No. SC22-0860

Supreme Court of Florida

THE FLORIDA BAR,

Complainant,

v.

JERRY GIRLEY,

Respondent.

ON APPEAL FROM REPORT OF REFEREE
FLORIDA BAR FILE NO. 2021-30,853 (09B)

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., IN SUPPORT OF RESPONDENT JERRY GIRLEY

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Foundation of Florida, Inc. (ACLU-FL), is a statewide, nonprofit, and nonpartisan organization dedicated to defending the principles embodied in the State and Federal Constitutions and our nation's civil rights laws. For decades, the ACLU-FL has played a critical role in defending the First Amendment freedoms of those who express unpopular or controversial ideas and opinions. The ACLU-FL has appeared in numerous cases, both as direct counsel and as *amicus*, before Florida courts in cases involving free-speech issues.

Moreover, the ACLU-FL has a significant interest in its own ability to communicate ideas and opinions about federal, state, and local government, including government officials, our criminal-justice system, and our legal system more broadly. The ACLU-FL's ability to communicate ideas and opinions as part of its mission to hold government officials accountable would be significantly chilled by a ruling that punishes individuals for suggesting, for example, "that the court system does not provide equal justice to all," Complaint (Brooke Girley) ¶ 12; Complaint (Jerry Girley) ¶ 12.

PRELIMINARY STATEMENT

The Florida Bar asks this Court for its blessing to punish Brooke and Jerry Girley for behavior that is both quintessentially American and protected by the U.S. Constitution—speaking critically, even harshly, of their government. As Justice Gorsuch recently explained, "[t]he framers designed the Free Speech Clause of the First Amendment to protect the freedom to think as you will and to speak as you think." *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). "By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation." *Id.* "[S]peech on public issues" is particularly important to our constitutional order, "occup[ying] the highest rung of the hierarchy of First Amendment values" and meriting "special protection" because "it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). All this to say, the Constitution zealously safeguards the people's right to criticize their government.

The Bar asks this Court to deviate from that constitutional rule. It takes the stance that the Girleys deserve punishment because they have "convey[ed] that the court system is unfair, biased and does not provide equal justice to everyone," and "impugn[ed] the integrity of

Judge [Kevin] Weiss, the Judiciary, and the court system as a whole." Ref.'s Rep. (Brooke Girley) at 9; Ref.'s Rep. (Jerry Girley) at 6. The Bar asks this Court to affirm a rule that requires the Girleys to provide an objectively reasonable factual basis for their political opinions. But it has not explained what special circumstances exist here that justify deviating from the First Amendment's general principles.

Crucially, by the time the Girleys made their comments critical of the court system and judiciary, Judge Weiss had already directed his verdict. There was no ongoing proceeding to prejudice, and the Girleys' comments were not made in court or in legal filings. Brooke Girley was not even part of the litigation. It is well established that the First Amendment fiercely protects "the noncommercial speech of lawyers." *NIFLA v. Becerra*, 585 U.S. 755, 771 (2018). This rule exists to ensure that the government does not try "to suppress unpopular ideas or information"—like, for example, harsh criticism of government officials. *Id.* (citation omitted).

In its prosecution of the Girleys, the Bar relies on multiple sources of authority, including Rule 4-8.2 of the Rules Regulating The Florida Bar. Rule 4-8.2 protects not only members of the judiciary, but also public legal officers like the attorney general and

elected prosecutors. Requiring attorneys to marshal evidence in support of their political opinions whenever they criticize a judge or public legal officer is an unworkable, unconstitutional rule.

An example shows the danger of this rule. Recently, the Federalist Society's Miami Lawyers Chapter hosted a debate on progressive prosecutors.[1] Florida attorney Zack Smith co-authored *Rogue Prosecutors: How Radical Soros Lawyers Are Destroying America's Communities*, a book sharply critical of progressive prosecutors. If Mr. Smith knew that he needed to collect evidence showing an objectively reasonable factual basis for every criticism he offered of progressive prosecutors or risk losing his bar license, might that have chilled his speech?

