No. 17-54

IN THE

Supreme Court of the United States

IN THE MATTER OF: THE HONORABLE STEPHEN O. CALLAGHAN, JUDGE-ELECT OF THE TWENTY-EIGHTH JUDICIAL CIRCUIT,

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

REPLY BRIEF FOR PETITIONER

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Certiorari is warranted because the West Virginia Supreme Court's decision deepens an existing split among the circuits and state courts of last resort over the important and recurring issue of First Amendment protection for allegedly false or misleading judicial campaign speech. Judge Callaghan circulated a campaign flyer that would be protected in the Sixth Circuit and in Michigan as true or substantially true. But he has been suspended from serving as a judge for two years because West Virginia joins Florida, Indiana and Ohio in holding this speech is sanctionable. Additionally, the decision below is contrary to this Court's precedent that speech is protected based on a rational interpretation or when inaccuracies are immaterial.

1. None of this is disputed. The West Virginia Judicial Commission ("Commission") opposes review solely on the merits. Opp. 20-38.

The Commission does not attempt to reconcile the conflicting standards, does not mention this Court's precedents regarding a rational interpretation and materiality, and does not dispute that the issue is recurring and important. Indeed, the Commission even quotes without comment conflicting statements about the governing legal standard. *Compare* Opp. 25-29 (quoting Sixth Circuit, Ohio and Michigan cases striking down bans on "misleading" judicial campaign speech); *with id.* 30 (quoting Florida upholding and applying a ban on "knowing misrepresentations"). And the

Commission concedes the importance of the issue. Opp. 23-24, 37-38.

Instead, the Commission argues only the merits. It block quotes cases holding that some judicial campaign speech can be punished, and argues that the speech here was unprotected under the West Virginia Supreme Court's inverse substantial truth standard. Opp. 21-38. But the issue in this case is whether the West Virginia Supreme Court applied the correct legal standard. On that important and recurring issue, there is an undisputed split with other courts and undisputed inconsistency with this Court that warrant review. Pet. 20-37.

2. Beyond the legal arguments, the Commission's brief demonstrates the need for this Court's intervention. On one hand, it proposes to restrict a candidate's ability to prove truth, by asking the Court to ignore judicially-noticeable evidence that the statements are true. Opp. 11 & n.6. While at the same time, the Commission seeks to show that the statements are false by relying on different, uncharged statements, including a "teen court" flyer, which was plainly true from the Commission's own description, Opp. 13-15, and by completely misconstruing the statements at issue, *id.* at 37 (mischaracterizing the Mailer as purportedly saying that Judge Johnson "support[ed] the president's policies adversely affecting local jobs"). Without this Court's intervention, state courts, commissions and disciplinary counsels will continue applying such one-sided disciplinary standards unabated.

Because the decision below deepens an undisputed direct split involving eleven courts and

conflicts with this Court's precedent on a fundamental issue, review is warranted.

I. THE BRIEF IN OPPOSITION DOES NOT DISPUTE THE SPLIT FROM OTHER COURTS OR INCONSISTENCY FROM THIS COURT ON A FUNDAMENTAL AND RECURRING ISSUE

The Commission does not dispute any of the three bases cited in the Petition for granting review.

1. Eleven circuit courts and state courts of last resort are split over the standard to determine what speech in judicial elections is unprotected as untrue, reaching irreconcilably inconsistent results. Pet. 20-32. There is a direct 4-2 split over whether a statement that is true (and therefore protected) on its own can become false (and therefore, according to these courts, unprotected) from context. *Id.* at 20-30. And the Wisconsin Supreme Court is split 3-3 over the issue. *Id.* at 30-31. There is also a tangential split over whether misleading speech that is not false is protected. *Id.* at 23.

