IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JOHN B. THOMPSON,

Plaintiff,

v. Case No. 07-21256 (Judge Adalberto Jordan)

THE FLORIDA BAR,
DAVA J. TUNIS, FRANK ANGONES,
and JOHN HARKNESS,

Defendants.

PLAINTIFF'S RESPONSE TO BAR DEFENDANTS' MOTION TO DISMISS

COMES NOW PLAINTIFF, on his own behalf, and files this response to The Florida Bar's motion to dismiss the ***verified*** third amended complaint herein, stating:

PREFACE

Proper pleading practice requires that any defendant, in moving for the dismissal of any complaint, must limit himself to the four corners of the complaint, and assume as true the facts asserted therein. Assuming the asserted facts to be true, a defendant must limit himself to the legal sufficiency of the complaint. Then, if the plaintiff survives the motion to dismiss, the facts can be disputed and litigated.

Disturbingly, the defendants not only have failed to do that in their respective motions to dismiss, but they have also asserted therein their set of "facts" many of which are demonstrably false. This is not only improper pleading practice, it constitutes a breach of ethics by some of these lawyers who have asserted to this court "facts" which they know or should know to be false, as will be seen, *infra*. This improper conduct by record counsel herein is an index of how desperate The Bar is to avoid *any* judicial review of their illegal and unconstitutional activities. It is also further proof of yet

another layer of "bad faith" by The Bar which alone cries out for the need of federal judicial review.

THE BAR'S MOTION TO DISMISS

The Florida Bar, Bar executive director John Harkness, and Bar president Frank Angones have all moved to dismiss the complaint herein. They are referred to in their motion as Bar defendants, and that appellation if fine with plaintiff and will be utilized herein, along with The Bar.

The Bar defendants commence their motion with the assertion that there is "no subject matter jurisdiction for federal court review" and that the complaint "fails to state a claim upon which relief can be granted." Plaintiff will deal with those two assertions in detail, *infra*, as did the Bar defendants later in their memo. Plaintiff begins his response to their motion and memo by noting what is stated immediately under their "Memorandum of Law" heading on page 2 thereof. The Bar claims thereat that The Bar has "the authority to enforce the rules of professional conduct and to discipline persons practicing within the State of Florida that violate such rules." Fair enough as far as that assertion goes.

However, this "authority to discipline" is a means to an end, as The Bar itself more grandly acknowledge in its own Rules, for example:

Rule 1-2: PURPOSE

The purpose of The Florida Bar shall be to inculcate in its members ***the principles of duty and service to the public***, ***to improve the administration of justice***, and to advance the science of jurisprudence. [emphasis added]

[Updated: 08-01-2006]

It is not mere idle chatter to note that plaintiff's consistent (The Bar would say "obsessive,") identification of the illegal marketing and sale of adult entertainment to children is an acting out of what The Bar itself concluded in 1992 was plaintiff's faith-based activism in serving what he perceived to be the *public* interest. Further, when Thompson has identified the illegal acts and the alleged corruption of a Florida and an Alabama judge, respectively, it has been to "improve the administration of justice." The Bar charges itself, as is seen not only in the above-noted Rule 1-2 but elsewhere with using its powers to *serve the public*. So as we together wade through the latest attempt by The Bar, and others, to punish Thompson's public activism, the court is asked, respectfully, to at least have in the back of its mind this question: Has Thompson harmed the public or has he inconvenienced pornographers distributing their material to children? Answering or at least pondering this question does not require this court, as the court rightly put it at the August 23 hearing, to endorse plaintiff's social agenda. Plaintiff does not seek that and frankly does not welcome it. But when The Bar begins its legal analysis in its Memorandum with what power it has without noting *why* it has that power—to serve the public, not the porn industry—then it opens wide the door to analysis of what it is doing and why it is doing it.

