No. 25-BG-0731

District of Columbia
Court of Appeals

IN RE JEFFREY B. CLARK, ESQ.,
Respondent.
A Member of the Bar of the District
of Columbia Court of Appeals

BDN: 22-BD-039
DDN: 2021-D193

Bar Registration No. 455315

On Appeal from the
Board of Professional Responsibility of the
District of Columbia Court of Appeals

CONSENT BRIEF OF NINE ATTORNEYS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT'S BRIEF
SHOWING CAUSE WHY HE SHOULD NOT BE SUSPENDED
PENDING FINAL ACTION ON THE RECOMMENDATIONS OF
THE BOARD OF PROFESSIONAL RESPONSIBILITY

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LIST OF ALL PARTIES AND *AMICI CURIAE* AND THEIR COUNSEL BEFORE THE BOARD ON PROFESSIONAL RESPONSIBILITY AND IN THIS APPELLATE PROCEEDING

Appearing before the Board on Professional Responsibility were: (1) attorneys for the Office of Disciplinary Counsel (Hamilton P. Fox III, Jason Horrell, and Jack Metzler); (2) Respondent Jeffrey B. Clark; and (3) attorneys for Jeffrey B. Clark (Charles Burnham, Robert Destro, and Harry W. MacDougald). In addition to those individuals, those appearing in this appellate proceeding include: (1) attorneys Michael B. Buschbacher and James R. Wedeking, who filed an *amicus curiae* brief on behalf of former U.S. Attorneys General William P. Barr, Michael B. Mukasey, and Jeff Sessions, in support of Respondent Jeffrey B. Clark; and (2) Richard A. Samp as well as the following attorneys (most of whom are members of the District of Columbia Bar), who are filing as *amici curiae* in support of Respondent Jeffrey B. Clark:

Mark Chenoweth
Margot Cleveland
Aram Gavoor
Philip Hamburger
Paul Kamenar
Joseph E. Schmitz
Ilya Shapiro
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INTERESTS OF *AMICI CURIAE*

Amici curiae (whose names are listed in the Appendix) are attorneys with a strong interest in proper administration of the attorney disciplinary system. Some have had a professional acquaintance with Respondent Jeffrey B. Clark during his long legal career as a private practitioner and a senior official within the U.S. Department of Justice (DOJ). Many of them disagree with the advice he apparently provided to President Donald Trump in questioning the results of the 2020 presidential election and believe that President Trump properly concluded on January 3, 2021, that Clark's proposed letter should not be released.

Amici nonetheless strongly believe that the effort to disbar Clark is unwarranted. Even accepting the Board on Professional Responsibility's factual findings as accurate, it failed to demonstrate that Clark ever attempted to make any *false* statements. The Board asserts that Clark's proposed draft letter contained a statement that Clark knew to be false: that DOJ had identified significant concerns that called into question the results of the 2020 presidential election. But the Board concedes, as it must, that Clark was not proposing to send a letter asserting that the *incumbent* DOJ leadership had identified such concerns when it had not. Rather, he proposed that DOJ alter its assessment of the severity of election irregularities. If it had done so, then the "significant concerns" he had identified would have become the concerns of DOJ as well. The Board may quibble with the reasonableness of any

such concerns about the election expressed by a revamped Justice Department, but assertion of such honestly held concerns cannot plausibly be labeled "false."

Amici worry that the effort to disbar Clark for drafting a letter that was never sent and contains no false statement severely infringes his free-speech rights. Any effort to punish an individual for expressing genuinely believed concerns is antithetical to First Amendment principles. Because Clark's exceptions to the Board's report are highly likely to prevail, the Court should not suspend his license pending its review of the Board's recommendation.

This proceeding is an example of an all-too-frequent occurrence in our increasingly divided society: partisans on both the left and right abusing legal processes to punish their political opponents. *Amici* are concerned that such "lawfare" discourages talented individuals from entering public service for fear that their efforts may lead to severe civil or criminal sanctions, massive legal bills, and irreparable injury to their reputations. *Amici* are filing this brief to urge the Court to halt that pernicious trend and to state unequivocally that the D.C. Bar's role is not to punish government officials for their policy recommendations—regardless of how strongly their opponents may disagree with those recommendations.

