

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

COA No.: 286992

vs.

Lower Court No.: 2005 401979 FH

EDWARD PINKNEY,

Defendant-Appellant.

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**BRIEF OF AMICI CURIAE FACULTY
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“Judges are assaulted verbally by litigants, lawyers, state and federal public officials, the media, and even their superiors on the bench. The attacks range from the political to the highly personal, from the bizarre to the outrageous. Sprinkled among these assaults, however, are legitimate expressions of criticism that constitute an essential part of the examination of the workings of an important government institution—an institution that must remain fully open to public scrutiny. Wise judges, even when wounded by unfair assaults, have learned that the best policy is ordinarily to dismiss the attacks as part of the baggage of their jobs. Abusive criticism simply goes with the territory.”

Dodds v ABC, 145 F3d 1053 (CA 9, 1998) (citations omitted)

INTRODUCTION

The matter before this Court can be summarized in these stark and unsettling terms: in this case, an individual was sentenced to three to ten years in prison for speaking his conscience about the judge who presided over his prosecution. Amici are faculty members at Michigan law schools who teach, research, and publish in the fields of First Amendment, civil rights, criminal law, and constitutional law.¹ These law school faculty

¹ Amici include: Margaret Costello, Visiting Clinical Professor of Law, University of Detroit Mercy School of Law; Lawrence Dubin, Professor of Law, University of Detroit Mercy School of Law; Daniel Halberstam, Eric Stein Collegiate Professor of Law, University of Michigan Law School; Don Herzog, Edson R. Sunderland Professor of Law, University of Michigan Law School; Mae Kuykendall, Professor of Law, Michigan State University College of Law; Ashley E. Lowe, Assistant Professor of Law, Thomas M. Cooley Law School; Joan Mahoney, Professor of Law, Wayne State University Law School; David Moran, Clinical Professor of Law, University of Michigan Law School; Leonard M. Niehoff, Adjunct Professor of Law, University of Michigan Law School; Christopher J. Peters, Associate Professor of Law, Wayne State University Law School; Richard Primus, Professor of Law, University of Michigan Law School; Frank S. Ravitch, Professor of Law, Michigan State University College of Law; Donald H. Regan, William W. Bishop Collegiate Professor of Law, University of Michigan Law School; Robert Sedler, Distinguished Professor of Law, Wayne State University Law School;

members believe that this case raises grave constitutional concerns and therefore respectfully submit this brief in an effort to assist the Court with its proper resolution.

STATEMENT OF FACTS

For purposes of this brief, the salient facts are few and beyond dispute. A jury found Rev. Edward Pinkney guilty of several violations of Michigan election law. On May 14, 2007, the Hon. Alfred M. Butzbaugh of Berrien County Circuit Court sentenced Rev. Pinkney to one year in jail and five years of probation. One of the conditions of Rev. Pinkney's probation was that he could not engage in any "assaultive, abusive, defamatory, demeaning, violent, threatening, or intimidating behavior," including through electronic or print media.

In the November/December 2007 issue of a small circulation periodical called the *People's Tribune*, Rev. Pinkney published an editorial critical of Judge Butzbaugh. The editorial came to the attention of Rev. Pinkney's probation officer, who concluded that it violated the above-referenced condition of his probation. According to the probation report, the

Brent E. Simmons, Professor of Law, Thomas M. Cooley Law School; Jonathan T. Weinberg, Professor of Law, Wayne State University Law School; James Boyd White, L. Hart Wright Professor of Law Emeritus and Professor of English Emeritus, University of Michigan Law School; and Christina B. Whitman, Francis A. Allen Collegiate Professor of Law, University of Michigan Law School. A collection of short profiles of Amici is attachment A to this brief.

officer was concerned about the following statements that appeared in the editorial: “We must fight for justice for all anytime you have a judge like Alfred Butzbaugh who is a racist”; “nor did I receive due process by the dumb judge and prosecutor”; “Judge Butzbaugh has violated his oath”; and “We are still waiting on the racist, corrupt judge to do the same.” The probation report does not state whether the officer viewed these statements as “assaultive,” “abusive,” “defamatory,” “demeaning,” “violent,” “threatening,” “intimidating,” one of these, some of these, or all of these.