THIS COURT'S ALLEGED LACK OF SUBJECT MATTER JURISDICTION

The Bar defendants assert that the "Eleventh Amendment has been held to apply to equitable relief." The Bar then goes on at its pages 3 and 4 of its memorandum to invoke, ultimately, the authority of the US Supreme Court case of *Middlesex*, 456 U.S. 423 (1982), in which the High Court took a look at whether state bar proceedings could be enjoined by a federal district court. Quite frankly, plaintiff is shocked by The Bar

defendants' obviously *knowing* misrepresentation of this case's holding. *Middlesex*, far from authorizing the dismissal of Thompson's complaint, is powerful authority *against* dismissal. For example:

The court notes that the federal trial court presided over a hearing on plaintiff's requested injunctive relief:

Instead of filing an answer to the charges in accordance with the New Jersey Bar disciplinary procedures, Hinds and the three respondent organizations filed suit in the United States District Court for the District of New Jersey contending that the disciplinary rules violated respondents' First Amendment rights. In addition, respondents charged that the disciplinary rules were facially vague and overbroad. The District Court granted petitioner's motion to dismiss based on Younger v. Harris, 401 U.S. 37 (1971), concluding that "[t]he principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge." App. to Pet. for Cert. 53a-54a. ***At respondents' request the District Court reopened the case to allow respondents an opportunity to establish bad faith, harassment, or other extraordinary circumstance which would constitute an exception to Younger abstention.*** Dombrowski v. Pfister, 380 U.S. 479 (1965). ***After two days of hearings the District Court found no evidence*** to justify an exception to the Younger abstention doctrine and dismissed the federal-court complaint. [***emphasis*** added] *Middlesex* at 429.

Reviewing the Supreme Court's actual ruling in *Middlesex* further, rather than relying upon The Florida Bar's cherrypicked portions thereof, this court is asked to note the devastating finding in the Supreme Court opinion that what was crucial in denying injunctive relief sought by the bar respondent in *Middlesex* was that respondent's right to ***"interlocutory"*** relief from the New Jersey Supreme Court on constitutional issues. Note what the U.S. Supreme Court actually held which distinguishes it from this case before this court:

A divided panel of the United States Court of Appeals for the Third Circuit reversed on the ground that the state bar disciplinary proceedings ***did not provide a meaningful opportunity to adjudicate constitutional claims***. 643 F.2d 119 (1981). The court reasoned that the disciplinary proceedings in this case are unlike the state judicial proceedings to which the federal courts usually defer. The Court of Appeals majority viewed the proceedings in this case as administrative, "nonadjudicative" proceedings analogous to the preindictment stage of a criminal proceeding.[Footnote 7]

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On petition for rehearing petitioner attached an affidavit from the Clerk of the New Jersey Supreme Court which stated that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and that the court would consider whether such a procedure should be made explicit in the Supreme Court rules. On reconsideration a divided panel of the Third Circuit declined to alter its original decision, stating that the relevant facts concerning abstention are those that existed at the time of the District Court's decision. 651 F.2d 154 (1981).[Footnote 8]

Pending review in this Court, the ***New Jersey Supreme Court has heard oral arguments on the constitutional challenges presented by respondent Hinds and has adopted a rule allowing for an aggrieved party in a disciplinary hearing to***

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seek interlocutory review of a constitutional challenge to the proceedings.[Footnote 9]

[***emphasis added]***

The Supreme Court then went on to deny respondent’s request for injunctive relief

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," Gibson v. Berryhill, 411 U.S., at 577, …

Plaintiff herein asks this court, not rhetorically, could it be any clearer, upon reading the immediate above from the opinion of Chief Justice Burger, that the reason the bar respondent was denied injunctive relief was because the New Jersey Supreme Court, before the US Supreme Court heard this case, decided that it would be a good idea to “an

aggrieved party in a disciplinary hearing [the right] to seek interlocutory review of a constitutional challenge to the proceedings"?

Such an "interlocutory review of a constitutional challenge" is precisely what The Bar and the Florida Supreme Court have denied Thompson! For example, the Florida Supreme Court has treated as if it were newspaper to line bird cages Thompson's repeated Petitions for Writs of Mandamus filed with the state's highest court. He has raised therein constitutional challenges to what The Florida Bar is trying to do to him, and the state's highest court, which claims to oversee The Florida Bar, refuses out of hand to entertain these constitutional challenges stating "Come see us when its all over."

Further, in the *Mason v. The Florida Bar* case found at WL 305483, bizarrely cited by The Bar's record counsel herein not only shortly after the August 23 hearing but also in its Memorandum filed yesterday, the federal court holds, in this case in which Greenberg Traurig represented The Florida Bar 1) that the Bar respondent did not need a federal court's injunctive relief because the respondent had a right to have his constitutional arguments heard by the grievance committee, and more importantly, by The Florida Bar's Board of Governors *before* proceedings went further.