ISSUES PRESENTED

The Board on Professional Responsibility concluded that Respondent Clark

violated Rule of Professional Responsibility 8.4(a) when he proposed sending a letter he drafted that contained two statements the Board deemed "intentionally false": (1) DOJ had identified significant concerns about potential outcome-determinative irregularities in the 2020 presidential election; and (2) DOJ was investigating the information in a report prepared by Georgia State Senator William Ligon (the "Ligon Report"). This *amicus* brief addresses two issues: (1) whether Clark is likely to prevail on his claim that the "significant concerns" statement was not false and thus not actionable under Rule 8.4(a); and (2) whether Clark is likely to prevail on his claim that the statements about the Ligon Report were not false.

STATEMENT OF FACTS

In December 2020, Clark was serving in two senior positions simultaneously at DOJ: Assistant Attorney General for the Environment and Natural Resources Division and Acting Assistant Attorney General for the Civil Division. Clark did not play a direct role in DOJ's ongoing investigation of alleged irregularities in the 2020 presidential election but nonetheless spent considerable time looking into those allegations. He read allegations contained in pending lawsuits challenging the vote count, as well as news-media and Internet accounts regarding alleged irregularities. Report and Recommendation of the Board on Professional Responsibility ("Report") at 19. Allegations he found credible and on which he focused included claims of

serious election irregularities cited in the Ligon Report. *Ibid.*

Based on his research, Clark contacted Acting Attorney General Jeffrey Rosen and Acting Deputy Attorney General Richard Donoghue on December 28, 2020, and proposed that the Justice Department send a letter to senior government officials in Georgia expressing DOJ's "concern" over potential election irregularities. Clark's draft letter, referred to by the Board as the "Proof of Concept" letter, stated:

> [A]t this time we have identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia. No doubt, many of Georgia's state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints.

DCX-8 at 1. The letter cited the Ligon Report as an example of a document which alleged irregularities in the Georgia election and of which DOJ took notice. *Ibid.*

Clark met with Rosen and Donoghue later that afternoon to discuss his proposed letter. They told Clark that they would neither authorize nor sign the letter because it was inaccurate. In particular, Donoghue—who was overseeing DOJ's investigation of alleged election irregularities—stated that his investigation had found nothing that would support the letter's claim that DOJ had "identified significant concerns that may have impacted the outcome of the election in multiple states."

Following the meeting, Clark was convinced that DOJ had not adequately investigated alleged election irregularities, Report at 76, and that—despite Rosen and

Donoghue's assurances—there was, indeed, evidence of significant irregularities that may have impacted the election's outcome. He continued to investigate that evidence, including speaking with "the source" of allegations regarding improper vote counting at the State Farm Arena in Atlanta and "the guy who took the video" of the vote counting. *Id.* 21. The Board repeatedly found that Clark held a "sincere belief" that there was evidence of significant election irregularities. *Id.* at 5, 69, 77-78, 80-81.

Clark's investigation and his continued support for releasing the Proof of Concept letter (if and only if it became DOJ's view) came to the attention of President Trump, and he agreed to a White House meeting with Clark and other senior Justice Department officials on January 3, 2021. According to the Board, "The very purpose of the Oval Office Meeting was to determine whether Respondent should replace Mr. Rosen as the Acting Attorney General," and thereby gain authority to direct that the Proof of Concept letter be sent to Georgia officials. *Id.* at 52 n.12.[1] At the meeting, Clark urged President Trump to adopt the views expressed in the Proof of Concept letter as DOJ's findings and authorize the letter's release. Rosen and Donoghue objected and asserted that DOJ "had *not uncovered* potentially outcome-determinative

[1] Clark contends that President Trump had named him Acting Attorney General earlier in the day on January 3. The Board rejected that contention. *Ibid*. Resolution of that factual dispute is not necessary to decide the issues addressed in this brief, which focuses on whether the proposed Proof of Concept letter contained intentionally false statements.

issues with the 2020 election." *Id.* at 71 (emphasis in original). They stated that if Clark were named Acting Attorney General, they and every Assistant Attorney General in the Justice Department (other than Clark) would resign. *Id.* at 27. At the conclusion of the meeting, the President decided that the draft letter should not be sent and that Rosen should remain in charge of DOJ, stating that the course proposed by Clark was not worth "the breakage" it likely would produce. *Id.* at 28.

