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THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

IN THE MATTER OF MARLA ANN BROWN, Member No. 140158, A Member of the State Bar	**BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION**

[1] Counsel would like to thank Gary S. Edinger, Esquire, Gainesville, Florida, who assisted with this brief.

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INTEREST OF *AMICI CURIAE*

First Amendment Lawyers Association ("FALA")

The First Amendment Lawyers Association (FALA) is a not-for-profit, nationwide association of hundreds of attorneys devoted to the protection of free expression under the First Amendment who represent businesses and individuals engaged in constitutionally protected expressive activity. For more than a half-century, FALA's members have advocated against governmental censorship.

FALA often appears as *amicus curiae* in the Supreme Court and other appellate courts in cases in which First Amendment rights are at stake, and its members have been involved in many of the landmark cases that helped define and strengthen protections for freedom of expression. (*See e.g. Ashcroft v. Free Speech Coalition, Inc.* (2002) 535 U.S. 234 (successful challenge to Child Pornography Prevention Act, argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803 (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and former president Robert Corn-Revere).) In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues pertaining to the First Amendment. (*See e.g. City of Littleton v. Z.J. Gifts D-4, LLC*, 2004 WL 199239 (Jan. 26, 2004) (*amicus* brief submitted by FALA); *United States v. 12,200-ft Reels of Super 8mm Film* (1972) 409 U.S. 909 (order granting FALA's motion to submit *amicus* brief).)

FALA has a direct interest in the conduct of this disciplinary proceeding as more than a dozen of its members are residents of California and many others are either licensed to practice in the State or appear on a *pro hac vice* basis in California courts. Given the nature of their advocacy and of their clients, FALA attorneys practicing in California are likely to self-censor their remarks on public media and elsewhere to avoid the kind of discipline Ms. Brown faces in this proceeding. FALA is also concerned that the discipline of an attorney for what amounts to pure speech, arguably of a political character, would have a chilling effect on the speech of other professionals as well as that of

the general public. FALA seeks to ensure that speech which falls outside the narrowly regulated categories of "incitement" or "true threats" is allowed to thrive free of the specter of censorship.

The Foundation for Individual Rights and Expression ("FIRE")

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization. FIRE's mission is to defend and sustain the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty. FIRE educates Americans about the importance of these inalienable rights, promotes a culture of respect for these rights, and provides the means to preserve them. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and *amicus curiae* participation. (Order Granting Prelim. Inj. Mot., *Flores v. Bennett*, Case No. 1:22-cv-01003, __ F. Supp. 3d. __, 2022 WL 9459604 (E.D. Ca. Oct. 14, 2022); (Order Granting Prelim. Inj. Mot., *Novoa v. Diaz*, Case No. 4:22cv324, __ F. Supp. 3d. __, 2022 WL 16985720 (N.D. Fl. Nov. 17, 2022); (Order Granting Prelim. Inj. Mot., *Volokh v. James*, Case No. 1:22-cv-10195, __ F. Supp. 3d. __, 2023 WL 1991435 (S.D.N.Y. Feb. 14, 2023).)

FIRE attorneys and staff speak nationwide about a variety of free speech-related topics touching on hot-button issues like police brutality, diversity initiatives, and book banning. For that reason, FIRE is concerned about the potential abuse of attorney disciplinary rules as a tool to suppress attorney speech on unpopular or controversial viewpoints. FIRE attorney Daniel Ortner lives and practices in California and several additional FIRE attorneys are barred in the state or appear on a *pro hac vice* basis in California Courts.

INTRODUCTION

The California State Bar seeks to punish a member of the Bar for engaging in protected political speech in the form of social media posts. That political speech was fully protected by the First Amendment. It was not focused on any identifiable person and did not advocate for any

imminent lawless action in any specific context. It was merely the kind of speech one may hear every day on the Internet and throughout the country.

The speech at issue concerned matters of interest to Ms. Brown which had nothing to do with the courts or the administration of justice. Her comments did not touch on any pending litigation; did not affect any client of hers; and did not reference any other attorneys. The posts were purely private expressions concerning public events of national interest. While the Bar may wish to set higher aspirational standards for its professionals, there is no "lawyer exception" to the First Amendment.[2]

The Supreme Court has made clear that the First Amendment requires society to tolerate a great deal of hurtful speech in order to preserve the fullest expression of those constitutional protections:

> "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 574.
> …
> "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry* (1988) 485 U.S. 312, 322 (some internal quotation marks omitted).

(*Snyder v. Phelps* (2011) 562 U.S. 443, 458.)

These are the principles for which FALA's members, including its California members, and FIRE attorneys litigate to defend on a daily basis. It is appropriate for FALA and FIRE to remind

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[2] "[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" (*Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (2018) ___U.S.___ [138 S.Ct. 2361, 2371–2372].) Indeed, FALA member Dominic Gentile established precedent upholding the First Amendment right of attorneys to speak without the threat of Bar discipline. (See *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030.)

this Court that it is obligated to honor these First Amendment principles even in difficult cases such as this one.

