IN THE
SUPREME COURT OF VIRGINIA

Record No. 091535

DWIGHT KEITH SMITH,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF ATTORNEY WILLIAM A. CRANE

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia") is the Virginia affiliate of the American Civil Liberties Union, and has approximately 10,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes. The ACLU of Virginia appears frequently before the state and federal courts of this Commonwealth, both as counsel and as *amicus curiae*. Since its founding, the ACLU of Virginia has been a forceful advocate for both the freedom of speech and due process of law.

Amicus wishes to emphasize that it files this brief on its own initiative, and not at the request of Mr. Crane. It is *Amicus*' understanding that Mr. Crane has apologized to the Court and has declined to raise any constitutional defenses, an approach that *Amicus* fully respects. The purpose of this brief is to remind the Court that important constitutional principles are nonetheless at stake.

STATEMENT OF THE CASE

This matter comes before the Court on a Rule to Show Cause issued by this Court on July 15, 2010 against William A. Crane, the attorney for the appellant. According to the Rule to Show Cause, the record reflects that Mr. Crane engaged in the following colloquy with the circuit court judge regarding a prior appeal to this Court in this case:

> MR. CRANE: The Court refused to consider the Fifth Amendment issue. They said there was enough besides that to go ahead and approve the findings.
>
> THE COURT: They didn't want to touch it?
> MR. CRANE: Well, they just stuffed it. <u>They didn't have the guts to handle it.</u>

(emphasis added in the Rule to Show Cause.)

In the Rule to Show Cause, the Court notes that "[a] lawyer's responsibilities are set forth generally in the preamble to the Virginia Rules of Professional Conduct. These responsibilities include demonstrating 'respect for the legal system and for those who serve it, including judges.'" The Court directed Mr. Crane to appear before the Court "to show cause why his privilege to

practice law in this Court should not be revoked or suspended for a fixed period of time because of his conduct."

ARGUMENT

I. DISCIPLINING MR. CRANE BASED ON THE PREAMBLE TO THE RULES OF PROFESSIONAL CONDUCT WOULD VIOLATE THE DUE PROCESS CLAUSE BECAUSE A REASONABLE ATTORNEY DOES NOT HAVE NOTICE AS TO WHAT CONDUCT IS PROHIBITED.

As this Court has recognized, the Due Process Clause of the Fourteenth Amendment precludes the government from punishing individuals without providing fair notice as to what conduct is prohibited. *See, e.g., Volkswagen of America, Inc. v. Smit*, 279 Va. 327, 689 S.E.2d 679 (2010); *Tanner v. City of Virginia Beach*, 277 Va. 432, 674 S.E.2d 848 (2009). Disciplining Mr. Crane based on the preamble to the Rules of Professional Conduct would violate this principle in two ways: First, the Rules provide no notice that a violation of the preamble, as opposed to any of the Rules themselves, may be cause for discipline. Second, assuming that the preamble may be used as a basis for discipline, the language in the preamble is too vague to allow a reasonable attorney to conform his conduct to it.

For centuries, this Court has understood that a preamble to a legislative or regulatory enactment is not a substantive source of law, but, at most, a helpful guide for interpreting the law:

> The term "preamble" is defined as "[a]n introductory statement in a constitution, statute, or other document explaining the document's basis and objective." Black's Law Dictionary 1214 (8th ed. 2004). This Court has stated "[t]he preamble to a statute is no part of it and cannot enlarge or confer powers or control the words of the act unless they are doubtful or ambiguous." *Commonwealth v. Ferries Co*., 120 Va. 827, 831, 92 S.E. 804, 805 (1917); accord *Hooe v. Tebbs*, 15 Va. (1 Munf.) 501, 510 (1810). Similarly, a "preamble is not an essential part of the act. It is often, and now, indeed, generally omitted, and is without force." *Smith*, 76 Va. at 484.

Renkey v. County Bd. of Arlington County, 272 Va. 369, 634 S.E.2d 352 (2006).

The preamble to the Rules of Professional Conduct is consistent with this general understanding of the function of a preamble. In addition to setting forth the scope of the rules and definitions of terms, the preamble speaks generally of a lawyer's professional responsibilities. It repeatedly states what an attorney "should" do, rather than what an attorney "shall" do, as in the Rules themselves. It sets forth general principles. The implementation of those principles is left for the actual rules.