STATEMENT OF THE CASE

In January 2021, Democrats took control of the U.S. Senate, and the Senate began an investigation into efforts to contest Joseph Biden's victory in the 2020 presidential election. After investigating Clark's post-election activities, Senator Dick Durbin (D-Ill.) referred Clark to the Office of Disciplinary Counsel (ODC) in October 2021 for possible violations of the D.C. Rules of Professional Conduct. ODC filed charges against Clark in July 2022, alleging that he had "attempted to engage in conduct involving dishonesty, by sending the Proof of Concept letter containing false statements" and "attempted to engage in conduct that would seriously interfere with the administration of justice." Specification of Charges at 9.

The Hearing Committee rejected the second of ODC's two charges but endorsed the first. It concluded that Clark's efforts to promulgate the Proof of Concept letter constituted an attempt to make a recklessly false statement, in violation

of Rule 8.4(a) and recommended that Clark be suspended for two years. Report at 4.

In its July 31, 2025 Report, the Board agreed with the Hearing Committee that ODC failed to prove that Clark attempted to engage in conduct that would seriously interfere with the administration of justice. *Id.* at 6. While agreeing with the Hearing Committee's assessment that Clark had attempted to make false statements, the Board held that he had done so intentionally, not merely recklessly. *Id.* at 5. A majority of the Board recommended that Clark be disbarred. *Id.* at 6.

The Board concluded that two statements in the Proof of Concept letter were false. First, it faulted the letter for "indicating that the Justice Department had identified significant concerns about potential outcome-determinative irregularities." *Id.* at 68. It concluded that Clark knew that the statement was false because "he had no facts to contradict Messrs. Rosen and Donoghue's clear and repeated warnings that the Justice Department had *not uncovered* potentially outcome-determinative issues with the 2020 election." *Id.* at 71. While conceding that Clark was "sincere in his beliefs" that there were significant irregularities with the election, *id*. at 78, the Board stated: "But the question is *not* whether *Respondent* believed there were problems with the election, the question is whether *the Justice Department* had uncovered potentially outcome-determinative issues with the election. The answer was 'no,' and Respondent knew the answer was 'no.'" *Ibid*.

The Board also faulted the following sentence: "No doubt, many of Georgia's state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints." *Id.* at 78-82. The Board stated that the sentence falsely implies that the Ligon Report (which concluded that the Georgia election results should be decertified) was among the pieces of evidence DOJ relied on in concluding that it had "significant concerns about the election," when, in fact, DOJ had no such concerns, *id*. at 82, and had concluded that irregularities identified by the Ligon Report were not "potentially outcome determinative." *Id.* at 81.

The Board recommended that Clark be disbarred because his alleged dishonesty was "flagrant" in that he persisted "despite being told in no uncertain terms" that the Justice Department had investigated all alleged irregularities and had *not* "identified significant concerns that may have impacted the outcome of the election." *Id.* at 100. Although conceding that no D.C. attorney has ever been disciplined under similar circumstances for "attempting" to be dishonest, *id*. at 99, the Board concluded that disbarment should "serve to deter other lawyers from following in Respondent's footsteps." *Id.* at 100.

SUMMARY OF ARGUMENT

Clark may not be disciplined for attempting to utter a false statement unless it demonstrates, at a minimum, that the statements he attempted to utter were false.

Because the factual record demonstrates that the statements Clark attempted to utter were *not* false, ODC's efforts to disbar Clark are wholly unwarranted.

The Board faulted Clark for attempting to disseminate a letter in DOJ's name that stated, "[A]t this time we have identified significant concerns that may have impacted the outcome of the election in multiple States." The Board is correct that, at the time Clark drafted the Proof of Concept letter on December 28, 2020, the Jeffrey Rosen-led DOJ had concluded that it had not identified "significant concerns" about election irregularities, and Rosen and Donoghue informed Clark of that position at their December 28 meeting. Thus, the sentence would have been false had it been disseminated on that day.

