No.

IN THE

Supreme Court of the United States

MICHELLE LOWNEY MACDONALD, PETITIONER

v.

LAWYERS BOARD OF PROFESSIONAL RESPONSIBILITY

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

MICHELLE LOWNEY MACDONALD SHIMOTA
Counsel of Record
1069 South Robert Street
West St. Paul, MN 55118
Michelle@MacDonaldLawFirm.com
(651) 222-4400

CURRY & TAYLOR ♦ 202-393-4141

QUESTION(S) PRESENTED

Allowing speech by attorneys critical of the judiciary is an essential component of the American system of government. This Court has not addressed the restraint on free speech which is inherent in disciplining a lawyer for comments criticizing a judge, and that is why this case presents an issue of first impression regarding the First Amendment, Free Speech and the discipline of attorneys for statements concerning the qualifications or integrity of a judge. Across the country, attorneys are generally prohibited from and severely punished for impugning judicial integrity. In scores of cases both state and federal courts have disciplined attorneys for making disparaging remarks about the judiciary, and have almost universally rejected the constitutional standard established by the Supreme Court in *New York Times v. Sullivan* , 376 US 254 (1964) and *Garrison v. Louisiana* 379 US 64 (1964) for punishing speech regarding government officials.
The questions presented are:

1. Whether a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court pleadings and proceedings?

2. Whether the disciplinary procedures for attorneys can constitutionally abrogate First Amendment Rights when rules are used to punish speech that impugns that integrity of the judiciary without requiring a showing of knowledge or reckless disregard to falsity?

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) for writ of certiorari in a civil case after rendition of a judgment or decree of a court of appeal. A judgment of the Minnesota Supreme Court was entered on January 17, 2018.

The jurisdiction of this Court is also invoked under 28 U.S.C. Section 1257(a)

RELEVANT PROVISIONS INVOLVED

AMENDENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting, the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. I; *accord.* Minn. Const. art. I, §3.

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. XIV; accord Minn. Const. art. I, §7

Minnesota Rule of Professional Conduct, 8.2 (a) Judicial and Legal Officials

> 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.

ABA Model Rule of Professional Conduct (MRPC) 8.2 (1) Maintaining the Integrity of the Profession, Judicial & Legal Officials:

> 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

Background

Michelle Lowney MacDonald has been licensed to practice law in Minnesota since 1987, and continually practiced law, until on January 17, 2018, the Minnesota Supreme court approved the findings and recommendation of a referee that Ms. MacDonald be suspended for 60 days, subject to two years of probation upon reinstatement under supervision. Appendix A

Ms. MacDonald asserted that the first amendment prohibits disciplining her on the basis of her communications about a judge, because the communications did not make or imply false statements of fact, and because the Director's claim of wrongdoing was not proved at a hearing due to the high burden of "clear and convincing evidence" which must be establish in every case.

Letters to Board of Judicial Standards about Judge Knutson

On December 26, 2013, Ms. MacDonald wrote a letter to the Board on Judicial Standards to complain about Judge David Knutson, a state agency that responds to complaints about state court Judges who violate the Judicial Code of Conduct, of which Judge Knutson was a member.

In her December 26, 2013 letter she complained about "ongoing retaliation" against herself and her client, Sandra Grazzini-Rucki "warranting investigation." She alleged "evidence of improper case assignments ", "usurping of court files", and failing to report or involve the juvenile court and child protection

after children ran away. Her complaint to the Board included copies of Affidavits filed in a Federal Civil Rights Complaint, Grazzini-Rucki, et al v. David Knutson, individually, et al, U.S. District Court File No.: 0:13-CV-02477 (SRN/JSM).

Most significantly, Ms. MacDonald reported to the Board that "during a break in the court's child custody trial on September 12, 2013, sheriff deputies "arrested" me and then *brought me back to Judge Knutson's courtroom in handcuffs and a wheelchair*, *with no eye glasses*, *hair piece*, *shoes*, and I was made to continue my participation in the custody trial in this debilitated, humiliating state, without my files, my client, a pen, paper, and with the Rucki children still missing…"

She further reported that Judge Knutson's "final *custody* order was attached *as an Exhibit* in the federal court action" requesting a dismissal. She wrote:

> "I am certain your independent agency finds this behavior of a Judge unimaginable, in particular, the act "*perfunctory trial*" about *missing children without their parent*, and with a litigant's *attorney in handcuffs*". She continued that such treatment of a citizen, and her attorney is "inconceivable," and that the ordeal has been a "nightmare" for her client, and "of late, myself".

Supplements to Letter to the Board of Judicial Standards

Based on requests from the Board, Ms. MacDonald supplemented her letters.

On February 7, 2014, she requested the Board investigate violations to Minn. Stat. 484.69, the

improper assignments, and usurping of files by Judge Knutson.

On March 11, 2014, she reported that "*the retaliation against myself and my client has been continuous, and is overwhelming.*" She stated that in a sworn affidavit Judge Knutson said did not have personal knowledge of the handcuffs, contrary to the sworn testimony of the deputies sheriffs, "who say he [Judge Knutson] knew I was in handcuffs, and a wheelchair and ordered me returned to finish the trial."

