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IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF	)	
	)	
THEODORE E. ROKITA	)	**CAUSE NO. 25S-DI-29**
Attorney No. 18857-49	)	
	)	

RESPONDENT'S MOTION TO DISMISS

Theodore E. Rokita ("Respondent" or "Attorney General Rokita"), by counsel, files this Motion to Dismiss the Indiana Supreme Court Disciplinary Commission's Complaint.

INTRODUCTION

As a duly elected public servant for the Hoosier state, Attorney General Rokita regularly communicates to his constituents. In a November 2023 press release, during his reelection campaign, he accurately and truthfully discussed resolving a disciplinary matter, corrected false media narratives around the matter and indicated his plan to continue fighting for Hoosier values by upholding the laws of the state. The Indiana Supreme Court Disciplinary Commission responded by petitioning this Court to release a previously signed confidential Conditional Agreement and Affidavit because of alleged "contradictory public statements." In the spirit of full transparency, Attorney General Rokita consented to the release of these documents. The Court agreed to make the Conditional Agreement and Affidavit publicly available and to include these documents in the record.

Now, one day shy of a year after this Court released the documents, the Commission has filed a new Complaint, wrongly alleging that Attorney General Rokita made statements in the press release that were inconsistent with the Conditional Agreement and Affidavit. But the Complaint merely confirms that Attorney General Rokita spoke truthfully about the disciplinary resolution in

the press release. The Commission's action, moreover, amounts to an impermissible attempt to restrain an elected official and candidate's political speech. The Commission even appears to be policing Attorney General Rokita's thoughts by purporting to evaluate his "intent" through rough drafts of the press release that circulated amongst his communications team after he signed the Conditional Agreement and was being pilloried in the press primarily over Count III, which the Commission agreed to dismiss before proceeding to file it and terribly confusing the public. Perhaps most troubling, the Commission is retaliating against Attorney General Rokita for daring to propose common-sense reforms to the disciplinary process. For example, under the guise of discovery for this action, the Commission has performed extensive discovery related to Attorney General Rokita's proposals, despite the proposals having no apparent relevance to this action. Attorney General Rokita should be permitted to speak freely to his constituents without the constant threat of an unelected Commission parsing his every word, ready to pounce with a disciplinary action when they perceive any imagined inconsistency.

As demonstrated in detail below, the Complaint should be dismissed for multiple reasons.[1]

[1] This motion is procedurally proper. Although Admission and Discipline Rule 23(14)(a)(3) provides that, during proceedings before the hearing officer, "[n]o motion to dismiss…shall be entertained," Respondent is asking this Court—not a hearing officer—to entertain this motion to dismiss. As noted in *A Procedural Guide for Attorney Discipline Cases* ("*Procedural Guide*"), prepared by this Court's Office of Court Services and Office of Supreme Court Services:

> [M]otions to dismiss are sometimes filed by the respondent or the Disciplinary Commission during the pendency of proceedings before the hearing officer. For example, the Disciplinary Commission might move for dismissal of the disciplinary complaint upon reconsideration of its initial determination of probable cause, or the respondent might move to dismiss the disciplinary complaint upon jurisdictional grounds. Such motions may be considered and resolved by the Supreme Court directly without intervention of the hearing officer.

Procedural Guide at 14–15 (rev. Mar. 2020) (citing *In re Fletcher*, 655 N.E.2d 58 (Ind. 1995) (per curiam) (ruling on respondent's motion to dismiss for lack of disciplinary jurisdiction)). And in specific reference to Rule 23(14) the *Procedural Guide* states that "*the hearing officer* has no authority to grant or entertain dispositive motions such as motions to dismiss or for summary judgment." *Id*. at 4 (emphasis added). But unlike a hearing officer, this Court may consider motions to dismiss.

First, the Commission is wrong in its assertion that Respondent contradicted the Conditional Agreement or Affidavit. *See* Part I. Moreover, the Commission's action, which asks this Court to impose discipline on Respondent for his speech, i.e., the press release, violates Respondent's free-speech rights under the First Amendment to the U.S. Constitution and Article 1, Section 9 of the Indiana constitution. *See* Parts II & IV below. The Commission's Complaint also constitutes unlawful retaliation against Respondent for his Rules Proposal. *See* Part III. The Rules Proposal, like Respondent's accurate press release, was a protected exercise of his freedom of speech.

The Complaint also violates Indiana law in two ways. First, it violates constitutional separation of powers principles. *See* Part V. Second, the Complaint is subject to dismissal under the Indiana Anti-SLAPP Statute. *See* Part VI. For these reasons, this Court should adjudicate the instant motion, dismiss the Complaint, and halt the Commission's unconstitutional harassment of Respondent based on his right to speak.

While this Court may and should dismiss the Commission's unlawful action, this Court would be spared from having do so if the Commission would simply do the right thing—withdraw its Complaint. Given the serious constitutional, statutory and factual problems with its case against Respondent, the Commission's action poses a significant risk to its credibility with the bar and the public. The Commission should therefore reconsider its initial determination of reasonable cause to proceed against Respondent. *See* Part VII.

ARGUMENTS

I. Respondent's Statements Did Not Contradict the Conditional Agreement or Affidavit.

At its core, the Complaint fails as a matter of law because it alleges that Respondent made false statements or misrepresentations, but Respondent's press release in no way contradicted the Conditional Agreement or Affidavit. *See* Compl. ¶¶ 54–57 (citing Ind. Prof. Cond. R. 3.3(a)(1), 8.4(c), 8.4(d)). Respondent addresses each alleged "inconsistency" separately.

