

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

FLORIDA BAR

Supreme Court Case

No. SC22-860

Complainant

v.

The Florida Bar File  
No. 2021-30,853 (09B)

JERRY GIRLEY

Respondent.

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**AMENDED INITIAL BRIEF OF JERRY GIRLEY, RESPONDENT**

Seeking Review of the Report of The Referee

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## **PRELIMINARY STATEMENT**

The Florid Bar, Complainant/Appellee will be referred to as “The Bar” or “The Florida Bar.” Jerry Girley, Respondent/Appellant, will be referred to as “Respondent.”

The Report of Referee will be designated as “RR”. The trial transcript will be designated “TT” and “ST” for sanction hearing transcript. All other citations to the record will be designated as (R. at page #)

## **STATEMENT OF CASE AND FACTS**

### **Procedural Posture**

The case is before the Court after a hearing was held in the above-styled matter on January 8, 2024.

### **Relevant Facts**

The Florida Bar filed a Formal Complaint against the Respondent on June 30, 2022. (R. at 1). The Florida Bar alleged that the Respondent violated five of its rules of Professional Conduct. First, the Florida Bar alleged he violated the Oath of Admission but did not specify which portion of the oath he violated. *Id.* at 6. Second, the Florida Bar accused the Respondent of violating rule 3-4.3, which is a catch-all rule. The Florida Bar did not delineate how the Respondent violated this rule. *Id.* at 7. Third, the

Florida Bar accused the Respondent of violating Rule 4-4.1. This rule prohibits an attorney from making false statements, in the course of representing a client. *Id.* Fourth, the Florida Bar accused the Respondent of violating rule 4-8.2(a). This rule prohibits an attorney from making comments that disparage members of the Judiciary or other actors within the criminal justice system. *Id.* Lastly, the Florida Bar alleged that he violated rule 4-8.4 (d). This rule prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice.

As with the other charges, the Florida Bar did not specify how the Respondent violated this rule. Due to the vagueness of the charges the Respondent filed a Motion for a More Definite Statement on November 29, 2022. (R. at 59). The Florida Bar filed a response to the motion on December 20, 2022. (R. at 65).

The Respondent filed a witness and exhibit list on November 18, 2022. (R. 57). The proposed exhibit list contained several articles from legal journals as well as results of studies, each article or report showed that there was a widespread and well-established sense that minorities received the least favorable treatment by the court system. (R. 25; Florida Bar's List of Respondent's proposed Exhibits). The Florida Bar moved in *limine* to keep the articles and the research report out of evidence because

they were irrelevant. Since the burden was on the Respondent to prove the truthfulness of his statements and or that he had a good faith basis for making the statement, the Respondent sought to use the following articles or reports as support for the statements he made. These items were expressly objected to by the Florida bar and ultimately excluded from the evidence that the referee relied upon at the final evidentiary hearing:

- A. Article “What would a Reasonable Jury Do Jury Verdicts Following Summary Judgment reversals”
- B. Document. “Special Issue Judicial Nominating Procedures: RX Warning: Quitting Diversity Efforts too Soon May Result in Harmful Relapse, 92 Fla. Bar J. 18”
- C. Touro Law Review: Racial Bias Still Exists in the Criminal Justice System? A Review of Empirical Research
- D. NACDL’s 5<sup>th</sup> Annual Conference & Seminar: Race Matters V: Policy, Practice, and the Intersection of Race in the Criminal Legal System
- E. CWET360 Episode 10, Part 2, Critical Race Theory (CRT)
- F. How Subtle Bias Infects the Law. Annual Review of Law and Social Science
- G. State Court’s Stark Lack of Destiny Demands Action
- H. Article: Does Unconscious Racial Bias Affect Trial Judges?
- I. Report: Race Matters in Judicial Decision-Making
- J. Article: Race and the Decision Making of Juries (September 2007)
- K. Journal Article: Racial Diversity and the Judicial Influence on Appellate Courts
- L. Scholarship@Cornellaw: A Digital Repository. Does Unconscious Racial Bias Affect Trial Judges?
- M. Unnamed Digital Journal Entry.

The Respondent argued that the above literary evidence was necessary since he had the burden to prove that the statements he made about the court system’s treatment of minorities is true. *Id.* Withstanding the

fact that the Respondent had the burden of demonstrating good faith basis for making the statement he made, the Referee entered an order granting the Florida Bar's Motion in Limine on November 6, 2023-(R. 394). In the relevant part the referee said, "Items A-M that are listed anticipated exhibits, as set forth in the bar's Motion in Limine will not be admitted as evidence because the exhibits are not narrowly tailored to the facts of the instant case and will not assist the trier of fact in resolving factual issues." (R. at 394). During the final hearing in this matter the Appellant's uncontroverted testimony was that the statements he made during the two interviews were based primarily on two sources: his experiences litigating Civil Rights and Criminal cases and the literature that he has read on the issues of implicit bias in the court system, and it affects judges and juries. *Id.*

All charges stemmed from two interviews the Respondent gave on social media Platforms. The first interview was with a church-based Christian couple group called "Black Love United." The Respondent was asked to speak to this group about prayer, religion, voting, and the need to participate in the judicial process (R at 613-78). During this interview, the Respondent discussed his involvement in the matter of *Baiwo Rop v. Adventhealth*. Specifically, he discussed how the court could negate a jury

verdict one week after the trial ended *Id.* The Respondent also discussed his broader concerns about how minority litigants are treated in the Court System. The Respondent summed up his statements by stating this was something that only God could resolve because it was not in the hearts of men to do what is right. (RR at 9).

The second interview the Respondent gave was on a podcast titled “Objections”. (R. at 591-611). The Respondent discussed the *Rop* case during that interview as well. He also discussed his genuinely held ideas, observations, and experiences in the court system. *Id.* According to the evidence adduced during the discovery process, the original complaint against the Respondent was initiated by the same judge who presided over the *Rop* trial, Circuit Court Judge, Kevin Weiss (R. at 80-81<sup>1</sup>).