It is axiomatic that "First Amendment freedoms need breathing space to survive." *Am. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) (citation omitted). Yet, the Bar threatens to put these freedoms in a vise. Attorneys throughout Florida must now worry that publicly criticizing a government official will lead to discipline.

[1] *See* Miami Lawyers Chapter, *Rogue or Righteous? Debating the Role of Prosecutors in Today's Legal Landscape*, FEDERALIST SOC'Y (last visited June 21, 2024), https://fedsoc.org/events/rogue-or-righteous-debating-the-role-of-prosecutors-in-today-s-legal-landscape.

That cannot be squared with the First Amendment's vigorous protection of speech on public issues. The Bar seeks to punish the Girleys for political expression that lies at the core of the Free Speech Clause, absent special circumstances that justify deviation from general First Amendment principles. This Court should not let that stand. The Girleys, like other Floridians, have the right to harshly criticize their government.

SUMMARY OF ARGUMENT

The First Amendment generally denies the government the power to restrict expression on the basis of its subject matter or viewpoint. Free speech protections are especially stringent when the government seeks to regulate political speech. However, the government can regulate conduct in ways that incidentally affect speech, including the conduct of professionals. The First Amendment also grants the government some latitude to regulate attorneys' commercial speech. That said, absent special circumstances, general First Amendment principles apply to a lawyer's expressive speech, including his political speech. The Girleys' criticism of Judge Weiss and the legal system was expressive speech entitled to the strictest First Amendment protections.

There is a robust consensus that the First Amendment forbids seditious-libel prosecutions—punishing a person for criticizing his government. Yet, the Florida Bar's disciplinary action against the Girleys closely resembles this unconstitutional restraint on speech. The ability to criticize one's own government is the hallmark of a free society. The Bar is denying the Girleys that right.

In so doing, the Bar imperils the political speech of all attorneys licensed in Florida. The sort of special circumstances that could justify deviating from the First Amendment's general rules—such as prejudicing the jury, intimidating witnesses, or maintaining decorum in the courtroom—are absent here. Because the Bar is engaging in viewpoint discrimination, free speech principles require strict scrutiny. The Bar's application of its rules in this matter fails to meet that standard. A contrary holding risks broadly chilling attorneys' political speech, including the speech of elected officials.

ARGUMENT

I. The First Amendment protects an attorney's out-of-court political speech.

Many years ago, the pioneering civil rights lawyer Charles Hamilton Houston observed that "public officials serve those who put

and keep them in office." He was right. But even if he were wrong, he still had a right to criticize the integrity of the judicial system, because the First Amendment protects lawyers just as much as it protects everyone else. While the bar and the courts can regulate the conduct of lawyers, neither the bar nor the courts can punish a lawyer merely for criticizing a judge or the judicial system, because the First Amendment forbids it.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I; *see also Gitlow v. New York*, 268 U.S. 652 (1925) (applying the First Amendment to the states). Under the First Amendment, the government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted).

The First Amendment is especially protective of political speech, including criticism of government officials. It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v.*

Sullivan, 376 U.S. 254, 270 (1964); *see also Snyder v. Phelps*, 562 U.S. 443, 451–53 (2011). As this Court has observed, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion." *Gibson v. Maloney*, 231 So. 2d 823, 826 (Fla. 1970) (quoting *New York Times Co.*, 376 U.S. at 269).

While the First Amendment permits the government to regulate conduct in ways that may incidentally affect speech, it prohibits the government from directly regulating the content of speech, especially when the regulation is based on the speaker's viewpoint. A regulation of conduct that only incidentally affects speech receives intermediate scrutiny, and "will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). But regulations that "target speech based on its communicative content" receive strict scrutiny, "are

presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also R.A.V. v. St. Paul*, 505 U. S. 377, 395 (1992). Even worse are content-based regulations of speech that discriminate on the basis of the speaker's viewpoint. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Essentially, content-neutral regulations that incidentally affect speech may be constitutional, but content-based regulations of speech are rarely constitutional, and viewpoint-based regulations are almost never constitutional.

