No. 13-1104

In the Supreme Court of the United States

PHILLIP D. KLINE,

Petitioner,

v.

KANSAS DISCIPLINARY ADMINISTRATOR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

AND

BRIEF *AMICI CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., AND LEGAL CENTER FOR DEFENSE OF LIFE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Eagle Forum Education & Legal Defense Fund ("Eagle Forum") and Legal Center for Defense of Life ("Legal Center") respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the Petition for Writ of *Certiorari* submitted by former Kansas Attorney General and Johnson County District Attorney Phillip Kline. Movant Eagle Forum provided the parties ten days' written notice of its intent to file an *amicus* brief or move to file one, and the petitioner consented to the filing of an *amicus* brief. The respondent withheld consent, thereby necessitating this motion.

Eagle Forum is a nonprofit Illinois corporation that has a longstanding interest in preventing political retaliation against citizens and public servants for holding pro-life views. Founded in 1981, Eagle Forum has been a consistent supporter of First Amendment protections for political beliefs.

The Legal Center is a 25-year-old nonprofit New Jersey corporation that includes a network of attorneys who together have volunteered thousands of hours of *pro bono* services in defense of pro-life advocates. Its work has included protecting the free speech rights of sidewalk counselors against state action that infringes on the First Amendment.

The petition presents three questions, which in summary are: (1) whether the First Amendment and Due Process Clause require a limiting construction for textually open-ended catch-all provisions like

Model Rule 8.4, (2) whether the First Amendment requires material prejudice to a proceeding before punishing attorneys, and (3) whether the punishment here was impermissible viewpoint discrimination under the First Amendment. The petitioner thoroughly demonstrates splits in circuit and state supreme-court authority in support of the first two questions. The accompanying *amicus* brief demonstrates an appellate-level split in authority on the third question, which supplements petitioner's argument of a conflict between the Kansas Supreme Court and this Court's decisions. *See* Pet. 39.

With that background, movants Eagle Forum and Legal Center respectfully submit that their proffered brief *amici curiae* will bring several relevant matters to this Court's attention:

- The proffered *amicus* brief focuses exclusively on the third question presented, which supplements the arguments in the petition.
- In addition to discussing the profound dangers posed to the legal system by ideology-based disciplining of the bar, the proffered *amicus* brief identifies a split with the Fourth Circuit's decision in *U.S. v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991), on the implications of judges' relying on personal views on contested issues, as distinct from relying on neutral legal principles.
- Like the *Bakker* decision, the proffered *amicus* brief analogizes heightened punishment based on ideology to racially tainted judicial proceedings, thereby implicating this Court's zero tolerance for tainted judicial proceedings under decisions such as *Edmonson v. Leesville Concrete Co.,* 500

> U.S. 614, 628 (1991) ("the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself"), and *Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979) ("[s]ince the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, [t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court, and ultimately in this court upon review, and all without regard to prejudice notwithstanding the undeniable costs associated with this approach").

These matters are relevant to whether this Court grants the writ, and they supplement the petition.

For the foregoing reasons, Eagle Forum and the Legal Center respectfully request this Court's leave to file the accompanying brief *amici curiae.*

Dated: April 8, 2014 Respectfully submitted,

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QUESTIONS PRESENTED

Petitioner Phillip Kline presents three questions for this Court's review:

1. Do the catch-all provisions in Model Rule 8.4, which state and federal courts use to suspend attorneys for "conduct that is prejudicial to the administration of justice," and lack of "fitness to practice law," require a limiting construction to avoid vagueness and overbreadth under the Due Process Clause and First Amendment?
2. Did the Kansas Supreme Court violate the First Amendment, as applied in *Gentile v. State Bar of Nevada,* when it punished Kline without finding that his speech was substantially likely to have materially prejudiced the proceedings?
3. Did the Kansas Supreme Court punish Kline for his political viewpoint when it increased his penalty based on a finding that Kline held and then acted upon a "fervid belief" regarding a political issue?

All three questions warrant this Court's review. In their brief *amici curiae,* Eagle Forum Education & Legal Defense Fund and Legal Center for Defense of Life focus on the third question, concerning whether the First Amendment permits states and their bars from enhancing punishment based on disapproval of an attorney's political beliefs.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

No. 13-1104

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INTEREST OF *AMICI CURIAE*

Amici curiae ("*Amici*") seek leave by this Court to file this brief for the reasons set forth in their accompanying motion.[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") is a nonprofit Illinois corporation that has a longstanding interest in preventing political retaliation against citizens and public servants for holding pro-life views. Founded in

[1] *Amici* file this brief after ten days' prior written notice. Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amici*, their members, and their counsel – contributed monetarily to the brief's preparation or submission.