In addition she reported that she learned that Judge Knutson provided "verbal permission for search and seizure of her phone, camera, which is not legal and violated 4th Amendment," providing testimony of the deputies.

On April 2, 2014, Ms. MacDonald wrote another supplement, responding to the board's request for a transcript of sheriff's deputy to support her assertion that Judge Knutson had personal knowledge that she was in handcuffs during the court trial he presided over, and where deputies say Judge Knutson absolutely knew of her condition before he ordered them to return her to continue the court trial.

Ms. MacDonald repeated that "Judge Knutson called an afternoon break, left the bench, where I was wheeled back to a jail cell again. After the lunch break, I was returned once again to the courtroom in handcuffs and a wheel chair, in this demoralizing state to again continue my participation in the court trial."

She added that deputies "testified to a culture of Judges in Dakota County regularly giving *verbal* permission for searches of citizens violative of the 4th Amendment to the Minnesota and State Constitutions."

Judge Knutson's Letter to the Board of Lawyers Professional Responsibility

On January 11, 2014, following her initial letter to the Board on Judicial Standards, Judge Knutson wrote an undated letter complaining to the Lawyers Board of Professional Responsibility about Ms. MacDonald which she received.

Disciplinary Proceedings and Exhibits

On June 8, 2016, the Director of the Lawyer's Board of Professional Responsibility filed a Petition for Disciplinary Action, based on Judge Knutson's letter.

The Director's Exhibits consisted of court registers of actions, court orders, court transcripts, court pleadings and memorandums, court docket sheets, citations, video of jail cell and holding area, appellate court pleadings, letters and orders, letters to attorneys involved in the case, affidavits, letters from Board of Judicial Standards, letter/motion to federal court and orders. The pleadings were in multiple cases involving Ms. MacDonald's client, Sandra Grazzini-Rucki. See divorce case Dakota County Court file no. 19-FA-11-1273, U.S. District Court Case no. 13-cv-02477; cases v. Ms. MacDonald that were dismissed (Dakota County District Court 19HA-CR-13-2934); G-R court of appeals, A14-0139, Court of Appeals, Grazzini-Rucki, No. A14-0524

Ms. MacDonald's own case regarding civil rights against others, U.S. District Court Case 15-CV-01590, and the first amended complaint therein was also included.

The Exhibits also included pleadings, orders, transcripts, in a matter unrelated to Ms. Grazzini-

Rucki, where Ms. MacDonald also made a constitutional challenge to Minnesota's Family Law, on behalf of a client, and where neither the client or judge complained. See D'Costa, Dakota County District Court file no. 27,FA,13,2583) and MN court of Appeals, No. A15-0655).

Hearing and Recommended Findings by Referee

On November 15, 2016, an evidentiary hearing took place before a Referee appointed by the Minnesota Supreme Court, where Judge Knutson and Ms. MacDonald testified.

On January 3, 2017, the Referee issued findings and recommendation, and adopted almost all of the Director's proposed findings of fact, conclusions of law and recommendations nearly verbatim. Appendix B

The Referee found that Ms. MacDonald violated Rule 8 (a) by making made false statements in reckless disregard for the truth concerning the integrity of the judge as follows:

> "43. Respondent's statement regarding Judge Knutson's lack of impartiality "since day one" was false and made in reckless disregard of the truth."
>
> 110. The "factual allegations" within the federal lawsuit were, in part, false and made with reckless disregard as to their truth or falsity.

The Referee found also that "The letters to the BJS include the same complaints made within the federal lawsuit outlined above. Respondent sent copies of all of her letters to the BJS to numerous

elected officials. As with the federal lawsuit, Respondent's statements were false and made with a reckless disregard as to their truth or falsity." (7a)

And finally, the referee writes:

> "Respondent's on-going statements and "factual allegations" within the federal lawsuit's Amended Complaint were false and in reckless disregard of their truth or falsity." (86a)

Consequently, in a conclusion of law, the Referee claims in conclusion 6,

> "The Director has proven by clear and convincing evidence that Respondent's false statements made with reckless disregard for the truth or falsity of those statements about Judge Knutson's impartiality and integrity in multiple forums violated Rule 8.2(a) (MRPC) and Rule 8.4(d) (MRPC) "(82a)

Appeal to the Minnesota Supreme Court

Ms. MacDonald appealed the Referee's findings and recommendations to the Minnesota Supreme Court. On January 17, 2018, the Court adopted the Referee's findings. Adopting the Referee's Findings. Appendix A

The Court summarized them, finding that:

> "MacDonald then moved for the judge's recusal from the case based on the pending federal lawsuit against him. The judge denied the motion, at which point MacDonald stated, "[a]nd you are telling me that you can be

> impartial in this trial, which you haven't done since day one." The referee found that this statement violated Minn. R. Prof. Conduct 8.2(a) and 8.4(d), because it was made with reckless disregard for the truth." (4a)

In concluding that Ms. MacDonald violated Minn. R. Prof. 8.2(a), the Court cited her client's civil rights lawsuit finding that:

> "The complaint alleged that the judge had retaliated against S.G. and MacDonald, compromised the Minnesota Court Information System (MNCIS), "usurped" case files with the assistance of opposing counsel, signed documents that he knew were false, and acted without jurisdiction or legal authorization.

