdoing, our obligation is first and foremost to the public and to our state's justice system. Florida has chosen a nonpartisan election process for selecting judges, and conduct that substantially misleads the voting public and interferes with its right to make a knowing and intelligent decision as to a judicial candidate's qualifications will simply not be tolerated in selecting members of the judiciary. Those who seek to assume the mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means.

Id. at 495 (citations omitted). *See also In re McMillan*, 797 So. 2d 560 (Fla. 2001) (successful judicial candidate removed from office, in part, for making unfounded attacks on his incumbent opponent and the

local court system); and *In re Chmura*, 626 N.W.2d 876 (Mich. 2001) (successful judicial candidate suspended for false or misleading claims in a campaign flyer).

Importantly, with respect to WVRPC 8.2(a), the State Supreme Court, in suspending a lawyer who made false statements about an administrative law judge, stated:

> The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.

Syl. pt. 4, *Lawyer Disciplinary Board v. Hall*, 234 W. Va. 298, 765 S.E.2d 187 (2014). The Court also held:

> Within the context of assessing an alleged violation of Rule 8.2(a) . . . a statement by an attorney that such attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office is not

> protected by the First Amendment as public speech on a matter of public concern where such statement is not supported by an objectively reasonable factual basis. The State's interest in protecting the public, the administration of justice, and the legal profession supports use of the objectively reasonable standard in attorney discipline proceedings involving disparagement of the credibility of the aforementioned judicial officers.

Syl. pt. 5, *Hall*.

In *Disciplinary Counsel v. Tamburrino*, *supra*, the Ohio Supreme Court suspended an unsuccessful judicial candidate in a 2014 Court of Appeals race from the practice of law for two false attack ads that he ran against his opponent on television. One ad alleged that his opponent did not think teenagers' consumption of alcohol was serious while the other asserted that the incumbent wouldn't disclose his taxpayer funded travel expenses. *Id.* The Hearing Panel found the ads "patently false" and that the statements were made "either knowing that they were false or with reckless disregard of their falsity." *Id.* at 5-6. The Hearing Panel also found that the use of the false statements was "inconsistent with the independence, integrity, and impartiality of the judiciary." *Id.* The Ohio Supreme Court agreed:

> The statement "Cannon doesn't think teenage drinking is serious" is a false factual declaration that imputes Judge Cannon's view about a particular offense that would certainly arise in future cases at the . . . Court of Appeals.

> And the statement "Cannon won't disclose his Taxpayer funded Travel Expenses" necessarily implies that Cannon has violated public-records laws. Tamburrino's misconduct impugned the integrity of this opponent as a jurist and a public servant. It endangered the independence of the judiciary and lessened the public's understanding of public records and the protections of the Fourth Amendment. We agree with the board that an actual suspension is necessary in this case.

Id. at 22.

D. Application of the Law to West Virginia's Rules.

In applying the foregoing to the instant case, it is fundamentally clear that WVCJC Rule 4.1(A)(9) and WVRPC 8.2(a) are constitutional. West Virginia has a compelling interest in preserving the integrity of the judiciary and maintaining and promoting the appearance and actuality of an impartial, open-minded judiciary. West Virginia also has a compelling interest in making sure that its judges are truthful. Judges expect lawyers, litigants, and witnesses who come before them to tell the truth. We can ask no less of the judges who take the bench.

Both rules are also narrowly tailored to fit compelling interests. West Virginia has chosen to target the conduct it believes most likely to erode the compelling interests: false statements by those entrusted to carry out the law – lawyers, judicial candidates, and judges.

There is no less restrictive alternative. The Rules are not overly broad. Judicial candidates are free to express factually-based opinions and to report truthfully in commenting about an opponent. Our rules also do not prevent judicial candidates from announcing their views or making truthful critical statements about their opponents.

