

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case No.
SC20-529

Complainant,

v.

The Florida Bar File Nos.
2019-10,070 (12B)
2019-10,109 (12B)
2019-10,148 (12B)

CHRISTOPHER W. CROWLEY,

Respondent.

_____ /

CROSS-ANSWER/REPLY BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the Bar.

Christopher W. Crowley is referred to as Respondent or Crowley.

Bar exhibits are referred to as “TFB-Exh.” and Respondent’s exhibits are referred to as “R-Exh.” followed by the exhibit number and any applicable page number(s) (e.g., TFB-Exh. 1 at 5).

Documents comprising the Index of Record are referred to by tab number and any applicable page number(s) (e.g., Tab#1 at 5).

The Report of Referee on Findings of Fact and Guilt (Tab#52) is referred to as “ROR1:” and the Sanctions Report of Referee (Tab#133) is referred to as “ROR2:” followed by the applicable page number(s).

Transcripts of hearings are referred to as follows: T1 for the trial held February 8, 2021 through February 9, 2021; T2 and T3 for the sanction hearing held February 28, 2024 through February 29, 2024, respectively; T4 for the hearing on Respondent’s Motion for Reconsideration and / or New Trial held August 25, 2021; and T5 for the hearing on Respondent’s Motion to Reconsider and Vacate Findings of Referee Due to Subsequent Authority from U.S.

Supreme Court held January 18, 2024. These transcripts are followed by applicable page and any line number(s) (e.g., T1:1:1-2).

Respondent's Initial Brief is referred to as R-I.B. and the Bar's Answer and Initial Brief on Cross Appeal is referred to as TFB-A.B./I.B.

The Rules Regulating The Florida Bar may be referred to as "Rule(s)" followed by the rule number(s). Florida's Standards for Imposing Lawyer Sanctions may be referred to as "Standard" followed by the standard number.

REPLY ARGUMENT IN RESPONSE

I. RULE 4-8.2(a) IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT DISCRIMINATES BASED ON CONTENT INVOLVING DISFAVORED SUBJECTS ABOUT SPECIFIC CATEGORIES OF PEOPLE

A. FIRST AMENDMENT PROTECTIONS ARE NOT DIMINISHED FOR LAWYERS OR AS TO THEIR PRIVILEGE TO PRACTICE LAW

The Bar makes a troubling claim that because “[i]t is a privilege to be a lawyer, not a right,” Crowley and all lawyers have given up a significant extent of their First Amendment rights in exchange for that privilege, and that this diminished protection of Crowley’s and other lawyers’ freedom of speech affects all areas of their lives—not just “in the context of legal representation of a client”—because “an attorney is an attorney is an attorney.” (TFB-A.B/I.B. 35-36).

But the Bar fails to recognize that the First Amendment is the First Amendment is the First Amendment no matter the context—whether a criminal case, a civil case, an administrative proceeding, a quasi-judicial proceeding, government employment, professional regulation, etc. First Amendment protections of speech apply the

same in any judicial proceeding and even when there is no judicial proceeding.

The First Amendment did not fail to protect public high school football coach Joseph Kennedy from losing his job for kneeling on the field in prayer after games just because he did not have a “right” to be a coach and did not face a criminal proceeding. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022). Nor did the First Amendment fail to protect 303 Creative LLC from compelled speech to fit the government’s message and agenda just because the company did not have a “right” to make website designs and faced an administrative hearing rather than a criminal proceeding. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023). Neither did the First Amendment fail to protect licensed clinics in California from being compelled to notify women that the state provided free or low-cost abortions just because the clinics were within the confines of the professional relationship. National Institute of Family and Life Advocates v. Becerra, 585 U.S. 755 (2018) (hereinafter “NIFLA”). And the First Amendment does not fail to fully protect Crowley’s political campaign speech in this case. The Bar mistakenly claims that “Crowley’s position [is] that his privilege to practice law is

constitutionally protected” (TFB-A.B./I.B. 46), but Crowley’s claim is that his speech is constitutionally protected and therefore the Bar cannot harm his privilege to practice law in violation of those First Amendment protections.

In NIFLA, the U.S. Supreme Court warned that “regulating the content of professionals’ speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” Id. at 771 (cleaned up). This is concerning because, “when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” Id. at 772 (internal quotation marks omitted).

The Court noted in NIFLA that it “has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’” Id. at 767. The Court also made clear that a “State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” Id. at 769 (quoting NAACP v. Button, 371 U.S. 415, 439 (1963)). The Court even specifically mentioned protections for lawyers’ noncommercial speech: “this Court's precedents have long

protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.” 585 U.S. at 771. So, the mere context of professional regulation does not negate or lessen First Amendment protections on speech, even for lawyers.

Nor does the type of proceeding negate or lessen First Amendment protections. In Counterman v. Colorado, the Court noted that there was no distinction between the *mens rea* requirements for criminal or civil punishments on speech. Counterman v. Colorado, 600 U.S. 66, 76, 80 (2023). In discussing incitement, the Court explained that “the First Amendment precludes punishment, *whether civil or criminal*, unless the speaker's words were ‘intended’ (not just likely) to produce imminent disorder.” Id. at 76 (emphasis added). As for defamation cases, the Court stated that it “adopted a recklessness rule, *applicable in both civil and criminal contexts.*” Id. at 80 (emphasis added).

In its attempt to counter this, the Bar cites no authority from the U.S. Supreme Court that the First Amendment does not fully

protect an attorney's political speech in a campaign about another attorney when disciplined in a non-criminal context. Instead, the Bar attempts to rely on Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), (TFB-A.B./I.B. 39), but the Bar fails to explain and recognize the very narrow context in which Gentile applies.

Gentile involved an attorney being disciplined after the state Bar filed a complaint against him for holding a press conference about a pending case in which he represented a criminal defendant. 501 U.S. at 1033, 1062. The U.S. Supreme Court was heavily split on different issues, having a majority only in parts of two (2) separate opinions, but reversed the Supreme Court of Nevada's discipline against the attorney because the ethics rule was void for vagueness, which raised concerns of discriminatory enforcement, especially when the speech was critical of the government. Id. at 1048-51, 1058.

Separate from the determinative issue, and thus *dicta* in an essentially dissenting opinion by Chief Justice Rehnquist (though with a majority as to certain parts), Chief Justice Rehnquist opined that "a lawyer *who represents a defendant involved with the criminal justice system*" may be penalized "*for public pronouncements about*

the case” on a lesser standard than what is required to prohibit speech or publication of pending cases by the general media. Id. at 1070-71, 1075 (Rehnquist, C.J.) (emphasis added). It is the *dicta* in this separate opinion by Chief Justice Rehnquist to which the Bar cites. (TFB-A.B./I.B. 39). But even Chief Justice Rehnquist’s separate opinion does not support the Bar’s broad assertion that Crowley’s speech is not fully protected.

Chief Justice Rehnquist explained that such speech has less First Amendment protections because a lawyer’s “*extrajudicial statements* pose a threat to the fairness of a pending proceeding.” Id. at 1074 (Rehnquist, C.J.) (emphasis added). Therefore, the First Amendment right to freedom of speech about “evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts” in a pending criminal case, id. at 1070 (Rehnquist, C.J.), threatens the Sixth Amendment right that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury,” U.S. CONST. amend. VI, and “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by

extrajudicial statements would violate that fundamental right,” Gentile, 501 U.S. at 1075 (Rehnquist, C.J.).