Thompson has for *three years* asked to exercise his *right*, enunciated in *Mason*, to assert and argue his *constitutional defenses* before his grievance committees, before the Board of Governors, and before the disciplinary referee, Ms. Tunis, a defendant herein. ***THOMPSON HAS BEEN DENIED IN EVERY INSTANCE HIS RIGHT TO THIS INTERLOCUTORY REMEDY AS TO HIS CONSTITUTIONAL RIGHTS THAT MIDDLESEX SETS FORTH IS CRUCIAL TO THE DENIAL OF INJUNCTIVE RELIEF BY THE FEDERAL COURT***.

With no disrespect intended for the opposing parties and their counsel, how can The Bar's and the Bar defendants' counsel, *in good faith*, cite *Middlesex* as the basis for denying Thompson federal injunctive relief when it screams out that he is entitled to it in a situation in which any ***interlocutory*** remedy for a bar's unconstitutional acts is denied?

Note also in *Middlesex* that

> Respondent Hinds contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to attempt to raise any federal constitutional challenge in the state proceedings.

Thompson, by contrast, responded vigorously to The Bar's complaints and he has raised "federal constitutional challenges" from the very first day in August 2004.

Further, note that in *Middlesex* the court finds

> Respondents have not challenged the findings of the District Court that there was ***no bad faith or harassment*** on the part of petitioner and that the state rules were not "`flagrantly and patently'" ***unconstitutional***. Younger, supra, at 53, quoting Watson v. Buck, 313 U.S. 387, 402 (1941). See App. to Pet. for Cert. 50a-52a. We see no reason to disturb these findings, and no other ***extraordinary circumstances*** have been presented to indicate that abstention would not be appropriate.[Footnote 17] [***emphases*** added]

Thompson's Third Amended Complaint, by contrast, is chocked full of allegations of "bad faith" by The Bar. He alleges that he is being harassed for the purposes not of enforcing ethics rules but rather in pursuit of illiberal, unconstitutional "speech codes," the effect of which is to harm the public and protect the porn industry.

"Extraordinary circumstances?" Has Thompson not alleged them? He has alleged that The Florida Bar, both in 1991-1992, and now has sought to pathologize Thompson's faith-based public activism as mental illness and has tied resolution of the "ethics" matters to Thompson's acceding to The Bar's demand, in violation of its own

Rule 3-7.13, to get on The Bar's "Christianity is mental illness" couch. "Circumstances" don't get any more "extraordinary" than that.

The Bar does not have a right, in its zealous advocacy, then, to wildly misrepresent to this court what *Middlesex* says. This is not advocacy, this is prevarication and misrepresentation to the court by lawyers, who have represented this particular Florida Bar for years, know better. The fact is and the law is that *Middlesex* extends the principles in *Ex Parte Young* and makes the case for injunctive relief even in the face of *Younger* (and any other theory) of abstention.

GOOD FAITH BY THE BAR?

Found at page five of the Bar defendants' Memorandum in support of its motion to dismiss is a statement as extraordinary as its assertion that *Middlesex* supports a denial of injunctive relief. Here it is:

"The Bar, in good faith, has only opened, investigated, and where appropriate, closed those complaints."

President Reagan noted that "facts are stubborn things." Here are the facts, which this court must, for purposes of a motion to dismiss, consider to be true as alleged, and in fact they are. They are, not that it matters at this stage, irrefutable:

- The Bar's outside investigator, David Pollack, concluded that the Norm Kent complaints, on behalf of the *Howard Stern Show*, were baseless. What did The Bar do? The Bar, on Ben Kuehne's "fairness" watch, overrode Pollack's finding and kept the Kent complaints going for another two years. In fact, they are still pending, with The Bar's having filed them as part of the formal complaints filed with the Florida Supreme Court earlier this year, which has given the SLAPP-

happy Mr. Kent the opportunity to spread his Gospel around the country that Thompson is unethical. Mr. Kent has recently stated in sworn answers to interrogatories that his complaints are still pending, and they are.