In the run-up to the evidentiary hearing, the Respondent propounded interrogatories to the Florida Bar on August 18, 2022. (R. at 141-51). The interrogatories requested that the Florida Bar specify which statements the Respondents made violated the different rules listed in the formal complaint. The Florida Bar refused to answer the questions. (R. at 141-51). It asserted that that was a factual question the Referee would decide at the

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<sup>1</sup> The Bar failed to transmit its Answers to Respondent’s interrogatories in the Record. It filed a Notice of Service of Answers, but not the answers. Within the its Answer, the Bar states that Judge Weiss initiate the complaint.

evidentiary hearing. The specific Interrogatories and the Bar's Responses of note are listed below:

**9. Which specific statements made by the Respondent, does the Bar contend mischaracterized the civil process, procedural mechanism and rules of evidence**

A. Objection this is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing.

**10. What empirical evidence does the Florida Bar intend to rely upon to prove that the Respondent's suggestion/implication regarding inequity or implicit bias in the court system is factually untrue?**

A. The Bar does not anticipate presenting any empirical evidence

**11. During his discussion on the Black Love United program the Respondent stated, in part, as quoted at paragraph 15 of the complaint, that "But at the end of the day, this is something that God will have to address because it is not in the hearts of those in-in-the -in power, and that includes the appellate court, I would say, to right the wrongs that have been committed against us, because it -it makes financial sense to them to keep us in a place where we are beholden to the." Does the Florida Bar contend that this was a false statement? If the answer to this question is yes, please state the means and the method used to make such a determination.**

A. Objection. This is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing. The bar also objects to this interrogatory as it calls for a legal conclusion.

**14. Is it the Florida Bar contention that the Respondent violated a court rule or rule of ethics by pointing out the lack of racial diversity on the Fifth DCA? If so, what specific rules(s) does the Bar claim he violated by making such a statement?**

A. Objection. This is a factual determination to be made by there referee after considering the evidence and the

**15. Please list each and every false statement that the Florida Bar contends the Respondent made which forms the basis for this grievance complaint. Relatedly, indicate the means and the evidence used by the Florida Bar to determine that each statement is false?**

A. Objection this is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing.

**16. Please list each and every false statement that the Florida Bar contends the Respondent made which forms the basis for this grievance complaint. Relatedly, indicate the means and the evidence used by the Florida Bar to determine that each statement is false?**

A. Objection. This is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing.

(R. at 141-51).

The Plaintiff filed a motion to compel better responses to the above-listed questions. (R. 131-139). The Respondent was seeking clarification of the allegations made in the complaint. The Respondent argued that the complaint's allegations were broad and vague, and that due process required the Florida Bar to provide clarity and more body to the allegations. The referee denied the Respondent's Motion for better responses to the interrogatories (R. at 396).

Before the trial, the Respondent filed a Motion for Summary Judgment. Among other things, the Respondent argued that the Florida Bar's charges violated the State's Anti-Slap Statute which prohibits the State from punishing citizens because of their speech. The Florida Bar responded and argued that the Anti-SLAPP statute did not pertain to Bar Proceedings. Rather, it argued the scope of the statute governed only civil proceedings. As such, it alleged that it was subject to the Anti-Slap statute.

The Florida Bar listed Judge Kevin Weiss on its witness list. (R. at 412). The Respondent then reached out to the Florida Bar to coordinate the setting of Judge Weiss' deposition. Before a date could be set for the deposition Judge Weiss moved for a Protective Order to limit the scope of the questions that the Respondent could ask him during his deposition. Withstanding the fact that the rules that govern Bar disciplinary hearings provide a Respondent the right to depose the complaining witness, the Honorable Referee limited the scope of the questions that the Respondent could ask the Judge to questions that related to his alleged damages. (R. at 264).

The Florida Bar called the Respondent as its only fact witness during the final hearing. The Respondent testified that he could not authenticate some of the documents in the binder. Nevertheless, the Referee ruled that all the documents in the Florida Bar's evidentiary binder had been previously properly authenticated and thus, they would be admitted into evidence in this matter.

On re-direct, the Respondent was asked about the basis for the statements that formed the basis for the charges in the instant matter. The Respondent testified that his statements were based on two sources the multiple trials he participated in, both criminal and civil, as well as the

constant research that he conducted concerning how race and ethnicity affect different persons acting within and interacting with the court system. The Respondent's testimony was unrefuted. Withstanding this testimony, the referee did not say what weight, if any was assigned to this testimony. (See RR).

After the evidence was presented and the parties made their closing arguments the referee found that the Respondent was guilty of each rule violation specified in the complaint. Two days later both parties presented testimony at the related Sanction Hearing. The Florida Bar argued that the Respondent should receive a 30-day suspension. The justification for seeking such a substantial penalty was in part that the Respondent allegedly has a pattern of misconduct. However, the Respondent had never been disciplined before the instant allegations, for any reason. Additionally, the Appellant presented substantial mitigation evidence which demonstrated that his actions and the trajectory of his entire adult life was one of serving the traditionally underserved people in society. (See ST).

Before entering the practice of the law, the Respondent served in and was Honorably Discharged from the United States Navy. (R. at 807). The Respondent worked for the Orlando Police Department for 7.5 years. *Id.* The Respondent. Currently, the Respondent is and has been a licensed

Minister of the Gospel since 1986. His entire adult life has been devoted to serving others less fortunate than himself.

The Referee stated in the report that the Respondent accused Judge Weiss of abusing his authority. (R. at 783). However, the Referee did not state in the report where such statement was made. *Id.* The fact is that during both interviews that gave rise to the instant charges, the Respondent exercised great care not to mention Judge Weiss's name because he was articulating his overall concern about problems that minority litigants encounter in court. In fact, the Respondent acknowledged that the Court was permitted to enter a directed verdict. And he took time explain how the rule normally operates. For example:

There's a technical mechanism, Adam, that permits the judge to do that. In rare circumstances, there is. But, this was not one of those circumstances. And the judge had the opportunity to make that decision before the jury got the trial -- before the jury went out to deliberate. (R. at 608).

Well, so there's something called "directed verdict." Normally, it happens before a matter is submitted to the jury. The judge, as the expert on the law, is listening to make sure there's a minimal amount of evidence that is necessary to actually submit it to the jury. At the end of the plaintiff's -- or the person who's bringing the lawsuits after he or she puts on all of their evidence, normally the defendant will say, "There's not enough evidence for the jury to decide this, Judge." If the judge agrees with the defendant, then that's called a directed verdict. It's taken out of the hand of the jury and the judge makes the decision. (R. 631).

The referee also stated that the Respondent accused Judge Weiss of theft (R.789, 790). However, the referee took three lines out of a discussion

that covered over one and a half pages. Listed below is the complete context of the discussion about theft:

But it's just the fact that that's another lengthy process that you gotta go through. When I already did what you told me the system says I have to do. I had a jury of my peers -- not necessarily my peers -- but my peers said, "Even with all the roadblocks you threw," I still won. And you try to take what -- you took it away temporarily. MR. GIRLEY: Right. SPEAKER 2: Yeah. Yes, but this is the way I look at it, though, is, that the energy that you're gonna use to correct what he did, you could have been using that to help somebody else or to do something else for someone else.

