No. 06-596

In The Supreme Court of the United States

GEOFFREY N. FIEGER,

Petitioner,

v.

MICHIGAN GRIEVANCE ADMINISTRATOR,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition demonstrates why the petition should be granted. As Respondent observes, "[n]one of [this Court's] prior decisions can be considered directly on point." Br. Opp. 1. *See also In re Green*, 11 P.3d 1078, 1083 (Colo. 2000) ("The Supreme Court has not addressed the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge"). In the absence of clear authority from this Court, federal and state courts have deeply split on whether attorneys enjoy a First Amendment right to engage in nondefamatory out-of-court criticism of judges when such criticism is unlikely to interfere with a pending proceeding. *See* Pet. 7-9 (collecting cases).

Respondent makes essentially two major arguments, both of which underscore the need for this Court's review. First, Respondent maintains that there is a "well-settled obligation of courtesy on the part of lawyers involved in pending cases" and that discourteous remarks are therefore outside the protection of the First Amendment, even when those remarks consist of nondefamatory public criticism of judges. Br. Opp. 2-5. In support of this "well-settled" proposition, however, Respondent can only cite dicta from *Bradley v. Fisher*, 80 U.S. 335 (1871), and *In re Snyder*, 472 U.S. 634 (1985), two cases involving neither public criticism of judges nor the First Amendment.[1]

[1] In *Bradley*, a lawyer was disbarred after he "threatened [a judge], as he was descending from the bench, with personal chastisement." 80 U.S. at 356. In holding that the judge was immune from suit, this Court suggested in dicta that lawyers must abstain "out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Id.* at 355. Given the facts in *Bradley*, this dicta

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By contrast, the Court has suggested, but not held, that a lawyer "has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice" if he is not "actively participating in a trial." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072 (1991) (quoting *In re Sawyer*, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting)). Thus, this Court in *Gentile* upheld the challenged rule because it imposed "narrow and necessary limitations on lawyers' speech" by barring only "comments that are likely to influence the actual outcome of the trial" and "comments that are likely to prejudice the jury venire." *Id.* at 1075.

The split of authority discussed in the petition exists precisely because this Court has not authoritatively decided whether attorneys enjoy the same First Amendment right as all other Americans to publicly "castigate courts" when such speech is not likely to prejudice a pending proceeding. Some courts have held that the First Amendment does not protect attorneys from discipline for disrespectful judicial criticism, *see*, *e.g.*, *Mississippi Bar v. Lumumba*, 912 So.2d 871, 883-884 (Miss.) (attorney's published comment after trial that judge had "judicial temperament of a barbarian" not protected by First Amendment), *cert. den.*, 126 S.Ct. 363 (2005), while other courts have held to the contrary. *See*, *e.g.*, *Green*, 11 P.3d at 1085 (attorney's statements that judge was "racist"

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plainly refers to a threat or insult made "personally" to a judge, not to the sort of public criticism of judges at issue here. The dicta in *Snyder* is even less helpful to Respondent given that this Court reversed the discipline meted out to an attorney who wrote a "harsh" and "ill-mannered" letter to an appellate court. 472 U.S. at 647. Neither *Bradley* nor *Snyder* addressed any First Amendment issues.

protected by First Amendment). Only this Court can settle the issue.[2]

Respondent's second argument is that the Court has never limited the "pending" exception in *Gentile* to pending trials. Br. Opp. 1-2. Therefore, Respondent maintains that the Michigan Supreme Court properly disciplined Petitioner for his comments made shortly after the Michigan Court of Appeals ruled against his client. *See* Pet. App. 15a-18a (holding appeal was "pending" within the meaning of *Gentile* because rehearing or further appeals were still possible).

Once again, Respondent's argument highlights why this Court should grant the petition. The holding in *Gentile* that "narrow and necessary limitations" on attorney speech are permissible to prevent serious threats of prejudice to pending trials has been applied by the Michigan Supreme Court and other courts to bar speech that could not possibly affect a trial or reasonably influence any other proceeding. *See*, *e.g.*, *Lumumba*, 912 So.2d at 882 (concluding that published statement criticizing judge after conclusion of trial not protected because appeals were available). By contrast, other courts have concluded from *Gentile* that extrajudicial criticism of judges can be punished only if it is likely to prejudice a pending

[2] Petitioner agrees that a state may constitutionally punish attorneys for threatening out-of-court conduct directed toward judges, witnesses, parties, and opposing counsel. Petitioner argues only that so-called "courtesy" rules cannot be used to punish public nondefamatory criticism of judges, such as the comments Petitioner made on his talk show after his client's appeal had been decided. *Cf. Garrison v. Louisiana*, 379 U.S. 64, 76-79 (1964) (holding district attorney who had publicly criticized judges could not be punished for defamation absent showing of actual malice).

proceeding. *See*, *e.g.*, *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) (concluding *Gentile* focused "on situations where public statements by lawyers impair the 'fair trial rights' of litigants" (quoting *Gentile*, 501 U.S. at 1068)). Under the latter view, Petitioner clearly could not be punished. Indeed, Respondent has not even attempted to explain how Petitioner's comments could have influenced the further appeals that were available to his client at the time Petitioner made his comments on his radio talk show.

If Respondent's view is correct, a lawyer can be barred from exercising his First Amendment right to "castigate courts" for as many years as it takes to exhaust all possible appeals from the judicial decision the lawyer wishes to castigate. That view completely unmoors the holding in *Gentile* from the rationale that some restrictions on attorney speech are necessary to assure a fair trial. The fact that some lower courts have adopted Respondent's view in order to punish speech critical of judges demonstrates the need for this Court to intervene.

Finally, Respondent does not seriously deny that this case is an excellent vehicle to decide the issues presented. Respondent does not deny that Petitioner's comments on his radio talk show were purely extrajudicial and nondefamatory and that Petitioner fully litigated the First Amendment issue in the tribunals below.

CONCLUSION

Therefore, Petitioner Geoffrey N. Fieger respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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