The federal district court dismissed all of the claims in the complaint, describing them as "futile" and noting that "nothing in the record supports the[m]."

When asked at the disciplinary hearing about the basis for her allegations, MacDonald responded, "[t]he record speaks for itself."

The referee concluded that MacDonald violated Minn. R. Prof. Conduct 3.1, 8.2(a), and 8.4(d) by making recklessly false allegations against the judge that no reasonable attorney would have made based on the evidence available. (7a).

The Court cited the letters to the Board on Judicial Standards, finding that she violated Minn. R. Prof. Conduct 8.2(a):

> "In addition to filing a federal lawsuit against

> the district judge in S.G.'s case, MacDonald wrote a letter to the Board on Judicial Standards complaining about the judge's behavior and asserting that he had acted unethically during S.G.'s trial. In total, she wrote four letters to the Board, each impugning the judge's integrity and repeating the allegations from the federal lawsuit. She sent copies of these letters to numerous elected officials and made similar remarks in letters to other attorneys. The referee concluded that MacDonald's statements were false, made with reckless disregard for the truth, and violated Minn. R. Prof. Conduct 8.2(a) and 8.4(d). (7a)"

In addressing First Amendment rights, the Supreme Court held that:

> "An attorney's good-faith reliance on her client's representations is not an absolute defense to attorney discipline, nor does the First Amendment immunize an attorney's false statements impugning the integrity of a judge." (1a)

The Court also held that:

> A 60-day suspension, followed by 2 years of supervised probation, is the appropriate discipline for an attorney who failed to competently represent a client; made false statements about the integrity of a judge with reckless disregard for the truth. (1a)

This appeal followed.

Attorney MacDonald's Background

For 30 years, Ms. MacDonald has been an attorney in good standing, serving as a conciliation/small claims court Judge, Hennepin County for 22 of those years; and Adjunct Referee/Arbitrator in family and civil court. She received a Years of Service Recognition Award, Conciliation Court, Hennepin County.

Ms. MacDonald received the Northstar Lawyers, Pro Bono award 2013, 2014, 2015, and 2016.

Ms. MacDonald has represented thousands of clients, before hundreds of Judges, including lead counsel on over Sixty (60) appellate decisions, which include amicus briefs, appearances before the Appellate and Minnesota Supreme Court, and Petitions to the United States Supreme Court.

Ms. MacDonald is Founder, Volunteer President and Board Member of Family Innocence, a nonprofit dedicated to keeping families out of court: resolving conflicts and injustices peacefully (2011- present). She is a founding member of Cooperative Private Divorce Project (Divorce without courts), with regular meetings since 2013 for family court reform to develop proposed legislation, Cooperative Private Divorce Bill HF 1348, which creates an administrative pathway to divorce that skips the court adversarial system. She is founding member of Child Custody/Parenting Time Dialogue Group, with regular meetings since inception, 2013.

Ms. MacDonald is a longtime member of the Minnesota State Bar Association, was chairman of the professionalism committee, and currently serves on the Family Law, ADR and Children's Law sections. She is a member of the Amdahl Inn of Court.

REASONS FOR GRANTING THE PETITION

Across the country, attorneys are generally prohibited from and severely punished for impugning judicial integrity. In scores of cases, both state and federal courts have disciplined attorneys for making disparaging remarks about the judiciary, and these courts have almost universally rejected the constitutional standard established by the Supreme Court in *New York Times v. Sullivan* , 376 US 254 (1964) and *Garrison v. Louisiana* 379 US 64 (1964) for punishing speech regarding government officials. The punishment imposed for impugning judicial reputation is often severe, with suspension from the practice of law being typical. Attorneys have been punished regardless of whether they were engaged in a representative capacity when making the statements and regardless of the forum in which the statements were made.

After this court's decision in Garrison v. Louisiana, 379 US 64,74-75 (1964) (explaining "speech concerning public affairs is more than self-expression; it is the essence of self-government")(quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) the American Bar Association (ABA) expressly adopted the *Sullivan* standard in Model Rule of Professional Conduct (MRPC) 8.2 (a) for regulating lawyer speech regarding the judiciary. The Model Rule is identical to the Minnesota rule. [1] Thus, the current regulatory regime for the vast majority of states merely prohibits lawyers from making 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."

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[1] See Model Rules of Professional Conduct R. 8.2(a)(2018)

The ABA expressly recognized the applicability of *Garrison* and *Sullivan*, and the drafters of Model Rules intentionally incorporated the *Sullivan* standard. See Model Rules of Prof'l Conduct R. 8.2 legal background at 206 (Proposed Final Draft 1981). The drafters also stated that: "[t]he critical factors in constitutional analysis are the statement's falsity and the individual's knowledge concerning its falsity at the time of the utterance," again citing Garrison. Id.