SPEAKER 1: Right. You could have been your own -- you're not talking about the client

SPEAKER 2: Right.

SPEAKER 1: --- what it is.

SPEAKER 2: Right.

SPEAKER 1: You know, you're always fighting for each client.

MR. GIRLEY: Yes. And that's -- it's a theft.

When you say it's a theft to the community, that's -- in that way, Cedric, it is a theft. Honestly, I agree with you on(indiscernible).

SPEAKER 2: Yeah. 'Cause you can't get that time back. You can get the money back, but you can't get that time back. (R. 51).

The referee acknowledged that the Respondent stated his challenged statements were based upon his personal experiences in court. However, the Respondent also stated that his statements were predicated upon studies and articles written on the topic. The Respondent's relevant statements as to this issue are listed below:

So I've tried cases against Walt Disney, against Orange County, against the City of Orlando, the City of Ocoee, Universal Studios. I've tried cases against every major employer in town. And I've tried cases against major law firms: Baker Hostetler, Gray Robinson, Shutts & Bowen, Dean Ringer, to name a few. Americans. In every -- in every single case, you had a white lead attorney directing most, if not all, of his or her peremptory challenges at African Americans. At African

Q. And what is -- is there a mechanism that you can use to challenge that?

Yes. Absolutely. It's -- it's What is that? The Batson Challenge or the Slappy Challenge. And could you describe how that challenge works.

A. Well, you point out to the court that the plaintiff is black or Latino or whatever their particular minority designation may be. Then you point out that the person -- the narrative panel member that is being challenged is also a minority. Then you ask for a facially neutral reason.

Q. And --

A. And then the proponent of the peremptory challenge is required to come forth with a facially neutral reason. And then the court -- inquiry a genuine

Q. And when -- go ahead. The court has to determine whether or not that's reason, and normally that's the end of the

Most recently in -- in -- in the case -- it's a United Supreme Court case -- of *Flowers v. The State of Mississippi*, it's a case involving an African American who was tried for murder six different times. And what was odious and noteworthy to the court is that each time that Mr. Flowers was tried, all of the black voir dire, veniring (sic) members were struck. So the court said, "Look. To get to the heart of the matter, the judge has to go beyond just the facially neutral reason offered by the proponent." The judge has to look at the -- the pattern, whether or not all the people that are being struck are of a particular race. The court has to look at whether or not the reason offered -- the facially neutral reason offered applied to someone that the -- the proponent of the challenge didn't challenge. (R. 538, 539).

In other words, the Respondent explained, in great detail, the basis for his statements, but the referee dismissed his explanations in a conclusory manner. At more than one place in her recommended order, the referee cited to the Respondent's statements in small excerpts, that did not provide a complete context for each statement. Another example of this pattern is the comments that the Respondent made about the Fifth DCA. Again, the referee cites to a small portion of his comments without providing the fuller

context of these comments. The broader context of the conversation is listed below:

**Q** Well, I'm talking about, in particular, this case with Dr. Rop against AdventHealth. You be speaking about that case. On page 72, line 18, you say, "A 2.75 million They don't want that out there." verdict.

**A.** Uh-huh. Well, so . . .

**Q.** And then you pick up on line 21, "Now everybody-- times."

**A.** So it's very important that we look at the words, because that tells you that I'm not just talking about this case. I'm talking about the 30 that I just mentioned that -- that were in the Middle District court, and 27 are granted summary judgment. And the empirical data says, that of all the cases that are most likely to be disposed of through summary judgment, civil rights cases, employment cases are the number one cases. That is being discriminated against is gonna step forward and file a claim, and the courts don't want to hear it." Okay. So again, ma'am, if we go back to page 72, it - - back to 72, the first -- the words are "a lot of Now -- so I'm talking about that, and then I'm coming to an opinion. My opinion. I'm reading this, I'm interpreting this. I'm trying to figure out what does that mean. I'm trying to figure out in my life am I doing what Albert Einstein said is the definition of insanity, doing the same thing over and over again and expecting this time a different result.

So it is -- it is my opinion, yes, based upon my experiences, based upon the overwhelming amount of times that summary judgment has been granted when I felt like at least there was something there for the jury to consider.

**Q.** By this -- by these statements, are you suggesting that the Fifth DCA has a financial interest in not granting the appeal?

**A.** Ma'am, I said earlier no. I -- not at all. I -- I think the system has a financial interest in making sure that the oppressed not be able to rise up. I think that.

But I'm not narrowing, nor have I ever narrowed my comments to this case. This whole conversation was about the plight of African **Americans in America in 2021.**

**Q.** On page 73 --

**A.** Okay.

Q. -- it appears you were relaying an experience that you had in a courtroom in Daytona. Is that right? Beginning on line 7 through 17. Id.

Despite these inaccuracies, the referee found the Respondent guilty of violating the Florida Bar's rules and recommended 30-day suspension.

### **SUMMARY OF THE ARGUMENT**

As a threshold argument, the Respondent argues that the Florida Bar did not prove that his actions violated the rules of professional conduct. Secondly, the Respondent argues that the Bar's prosecution of him violate his First Amendment right to free speech, under the United States Constitution. The charges brought in this matter are based upon statements made during two different interviews. Punishment for words alone, without more, violates his right to Free Speech under the United States Constitution. The Respondent also argues that his rights under the First Amendment's Free Exercise Clause are being violated. The third argument raised in is rule 4-8.2 (a) and the other alleges Florida Bar rules are unconstitutionally vague as they were applied to him and violate his Equal Protection rights under the Fourteenth Amendment to the United States Constitution, as it relates to the severity of the recommended sanction. The recommended 30-day suspension is not warranted given the nature of the alleged violation. The Respondent's statements were not made during a pending trial or other court proceeding, Additionally, the Respondent did not submit filings to any court

disparaging, Judge Weiss or any other judicial officer. Further, the Respondent does not have a prior history of being disciplined for the same thing or anything. Therefore, if the referee's finding of guilt is upheld a lesser penalty is still appropriate under the record facts.

Finally, argument the Respondent raises is the referee erred by excluding relevant evidence in the form of bar journal articles and research reports that document problems of racial bias and implicit bias in the American court system. The Respondent argued that this evidence was necessary to demonstrate he had a good faith basis for making the statements the Florida bar alleges are false or disparaging to the court system.

### **STANDARD OF REVIEW**

"[I]f 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." *The Florida Bar v. Shoureas*, 913 So.2d 554, 557 (Fla. 2005). Likewise, a "referee's findings of mitigation and aggravation carry a presumption of correctness, and we will uphold them unless they are clearly erroneous or without support in the record. *Fla. Bar v. Kinsella*, 260 So. 3d 1046, 1049 (Fla. 2018) (citing *Fla. Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007)). A

“party contending that the referee’s finding of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradict the conclusions.” *The Florida Bar v. Carlon*, 820 So.2d 891, 898 (Fla. 2002).