- The Bar now has *unsworn* complaints filed by two judges that The Bar's own Rules state are to be treated as null and void by virtue of their unsworn nature. The Bar couldn't care less.
- The Bar for two years has asserted that Thompson lied about his "colorful disciplinary history" to the Alabama State Bar and to Alabama Circuit Court Judge James Moore, refusing for these two years to answer Thompson's formal requests, through discovery, as to what he failed to disclose. Now Judge Moore has been deposed, and this Judge has admitted that Thompson disclosed "more than you had to disclose" (!) Upon receiving that testimony, The Bar has refused to dismiss that count. How in bloody Hell can The Bar then tell this court that it "where appropriate, closed those complaints"? This is a patent, demonstrable, consequential misrepresentation to this court.
- Further, The Bar, as has been noted *ad nauseam*, Thompson is sure, has demanded repeatedly, in writing, in this disciplinary context and as part of the discipline to be meted out to Thompson, that he submit to The Bar's psych evaluation. Thompson has come forward with a respected doctor's Forensic Evaluation of Thompson (he has lectured The Bar, at its request, about such things) indicating that there is no basis for this concern. Yet The Bar persists with this demand, refusing to comply with its own Rule 3-7.13 as to how this is to be done. How can The Bar, with a straight face, tell this court that it has acted

in "good faith" in this regard? The Bar is holding Thompson, this disciplinary process, and this federal lawsuit hostage to this baseless, hurtful, illegal demand. "Good faith?" Whom is The Bar kidding?

- Thompson need not list other acts of bad faith engaged in by The Bar, which provide a basis for injunctive relief. The Third Amended Complaint is replete with them. However, Thompson would note again the incredible position of The Bar that the one person who has guaranteed every step of the way the "fairness" of these proceedings, cannot be deposed, and in fact interrogatories cannot even be submitted to The Bar about, why he has recused himself, why the Pollack recommendations were overridden, why the demand for a mental exam was approved by him, why Thompson did not get the benefit of a McClain hearing when Kuehne was served with a US DOJ "target letter," etc.

ROOKER-FELDMAN DOCTRINE

Plaintiff is aghast that The Florida Bar would cite this "doctrine" to assert that a federal court cannot enjoin a state bar from doing *anything* illegal or unconstitutional. Not only do *Middlesex* and *Mason* prove otherwise, but a reading of *Feldman* shows that this was a ruling peculiar to which court has appellate jurisdiction in cases coming out of the District Court for the District of Columbia. It is increasingly obvious that The Bar and its attorneys have what is derisively referred to by lawyers as a "brief bank" from which it pulls cases to plug into memoranda regardless of whether they support their legal position or not, as we have seen with The Bar's citing of the *Middlesex* and *Mason* cases. Again, this borders on if it does not in fact cross an ethics line.

PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION?

The Bar defendants assert at page 7 of their memorandum that "Mr. Tomposn does not allege that Florida law precludes him from asserting his federal claims during state court review of the disciplinary proceeding. The Florida Supreme Court's review does provide a meaningful and adequate alternative legal remedy for Mr. Thompson with respect to the disciplinary proceedings."

We have already seen in the discussion of the U.S. Supreme Court's ruling in *Middlesex* that Thompson is entitled to an interlocutory review of Thompson's constitutional challenges to what The Bar is doing. The grievance committee, the Florida Supreme Court, the Bar Governors, and the disciplinary referee have *all* denied him that interlocutory review. *All* of them.

Further, the semantic cleverness of The Bar's record counsel is really getting to be a bit much. The issue is not that "Mr. Thompson does not allege that Florida law precludes him from asserting his federal claims during state court review." The issue is whether ***The Florida Bar*** has precluded him from that timely review! Of course Thompson is entitled to due process, both procedural and substantive, every step of the way, and he is entitled to it ***now*** not when The Bar is done shredding his rights. He is entitled to it as a matter of state and federal law. That is precisely the point. But The Bar is denying Thompson that legal right.

Here is a perfect example of how The Bar is doing this. Florida has what is called its Religious Freedom Restoration Act, FSA 761.01. This law, held constitutional, states that "2) A person whose religious exercise has been burdened in violation of this

section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."