A probation revocation hearing was held before Judge Butzbaugh on December 20, 2007. At the hearing, the probation officer testified that he believed the cited language was “demeaning” and “defamatory.” Hearing transcript, p. 13. Citing First Amendment concerns, Judge Butzbaugh declined to find a probation violation on this basis. *Id.* at 27. Judge Butzbaugh went on, however, to suggest that the article violated the terms of the probation because its purpose was to “intimidate” him and “threaten [him] with physical harm.” *Id.* at 27-28. In this connection, Judge Butzbaugh cited the fifth paragraph of the article, where Rev. Pinkney prophesied that if Judge Butzbaugh did not “hearken unto the voice of the Lord” then “curses” would befall him and his family and the Lord would “smite” him. *Id.* at 26-27. Judge Butzbaugh postponed his ruling on this

matter in order to provide Rev. Pinkney with an opportunity to address the issue of whether this constituted a “threat.” *Id.* at 28.

Judge Butzbaugh recused himself from the case, which was reassigned to the Hon. Dennis M. Wiley. Judge Wiley found that the language contained in the fifth paragraph of the editorial did not describe “what Mister Pinkney, himself, [was] going to do,” but, rather, what the “divine powers of God” were going to do. Hearing transcript, p. 71. Judge Wiley nevertheless concluded that this language was “intimidating” and a “threat.” *Id.* at 72. And he further concluded that the editorial was “demeaning” and “defamatory” insofar as it opined that Judge Butzbaugh had “violated his oath,” was “racist,” and was “corrupt.” *Id.* at 75. In so ruling, Judge Wiley emphasized that “it doesn’t take a rocket scientist to figure out” what the words included in the fifteenth term of probation meant, noting that dictionaries include definitions of them. *Id.* at 76.

Based on these findings, Judge Wiley revoked Rev. Pinkney’s probation and re-sentenced him to three to ten years in prison. *Id.* at 88. Rev. Pinkney’s punishment for making these statements critical of Judge Butzbaugh was therefore a 300 to 1000 percent increase in his prison sentence.

ARGUMENT

In *New York Times v Sullivan*, 376 US 254 (1964) the United States Supreme Court held that the First Amendment embodies a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270.² Indeed, the criticism of public officials has been described as not just the right, but the duty, of citizens in a democratic society. *See Id.* at 282. *See also* Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT (Philip B. Kurland ed. 1975). The First Amendment accordingly provides considerable “breathing space” to statements critical of public officials, including elected judges. *See New York Times, supra*, at 272. Amici respectfully submit that Judge Wiley’s punishment of Rev. Pinkney’s statements as “demeaning,” “defamatory,” and “threatening” violated this well-settled constitutional principle.³

² In the same vein, the Court observed that “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Id.* (quoting *Bridges v. California*, 314 US 252, 270 (1941)).

³ Amici recognize that under certain circumstances the conditions of probation may limit the exercise of constitutional rights. That principle, however, does not apply here for two reasons. First, courts have recognized that there must be a rational relationship between

I. The Constitution Protects “Demeaning” Speech Concerning Judges

Judge Wiley concluded that Rev. Pinkney’s statements regarding Judge Butzbaugh were “demeaning.” Amici sympathize with Judge Wiley’s concern for his colleague; and Amici recognize that respect for the judiciary plays an important role in our criminal and civil justice system. But Judge Wiley’s ruling was misguided, even if well intended and in some sense accurate, because the First Amendment protects a citizen’s right to make demeaning statements regarding a judicial officer.⁴ The Supreme Court made this abundantly clear in *New York Times*.⁵

In that case, the Supreme Court held that statements regarding public officials do not lose their First Amendment protection simply because they

those terms and the goal of rehabilitation. See, e.g., *People v. Miller*, 182 Mich App 711, 452 NW2d 890 (1990). No legitimate or truly rehabilitative goal is served by forbidding a person from voicing their conscience on matters of faith and justice. Second, courts have indicated that terms limiting constitutional rights must be narrowly tailored. See, e.g., *United States v. Crandon*, 173 F3d 122, 128 (CA 3, 1999). As is discussed within, this term of condition was framed in vague and overbroad language that reached core First Amendment speech. In addition, that term has nothing to do with the basis for Rev. Pinkney’s conviction—giving five dollars to people at a soup kitchen to influence their vote and improperly possessing absentee ballots.

⁴ Of course, a citizen’s right to make such statements *in court* may be circumscribed by time, place, and manner restrictions designed to preserve order and decorum. This case, which concerns the publication of statements in a periodical, obviously presents an entirely different circumstance.