This court’s review of a referee's recommended discipline, however, is broader and less deferential, because "this Court has the ultimate responsibility to determine the appropriate sanction." *Fla. Bar v. Barrett*, 897 So. 2d 1269, 1275 (Fla. 2005). “In rendering attorney discipline, [this court] considers the respondent's previous disciplinary history and increases the discipline where appropriate. The Court deals more harshly with cumulative misconduct than it does with isolated misconduct.”; *Fla. Bar v. Patterson*, 330 So.3d 519 (Fla. 2021)(this was Patterson’s second disciplinary case and he made comments in court documents).

## **ARGUMENT**

### **I. THE FLORIDA BAR DID NOT PROVE THE RESPONDENT’S ACTIONS VIOLATED ITS RULES OF PROFESSIONAL CONDUCT**

The Referee’s finding of guilt is not supported by the evidence in the record. The Respondent fully accepts his burden and respectfully submits that the record in this case fully demonstrates that the findings of guilt in this

case are "clearly erroneous and lacking in evidentiary support." *The Florida Bar v. Canto*, 668 So. 2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So. 2d 810 (Fla.1996).

The Bar carries a heavy burden when it seeks to discipline a lawyer for alleged acts of unethical conduct. The Court previously found that a clear and convincing evidence standard entails the following: "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (inquiry re judge) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The Bar failed to meet this burden, and the Referee's findings are unsupported.

The Florida Bar accused the Respondent of violating various rules previously discussed herein. The chief allegation made against the Respondent is that he violated rule 4-8.2(a) by disparaging the judiciary. The Florida Bar acknowledges that the Respondent only violates this rule if he knowingly or recklessly makes false statements that impugn the judiciary. The Respondent put forth evidence that clearly establishes the good faith basis for the statements that he made. However, the referee rejected the Respondent's exhibits which demonstrate the problems of race and how it

affects judicial decision making. Three reports and articles in particular were excluded from evidence which made far reaching statements about implicit bias in the Court system, these articles are as follows: *How Subtle Bias Infects the Law, Annual Review of Law and Social Science, Report: Race in Matters of Judicial Decision Making and Racial Diversity and Judicial Influence on Appellate Court.*

Moreover, the Respondent offered specific examples of how White attorneys who represent Walt Disney, the City of Orlando, the Orange County Government and other local employers regularly used their peremptory challenges to strike Black members of the venire panel. Additionally, the Appellant discussed the fact that 27 of 30 Employment discrimination cases filed in the Middle District of Florida were dismissed after the defendants filed a motion for summary judgment.

The referee did not explain the infirmity of this evidence and how it was determined that this evidence was false. Ostensibly, the referee dismissed the objective proof the Respondent offered during sworn testimony. And the referee refused to admit into evidence documents that would refute the Florida Bar's inaccurate assertion that the Respondent did not have a good faith basis makes the statements that he did. In this way the Respondent believes that he was denied the right to a fair trial

## II. THE FLORIDA BAR'S DISCIPLINE OF THE RESPONDENT FOR SPEECH ALONE VIOLATED HIS FIRST AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

There is no doubt that “States may regulate professional conduct, even though that conduct incidentally involves speech.” *NIFLA*, 138 S. Ct. at 2372. That is because “words can in some circumstances violate laws directed not against speech but against conduct.” *R.A.V.*, 505 U.S. at 389, 112 S.Ct. 2538. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 865 (11th Cir. 2020).

“When regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker's views.’” *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980)(quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)). “The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Consol. Edison*, 447 U.S. at 537 (quoting *Police Department of Chicago v. Mosley*, *supra*, at 95).

The purpose of the Florida Bar rules against impugning the integrity of the judiciary is not designed to protect judges from criticism. *See The Florida Bar in re Shimek*, 284 So 2d 686, 690 (Fla. 1973) (“The conclusion which we here reach takes cognizance of the proposition that a judge as a public

official is neither sacrosanct nor immune to public criticism of his conduct in office.”); *Fla. Bar v. Ray*, 797 So. 2d 556, 558-59 (Fla. 2001). The Florida Bar Rule 4-8. 2(a) specifically prohibits lawyers from making statements that they know to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge because it can erode public confidence without contributing to the exposure of legitimate problems. *See id.*; *Ray*, 797 So. 2d at 558-59.

This rule is not intended to limit a lawyer's legitimate criticism of judicial officers, but it requires that such criticism be based on an objectively reasonable factual basis. *Ray*, 797 So. 2d at 559. Speech directed towards specific rules and the actions of the Government and not explicitly towards the judge are protected by the First Amendment. *See In re Sawyer*, 360 U.S. 622 (1959). In *Sawyer*, the United States Supreme Court made it abundantly clear that a lawyer is free to speak critically of how the law is currently operating. In *Sawyer*, like this case, the Lawyer made speech to public, non-lawyer group in which she offered criticism of the Smith Act, an act related to efforts to sniff out communism, and particularly how it was being used against certain members of society, in what she believed was an unfair manner. The State Bar suspended her for disparaging the judiciary. The U.S.

Supreme Court made it abundantly clear that such criticisms do not amount to professional misconduct.

The Sawyer Court said in relevant part:

Even if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law...we think there was still nothing in the speech warranting the findings. If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent. The public attribution of honest error to the judiciary is no cause for professional discipline in this country...It may be said that some of the audience would infer improper collusion with the prosecution from a charge of error prejudicing the defense. Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions. We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others.

Furthermore, opinions, by virtue of what they are, cannot be false and thus cannot be punished. Only false statements of fact or statements made with reckless disregard for the truth may be punished. Under *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), unless Respondent knowingly made false statements of fact or made them with reckless disregard for the truth, or that had a substantial likelihood of materially prejudicing a pending judicial proceeding, the First Amendment protects her comments.

“Under the First Amendment there is no such thing as a false idea.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). See also *Lawyers' Comments about Judges: A Balancing of Interests to Ensure a Sound*

Judiciary, 17 Geo. J. Legal Ethics 659, 675 (2004) ("Attorney comments, however, are afforded [First Amendment] protection where they are clearly the opinion of the speaker. Personal opinion is generally protected from sanction because it is incapable of being proved false") (internal footnotes omitted).