But once Clark learned that Rosen and Donoghue were unwilling to alter DOJ's assessment of election irregularities and sensitive to the President's concerns, he persisted until the disagreement was presented to the President for final resolution, which at the President's discretion might have included making him Acting Attorney General. A presidential decision to change DOJ's position would have rendered truthful the challenged statement in the draft letter. At no point did Clark attempt to disseminate the letter without first effecting a revision of DOJ's assessment of the election-irregularity evidence, and he abandoned efforts to disseminate the letter once President Trump rejected his counsel at the January 3, 2021 White House meeting.

Accordingly, it is fanciful for the Board to assert that Clark ever attempted to issue a false statement.

The Board's second false-statement claim—that the letter's citation to the Ligon Report falsely implied that DOJ arrived at its supposed "significant concerns" position in part by relying on the Report's findings—is entirely dependent on its first false-statement claim. Because Clark's inclusion of the "significant concern" language cannot be characterized as an attempt to make a false statement, the citation to the Ligon Report was entirely blameless. The Ligon Report cited many alleged irregularities in Georgia voting and recommended that certification of the Georgia election results be rescinded. Because Clark genuinely believed that the Report raised significant concerns about the election, it would have been entirely truthful, when and if he was granted authority to determine DOJ's position on the matter, for him to cite the Ligon Report as being among the pieces of evidence upon which he relied in expressing the Justice Department's new "significant concerns" position.

Sanctioning Clark for his alleged attempt to issue false statements is particularly inappropriate because doing so would raise serious First Amendment concerns. The Supreme Court has made clear that even false speech is subject to considerable First Amendment protection, in large measure because "[t]he mere potential" that punitive sanctions may be imposed on speakers "casts a chill" on all

speech. *United States v. Alvarez*, 567 U.S. 709, 723 (2012). *Alvarez* invoked First Amendment rights to overturn the criminal conviction of a man who falsely claimed to have won medals for his military service. If the First Amendment significantly curtails prosecution even of those whose "stolen valor" speech is certifiably false, there are even greater constitutional objections to sanctioning Clark for drafting a letter that he did not intend to send unless and until President Trump established the DOJ position outlined in the letter or else authorized him to do so.

ARGUMENT

I. CLARK IS NOT SUBJECT TO DISCIPLINE UNDER RULE 8.4(a) BECAUSE THERE IS NO EVIDENCE THAT THE SPEECH HE ATTEMPTED TO DISSEMINATE WAS FALSE

D.C. Rule of Professional Conduct 8.4(a) states that it is professional misconduct for a lawyer to "violate or *attempt to violate* the Rules of Professional Conduct." The Board concluded that Clark's effort to disseminate the Proof of Concept letter violated Rule 8.4(a) because it amounted to an attempt to violate Rule 8.4(c), which prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." Report at 104. It concluded that several statements in the letter were false and asserted that "[b]oth intentional and reckless false statements violate Rule 8.4(c)." *Id.* at 68.

The Board's finding that Clark attempted to make "false" statements—a

prerequisite to any finding of a Rule 8.4(a) violation—is based on a basic misunderstanding of the facts of this case. It is uncontested that Clark did not intend to disseminate his letter unless and until the letter's expression of "significant concerns" became the Justice Department's position—at which point no statement in the letter would be false.

A. Asserting in the Draft Letter that "We Have Identified Significant Concerns that May Have Impacted the Outcome of the Election" Was Not an Attempt to Make a False Statement

On December 28, 2020, when Clark met with Rosen and Donoghue, he was told in no uncertain terms that DOJ had determined, after conducting what it deemed a thorough investigation, that it had *not* "identified significant concerns that may have impacted the outcome of the election." Accordingly, any claim on that date that DOJ had identified "significant concerns" would have been false, and a lawyer who attempted to send such a letter despite knowledge of the Department's position could have been charged under Rule 8.4(a) with attempting to issue a false statement.[2]