A. Respondent was not found to have violated any laws.

The press release began: "First things first: I deny and was not found to have violated anyone's confidentiality or any laws. I was not fined. And I will continue as Indiana's duly-elected attorney general." Compl., Ex. 4 at 1. These are true statements about what the 2023 disciplinary action did not entail. The Commission claims the statement that Respondent did not violate "any laws" conflicts with his admission that he violated Indiana Professional Conduct Rules 3.6(a) and 4.4(a). *See* Compl. ¶ 37. But that is flat-out wrong. The Commission's 2023 disciplinary complaint originally accused Respondent of violating a law, Indiana Code § 25-1-7-10(a). Compl., Ex. 1 at 9. That law concerns the confidentiality of certain complaints filed with the Attorney General's office. But Respondent disputed that charge, and the Commission dismissed it as part of the Conditional Agreement. *See* Compl. ¶¶ 19, 25. Because the charge was dismissed, no finding was ever made that he violated any state statute, i.e., the law. Thus, Respondent's statement—"I deny and was not found to have violated anyone's confidentiality or any laws"—was true. And his reference to "anyone's confidentiality or any laws" was a clear reference to Indiana Code § 25-1-7-10(a).

Respondent, moreover, made this statement to a general lay audience, not a group of legal professionals debating whether a disciplinary rule is technically a law. The ordinary person, whom Respondent was addressing, would not consider the disciplinary rules to be "laws." Respondent admitted he violated Rules 3.6(a) and 4.4(a), *see* Compl. ¶¶ 22–23, but those are rules, not statutory laws. As an agency of this Court, the Commission's decision to bring a disciplinary action based on differing colloquial and legal interpretations of a term in an attempt to fabricate misrepresentation where none exists is wrong and, frankly, shocking.

B. Respondent had "evidence and explanation for everything [he] said" and "could have fought over those 16 words…."

The press release also stated: "[I]t all boiled down to a truthful 16-word answer I gave over a year ago during an international media storm caused by an abortionist who put her interests above her patient's. … Having evidence and explanation for everything I said, I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction, which is also very important to me." Compl., Ex. 4 at 1–2. The Commission alleges that this statement conflicts with Respondent's statement in his Affidavit that "I submit my agreement to discipline because I know that if this proceeding were prosecuted, I could not *successfully* defend myself." Compl. ¶ 38 (emphasis added); Rokita Aff. (Compl., Ex. 2) (emphasis added). But there is not the slightest contradiction between the two statements. In saying that he had "evidence and explanation for everything," he also said he "could have fought over those 16 words." Compl., Ex. 4 at 2. Respondent did not say he could have *successfully* defended himself. Indeed, the nature of the charges against Respondent, the nature of the disciplinary process itself combined with the extreme breadth of Rule 3.6(a), made it impossible for him to do so.

In paragraph 18 of the Conditional Agreement, "[t]he parties agree[d] that Respondent's use of the phrase 'abortion activist acting as a doctor—with a history of failing to report' *could reasonably be considered* a statement about the doctor's character, credibility, or reputation in violation of Rule 3.6(a)[.]" Compl., Ex. 2 (emphasis added). Although that phrase could reasonably be considered a violation of the rule, it could also reasonably be considered *to not be* a violation. Respondent agreed he could not successfully defend himself given the malleable "reasonably be considered" test. Similarly, in paragraph 21 of the Conditional Agreement, "[t]he parties agree[d] that a reasonable person *could* conclude that Respondent's use of the phrase 'abortion activist acting as a doctor – with a history of failing to report' had 'no substantial purpose other than to embarrass or burden' the doctor in violation of Rule 4.4(a)." Compl., Ex. 2 (emphasis added).

Again, one reasonable person could conclude that—and another reasonable person could conclude the opposite. Respondent could not successfully defend himself against a charge about what "a reasonable person"—even one—"could" conclude. But still, as he said in his press statement, he "could have fought over those 16 words" in hopes of persuading an overwhelming majority of "reasonable persons" that he had *not* unfairly attacked the doctor's "character, credibility or reputation."

Furthermore, Respondent agreed that he violated rules regarding the *timing* of statements, not their *truthfulness.* Rules 3.6(d) and 4.4(a) do not implicate the statements' truthfulness whatsoever. Because the crucial distinction between timing and truthfulness was lost on the media (and, now, on the Commission), Respondent attempted to correct the misconception with his press release. Respondent's statements were true, and nothing he signed in the Conditional Agreement or Affidavit conflicts with this reality.

Nor does any conflict arise from Respondent's statement in the press release that "ending their campaign now will save a lot of taxpayer money and distraction[.]" Compl. ¶ 38. This was a reference to the campaign of "[t]hese liberal activists [who] would like to cancel your vote[.]" *Id*. ¶ 35(c). Respondent could believe that he could not successfully defend himself and also believe that "ending their campaign would save a lot of taxpayer money and distraction." And he did, and it did. There is no conflict between those two beliefs.

C. To resolve the disciplinary issue when he did, Respondent was required to sign an affidavit without any modifications.

The last alleged conflict is based on Respondent's statement in the press release that "In order to resolve this, I was required to sign an affidavit without any modifications." Compl., Ex. 4 at 2. This was true; Respondent could not modify the Affidavit. If he had, the Commission had already made clear it would not have agreed to the resolution.