In *Okla. Bar Ass'n v. Porter*, 766 P.2d 958 (Okla. 1988), the Supreme Court of Oklahoma declined to impose any discipline on an attorney who had made statements to the press after trial that the trial judge had "showed all the signs of being a racist"; that "if he wants to practice his racism that way that's his business"; and that he had "never tried a case before him that I felt I got an impartial trial out of him." 766 P.2d at 960. The Court held that the attorney's comments were "expressive activity [that] stands at the epicenter of those expressive activities protected by the First Amendment." *Id.* at 966.

The speech activity for which respondent is called to answer for here is thus plainly at the center of the protective umbrella of the First Amendment. Freedom of speech, press, assembly and the right to petition the government for a redress of grievances share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.

*Porter*, 766 P.2d at 966-67. See also *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430 (9th Cir. 1995)(lawyer not disciplined after making comments that judge had

“evidence of anti-semitism”); *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000) (attorney's statements that the judge was a "racist and bigot" and had a "bent of mind" did not involve false statements of fact or represent statements of opinion necessarily implying undisclosed false assertions of fact; statements could not be basis for disciplining attorney consistent with the First Amendment); *State Bar v. Semaan*, 508 S.W.2d 429, 431-32 (Tex. Civ. App. 1974) (attorney's comment that judge was "a midget among giants" not sanctionable because it could not be proven true or false); *In re Erdmann*, 301 N.E.2d 426, 427 (N.Y. 1973) (reversing sanction against attorney who criticized trial judges for not following the law, and appellate judges for being "the whores who became madams").”

Here, the Bar’s charges run afoul against these constitutional safeguards, which prevent the government from impinging upon a citizen’s right to free speech. The Bar seeks to avoid this restriction by saying it was regulating professional conduct, which it is permitted to do. However, when the Bar is regulating professional conduct, it is only permitted to incidentally restrict speech. This case is wholly about speech. In other words, if the court removes the Respondent’s words, which are the expression of his ideas, there would be no case. The Bar cannot use its apparatus to discipline lawyers simply because they do not like their speech.

Accordingly, the Bar's prosecution is unconstitutional.

III. FLORIDA BAR RULE 4-8.2 (A) WHICH PROHIBITS ATTORNEYS FROM DISPARAGING THE JUDICIARY, AS WELL AS THE OTHER LISTED RULES, VIOLATES THE RESPONDENT'S EQUAL PROTECTION UNDER THE 14TH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The general rule is that legislation or laws are presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174–175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This general rule gives way, however, when a law or rule has a discriminates based on race.

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); see also *Johnson v. Smith*, 696 F.2d

1334, 1336 (11th Cir. 1983)(overturned on other grounds)(quoting Gunther, Constitutional Law at 678 (10th ed. 1980)). “Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle [equal protection of the laws] is violated arise.” *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587–88, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979). See also *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Luny v. Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U.S. 370; and *Soon Hing v. Crowley*, 113 U. S. 703; S. C. 5 Sup. Ct. Rep. 730.

Because a factual, as-applied challenge “asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider.” *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009). This is because an as-applied challenge “addresses whether ‘a statute is unconstitutional on the facts of a particular case or to a particular party.’ ” *Id.* (quoting *Black's Law Dictionary* 223 (7th ed. 1999)). *Schultz v. Alabama*, 42 F.4th 1298, 1319 (11th Cir. 2022), *cert. denied sub nom. Hester v. Gentry*, 143 S. Ct. 2610, 216 L. Ed. 2d 1208 (2023).

The Equal Protection requirement is not limited to criminal prosecutions” (citations removed)); *Boddie v. Connecticut*, 401 U.S. 371, 382–84, 91 S.Ct.

780, 28 L.Ed.2d 113 (1971) (striking down state procedures imposing filing fees on an indigent couple who sought a divorce, deciding on due process grounds but stating “the rationale of *Griffin* covers quasi Judicial cases such as this one. See *Jones v. Governor of Fla.*, 950 F.3d 795, 820–21 (11th Cir. 2020).

Here, the Bar is attempting to apply its rules more harshly to the Respondent than others who have engaged in similar or more egregious behavior. As noted above, the Respondent is being punished purely for speech. However prominent, non-black, Republican Florida lawyers used X (formerly known as Twitter) to directly tweet similar or far more egregious comments to a much broader audience:

“Just one hour into deliberations at the sham Trump trial.”  
Senator Marco Rubio Tweet 5/29/24<sup>2</sup>

“The sham trial in NYC wasn’t about Trump It was the radical left sending a message to their opponents of what can happen to them too.”  
Senator Marco Rubio Tweet 5/31/24, posted with a video to a Fox News Interview where he made similar claims of the court system being corrupted<sup>3</sup>

“So many Americans will remember today, the day partisan prosecutors hijacked our criminal justice system to go after political opponents, shaking the foundation of this country—built upon the rule of law applied evenly, fairly and blindly to all. There is a reason for

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<sup>2</sup> <<https://x.com/marcorubio/status/1795930449396527504>>

<sup>3</sup> <<https://x.com/marcorubio/status/1796563118975516847>>

appellate review and the errors in this trial are just as blatant as the reasons of charges were brought.”

Florida Attorney General Ashley Moody Tweet 5/30/24<sup>4</sup>

“This verdict is the corrupt result of a corrupt trial, a corrupt judge, and a corrupt DA.”

Rep. Matt Gaetz Tweet 5/31/24<sup>5</sup>

“This is a sad day for our country - the latest example of the two-tier justice system being weaponized against [the President]”

Rep. Daniel Webster Facebook post 5/31/24<sup>6</sup>

“Today’s verdict represents the culmination of a legal process that has been bent to the political will of the actors involved: a leftist prosecutor, a partisan judge and a jury reflective of one of the most liberal enclaves in America—all in an effort to “get” Donald Trump.”

Florida Governor Ron DeSantis Tweet 5/31/24<sup>7</sup>

The above quotes show, Marco Rubio, a US Senator with 4.4M followers on X, using the word “sham” twice to describe a court proceeding that did not go the way he thought it should. U.S. Representative Matthew Gaetz, unlike anything the Respondent ever stated or implied, explicitly called the judge and the trial corrupt when he wrote, “corrupt result of a corrupt trial, a *corrupt judge*.” (emphasis added). He has 2.7M followers on X. Likewise, Florida Attorney General Moody, who has 39.4k followers, disparaged the attorneys by describing them as “partisan prosecutors hijack[ing] our criminal justice.”

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<sup>4</sup> < <https://x.com/AGAshleyMoody/status/1796300535412244697>>

<sup>5</sup> < <https://x.com/RepMattGaetz/status/1796291273009017123>>

<sup>6</sup> < <https://www.facebook.com/share/p/AwYXTNziWwv93EhH/>>

<sup>7</sup> < <https://x.com/GovRonDeSantis/status/1796288427924639987>>

These lawyers, who are not black, are also not facing a 30-day suspension. The Bar's failure to address them like the Respondent is evidence of an equal protection violation, and thus is unconstitutional.