But Clark did not respond to his superiors' refusal by attempting to disseminate

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[2] Importantly, both Disciplinary Counsel and the Board concede that Clark did not act improperly when he emailed the initial draft of the letter to Rosen and Donoghue on December 28. Report at 75. The Board explained that when Clark emailed the draft, he was merely "sharing his views of the relevant facts, and his views as to how the Georgia legislature should respond." *Ibid*. The Board faulted Clark only for the actions he took after he was told that the letter inaccurately portrayed DOJ's current assessment of the severity of election irregularities.

the letter despite his knowledge that its statement contradicted DOJ's official position that it lacked "significant concerns" about the election. Rather, he responded by seeking to alter the Department's position regarding "significant concerns"—an alteration that would have rendered the letter's statement truthful. As the Board recognized, one purpose of the January 3, 2001 White House meeting "was for the President to determine whether Respondent should replace Mr. Rosen" as Acting Attorney General, *id.* at 69 n.18, and thereby gain authority to alter DOJ's position. President Trump decided at that meeting not to name Clark the Acting Attorney General or otherwise direct an alteration of DOJ's position. *Id.* at 28. Once the President made that decision, Clark ceased his efforts to disseminate the letter because he realized he was powerless to alter the Justice Department's position in a way to make the letter true.

There is little doubt President Trump, in his role as head of the Executive Branch, was authorized to change the Department's position—as would Clark if named Acting Attorney General. They would not have been bound by the results of the previous investigation led by Mr. Donoghue, an investigation that Clark had always deemed inadequate. Federal statutes grant the Attorney General broad-ranging authority over the *entire* Justice Department. *See, e.g.*, 28 U.S.C. §§ 503, 509.

The Board does not seriously contest that Clark could have altered the

Department's position had he been named Acting Attorney General. The best that the Board could come up with was its statement, unsupported by any legal citations, that "even if Respondent had been appointed the Acting Attorney General, it is far from settled law that his personal views would constitute the views of the Justice Department." Report at 69 n.18. But to admit that the issue is "far from settled" is to admit that there is no clear authority for disbarring an attorney based on Clark's course of conduct. The Board concedes that the Due Process Clause prohibits imposing career-ending discipline on an attorney without "a fair warning" that what he intends to do violates D.C.'s disciplinary rules. Report at 43 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005)). Clark cannot have been deemed to have received "fair warning" of potential sanctions when the Board concedes that there is no "settled" law supporting its view of Clark's actions.

The Board argues alternatively that even if Clark's sincerely held views (that he had identified "significant concerns that may have impacted the outcome of the election") "were the views of the Justice Department, … his efforts to send the Proof of Concept letter would still have constituted an attempt to make recklessly false statements because 'his sincere belief was not objectively reasonable.'" Report at 69 n.18 (quoting Hearing Committee Report at 183). That argument makes little sense. As the Board noted repeatedly throughout the Report, it concluded that the

"significant concerns" sentence was false because it inaccurately reported the position of the Rosen-led DOJ. But if, as posited by the Board, Clark's views were to become DOJ's views, then the "significant concerns" sentence would be not only "objectively reasonable" but also the absolute truth.[3]

Moreover, it is important to note that the sentence does not claim that DOJ, after a thorough investigation, has uncovered strong evidence of election fraud such that the election outcome is open to serious question. Rather, it uses equivocal language: DOJ has identified significant "concerns" that "may have" impacted the outcome of the election. Clark conducted a fair amount of research regarding potential voting irregularities. The Board concedes that as a result of his research, Clark had sincerely held "concerns" about the election (and, by definition, so did DOJ if and when Clark succeeded in changing DOJ's position). The Board cites no authority for its contention that such equivocal statements can be deemed false or deceitful within the meaning of Rule 8.4(c).