Crowley’s speech did not pertain to a pending criminal case of a client or threaten any fundamental constitutional rights. Rather, Crowley’s statements pertained to his political opponent in an election, and the U.S. Supreme Court has explained the difference: “The very word [sic] ‘trial’ connotes decisions on the evidence and arguments properly advanced in open court. *Legal trials are not like elections*, to be won through the use of the meeting-hall, the radio, and the newspaper.” Bridges v. California, 314 U.S. 252, 271 (1941) (emphasis added). Therefore, the Bar’s reliance on Chief Justice Rehnquist’s *dicta* in Gentile is misplaced.

Likewise, the Bar also tries to rely on Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015). (TFB-A.B./I.B. 45-46). That case involved whether “States [can] prohibit judges and judicial candidates from personally soliciting funds for their campaigns.” 575 U.S. at 437. Although the Court permitted a restriction on such solicitations by judges and judicial candidates, the Court affirmed that “the First Amendment *fully applies* to Yulee’s speech,” id. at 446 (emphasis added), and that “speech about public issues

and the qualifications of candidates for elected office commands *the highest level of First Amendment protection*,” *id.* at 443 (emphasis added), but that “[*t*his is . . . one of the rare cases in which a speech restriction withstands strict scrutiny,” *id.* at 444 (emphasis added). The Court reasoned that “[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta.” *Id.* at 445.

Thus, First Amendment protections fully apply to lawyers and are not diminished under professional regulation as the Bar claims. And while there are very rare cases where strict scrutiny is satisfied—such as judges soliciting campaign funds and perhaps extrajudicial statements about a client’s pending criminal case—this is not such a case with a principle dating back to Magna Carta or speech threatening a fundamental constitutional right. Again, the Bar cites no authority from the U.S. Supreme Court that the First Amendment does not fully protect an attorney’s political speech in a campaign about another attorney.

B. CONTENT DISCRIMINATION OF A SUBCATEGORY OF PROSCRIBABLE SPEECH IS UNCONSTITUTIONAL.

Even if lawyers had diminished First Amendment rights in all of their speech as the Bar suggests, that still would not make Rule 4-8.2(a) (and Rule 3-4.3 insofar as it relies on the same grounds) facially constitutional by permitting the Rule's content discrimination.

The Bar claims that Rule 4-8.2(a) can limit its scope to protect only a specified class of individuals from disparagement. (TFB-A.B./I.B. 43). But the Bar fails to address that it is not just the Rule protecting a subclass of individuals which is constitutionally problematic, it is primarily the Rule's prohibition against a subclass of impugning statements "*concerning the qualifications or integrity of*" that specific subclass of individuals. R. Regulating Fla. Bar 4-8.2(a) (emphasis added). Other types of defamatory or impugning statements made by a lawyer about that same subclass of individuals are not prohibited by Rule 4-8.2(a), such as embarrassing statements about a judge's or state attorney candidate's personal life which does not pertain to their qualifications or integrity. This is similar to the North Carolina

statute in Grimmett v. Freeman which criminalized only derogatory reports calculated or intended to affect the chances of a candidate for election. 59 F.4th 689, 691 (4th Cir. 2023). As the Fourth Circuit explained:

Under this statute, speakers may lie with impunity about businesspeople, celebrities, purely private citizens, or even government officials so long as the victim is not currently a “candidate in any primary or election.” That is textbook content discrimination.

The Act's limitation to statements “calculated or intended to affect the chances of such candidate[s] for nomination or election,” only compounds the problem. Taken literally, this language means spreading a viral falsehood hoping to end a candidate's marriage is fine but doing the same thing becomes a crime if it is intended (in whole or in part) to doom the person's political campaign.

Id. at 694-95 (internal citations omitted).

As stated previously in Crowley’s Initial Brief, “*Rule 4-8.2(a)* is *limited to only a subset of impugning statements* to which certain types of people, mainly candidates and elected officials of a judicial or legal office, may be hostile—those harmful to their qualifications and integrity, and thus to their own political prospects;” and the section heading itself states that the Rule “DISCRIMINATES BASED ON *CONTENT INVOLVING DISFAVORED SUBJECTS* ABOUT SPECIFIC CATEGORIES OF PEOPLE.” (R-I.B. 27, 31-32 (emphasis

added)). And as the Fourth Circuit explained, a “careful *limitation to only a subset of derogatory statements* to which elected officials may be particularly hostile—those harmful to their own political prospects—raises the ‘possibility that official suppression of ideas is afoot.’” Grimmett, 59 F.4th at 695-96 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992)) (emphasis added).

The Bar points out from R.A.V. that prohibitions can possibly be limited in the scope of the persons which they protect, such as “criminaliz[ing] only those threats of violence that are directed against the President.” R.A.V., 505 U.S. at 388; TFB-A.B./I.B. 43. But R.A.V. only allows such a limitation “[w]hen the basis for the content discrimination consists *entirely of the very reason* the entire class of speech at issue is proscribable,” and therefore while:

[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President[,] . . . *the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.*

505 U.S. at 388 (emphasis added). Similarly, the government “may not prohibit, for example, only that obscenity which includes offensive *political* messages,” “only that commercial advertising that depicts men in a demeaning fashion,” and “may not...proscrib[e] *only* libel critical of the government.” Id. at 384, 388-89.

Although the Bar briefly acknowledges that the government cannot engage in such content-based discrimination (TFB-A.B./I.B. 42-43), it fails to address how the subclass of impugning statements proscribed by Rule 4-8.2(a) is constitutional. Instead, the Bar solely focuses on justifying the subclass of individuals whom the Rule protects by noting that they are not only government officials (but include jurors or members of the venire) and claims that “a lawyer’s false or reckless disparagement has ‘special force when applied’ to individuals serving a fundamental role in the judicial system.” (TFB-A.B./I.B. 42-43). But even if part of the “judicial system” is not considered the government, content-based discrimination on any subset of speech is unconstitutional—not just on anti-government speech, which most of the examples in the preceding paragraph happen to involve. The ordinance in

R.A.V. itself did not punish anti-government speech, but it was still facially unconstitutional on account of its content-based discrimination. 505 U.S. at 391.

And, again, even though threats of violence “have special force when applied to the person of the President[,] . . . *the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.*” R.A.V., 505 U.S. at 388 (emphasis added). Likewise, even if disparaging statements have “special force” when applied to the protected subclass of people, Rule 4-8.2(a) may not penalize only those disparaging statements “concerning the qualifications or integrity of” those specified protected individuals.

Additionally, the content discrimination in Rule 4-8.2(a) does not “consist[] entirely of the very reason the entire class of speech at issue is proscribable.” See R.A.V., 505 U.S. at 388. This Court’s own earlier ruling in Ray explicitly noted the distinct reasons when it explained that:

The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the

integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.

Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001) (emphasis added). The reason defamation as a class of speech is proscribable is because it falsely damages a private individual's reputation—not to preserve public confidence in government systems. As the Fourth Circuit explained in Grimmett, “the justification the [government] offers to support the Act's content discrimination . . . is of a different kind, not degree, than the reputation-based justifications underlying libel laws.” 59 F.4th at 695. Therefore, Rule 4-8.2(a) goes beyond the very reason defamation is proscribable and is facially unconstitutional because of its content discrimination.