⁵ Amici assume, for purposes of this argument, that the word “demeaning” has a clear definition. In fact, it does not and it therefore imposed an unconstitutionally vague standard on Rev. Pinkney. It is interesting to note that a brief survey of dictionaries revealed a wide range of definitions of the word “demeaning” (e.g., “to lower in status,” “to degrade,” or “to humble”) but no dictionary consulted equated “demeaning” with “defaming.” Amici discuss issues of vagueness and overbreadth in more detail later in this brief.

may have an adverse impact on reputation—in other words, because they are demeaning. Interestingly—and, for present purposes, importantly—the Court used the criticism of *judges* as its example of why this is so:

Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains ‘half truths’ and ‘misinformation.’ Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations ... [D]efamatory content [alone does not suffice] to remove the constitutional shield from criticism of official conduct.

Id. at 272-273 (citations omitted). In sum, the First Amendment *must* protect negative, even demeaning, speech regarding public officials like judges because a contrary principle would effectively stifle the sort of criticism and debate that our democracy requires. Judge Wiley plainly erred in concluding that the First Amendment does not protect “demeaning” speech and that such expressions can therefore serve as a constitutionally permissible basis for punishment.

II. Rev. Pinkney's Statements Were Not "Defamatory"

The Supreme Court has held that the First Amendment protects "rhetorical hyperbole," "vigorous epithet[s]," "loose, figurative" language, and "lusty and imaginative expression," and that such communications therefore do not amount to defamation punishable through the state courts. *See Milkovich v Lorain Journal Co*, 497 US 1, 16-17 (1990). Two lines of reasoning support this principle. First, such statements do not lend themselves to proof of truth or falsity, a matter that must be addressed in determining whether a communication qualifies as defamatory. *Id.* at 21.⁶ Second, immunizing such statements from punishment "provides assurance that public debate will not suffer for lack of 'imaginative expression.'" *Id.* at 20.

State and federal courts have honored this constitutional principle in numerous cases that offer instruction here. With respect to the statement that Judge Butzbaugh was "racist," consider the frequently cited case of *Stevens v Tillman*, 855 F2d 394 (CA 7, 1988). In that case, an elementary school principal brought a variety of claims (including a defamation action) against the president of a parent-teacher association for, among other things,

⁶ See Leonard Niehoff, *The Michigan Law of Defamation*, 4 Det CL Rev 975, 981 n 32 (1985) and Richard Rassel, James E. Stewart, and Leonard M. Niehoff, *The Michigan Law of Defamation Revisited*, 1 Det C L Rev 61, 81-83 (1994).

calling the principal “racist.” In an opinion written by Judge Easterbrook, the Seventh Circuit held that this amounted to mere “name calling” and was not actionable defamation:

Accusations of “racism” no longer are “obviously and naturally harmful.” The word has been watered down by overuse, becoming common coin in political discourse Language is subject to leveling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared “segregation now, segregation forever,” everyone knew what a “racist” was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life “racist” is hurled about [indiscriminately].

Id. at 402. See also *Smith v Philadelphia School District*, 112 F Supp 2d 417, 429 (ED Pa 2000) (holding that “[w]hile the Court acknowledges that a statement that plaintiff is ‘racist and anti-Semitic,’ if it was made, would be unflattering, annoying, and even embarrassing, such a statement does not rise to the level of defamation as a matter of law because it is merely non-

fact based rhetoric”); *Carto v Buckley*, 649 F Supp 502, 508 (SDNY 1986) (holding that “the general terms ‘racial and religious bigotry’ are imprecise concepts which cannot be proven true or false as statements of fact”); *Raible v Newsweek*, 341 F Supp 804, 807 (WD Pa 1972) (“We hold that to call a person a bigot ... gives no rise to an action for libel”); *Covino v Hagemann*, 165 Misc 2d 465, 627 NYS2d 894 (1995) (holding that a statement accusing plaintiff of being “racially insensitive” did not constitute defamation because it cannot be proved true or false); *Ward v Zelikovsky*, 136 NJ 516, 532, 643 A2d 972, 981 (1994) (holding that a statement accusing plaintiffs of “hat[ing] Jews” was name-calling that did not constitute defamation and noting that “[m]ost courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not”); and *Gillis v Landmark Communications*, 25 Media L Rptr 1382 (Va Cir Ct, 1996) (holding that an accusation that plaintiff had exhibited a “racist” attitude “described a state of mind or viewpoint which simply are not susceptible to verification”).