In practice, as here, the regulation has been interpreted to punish speech by attorneys that impugn the integrity of the judiciary without requiring a showing of knowledge or reckless disregard to falsity.

Attorneys Sanctioned for Speech: An Epidemic

Attorneys sanctioned for speech appears epidemic. Professor Margaret Tarkington's research is worth repeating here. [2] In "The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, she reveals that statements by attorneys subject to sanction have been as mild as accusing the judiciary of being result-oriented or politically motivated.[3] At the other end of the spectrum are

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[2] See The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, Margaret Tarkington, Georgetown Law Journal, Vol. 97, p. 1567, 2009 (hereinafter "Truth"); A Free Speech Right to Impugn Judicial Integrity in Court Proceedings, Margaret Tarkington, Boston College Law Review, Volume 51, Issue 2, Article 2, 2010.

[3] For example, in Idaho State Bar v. Topp, 925 P2d 1113, 1115 (Idaho 1996), an attorney who attended a hearing (and who was not involved in the case) was reprimanded for opining to the press that the ultimate decision differed from a similar case because the judge in the first decision "wasn't worried about the political ramifications." His statement "necessarily implied that Judge

accusations of widespread judicial corruption and conspiracy.[4] Rarely do attorneys resort to crude language or expletives.[5]

Nor does the forum in which the speech is made by the attorney appear to make much difference in terms of the standard applied or punishment imposed. Attorneys are punished for allegations in briefs and filings with courts,[6] statements to the press,[7] letters to

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Michaud based his decision on completely irrelevant and improper considerations" and thus "impugned his integrity." See id. at 1117; see also In re Reed, 716 N.E.2d at 427; In re Westfall, 808 S.W.2d 829, 831 (Mo. 1991); In re Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam).

[4] In Committee on Legal Ethics of the West Virginia State Bar v. Farber, 408 S.E.2d 274, 284 (W. Va. 1991), the attorney accused a judge of being part of a secret Masonic plot to cover up the arson of a local establishment.

[5] But see Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006) (making crude remarks on radio show about judges after verdict for client was reversed on appeal), cert. denied, 549 U.S. 1205 (2007); Tresa Baldas, Lawyers Critical of Judges Fight for Rights, Nat'l L.J., Feb. 9, 2009, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428070373 (stating that comments posted by lawyers on blogs are sometimes crude and "vile").

[6] In re Abbott, 925 A.2d 482, 483 (Del. 2007) (per curiam); In re Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (per curiam), modified, 782 N.E.2d 985, 987 (Ind. 2003); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 427 (Ohio 2003) (per curiam); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 967-68 (Utah 2007). Attorneys have been punished for statements about the judiciary in briefs to the court even when the suit is filed against judges, and the question at issue is whether an exception to judicial immunity exists. See Ramirez v. State Bar of Cal., 619 P.2d 399, 406, 414 (Cal. 1980) (per curiam).

[7] Topp, 925 P.2d at 1115 (statements to press that implied judge's decision was politically motivated); In re Reed, 716 N.E.2d at 427 (statements in interview with press); In re Atanga, 636 N.E.2d 1253. 1256 (Ind. 1994) (per curiam) (statements in interview for

the judiciary,[8] communications with an authority to complain about a judge,[9] pamphlets or campaign

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ACLU local newsletter); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam) (statement to press criticizing judge for holding restraining order hearing ex parte); Ky. Bar Ass'n v. Nall, 599 S.W.2d 899, 899 (Ky. 1980) (per curiam) (statements in radio interview); Fieger, 719 N.W.2d 123 (statements on radio show); In re Westfall, 808 S.W.2d at 831 (statements to press criticizing appellate decision that had been released); In re Holtzman, 577 N.E.2d 30, 40-41 (N.Y. 1991) (per curiam) (letter sent to press criticizing judge's treatment of sexual assault victim); In re Raggio, 487 P.2d at 500 (statements made in television interview criticizing decision of Nevada Supreme Court to have death penalty case reheard); In re Lacey, 283 N.W.2d 250, 251 (S.D. 1979) (statements to press criticizing state courts' handling of the case after appellate decision received); Ramsey v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 771 S.W.2d 116, 120-21 (Tenn. 1989) (statements to the press complaining about a judge and then the disciplinary process).

[8] In re Evans, 801 F.2d 703, 703-04 (4th Cir. 1986) (letter sent to magistrate after case was on appeal and no longer before the magistrate or the district court); In re Guy, 756 A.2d 875, 877-78 (Del. 2000) (letter sent to judge); Fla. Bar v. Ray, 797 So. 2d 556, 557 (Fla. 2001) (per curiam) (three letters sent to chief immigration judge complaining about another immigration judge); In re Arnold, 56 P.3d 259, 263 (Kan. 2002) (per curiam) (disqualified attorney sent letter to judge).