The Bar has tied resolution of these "disciplinary" matters to its demand that he be assessed as to his mental health. The Bar is doing this, despite a formal Bar finding over a decade ago, that Thompson does what he does "in acting out his Christian faith." The recent Forensic Evaluation by Dr. Wunderman says the same thing.

Whether The Bar or this court agrees with that assessment of what Thompson does or not, Thompson is *entitled, as a matter of legal right, under FSA 761.01* to at least a hearing on whether The Bar, in seeking to punish and also pathologize Thompson's faith-based activism, is doing so in violation of FSA 761.01.

When Thompson has stood before Bar Referee Tunis and asked for a hearing on that very issue, she has smiled at looked at Thompson as if he just exited from a spaceship from another galaxy. Whether Ms. Tunis likes it or not, Thompson is entitled to a hearing now, not later, as to whether The Bar is violating FSA 761.01 in its pursuit of his faith-based efforts. He is entitled to that hearing now, and then to an interlocutory appeal of any adverse ruling, because of what *Middlesex* holds is the proper exercise of federal judicial power to enjoin a state bar proceeding that has gone off the rails in denying such an interlocutory review of a *constitutional* issue. The "free exercise of religion," the last time the undersigned read the US Constitution, is in its First Amendment.

So when this Bar tells this federal court that he has has not been precluded from state court review of his federal or constitutional claims he wonders what spaceship from another galaxy they just flew in on. This is disingenuousness that borders on unethical

pleading practice. This is not zealous advocacy. This is knowing lawyerly obfuscation intended to deny Thompson even an evidentiary hearing in this federal court by means of a clever motion to dismiss that is too clever for its own good.

At the end of page 7, defendants assert Thompson has an "adequate opportunity for review." Hogwash. Thompson is entitled to that interlocutory review now, in light of The Bar's bad faith, the extraordinary circumstances of The Bar's attempt to declare mentally ill this Christian, and the unconstitutionality of certain Rules, on their face and/or in their application to Thompson. See *Middlesex.*

PLAINTIFF FAILS TO STATE A CLAIM FOR DECLARATORY RELIEF?

With all respect for this court, and with utter dismay at the willingness of The Bar defendants, knowingly, to misrepresent the law and the facts to this court, this portion of the Memorandum may take the cake.

The Bar begins by stating that there must be "a concrete controversy" rather than a mere "abstract question" and "that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity." The Bar's implication, then, is that this is just Thompson looking for a philosophical spat.

The Bar has told Thompson that he will be disbarred unless he agrees to plead guilty to its "speech code" violations and submit to a psych evaluation. This is a *real controversy that affects the rest of Thompson's life.*

Quite forthrightly, when Thompson reads The Bar's assertion that this is not a real and "present controversy," then he wonders what a *real controversy* would look like. Would it involve The Bar's sending people to his home to rifle through his sock drawer? The suggestion by The Bar that this is simply, to quote Shakespeare nothing but "sound

and fury, signifying nothing" makes Thompson wonder who is out of touch with both the Constitution and reality?

If there is any doubt, The Bar concludes its argument in this regard, near the bottom of page 9, with the absolutely absurd assertion that "there is no substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant he issuance of a declaratory judgment." The Bar is right. We're all just one big happy family engaged in a meaningless spat over who gets the channel changer.

NEITHER RULE 4-8.2 (a) NOR 4-8.4 (d) VIOLATE THE FIRST AMENDMENT

The Bar maintains in its memorandum at this juncture that Bar Rules that prohibit a lawyer from criticizing a judge or an opposing party or their counsel are not unconstitutional on their face nor in their application to Thompson.

Well, *Fieger v. Michigan Supreme Court* says otherwise. *Fieger* says that a lawyer does not give up his First Amendment rights when he becomes a lawyer.

But lets assume that The Bar has the right, under such Bar Rules, to punish a lawyer who is uttering demonstrable falsehoods or statements made in reckless disregard of the truth. Did this court know (of course it did not know) that the Alabama State Bar has now executed sworn answers to interrogatories that it has not found that Thompson has said *anything* untrue about Judge Moore? The Florida Bar complaint counts that arise out of what Thompson said about Judge Moore that simply annoyed him. When Thompson has asked The Florida Bar, for two years, what he said about Judge Moore that were not true, The Florida Bar refuses to answer. Why? Because it either knows that what Thompson said was true or it simply does not want to "go there." It wants to

take the convenient position that its cherished "judicial independence" depends upon slapping down lawyers critical of what certain judges do unless, of course, one's name is Roy Black.