Both criminal and civil law universally frown on efforts to sanction an individual for making a "false" statement unless the statement is one of fact that

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[3] We note as well that the Board's "not objectively reasonable" claim—by suggesting that Clark's conduct "constituted an attempt to make recklessly false statements"—is inconsistent with the Board's later finding that Clark attempted to make *intentionally* false statements that warranted his disbarment.

expresses certainty about the state of affairs. Thus, the Supreme Court held that a public company could not be held liable to investors for stating (inaccurately, according to the plaintiffs) that it believed it was complying with the securities laws. *Omnicare, Inc. v. Laborers District Council*, 575 U.S. 175, 186 (2015) (stating that the company's sincerely believed compliance statement was a non-actionable statement of opinion, even though the plaintiffs might be able to prove that the company was not, in fact, complying). The Court explained that an actionable statement of fact is one that "expresses certainty about a thing," while "[a]n opinion, in ordinary usage does not imply definiteness or certainty." *Id.* at 183. Here, Clark's proposed statement that he (and the Justice Department whose position he wished to alter) had "concerns" that "may have" impacted the election outcome is not an expression of sufficient certainty to warrant sanctions under any circumstances—even if those concerns are later determined to be "unreasonable." *See also U.S. ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011) (stating that "a statement may be deemed 'false' for purposes of the False Claims Act only if the statement represents an objective falsehood. … [m]ere differences in interpretation growing out of a disputed legal question" do not suffice to meet that standard).[4]

[4] The Board's focus on whether it was "reasonable" for Clark and DOJ to express concerns about election irregularities is not merely inconsistent with its principal claim (that the "significant concerns" statement misstated the Rosen-led DOJ's actual

B. Asserting in the Draft Letter that "We Have Taken Notice of … Complaints" About the Georgia Election and Citing the Ligon Report as an Example Was Not an Attempt to Make a False Statement

The Board also faulted Clark for the sentence in the Proof of Concept letter that immediately follows the "significant concerns" sentence: "No doubt, many of Georgia's state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints. *See, e.g.,* [The Ligon Report, prepared by Georgia State Senator William Ligon]." The Board held this was an intentionally false sentence because it wrongly implied that the Justice Department was investigating allegations contained in the Ligon Report and wrongly implied that the Report was among the pieces of evidence DOJ relied on in concluding that it had "significant concerns" about the election. Report at 78-82.

The evidence before the Board provides no support for this attempt-to-make-a-false-claim finding, for the same reasons that the Board's first false claim finding is deficient. Clark's intent to issue a statement regarding DOJ's reliance on the Ligon Report was contingent upon his obtaining authority to direct DOJ to conduct further

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position). It also undermines the Board's rejection of Clark's efforts to introduce evidence of election irregularities of which he became aware after January 3, 2021. If the "reasonableness" of expressing concerns about the 2020 presidential election becomes the focus of these disciplinary proceedings, then Clark should be entitled to introduce *any* evidence of election irregularities he discovers that bears on the issue of reasonableness.

investigation of the Ligon Report's findings. Had President Trump granted such authority, Clark's statements about the Ligon Report would have been truthful.

The Board's response misses this point entirely. Rejecting the relevancy of Clark's assertion that "he reviewed and considered the Ligon report—which concluded that the Georgia election results 'must be viewed as untrustworthy,'" the Board stated:

> We find Respondent's assertion disingenuous. If Respondent could speak for the Justice Department, there would have been no reason for him to prepare a letter for signature by him, Rosen, and Donoghue. There would have been no need for the Oval Office meeting to determine whether he should have been appointed Acting Attorney General in order to send the letter. Respondent's belief in the accuracy of the Ligon report did not mean that the *Justice Department* had adopted the Ligon report.

Report at 80-81. But Clark does not contend that the Rosen-led DOJ had "adopted" the Ligon Report or that on December 28, 2020 he was authorized to determine on his own whether DOJ should do so. He recognized that any such adoption required approval by the Attorney General or the President. That is why he sought President Trump's approval of the letter and the positions it espoused. And, had he succeeded in obtaining that approval, the statement regarding the Ligon Report contained in the letter he was attempting to send would have been fully accurate.

The Ligon Report was issued by Senator William Ligon, the Chairman of the

Georgia Senate Judiciary Subcommittee on State Election Processes. The Report cited many alleged irregularities in Georgia voting and recommended that certification of the Georgia election results be rescinded. Because Clark believed that the Ligon Report raised significant concerns about the presidential election, it would have been entirely truthful and appropriate, if and when President Trump directed alteration of DOJ's position on potential election irregularities, for him to cite the Ligon Report as being among the pieces of evidence upon which he relied in expressing DOJ's new "significant concerns" position.