The Commission nevertheless claims (*see* Compl. ¶¶ 39–40) the statement is contrary to Respondent's Affidavit, which said "I consent, knowingly, freely, and voluntarily, to the agreed discipline that is set forth in [the Conditional Agreement]. I have entered into said agreement without being subject to any coercion or duress whatsoever[ ]." Rokita Aff. ¶ 1 (Compl., Ex. 2). But there is no conflict. Respondent's inability to modify the Affidavit does not mean he failed to voluntarily consent to the agreed discipline or that he suffered coercion or duress. Or that the Affidavit was made falsely. It simply means he was not allowed to show in the Affidavit *why* he could not be successful. There is no conflict, as the Commission alleges.

Based on these alleged but false contradictions, the Commission asserts that Respondent "retracted his acceptance of responsibility" and "was not candid" with this Court. Compl. ¶¶ 8–9. But Respondent made no such retraction; nothing in the press release retracted his agreement to be disciplined with a public reprimand. Respondent was always candid with this Court. No statement in the press release shows otherwise.

D. The Commission's use of prior drafts of the press release to gauge "intent" is improper.

The Commission's Complaint improperly relies on *unreleased drafts* of the press release and emails between Respondent and his staff discussing the drafts. *See* Compl. ¶¶ 47–52. These drafts and emails were unreleased, that is, until the Commission saw fit to release their contents with its Complaint.[2]

The Commission views the drafts as showing "Respondent's reason for settling" the 2023 disciplinary case. Compl. ¶ 52. But a draft is just that—a draft, not a final or approved product. Contrary to the Commission's view, the fact that draft language did not make the final press release

[2] The 2023 Conditional Agreement was also confidential until the Commission caused it to be released, despite the fact that such agreements "generally are not open to public inspection." Compl. ¶ 43.

shows rejection of the discarded text. For example, the draft language that "I do not feel as though I did anything wrong," *id*. (emphasis omitted), was rejected; it did not end up in the press release.

The Commission's use of unpublished drafts to demonstrate "intent" is telling. *Id*. at ¶ 47 (the Commission requested the prior drafts "[t]o evaluate Respondent's intent and meaning regarding certain statements made in the … press release"). Ironically, the draft content—much of it written by staff and then changed or rejected by Respondent—conclusively demonstrates what was *not* intended, as it did not get published. The press release's plain language itself does not contradict the Conditional Agreement or Affidavit.

The Commission's actions set a dangerous future precedent that an elected official's—or any lawyer's—unpublished drafts or even thoughts can be utilized to justify a feeble allegation of dishonesty. Unfortunately, this seems to be the path the Commission is taking. As recently as November 2023, the Disciplinary Commission's Executive Director stated "that both explicit and implicit bias negatively impact the judicial process, litigant perceptions, and public confidence," and then strikingly mused, "[w]ould and should a judge's seemingly benign comments and references…be ethically actionable if those comments reflect implicit bias?" *See* Adrienne Meiring, *The Impact of Bias* 67 Res Gestae: Ind. State Bar Ass'n Member J. 30, 32-33 (2023), https://tinyurl.com/2ps5uf26. This weaponization of the disciplinary process threatens fundamental First Amendment political speech protections. *See* Part II.

E. The Commission misrepresents an *Indiana Lawyer* quote.

The Complaint includes the following quotation attributed to Respondent: "One thing that is clear is that the AG did nothing dishonest, illegal, or even wrong, and he will continue to fight for the people of this state no matter how much the Left hates it." Compl. ¶ 53 (quoting Alexa Shrake, *Once-Reprimanded Rokita Details His Proposed Changes for Lawyer Discipline*, Ind. Lawyer (Jan. 7, 2025), https://tinyurl.com/4f9vjrkr) (hereinafter, "*Indiana Lawyer* article"). By

including this quotation in the Complaint, the Commission seems to imply that Respondent was referencing the Conditional Agreement and Affidavit. *Id*. ¶¶ 53–54 (refencing the *Indiana Lawyer* article, *supra,* and, in the next paragraph, vaguely referring to Respondent's "continuing course of conduct"). But the article's context shows Respondent's quote was plainly referencing the multiple recent disciplinary complaints filed by Democratic activists:

> Indiana Attorney General Todd Rokita on Tuesday released the details of his proposed rule changes for attorney discipline, calling on the Indiana Disciplinary Commission to quickly dismiss politically motivated complaints against attorneys and follow the same impartiality guidelines as judges.
>
> The proposals escalate ongoing differences Rokita has had with the disciplinary commission since he was reprimanded by the Indiana Supreme Court for comments he made in 2022 about a doctor who performed an abortion.
>
> **He also became the subject of at least three more disciplinary complaints that dogged him throughout his re-election campaign last year and that he considers purely political.**
>
> **"This judicial process is being hacked by activist attorneys whose candidates and issues continue to lose at the ballot box," Rokita said in a statement to the Indiana Lawyer. "They are attorneys—attorneys who are trying to silence the large number of voters who hired a lawyer to speak for them and their policies. These are lawyers who are weaponizing a non-public agency of the judicial system.["]**
>
> **"Whether the investigations of the Attorney General that the Rules allow to be leaked are going to be continued is unknown, as is a clear understanding of exactly what it's all about," Rokita added.** "One thing that is clear is that the AG did nothing dishonest, illegal, or even wrong, and he will continue to fight for the people of this state no matter how much the Left hates it."

Indiana Lawyer article, *supra* (emphasis added); *see also* Compl. ¶ 53.