In Grimmett, the Fourth Circuit rejected the very same argument, which the Bar makes here, about the North Carolina statute that criminalized derogatory reports calculated or intended to affect the chances of a candidate for election. The Fourth Circuit explained that “the lines this Act draws have no obvious relation to the reputation-based reasons for allowing States to prohibit libel in

the first place. And that, in turn, is why the [government's] attempt to analogize the Act to . . . the presidential threat statute [in R.A.V.] falls flat.” 59 F.4th at 695. Therefore, “[a]s in *R.A.V.*, the Act's limitation to speech addressing only certain topics renders it facially unconstitutional.” Id. at 696. Likewise, the limitation of Rule 4-8.2(a) to speech addressing only the qualifications or integrity of the specified subclass of individuals renders the Rule facially unconstitutional.

C. RULE 4-8.2(a) FAILS STRICT SCRUTINY

Even if Rule 4-8.2(a) discriminates based on content, the Bar claims that strict scrutiny is satisfied because the Rule is narrowly tailored to serve a compelling interest. (TFB-A.B./I.B. 40-42). The U.S. Supreme Court has held that “content-based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (internal quotation marks omitted).

In R.A.V., the City claimed its ordinance was “narrowly tailored to serve compelling state interests.” 505 U.S. at 395.

However, the U.S. Supreme Court held that:

The existence of adequate content-neutral alternatives thus undercuts significantly any defense of such a [facially content-based] statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law. *The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve [the government's] compelling interests; it plainly is not.* An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the [government's] special hostility towards the particular [subcategories] thus singled out. That is precisely what the First Amendment forbids.

Id. at 395-96 (cleaned up) (emphasis added). Thus, the issue is not whether the rule or law itself is narrowly tailored to serve a compelling interest, but is whether the content discrimination contained within that rule or law is narrowly tailored to serve a compelling interest in order to satisfy strict scrutiny and First Amendment requirements.

Applying this standard, the Fourth Circuit similarly held in Grimmett that the North Carolina statute's content discrimination was plainly not reasonably necessary to achieve North Carolina's

compelling interest “because an ordinance not limited to speech about current political candidates would have precisely the same beneficial effect.” 59 F.4th at 696 (cleaned up).

In the same way, a Bar Rule not limited to penalizing attorneys for speech addressing only the qualifications or integrity of a specified subclass of individuals would have precisely the same beneficial effect. Therefore, the content discrimination contained in Rule 4-8.2(a) is plainly not reasonably necessary or narrowly tailored to achieve the government’s interest. Instead, the content limitation serves only to display the government’s special hostility towards the particular subcategories of defamation singled out in Rule 4-8.2(a), which is precisely what the First Amendment forbids.

That is dispositive of the constitutionality of Rule 4-8.2(a). But going further to the Rule itself, the Bar claims from the comment to Rule 4-8.2(a) that there is a compelling interest to not “unfairly undermine public confidence in the administration of justice.” (TFB-A.B./I.B. 41). However, this is not a compelling interest to apply lesser First Amendment protections, nor is Rule 4-8.2(a) narrowly tailored to serve that interest.

To be clear, this is different than the compelling interest, which was acknowledged by Williams-Yulee, of “preserving public confidence in the integrity of the judiciary” by prohibiting judges and judicial candidates from personally soliciting funds for their campaigns so that a “State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.” Williams-Yulee v. Florida Bar, 575 U.S. 433, 437-38, 444, 448 (2015). Rather, the Bar claims Rule 4-8.2(a) concerns the general reputation of the administration of justice. But the U.S. Supreme Court has stated that even though a State might have “an interest in protecting the good repute of its judges, like that of all other public officials,” the Court has “firmly established . . . that injury to official reputation is an insufficient reason for suppressing speech that would otherwise be free,” and even “the institutional reputation of the courts . . . is entitled to no greater weight in the constitutional scales.” Landmark Commc’ns, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978) (cleaned up); see also New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (“Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error.”); In re

Warner, 21 So. 3d 218, 256, 262 (La. 2009) (“While protecting the reputations of ethical attorneys is clearly an important interest . . . this interest does not qualify as compelling. Thus, this state interest fails to satisfy the requirements of the strict scrutiny analysis” for a content-based restriction on attorney speech); Doe v. Supreme Court of Florida, 734 F.Supp. 981, 986 (S.D. Fla. 1990) (“If maintaining the reputation of the judiciary as an abstract end is insufficient to justify encroaching upon the robust exercise of free speech, then maintaining the reputation of lawyers or the Bar is, in our view, equally insufficient.”).

Even if this were a compelling interest, Rule 4-8.2(a) is not narrowly tailored to serve that interest because it is both overbroad and underinclusive. As the Fourth Circuit explained in Grimmett, North Carolina’s statute was overbroad because it “criminalize[d] at least some truthful speech—a step the Constitution forbids.” 59 F.4th at 692, 694 (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (“Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.”)). The Fourth Circuit noted that “[i]n North Carolina, statutory interpretation properly begins with an examination of the plain

words of the statute,” and “the plain words of the statute” at issue—
“knowing such report to be false or in reckless disregard of its truth
or falsity”—“reach truthful statements,” which “is precisely what
Garrison holds is unconstitutional.” 59 F.4th at 693 (cleaned up).
Rule 4-8.2(a) contains an almost identical phrase—“knows to be
false or with reckless disregard as to its truth or falsity”—and for
any statutory construction issue in Florida, the “first (and often
only) step . . . is to ask what the Legislature actually said in the
statute, based upon the common meaning of the words used.”
State v. Peraza, 259 So. 3d 728, 733 (Fla. 2018) (citation omitted).
Therefore, Rule 4-8.2(a) is unconstitutionally overbroad.

Rule 4-8.2(a) is also underinclusive. There are obviously many
other things besides a lawyer’s false statements which can unfairly
undermine public confidence in the administration of justice, and
the Rule does nothing to regulate that. For example, a recent report
noted that the “percentage of Americans who express either ‘a great
deal’ or ‘a fair amount’ of trust and confidence in the judicial
branch has fallen from 75% in 2000 to under 50% in 2022,” and a
“majority of Americans believe that the courts favor the wealthy and
judges don’t set aside their personal political beliefs when making

rulings.” “Report Finds ‘Withering of Public Confidence in the Courts,’” ANNENBERG PUBLIC POLICY CENTER (July 29, 2024), <https://www.annenbergpublicpolicycenter.org/report-finds-withering-of-public-confidence-in-the-courts/>. The report’s “authors suggest that ‘robust civics education’ that goes beyond mechanics and fosters an appreciation for democratic norms and civil discourse may help to rebuild public confidence in the judiciary.” Id. There is no indication in the article that the drop in public confidence is at all related to attorneys making defamatory comments about the qualifications or integrity a subclass of people associated with the administration of justice, and the Rule does nothing to prevent other causes of the loss of public confidence in the courts.

Instead, the Rule seems to be counterproductive by chilling speech which would inform the public of important information about the administration of justice. As the U.S. Supreme Court noted:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. An enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably

engender resentment, suspicion, and contempt much more than it would enhance respect.

Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 842 (quoting Bridges v. California, 314 U.S. 252, 270-271 (1941)) (cleaned up).