1981, Eagle Forum has been a consistent supporter of First Amendment protections for political beliefs. For these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

Amicus curiae Legal Center for Defense of Life ("Legal Center") is a 25-year-old nonprofit New Jersey corporation that includes a network of attorneys who together have volunteered thousands of hours of *pro bono* services in defense of pro-life advocates. Its work has included protecting the free speech rights of sidewalk counselors against state action that infringes on the First Amendment. The Legal Center has a direct and vital interest in clarifying that judicial retaliation against attorneys based on their pro-life views is not allowed by the First Amendment.

STATEMENT OF THE CASE

More than a century ago, First Amendment jurisprudence took a wrong turn – led by no less than Justice Oliver Wendell Holmes – from which we still are recovering:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892). This crimped view of First Amendment protection has "fathered more than 70 cases of which almost four-fifths resolved the decision against the constitutional right being asserted." *Brukiewa v. Police Comm'r of Baltimore City*, 257 Md. 36, 45 (Md. 1970) (citing William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1441 n.7 (1968)).

Although "Holmes' epigram expressed this Court's law" under the First Amendment "[f]or many years," *Connick v. Myers,* 461 U.S. 138, 144 (1983), the Court gradually retreated from that position in a succession of public-employee cases from the 1950s onward. *See id.* at 143-45 (collecting cases). In addition to the rationales that petitioner provides with respect to First Amendment and Due Process requirements for regulation of the legal profession with respect to the first and second questions presented, *see* Pet. at 15-38, this case requires the Court to address viewpoint discrimination with respect to the legal profession generally and public prosecutors specifically.

As bad as *McAuliffe* was for executive and legislative efforts to suppress First Amendment rights, the decision here is even worse because – as this Court has said in an analogous context – "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1991); *see also Campbell v. Louisiana,* 523 U.S. 392, 307-08 (1998); *Vasquez v. Hillery,* 474 U.S. 254, 262-63 (1986); *Batson v. Kentucky,* 476 U.S. 79, 100 (1986); *Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979) (collecting cases). As it has done in these decisions on racially tainted judicial proceedings, this Court must forcefully slam the courthouse door to ideologically tainted judicial proceedings.

Both as Attorney General of Kansas and as District Attorney of Johnson County, petitioner Kline campaigned as pro-life and sought to meet his

obligations in office consistent with both the rule of law and the choice that he put to the voters who elected him. Insofar as roughly half of U.S. citizens identify themselves as pro-life, *see* Lydia Saad, *Americans Misjudge U.S. Abortion Views: Perception that pro-choice position dominates contrasts with even split in actual views* (Gallup, Inc. May 15, 2013)[2] (48% are pro-life, and 45% are pro-choice), his views are entirely mainstream. But the issue that has ensnared Mr. Kline was not so much a pro-life issue as an anti-crime issue, given that Mr. Kline was investigating Kansas abortion providers' failure to report abortions by minors. The issue, then, was not abortion's legality or illegality but whether those providers violated reporting requirements and thus essentially helped cover up actions – presumably illegal actions – that lead to minors' becoming pregnant. In response to that appropriate investigation, the abortion providers launched a scorched-earth campaign, both politically and legally, to evade the investigation.

The decision below heightened the punishment of Mr. Kline because of his "fervid" beliefs on abortion. By enhancing judicial punishment of a public servant based on disapproval of his political beliefs, the court's decision opens the door to expanded, viewpoint-based discrimination by both courts and bar disciplinary administrators not only against attorneys generally but also against properly elected officials. Unless overturned here, the Kansas court's

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[2] The Gallup article and poll are available at http://gallup.com/poll/162548/americans-misjudge-abortion-views.aspx (last visited April 8, 2014).

decision will chill elected officials' First Amendment right to hold views – whether strongly, passionately, or even fervidly – on which they campaign and for which they get elected. Not even state supreme courts or bar authorities have a veto power over political views. When a state court or bar authority discriminates based on viewpoint by enhancing a punishment for an elected official's political views, the need for this Court's review is compelling.

SUMMARY OF ARGUMENT

Amici agree with Mr. Kline's analysis of the first and second questions presented, Pet. at 15-38, and have nothing to add to those sections. *See* Rule 37.1. Focusing on the third question presented – viewpoint discrimination – *Amici* argue that two additional rationales warrant this Court's granting the writ:

I. The Kansas Supreme Court impermissibly sided against Mr. Kline's strongly held pro-life views by heightening his punishment for trying to advance those views. Heightened punishment in those circumstances violates not only the First Amendment rights of counsel generally but also the First Amendment rights of public officials and the public that elects them.

II. When judges allow personal views to heighten a party's punishment, this Court should follow the Fourth Circuit's decision in *U.S. v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991), by rejecting ideologically tainted decisions as forcefully as this Court has rejected racially tainted judicial proceedings in the *Rose-Edmonson* line of cases.