The Commission rips this quote out of context to create a false narrative that Respondent was dishonest. As the full context shows, Respondent's quote was responding to the recent wave of politically motivated disciplinary complaints and the ensuing investigations the Commission started as a result of those politically motivated grievances filed and intentionally made public during Respondent's re-election campaign by self-described liberal activist attorneys. Compl. ¶

53. This quote was unrelated and irrelevant to the Conditional Agreement and Affidavit. Especially considering its role in the judicial system, the Commission's misrepresentation of this quote is shocking.

II. The Commission Has Violated Respondent's First Amendment Right to Free Speech.

The Commission's latest attempt to discipline Respondent based on the exercise of his freedom of expression is blatantly unconstitutional. The First Amendment does not permit the Commission, as an agent of the state government, to punish Respondent, an elected public official, for his protected speech. Respondent had a right to issue the press release about the Conditional Agreement, and Hoosiers had a right to hear what he had to say about the matter. The Attorney General even has greater speech protections under our Constitutions because he does not speak (and was not speaking) with one voice. He speaks with millions of voices as a statewide elected official and these voices are all equally protected under our Constitutions. *See Gentry v. Lowndes County, Miss.*, 337 F.3d 481, 485-86 (5th Cir. 2003).

A. Respondent has a right as a public official and candidate for office to speak on matters of public interest.

The First Amendment protects the right of public officials to speak out on matters of public interest. *See Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) ("The First Amendment surely promises an elected [official] … the right to speak freely on questions of government policy."); *Phegley v. Ind. Dep't of Hwys.*, 564 N.E.2d 291, 295 (Ind. Ct. App. 1990) ("Statements by public officials on matters of public concern must be accorded First Amendment protection[.]"). Indeed, "'[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.'" *Republican Party of Minn. v. White*, 536 U.S. 765, 781–82 (2002) (quoting *Wood v. Georgia,* 370 U.S. 375, 395 (1962)); *see Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function

of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.").

When Respondent issued the press release, he was not only a public official but a candidate for reelection, a fact that increases the magnitude of his speech interest. The U.S. Supreme Court has declared categorically that "[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Republican Party of Minn.*, 536 U.S. at 782. The reason is "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 223 (1989) (quotation marks omitted); *see Buckley v. Ill. Jud. Inquiry Bd*., 997 F.2d 224, 227 (7th Cir. 1993) ("Candidates for public office should be free to express their views on all matters of interest to the electorate. … The roots of [this] principle[ ] lie deep in our constitutional heritage.").

Respondent does not lose his right to speak as a public official and candidate for office by being a member of the bar. The U.S. Supreme Court has stated that "our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule[.]" *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (plurality) (citing cases); *see also id*. (restrictions by "professional bodies" on the practice of law must yield "when those restrictions impinge upon First Amendment freedoms").

States that find a compelling interest in curtailing an attorney's free speech consistently link the speech to a specific practice within the legal system or to a relationship with clients. *See, e.g.*, *In re Wilkins*, 777 N.E.2d 714, 717–18 (Ind. 2002) (per curiam) (prevailing state interest in attorney statements questioning integrity of judge in footnote of petition), *modified on other grounds on reh'g,* 782 N.E.2d 985 (Ind. 2003); *In re Friedland*, 416 N.E.2d 433, 438 (Ind. 1981)

(prevailing state interest when attorney engaged in "pattern of litigation directed toward intimidating and influencing public officials and adverse witnesses"); *Justice v. Bd. of Pro. Resp.*, 693 S.W.3d 225, 246 (Tenn. 2024) (compelling state interest when attorney harassed and criticized judge in pleadings); *Manookian v. Bd. of Pro. Resp. of Sup. Ct.*, 685 S.W.3d 744, 785 (Tenn. 2024) (compelling state interest in in-court statements and out-of-court statements that were directly linked to representation of client in specific case); *In re Abrams*, 488 P.3d 1043, 1054 (Colo. 2021) (compelling state interest in use of slur when communicating with clients about presiding judge). Not so here. Respondent was speaking to Hoosiers through a press release about matters of public interest during a campaign for re-election.

The Commission's attempt to punish Respondent during his reelection campaign based on statements in his press release is a content-based restriction on his speech. *See Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) ("Disciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the first amendment." (cleaned up)). As a content-based speech restriction, the Commission's action receives strict scrutiny, the most demanding form of review under the First Amendment. *See Love v. Rehfus*, 946 N.E.2d 1, 8 (Ind. 2011) ("The government generally may not impose content-based restrictions on speech unless it satisfies the strictest judicial scrutiny."). Courts apply "strict scrutiny [to] the government's regulation of [an] elected official's speech to his constituency, requiring such regulations to be narrowly tailored to address a compelling government interest." *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007). "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982). The Commission bears the burden to

prove the validity of its speech restriction. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (quotation marks omitted); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.") (collecting cases). State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979).[3]

The First Amendment also condemns the Commission's action against Respondent because of its chilling effect. "[I]mposing penalties for speech, belief, and association chills the exercise of First Amendment freedoms and thereby indirectly produces a result that the government cannot command directly[.]" *Colson v. Grohman*, 174 F.3d 498, 509 (5th Cir. 1999).

The Commission's investigation was highly intrusive. The Commission served a subpoena demanding that Respondent and his staff "provide copies of all prior drafts of the November 2, 2023 press release that were written, edited, revised, or reviewed by Respondent and to provide copies of all written or electronic communications sent to or from Respondent about the November 2, 2023 press release or the prior drafts." Compl. ¶ 47. In compliance, Respondent produced voluminous documents, including countless internal emails, to the Commission, which publicly released the contents of several of the emails with its Complaint. And not only did Respondent sit for an all-day deposition by the Commission, during which he answered question after question about various drafts of the press release among many other subjects, but the Commission also did the same to his staff by deposing both his Chief of Staff and Director of Communications for hours.