The Commission does not dispute any aspect of the split or tangential split. It quotes several of these cases. Opp. 19, 24-34. But it makes no attempt to reconcile their standards. *Id.* The Commission even directly quotes the contrary standards on the tangential split. It provides block quotes from cases striking down bans on "misleading" judicial campaign speech, Opp. 25-29 (quoting the Sixth Circuit, Ohio and Michigan), then block quotes and cites from Florida cases upholding and applying a ban on "knowing misrepresentations." *Id.* at 30-31 (quoting Florida

cases). As a result, the Commission has conceded the split.

2. The Commission does not even address, let alone dispute, that the opinion below is contrary to this Court's precedent that a statement is protected based on a rational interpretation or when any inaccuracies are immaterial. Pet. 32-37. The decision below is contrary to this Court's precedent that speech susceptible to multiple interpretations cannot be punished if one rational interpretation is protected by the First Amendment. Pet. 32-35 (citing *Air Wisconsin*, *Bose Corp.*, and *Masson*). Additionally, the decision below did not even engage in the materiality analysis required to find false speech sanctionable. Pet. 35-37. The Commission does not address, and thus also concedes, these issues. Opp. 21-38.

3. The Commission does not dispute that the scope of First Amendment protection for judicial campaign speech is an important and recurring issue. The Commission does not dispute that similar restrictions are prevalent in the thirty-six states with contested judicial elections. Pet. 37-39. Indeed, the Commission emphasizes that one of the rules challenged here is based on an American Bar Association Model Rule, Opp. 20-21, which confirms the issue's prevalence. The Commission also does not dispute that there has been increasing litigation, discipline, and penalties for judicial campaign speech. Pet. 39-40.

Significantly, the Commission does not dispute the entanglements inherent in judges deciding whether to punish their colleagues and challengers. Pet. 40-41. Those entanglements are particularly

pronounced in this case. Pet. 9-10, 14-15, 41 n.8; *see also* Opp. 12 n.7, 15, 37. This Court's intervention is needed to protect core speech from the malleable standards that are being created and enforced by entangled and conflicted judges, disciplinary boards, and disciplinary counsels.

4. Instead of addressing the reasons for granting review, the Commission dedicates only one sentence to the standard for protected hyperbole, Opp. 35 (citing *Milkovich*), but does not provide any analysis of how that standard was not satisfied here. *Cf.* Pet. 34-35 (citing cases and arguing that the Mailer's first page is hyperbole, because "it is reasonable to interpret the White House Mailer as saying something other than that Judge Johnson actually 'part[ied]' with President Obama, particularly in context of the clearly Photoshopped headshots and exaggerated streamers").

5. The Commission's main argument is that the West Virginia Rules at issue "survive strict scrutiny." Opp. 34-38. Specifically, it argues that some courts allow some judicial campaign speech to be punished, and the speech here was unprotected as false under the West Virginia Supreme Court's standard. Opp. 21-38. To argue that the statements here are unprotected as false, the Commission relies entirely on the West Virginia Supreme Court's "inverse substantial truth" doctrine. Opp. 37-38.

But that ignores the split over the applicable standard. Pet. 20-37. This Court, the Sixth Circuit, the Michigan Supreme Court, and three Justices on the Wisconsin Supreme Court apply standards that would protect the speech here. Pet. 20-23, 30-31, 32-37. Those state courts would protect the statements

if true individually or true in context, but would not use context to remove the constitutional protection from statements that are individually true. *Id.* at 20-23, 30-31. Similarly, this Court would evaluate whether there is a rational interpretation that is protected, even if there are rational interpretations that could be unprotected, and would allow sanctions only for "materially" false speech. *Id.* at 32-37.

In contrast, the standards applied by West Virginia, Florida, Indiana, Ohio, and three Wisconsin Justices, would allow the same speech to be sanctioned. West Virginia, Florida, Indiana, and three Wisconsin Justices would hold that truthful speech loses its protection when deemed false (or misleading in Florida) from context. Pet. 23-26. And the Ohio Supreme Court defines truth so narrowly and falsity so broadly that it would also find such speech unprotected. *Id.* at 27-29. Judge Callaghan seeks review of that direct and undisputed split and inconsistency.