Further, the Rule does not prohibit non-attorneys from impugning the qualifications or integrity of judges or other officers in the protected subclass. Nor does the Rule prohibit the defamation of lawyers and other court staff who are not part of the subclass of protected people, but who are yet still part of the administration of justice and who affect the public confidence in the courts. This again highlights the content discrimination of the Rule and is shown in the Bar's own Answer Brief which incorrectly states, "Crowley created and advocated a false narrative that his opponent was a Muslim who would enforce Sharia Law if elected" and accuses him of a "dishonest effort to label Ms. Fox a covert religious [or Muslim] extremist." (TFB-A.B./I.B. 3, 8, 16, 50). There is no evidence to that effect. (See R-I.B. 7-15). And as far as the Bar associates Crowley with portions of the American Thinker article which he did not quote, that association is far more tenuous than Crowley's association of Fox with her father's book, Crowley's

arrest, and the conviction rate and handling of several cases by the State Attorney's Office where Fox was Chief Assistant State Attorney. Nonetheless, the Bar can utilize inflammatory language against Crowley without any fear of violating Rule 4-8.2(a) because Crowley is not part of the subclass of protected people. Even if he were, the Bar could claim that these statements do not concern the subclass of prohibited speech regarding his qualifications or integrity.

Because of its content discrimination Rule 4-8.2(a) is facially unconstitutional.

II. RULE 4-8.2(a) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT, BOTH FACIALLY AND AS APPLIED, BECAUSE A VIOLATION ONLY REQUIRES AN OBJECTIVE STANDARD RATHER THAN A SUBJECTIVE *MENS REA* OF RECKLESSNESS

The Bar mistakenly claims that Crowley's argument that the First Amendment requires the Bar to prove a subjective *mens rea* of recklessness to establish a violation of Rule 4-8.2(a) "primarily relies on Counterman v. Colorado." (TFB-A.B./I.B. 48). But Crowley's argument actually relies primarily on New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) and Garrison v. Louisiana, 379 U.S. 64, 73-75 (1964). (See, e.g., R-I.B. 46). So, even if

“Counterman does not apply to lawyer disciplinary proceedings” as the Bar claims (TFB-A.B./I.B. 48), that would not negate Crowley’s argument. However, since Counterman does in fact have a very broad scope and applies to lawyer disciplinary proceedings like this, Counterman heavily supports Crowley’s argument and further indicates that the holdings in Florida Bar v. Ray, 797 So. 2d 556, 558-59 & n.3 (Fla. 2001) and Florida Bar v. Patterson, 257 So. 3d 56, 62 (Fla. 2018) are incorrect as applied to Crowley.

In Counterman, the U.S. Supreme Court set a constitutional floor or minimum standard for punishing speech. The Court explained that “we see no reason to offer greater insulation to threats than to defamation” because “the protected speech near the borderline of true threats . . . is, if anything, further from the First Amendment’s central concerns than the chilled speech in Sullivan-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures).” Counterman v. Colorado, 600 U.S. 66, 80-81 (2023). Thus, if proving recklessness is required to penalize threatening speech in the context of stalking, then at least that same level of speaker-protection must apply to alleged defamatory political campaign speech, as Crowley is accused of here.

Given the Court’s concerns about self-censorship and chilling protected speech, along with the Court’s establishment of the recklessness standard for speech even less central to the Constitution, the Bar’s reading of Counterman is counterintuitive and backwards. The Bar suggests the Court gives greater protection to the “breathing room” around a stalker’s true-threats than to speech which is closer to the central concerns of the First Amendment—political speech which could be vital in the election of a state’s attorney. Commonsense would favor at least the same, if not more expansive, protection of speech which is closer to the First Amendment’s core protections. And because “debate” and “speech about the qualifications of candidates for public office” are “at the core of our electoral process and of the First Amendment freedoms, not at the edges,” Republican Party of Minnesota v. White, 536 U.S. 765, 774, 781 (2002) (cleaned up), Counterman makes clear that Crowley’s speech concerning a public figure in this election context must be given at least the same subjective recklessness standard protection as criminal true threats. Indeed, the Court has explained that:

[I]f it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971) (cleaned up).

Even Justice Barrett in her dissent recognized the constitutional floor or minimum on speech protections which the majority set forth in Counterman. Justice Barrett stated, “despite what the Court says, Sullivan does not stand for the *broad proposition* that the First Amendment ‘demand[s] a subjective mental state requirement.’ *Ante*, at 2114.” Counterman, 600 U.S. at 112 (Barrett, J., dissenting) (emphasis added). Justice Barrett then concludes that section of her dissent by arguing, “[i]n sum, our First Amendment precedent does not set a ‘*baseline ban* on an objective standard.’ *Ante*, at 2117.” Id. at 113 (Barrett, J., dissenting) (emphasis added).

Justice Barrett is only arguing this in dissent because she understands that the majority in Counterman has indeed found a “broad proposition” from Sullivan and other cases that there is

indeed a “baseline ban on an objective standard” for punishing someone on account of their speech, and thus a subjective standard is required by the First Amendment.

Additionally, Justice Sotomayor issued a statement respecting the denial of certiorari in the civil personal injury case of Mckesson v. Doe, which involved a negligence claim for personal injury brought by a police officer against a protest leader because an unidentified individual attending the protest threw an object that hit the officer in the face. 144 S.Ct. 913 (2024) (statement of Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor explained that after the Fifth Circuit issued its opinion to allow the negligence claim to proceed to trial, the Supreme Court decided Counterman, in which the Court “*made clear that the First Amendment bars the use of ‘an objective standard’ like negligence for punishing speech.*” Id. at 914 (citing Counterman, 600 U.S. at 78, 79, n.5) (emphasis added). Justice Sotomayor closed by stating that she “expect[s the lower courts] to give full and fair consideration to arguments regarding Counterman's impact in any future proceedings in this case” as the case would thereby proceed to trial. 144 S.Ct. at 914. Although the Mckesson case was civil

and did not involve true threats, Justice Sotomayor stated that the holding from Counterman against the use of an objective standard should apply to that proceeding.

Other courts have also applied Counterman to contexts outside of true threats. In de Laire v. Voris, the New Hampshire District Court relied on Counterman in a civil defamation case and held that “[d]espite the general rule” under New Hampshire law that a plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact, “the First Amendment provides certain safeguards” whereby “a public figure cannot recover . . . unless the speaker acted with ‘knowledge that it was false or with reckless disregard of whether it was false or [sic] not.’” de Laire v. Voris, No. 21-CV-131-JL, 2023 WL 5096150, at *1, *6 (D.N.H. Aug. 9, 2023) (quoting Counterman, 600 U.S. at 76).

In Cider Riot, LLC v. Patriot Prayer USA, LLC, the Court of Appeals of Oregon held in a civil case that “[i]n its decision [in Counterman], the Court unequivocally rejected a negligence standard for the imposition of liability arising out of speech because such a standard would not adequately insulate the core freedoms protected

by the First Amendment from the chilling effect of potential liability,” and thus concluded that “the First Amendment does not allow for the imposition of liability on a protest leader or an organizer under a negligence theory.” 544 P.3d 363, 370 (Or. Ct. App. 2024) (emphasis added).

And in Kindschy v. Aish, the Supreme Court of Wisconsin held that “Counterman applies to civil harassment injunctions premised on true threats” and thus requires a finding that the speaker “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” 8 N.W.3d 1, 8 (Wis. 2024) (quoting Counterman, 600 U.S. at 69).