[9] U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 863-64 (9th Cir. 1993) (statements made to FBI and appropriate authorities at U.S. Attorney's office regarding judge's editing of transcripts); Ray, 797 So. 2d at 560 (letter sent to chief immigration judge complaining about another immigration judge, which Ray and amici argued was "an accepted manner in which to seek redress when an attorney is having difficulties with an immigration judge"); In re Disciplinary Action Against Graham, 453 N.W.2d 313, 315, n.3 (Minn. 1990) (per curiam) (statements made in letter to U.S. Attorney, in judicial misconduct complaint, and in affidavit in support of motion to recuse, although court indicates that the charges were also released to the public).

literature,[10] comments posted on blogs,[11] and even correspondence with friends, family, and clients.[12]

Attorneys have been punished when the statements made could not have prejudiced or affected a pending proceeding[13] and when the statements are

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[10] See, e.g., In re Glenn, 130 N.W.2d 672, 674-75 (Iowa 1964) (leaflet circulated in community); In re Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 810 (Minn. 2006) (statement by judicial candidate's campaign issued about incumbent judge).

[11] See, e.g., Baldas, supra note 25 (reporting pending proceedings in various states regarding discipline for comments posted by lawyers on blogs, including a Florida attorney who is being disciplined for describing a judge on a blog as an "'evil, unfair witch' with an 'ugly condescending attitude'").

[12] See, e.g., In re Pyle, 156 P.3d 1231, 1233-36 (Kan. 2007) (per curiam) (letter sent to family, friends, and clients); In re Shay, 117 P. 442, 443-44 (Cal. 1911) (letter sent to client). Courts still rely on Shay as authority. See, e.g., Ramirez v. State Bar of Cal., 619 P.2d 399, 411 (Cal. 1980).

[13] See, e.g., In re Glenn, 130 N.W.2d at 674-75 (pamphlet after cases decided with no appeal pending); In re Pyle, 156 P.3d 1231 (explanatory letter regarding earlier discipline sent to family, friends, and clients). There are several cases where statements are made to the press after an appellate decision has been handed down. See, e.g. Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007); In re Westfall, 808 S.W.2d 829, 831 (Mo. 1991); In re Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam); In re Lacey, 283 N.W.2d 250, 251 (S.D. 1979); see also In re Evans, 801 F.2d at 704-05, 708 (attorney disbarred from United States District Court after sending letter accusing magistrate of incompetence and pro-Jewish bias, where attorney waited to send letter until after district court had adopted magistrate's ruling and Fourth Circuit had rejected summary reversal, although full disposition at the Fourth Circuit was still pending). Some courts have implicitly recognized a right of an attorney to criticize the judiciary after a case is no longer pending. See In re Cobb, 838 N.E.2d 1197, 1210 (Mass. 2005) (holding that the state has the power "to regulate the speech of an attorney

made by attorneys who are not engaged in a representative capacity before the criticized court.[14] There are certainly others.[15]

Notably Professor Tarkington's article *excludes* cases in which the speech was made verbally in a courtroom during a court proceeding or in which the speech was made at a time or in a manner that could potentially influence a jury trial. See Truth at 1572-1573.

This Court has not had occasion to address the issue of criticism of the judicial system and the judiciary in various cases involving attorneys. Professor Tarkington's contends, as does this Petitioner, that an appropriate standard for evaluating the content of speech is found in New York times v. Sullivan, and Garrison v. Louisiana.

In order to preserve the First Amendment rights of attorneys who have filed, or may file in the future, complaints that are critical of members of the

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representing clients in pending cases," suggesting it does not once a case is no longer pending); In re Graham, 453 N.W.2d at 321 (stating that the First Amendment protects the ability to "criticize rulings of the court once litigation was complete or to criticize judicial conduct or even integrity" (emphasis added)).

[14] Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437, 1440 (9th Cir. 1995) (initially suspended for one year for comment sent to Prentice Hall for publication in the Almanac of the Federal Judiciary suspension reversed by Ninth Circuit, but Ninth Circuit still rejected applicability of Sullivan standard); Idaho State Bar v. Topp, 925 P.2d 1113, 1115 (Idaho 1996); In re Pyle, 156 P.3d at 1233-34, 1248; Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam).

[15] See Lanre O. Amu, U.S. Supreme Court No. 14-689;2014 WL 6967828 (three year suspension for letters to judges where judges did not complain)

judiciary, this Court should grant certiorari to clarify the due process requirements that must be met before attorneys can be punished for complaints that are critical of the judiciary.

The Fundamental Issue is Free Speech in this Exemplary Case

The fundamental issue in this case is the free speech right to criticize the judiciary that must be recognized for attorneys when acting as officers of the court, and making statements in court proceedings, and in particularly communications to an authority accepting complaints about Judges.

Attorney criticism of the judicial system is an important and substantial right in that attorneys have special knowledge of the judicial system and are in a special position to use that knowledge to improve the system and correct its mistakes.