Amici respectfully submit that each of the foregoing rationales provides sufficient justification for this Court to grant the writ.

ARGUMENT

I. A WRIT OF *CERTIORARI* IS NECESSARY TO DECISIVELY REJECT VIEWPOINT DISCRIMINATION BY COURTS IN DISCIPLINING PUBLIC SERVANTS IN VIOLATION OF THE FIRST AMENDMENT

Before assessing the actions of the Kansas Supreme Court, *Amici* respectfully submit that this Court must first recognize that Mr. Kline's actions were within the proper bounds of his elective office. As explained in the Statement of the Case, Mr. Kline was simply investigating the possibility that abortion providers criminally failed to report instances of minors' having abortions, which itself might identify instances of sexual abuse of minors. Against that background, the Kansas court's persecuting Mr. Kline for his viewpoints has troubling implications and could lead to more disputes over divisive issues devolving (as this one has) into attempts to destroy the lawyers who engage in those disputes zealously for their clients. Applied to public officials like Mr. Kline, that outcome would subvert our democracy.

In a comment that "characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say," Voltaire is crediting with saying that "I disapprove of what you say, but I will defend to the death your right to say it." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 63 (1976) (*quoting* S. Tallentyre, THE FRIENDS OF VOLTAIRE 199 (1907)). This Court

has relied on "[t]he essence of that comment … time after time in … decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas." *Id.* This case calls on this Court to defend Mr. Kline's right to pursue the beliefs for which Kansans elected him.

In that respect, this case implicates not only the First Amendment rights of attorneys but also the First Amendment rights of public officials acting within the scope of their office or employment. Attempts to punish speech by an elected official doing what the public elected him to do threaten democracy itself:

> If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process … the First Amendment rights that attach to their roles.

Pet. at 39 (*quoting Republican Party of Minnesota v. White,* 536 U.S. 765, 788, (2002)) (alteration in petition). Unlike the policeman in *McAuliffe,* public officials have a First Amendment right to hold "fervid" beliefs on political issues that disagree with the beliefs of other government officials. And, public officials just as surely have First Amendment rights not only to act on those beliefs in office but also not to be punished for those beliefs. Indeed, it is a First Amendment right of the people to elect officials who hold passionate beliefs on controversial issues. Yet the substance and tone of the Kansas ruling violates these rights by enhancing the punishment of a properly elected public official based on his views.

As objectionable as violations of the First Amendment are when taken by the legislative or executive branches, violations by a state's highest court are worse for several reasons. First, legislators have the restraint of frequent elections, through which the public can intervene to change policy, whereas judicial elections (where they happen at all) are less frequent. Second, discrimination in court proceedings undermines the rule of law. *See* Section II.B, *infra.* Third, court rulings set binding precedents that resolve not only the case at issue but also future cases, which chills speech even more than legislative or executive action. All of these factors compel this Court's review here.

The Kansas Supreme Court and bar disciplinary authorities heightened Mr. Kline's punishment for his "fervid belief" and actions that they perceived that he took to further that belief. Pet. App. 197. They found his lawyerly efforts directed at increasing the chances that his cause would succeed as, somehow, *selfish* in a way that justified resort to the catch-all provisions of Rule 8.4's prohibition of conduct that is prejudicial to the administration of justice. Pet. App. at 196-97. As Mr. Kline explains, a selfish motive should mean "financial benefit … or the advancement of some unlawful purpose." Pet. at 39. These general terms cannot be read to limit the First Amendment right of access to the courts. *Cf. California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972) ("right of access to the courts is indeed but one aspect of the right of petition"). State courts cannot close the courthouse doors selectively, based on ideology.

The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *F.E.C. v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 469 (2007) (interior quotations omitted). "To safeguard this liberty," reviewing courts must "focus[] on the substance of the communication," not on "amorphous considerations of intent and effect." *Id.* Courts "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* Here, the Kansas Supreme Court did not give Mr. Kline the benefit of the doubt in pursuing the tasks that Kansans elected him to undertake.

Calling someone's views fervid denigrates those views and the person who holds them; it is not viewpoint neutral. When it comes to punishing attorneys or public officials for their political views, courts must be neutral, allowing strongly held views on both sides of divisive issues. Their "job [is] to call balls and strikes, and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the Senate Comm. on the Judiciary,* 109th Cong. 56 (2005) (Statement of Hon. John G. Roberts, Jr.). Here, the Kansas Supreme Court not only pitched but also threw one high and inside at Mr. Kline. In baseball, that inevitably leads to reciprocation by the other side unless the umpires take control of the game. Allowing viewpoint discrimination by the judiciary to stand in even one instance would be a grave abdication by this Court.

