No. 91-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELIZABETH HOLTZMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

REPLY BRIEF FOR PETITIONER

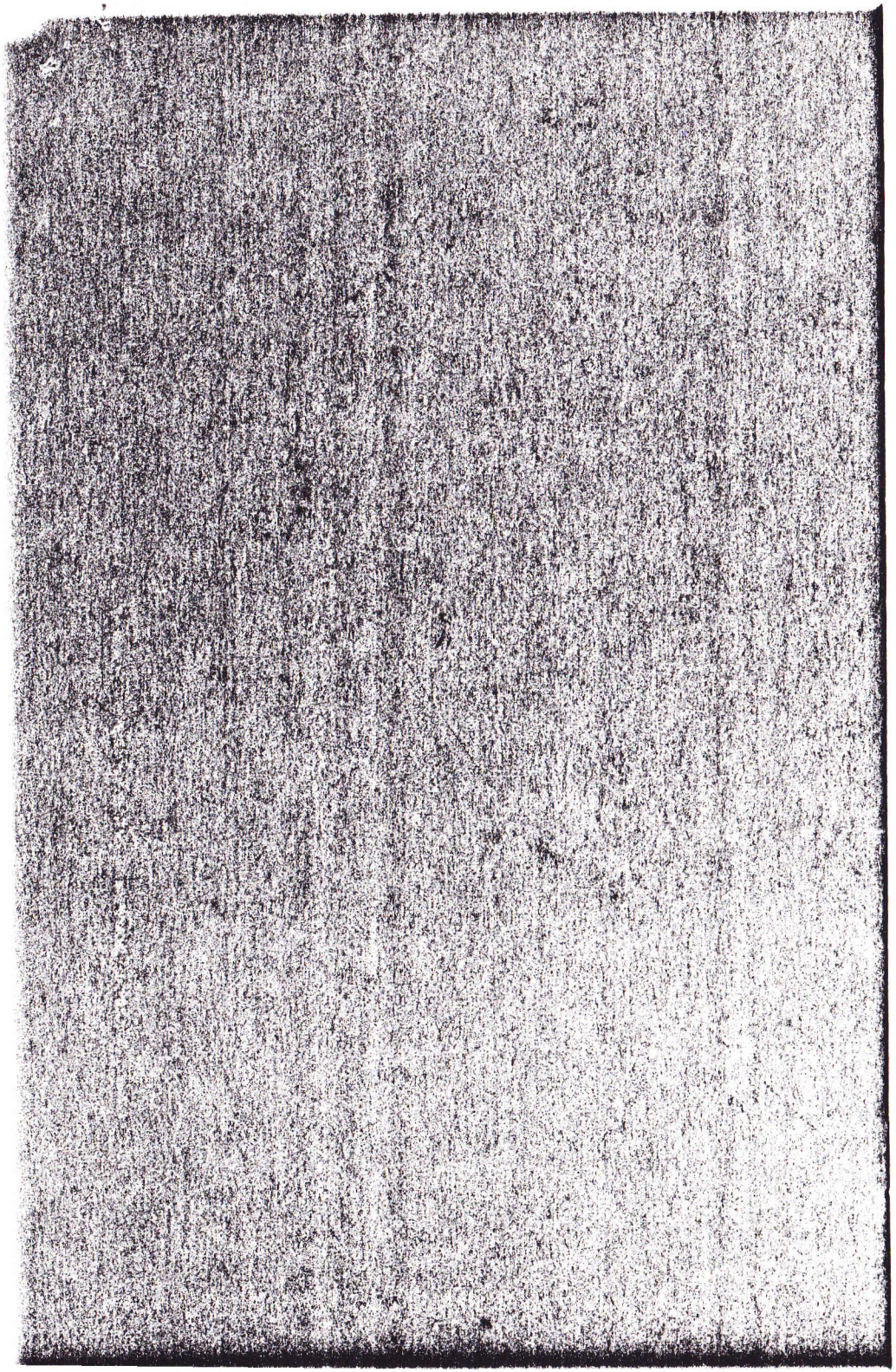
BERNARD W. NUSSBAUM
NORMAN REDLICH*
ROBERT B. MAZUR
GEORGE T. CONWAY III
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Attorneys for Petitioner Elizabeth Holtzman

*Counsel of Record

October 10, 1991

RECORD PRESS, INC., 157 Chambers Street, N.Y. 10007 (212) 619-4949
78031 • 52



IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-401

ELIZABETH HOLTZMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

REPLY BRIEF FOR PETITIONER

This brief is respectfully submitted in reply to respondent's brief in opposition. Respondent's brief only serves to underscore why certiorari should be granted in this case.

1. It is undisputed—indeed, indisputable—that application of the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, would compel reversal. Respondent's brief (p. i) explicitly recognizes, as did the court below, that Holtzman's public accusation against Judge Levine would be constitutionally protected under that standard. Respondent thus confirms that this case, like *In re Westfall*, No. 91-429 (petition for certiorari pending), raises an important, but as yet unresolved, question under the First Amendment—whether the constitutional standard that gov-

erns civil and criminal liability for criticism of public officials also governs attorney disciplinary proceedings involving public criticism of judges, when the criticism could not prejudice any adjudicative proceeding. If the *New York Times* standard controls, the reprimand must fall. The question could not be more squarely and cleanly presented.