The application of the rule here applies a standard which prohibits statements *in and of themselves* critical of a Judge, and as such the standard used here is an unconstitutional restriction of an attorney's right to free speech.

Ms. MacDonald's statements in her letters to the Board of Judicial Standards, the very agency where one reports misconduct by Judges, were true, and the fact that the Judge continued with the trial with a parties' attorney in handcuffs, was a threat to the administration of justice and constitutes an obstruction of justice by the Judge himself.

Minnesota Rules of Professional Conduct, Rule 8.2 (a) states that "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."

Accordingly, Ms. MacDonald was disciplined by the Minnesota Supreme Court without making false statements concerning the integrity of a judge, but for statements in letters to the Board of Judicial Standards, (the agency that accepts complaints against Judges), and a Civil Rights Complaint she filed in the United States District Court, District of Minnesota, Case no. 13-cv-2477. Even though Ms. MacDonald did not make false statements, the court essentially refers to statements in her letters and the civil rights complaint, indicating the statements, *in and of themselves*, were impugning.

There was no showing of knowledge of or reckless disregard to falsity, as required by *Garrison*. In fact, the statements were true, and the Judge did not testify or state in his letter complaint that that Ms. MacDonald lied in the Civil Rights Complaint or letters to the Board. The civil rights complaint brought on behalf of Ms. MacDonald's client was dismissed pursuant to rule 12(b) (where facts in the complaint are taken as true) based on judicial immunity grounds. (7a, 30a) Ms. MacDonald appealed the judgment to the Eighth Circuit Court of Appeals without success, 597 Fed. Appx. 202 (8th Cir. 2015); and filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied. Court File 15-220, 136 S.Ct. 361 (2015); The Court parroted the statements, without specifying what exactly was false or in reckless disregard of the truth about the Judge's qualifications or integrity. In her letters to the Board, Ms. MacDonald made these same claims, of being "in a wheel chair and in handcuffs," without "a pen, paper" and "eyeglasses,"

"hair piece" and "shoes," during the child custody trial, with no client. All of her claims were true.

This Petition can give this Court the opportunity to establish guidelines for attorney speech, by applying the standard originally adopted by the American Bar Association in its Model rule, which was rejected by the Minnesota Supreme Court regarding maintaining the integrity of the profession. Given the present state of the law, guidance to the lower federal courts and state courts is clearly necessary.

Ms. MacDonald could not be disciplined without a showing that she had known her statements to be false or had acted with "reckless disregard" of truth or falsity, as that term is defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny.

Illustrating the divergence of opinion across the country, the Minnesota Supreme Court ruled that attorneys are subject to a *modified* version of the constitutional standard for defamation claims. The standard, adapted from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applies a version of the actual-malice standard from defamation cases, but the Minnesota Court modified it using a state court case to ask what a "reasonable attorney . . . would do in the same or similar circumstances." *Graham*, 453 N.W.2d at 321-22,321 n.6. The Court wrongly reasoned that its "modified standard" provides adequate protection for attorney speech but also preserves the court's ability to discipline attorneys who make baseless allegations against judges or other attorneys during the course of litigation. *See id.* at 321-22.

Applying the *modified* actual-malice test from *Graham*, the Court ruled that "MacDonald is not entitled to First Amendment protection for her statements because no reasonable attorney in

MacDonald's shoes would have made such serious allegations about a judge's integrity and impartiality without substantiating evidence. Our conclusion applies equally to her allegations in the federal lawsuit, in her complaints to the Board on Judicial Standards, and in her correspondence to other attorneys and public officials. As we have held, when "an attorney abuses" her First Amendment rights, "she is subject to discipline." *Id.* at 321. (14a-15a)"[15]

The Sullivan standard for determining whether a statement is made with reckless disregard as to truth or falsity has been extensively litigated and is determined by examining the speaker's subjective intent, which requires "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson 390 U.S. 727, 731 (1968) (emphasis added). An objective standard--what a reasonable person would believe was true or false--has been repeatedly rejected, beginning in Garrison. Id [16]

Professor Tarkington's research is that most state judiciaries have read the Sullivan standard out of the language of MPRC 8.2 interpreting it to punish speech *in and of itself* if it impunes the integrity of the judiciary, contrary to the drafters of the Model Rules which intentionally incorporated the Sullivan standard. [17]

Judges, in their capacities as individuals or courts, are entitled to no greater immunity from criticism than other persons or institutions. Landmark

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[16] Also see Truth at 1587- 1588

[17](See id. R. 8.2 legal background at 206 (Proposed Final Draft 1981); see also Truth at 1569

Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

Example of a Case Applying Sullivan

This Court is asked to look into adopting the reasoning and procedure where a showing of knowledge of or reckless disregard to falsity is required. For example, in In re Green, the court concluded that the First Amendment prohibited disciplining an attorney on the basis of his communications with the judge because the communications did not make or imply false statements of fact. Id. at 1078 [18] In Green, the court noted that if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct. (citing *In re Primus*, 436 U.S. 412, 432-433 (1978); *Bates v. State Bar of Arizona,* 433 U.S. 350, 355, 365, 384 (1977); *State of Oklahoma v. Porter*, 766 P.2d 958, 966-970 (Okla.1988); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991) (Kennedy, J., dissenting in part). Green, 11 P.3d 1078, 1083 (Colo. 2000) (per curiam)