The First Amendment protects professional speech just like it protects every other kind of speech. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA v. Becerra*, 585 U.S. 755, 767 (2018). States can use their police powers to regulate professions, including the practice of law, and can delegate their regulatory authority to professional organizations, including state bar associations. But a state's authority to regulate a profession is

limited to regulating the professional conduct of its members; it does not include unfettered authority to regulate their expressive speech. *See Otto v. City of Boca Raton, Fla.*, 981 F. 3d 854, 861 (11th Cir. 2020) ("As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" (quoting *NIFLA*, 585 U.S. at 771)). Specifically, states can "require professionals to disclose factual, noncontroversial information" when they engage in "commercial speech," and states can "regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768.

The practice of law is among the oldest professions. States have always regulated lawyers. But the First Amendment still protects lawyers, just like it protects all other professionals. *See, e.g.*, *id.* at 771 ("For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."). While states can regulate the practice of law, they are limited in their ability to regulate a lawyer's expressive speech.

States can require attorney advertisements to be truthful and accurate, because they are commercial speech. *See, e.g.*, *Zauderer v.*

Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985); *see also Fla. Bar v. Pape*, 918 So. 2d 240 (2005). And states generally can regulate an attorney's solicitation of clients, because it is also commercial speech. *Compare Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (holding that prohibiting the solicitation of accident victims was constitutional), *with Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding that prohibiting the solicitation of foreclosed homeowners was unconstitutional), *and In re Primus*, 436 U.S. 412, 426–39 (1978) (holding that disciplining an ACLU attorney for soliciting clients for pro bono litigation aimed at political advocacy was unconstitutional). Essentially, the First Amendment allows states to regulate the truthfulness and accuracy of attorney advertising in order to protect the public from unscrupulous lawyers.

States can also regulate a lawyer's speech during a judicial proceeding, but only in order to prevent prejudice to the proceeding. For example, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a criminal defendant's lawyer held a press conference immediately after his client was indicted, in which the lawyer claimed the government was corrupt, among other things. The Nevada bar disciplined the lawyer, finding that his statements created a

"substantial likelihood of materially prejudicing" the proceeding, and the Nevada Supreme Court affirmed. *Id.* at 1033. The Supreme Court unanimously reversed, holding that the rule in question was void for vagueness, but the justices disagreed about the extent to which the First Amendment allows states to regulate a lawyer's political speech.

A plurality of four justices found that a lawyer's speech is fully protected by the First Amendment at all times, observing that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Id.* at 1054 (1991) (Kennedy, J.). The rest of the majority held that the First Amendment provides only limited protection to a lawyer's speech in relation to a pending judicial proceeding: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Id.* at 1071 (Rehnquist, J.); *see also id.* at 1070, 1072–75 (discussing these principles in the context of "pending cases"). However, all of the members of the *Gentile* Court

unanimously agreed that a lawyer's speech receives full First Amendment protection as soon as a judicial proceeding ends.

Lawyers don't forfeit their First Amendment rights when they join the bar. The First Amendment permits lawyers to have opinions and to express them, so long as they don't mislead consumers or prejudice pending cases in which they represent a party. And the First Amendment affords lawyers the same rights to criticize judges as anyone else. Specifically, the First Amendment protects an attorney's right to call a judge racist, anti-Christian, or a judicial activist because it is an opinion, and the First Amendment protects everyone's right to express their opinion about government officials, including lawyers.

II. The Bar's interpretation of its rules imperils attorneys' political speech.

The Bar's disciplinary action sanctioning the Girleys for their political speech is unconstitutional. It is analogous to a seditious-libel prosecution, an anachronism of British common law that the First Amendment was designed to prohibit. A rule that empowers the government to punish its attorney-critics risks broadly chilling political speech.

A. The Bar's disciplinary action is akin to a seditious-libel prosecution, violating one of the First Amendment's clearest lines.