#### IV. THE FLORIDA BAR VIOLATED THE RESPONDENT'S DUE PROCESS UNDER THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION

Holding a law license "endows the holder with a conditional privilege," and not a right. *Fla. Bar v. Fussell*, 179 So.2d 852, 854 (Fla. 1965). Nevertheless, "it has characteristics of property which should not be withdrawn by a governing authority save by proper application of traditional concepts of due process." *Id.* When an attorney is facing disciplinary action, she is entitled to procedural due process, which includes fair notice of the charge. *In re Ruffalo*, 390 U.S. 544, 550 (1968).

Additionally, due process requires that the Respondent have the "opportunity to be heard full and fair, not merely colorable or illusive...Due process of law means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." *Ryan's Furniture Exchange, Inc. v McNair*, 120 Fla. 162 So. 483, 487 (1935); see *Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process

requires both fair notice and a real opportunity to be heard”) (citing *Dep’t of Law Enforcement v. Real*, 588 So. 2d 957, 960 (Fla. 1991)); *Fla. Highway Safety & Motor Vehicles v. Griffin*, 909 So. 2d 538, 541 (Fla. 4th DCA 2005).

Here, the Bar failed to set forth the particular acts of conduct for which it sought to discipline the Respondent.

- a. The Bar Violated Respondent’s Due Process By Not Providing Him With Sufficient Notice Regarding The Nature Of The Alleged Violations To Enable Him To Formulate A Proper Defense.

As this court has held, “as a matter of due process, the Bar's complaint must allege all rule violations the Bar seeks to prosecute.” *Fla. Bar v. Phoenix*, 311 So.3d 825, 831 (Fla. 2021). While the Bar does not have to connect every alleged item of misconduct to a specific rule violation, it is required to set forth the particular acts of conduct for which the attorney is sought to be disciplined. *Fla. Bar v. Committee*, 916 So.2d 741, 745 (Fla.2005); see also R. Regulating Fla. Bar 3–7.6(h)(1)(B) (Pleadings; Complaint; “Content. The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined.”).

The “[A]bsence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of

procedural due process.” *Id.* (quoting *In re Ruffalo*, 390 U.S. 544, 552, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)).

Here, as noted above, in the run-up to the evidentiary hearing, the Respondent propounded interrogatories to the Florida Bar on August 18, 2022. (R. at 141-51). The interrogatories requested that the Florida Bar specify which statements the Respondents made violated the different rules listed in the formal complaint. The Florida Bar refused to answer the questions. (R. at 141-51). It asserted that that was a factual question the Referee would decide at the evidentiary hearing. For example:

**9. Which specific statements made by the Respondent, does the Bar contend mischaracterized the civil process, procedural mechanism and rules of evidence**

B. Objection this is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing.

**10. What empirical evidence does the Florida Bar intend to rely upon to prove that the Respondent’s suggestion/implication regarding inequity or implicit bias in the court system is factually untrue?**

B. The Bar does not anticipate presenting any empirical evidence

**11. During his discussion on the Black Love United program the Respondent stated, in part, as quoted at paragraph 15 of the complaint, that “But at the end of the day, this is something that God will have to address because it is not in the hearts of those in-in-the -in power, and that includes the appellate court, I would say, to right the wrongs that have been committed against us, because it -it makes financial sense to them to keep us in a place where we are beholden to the.” Does the Florida Bar contend that this was a false statement? If the answer to this question is yes, please state the means and the method used to make such a determination.**

B. Objection. This is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing. The bar also objects to this interrogatory as it calls for a legal conclusion.

**15. Please list each and every false statement that the Florida Bar contends the Respondent made which forms the basis for this grievance complaint. Relatedly, indicate the means and the evidence used by the Florida Bar to determine that each statement is false?**

B. Objection this is a factual determination to be made by the referee after considering the evidence and testimony at the final hearing.

(R. at 141-51).

The Respondent filed a motion to compel better responses to the above-listed questions, which the referee denied. (R. 131-139). The Bar waited until closing arguments to list all the particular statements it believed violated its rule. There was literally no time for the Respondent to address the allegations against him at that time. Such action falls well below the requirements of the due process. As such, the Bar's actions are unconstitutional.

b. The Presiding Referee Erred by Excluding Relevant Evidence Offered by the Respondent to prove the truthfulness of the Statements he made.

Due process mandates that the Respondent have a chance to address his statements. However, the Referee, by limiting Respondent's expert's testimony to only civil litigation, and by failing to consider other addressing the whole court system testimony, deprived the Respondent of a "real

opportunity to be heard.” As such, the Referee’s ruling violated the Respondent’s due process.

Here, the Respondent had the burden of proving he had a good faith basis for his comments. He endeavored to do so through exhibits that included several articles from legal journals as well as results of studies. Each article or report showed that there was a widespread and well-established sense that minorities received the least favorable treatment by the court system. These items were expressly objected to by the Florida bar and ultimately excluded from the evidence that the referee relied upon at the final evidentiary hearing:

- A. Article “What would a Reasonable Jury Do Jury Verdicts Following Summary Judgment reversals”
- B. Document. “Special Issue Judicial Nominating Procedures: RX Warning: Quitting Diversity Efforts too Soon May Result in Harmful Relapse, 92 Fla. Bar J. 18”
- C. Touro Law Review: Racial Bias Still Exists in the Criminal Justice System? A Review of Empirical Research
- D. NACDL’s 5<sup>th</sup> Annual Conference & Seminar: Race Matters V: Policy, Practice, and the Intersection of Race in the Criminal Legal System
- E. CWET360 Episode 10, Part 2, Critical Race Theory (CRT)
- F. How Subtle Bias Infects the Law. Annual Review of Law and Social Science
- G. State Court’s Stark Lack of Destiny Demands Action
- H. Article: Does Unconscious Racial Bias Affect Trial Judges?
- I. Report: Race Matters in Judicial Decision-Making
- J. Article: Race and the Decision Making of Juries (September 2007)
- K. Journal Article: Racial Diversity and the Judicial Influence on Appellate Courts

- L. Scholarship@Cornellaw: A Digital Repository. Does Unconscious Racial Bias Affect Trial Judges?
- M. Unnamed Digital Journal Entry.