But it gets worse, and now we come to a knowing misrepresentation to this court by record counsel Barry Richard. If one reads pages 9, 10, and 11 of The Bar defendants' Memorandum, one sees that The Bar is saying to this court that these two "speech code" Rules are not unconstitutional because they do not seek to punish "constitutionally protected speech." The Bar says just that in the middle of page 10 when discussing the *Harper* case. So The Bar is telling this federal court that it is simply trying to punish Thompson not for telling the truth but for telling something other than the truth, since falsehoods are not "constitutionally protected speech."

Well, upon receiving this remarkable memorandum from The Bar, Thompson wrote both Mr. Richard and The Bar's prosecutor, Sheila Tuma, and gave them one last chance. He asked them to identify (this was roughly the tenth time this was requested) what Thompson said about Judge Moore and about Miami-Dade's Judge Ronald Friedman that was not true and which was thus not protected by the First Amendment as truthful speech. Both Ms. Tuma and Mr. Richard have refused to respond to that question. Mr. Richard has written and said "It's not clear to me what you are complaining about…" It's quite clear.

Here is The Bar telling this court that it seeks to punish Thompson for untruths about judges a) when it won't tell him what the untruths are, and b) when it is confronted with the Alabama State Bar's sworn admission that Thompson has not been found to have said anything untrue about Judge Moore. Thus, the suggestion that The Bar is not

trying to punish Thompson for truthful, First Amendment-protected speech is a falsehood.

Let's take a look at the *Harper* case onwhich The Bar has substantially hung its effort to defeat even a hearing on plaintiff's motion for a declaratory judgment. It is attached hereto, since it is an unpublished opinion, so that the court can see what it *really* says, as opposed to what The Bar says it says.

First of all, *Harper* deals with speech that was in the form of a campaign advertisement by a sitting Ohio appellate court judge running for a seat on the Ohio Supreme Court. Apparently The Florida Bar "forgot" to note that this was a "speech code" pertaining not to a mere lawyer but to a judge. One can search The Bar's Memorandum of law in vain for a mention that this was a case about Judicial Canons of Conduct and not about speech codes for lawyers. That is a hugely significant difference, given the higher standard to which judges have historical been held.

However, as the court can see by a reading of the attached *Harper* decision, the Sixth Circuit Court of Appeals holds that the judicial candidate's speech was "false and misleading." This is in stark contrast to The Florida Bar's attempt to punish Thompson for truthful speech. See *Harper* at page 5 of the attached.

Further, now that we actually have *Harper* to read rather than The Bar's mischaracterization of the holding therein, note that the court states that the "judicial speech code" rules sought to be enforced against do not seek to punish truthful statements by judicial candidates that are "done fairly, accurately, and upon facts, not false representations." *Harper*, page 3.

Again, The Bar seeks to punish Thompson for vexatious comments and speech and writings about judges, opposing parties, and opposing counsel regardless of whether they are true or not. The Bar uses Rule 4-8.4 (d) to assert, for example, that annoying communications by Thompson "impede the proper administration of justice" even if true. *Harper* specifically states, unlike what The Florida Bar wants this court to believe it says, that truthful speech by even judicial candidates is fully protected First Amendment speech. The Bar, if it is to punish a mere lawyer such as Thompson, must assert that Thompson has communicated untruths or communicated recklessly about others. I cannot do so, apparently, as Thompson has been asking, as noted above, for three years what he has said that is false.

Finally, as to *Harper,* The Florida Bar apparently "forgot" to cite to this court not only the fact that *Harper* pertained to a judge but that the U.S. Supreme Court handed down a case, *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), ***a full five years after Harper.*** Thompson reads *White* to say that it severely restricts the application of *Harper* in any fashion to limit the speech of any judge running for office.

What The Florida Bar has done in hanging its anti-declaratory judgment hat on *Harper* by not disclosing to this court that it pertained to judicial speech codes, that it was five years prior to *White,* that it ruled that truthful speech is protected speech, no matter how noxious, and that The Bar refuses to tell Thompson that he has engaged in untruthful speech and that in fact the Alabama State Bar says he has not, serves to show how desperate The Bar is to avoid any review by anyone of what it is doing to Thompson.