[3] Even false statements—though inapplicable here—are protected by the First Amendment. *See United States v. Alvarez*, 567 U.S. 709 (2012).

Respondent and his staff were also forced to produce voluminous mobile phone records. Even Respondent's campaign manager—the person responsible for the strategy of Respondent's campaign for election—was subpoenaed.

The Commission's demand for, questions about, and public disclosure of confidential emails of the Attorney General's office flouts the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news[.]" *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). Indiana Admission and Disciplinary Rule 23(10.1)(a) states: "[i]t shall be the duty of every attorney to cooperate with an investigation by the Disciplinary Commission[.]" Respondent has done so by producing internal communications to the Commission. But the Commission's actions have had and will continue to have a "chilling effect" on the giving and receiving of candid advice within the Attorney General's office. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 592 U.S. 261, 267 (2021).

B. The Commission's claimed justifications for punishing Respondent's speech fail strict scrutiny.

Respondent's compelling interest in speaking to the public and voters about the public reprimand dwarfs the Commission's purported justifications for seeking to discipline him. The Commission's action does not come close to surviving strict scrutiny.

The Commission's theory hinges on the claim that Respondent's press release contradicts sworn statements he made in resolving the 2023 disciplinary matter. But the Commission has never sought to police the speech of the bar in this manner before. And its claim falls to pieces upon inspection. As argued *supra*, nothing said in the press release conflicts with any prior statement. *See* Part I. And Respondent has a weighty interest in speaking to the public and voters about the reprimand and Conditional Agreement, an interest that is protected by the First Amendment.

III. The Commission Has Retaliated Against Respondent Based on His Rules Proposal, Which Is Also Protected Speech.

But that is not the only First Amendment violation the Commission has committed here. As the U.S. Supreme Court has held, "the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman v. Riviera Beach*, 585 U.S. 87, 90 (2018). Indeed, "[t]here can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based on the expression, is unequivocally among the protections provided by the First Amendment." *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 520 (6th Cir. 2001), *abrogated on other grounds by Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). And these principles undoubtedly apply when retaliation is meted out against an elected official. *See Bond*, 385 U.S. at 136 ("The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."); *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir. 2009) ("[T]he Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general.") (citing cases), *vacated as moot on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009).

Here, Respondent's Rules Proposal was filed with this Court on November 8, 2024, with a copy delivered to the Commission's Executive Director, who is also the author of this Complaint. Attorney General Rokita's Rules Proposal (Exhibit A at 1). The Rules Proposal was then publicly released on January 7, 2025, a few weeks before the Commission filed its Complaint against him. In making the case for changing the rules governing the Commission, the Rules Proposal necessarily included some sharp criticism of the Commission's conduct. It stated that "[t]he Commission's willingness to entertain blatantly political and partisan grievances threatens the rule of law and freedom of speech[.]" *Id*. at 1. It accused the Commission of having "apparently negligently or intentionally leaked confidential information to the press[.]" *Id*. at 2. It noted that

the Commission, at the same time it was investigating Respondent for speech and legal positions he took during the election, had "allowed its recent Chairman to publicly endorse" Respondent's opponent in the Attorney General's race and to "host a 'Meet and Greet'" for her, creating, at the least, an obvious "appearance of impropriety." *Id*. at 3.[4] It cast light on the Commission's subsequent chair authoring an article endorsing the removal of President Donald Trump from the ballot while the Commission was actively investigating Respondent for filing the state's *amicus* brief in the U.S. Supreme Court endorsing President Trump's position on the very issue.[5] *Id*. at 3. Further, the Commission allowed its Executive Director "to publish in her official capacity thinly veiled disciplinary threats to judges and practitioners who fail to abide by leftist Diversity, Equity and Inclusion policy[.]" *Id*.

Respondent's Rules Proposal cast light on Commission's decision to consider repetitive and overtly political grievances filed by self-proclaimed liberal activist attorneys who have no personal knowledge of the alleged offending conduct. *Id*. at 3-4. Then, the Commission—acting in lock step with the activists—reports their "confidential" investigation to the activists, who disseminate the information to the press. *Id*. This cycle continues to repeat itself, to the detriment of the attorney grieved against and the entire disciplinary system.

Less than a month after the Attorney General's office publicly released this Rules Proposal, the Commission filed this Complaint accusing Respondent of professional misconduct. The Complaint is an act of retaliation against Respondent for the Rules Proposal, which constitutes expression protected by the First Amendment. At minimum, it has the appearance of such an impropriety, just like the behavior of the Commission's members and staff, described *supra*. And

[4] The criticism must have stung. This Commissioner recused himself from the decision to file the Complaint against Respondent. Of course, the fact that he recused himself from the final decision to file does not mean he had no role in the investigation leading up to the Complaint.