Thus, Counterman has a much broader application than what the Bar asserts, and the First Amendment principles set forth in that case, as well as in Sullivan and Garrison, apply to Bar disciplinary proceedings like this. The fact that this proceeding “can only result in licensure action impacting Mr. Crowley’s *privilege* to practice law, not his freedom” (TFB-A.B./I.B. 49), makes no difference. As the Court explained in Counterman, for defamation the Court “adopted a recklessness rule, *applicable in both civil and criminal contexts*.” 600 U.S. at 80 (emphasis added).

The Bar insists that an objective standard applies to Rule 4-8.2(a) as well as Rule 3-4.3 (TFB-A.B./I.B. 50-51, 54) because that is all that the Bar can possibly hope to prove. But as thoroughly explained above and in Crowley's Initial Brief, the First Amendment requires the Bar to prove that Crowley had a subjective *mens rea* of recklessness for any of his statements to violate Rules 4-8.2(a) and 3-4.3, and the evidence does not support finding any violation under a subjective standard. (R-I.B. 32-46).

However, the Bar tries to conclusively claim that Crowley's statement about the 39% conviction rate "was knowingly false, because it was based on data that in no way could establish Ms. Fox's conviction rate." (TFB-A.B./I.B. 50). But the Referee did not find that to be knowingly false, and as explained in Crowley's Initial Brief, Crowley had asked a former IT coordinator to calculate the conviction rate, and there is no evidence that Crowley was personally aware of any imprecision at the time he made the statements, as he was relying on the accuracy of the calculation made by the former IT coordinator, and he saw Fox as responsible for her Office's conviction rate due to her supervisory position. (R-I.B. 18-20, 45).

The Bar also attempts to distinguish Garrison and Stanalonis based on the quantity of erroneous statements (TFB-A.B./I.B. 51-52) but fails to show how that makes any difference. The Bar cites no authority for a proposition that a speaker only gets to make one erroneous statement and then the First Amendment protections no longer apply. Whether a speaker makes one, seven, or seventy times seven erroneous statements, the First Amendment provides the same protections and requires the Bar to prove a subjective recklessness *mens rea* for each statement.

The Bar further asserts that Crowley calling his political opponents “corrupt” and “swampy” is somehow a false statement of fact offered as an opinion. (TFB-A.B./I.B. 53). The Bar notes that a statement’s specificity and verifiability, as well as its literary and public context should be considered to determine if one is cloaking an assertion of fact as an opinion. Id. But Crowley did not make a specific assertion of fact, such as “In my opinion, I think Mr. Jones embezzled money from his employer.” Instead, the vague terms of “corrupt” and “swampy” broadly mean “an impairment of integrity, virtue, or moral principle” (ROR1:16 (quoting BLACK’S LAW DICTIONARY (11th ed. 2019))), which is clearly understood as a

matter of opinion about a person’s character, especially when generally stated in the context of a political campaign. Regardless, there is no evidence that Crowley was subjectively reckless in making these statements based on his knowledge and sincere beliefs. (R-I.B. 23-24, 45).

Again, under the subjective recklessness standard required by Sullivan, Garrison, and Counterman, Crowley cannot be found in violation of Rule 4-8.2(a) or Rule 3-4.3. The application of an objective standard was unconstitutional and harmful error that clearly resulted in a different outcome on each claim than would a subjective recklessness *mens rea* standard.

III. THE BAR’S PROSECUTION FOR PARTISAN POLITICAL SPEECH SHOULD HAVE BEEN DISMISSED ON CROWLEY’S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FLORIDA STATUTES SECTION 768.295 (FLORIDA’S ANTI-SLAPP STATUTE)

The Bar appropriately notes that the Florida Supreme Court is vested with exclusive authority to oversee the discipline of lawyers but recognizes that its authority is “limited to the extent that its exercise of authority unduly burdens a fundamental right, like the First Amendment right to free speech.” See TFB-A.B./I.B. at 55 (citing American Civil Liberties Union of Florida, Inc. v. The Florida

Bar, 744 F. Supp. 1094, 1097-98 (N.D. Fla. 1990)). Anti-SLAPP legislation was enacted by the Legislature to protect “the rights of free speech.” § 768.295(1), Fla. Stat. The clear and unambiguous language in the Anti-SLAPP legislation applies to disciplinary proceedings that are quasi-judicial. (See R-I.B. at 50 n.9, addressing Comm’n for Lawyer Discipline v. Rosales, 577 S.W.3d 305 (Tex. App. 2019)). The Bar does not argue that the Legislature has enacted any provisions excluding disciplinary proceedings.

Instead, the Bar contends that the Anti-SLAPP motion was not expeditiously sought and therefore, did not promote a “just and speedy determination.” (TFB-A.B./I.B. 56). Florida Statutes Section 768.295 does not set forth a time limit for asserting relief. While the statute notes a claimant may move for expeditious resolution of the claim in a motion to dismiss or a motion for summary judgment, it does not compel Florida Statutes Section 768.295 to be raised at these times. § 768.295(4), Fla. Stat.

Bar proceedings are procedurally unique. A Report of Referee is only a recommendation to the Florida Supreme Court. Crowley raised Florida Statutes Section 768.295 in December 2022, after the findings of fact but prior to the hearing on sanctions or this

Court's review. Consideration of these issues at the time it was filed would have expeditiously resolved these proceedings without the necessity of continued defense of a prosecution that is inconsistent with Crowley's right of free speech during a partisan political campaign.

IV. REMAND IS WARRANTED BECAUSE THE REFEREE'S FINDINGS ENTERED PRIOR TO RECUSAL ARE TAINTED BY THE POTENTIAL OF BIAS

The Bar repeatedly asserts that First Amendment protections are not relevant because the Referee found the allegations to have merit. The merit of the Referee's findings is directly impacted by her subsequent recusal. The Bar incorrectly frames Crowley's argument as contending that adverse factual determinations warranted her recusal, and the Bar cites case law finding a judge's adverse findings do not warrant disqualification. (TFB-A.B./I.B. 61). However, disqualification was not sought on that basis. Disqualification was premised on a relationship between the Referee's judicial campaign and Ms. Fox's state attorney campaign using the same campaign treasurer during the same August 2018 campaign cycle at issue in this Complaint.

The Bar's brief downplays the connection between the Referee and Ms. Fox noting throughout its brief that the Referee and Ms. Fox had employed the same campaign treasurer. The Bar does not acknowledge that the Referee and Ms. Fox employed the same campaign official during the August 2018 election in which Crowley's underlying campaign conduct occurred. (TFB-A.B./I.B. 2, 58). Disqualification was raised as soon as it was discovered because the Referee had not previously disclosed this connection.

The Bar's assertion that the recusal was not warranted is undermined by Judicial Ethics Advisory Committee opinions as well as similar determinations by three (3) successor judges who disqualified themselves from considering Crowley's matter. The Judicial Ethics Advisory Commission has explained that a judge should consider the "St. Pete Times test" which would have required the Referee to evaluate how would the "average, reasonably well informed citizen react were he to read in the newspaper" that the Referee was making credibility assessments between one campaign (who employed the same official as the Referee in her contested election) and the opposing campaign (with whom the Referee had no connection). See Judicial Ethics Advisory Opinion 2012-08 (Mar.

26, 2012); 95-15 (May 1, 1995). In this case, the hypothetical assessment of whether the relationship impacted the Referee's neutrality is not necessary because three (3) other judges answered the question directly by determining that recusal was appropriate.