FLORIDA IS AN ARM OF THE STATE OF FLORIDA?

There is no doubt that The Florida Bar got a chuckle out of Thompson's assertion that The Bar is a mere professional guild as opposed to an arm of the State of Florida. Let's take a look, however, at the four-prong test in *Manders* as to what makes an entity a state entity:

First, there is no question that state law defines The Bar as a state governmental entity. This first prong is surely helpful to The Bar, as a law passed by the Florida legislature and signed into law that proclaimed the Earth to be the fourth planet from the Sun would at least raise a presumption that it is but that would not revoke the fact that it is not. As to the second prong, as to "what degree of control the State maintains over the entity," we start to get into dangerous territory for The Bar. Is there any control of any kind by the other two branches of government—the legislative and the executive—over The Florida Bar? Of course not. Bar Governors are state officials unelected by the people and unappointed by the executive. There is in fact checks-and-balances control over the Florida Supreme Court by the other two branches of government from which The Bar is completely insulated. It may be under the supervision of the Supreme Court, but it is completely insulated from any democratic or governmental impulse exerted by the Governor or the House or Senate.

Now as to the third prong: "Where the entity derives its funds." This is from The Bar's own web site at www.flabar.org:

> Article V, Section 15 of the Constitution of the State of Florida gives the Supreme Court of Florida exclusive and ultimate authority to regulate the admission of persons to the practice of law and the discipline of those persons who are admitted to practice. The Court performs those official functions through two separate arms: the Florida Board of Bar Examiners , which

screens, tests and certifies candidates for admission to the practice; and The Florida Bar, the investigative and prosecutorial authority in the lawyer regulatory process. ***Neither of these two agencies, nor any of their functions, is supported by state tax dollars.***

Wow. The Bar is funded solely by its 81,000 members' dues. So a "state entity" not funded by the state is a "state entity?" By now, The Bar should be dismayed that it brought up *Manders.*

Finally, as to the fourth prong, all of which must be satisfied for an entity to be deemed a state entity, it asks "Who is responsible for judgments against the entity?" If the court has followed The Bar's reasoning from the inception of this case, The Bar is quite literally not vulnerable to judgments by anyone or anything against it. It is literally, to follow The Bar's reasoning, "above the law." The notion that a "state entity" is above the law simply because it says so but is a governmental entity nevertheless is indeed an example of use "syllogisms, converse deductions, and presumptions" with which derisive language The Bar on page 13 seeks to ridicule plaintiff.

Thompson's point is a very simple one: If The Bar is going to claim to be a state or governmental entity, with all of the power and majesty of being just that, then it had best start acting like a governmental entity that is bound by the Constitution of the United States. Here is a "Bar" that thinks and acts like it can strip a lawyer of his First Amendment right to tell the truth about a corrupt judge, an in doing so exercise an arbitrary, Taliban-like prerogative that no other "governmental" entity has.

The Florida Bar states on page 12 of its Memorandum that "If this Court chooses to analyze whether or not the Florida Bar is an arm of the stae by considering all four *Manders* elements, Defendants are confident that this Court would reach the conclusion

that The Florida Bar is an arm of the state." In fact, The Bar fails to satisfy three of the four prongs of *Manders.* Plaintiff more than appreciates the analysis.

This court, then, in applying *Manders,* should find either that it is not a state entity or that, if it is going to claim to be, then it should start acting like one under this country's constitutional view that government is to be limited and that, in Lincoln's formulation, government is to be "of the people, by the people, and for the people."

As it now stands, The Bar is insulated completely from the other two branches of government. It is, according to its own formulations, insulated from any judicial review and conrol, other than by its adoring parent, the Florida Supreme Court. Finally, it is funded by its members and not by the state.

It looks like a guild to me.

PLAINTIFF FAILS TO PROPERLY PLEAD A 42 USC 1983 ACTION

The Bar states in this remarkable section of its Memorandum commencing at page 13 that because he enjoys only a "privilege" to practice law, that he has no right to practice law, and thus his disbarment does not deny him any right guaranteed by the United States Constitution.