Citing the reasoning as the interests in protecting attorney speech critical of judges, the Green Court agreed with "those jurisdictions that have applied a version of the *Sullivan* standard when considering discipline of attorneys who criticize judges. Green held that under the *Sullivan* standard, a two-part inquiry applies in determining whether an attorney may be disciplined for statements criticizing a

[18] However Green did so without reaching the question of whether a subjective or objective standard applied See In re Green, 11 P.3d 1078, 1086 n.7 (Colo. 2000) (per curiam).

judge: (1) whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice — that is, with knowledge that it was false or with reckless disregard as to its truth. Id at 1085

The Green Court further noted that "[The First Amendment] prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the 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, citing New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). The burden of proving actual malice is on the plaintiff because otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279, 84 S.Ct. 710. Green determined, rather, that reckless disregard means that a statement is unprotected if the speaker made it "with a high degree of awareness of . . . probable falsity,' . . . or . . . `entertained serious doubts as to the truth of his publication.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), and *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968), respectively). Id at 1084

Green further noted that, although the Supreme Court has never considered the *New York Times v. Sullivan* test in the context of attorney discipline based

upon criticism of a judge, disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purpose of this First Amendment analysis. The Court considers attorney discipline a "quasi-criminal" sanction. (citing *In re Ruffalo*, 390 U.S. 544, 551(1968); *and United States v. Brown*, 72 F.3d 25, 29 (5th Cir.1995). The Supreme Court has applied the *Sullivan* test of actual malice to the criminal defamation prosecution of a lawyer for criticism of a judge, finding no relevant distinction between the civil and criminal contexts. See Garrison, 379 U.S. at 74, 85 . Id at1084. These cases reason that the protection of attorney criticism of judges is similar to the protection of criticism of other public officials, relying upon the principal purpose of the First Amendment: safeguarding public discussion of governmental affairs. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

Core Political Speech

An individual's subjective opinion is afforded First Amendment protection, Foley v. WCCO Television, Inc., 449 N.W.2d 497, 501 (Minn, 1990)(citing Janklow v. Newsweek, Inc., 788 F.2d 1300, 1306 (8' Cir. (en bane)), cert. denied, 479 U.S. 883 (1986). Impugning judicial qualifications and integrity is core political speech protected by the First Amendment. The worst examples of unacceptable free speech involve efforts by government to insulate itself from criticism.[19] The Sullivan and Garrison Courts relied upon Free speech in holding that speech critical of our government

[19] Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 305 (1992)

officials could not be punished absent knowledge of or reckless disregard as to a statements falsity. See Garrison v. Louisiana, 379 U.S. 64, 74--75 (1964) (explaining that "speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)))

Speech regarding the qualifications and integrity of judges, the third branch of our government, is essential for democracy to function properly and cannot be suppressed merely to protect judicial reputation.

The punishment of attorney speech impugning judicial integrity falls squarely with the Sullivan and Garrison rules. In Sullivan, the Court noted that the judiciary cannot protect its reputation through contempt citations even if the statements contained" half truths" and "misinformation." Sullivan, 376 US at 272 (quoting Pennekamp v. Florida, 328 US 331 (1946)

More importantly for the purpose of this petition, however, the court below provided no basis for refusing to apply the "actual malice" test of New York Times Co. v. Sullivan ---a test it did not met in this case. In fact, the very considerations that led this Court to apply New York Times in the diverse contexts of criminal libel, Garrison v. Louisiana, 379 U.S. 64 (1964), and the discipline of public employees, Pickering v. Board of Education, 391 U.S. 563 (1968), compel its application here as well. Garrison involved an elected district attorney who had made an accusation of misconduct against a judge (eight judges, in fact, about whom Mr. Garrison raised, at a press conference, "questions" of "racketeer influences," 379 U.S. at 65-66). There, as here, the matter was publicly prosecuted by a state official (in Garrison, through a criminal libel action brought by a state attorney general, State v.

Garrison, 244 La. 787, 794, 154 So. 2d 400, 402 (1963), rev'd, 379 U.S. 64 (1964)). There the interest sought to be vindicated was a public one (according to the Bill of Information in Garrison, to enforce a "statute of the State of Louisiana" and thus to vindicate "the peace and dignity of the same," 244 La. at 804, 154 So. 2d at 406). Yet this Court found "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the New York Times rule," for "[t]he accusation concerned the judges' conduct of the business of the Criminal District Court." 379 U.S. at 76.

The court acknowledge the "constitutional malice" standard of New York Times v. Sullivan, but applied the "modified actual malice test" from its decision in Graham, and found that Ms. MacDonald is not entitled to First Amendment protection for her statements because "no reasonable attorney in MacDonald's shoes would have made such serious allegations about a judge's integrity and impartiality without substantiating evidence " (15a) . The Court wrongly used an objective standard, of what a reasonable attorney would do in similar circumstances.