[5] All nine justices rejected the chairman's position.

as every lawyer and judge knows, the appearance of impropriety is just as harmful as retaliation itself. Telltale evidence of the Complaint's retaliatory nature is the fact that it was filed hard on the heels of the publication of the Rules Proposal, which had sharply criticized the Commission's practices and treatment of Respondent. *See Lavite v. Dunstan*, 932 F.3d 1020, 1031 (7th Cir. 2019) (circumstantial evidence for First Amendment retaliation claim "may include suspicious timing") (quotation marks omitted). That the Complaint cites an article about the Rules Proposal is further evidence. *See* Compl. ¶ 53 (citing *Indiana Lawyer* article, *supra*). What's more, in Respondent's deposition, Commission staff questioned him about the proposals, despite it bearing no real relevance to this Complaint. *See* Affidavit (Exhibit B). Because the First Amendment prohibits retaliation against speech, the Complaint should be dismissed.

IV. The Commission's Action Violates Article 1, Section 9 of the Indiana Constitution.

The Complaint violates Indiana's Constitution as well as the U.S. Constitution. Article 1, Section 9 of the Indiana Constitution—"[o]ur free expression clause," *State v. Katz*, 179 N.E.3d 431, 442 (Ind. 2022)—bars state action "restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." Ind. Const. art. 1, § 9. The Commission's action violates not only the First Amendment but Section 9 as well.[6]

Indiana courts apply a two-prong test under Section 9. "First, a reviewing court must determine whether state action has restricted a [person]'s expressive activity. Second, if it has, the court must decide whether the restricted activity constituted an 'abuse' of the right to speak." *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996).

[6] This Court has reminded litigants and lawyers making arguments under the U.S. Constitution not to forego remedies they may have under the Indiana Constitution as well, noting that "a basketball player would never just take one of two free throws[.]" *Katz*, 179 N.E.3d at 442.

The first prong is met "when the state imposes a direct and significant burden on a person's opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate." *Id*. at 1368. The Commission's action against Respondent, which seeks to have this Court discipline Respondent based on his press release, clearly satisfies this test. *Cf*. *Katz*, 179 N.E.3d at 447 ("[T]he State's prosecution of Katz more than satisfies this standard of imposing a direct and significant burden on his opportunity to express himself.").

As to the second prong, Respondent's expression was not an "abuse" of the right to speak within the meaning of Section 9 because his speech was political expression. "Political expression is the one type of expression" that this Court has "enshrine[d] as a core constitutional value under Section 9." *Katz*, 179 N.E.3d at 448. This Court has "held that pure political expression cannot be said to constitute an 'abuse' … unless it 'inflicts upon determinable parties harm of a gravity analogous to that required under tort law.'" *Whittington*, 669 N.E.2d at 1369–70 (quoting *Price v. Stat*e, 622 N.E.2d 954, 964 (Ind. 1993)) (footnote omitted).

Respondent's press release was political expression. "Expressive activity is political, for the purposes of the responsibility clause, if its point is to comment on government action." *Katz*, 179 N.E.3d at 448 (quoting *Whittington*, 669 N.E.2d at 1370). That exactly describes Respondent's press release, the whole point of which was to comment on the disciplinary action. And the press release cannot be said to have "inflict[ed] upon determinant parties harm analogous to that which would sustain tort liability against the speaker.'" *Price*, 622 N.E.2d at 964. *See id*. ("When the expressions of one person cause harm to another in a way consistent with common law tort, an abuse under § 9 has occurred."). Respondent's speech was not a tort of any kind. *Cf*. *Ellis v. State*, 194 N.E.3d 1205, 1218 (Ind. Ct. App. 2022) (concluding that defendant's speech was not protected under Section 9 because it met the elements of the tort of intentional infliction of emotional distress under Indiana law).

The Commission's Complaint, which seeks to have discipline imposed on Respondent for a protected (and non-abusive) act of political expression, violates the free expression clause of Article 1, Section 9. Accordingly, for that reason, too, the Complaint should be dismissed.

V. The Commission's Complaint Violates Separation of Powers Principles.

Separation of powers principles provide another powerful reason for dismissal. The Indiana constitution divides governmental powers among the legislative, executive, and judicial departments. *See* Ind. Const. art. 3, § 1. The Indiana Attorney General is an executive branch office, and the Disciplinary Commission is an arm of the judicial branch. Here, the judicial branch attempts to usurp authority from the executive branch by curtailing what the executive branch can say to the people. Separation of powers principles preclude this action.

"The separation of powers doctrine prevents the courts from reviewing political, social, and economic actions within the exclusive province of coordinate branches of government." *Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013) (citing *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 44 (Ind. 1988)). "The purpose of this doctrine is to rid each separate department of government from any influence or control by the other department." *Id*. at 415 (quotation marks and citation omitted).

These considerations played an important role in a similar case decided last year by the Texas Supreme Court, which was likewise forced to grapple with the judicial branch's disciplinary commission encroaching on the executive branch's Attorney General. *See Webster v. Comm'n for Law. Discipline*, -- S.W.3d --, 2024 WL 5250614 (Tex. Dec. 31, 2024). Texas' constitution enshrines separation of powers among the executive, legislative, and judicial branches. *Id*. at *12. The Texas Supreme Court analyzed the "judiciary's authority to regulate the practice of law and the attorney general's exclusive authority to determine the arguments and assess the evidence that warrant bringing suit on behalf of the State," *id.* at *6, and held that separation of powers principles

preclude the commission from exercising power over the attorney general's decision-making authority for arguments to make in a suit on the state's behalf. *See id*. at *12 ("We do not find the call to be close. … [T]he commission claims authority for the judicial branch that the judiciary lacks: a free-ranging power to second-guess the attorney general's and his first assistant's exercise of discretion in making initial filings that is wholly divorced from and collateral to the litigation in which those filings are made.").