This is quite a remarkable formulation of a citizen's constitutional rights. It is akin to suggesting to this court that because he has no state-guaranteed "right" to drive a car that the State of Florida can strip him of his driver's license without due process, in retaliation for his political speech, and in furtherance of some agenda that has absolutely nothing to do with public safety or public welfare.

Where in the world, quite seriously, does The Florida Bar find lawyers to make arguments like this? The issue is not that Thompson has a right to practice law. The

issue is that HE HAS A RIGHT TO DUE PROCESS OF LAW, TO EQUAL PROTECTION UNDER THE LAW, AND TO EXERCISE FREEDOM OF SPEECH AND RELIGION EVEN THOUGH HE IS A LAWYER!

Good grief. Nobody has a "right" to be a judge either, but the *Harper* decision, which The Florida Bar inaccurately, deceptively, and foolishly cited to this court states that even a judge, who is held to a high standard of conduct, is allowed to speak the truth and cannot be punished for speech that is merely inconvenient to somebody.

Thompson for three years has been asking this Bar what he has said or done that is unethical, untruthful, violative of any Bar Rules so that he can know what in the world The Bar is concerned about that he has done, and The Bar, to this day, refuses to tell him. The only conclusion that can be drawn is that The Bar simply finds Thompson and his activist Christian faith, annoying and thus punishable.

It has gone even beyond that. Yesterday, as he has ten times previously, Thompson has asked The Bar to tell him what the factual bases are for The Bar's demand that he has his head examined. The Bar refuses, again, to say. These, with all respect to the court and to The Bar, are not people looking out for the public. They are interested solely in demonizing their opponents and flexing their considerable muscle, not matter how silly they look doing so.

COMPLAINT FAILS TO STATE A CLAIM UNDER THE FIRST AMENDMENT

The Bar claims that Thompson has "failed to plead facts sufficient to show" that the Bar defendants have violated his rights under the First Amendment. Nonsense. Since August 2004, The Florida Bar has wasted thousands of hours of Thompson's time and what The Bar finds to be his considerable energy in defending himself against Bar

complaints based solely upon the exercise of his First Amendment speech and religion rights. The Bar has not asserted, with any facts, a single thing that Thompson has done that is unethical in any meaning of the term.

His letters to Governor and President Bush have spawned Bar complaints by Tew Cardenas in order to protect Al Cardenas' illicit lobbying relationship with both politicians and to protect the criminal airing of indecent material on the *Howard Stern Show*. Thompson undertook this public activism against illegal shock radio on behalf of no client but instead on behalf of the public good and on behalf of kids who do not have an advocate in this regard. The Bar has the unmitigated gall during what Bar President Kelly Overstreet Johnson called her Bar's "Year of the Child" to orchestrate the harassment of Thompson, through Bar complaints, in retaliation for his efforts to protect, *pro bono*, children. This is not just hypocrisy by The Bar and its self-styled, self-righteous, illiberal "Guardians of Democracy." It is the arrogant use of what they consider "governmental authority" to chill, punish, hector, harass, infringe upon, and just generally screw around with someone who does not share their "politically correct" agenda.

This abuse of "governmental power" to punish a human being for pursuing an agenda given him by God, and not by the anti-God Florida Bar, is just the kind of nonsense that the federal civil rights laws were fashioned to remedy.

Florida is a Southern State with a very long historical tradition of denying to citizens who did not look like or act like what the powers that be the same constitutional rights that they claim for themselves.

"Mr. Thompson failed to plead facts sufficient to show that…The Florida Bar violated his rights under the First Amendment"? He plead facts sufficient for a U.S. Attorney with intestinal fortitude to throw the whole lot of these Guardians of Democracy into jail for violation of 18 USC 242.

CONCLUSION

The Florida Bar and the Bar defendants seek, by their motion to dismiss, to deny plaintiff even a hearing on the relief he seeks. The factual allegations contained in the ***Verified*** Third Amended Complaint must be assumed to be true. Applying those alleged facts to the law as it now exists, Thompson is entitled to proceed to a hearing on the appropriateness of his requested relief.

I HEREBY CERTIFY that the foregoing has been served electronically upon record counsel herein this 25th day of September, 2007.

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