The Florida Bar moved in *limine* to keep the articles and the research report out of evidence because they were irrelevant, and the referee granted their motion. In the relevant part the referee said, “Items A-M that are listed anticipated exhibits, as set forth in the bar’s Motion in Limine will not be admitted as evidence because the exhibits are not narrowly tailored to the facts of the instant case and will not assist the trier of fact in resolving factual issues.” (R. at 394).

During the final hearing in this matter the Appellant’s uncontroverted testimony was that the statements he made during the two interviews were based primarily on two sources: his experiences litigating Civil Rights and Criminal cases and the literature that he has read on the issues of implicit bias in the court system, and it affects judges and juries. *Id.* Because the referee already stated she would not consider his research and the full breadth of his experience, as well as the referee excluding the literary evidence, the Respondent was prevented from putting on a full defense. Put differently, he did not have a “real opportunity to be heard.” Accordingly, the referee’s ruling violated his constitutional rights.

c. The Referee's Order on the Protective Order Violated  
Respondent's Right to Confront His Accuser Under the 14th  
Amendment Due Process

When a state denies or suspends a person's license that they need to participate in their profession, the right to cross-examine witnesses applies. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 108 (1963); *State v. Hollingsworth*, 103 Fla. 801, 803-04 (1931) (indicating that Florida protected this right by statute); *Fla. Bar v. Tipler*, 8 So.3d 1109, 1117 (Fla. 2009)(due process not violated where Respondent afford full opportunity to confront witnesses); see also *Brown v. South Carolina State Bd. Of Educ.*, 301 S.C. 326, 329-30 (1990) (holding that a teacher has a right to confront and cross-examine witnesses when her teaching license is being revoked).

In non-criminal proceedings, the right to confront and cross-examine witnesses is part of procedural due process guaranteed by the Fifth and Fourteenth Amendments. See *August v. Dep't of Motor Vehicles*, 264 Cal.App.2d 52, 60 (1968). For example, a state committee denies someone entry to the profession based on an anonymous letter, with no opportunity to confront the letter's author, due process is violated. *Id.*

Here, the Referee's Protective Order preventing Respondent from calling Judge Weiss as a witness in his case violated her due process right

to confront witnesses. The Referee nearly adopted the wholesale the language in the Bar's motion, without considering Respondent's motion, and ruled that "respondent's intention to call Judge Weiss as a witness at the final hearing can only be viewed as an effort to inquire into his thought processes and orders which is...improper, oppressive, burdensome, and designed to frustrate these proceedings. Additionally, respondent's tactics in this regard are nothing more than an attempt to harass and intimidate a sitting judge." Not only did the Referee's order not comport with the requirements of the law, but it was also not accurate.

FL ST BAR Rule 3-7.6(k), states in relevant part, "A complaining witness may be called on to testify and produce evidence as any other witness." A complaining witness is "any person who has complained of the conduct of any member of The Florida Bar to any officer or agency of The Florida Bar." *In re Amends. to Rules Regulating Fla. Bar-Chapters 3 & 14*, 369 So. 3d 228, 230 (Fla. 2023). "The role of the complaining witness in a bar disciplinary proceeding, is somewhat analogous to that of the victim in a criminal proceeding." *Tyson v. The Fla. Bar*, 826 So. 2d 265, 267 (Fla. 2002). According to TFB's sworn answers to Respondent's interrogatories, "the initial grievance against the respondent on or about June 18, 2021, was initiated by a complaint from the Honorable Kevin Weiss." Res. Inter.

8. Simply stated, Judge Weiss complained of the Respondent's (a member of the Florida Bar) conduct to an officer or agency of TFB. Thus, according to the Bar's rules, he is a complaining witness.

As a complaining witness, the Rules of procedure state that he may be called to testify. FL ST BAR Rule 3-7.6(k). The plain language of the statute does not provide an exception simply because that complaining witness is a sitting judge. See *id.* Indeed, the Bar was able to call him during the sanction hearing and allowed him to discuss the "effect respondent's actions had on...him personally as a sitting judge." (Fl Bar Pr. Mt at ¶4. See *also* Res. Inter. 8). In other words, the Bar called Judge Weiss to provide a victim impact statement. As noted above, a complaining witness in a bar disciplinary proceeding is analogous to that of the victim in a crime. *Tyson*, 826 So. 2d at 267. Thus, by evoking him as a victim, they also underscored. Basic notions of fairness and due process mandate that if the Bar can call him as a complaining witness, the Respondent should have also been permitted to call him as a complaining witness.

This is particularly so when considering the conflict in testimony regarding who initiated the complaint against the Respondent and why. The Bar in its Interrogatories and Admissions stated that Judge Kevin Weiss

initiated the complaint. (R. 131). Judge Weiss in his deposition and during the sanction hearing stated that he did not initiate the complaint. (Weiss Dep T. 27). Rather, he stated that the Bar came to him, or Chief Judge Donald Myer initiated the complaint. (Id. 28). Such a discrepancy is not insignificant. The Respondent should have been permitted to question Judge Weiss, which may have also revealed the need to question additional witnesses like Chief Judge Myer.

Accordingly, the Referee's report must be reversed because it constitutes a violation of the Respondent's due process.

#### V. THE BAR'S PROSECUTION VIOLATES RESPONDENT'S RELIGIOUS FREEDOM

Both the First Amendment to the U.S. Constitution and Florida Constitutions, in Article I, Section 3, provide protection from laws prohibiting or penalizing the free exercise of religion. Religious speech enjoys sanctuary within the First Amendment. See *Widmar v. Vincent*, 454 U.S. 263, 269, 102 S. Ct. 269, 274, 70 L. Ed. 2d 440 (1981) ("Religious worship and discussion . . . are forms of speech and association protected by the First Amendment."); *Snowden v. Town of Bay Harbor Islands*, 358 F. Supp. 2d 1178, 1189 (Fla. S.D. 2004) (plaintiff's request for public displays was protected religious speech). This right is not absolute, and the court must determine when the government's interest outweighs the interest of those

wishing to engage in protected speech. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1201 (11th Cir. 1991).

As the court noted in *Snowden*:

Speech finds its greatest protection in traditional public fora, and government may not alter their public status without completely changing the fora's use, e.g., converting a public park to an office building. In public fora, content-neutral time, place, and manner regulations of speech must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.

*Snowden*, 358 F.Supp.2d at 1191(citing *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004)).

The Florida Religious Freedom Restoration Act (FRFRA) further supports this:

- (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
  - (a) Is in furtherance of a compelling governmental interest; and
  - (b) Is the least restrictive means of furthering that compelling governmental interest.