Respondent's press release constitutes an official duty of the Attorney General, a member of the executive branch. As Indiana's elected Attorney General, Respondent must inform Hoosiers about pertinent happenings related to his office. Respondent did so here by informing Hoosiers that a disciplinary matter involving his office had been resolved. *See* Compl., Ex. 4. The unelected Commission's attempt control or influence the Attorney General's statements on these matters of public concern violates the separation of powers principles set forth in the Indiana constitution. The Commission's Complaint should be dismissed based on this fundamental and simple constitutional principle alone.

VI. The Commission Complaint Targets Respondent's Speech in Violation of Indiana's Anti-SLAPP Statute.

The Commission's action also violates another Indiana law—the Anti-SLAPP Statute, Indiana Code §§ 34-7-7-1 to -10. Enacted in 1998, this law shields individuals from "being sued for simply speaking out politically." *Gresk v. Demetris*, 96 N.E.3d 564, 568 (Ind. 2018). Speech on matters of public interest "is fundamental to self-government, and thus protected by the Indiana and United States Constitutions." *Id*. at 566. Thus, when Hoosiers "are faced with meritless retaliatory lawsuits designed to chill their constitutional rights of petition or free speech, also known as Strategic Lawsuits Against Public Participation (SLAPP), Indiana's anti-SLAPP statute provides a defense." *Id*. Because the Disciplinary Complaint filed by the Commission against Respondent is such a lawsuit, it violates the Anti-SLAPP Statute and is due to be dismissed.

Indiana's Anti-SLAPP Statute creates "a defense in a civil action against a person"[7] if the act "complained of" was (1) "in furtherance of the person's right of petition or free speech" under the federal or Indiana Constitutions and (2) the act was "taken in good faith and with a reasonable basis in law and fact." Ind. Code § 34-7-7-5. The person's speech must have been "in connection with a public issue or an issue of public interest." Ind. Code § 34-7-7-2. The statute authorizes the filing of a motion to dismiss, which the court shall treat as a motion for summary judgment and resolve within 180 days. *See* Ind. Code § 34-7-7-9(a). "The motion to dismiss shall be granted if the court finds that the person filing the motion has proven, by a preponderance of the evidence, that the act upon which the claim is based is a lawful act in furtherance of the person's right of petition or free speech[.]" *Id.* § 34-7-7-9(d).[8]

The Commission's Complaint against Respondent should be dismissed; every requirement of the statute is met here. First, "the public issue or issue of public interest" that prompted Respondent's speech was the Disciplinary Action. *Id.* § 34-7-7-9(b). Second, the act complained of in the Complaint is Respondent's press release—an obvious act in furtherance of Respondent's right of free speech under the U.S. Constitution and the Indiana Constitution. *See* Ind. Code §§ 34-7-7-1(a), -2, -5(1). Third, the press release was "in connection with a public issue or an issue of public interest." Ind. Code § 34-7-7-2. Fourth, Respondent's act was "taken in good faith and with a reasonable basis in law and fact." Ind. Code § 34-7-7-5(2). As shown in the affidavit submitted with this motion, Respondent reasonably believed in good faith that every word of the press release was true. *See* Exhibit B.

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[7] Any "individual" may raise an anti-SLAPP defense. *See* Ind. Code § 34-7-7-4(1) (defining "person" to include an "individual"). The fact that Respondent is an attorney and holds public office does not deprive him of this right.

[8] The statute defines a "claim" as, *inter alia*, a "lawsuit," "cause of action," "complaint" or "any other judicial pleading or filing" that "requests legal or equitable relief." Ind. Code § 34-7-7-3. The Complaint is a "claim" for purposes of the statute.

In these circumstances, the Commission's complaint must be dismissed. *See Kay v. The Irish Rover, Inc*., -- N.E.3d --, 2025 WL 338938, at *6, *8, *9 (Ind. Ct. App. Jan. 30, 2025) (affirming dismissal of defamation suit against newspaper under the Anti-SLAPP Statute where the newspaper's "articles were written in good faith," it "had a reasonable basis in fact to publish the [allegedly defamatory] statements in the two articles," and its "reporters believed that the statements in their articles were true").

The Commission cannot claim to be exempt from the Anti-SLAPP Statute. The Commission's Complaint commenced a civil action that constitutes a "claim" within the statute's scope. *See* Ind. Code § 34-7-7-3. And the statute expressly exempts only *some* enforcement actions—it "does not apply to an enforcement action brought in the name of the state of Indiana by the attorney general, a prosecuting attorney, or another attorney acting as a public prosecutor," Ind. Code § 34-7-7-1(b)—the Commission's Complaint does not qualify as such an action.

A party moving to dismiss under the Anti-SLAPP Statute is authorized to seek "discovery relevant to the motion" pursuant to an "expedite[d]" process. Ind. Code §§ 34-7-7-6, -9(a);[9] *see Gresk*, 96 N.E.3d at 568 ("Anti-SLAPP statutes establish key procedural tools to safeguard First Amendment rights."). Here, Respondent plans to seek relevant discovery from the Commission. Respondent is entitled to discover, among other things, whether the Disciplinary Complaint was "filed for an ulterior political end[.]" *Gresk,* 96 N.E.3d at 568. If the Commission filed the Complaint in retaliation for Respondent's rules proposal, then the Complaint was not brought for a "legitimate legal" end but is instead "a SLAPP." *Id*.; *see Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[W]ell established is the principle that government officials…may

[9] The Commission, its members, and staff are hereby put on notice of their duty to preserve all documents and communications in their possession, custody, or control (including on any personal email accounts) referring or relating to the press release, the Rules Proposal, or the pending disciplinary action against Respondent.

not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity."); *accord McCurdy*, 240 F.3d at 520; *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998).