For this and other reasons, this case is a better vehicle than the Ohio case in which this Court denied review recently. *Tamburrino v. Office of the Disciplinary Counsel of the S. Ct. of Ohio*, 137 S. Ct. 2170 (2017). That case presented an entirely different question regarding whether false judicial campaign speech is protected in the same way as false legislative and executive campaign speech. *Pet. for Writ of Cert.*, at i, *Tamburrino*, 137 S. Ct. 2170 (No. 16-1188), 2017 WL 1244425; *see also* Opp. 19. Unlike this case, the *Tamburrino* Petition did not present the question of what standard applies to determine whether speech is protected as true, nor

did it ask the Court to resolve the undisputed split and inconsistency on this issue. *Cf.* Pet. i.

Because the direct split and inconsistency here are undisputed, they warrant this Court's review.

II. THE BRIEF IN OPPOSITION DEMONSTRATES THE NEED FOR THIS COURT'S INTERVENTION

The Commission's factual arguments demonstrate the dangers of the disciplinary standard in West Virginia (and other similar states) and the need for this Court's intervention. The Commission proposes to cabin a candidate's ability to prove truth, while claiming for itself the right to overreach on the facts to try to show a punishable falsity.

1. Judicial campaign speech "commands the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (plurality); *see also* Br. of Amicus Curiae First Amend. Coalition 8-11 (citing and quoting cases holding that pure judicial campaign speech is entitled to the highest form of protection). This level of protection is necessary to preserve both the rights of candidates to speak and the rights of voters to the free flow of information necessary for their decisionmaking. Br. of Amicus Curiae First Amend. Coalition 3, 6-7 (citing and quoting cases). Because the threat of punishment alone chills such protected speech, this Court has imposed the highest level of protection and requires stringent, defined standards that favor protection of speech. *Id.* at 4-6 (citing and quoting cases).

The Commission asks this Court to flip that protection on its head and analyze First Amendment

protection to favor restrictions on judicial campaign speech. In addition to accepting the West Virginia Supreme Court's unduly restrictive legal standard, the Commission proposes narrowing a candidate's ability to prove a statement's truth.

Specifically, the Commission asks the Court to ignore judicially-noticeable facts that demonstrate the truth and reasonable basis for the White House Mailer. That Mailer described the core event as taking place "at the White House." Pet. 7-8, 75a. Because the decision below questioned the truth of that description, the Petition quotes public statements that the event was, in fact, "at the White House." Pet. 4-5, 26. The Petition included undisputed, verifiable and contemporaneous articles posted by Federal Officials – Valerie Jarrett (then-Senior Advisor and Assistant to the President) and Mark Greenberg (then-Acting Assistant Secretary of Administration for Children and Families) – on official Government websites, *id.* at 4 & n.1, that are plainly subject to judicial notice. *See, e.g.,* Fed. R. Evid. 201; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 & n.18 (2008) (taking judicial notice of "Frequently Asked Questions" on a State website); *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 19 (2012) ("Even without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question.").

The Commission claims, however, that the Court should ignore this public and admissible evidence, which demonstrates the truth of the Mailer. Opp. 7 n.3. The Commission would have this Court find the Mailer false – and uphold Judge Callaghan's two year suspension – based in part on a statement that

Federal Officials (and the West Virginia Supreme Court) described with the same exact words. *Id*; Pet. 26-27 (quoting the articles that the event was "at the White House."). The Commission even calls the citation to this proper, public evidence, part of a "disturbing trend." Opp. 7 n.3. That is exactly the kind of unduly restrictive inquiry that chills protected speech and should never apply to campaign speech that commands the highest level of protection.

2. This overreaching to punish protected speech is particularly troubling because the Commission admits that the White House Mailer is based on ***facts***, albeit it says "wholly unrelated facts." Opp. 8. Thus, to claim that the Mailer is punishable as false, the Commission overreaches to rely upon uncharged conduct and misconstrues the Mailer.