Fla. Stat. §761.03(1)(a)-(b). In order to establish cognizable claim for burdening exercise of religion under RFRA, a party must demonstrate substantial burden on conduct that, while not necessarily compulsory or central to larger system of religious beliefs, nevertheless reflects some

tenet, practice or custom of larger system of religious beliefs; conduct that reflects purely personal preference regarding religious exercise will not implicate statute's protections. *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272 (Fla. S.D. 1999), question certified 267 F.3d 1223, certified question answered 887 So.2d 1023, rehearing denied, answer to certified question conformed to 420 F.3d 1308.

Here, the Free Exercise clause of the First Amendment applies here because the majority of the comments occurred during and online religious service. The Respondent was expressing clear religious opinions such as “This is something that only God will have to resolve.” The Bar is not permitted to reach into religious services and discipline its members who are engaged in religious activity simply because it does not like what the person says. The Bar has no compelling reason for doing so here, and its solution is not narrowly tailored.

Accordingly, the Bar’s prosecution violates Respondent’s First Amendment rights with respect to Free Exercise.

VI. THE REFEREE’S RECOMMENDATION OF A 30-DAY  
SUSPENSION IS NOT WARRANTED OR SUPPORTED BY THE  
RECORD

- a. 30-day Suspension is an Aberration for the Alleged Conduct

The Referee relies on Rule 7.1 of the Florida Standards for justifying her recommendation of a 30-days suspension. Rule 7.1 does not support her recommendation, however. Additionally, a 30-day suspension cannot be sustained when looking at the comments for Rule 7.1. The comments further highlight the type of behavior where suspension is recommended, and the conduct is far more egregious than anything the Respondent has been accused of doing.

In *The Florida Bar v Draughon*, 94 So. 3d 566 (Fla. 2012), the respondent was suspended from the practice of law for 1 year for transferring real property and other assets from a corporation he wholly owned and controlled, to himself. The Referee found that fraudulently transferring the property to himself, the lawyer acted with the actual intent to defraud his creditors and violated well-established law prohibiting fraudulent transfers.

Similarly, in *The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990), the court suspended the respondent when the respondent did not mislead clients but routinely charged a fee for tasks that took significantly less time than the amount billed. The court found, “The [lawyer’s] fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social

malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys the power to perform adequately the function of its creation.” *Id.* at 62.

Both of these cases involve instances where attorneys were essentially engaged in some type of fraud conduct that undermined the system. By contrast, when where a lawyer has made statements against the judiciary public reprimand is usually appropriate. See *The Florida Bar v. Tindall*, 550 So.2d 449 (Fla. 1989). In *Tindall*, this Court held that the filing of formalized and unsubstantiated allegation that judge has made unfair disposition of case and accepted bribes warranted public reprimand. Likewise, in *Cerf. v. State*, 458 So.2d 1071 (Fla. 1984) this court held that false and unsubstantiated charges made against a judge's integrity in legally filed papers represent more than a personal attack upon the judge but cast slur and insult upon the judiciary as a whole and warrant a public reprimand. See also *The Florida Bar v. Tropp*, 112 So.3d 101 (Fla. 2013)(lawyer lied and impugned the integrity of judiciary and public reprimand was appropriate); *The Florida Bar v. Clark*, 528 So.2d 369 (Fla. 1998)(public reprimand warranted when lawyer had multiple violations including making unsubstantiated charges against judiciary warrants public reprimand).

In other words, assuming *arguendo* that the Referee's report is accurate, the Bar's precedent demonstrates that the Respondent deserves a public reprimand at most. A 30-day suspension would be a significant departure from the Bar's precedent, which again speaks to the Respondent's equal protection and first amendment claims.

b. There Was No Record Evidence Demonstrating a Pattern of Misconduct as Understood under Florida Bar Precedent

Under the Florida Standards on Imposing Sanctions Rule 3.2(b)(3), an aggravating factor can be a pattern of misconduct. However, the comments to the rule as well as other Florida Bar precedent, find this factor when an attorney has engaged in egregious behavior over substantial time. See Rule 3.2(b)(3). For example, in *Fla. Bar v. Parrish*, 241 So.3d 66 (Fla. 2018), the case cited in the Rule comments, there the attorney used his client's car as surety, loaned other clients about \$150,000 and took a mortgage interest in the land he was assisting them in buying, he failed to notify the court when his clients died in order to substitute parties, among other things. This occurred over years. The Referee found, and this court agreed, that the attorney's behavior was a pattern of misconduct. See *also Fla. Bar v. Horton*, 332 So. 3d 943, 950 (Fla. 2019)(Court found Respondent demonstrated a pattern of misconduct involving multiple clients over a period of approximately two years).

Here, the Respondent has not engaged in nearly as serious or egregious conduct. At most he engaged in critiques of the court system by speaking to the public about what he believes. Moreover, it was only over a little more than two weeks. Contrary to the Referee's report, the Respondent did not make "false or misleading statements."

Also, all the comments were made for a short period of time. Judge Weiss' Order was issued May 29, 2021, and Respondent received the Bar's Complaint on June 18, 2021. The cases cited above occurred over the course of years, not less than three weeks. To be sure, this makes sense. It is hard to establish a pattern in a short period.

Therefore, there is not sufficient record evidence to show a pattern of misconduct that is consistent with the Bar's precedent. Thus, the Referee's recommendation must be denied.

#### c. The Referee Failed to Consider Mitigation

The Referee listed the Respondent's good character and reputation in the community as a mitigating factor but did not provide specific aspects of that evidence. The Respondent presented substantial mitigation evidence which demonstrated that his actions and the trajectory of his entire adult life were one of serving the traditionally underserved people in society. (See ST).

Before entering the practice of the law, the Respondent served in and was Honorably Discharged from the United States Navy. (R. at 807). The Respondent worked for the Orlando Police Department for 7.5 years. *Id.* Currently, the Respondent is and has been a licensed Minister of the Gospel since 1986. His entire adult life has been devoted to serving others less fortunate than himself.

The Referee failed to consider this evidence and thus failed to consider important mitigation.

### **CONCLUSION**

For the above-stated reasons the Respondent prays that this Honorable Court reject the recommendation of the Referee as it relates to a finding of guilt and as it relates to the proposed 30-day suspension because the record does not support the referee's findings of fact and conclusion of law.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the Florida e-portal system on this the 21st day of June and that a copy was served via email upon Mark Lugo Mason mmason@floridabar.org, Ashley Taylor Morrison, Esq., Bar Counsel, amorrison@floridabar.org, Carrie Lee, Bar Counsel, clee@floridabar.org; and Patricia Ann Toro Savitz, Esq., Bar Counsel, The Florida Bar, psavitz@floridabar.org.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.210(a)(2)(B) for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2004 in Arial 14 point font. The length of this brief is 10,778 words.

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