These cases confirm what common sense suggests: calling someone “racist” is not a statement of demonstrable fact, provable as true or false, but is a subjective and necessarily speculative opinion about someone’s possible motives, expressed through the use of “rhetorical hyperbole,” a “vigorous

epithet,” and “loose, figurative” language. Such name-calling therefore does not qualify as a “defamatory” statement falling outside the protections of the First Amendment. Judge Wiley erred in failing to recognize this.

The same analysis applies with respect to the statement that Judge Butzbaugh was “corrupt” and had “violated his oath.” Consider, for example, *Starnes v Capital Cities Media*, 19 Media L Rptr 2115 (Ill App Ct, 1992). In that case, an Illinois state court judge filed a defamation action against a newspaper for publishing an editorial commenting on his handling of a criminal case. Among other things, the editorial stated that the judge was “a disgrace to the judiciary” and had breached his duties under the judicial ethics code. Applying *Milkovich*, the court had no difficulty concluding that these statements “were not verifiable” and therefore did not amount to actionable defamation. *See also Discipline Committee v Yagman*, 55 F3d 1430, 1441 (CA 9, 1995) (holding that a statement that a judge was “dishonest” was “rhetorical hyperbole, incapable of being proved true or false”); *Lizotte v Welker*, 45 Conn Supp 217, 231; 709 A2d 50, 59 (1996) (holding that a statement accusing plaintiff of “maneuvers with political and corrupt implications” was “rhetorical hyperbole”); and *Grillo v Smith*, 144 Cal App 3d 868 (1983) (holding that statements that judge ran a “kangaroo

court,” issued an illegal order, and exceeded his authority were “absolutely protected under the First Amendment”).

The language used by Rev. Pinkney here is unmistakably in the nature of “rhetorical hyperbole,” “vigorous epithets,” and “loose, figurative” expression. Rev. Pinkney, railing against the injustice he believes he experienced in the course of his trial before an all-white jury and a white judge, uses the word “corrupt” or “corruption” six times, variously applying it to the “Courthouse,” “the top,” and Judge Butzbaugh. Judge Wiley clearly erred in concluding that this hyperbolic expression of outrage, not uncommon with respect to matters of justice and injustice, amounted to a provably false statement of fact.⁷

In sum, the First Amendment fully protects Rev. Pinkney’s statements and the state cannot punish him for making them.

III. Rev. Pinkney Did Not Threaten Judge Butzbaugh

As the Supreme Court recognized in *New York Times*, democratic discourse can include shrill and strident attacks against public officials. Of course, some officials will find such discourse intimidating or even

⁷ In the course of ruling, Judge Wiley indicated that if Rev. Pinkney’s accusations were true then the Judicial Tenure Commission would have disciplined Judge Butzbaugh. Amici respectfully suggest this reflects significant confusion on Judge Wiley’s part. An example demonstrates this. The statement, “in my opinion, Dr. Doe is a quack” clearly qualifies as protected rhetorical hyperbole. This holds true regardless of whether the state ever revoked Dr. Doe’s license to practice medicine or whether a jury ever found Dr. Doe liable for medical malpractice.

threatening when directed toward them personally. But the case law makes clear that a certain amount of abuse simply goes with the territory. And, in order to foster the robust expression our democracy demands, the case law distinguishes protected rhetorical hyperbole from a true threat.

The Supreme Court addressed this distinction in the case of *Watts v United States*, 394 US 705 (1969). In that case, Watts remarked in the course of a political debate that he would resist induction into the army and that, if forced to carry a rifle, “the first man [he would] want to get in [his] sights [was President Johnson].” On the strength of this statement he was convicted of the federal felony of knowingly and willfully threatening the President of the United States. The Supreme Court reversed the conviction.

Citing and quoting *New York Times*, the Court held that it was necessary to interpret the federal statute at issue “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 708. The Court went on to observe that “[t]he language of the political arena . . . is often vituperative, abusive, and inexact. We agree with [Watts] that his only offense here was ‘a kind of very crude offensive method of stating political opposition to the President.’” *Id.*

In his statements, Rev. Pinkney invoked biblical language to express his belief that God punishes the unjust and that a judge who remained unmindful of this would find himself sorely cursed. Such use of biblical imagery has a storied place in American culture, and particularly African American culture. Indeed, the most famous rallying cries of the civil rights movement mobilized scriptural texts in the call for justice: “let justice roll down like waters” (Amos 5:24); “like a tree planted by the water, we shall not be moved” (borrowing from Psalm 1:3 and Jeremiah 17:8); “I see the promised land” (Dr. King’s historic invocation of the liberation image of Exodus and Deuteronomy). Of course, biblical language is strong medicine—that is the point of using it. But a prophetic declaration about the nature of divine justice does not constitute a threat. Certainly, it is a good deal less ominous than a statement that if an individual were ever forced to carry a gun he would draw aim on the President of the United States.