Further supporting the notion that the preamble is itself not a source of law is Rule 8.4, pertaining to misconduct. The Rule states that it is misconduct to, among other things, "violate or attempt to violate the Rules of Professional conduct . . ." It does not suggest that violation of the preamble to the Rules is misconduct.

Finally, although the preamble states generally that attorneys should have respect for the judiciary, a specific rule deals expressly with the subject of lawyers' statements about judges. Rule 8.2 states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."[1] As this Court has explained, "where one statute speaks to a subject generally and another deals with that subject specifically, the more specific statute prevails." *Hollingsworth v. Norfolk Southern Ry. Co*., 279 Va. 360,

[1] The Rule to Show Cause does not reference Rule 8.2, presumably because it is clear that the statement in question does not fall within its ambit. As explained in Part II, the Mr. Crane's comment was an expression of opinion, not a statement of verifiable fact.

368, 689 S.E.2d 651, 655 (2010). A reasonable attorney would therefore conclude that his statements about judges are governed by Rule 8.2, rather than the more general statements contained in the preamble.

For all of these reasons, attorneys are not on notice that they may be subject to discipline based on the preamble to the Rules of Professional Conduct. Even if the preamble could be considered a source of substantive disciplinary regulation, however, the language in the preamble is too vague to be applied in such a manner.

"The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause. . . . Thus, the language of a law is unconstitutionally vague if persons of common intelligence must necessarily guess at the meaning of the language and differ as to its application." *Tanner*, 277 Va. at 439, 674 S.E. 2d at 852 (citations and internal alterations omitted). Vagueness is especially problematic when the statute at issue affects First Amendment rights. "In such circumstances, vague language in a statute or ordinance may

cause citizens to avoid constitutionally permissible conduct based on a fear that they may be violating an unclear law. Thus, a vague statute may inhibit the exercise of constitutionally protected activities." *Id.* at 440, 852.

The preamble states that "a lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." The term "respect" is inherently vague. Like the language in *Tanner*, "the reach of [this] general descriptive term[] depends . . . on the subjective tolerances, perceptions, and sensibilities of the listener." *Id.* at 440, 853.[2] Thus, for example, in *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004) the court held that an abortion regulation requiring women to be treated with "consideration," "respect," "dignity," and "individuality" was unconstitutional because those words were "too vague and subjective for providers to know how they should behave in order to comply, as well as too vague to limit arbitrary enforcement." Similarly, in

[2] Indeed, in the present case, the circuit court judge apparently found nothing untoward in Mr. Crane's comment, as he did not reprimand Mr. Crane or otherwise react.

Knight v. State, 593 So.2d 1202 (Fla. App. 1992), the court held that a condition of probation requiring a defendant to "show respect to officers connected with the criminal justice system" was "too vague to inform [him] of what conduct is acceptable or unacceptable." To discipline Mr. Crane for failing to show "respect" would not accord with due process.

II. MR. CRANE'S COMMENT IS PROTECTED BY THE FIRST AMENDMENT.

Attorney statements about judges are generally protected by the First Amendment unless they pose "substantial likelihood of material prejudice" to judicial proceedings. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). This Court has held that a "derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity" creates a "substantial likelihood of material prejudice" because it "tends to diminish the public perception of the qualifications or integrity of the judge." *Anthony v. Virginia State Bar*, 270 Va. 601, 621 S.E.2d 121

(2005); *Moseley v. Virginia State Bar*, --- S.E.2d ----, 2010 WL 2305842 (2010).

In this case, however, Mr. Crane's comment was not a statement of fact, but one of opinion. While the remark was ill-advised, it is not plausible to understand it as professing any knowledge of the mental state or intestinal fortitude of the Justices who rendered the opinion. At most, it was a wry expression of dismay that the Court chose not to address an issue that counsel considered important.

This Court has not ruled on whether expressions of opinions about judges may be sanctioned, but other courts have held that such statements are protected by the First Amendment. *See Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *In re Green*, 11 P.3d 1078 (Colo. 2000); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996). This position is consistent with this Court's repeated holdings that statements of opinion are protected by the First Amendment and cannot form the basis of a defamation action. *See*, *e.g.*, *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 132, 575 S.E.2d 858, 861

(2003); *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101 (1985); *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges the Court not to impose discipline on Mr. Crane.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2010, I hand delivered 15 copies of the foregoing brief to the Clerk of the Supreme Court, and served 3 copies by U.S. Mail, postage prepaid, to the following:

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