The Court concluded Ms. MacDonald was guilty of making statements against a judge without first determining the certainty of the merits of the statements in her letters or the civil rights complaint. The rule provides that that "[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…" Minn. R, Prof. Conduct 8.2 (a). The Orders, however, do not state how Ms. MacDonald's statements were false. The Minnesota Supreme Court concluded that Ms. MacDonald violated Minn. R. Prof. Conduct 8.2 (a) by

making "recklessly false allegations against a judge that no reasonable attorney would have made based on the evidence available. (7a). The findings by the Supreme Court gave no indication of how Ms. MacDonald's statements were false or with reckless disregard as to their truth or falsity, other than repeating the statements. Thus, no one reading the Referee's findings and Minnesota Supreme Court decision, could have any inkling of the manner in which Ms. MacDonald's statements were untrue.

Court Trial in presided over by Judge with Attorney in Handcuffs

The most significant claims — Ms. MacDonald's lawsuit for Sandra Grazzini-Rucki and complaints against Judge Knutson — are protected conduct. Ms. MacDonald appealed the United States District Court Order dismissing lawsuit against Judge Knutson. The Eighth Circuit made no finding of frivolousness. 597 Fed. Appx, 902 (8th Cir. 2015). Ergo, we take issue with the Referee's Conclusion that the lawsuit and her comments to the Board were "in reckless disregard for the truth." (82a) Conclusion at para. 6.

Ms. MacDonald also asserted Judge Knutson prevented her from zealously representing her client, by permitting her arrest, and having her handle a court trial for a client while handcuffed. See In the matter of Conrad Hafer, No. 72453 (Nev. Supreme Court 2017); Findings at paras. 65-82 (A16-20).

In Hafen, a similar case, Public Defender [Zohral Bakhtary] appeared before Judge Hafen on behalf of a client. Ms. Bakhtary repeatedly interrupted the Judge.

The Judge told her to be "be quiet" and after she continued to argue for lenience for her client, he ordered

his bailiff to handcuff Ms. Bakhtary and seat her in a chair located next to the jury box. The Judge then proceeded with his ruling to , sentence the [Ms. Bakhtary's client] . At the conclusion of this hearing, he told his bailiff to "un-cuff Zohra", stating, "I think she's learned a lesson." Order at p. 3, para. D. See Matter of Hafen, 393 P3d 685 Nevada Supreme Court 2017.

For allowing a lawyer to be cuffed in court, and other conduct, Judge Hafen agreed that he had violated the Nevada judicial canon, requiring him to "act at all times in a manner that promotes public confident in the independence," with "integrity and impartiality of the judiciary," by "avoiding impropriety and the appearance of impropriety," to perform his duties "fairly and impartially." By "failing to allow every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law," and failing to be "dignified and courteous to litigants ... and lawyers . . ." Judge Hafer did not dispute the Public Defender's claim that her cuffing "precluded her from advocating" at that hearing. Order, at p. 3. Judge Hafer stipulated to an order to never to be a judge again.

Minnesota's Rules of judicial decorum are similar to Nevada's. See e.g., Canons 1, Rules 1.1 and 1.2, Minnesota Code of Judicial Conduct (the avoidance of impartiality and the appearance of impropriety and the promotion of public confidence); Rule 2.3(B)(the prohibition against harassment); Rule 2.6 (assuring the lawyer's right to be heard); Rule 2.8 (maintaining decorum); and Rule 2.12 (the requirement that the Judge supervise "court staff, court officials and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code").

Ms. MacDonald's complaints regarding the behavior of Judge Knutson features facts far more severe than what

happened to lawyer Bakhtary in Nevada. Cuffing for almost an entire day of trial, as opposed to a short sentencing hearing; a thirty-hour incarceration, as opposed to an Order to "un-cuff Zohra" after the imposition of a criminal sentence.

The Referee's findings that Ms. MacDonald could have cured her status, e.g., is a form of protective masking of the judiciary. (5a) (Paras. 65, 66 67, 68, 69, 70). No lawyer should ever be cuffed during a trial. Not the public defender who "repeatedly interrupted" the tribunal in Nevada. And surely not Ms. MacDonald for taking a photograph.

Judge Knutson did what Judge Hafen did, And he likewise should have been sanctioned. Judge Knutson should have refrained, directly or passively, from demeaning an advocate, however imperfect her advocacy was, and whether or not, as in Nevada, Ms. MacDonald "repeatedly interrupted" the Court. The decision to shackle Ms. MacDonald, with which the Court knew of and chose not to interfere, "offends not only judicial dignity and decorum, but as to that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350 (1970)(J. Brennan, concurring).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Michelle Lowney MacDonald Shimota
1069 South Robert Street
West St. Paul, MN 55118
Telephone: (651) 222-4400
Michelle@MacDonaldLawFirm.com

Cases

Statutes

Rules