II. A WRIT OF *CERTIORARI* IS NECESSARY TO CLARIFY THAT PUNISHMENT BASED ON IDEOLOGY VIOLATES THE FIRST AMENDMENT

Federal courts have long recognized that it is reversible error for a tribunal to inject its own religious or political viewpoint into the disciplining of someone because of an ideological disagreement. In one leading case on that issue, the Fourth Circuit analogized – correctly, *Amici* submit – to racially tainted judicial proceedings, for which this Court has adopted a zero tolerance.

A. The Kansas Supreme Court Splits with the Fourth Circuit's *Bakker* Decision on Basing Punishment on Judges' Personal Views

In the widely publicized vacatur and remand of the sentence of televangelist James O. Bakker, the Fourth Circuit reversed the sentence because the trial judge's comments suggested that he had injected his own religious views into assessing the seriousness of the crimes at issue:

> Courts … cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of

> religious propriety had somehow been betrayed. In this way, we believe that the trial court abused its discretion in sentencing Bakker.

Bakker, 925 F.2d at 740-41. In rejecting the trial judge's sentence, the Court of Appeals analogized to heightened punishment based on race or national origin: "sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process." *Id.* at 740 (*citing U.S. v. Borrero-Isaza,* 887 F.2d 1349, 1352-57 (9th Cir. 1989); *U.S. v. Gomez,* 797 F.2d 417, 419 (7th Cir. 1986)).[3] The appellate panel emphasized that while most "cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes his own religious characteristics into account in sentencing." *Bakker*, 925 F.2d at 740. That is the essential constitutional safeguard that the Kansas Supreme Court breached.

A fair reading of the Kansas decision is that the state court allowed its own opposition to pro-life views to increase its discipline of Mr. Kline to the unprecedentedly harsh level of indefinite suspension of his law license for minor issues: "the fact remains that this case involves the explicit intrusion of personal … principles as the basis of a sentencing

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[3] S*ee also Berger v. U.S.,* 255 U.S. 22 (1921) (racial bias towards ethnic group); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *U.S. v. Safirstein*, 827 F.2d 1380 (9th Cir. 1987); *Gomez*, 797 F.2d at 419 (it "obviously would be unconstitutional" to impose a harsher sentence based on nationality or alienage).

decision; at least, that is not an unfair reading of the trial court's comments in this case." *Bakker*, 925 F.2d at 740. Where "an impermissible consideration was injected into the sentencing process," *id.,* reversal and remand is appropriate.

B. Ideologically Tainted Judicial Action Should Trigger this Court's Zero-Tolerance Policy for Racially Tainted Judicial Proceedings

When *private attorneys* have inserted racial discrimination into judicial proceedings, this Court not only has held that to be *per se* actionable, but also has recognized that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." *Edmonson*, 500 U.S. at 628. Far from something that the courts potentially can excuse if it is harmless error, such discrimination must be *eliminated* under this Court's precedents:

> Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, [t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court, and ultimately in this court upon review, and all without regard to prejudice notwithstanding the undeniable costs associated with this approach.

Rose, 443 U.S. at 556-57 (internal quotations and citations omitted). By analogy to *Rose* and related

cases, this Court should vacate the Kansas court's discriminatory actions against Mr. Kline.[4]

Significantly, the harms identified in these cases "are not limited to the criminal sphere," because "discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson,* 500 U.S. at 630. Nor is there any reason to restrict this line of cases to just petit and grand jurors, rather than all aspects of judicial proceedings. Indeed, *Powers* warned of the danger if "race is implicated" in "the standing or due regard of an attorney who appears in the cause." 499 U.S. at 412. Finally, the injury is even more severe when (as here) it "occurs at the behest of not just the parties but of the court itself." *U.S. v. Nelson,* 277 F.3d 164, 207 (2d Cir. 2002). Mr. Kline's ideological views – which are entirely mainstream – deserve the same protection.

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[4] In *Batson*, a criminal defendant was permitted to allege race-based peremptory challenges. If the defendant could prove "prima facie, purposeful discrimination" without a "neutral explanation" for peremptory challenges, the "conviction must be reversed" (*i.e.,* injury would be assumed). 476 U.S. at 100 (citing cases). In *Vasquez*, 474 U.S. at 262-63, a defendant was found guilty beyond reasonable doubt by an unbiased jury, but this Court set aside the conviction because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. In *Powers,* this Court rejected the argument that a defendant must show that "the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant." *Powers,* 499 U.S. at 411. Rather, racial discrimination "casts doubt on the integrity of the judicial process" and alone creates injury. *Id.* (*quoting Rose,* 443 U.S. at 556).

In *Rose*, 443 U.S. at 556-57, this Court committed itself to "correct the wrong" of a racially tainted judicial proceeding whenever the lower courts would not. *Amici* respectfully submit that this Court also must correct the ideology-based wrong here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Dated: April 8, 2014

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