Seditious libel was a common-law crime in Britain that punished criticism of the government and government officials. *See* Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES 19 (2d ed. 1969). Seditious-libel prosecutions were intensely unpopular in colonial America, so much so that when the Crown attempted to prosecute John Peter Zenger in 1735 for criticizing the colonial Governor of New York, the jury refused to convict. *See* Michael Kent Curtis, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 41–42 (2000). Gouverneur Morris, one of the framers of the U.S. Constitution, later remarked that the "trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." Douglas Linder, *The Trial of John Peter Zenger: An Account*, at 8, SOC. SCI. RSCH. NETWORK (Oct. 16, 2007).[2]

Yet, this was not the end for seditious-libel prosecutions in America. During John Adams's administration, a Federalist-controlled Congress—fearing the factionalism and fierce opposition

[2] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021258.

that had begun to take hold in the early United States and war with France—narrowly passed the Sedition Act of 1798. *See* Michael Kent Curtis, *supra*, at 58–61, 71. The Sedition Act made it a crime to "write, print, utter or publish … any false, scandalous and malicious writing or writings against the government of the United States … with intent to defame the said government … or to bring [it] … into contempt or disrepute …." An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (July 14, 1798).[3] The Sedition Act of 1798 did allow for truth as a defense. *Id.* But, as Congressmen Albert Gallatin and John Nicholas explained during debate on the bill, it was unlikely an accused could prove the truth of their political opinions, resulting in critics of the government choosing to forego dissent rather than risk prosecution. *See* Rep. John Nicholas, 5 Annals of Cong. 2140–41 (1798) ("If this bill be passed into law, the people will be deprived of that information on public measures, which they have a right to receive, and which is the life and support of a free Government … [Printers] would not only refrain from publishing anything of the least questionable nature, but

[3] *Available at* https://avalon.law.yale.edu/18th_century/sedact.asp.

they would be afraid of publishing the truth, as though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice."); Rep. Albert Gallatin, 5 Annals of Cong. 2162 (1798) ("[H]ow could the truth of opinions be proven by evidence? If any individual thinking … that the present bill was unconstitutional, and that it had been intended, not for the public good, but solely for party purposes, should avow and publish his opinion … by what kind of argument or evidence, in the present temper of the parties, could the accused convince them that his opinion was true?").[4]

Among the many who contested the Sedition Act, James Madison and Thomas Jefferson offered especially forceful criticisms of it. In The Virginia Report of 1799–1800, Madison spoke of the inherent unfairness of the Act because it protected incumbents from criticism while threatening supporters of the opposition with criminal prosecution—denying the people their right to "free examination" of their elected officials and the "free communication among the people" regarding the state of their government. James Madison, *The Virginia Report of 1799–1800*, at 225, 227 (J.W. Randolph ed. 1850).[5]

[4] *Available at* https://digital.library.unt.edu/ark:/67531/metadc29472/m1/?page=5.

[5] *Available at* https://www.loc.gov/item/16007972/.

Madison also recognized, like his Republican peers in Congress, that the defense of truth could not protect unpopular political opinions from prosecution. *See id.* at 226 ("[I]t must be obvious to the plainest minds, that opinions … are not only in many cases inseparable from the facts, but may often be more objects of the prosecution than the facts themselves; or may even be altogether abstract from particular facts; and that opinions … cannot be subjects of that kind of proof which appertains to facts, before a court of law."). Meanwhile, Thomas Jefferson, then-Vice President of the United States, drafted in secret the Kentucky Resolutions expressing the view that the Sedition Act violated the First Amendment and therefore was "altogether void." Thomas Jefferson, *Resolutions Adopted by the Kentucky General Assembly*, Resolution III (Nov. 10, 1798).[6]

While some prosecutions under the Sedition Act of 1798 did occur, the law proved so unpopular that John Adams lost his bid for reelection in 1800, the Sedition Act expired, and Thomas Jefferson, the newly elected President, pardoned all persons prosecuted under the Act. *See* Michael Kent Curtis, *supra*, at 5. Later, Congress—