One of the many distressing aspects of this case is that Judges Butzbaugh and Wiley appear to have objected to Rev. Pinkney’s manner of expression on religious grounds, respectively describing it as “blasphemy” and as “words that would put the fear of God into anybody.” See Opinion and Order of August 29, 2008 and Hearing Transcript, p. 72. But their discomfort with Rev. Pinkney’s choice of words does not render his

language threatening or otherwise subject to judicial censorship. To the contrary, as the United States Supreme Court held in *West Virginia State Bd of Education v Barnette*, 319 US 624, 642 (1943), “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” See also *Abington School Dist v Pennsylvania*, 374 US 203 (1963):

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel....

Id. at 226. And see *Abood v Detroit Bd of Education*, 431 US 209, 234-235 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be able to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the state.”). The story here is simple and chilling: Rev. Pinkney spoke his conscience; two judges disapproved; and Rev. Pinkney may languish in prison for a decade because of it. This constitutes precisely the kind of punitive and coercive measure that the First Amendment forbids.

IV. The Condition of Probation at Issue Was Unconstitutionally Vague and Overbroad

The condition of Rev. Pinkney's probation prohibiting "assaultive, abusive, defamatory, demeaning, violent, threatening, or intimidating behavior" is unconstitutionally overbroad. It is not just conceptually and theoretically overbroad, raising the risk that it might chill protected expression. See *United States v Williams*, 128 S Ct 1830, 1845 (2008). It is concretely and demonstrably overbroad, having been deployed to punish Rev. Pinkney for engaging in core First Amendment speech. The preceding discussion proves as much.

That condition of probation is also unconstitutionally vague, both as that principle is understood with respect to a condition of probation, see *People v Bruce*, 102 Mich App 573, 578, 302 NW2d 238 (1980), and as it is understood with respect to constitutional law more broadly, see *Chicago v Morales*, 527 US 41, 56 (1999). Indeed, it is so hopelessly vague that the three public officials who interpreted it all did so differently. Rev. Pinkney's probation officer thought the words "demeaning" and "defamatory" applied to the speech in question. Judge Butzbaugh thought that, for reasons related to the First Amendment, those words did not apply, but that the words "threatening" and "intimidating" did. Judge Wiley concluded that all these words applied, suggesting that the consultation of a

dictionary disposed of any nagging ambiguity. This rather glib proposal disregards the fact that many of these words (like “defamatory” and “threatening”) have a nuanced legal meaning that differs substantially from the meaning they possess in common usage. It also disregards the fact that, if understanding these words was really that simple, then presumably all three officials who were charged with determining Rev. Pinkney’s fate would have construed them the same way. They did not, except in one salient respect: they all interpreted this language in a manner that violated Rev. Pinkney’s freedoms under the First Amendment to the United States Constitution.

CONCLUSION

There are those who speak inoffensively, hold orthodox views, and quietly bear the injustices they believe the powerful have visited upon them. The First Amendment does not exist to protect them. They do not need protection.

There are those who speak their minds out of a muscular sense of conscience, believe things most people do not, and decry injustice wherever and whenever they think they see it. They are the wards of the First Amendment. They are the ones who need its shelter from oppression,

persecution, and the tyrannies of the majority. The history of freedom of speech in America is, in large measure, the history they have written.

Rev. Pinkney has opinions. We may find them provocative or obnoxious, zealous or intemperate, inspired or incoherent. But that does not matter. What matters is that they are his. What matters is that the First Amendment empowers him to give them voice. And what matter is that in this country, under this Constitution, and on this Court's watch, he must not be imprisoned for speaking his conscience.

Respectfully submitted,

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Summary Profiles of Amici

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Lawrence Dubin, Professor of Law, University of Detroit Mercy School of Law. Professor Dubin has served on the law school faculty for more than three decades and has served on and chaired the Michigan Attorney Grievance Commission. He teaches courses in Evidence and Professional Responsibility that include discussion of First Amendment issues.

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