The Rules are not underinclusive. They are aimed at conduct that the State has identified as most likely to undermine public confidence in the integrity of the judiciary – i.e., false statements of lawyers, judicial candidates, and judges. The Rules apply to all lawyers under WVRPC 8.2 and WVCJC Rule 4.1(A)(9). There are no exceptions. Based upon the foregoing, the Rules as applied are constitutional.

E. The Obama Flyer is Not Rhetorical Hyperbole or Substantially True.

Petitioner wants this Court to believe that the statements in the Obama flyer are mostly true.[11] They are not "rhetorical hyperbole" or "substantially true."

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[11] Petitioner has previously argued that the statements in the Obama flyer are "political parody." Petitioner could not adequately define the term "political parody" at hearing. He testified that "[i]t's when you poke fun at or make light of something someone says or does" (Tr. 33). The purpose of "parody" is to "mimic an original to make its point." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-581 (1994). The photo used on the first page of the Obama flyer was not taken from another source in order to mimic it to make its point. Instead, it is an original work created for Petitioner's use in the Obama flyer (Tr. 96-97). Thus, as a matter of law, it cannot be a "parody."

The First Amendment provides protection for "rhetorical hyperbole" only for statements that "cannot reasonably be interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 26 (1990). This Court has stated that in order to determine the falsity of a communication it must examine "the substance, the gist, the sting" of the statement as a whole. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). This Court has stated that a communication is considered false if it has "'a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (citations omitted). The State Supreme Court noted that generally the "'substantial truth doctrine' inures to the benefit of the accused, i.e., if something is 'substantially' true in overall effect, minor inaccuracies or falsities will not create falsity," but in Petitioner's case it worked to his "detriment." *Callaghan* at ___, 796 S.E.2d at 627. As the State Supreme Court stated:

> The communication, taken as a whole, is patently false. . . . We find that merely peppering the latter portion of the flyer with statistical facts about job losses in Nicholas County does not elevate the flyer as a whole to the level of "substantially true." Nor does the narrow fact that Judge Johnson did in fact attend a federal seminar and meeting make the statement that he "accepted an invitation from Obama to come to the White House" substantially true. There can be little question that the truth, *i.e.*, that Judge Johnson merely attended a federally-required meeting and

> seminar, would produce a "different effect on the mind of the reader" than what the flyer conveys, *i.e.*, that Judge Johnson was invited by and socialized with President Obama.

Id. at ___, 796 S.E.2d at 627-628.

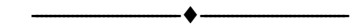
Quite simply, this is a case about a man who wanted a judgeship so badly that he lied to get the job. Judge Johnson attended mandatory work-related conferences in D.C. In his campaign materials, Petitioner knowingly and falsely told voters that the purpose of Judge Johnson's trip was to party with a locally unpopular sitting president and to support the president's policies adversely affecting local jobs. He also took such action at a time intentionally calculated to prevent any meaningful correction by his opponent.

The disciplinary system is more than a means to sanction lawyers, judges, and judicial candidates for ethics violations. It is also a method of deterrence for future similar conduct by other individuals. It is in the public interest for judicial candidates, lawyers and judges who are engaging in serious violations of the WVCJC and the WVRPC and who are causing irreparable harm to be stopped. When judicial candidates and lawyers make false representations about a sitting judge, they cause the public to lose confidence in the integrity and impartiality of the sitting judge, the candidate, and the entire judicial system. The State Supreme Court made a similar point in *In re Watkins*, 233 W. Va. 170, 182, 757 S.E.2d 594, 606 (2013):

> Citizens judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers. "The law

> should provide an exemplar of correct behavior. When the judge presides in court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position." *Matter of Ross*, 428 A.2d 858, 866 (Me. 1981). Hence a judge must be more than independent and honest; equally important, a judge must be perceived by the public to be independent and honest. Not only must justice be done, it also must appear to be done.

Based upon the foregoing, JDC respectfully requests that this Court deny the Petition for Writ of Certiorari.



CONCLUSION

Petitioner has not met the heavy burden to establish compelling reasons for this Honorable Court to grant the Petition. Therefore, Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

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