Respondent was prejudiced by the Referee's potential bias because credibility determinations should be made by a neutral arbiter. The Florida Bar's Answer and Initial Brief on Cross Appeal repeatedly relies on the Referee's credibility assessments in her findings to argue that the underlying allegations had merit. As examples, the Bar cites the following determinations made in favor of Ms. Fox despite contradiction by Crowley or the Exhibits:

- Finding the 39% conviction rate was targeted solely at Ms. Fox's cases when campaign materials noted application to the general management of the State Attorney's Office (TFB-A.B./I.B. 17; TFB-Exh. 4a, "[o]ur local prosecutor's office has a pathetic 39% conviction rate");
- Holding that Ms. Fox, in her role as Chief Assistant, could not be criticized or scrutinized for highly publicized prosecutions or investigations in which she

- was not trial counsel despite her references to the “Lake Boyz” case on the campaign trail for her benefit and Mr. Russell’s acknowledgement that she was involved in the prosecution (TFB-A.B./I.B. 27, T1:442);
- Describing Ms. Fox’s involvement in the Slaughterhouse cases as being sent “an email” when the citizen investigator testified to several emails Ms. Fox acknowledged receiving (TFB-A.B./I.B. 29; T1:319, 333);
 - Determining Ms. Fox should not be criticized for State Attorney Office decisions in which she was not directly involved even though her campaign speech highlighted popular State Attorney Office results in which she was not the prosecutor (closure of a local illegal slaughterhouse) (TFB-A.B./I.B. 17; T1:413-14);
 - Minimizing Ms. Fox’s participation in the grand jury proceedings related to an inmate’s death even though she was the most senior assistant state attorney and had supervisory capacity over the other attorneys (TFB-A.B./I.B. 24-25; R-Exh. 17, 26; T1:450, 457);

- Rejecting a grand juror’s statement coming forward to say he was pressured by the prosecutors not to indict in grand jury proceedings led by Ms. Fox (TFB-A.B./I.B. 24; R-Exh. 17, 26);
- Incorrectly describing the scope of the State Attorney’s Office conduct in forwarding the complaint and video evidence of the \$670.00 raffle to the Florida Department of Law Enforcement by contending that Mr. Russell did not give any instructions on the prosecution but omitting Mr. Russell’s request for an “*expedited*” criminal investigation when the only exigency was the campaign (TFB-A.B./I.B. 10-11; R-Exh. 6) (emphasis added);
- Accepting testimony that Ms. Fox was not responsible for Crowley’s arrest despite her senior position and her capitalization on the arrest through political action committee mailers immediately campaigning on the arrest which she had reviewed before publication (TFB-A.B./I.B. 14, T1:201-02);

- Not considering that the book, “From Palestine to America: A Memoir,” contained more than just a “dedication” to his daughters but gratitude for his daughters “support, suggestions and valuable editorial comments” warranting questions clarifying which portions Ms. Fox disavowed, including the reference to the PLO. (TFB-A.B./I.B. 9; TFB-Exh. 4c).

The relationship between the Referee and Ms. Fox’s campaigns adversely impacted the Referee’s ability to be a neutral arbiter, and the credibility determinations underlying these factual findings are tainted by this potential bias. Remand for a new hearing would “remove the taint” and permit an unbiased Referee to evaluate the evidence and make findings. Rath v. Network Marketing, L.C., 944 So. 2d 485, 487 (Fla. 4th DCA 2006).

CROSS-ANSWER SUMMARY OF THE ARGUMENT

In order for Rule 4-8.4(d) to be applicable, clearly established precedent and the rule language indicate that the attorney must be employed in the practice of law and the underlying conduct must be in connection with the practice of law. These restrictions are necessary to ensure that an attorney’s First Amendment rights are

not unduly restricted as recognized by this Court when amending Rule 4-8.4(d). Crowley, as a candidate for State Attorney, was not employed in the practice of law and therefore, his campaign speech did not violate Rule 4-8.4(d). Moreover, the Bar has not alleged any independent facts showing Crowley induced or assisted others in committing a Rule violation to support a Rule 4-8.4(a) violation. If a Rule 4-8.4(a) violation is premised solely on the commission of another rule violation without additional misconduct, it does not support aggravation of the sanction.

If the Rule 4-8.2(a) violation is upheld, an admonishment is the appropriate sanction given the absence of any guidelines or precedent related to partisan campaign speech for legal office and Crowley's substantial mitigation, including military service and character testimony. The Bar's cited case law is not persuasive because it either pertains to judicial campaign speech, which is regulated by Canon 7 in which candidates have the benefit of advisory opinions and substantial guidance on campaign conduct, or to conduct impugning the judiciary during court proceedings. Even if judicial campaign conduct is considered analogous, recent case law does not support a rehabilitative suspension.

STANDARD OF REVIEW

In evaluating a “referee's factual findings and recommendations as to guilt” this Court has set forth the following standard of review:

This Court's review of such matters is limited, and if a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee.

Florida Bar v. Shoureas, 913 So. 2d 554, 557 (Fla. 2005) (quoting Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002)). This Court has explained that “[i]mplicit in this standard is the requirement that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt.” Shoureas, 913 So. 2d at 557-58.

As when evaluating a Referee’s recommendations as to guilt and findings of fact, a “referee's decision not to find that a mitigating or aggravating factor applies also carries a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record.” Florida Bar v. Varner, 992 So. 2d 224, 230 (Fla. 2008).

The Court’s review of a Referee’s recommended sanction is “broader than that afforded to the referee’s findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction.” Florida Bar v. Kinsella, 260 So. 3d 1046, 1048 (Fla. 2018) (quoting Florida Bar v. Ratiner, 46 So. 3d 35, 39 (Fla. 2010)). Generally, the “Court will not second-guess the referee’s recommended discipline as long as it has a reasonable basis in existing caselaw and the [Florida] Standards for Imposing Lawyer Sanctions.” Kinsella, 260 So. 3d at 1048 (quoting Ratiner, 46 So. 3d at 39).

CROSS-ANSWER ARGUMENT

I. THE BAR HAS NOT MET ITS BURDEN OF ESTABLISHING THE REFEREE ERRED IN FINDING MR. CROWLEY DID NOT VIOLATE RULES 4-8.4(d) OR 4-8.4(a)

The Bar provides no analysis to refute the Referee’s recommendation that Crowley did not violate Rule 4-8.4(a). There was no evidence that Crowley knowingly assisted or induced anyone into violating the Rules Regulating The Florida Bar. See Florida Bar v. D’Ambrosio, 25 So. 3d 1209, 1217 (Fla. 2009) (considering record evidence of assistance and inducement). If it is the Bar’s position that a respondent violates Rule 4-8.4(a) whenever respondent is

found in violation of any other rule without any additional misconduct, Rule 4-8.4(a) does not provide any substantive basis for increased discipline.

The Bar does not contest the established authority that Rule 4-8.4(d) “applies only when a lawyer engages in misconduct *while employed in a legal capacity*.” Florida Bar v. Winters, 104 So. 3d 299, 302 (Fla. 2012) (quoting Florida Bar v. Brake, 767 So. 2d 1163, 1168 (Fla. 2000) (emphasis in the original)). In Winters, the attorneys were employed by the Mulholland firm when they were found to have engaged in misconduct related to the solicitation of clients and temporarily depriving the law firm of client files. The respondents were associate attorneys employed by the Mulholland firm when the misconduct occurred. The Winters Court concluded that “because Respondents’ misconduct in this case occurred in their capacities as associate attorneys of the Mulholland Firm, it was sufficiently ‘in connection with the practice of law’ to be covered by this rule.” Id. at 302.