SUMMARY OF THE ARGUMENT

However unwise, untimely, ill-considered, or unpopular Ms. Brown's tweets may have seemed to some, they were statements of pure political expression by a private citizen acting in a private capacity. The Bar cannot succeed in this matter unless it can show that some characteristic of that expression placed it into a category of unprotected speech. Those categories are limited and fixed in number and intentionally narrow, addressing such matters as defamation and objectively false commercial speech. (*See generally United States v. Stevens* (2010) 559 U.S. 460, 468–69.) The only category even remotely applicable to these facts is imminent incitement to riot.[3] However, it should be obvious on this record that Ms. Brown's speech did not constitute incitement. It is questionable whether one can incite anyone to do *anything* through anonymous posts on the Internet to strangers hundreds of miles away. Certainly, there was no evidence that any violence actually ensued, or was likely to ensue, as a result of these posts.

Regardless, the tweets lawfully advocate the use of force—in a political context—concerning a matter of public concern. They are protected by the First Amendment. (*See Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").)

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[3] Ms. Brown's tweets did not intentionally threaten any identifiable persons with harm so the exception for "true threats" cannot apply here. (See *Counterman, supra.*) Likewise, there can be no realistic charge based on the obsolete "fighting words" doctrine. Even assuming that some level of violence was advocated, there was no one physically present when the tweets were posted and the messages were not directed to any particular person. As the Supreme Court recently observed: "This Court has not upheld a conviction under the fighting-words doctrine in 80 years." (*Id*. at 2116, n.4.)

In the marketplace of ideas, the public has an interest in hearing those members of the California Bar wishing to opine on political matters of public interest. Although many may disagree, such diverse viewpoints offer a different perspective on issues those in the majority might otherwise never have contemplated. This can lead to vigorous debate or even new approaches not yet considered. Regardless, *amici* have an interest in ensuring that members of the California Bar – in addition to attorneys in other states – are not punished for taking unpopular but lawful stances on issues of public concern. As stated in previous Supreme Court jurisprudence, the state should remain neutral in the marketplace of ideas.

ARGUMENT

A. The Tweets Are Protected by the First Amendment.

Ms. Brown's tweets are hyperbolic statements that "Antifa," "thugs," "looters," and "protesters" "need to be shot" or "should be shot." Respondent's Notice of Motion and Motion to Dismiss Notice of Disciplinary Charges: Memorandum of Points and Authorities ("Respondent's Motion"), at pg. 3, ln. 8–10 (responding to a tweet about "overrun by Antifa," stating "Can't wait. At least a reason to shoot them."), *id.* at ln. 16– 18 (in response to comments about "thugs" and "looters," "They need to be shot."), *id.* at ln. 20–22 ("Yes and they should be shooting the looters."), *id*. ("They should be shot. And if it was your business you'd pull the trigger."), *id.* at pg. 4 ln. 3–4 ("Shoot the protesters."), *id.* at ln. 5–6 (replying to two other Tweets, "Let's burn your house."). Another tweet insulted a television commentator and stated his house should be burned down. *Id.* at ln. 7–9 (in response to a television commentator, "you've hit a new low in stupidity. Let's go burn your house down with you in it."). Under *Brandenburg*, *supra,* 395 U.S. 444, her tweets are protected by the First Amendment. Nothing in this record comes close to the sort of facts that must be shown to demonstrate incitement to imminent lawless action.

In *Brandenburg*, a speaker at a Ku Klux Klan rally urged members of the KKK, some of whom were armed, to march to Washington D.C. and on the way to take some "revengeance" on African-Americans and Jews. (395 U.S. at 446.) The State charged him with violating an Ohio criminal statute that prohibited "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." (*Id.* at 445.) The Supreme Court invalidated the conviction, holding that no state may "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or product such action." (*Id.* at 448.) As the *Brandenburg* court pointed out, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as *preparing a group for violent action and steeling it to such action*." (*Id.* citing *Noto v. United States* (1961) 367 U.S. 290, 297–98 (emphasis added); *see also Counterman v. Colorado*, (2023) ___U.S.___ [143 S. Ct. 2106, 2115] ("But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder.").)

Here, while Ms. Brown's tweets hyperbolically advocate the use of force, more is required to punish her for incitement. In *Brandenburg*, the audience was armed. (*Brandenburg at* 447.) A live speaker who a crowd was assembled to hear encouraged the gathered mob to "bury" or take "revengence" against certain segments of the population in the course of an already planned march to the Capitol. (*Id.* at 446–47.) The Court found the speech did not rise to the level of incitement and was thus protected by the First Amendment.

Unlike in *Brandenburg*, there was no armed mob physically present to hear Ms. Brown speak or be swayed by her tweets. Nor was there evidence her audience was armed, or that any violence ensued from Ms. Brown's tweets. The remarks, like those in *Brandenburg*, simply employed "political hyperbole" that was unlikely to incite actual, imminent violence. (*See also*, *e.g.*, *Watts v. United States* (1969) 394 U.S. 705, 708 (holding that remarks about shooting the President were

"political hyperbole" and not a true threat).) Ms. Brown's speech cannot fairly be said to be "preparing a group for violent action and steeling it to such action." (*Brandenburg,* 395 U.S. at 448.)