II. SANCTIONING CLARK FOR HIS ATTEMPTED SPEECH WOULD RAISE SERIOUS FIRST AMENDMENT CONCERNS

Sanctioning Clark for his attempt to issue allegedly false statements is particularly inappropriate because there are serious concerns that doing so would violate his First Amendment free-speech rights. Even false speech is entitled to considerable First Amendment protection. Imposing sanctions on Clark would raise particularly serious First Amendment concerns, given that: (1) he merely drafted the Proof of Concept letter but did not send it; (2) there is no evidence that anyone was harmed by a draft letter DOJ never sent; and (3) as explained above, the statements contained in the letter would have been entirely truthful if he had sent the letter under the only contingent circumstances under which he contemplated sending it.

In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court overturned on First Amendment grounds a defendant's conviction for falsely stating at a public meeting that he had been awarded the Congressional Medal of Honor. The Court expressly rejected the federal government's assertion that false speech is not entitled to First Amendment protection. Noting that the false claim was not made for the purpose of gaining any material advantage, the Court explained that a statute authorizing imposition of sanctions against all false speech created an unwarranted risk of chilling truthful speech:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Alvarez, 567 U.S. at 723 (plurality opinion). In an opinion concurring in the judgment that was joined by Justice Kagan, Justice Breyer fully agreed with that assessment:

> [T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart. Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively.

Id. at 733-34 (Breyer, J., concurring in the judgment).

If the First Amendment significantly curtails prosecutions even against those whose speech is certifiably false, there are even greater constitutional objections to sanctioning Clark for drafting a letter that was not false. Indeed, because the letter was never disseminated publicly, it did not cause harm to anyone. The absence of appreciable harm arising from Mr. Alvarez's statement that he had been awarded the Congressional Medal of Honor was the Supreme Court's principal reason for determining that the First Amendment barred imposing criminal sanctions on him for his false statement. Similarly, the Board could not point to any harm that arose from Clark's alleged attempt to issue a false statement, but only to the harm that *might* have arisen if the Proof of Concept letter had actually been disseminated. In the absence of evidence of any tangible harm, *Alvarez* dictates a finding that the First Amendment prohibits imposing sanctions on Clark for his attempted speech—particularly in light of the evidence that his attempted speech would have been wholly truthful if disseminated in the manner Clark intended. Sanctioning Clark will inevitably deter future government officials from expressing their sincerely held views on important public policy issues, especially in draft letters or memoranda.

To avoid having to face these serious First Amendment concerns, the Court should rule that Clark did not violate Rule 8.4(a), for all the reasons cited above.

III. The Court Should Call a Halt to Partisan Efforts to Punish One's Political Opponents

This proceeding is an example of an all-too-frequent occurrence in our increasingly divided society: partisans on both the left and right abusing legal processes to punish their political opponents. The political overtones of these proceedings are self-evident; opponents of President Trump have made no secret of their desire to impose severe punishment on anyone associated with efforts to challenge the results of the 2020 presidential election. Indeed, these proceedings were initiated at the behest of a Democratic U.S. Senator who chaired the Senate Judiciary Committee and launched an investigation of Clark and others who expressed concerns about the results of the election. *Amici* urge the Court to call a halt to this trend by refusing to impose sanctions on government officials who act in good faith to express their sincerely held beliefs regarding legal issues that come before them.

There are countless recent examples of attorneys and judges who have faced largely baseless accusations of misconduct raised by their political opponents. For example, William Pryor, the Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit, whose judicial opinions have at times angered Democrats, endured a lengthy judicial ethics proceeding based on claims that he hired a law clerk alleged to have made statements (before entering law school) that expressed dislike of

African-Americans. The claim against Pryor, filed by seven Democratic Members of Congress, was frivolous, yet Pryor was required to spend several years defending himself against the attack. *See In re Charge of Judicial Misconduct* (Judicial Council of the Second Circuit, Oct. 31, 2023).