Accordingly, pursuant to the Anti-SLAPP Statute, Respondent requests that this Court issue an order to "[e]stablish a reasonable time period, not to exceed one hundred eighty (180) days, to expedite and rule on [his] motion"; and to "[s]pecify time limits for the discovery of evidence to respond to material issues raised in the motion." Ind. Code § 34-7-7-9(a).[10]

VII. The Commission Should Reconsider its "Reasonable Cause" Determination and Withdraw the Charges in the Complaint.

For all these reasons, this Court should dismiss the Commission's Complaint against Respondent. But it shouldn't come to that. Given the compelling reasons for dismissal, the Commission should not force this Court to clean up the Commission's mess and incur the risk of having the Commission's authority limited in all future cases. The Commission should withdraw the Complaint to help preserve the integrity of the attorney discipline system as a public hearing will only serve to further highlight all the above issues—including the repeated appearances of impropriety by Commission members and staff. The Commission should instead reconsider its determination that there is probable cause to proceed against Respondent.

That result is compelled by Rule 23, which provides: "If after its consideration, the Disciplinary Commission determines there is a reasonable cause to believe the respondent has committed misconduct which would warrant disciplinary action, it shall file with the Supreme Court Clerk a Disciplinary Complaint as provided in Section 12." Admis. Disc. R. 23(11)(c). The Commission may reconsider its determination. *See Procedural Guide* at 15 (advising that the

[10] The Court need not do these things or decide Respondent's anti-SLAPP motion if it dismisses the Complaint based on his First Amendment or Section 9 arguments. *See* Ind. Code § 34-7-7-10 ("The remedy provided by this chapter is in addition to any other remedies provided by law.").

Commission may also "move for dismissal of the disciplinary complaint upon reconsideration of its initial determination of probable cause" and that "[s]uch motions may be considered and resolved by the Supreme Court directly without intervention of the hearing officer"). And it may withdraw charges against a respondent. *See In re Thomas*, 30 N.E.3d 704, 705 (Ind. 2015) (per curiam) (noting that "The Commission withdrew certain charges at the outset of the hearing, including Count 7 in its entirety."); *In re Hear*, 755 N.E.2d 579, 582 n.1 (Ind. 2001) ("The Commission has withdrawn charges that the respondent violated Prof. Cond. R. 8.1(a) and 8.4(c)"); *cf*. *In re Rokita*, 219 N.E.3d 733, 734 (Ind. 2023) (per curiam) (noting that the Commission dismissed a charged violation in exchange for Respondent's admission to two others).[11]

In light of Respondent's defenses under the First Amendment, the Indiana Constitution, and the Anti-SLAPP Act, the Commission should withdraw the charges against Respondent—both because those charges cannot be squared with the right of free speech and because—especially given the Commission's implausible claims of a conflict between the Attorney General's press release and the Agreement—insisting that this Court resolve this case will recklessly jeopardize the Commission's credibility.

CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss should be granted, and the Complaint should be dismissed if it is not withdrawn by the Commission.

[11] Rule 23 permits the Executive Director to "amend" a Complaint. *See* Admis. Disc. R. 23(12)(d) ("The Executive Director may amend a Disciplinary Complaint or a charge without the Disciplinary Commission's approval, if further investigation reveals that the facts do not support continued prosecution of a particular charge. The Executive Director may not, however, add additional charges to a Disciplinary Complaint."). Thus, the Executive Director may, on her own initiative or at the Commission's direction, withdraw charges against a respondent. *See Clark v. Witco Corp*., 102 F. Supp. 2d 292, 297 (W.D. Pa. 2000) ("the word 'amend' is defined as 'to alter formally by modification, *deletion* or addition'") (quoting *Webster's Ninth New College Dictionary* 78 (9th ed. 1990) (emphasis added)).

Dated: February 20, 2025

Respectfully submitted,

/s/ *Paul O. Mullin*
/s/ *E. Ryan Shouse*
Paul O. Mullin, Atty No. 25896-49
E. Ryan Shouse, Atty No. 35597-49
Lewis And Wilkins LLP
8777 Purdue Road, Suite 104
Indianapolis, IN 46268-3104
Phone: (317) 636-7460
Fax: (317) 636-7505
mullin@lewisandwilkins.com
shouse@lewisandwilkins.com

James Ammeen, Attorney No. 18519-49
Ammeen & Associates LLC
Barrister Building, Suite 550
155 E. Market St.
Indianapolis, IN 46204
Phone: (317) 423-7505
Fax: (800) 613-4707

Gene C. Schaerr*
H. Christopher Bartolomucci*
Schaerr | Jaffe LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Phone: (202) 787-1060
gschaerr@schaerr-jaffe.com
cbartolomucci@schaerr-jaffe.com

**Pro hac vice* motion forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2025, I served the foregoing to all parties of record by electronically filing through the Indiana Court's e-filing system.

/s/ *Paul O. Mullin*
/s/ *E. Ryan Shouse*
Paul O. Mullin, Atty No. 25896-49
E. Ryan Shouse, Atty No. 35597-49
Lewis And Wilkins LLP
8777 Purdue Road, Suite 104
Indianapolis, IN 46268-3104
Phone: (317) 636-7460
Fax: (317) 636-7505
mullin@lewisandwilkins.com
shouse@lewisandwilkins.com