The Supreme Court's decision this Term in *Counterman* doesn't change the foregoing analysis—if anything, it reinforces it. The Supreme Court has long cautioned that courts must "draw the line between incitement and 'political rhetoric lying at the core of the First Amendment,'" like Ms. Brown's tweets. (*Counterman*, 143 S.Ct. at 2137) (Barrett, J., dissenting) (quoting *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 926–927).) Two of Ms. Brown's tweets were responses to messages sent by others: One suggested to Ms. Brown "Let's burn your house." (Respondent's Motion, pg. 4.) Another was in response to a tweet by television commentator Joe Scarborough that read: "Let's go burn your house down with you in it." (*Ibid.*) The tweet started with "Omg Scarborough you've hit a new low in stupidity." (*Ibid.*) These are not true threats; the First Amendment requires more. Only "'serious expression[s]' conveying that a speaker means to commit and act of unlawful violence" may be lawfully proscribed. (*Counterman*, *supra*, at 2114.)

In *Counterman*, the Defendant's threats actually caused fear in the targeted person. Here there was no such evidence produced by the State that Ms. Brown's tweets caused fear in any protestor – thereby disrupting their activities. This militates against a finding of a serious threat. What is more, the State of California would have to produce evidence of "awareness on" Ms. Brown's part "that the statements could be understood that way." (*Id.* at 2119.) No such evidence was offered.

The tweets may have struck some as inadvisable, untimely, and unwise. But they are protected by the First Amendment.

B. To Facilitate a Robust "Marketplace of Ideas," Today's Unpopular Political Rhetoric Should Receive Equal Protection from Censorship.

The result for which FALA and FIRE advocate in this case is necessary to maintaining a marketplace of ideas among attorneys licensed in the State of California. In 1919, the marketplace of ideas concept was set forth by Justice Holmes:

> But when men have realized that time has upset many faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

(*Abrams v. United States* (1919) 250 U.S. 616, 630 (Holmes, J., dissenting); *see also, e.g., Federal Communications Commission v. Pacifica Foundation* (1978) 438 U.S. 726, 745–46 ("For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."), and *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 50 ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").) "[A]ny restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited". (*Pleasant Grove City v. Summum* (2009) 555 U.S. 460, 469.)

The peaceful airing of conflicting opinions is a key basis on which the Supreme Court has justified robust protection of the free flow of ideas. This is particularly true of political expression. (See *Meyer v. Grant* (1988) 486 U.S. 414, 422 ("The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'").) Earlier, Justice Douglas explained the rationale behind this reasoning:

> Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps society from becoming stagnant and unprepared for the stresses and strains that work to tear civilizations apart.

(*Dennis v. United States* (1951) 341 U.S. 494, 585 (Douglas, J., dissenting); *see also Kleindienst v. Mandel* (1972) 408 U.S. 753, 780 (Marshall and Brennan, dissenting) ("The First Amendment represents the view of the Framers that 'the path of safety lies in the opportunity to discuss freely

supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones' — "more speech.").)

In this case, Ms. Brown tweeted in the context of a beehive of political rhetoric. All of her tweets responded to other tweets on an issue of public concern: violent rioting or protesting that destroys life and property. They were not intended to be, nor could they be construed as, true threats given the political undertones, the issues discussed, and the ironic or sarcastic tone of many of the tweets (such as the use of the term "OMG"). (*See e.g.* Respondent's Brief at pg. 3, ln. 8–10 (responding to a tweet about "overrun by Antifa," stating "Can't wait. At least a reason to shoot them.").) As in all matters pertaining to speech, context matters. (*See Pacifica Foundation*, 438 U.S. at 742 (stating that "indecency is largely a function of context—it cannot adequately be judged in the abstract.").) In context, Ms. Brown's tweets were expressions—however unpopular—of how she thought "looters" should be responded to: with deadly force.

Members of the California bar invariably have opinions on issues of public concern in other contexts, as well. They can range from the advisability of the "three strikes" law, the constitutionality of COVID restrictions, the ramifications of stand-your-ground laws, or countless other controversial topics. Private social media companies may choose to moderate political speech of this nature. But the First Amendment demands that, as a *government* actor, the State of California must reject such censorship in dealing with members of the Bar. To hold otherwise would be to gut the First Amendment of its primary purpose: protection of political speech.

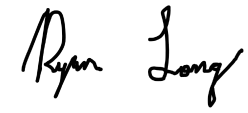
CONCLUSION

Regardless of one's view of the tweets at issue, they did not rise to the level of incitement under applicable Supreme Court First Amendment jurisprudence. This conclusion is all the more inescapable considering the fact that none of the recipients of Ms. Brown's tweets were shown to be armed, and no violence ensued.

Finding in Ms. Brown's favor will also preserve the marketplace of ideas. Because a ruling against Ms. Brown would be detrimental to the pressure valve afforded by this marketplace, FALA and FIRE respectfully submit that the court should overrule the charges against her and that she be discharged from these disciplinary proceedings.

Respectfully submitted,

Dated: July 28, 2023



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