[6] *Available at* https://www.loc.gov/item/16007972/.

recognizing the unconstitutionality of the Sedition Act—repaid the fines levied against people prosecuted under it. *New York Times Co.*, 376 U.S. at 276 (collecting sources). Both the U.S. Supreme Court and this Court have recognized that seditious-libel prosecutions violate the First Amendment. *See, e.g.*, *id.* ("These views reflect a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."); *Firstamerica Dev. Corp. v. Daytona Beach News-J. Corp.*, 196 So. 2d 97, 99 (Fla. 1966) ("It was these restraints [(prosecutions for seditious libel)] that the Bill of Rights sought to avoid."). As famed First Amendment scholar Harry Kalven put it, "[p]olitical freedom ends when government can use its powers and its courts to silence its critics. … If … [a society] makes seditious libel an offense, it is not a free society no matter what its other characteristics." Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205 (1964).

Yet, despite this robust consensus, the Florida Bar is engaged here in what is akin to a seditious-libel prosecution. It seeks to punish the Girleys for publicly criticizing the legal system and the

judges within it. The First Amendment does not tolerate the government using the threat of sanctions to silence its critics, even when those critics are attorneys. *See NAACP v. Button*, 371 U.S. 415, 439 (1963) ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."). As the next section will discuss, none of the conditions that could justify deviating from this general rule apply here.

B. The Bar's actions in this case threaten to broadly chill attorneys' political speech.

The Bar's interpretations of Rules 3-4.3 and 4-8.2 and the oath of admission violate the First Amendment. Political speech on matters of public concern "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). The Girleys' criticism of the legal system and judiciary was quintessential political speech.[7] The U.S. Supreme Court has repeatedly warned that "First Amendment freedoms need breathing space to survive." *Button*, 371 U.S. at 433. Here, the Bar has done exactly the opposite—advancing

[7] In fact, Brooke Girley testified that "she planned to run … against Judge Weiss"—making the Bar's sanctions against her all the more troubling, as they help protect an elected incumbent from a political challenger. Ref.'s Rep. (Brooke Girley) at 8.

interpretations of its rules that, if applied consistently, threaten to smother attorneys' ability to engage in core political speech. Simply put, the Bar cannot discipline attorneys for critical opinions of the judiciary or legal system when they are made outside of court or legal filings and after the proceeding has concluded.

In its referee reports, the Bar faults the Girleys, for among other things, "convey[ing] that the court system is unfair, biased and does not provide equal justice to everyone," and "impugning the integrity of Judge Weiss, the Judiciary, and the court system as a whole." Ref's Report (Brooke Girley) at 9; Ref's Report (Jerry Girley) at 6. The Bar required the Girleys to provide an objectively reasonable factual basis for their opinions expressed after Judge Weiss directed a verdict in *Rop v. Adventist Health System*. *See* Ref.'s Rep. (Brooke Girley) at 12–15; Ref.'s Rep. (Jerry Girley) at 16–19. It concluded that the Girleys failed to provide sufficient evidence and sanctioned them.

In doing so, the Bar committed the "the greatest First Amendment sin"—viewpoint discrimination. *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277 (11th Cir. 2024). If the Girleys had asserted that the legal system provides equal justice and affirmed Judge Weiss's integrity, the Bar would not have punished the

statements. Accordingly, strict scrutiny should apply to the Bar's application of its rules here. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *cf. also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (applying strict scrutiny to an ethical rule that prohibited judges from personally soliciting money while campaigning); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (applying strict scrutiny to ethical rules that restricted elected judges' political speech while campaigning).

Certainly, there are situations where the Bar or judiciary can punish an attorney for the substance of statements they make—for example, public statements that seek to intimidate a witness or prejudice a jury in an ongoing case or unprofessional statements in court or in court filings. *See, e.g.*, *Fla. Bar v. Jacobs*, 370 So. 3d 876, 881 (Fla. 2023). But these are exceptions to the rule.[8] The general rule under the First Amendment is neither the legal system nor the judiciary have a free-floating interest in insulating judges or the court system from attorney criticism. *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 205 (2014) (refusing "to define the boundaries

[8] This Court need not name every exception. It is enough to recognize that this set of facts does not qualify as one.

of the First Amendment by reference to … a generalized conception of the public good").