Similarly, other precedent cited by the Bar, including Florida Bar v. Frederick, 756 So. 2d 79 (Fla. 2000), Florida Bar v. Black, 602 So. 2d 1298 (Fla. 1992), and Florida Bar v. Perlmutter, 582 So.

2d 616 (Fla. 1991), all involve misconduct related to clients which inherently involves the practice of law. In addition, Florida Bar v. Saphirstein, 376 So. 2d 7 (Fla. 1979), also cited by the Bar and addressing an attorney's misconduct in interfering with another lawyer's disciplinary proceeding, was decided before the phrase "connection with the practice of law" was added to Rule 4-8.4(d) in 1993 and before Florida Bar v. Brake clarified in 2000 that the misconduct must occur while employed in a legal capacity. Accordingly, the analysis in the Saphirstein opinion is not relevant to the current interpretation of Rule 4-8.4(d).

The Bar asserts that Crowley was campaigning to be employed as the elected State Attorney and therefore, he was engaged in the practice of law. Crowley does not dispute that an elected State Attorney engages in the practice of law. Crowley's campaign did not occur in his capacity as the elected State Attorney. He was merely a candidate for State Attorney and was acting as a candidate in a contested partisan campaign. Because he was not "employed in a legal capacity" nor "engag[ing] in conduct in connection with the practice of law," Rule 4-8.4(d) is not applicable.

The Court recently noted in Florida Bar v. Mirabal, “[t]he phrase ‘in connection with the practice of law’ was added to rule 4-8.4(d) in 1994 to make sure that the rule is ‘limited in its application to situations involving the practice of law in order to ensure that the First Amendment rights of lawyers are not unduly burdened.’” Florida Bar v. Mirabal, 390 So. 3d 1172, 1186 (Fla. 2024) (quoting Fla. Bar re Amends. to Rules Regulating Fla. Bar, 624 So. 2d 720, 721 (Fla. 1993). As argued in the Reply Sections I and II and in Respondent’s Initial Brief, lawyers engaged in partisan political speech deserve the First Amendment protections contemplated by the Court in promulgating the 1993 amendment to Rule 4-8.4(d).

II. IF THE VIOLATIONS ARE UPHELD, THE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND CASELAW SUPPORT AN ADMONISHMENT

A. FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

If the Rule violations are upheld, an admonishment is the appropriate sanction. As stated in Florida’s Standards for Imposing Lawyer Sanctions Standard 1.3(a), “[t]he purpose of lawyer disciplinary proceedings is to protect the public and the

administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.” The Standards for Imposing Lawyer Sanctions offer guidance for determining an appropriate disposition of Bar disciplinary cases. These standards operate on a model that identifies and considers: “(a) duties violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; (d) the existence of aggravating or mitigating factors.” Fla. Stds. Imposing Law. Sancs. 1.1.

Standard 1.1(b), “the lawyer’s mental state” broadly considers whether the conduct is negligent or intentional. Having the opportunity to carefully parse partisan campaign speech with hindsight and unrestricted time to critique phrasing and argument overlooks the reality of engaging in a contested partisan election. Protection of First Amendment rights warrants consideration of the different nature of a partisan campaign from a judicial campaign which requires strict compliance with Canon 7 of the Code of Judicial Conduct.

Unlike judicial candidates who have the benefit of substantial case law, Judicial Ethics Advisory Committee training sessions educating judicial candidates, Judicial Ethics Advisory Committee Opinions, and An Aid to Understanding Canon 7, there is no similar instructive materials for lawyers seeking “public legal office.” In judicial election misconduct cases, this Court has authored opinions to educate and warn future judicial candidates. See In re Renke, 933 So. 2d 482, 493 (Fla. 2006) (citing In re Alley, 699 So. 2d 1369 (Fla. 1997) and stating “[i]mportantly, our previous opinions have cautioned against the exact type of misconduct that is before us in this case.”). In contrast, this is a case of first impression as well as Crowley’s first election campaign. To the extent the campaign conduct is found to violate Rule 4-8.2(a), the violations are appropriately categorized as “negligent.”

This determination is consistent with Crowley’s testimony that he would have changed things about his campaign, including quickly sharing an article from “American Thinker” on his Facebook page. (T2:163). This Court explained in Florida Bar v. Jacobs, 370 So. 3d 876, 886 (Fla. 2023) that the aggravator for refusal to admit the wrongful nature of the conduct does not exist merely because a

respondent is not remorseful. Mr. Jacobs, under radically different circumstances, contended that he did not violate Rule 4-8.2(a) as worded, but he acknowledged that he should have done some things differently. Id.

The Bar continues to maintain that the “refusal to admit misconduct” aggravator is applicable because Crowley believes he should be able to express his opinion that his political opponent is corrupt during a partisan campaign. In considering the word “corrupt,” the Bar relied on the Black’s Law Dictionary’s narrow definition of “corrupt” which was also utilized by the Referee, connoting a “bribe.” A campaign is not a legal proceeding, and the electorate is made up of primarily non-lawyers. Merriam Webster’s Definition of “corrupt” is “to change from good to bad in morals, manners, or actions.” Crowley explained that he had considered the broader definition of corrupt in rendering his opinion. Crowley asserted, similar to the holding by the Nevada Supreme Court in Matter of Discipline of Colin, 448 P. 3d 556 (Nev. 2019), that Rule 4-8.2(a), if applicable to partisan campaigns, should be “limited to statements of fact as opposed to opinion.” These circumstances do not warrant the “refusal to acknowledge” aggravator.

In addition to the absence of any prior disciplinary issue, the Bar does not contest application of the positive character mitigator. Crowley's character evidence, including significant military service to our country, warrants mitigation of any sanction imposed.

B. THE ABSENCE OF ANY PRIOR PRECEDENT AND COMPARISON OF THE BAR'S CASES SUPPORTS AN ADMONISHMENT

This is a case of first impression. Neither the Bar nor Respondent has found published or unpublished record of imposing discipline for violating Rule 4-8.2(a) in a legal officer election. The Bar relies on either (1) cases disciplining judicial candidates, who are subject to Canon 7 as well as the Rules Regulating The Florida Bar, and (2) cases disciplining lawyers for impugning the judiciary during a legal proceeding. The absence of any guidelines for restricting out-of-court partisan political speech warrants significant mitigation from discipline imposed in the Bar's cited cases.

Florida Bar v. Aven, 317 So. 3d 1095, 1096 (Fla. 2021), addressed judicial campaign misconduct and imposed a public reprimand. In Aven, the Court upheld the Referee's findings that the judicial candidate not only made disparaging statements

against a sitting judge in violation of Rule 4-8.2(a), the respondent also violated the following sections of Canon 7:

Canon 7 of the Code of Judicial Conduct (A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity), specifically, Canon 7A(3)(a) (candidate for judicial office shall be faithful to the law, maintain professional competence, and not be swayed by partisan interests, public clamor, or fear of criticism); 7A(3)(b) (candidate for judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with impartiality, integrity, and independence of the judiciary); 7A(3)(e)(i) (candidate for judicial office shall not, with respect to parties or classes of parties, cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with impartial performance of adjudicative duties of office); and 7A(3)(e)(ii) (candidate for judicial office shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning candidate or opponent).

