UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE DIVISION)

CHOOSING JUSTICE INITIATIVE & CAROL DAWN DEANER,

Plaintiffs,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESEE, and JUDGE CHERYL A. BLACKBURN, in her judicial capacity,

Defendants.

Case No. 3:20-cv-00745
Judge William L. Campbell Jr.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

In Tennessee, as elsewhere, people who can afford a criminal-defense lawyer often receive better representation than those who cannot. Plaintiff Carol Dawn Deaner hopes to challenge that fundamental inequity. In 2018, after spending over a decade as Nashville's elected public defender, Deaner founded the Choosing Justice Initiative (C.J.I.), an organization dedicated to improving the quality of representation for poor people charged with crimes in Nashville. Deaner created C.J.I. to vindicate her deeply held belief that all people should have access to high-quality legal representation regardless of their economic status. Through C.J.I., Deaner developed a process by which indigent defendants could choose their own lawyer—as wealthier defendants typically do—instead of having to accept the lawyer assigned to them by the judge in their case. That process requires Deaner to communicate with people dissatisfied with their court-appointed lawyers so that she can hear their stories, advise them of their rights, and assist them in vindicating those rights.

This case concerns Deaner's constitutional right to engage in those communications. In July 2020, Tennessee's Board of Professional Responsibility notified Deaner that, in its view, her communication with a represented defendant violated the State's ethics rules. The Board's position effectively precludes Deaner and C.J.I. from pursuing their mission. And it contravenes long-established Supreme Court precedent recognizing the First Amendment rights of pro bono lawyers to speak and associate with prospective clients for the purpose of pursuing public-interest litigation. Deaner therefore

seeks a preliminary injunction to prevent the Board from instituting disciplinary proceedings against her and silencing her protected advocacy efforts.[1]

BACKGROUND

A. Dawn Deaner and the Choosing Justice Initiative

In Tennessee, a criminal defendant who cannot afford a lawyer is appointed a lawyer by the judge presiding over the defendant's case. *See* Tenn. Sup. Ct. R. 13. That lawyer will be either a public defender or a private attorney selected by the judge presiding over the case. If the judge chooses to appoint a private attorney, that attorney's compensation is typically capped at an amount well below the market rate.

The shortcomings of this system are well known. Deaner Decl. ¶¶ 7–8. Among other problems, the cap on compensation gives private attorneys a financial incentive to accept a high volume of cases and devote only a small amount of time on each case. And, because each judge controls the appointment process in his or her own cases, private attorneys have an added incentive to avoid any advocacy decisions that might challenge or annoy the judge, lest the attorney jeopardizes a chance at future appointments. The flaws with this system are far from theoretical for Nashville's indigent defendants: between 2016 and 2018, indigent defendants who were represented by private appointed attorneys spent nearly twice as long in pretrial detention waiting for their cases to be resolved as defendants who were represented by public defenders. *Id.*, Ex. A (Criminal Justice Planning Statistics).

---

[1] Undersigned counsel conferred with counsel for the Board prior to filing this motion. The Board opposes the motion. As this memorandum makes clear, