

BEFORE THE JUDICIAL HEARING BOARD OF WEST VIRGINIA

SUPREME COURT NO. 25-483

JIC COMPLAINT NO. 35-2025

**IN THE MATTER OF
THE HONORABLE MARYCLAIRE AKERS,
JUDGE OF THE 8TH JUDICIAL CIRCUIT**

BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE

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QUESTIONS PRESENTED

- I. Does the Board's Application of Rule 2.10(A) Violate the First Amendment Under Controlling Supreme Court Precedent?
 - A. Does *Gentile v. State Bar of Nevada* Establish the Constitutional Framework Governing Professional Speech Restrictions?
 - B. Does the Board's Application Fail *Gentile's* "Substantial Likelihood" Standard?
- II. Does the Public Have a Legitimate Interest in the Operation of the Abuse/Neglect System?

INTRODUCTION: IDENTITY OF AMICUS CURIAE, INTEREST IN THE CASE, SOURCE OF AUTHORITY TO FILE

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1523 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities). The ACLJ's interest before this tribunal is the intersection of West Virginia's Code of Judicial Conduct and the First Amendment.

The Board's focus on the constitutional rights of a sitting jurist triggers the ACLJ's mandate that leads it to provide information and guidance to tribunals addressing the Freedom of Speech.

The ACLJ cites as its authority the Rules of Appellate Procedure Rule 30, as the Rules of Judicial Disciplinary Procedure are silent as to the role of Amici before this tribunal. The ACLJ has approached the Judicial Board's Counsel Ancil Ramey, the Investigation Board's Counsel Teresa Tarr, and Judge Maryclaire Akers's Counsel Thomas Ryan seeking leave to participate. The Judicial Board and Investigative Board would grant leave only if the ACLJ were to file a closing brief, after the evidentiary hearing. Attorney Ryan does not limit leave in that manner.

With thanks and deference to Counsel, ACLJ moves by adjointed pleading for leave to participate as Amicus prior to the evidentiary hearing, given that its role here is providing an analysis of First Amendment jurisprudence and precepts relative to sitting jurists and their comments on matters that may or may not be pending before them. ACLJ will leave the evidentiary process to others.

SUMMARY OF ARGUMENT

While judges hold a special role in our legal system and must act "in a manner that promotes the public confidence in the independence, integrity, and impartiality of the judiciary," W. Va. Code of Jud. Conduct Rule 1.2, judges do not shed all constitutional rights upon assuming the bench. The rules that govern judicial conduct, here the West Virginia Code of Judicial Conduct, must not be applied in a manner that infringes upon constitutional rights. Here, the Judicial Investigation Board of West Virginia (the "Board") walks a narrow path between applying the Code of Judicial Conduct and doing so without infringing on Judge Maryclaire Akers's First Amendment freedom of speech. Any admonishment of Judge Akers runs the danger of

unconstitutionally chilling the speech of all West Virginia judges and depriving the public of information on the legal system which is of great public interest.

Under the Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), professional speech restrictions must satisfy rigorous First Amendment scrutiny. They cannot be applied absent a "substantial likelihood" of material prejudice to legal proceedings. The issue before this Board must be examined carefully so as to avoid becoming speculative concerns about "public perceptions" and conclusory assertions about judicial neutrality, precisely the type of enforcement that *Gentile* condemned as constitutionally impermissible.

In the ACLJ's review and analysis of the speech at issue, Judge Akers's carefully circumscribed comments about systemic problems in West Virginia's child welfare system posed no realistic threat to any legal proceeding. Her statements were based on information already in the public record, revealed no confidential information, and addressed policy failures that all parties acknowledged required reform. Any discipline thus would punish speech that lies at the First Amendment's core—expression about governmental accountability on matters of paramount public concern.

ARGUMENT

I. ANY APPLICATION OF RULE 2.10(A) MUST EXPRESSLY AVOID VIOLATING THE FIRST AMENDMENT UNDER CONTROLLING SUPREME COURT PRECEDENT

Any discipline of Judge Akers would violate clearly established constitutional principles governing restrictions on professional speech. The Supreme Court's decision in *Gentile* established a comprehensive framework for analyzing such restrictions—a framework the Board has entirely failed to apply. The fundamental principle bears emphasis: professional licensing does not create a constitutional vacuum where governmental authorities may restrict speech based on

subjective judgments about propriety or public perception. On the contrary, professional speech restrictions must satisfy the same rigorous constitutional standards that govern all governmental attempts to regulate expression—standards the Board’s discipline fails to meet.

A. Gentile v. State Bar of Nevada Establishes the Constitutional Framework Governing Professional Speech Restrictions

Gentile represents the Supreme Court’s definitive statement on the constitutional limits governing professional speech restrictions. The decision’s analytical framework controls this case and compels reversal of the Board’s discipline.

In *Gentile*, attorney Dominic Gentile was accused of violating the Nevada’s professional conduct rules for making public statements about his client’s criminal case. 501 U.S. at 1033. The Supreme Court’s analysis began with a fundamental constitutional principle: attorneys do not “surrender their First Amendment rights” upon entering the legal profession. *Id.* at 1073 (quoting *Seattle Times Co. v. Rhineheart*, 467 U.S. 20, 32–33, n.18 (1984)). *See also NAACP v. Button*, 371 U.S. 415, 439 (1963) (holding that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights”). Professional conduct rules that restrict speech must therefore comply with constitutional requirements, including narrow tailoring to serve compelling state interests and avoidance of vague or overbroad prohibitions. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). This principle applies with particular force to judges. While judges occupy a unique constitutional position that may justify certain speech restrictions not applicable to other government employees, they remain rights-bearing individuals whose expression receives First Amendment protection. The state’s legitimate interest in maintaining judicial neutrality and preventing prejudicial publicity cannot justify speech restrictions that fail to satisfy constitutional standards.

Gentile established that professional speech restrictions must be interpreted to require a “substantial likelihood of material prejudice” to legal proceedings. 501 U.S. at 1075. The Court’s reasoning was explicit and controlling:

We agree with the majority of the States that the “substantial likelihood of material prejudice” standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.

Id. The Court specifically rejected broader formulations that would restrict speech based on lesser probabilities of potential harm or speculative concerns about potential prejudice. *Id.*

The constitutional logic underlying this requirement is straightforward. Professional speech restrictions represent content-based governmental regulation of expression—a form of regulation that receives the most exacting First Amendment scrutiny. Such restrictions can survive constitutional review only if they are narrowly tailored to serve compelling governmental interests. *Id.* at 1076. Restrictions based on speculative or theoretical harm fail this demanding test because such regulations sweep too broadly, chilling protected speech without serving the state’s legitimate regulatory objectives.

B. The Board’s Application Must Consider *Gentile*’s “Substantial Likelihood” Standard

Applying *Gentile*’s constitutional framework, any discipline of Judge Akers speech fails. Most fundamentally, the Board made no finding—nor could it—that Judge Akers’s statements created a “substantial likelihood” of material prejudice to any legal proceeding.

The Board must analyze whether Judge Akers’s statements created any realistic prospect of affecting legal proceedings. The Board must avoid relying on conclusory assertions about “public perceptions” and generalized claims about the importance of judicial neutrality. This approach violates *Gentile*’s core holding, which is that professional speech restrictions must be

based on a specific finding that there is a substantial likelihood of material prejudice, not on speculative concerns or subjective judgments about appropriate judicial conduct. 501 U.S. at 1076.

Any determination must rely upon standards, as any standardless approach is precisely what *Gentile* condemned. The Supreme Court specifically rejected broader formulations that would restrict speech based on theoretical or speculative harms, holding that only restrictions tied to specific findings of “substantial likelihood” of actual prejudice could survive constitutional scrutiny. *See id.* at 1076. Constitutionally, any discipline untethered to any such finding cannot stand muster or review.

The “substantial likelihood” standard is not a generalized requirement that professional speech avoid any potential impact on legal matters. Rather, it is specifically designed to address speech that threatens the fairness or integrity of adversarial proceedings through prejudicial influence on decisionmakers. *Id.* at 1073–74. Judge Akers’s monitoring order presents no such risk.

Upon our review based in constitutional precepts, Judge Akers’s statements addressed broad systemic problems in West Virginia’s child welfare system. Her comments were carefully limited to information already in the public record, revealed no confidential information, and expressed no bias regarding contested factual or legal determinations. The constitutional significance of this restraint cannot be overstated. Judge Akers did not discuss pending criminal cases, reveal sealed court records, or express opinions about the guilt or innocence of particular defendants. She did not advocate for specific legal outcomes or align herself with particular parties in adversarial proceedings. Instead, she provided informed commentary on systemic policy failures that all parties acknowledged required reform.

Such speech lies at the First Amendment’s constitutional core. It addresses matters of paramount public concern, draws on unique professional expertise, and poses no realistic threat to the fairness of legal proceedings. Therefore, this process needs particularly to avoid punishing the type of expression that the Constitution most clearly protects.

Judge Akers’s statements were made in the context of a one-year monitoring period focused on policy implementation. In our review constitutionally, as speech, her comments posed no realistic threat of affecting administrative compliance with specified reforms, particularly given their focus on general systemic problems rather than specific implementation strategies or deadlines. *Gentile* recognized that attorneys serve as uniquely qualified sources of information about legal proceedings, noting that “the press and [the] public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar.” 501 U.S. at 1056–57. This principle applies with even greater force to judges. Judicial officers possess unparalleled expertise about the operation of legal institutions and unique insights into systemic problems that affect the administration of justice. Their professional experience provides them with both the knowledge and the credibility necessary to inform public discourse about governmental performance in ways that serve essential democratic functions.

Judge Akers’s speech exemplifies this constitutional principle. Her comments about child welfare policy were based upon her experiences as a prosecutor and as a sitting judge, and accordingly, provide the public with an informed analysis of systemic problems from a uniquely qualified professional perspective. Such speech serves the public interest precisely as *Gentile* envisioned, and any discipline runs the substantial risk of undermining the democratic values that the First Amendment was designed to protect.

The Board’s application of Rule 2.10(A) will consider fundamental Due Process requirements and provides this tribunal an opportunity to create and support a system of speech regulation that provides meaningful guidance for judicial conduct while eschewing arbitrary enforcement based on subjective judgments about appropriate expressions. The Board’s decision will offer principled basis for determining when judicial speech about systemic issues violates Rule 2.10(A). The decision could find that any discussion of governmental problems related to pending cases transgresses ethical boundaries and yet provide guidance for distinguishing such discussions from permissible judicial commentary on legal institutions. This approach avoids precisely the Constitutional problem that *Gentile* identified. Professional conduct rules must provide clear guidance about prohibited conduct to avoid creating a “trap for the . . . unwary” that punishes good-faith efforts to comply with ethical requirements. *Gentile*, 501 U.S. at 1051. The Board’s decision has the opportunity to address this fundamental test by offering coherent standards that other judges could apply to guide their own conduct.

Judge Akers’s statements were carefully crafted to comply with ethical constraints. She limited herself to information already in the public record, acknowledged ethical limitations on judicial speech, and focused on systemic policy issues rather than specific pending cases. Her approach reflected a good-faith effort to balance First Amendment freedoms with professional obligations—which is precisely the type of conduct that constitutional law should encourage rather than punish. The Board will want to avoid creating the quintessential “trap for the . . . unwary” that violates Due Process requirements. *Id.* If a judge acting in good faith and attempting to comply with ethical rules cannot predict what conduct will trigger professional discipline, then the regulatory system fails to provide the fair notice that Constitutional law demands. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000) (holding that “[a] statute can be impermissibly vague . . . if it

fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.”).

Vague speech restrictions create opportunities for discriminatory enforcement based on the content or viewpoint of the regulated expression. When governmental authorities possess standardless discretion to determine what speech violates professional conduct rules, those authorities may be tempted to use that discretion to suppress criticism or inconvenient truths about governmental performance. Judge Akers must not be disciplined for revealing confidential information or expressing bias about pending cases, neither of which she did, but must be recognized for drawing public attention to systemic problems in governmental institutions. The Board’s stand on these issues could provide assurance that similar speech criticizing other governmental institutions could be heard as intended, thereby avoiding any potential for viewpoint discrimination that the First Amendment forbids.

Professional speech restrictions violate the First Amendment when they punish “a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep.’” *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The Board’s interpretation of Rule 2.10(A) can pass this constitutional test by exceeding the rule’s legitimate purpose to encompass vast categories of protected expression. Under any other interpretation, judges would be prohibited from making any public statement about systemic issues if any related matter were pending in their jurisdiction. This interpretation would prevent judges from engaging in educational speeches about legal institutions, participating in academic conferences about judicial administration, or providing informed commentary on governmental performance—all forms of expression that occupy the First Amendment’s constitutional core. The potential constitutional problem is particularly acute given the broad scope

of judicial jurisdiction. Most judges handle numerous types of cases across multiple legal domains, meaning that the wrong interpretation would effectively prevent judges from engaging in any public discourse about governmental institutions or legal policy. Such a broad prohibition cannot survive constitutional scrutiny under established overbreadth doctrine.

Constitutional overbreadth analysis also considers whether the state's legitimate regulatory interests could be served through less restrictive means. Here, the state's undisputed interest in preventing prejudicial publicity regarding pending cases can be fully protected through a narrower interpretation of Rule 2.10(A) that focuses on speech creating a substantial likelihood of material prejudice, consistent with *Gentile*'s approach. Such an interpretation would permit judges to engage in public discourse about systemic issues while preventing speech that poses realistic threats to the fairness of legal proceedings. The Board's failure to adopt this less restrictive approach demonstrates that its interpretation is too broad to serve its legitimate regulatory purposes.

II. THE PUBLIC HAS A LEGITIMATE INTEREST IN THE OPERATION OF THE ABUSE/NEGLECT SYSTEM

"The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile*, 501 U.S. at 1035. *See also Landmark Communications v. Va.*, 435 U.S. 829, 839 (1978) ("the judicial system itself, is a matter of public interest . . ."). Likewise, the public has a legitimate interest in the operation of the state's abuse/neglect system. Such legitimate interest is arguably even more compelling than the public interest in the operation of the judicial system in general or the criminal justice courts. How the state tends to its most vulnerable, abused and neglected children, is a matter to be highly scrutinized.

In *Gentile*, the Court recognized that attorneys are uniquely qualified as a source of information about pending cases. 501 U.S. at 1056. Likewise, judges are uniquely qualified as vessels of information to the public because of their experience on the bench. And although a judge's leeway to convey information to the public does not extend to divulging confidential information he has received because of impending or pending proceedings, a state should not interpret the judge's freedom as being strictly unable to speak about matters of public importance. Few matters carry greater public interest than the state's treatment of abused and neglected children. How West Virginia protects its most vulnerable citizens represents a fundamental measure of governmental accountability and democratic governance.

In re Hey, 192 W. Va. 221, 452 S.E.2d 24 (1994) is particularly relevant. There, a complaint was filed against Circuit Court Judge John Hey for public comments he made on a local radio talk show concerning the behavior of one of the members of the Judicial Hearing Board during the Judge's judicial discipline hearing. *Id.* at 223. The court then held that the complaint required dismissal as enforcement would violate the Judge's First Amendment rights. *Id.* at 223–24.