2. Respondent's attempt to minimize the importance of the conflict among the state courts falls of its own weight. For respondent necessarily admits that the state courts have applied "differing" federal constitutional standards in determining whether to discipline lawyers for making public accusations against judges. Br. Opp. 17. Respondent concedes that the California and West Virginia courts apply the constitutional "actual malice" standard,* and that the Washington courts apply an (even stricter) actual-knowledge-of-falsity test. (Respondent ignores the fact that the reprimand in this case would not survive the First Amendment standards applied in Tennessee and New Jersey. *See* Pet. 14-15.) At the other end of the broad spectrum of tests adopted by state courts, the court below adopted (and respondent's brief seeks to defend) a "reasonable lawyer" standard, essentially a negligence test.

Respondent's brief seeks to paper over these differences among the States by emphasizing that some attorneys have been disciplined even under the most speech-protective standards. But respondent does not and cannot dispute the existence of the multistate bazaar of conflicting First Amendment standards that now govern an important and frequently recurring type of core political speech. And respondent cannot escape the clear statement by the Court of Appeals that

* Respondent's brief seems to labor under the puzzling misconception that the actual-malice standard of *New York Times* and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), somehow differs from the standard applied in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). The constitutional standard applied in these cases, however, is one and the same. *St. Amant* simply explained the meaning of the "reckless disregard" component of the *New York Times* "actual malice" standard.

petitioner's speech was protected under the "constitutional malice" standard established by the decisions of this Court.

3. Respondent seeks to minimize the importance of the constitutional issue in this case by contending that Holtzman was reprimanded for "irresponsible conduct, a component of which involves speech." Br. Opp. 7-8. Yet respondent's brief repeatedly refers to the public nature of petitioner's accusation, and, indeed, it was *precisely* the public release of the accusation that gave rise to the disciplinary proceedings below. To argue that this case involves primarily conduct, rather than speech, is to ignore that a central issue in constitutional defamation cases, starting with *New York Times Co.* v. *Sullivan*, is the extent to which a state may require the speaker to investigate the accuracy of a charge before making a public utterance. Whether such a duty exists lies at the heart of the constitutional issue in *New York Times*, *Garrison*, and *St. Amant*; it is the issue directly posed by this case. This case is about public speech, not conduct.

4. Finally, respondent's brief does not address the basic conflict between the decision below and this Court's opinion in *Gentile* v. *State Bar of Nevada*, 111 S. Ct. 2720 (1991). The "void for vagueness" issue presented by this case is whether a disciplinary rule that proscribes "conduct that adversely reflects on [a lawyer's] fitness to practice law" fails to provide "fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement." *Id.* at 2749 (O'Connor, J., concurring). Respondent attempts to avoid the conflict with *Gentile* by emphasizing this Court's reliance in that case on the safe-harbor provisions of the Nevada rule. But New York's Code of Professional Responsibility creates a harbor whose safety is even more illusory than that created by the Nevada rule. Petitioner contends that New York set a dangerous trap when it adopted DR 8-102(B)—a rule that sets forth a clear constitutional standard governing lawyers' accusations against judges, one that tracks the decisions of this Court—and then closed the trap by imposing discipline under DR 1-102(A)(6)—a catch-all that does not mention speech at all and had never been invoked in

New York to punish speech. In reality, New York's "safe harbor" is more akin to the Bermuda Triangle.

Moreover, the vagueness test propounded in *Gentile*—whether the disciplinary rule fails to provide fair notice and creates the possibility of discriminatory enforcement—is not limited to rules that create safe harbors. The language of DR 1-102(A)(6)—"conduct that adversely reflects on [a lawyer's] fitness to practice law"—is unconstitutionally vague as applied to public accusations against judges, because a lawyer has inadequate notice as to its meaning and because there is a palpable danger of discriminatory enforcement. Under *Gentile*, the New York Court of Appeals' construction of DR 1-102(A)(6) cannot stand.

* * *

From the early days of the Republic, long before *New York Times*, state and federal courts have struggled, time and again, with issues relating to the free speech rights of lawyers who would dare to criticize those courts.* Today, the most important of these issues remains unresolved: state courts, with great frequency, apply different constitutional standards in determining whether to discipline lawyers for their public accusations against judges. This constitutional conflict should be definitively resolved in the interest of the Nation's lawyers and judges, and in the interest of the public they both serve.

* See, e.g., *Austin's Case*, 5 Rawle 191, 28 Am. Dec. 657 (Pa. 1835), and other cases cited in Annotation, *Criticism of Opinion or Decision of Court As Ground for Disbarment of Attorney*, 53 A.L.R. 1244 (1928), in addition to the more recent cases cited in the petition. *Austin's Case* held that "an attorney at law holds his office during good behavior, and . . . is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen." 28 Am. Dec. at 665.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court also grants certiorari in *In re Westfall*, No. 91-429, the cases should be set for oral argument in tandem.

Respectfully submitted,

BERNARD W. NUSSBAUM
NORMAN REDLICH*
ROBERT B. MAZUR
GEORGE T. CONWAY III
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Attorneys for Petitioner
Elizabeth Holtzman

*Counsel of Record

October 10, 1991