Id. These heightened restrictions required in a judicial election do not apply to partisan legal officer elections.

The Bar argues that the public reprimand imposed in Aven should be increased to a rehabilitative suspension here because “the Aven opinion explicitly stated that the misconduct would warrant a stronger sanction in the future.” (TFB-A.B./I.B. 79.) The Aven opinion noted, “we write to place future candidates for judicial office on notice that this Court takes misrepresentations that cast a

sitting judge in a false light seriously because of their potential to undermine confidence in the rule of law.” Aven at 1096. However, the conduct here arose in an August 2018 election, and the Aven opinion was published almost three (3) years later in May 2021. Moreover, the Court’s warning was aimed at judicial elections and disparaging a sitting judge who was the respondent’s opponent. Given the absence of Canon 7 applicability or other guidance related to this matter, an admonishment is supported.

Similarly, the Bar also cites Florida Bar v. DuPont, No. SC19-1243, 2019 WL 5078893 (Fla. Oct. 10, 2019), a Court Order approving a consent agreement for a ninety-one (91) day suspension. The consent agreement occurred after the respondent was removed from judicial office for misconduct on the bench (including conducting “unlawful, judicially ordered seizures in open court” and “blatantly disregard[ing] the rules of criminal procedures and disrespect[ing] the attorneys and the rights of the inmates”) as well as multiple Canon 7 violations during the judicial campaign. In re Dupont, 252 So. 3d 1130, 1141-42 (Fla. 2018). The Dupont opinion noted, in pertinent part, that Judge Dupont “attended a required Judicial Ethics Advisory Committee training session at the

outset of the 2016 judicial campaign” that placed him on notice of the Code of Judicial Conduct which is expected of all judicial candidates whether or not they are sitting judges. Id. at 1133.

Florida Bar v. McBath, No. SC19-569, 2019 WL 6340276 (Fla. Nov. 27, 2019) is another consent agreement for a ninety-one (91) day suspension cited by the Bar. (TFB-A.B./I.B. 87). However, Mr. McBath was not found guilty of violating Rule 4-8.2(a), the rule at issue in these proceedings. Instead, Mr. McBath was found guilty of violating Rule 4-8.2(b), which states, “[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida’s Code of Judicial Conduct.” McBath, No. SC19-569. The McBath Referee cited In Re Kinsey, 842 So. 2d 77, 85 (Fla. 2003) in that “[t]he Code of Judicial Conduct governs the activities of all members of the judiciary, even those seeking to become members . . . Canon 7 . . . clearly states that it is applicable to all candidates who are running for office.” Id. In addition, Mr. McBath had two (2) prior admonishments and a public reprimand warranting more severe sanctions. The McBath sanction was based on a different rule violation which was aggravated by prior

discipline and does not support a rehabilitative suspension in this case.

The Florida Bar's reliance on caselaw addressing Rule 4-8.2(a) violations impugning a judge during the course of a legal proceedings is also not applicable. For example, the Bar cites Florida Bar v. Patterson, 257 So. 3d 56 (Fla. 2018) in support of a rehabilitative suspension. The two-year (2) suspension imposed in Patterson for a violation of Rule 4-8.2(a) also related to a serious Rule 4-1.7 conflict of interest violation and a prior disciplinary history which is not present here. The Florida Supreme Court found that Mr. Patterson's "significant personal and financial interest" became the focus of his appeal and hindered the representation of his client. Id. at 62. In pertinent part, the Court held, "this Court generally imposes a lengthy suspension in cases where a lawyer's personal interests create a conflict of interest." Id. at 65.

Moreover, Mr. Patterson made "incendiary and disparaging comments" regarding the judicial officer in appellate court pleadings as well as in a letter to the presiding judge that he also distributed to other members of the judiciary. Id. at 59. For example, in a

pleading in the appellate court, Mr. Patterson described the miscarriage of justice perpetrated by the lower court as “the story of Fidel Castro’s suffocating grip of Cuba, the Holocaust, Jim Crow laws, and Hillary Clinton.” Id. Mr. Patterson also implied that the appellate judge was biased toward opposing counsel at oral argument because he viewed a picture of the opposing counsel at the judge’s investiture ceremony. Id. at 63. The Florida Supreme Court noted that a “lack of respect and professionalism exhibited by many Florida lawyers *during judicial proceedings*” warrants a lengthier suspension. Id. at 65 (emphasis added).

Reliance on Florida Bar v. Jacobs, 370 So. 3d 876 (Fla. 2023), imposing a ninety-one-day (91) suspension is similarly misplaced. In Jacobs, the Court found the respondent had engaged in a deliberate assault on the legal system by impugning the integrity of judges in three (3) separate proceedings who ruled against him as a “tactical decision employed to frustrate judges into disqualifying themselves.” Id. at 880, 886. The respondent made incendiary statements about the judges including that they were acting “illegally,” as “traitors to the constitution” and “should be tried for treason.” Id. at 881. The respondent also charged that the courts

“falsified the facts,” “cannot issue a ruling with integrity” and could “not be fair” due to a judge’s “significant personal financial holdings.” Id. at 881-82. Not only did these statements impugn the judiciary, but respondent also intentionally sought to impact the outcome of the legal proceedings. As in Patterson, a more severe sanction was warranted because the conduct occurred during legal proceedings.

In the event Rule 4-8.2(a) as applied to campaigns involving a legal officer is constitutional and the Rule violations are upheld, the lack of any precedent or guidelines should be weighed in imposing the sanction. The Court has provided clear warnings in opinions, Judicial Canons, and advisory materials directing the expectations in judicial campaigns. Similarly, the Court has repeatedly emphasized the negative impact on the judicial system caused by impugning the judiciary in a legal proceeding. In contrast, out-of-court, partisan campaign speech has not been previously regulated by the imposition of a disciplinary sanction. An admonishment would serve the purposes of discipline while still being fair to the respondent.

CONCLUSION

For the reasons stated above, Respondent requests this Court to find Rule 4-8.2(a) unconstitutional under the First Amendment, both facially and as applied, and therefore dismiss the Bar's claims and grant or remand Respondent's anti-SLAPP motion as to the award of attorneys' fees and costs. However, if the Court finds that Rule 4-8.2(a) is not facially unconstitutional, then, in the alternative, Respondent requests the case be remanded for a new trial under the subjective recklessness standard, along with proceedings on the anti-SLAPP motion for summary judgment, before an unbiased Referee. Finally, if neither are granted, then Respondent requests the sanction be reduced to an admonishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of November, 2024, the foregoing was filed and served via the State of Florida’s E-Filing Portal to the Honorable John A. Tomasino and to: Mark Lugo Mason, Esquire, Bar Counsel, The Florida Bar at mmason@floridabar.org and mhowland@floridabar.org, and Patricia Ann Toro Savitz, Esquire, Staff Counsel, The Florida Bar at psavitz@floridabar.org.

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CERTIFICATE OF FONT STYLE, SIZE AND WORD COUNT

Undersigned counsel does hereby certify that this Brief complies with the applicable font style and size and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Bookman Old Style. The word count is **10,890 words**. It has been calculated by the word processing system, and it excludes the content authorized to be excluded under the rule but includes any footnote.

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