The West Virginia Supreme Court of Appeals made it clear that the judicial principle of upholding the “integrity and independence of the judiciary could be disserved by punishing judges for discussing with the public the fairness and validity of [judicial disciplinary] hearings.” *Id.* at 229–30. Judge Akers would be punished for even less here. Although unrelated to judicial discipline, Judge Akers did not discuss the specifics or fairness of particular hearings but rather highlighted her concerns with the abuse/neglect system as a whole. The Court held that “[c]learly, the public has a need to know about any deficiencies in [judicial disciplinary] proceedings, and the integrity of the judiciary cannot be advanced by a rule that chills critical discussion by those most knowledgeable of the very process created to enforce and protect judicial integrity.” *Id.* at 230.

Likewise, the public has a need to know about deficiencies in the abuse/neglect system. The integrity of that system and the judges that serve it will not be advanced by punishing the speech of those who seek to improve the system through First Amendment freedoms.

Any risk that Judge Akers statements could reasonably be expected to affect the outcome or impair the fairness of a matter pending before the court is less than negligible, be it in the case of the 12-year-old's foster placement, the one-year DHOS improvement period, or another case, because the Judge did not opine on a specific case nor did she divulge confidential information about any party.

The Court in *In re Hey* stated that a judicial conduct rule cannot be "stretched to restrict pure speech on a matter of public interest when the speech does not pertain to pending or impending cases and is not within a specific prohibition of the Code or some other law." *Id.* Judge Akers's statements here were drawn directly from her past experience as a prosecutor and the outcomes she has witnessed for individuals in the system. The Judge then turned her comments towards the inner workings of the system and made mere observations on the contractual relationships between the State and outside agencies which service the abuse/neglect system. Far from making any recommendation, the Judge's comments merely served as a lighthouse to the public so that citizens could investigate matters for themselves and reach conclusions on the current state of the abuse/neglect system.

It should be expected that a judge or any other person would want to improve the outcomes of those in the abuse/neglect system. Judges certainly have a duty to appear neutral and detached, but these statements of public interest can hardly be interpreted as the Judge's affliction for deciding matters before her one way or another.

In fact, as retired Michigan Supreme Court Chief Justice Bridget Mary McCormack recently pointed out, judicial conduct rules “leave open a vast *educative* function, where judges can inform legislators, the legal profession, and the public about their observations, insights, and recommendations.” Bridget McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J. F. 175, 184 (2021) (emphasis in original). Chief Justice McCormack argues that the ethical rules governing judges not only allow them to work to improve the legal system, but also impose an obligation to do so because “[a] judge’s decision-making is only as good as the legal system in which it takes place [A] judge therefore has an ethical obligation to help make [the legal system] as fair, equitable, and effective as possible.” *Id.* at 186.

That the public has a legitimate interest in the operation of the abuse/neglect system only underscores the fact that Judge Akers’s comments were restricted in scope to merely tip off the public to a legal system of concern. Judge Akers’s comments were far from advocating for one thing or another or aligning herself with a certain party before the court. Judge Akers has a First Amendment right to make such comments and the judicial conduct rules should not be interpreted to snuff out the judiciary’s ability to draw the public’s focus to such a concern, something judges are in a uniquely qualified position to do.

Any discipline to be applied in the face of the speech at issue would effectively prevent judges from fulfilling their constitutional role in promoting governmental accountability. Silencing judicial voices on systemic problems impedes the democratic processes necessary for effective reform. This result contravenes fundamental First Amendment principles. The Constitution’s protection of speech serves not merely individual expression, but also the broader democratic values of informed public discourse and governmental accountability.

CONCLUSION

For the reasons stated above, this tribunal must decline to sanction Judge Akers's speech.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2025, a true and correct copy of the foregoing

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