First, the Commission overreaches by raising uncharged conduct in other campaign flyers to try to show that the White House Mailer was false. Opp. 13-15. Specifically, it claims that the White House Mailer was "not isolated," because two additional flyers – one about a "drug court" and the other about a "teen court" – were also (according to the Commission) false. *Id.* Citing such uncharged conduct raises serious due process concerns, "particularly in an arena in which First Amendment rights to freedom to engage in campaign speech are asserted." Pet. 60a n.29 (citing *In re Disciplinary Action against Tayari-Garrett*, 866 N.W.2d 513, 520 n.4 (Minn. 2015)). It is even more improper to argue that other, separate (allegedly) untrue statements somehow prove that the White House Mailer is not protected as true.

The danger of such an inquiry is even clearer because the Commission's own description of another flyer shows the jaundiced lens brought to punish Judge Callaghan's truthful speech. The Commission claims that one of Judge Callaghan's May 2016 flyers "falsely indicated" that there was a "line item on court fees" for a "juvenile drug court" but it "has never been established" and those "programs do not exist." Opp. 14. The Commission then admits that, in January 2014, Judge Johnson imposed a $5 fee "to be deposited into an account specifically for the operation and administration of a teen court program." *Id.* And the Commission admits that the teen court program did not open until September 2016, *id.*, which was four months ***after*** Judge Callaghan circulated this "teen court" flyer. That means the flyer was true under any standard – a fee was being collected for a court program, but that program had not been established at the time of the flyer.[1] The Commissions' reliance on this uncharged, plainly truthful speech to try to support the decision to remove an elected judge from the bench, demonstrates the need for this Court's intervention to clarify the boundaries of judicial disciplinary standards.

Second, to try to show falsity, the Commission misconstrues the White House Mailer itself. The Mailer said, in part, that Judge Johnson attended an

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[1] The Commission even cites Judge Callaghan's testimony on the basis for him to believe that this flyer was true – a magistrate assistant said the "teen court" fee had been imposed for a year, and Judge Callaghan knew there was no teen court at that time. Opp. 15.

event that supported President Obama's legislative agenda at the same time that President Obama's policies were causing coal jobs to be lost in West Virginia. Pet. 7-8, 75a-76a. It did not say, however, that Judge Johnson supported the policies that were widely blamed for causing the loss of coal jobs, as even the West Virginia Supreme Court acknowledged. Pet. 48a n.23. Yet, the Commission argues in the Opposition that the discipline should be affirmed here, because Judge Callaghan "lied to get the job" by "knowingly and falsely telling voters" that Judge Johnson went to D.C. "to support the president's policies adversely affecting local jobs." Opp. 37.

This mischaracterization is telling. Judge Callaghan's actual statements are protected and the only way the Commission can try to support the lower court's decision to punish them is by misconstruing them. Not only is that legally incorrect, but it demonstrates why this Court's intervention is necessary to make clear that judicial candidate speech is entitled to the highest protections and that state commissions and disciplinary counsels cannot punish a true statement just because it could, theoretically, be misconstrued as false.[2]

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[2] The Commission also ignores, in addition to the numerous remedial steps Judge Callaghan took when Disciplinary Counsel raised concerns about the Mailer, *cf.* Pet. 8-9, the role of social media in modern judicial elections. It argues that sending the White House Mailer five days before the election was "intentionally calculated to prevent any meaningful correction by [Judge Callaghan's] opponent." Opp. 37; *see also*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(continued…)

id. 11 & n.6. Judge Johnson could have used social media, however, to meaningfully tell his story to the electorate, including by paying minimal fees to "boost" any post to reach voters within the circuit. *See, e.g.*, E. Rollins, *Social media changing the nature of campaigns*, Bloomington Herald-Times (May 9, 2016); Facebook, *Audience Optimization*, available at https://www.facebook.com/facebookmedia/get-started/audience-optimization (last visited Aug. 21, 2017). The remedy here was more speech and that remedy was available. A two-year suspension, however, is not an appropriate remedy.