Indeed, the Girleys have every reason to feel singled out by the Bar. Recently, Senator Marco Rubio referred to Donald Trump's criminal trial in New York as "[a] political show trial" and questioned the integrity of Judge Juan Merchan.[9] Representative Matt Gaetz referred to the verdict in that case as "the corrupt result of a corrupt trial, a corrupt judge, and a corrupt DA."[10] And Governor Ron DeSantis called Judge Merchan "a partisan judge" and claimed that Trump's guilty verdict was the result of "the political agenda of some kangaroo court."[11] Governor DeSantis has also criticized Chief Judge Mark Walker of the U.S. District Court for the Northern District of Florida in recent years, opining that Judge Walker's ruling against the state in a voting-rights lawsuit "was performative partisanship."[12]

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[9] Marco Rubio, X.COM (May 30, 2024), https://x.com/marcorubio/status/1796288773161984161.

[10] Matt Gaetz, X.com (May 30, 2024), https://x.com/RepMattGaetz/status/1796291273009017123.

[11] Ron DeSantis, X.com (May 30, 2024), https://x.com/govrondesantis/status/1796288427924639987.

[12] Gary Fineout, *Federal judge overturns parts of Florida election law, citing 'horrendous history' of racism*, POLITICO (Mar. 31, 2022), https://www.politico.com/news/2022/03/31/florida-judge-election-law-racism-00022041.

Senator Rubio, Representative Gaetz, and Governor DeSantis are all currently listed as members in good standing of the Florida Bar.[13]

Of course, the First Amendment protects each of the statements made by Senator Rubio, Representative Gaetz, and Governor DeSantis. But if the Bar were to apply the same standards to those three that it applied to the Girleys, each would be subject to disciplinary proceedings and required to provide an objectively reasonable factual basis in support of their opinions. That demand is untenable under the First Amendment. So too here. There are no special circumstances in this case that require a deviation from the First Amendment's general rules vigorously protecting political speech. Judge Weiss had already directed a verdict. The case was at its end in the circuit court. There was no risk the Girleys' statements would prejudice an ongoing legal proceeding.

Requiring the Girleys—and other attorneys like Governor DeSantis or Senator Rubio—to mentally put together an objectively reasonable factual basis for their political opinions before they offer

[13] *See* https://www.floridabar.org/directories/find-mbr/profile/?num=102946; https://www.floridabar.org/directories/find-mbr/profile/?num=48962; https://www.floridabar.org/directories/find-mbr/profile/?num=15976.

criticisms of the judiciary or the legal system is fundamentally inconsistent with free speech. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter [the] exercise [of our First Amendment freedoms] almost as potently as the actual application of sanctions."). As James Madison recognized well over 200 years ago, we must not burden opinions critical of our government with a requirement of truth because "opinions … cannot be subjects of that kind of proof which appertains to facts, before a court of law." James Madison, *supra*, at 226. The same is true of a requirement that attorney opinions critical of the legal system be founded on an objectively reasonable factual basis, as judged by the Florida Bar or a court of law. To permit imposition of that standard would be to enable the government to broadly "interfere with an uninhibited marketplace of ideas." *303 Creative LLC v. Elenis*, 600 U.S. 570, 585 (2023). This, the First Amendment does not tolerate.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court overrule the referee's disciplinary recommendations and dismiss the Florida Bar's complaints against Brooke and Jerry Girley.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to all persons included in the case's service list on the E-filed date of this document by filing the document with service through the e-Service system (Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(1)).

CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I certify that this brief complies with the font (Bookman Old Style 14-point) and word-count requirements. This filing contains 4,698 words (excluding sections permitted to be excluded), which is within the 5,000-word limit prescribed in Fla. R. App. P. 9.370(b).

Respectfully submitted,

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