John J. McConnell, Chief Judge of the U.S. District Court for the District of Rhode Island, also faces an insubstantial ethics complaint—filed by a conservative group angered by one of McConnell's recent rulings. On March 6, 2025, McConnell issued a preliminary injunction, enjoining the Trump Administration from pausing federal financial assistance to the plaintiffs—22 States and the District of Columbia. *New York v. Trump*, 769 F. Supp. 3d 119 (D.R.I. 2025).[5] The conservative group filed its misconduct complaint with the First Circuit in May 2025, alleging that McConnell acted unethically in failing to recuse himself from the case. The complaint asserts that McConnell has a conflict of interest because in the past he has served on the board of a nonprofit that operates shelters for the homeless and receives substantial federal funds. *See In re Judicial Misconduct Complaint* (1st Cir., filed May 13, 2025). But the nonprofit is not a party to *New York v. Trump* and is but one of countless organizations and individuals that are indirect recipients of federal funds

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[5] An appeal from the decision is pending in the U.S. Court of Appeals for the First Circuit.

distributed to States. Moreover, the proper procedure for raising objections to a judge's continued involvement in an ongoing case is to file a motion to recuse, not to file an ethics complaint against the judge. Nonetheless, Judge McConnell will likely be forced to devote time and resources to responding to the complaint.

Since becoming U.S. Attorney General, Pam Bondi has become the target of repeated legal misconduct complaints filed against her with the Florida Bar by several Democratic Members of Congress and progressive legal groups. In general, the complaints have alleged that Bondi has violated ethical norms by the manner in which she has administered the Justice Department. Dissatisfied by the reception they have received to date by the Florida Bar, the complainants recently petitioned the Florida Supreme Court to order the Florida Bar to open formal disciplinary proceedings. *See* Jay Weaver, "Legal group urges state Supreme Court to order Florida Bar to investigate Bondi," Miami Herald (July 15, 2025). Both Bondi and DOJ have been forced to divert resources to responding to these insubstantial charges. *See May v. Florida Bar*, No. SC2025-1020 (Fla.) (*amicus* brief for the United States supporting Respondent, filed Sept. 8, 2025).[6]

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[6] While the Board and Disciplinary Counsel may both believe that they are not swayed by partisan considerations, the sharp contrast between their handling of this case and disciplinary proceedings against Kevin Clinesmith is a cause for serious concern. Clinesmith, a high-level FBI attorney whose writings expressed anti-Trump animus, participated in an investigation of alleged collusion between Russia and the

The inevitable result of the ethics proceedings against Clark and the proceedings cited above is to discourage talented individuals from entering public service for fear that they their work may result in severe criminal or civil sanctions, massive legal bills, and irreparable injury to their reputations. The Court can help to put a stop to politically motivated attacks of this nature by dismissing the misconduct claims against Clark. If one is dissatisfied by the conduct of a government official, in almost all cases the appropriate response is to take steps to enjoin or overturn that conduct, not to seek imposition of punitive sanctions on the official—certainly not the career-destroying sanction of disbarment from the legal profession.

CONCLUSION

Amici curiae respectfully request that Respondent Clark's license to practice law not be suspended pending final action on the recommendations of the Board on Professional Responsibility.

2016 Trump presidential campaign. Clinesmith was convicted under 18 U.S.C. § 1001(a) of making a false statement by altering the contents of a CIA email about an individual associated with the Trump campaign. The altered email was used to obtain court-authorized surveillance of that person from the U.S. Foreign Intelligence Surveillance Court. Unlike Clark, Clinesmith actually issued the statement that led to disciplinary proceedings and criminal charges, his statement was false, and he was convicted of a felony. Nonetheless, in sharp contrast to their recommendations in this case, the Board and Disciplinary Counsel both recommended that Clinesmith receive a short suspension. *See In the Matter of Kevin C. Clinesmith*, Report and Recommendation of the Board on Professional Responsibility (Aug. 11, 2021).

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APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2025, I served counsel for all parties (listed below) with a copy of this brief, via the Court's electronic delivery system:

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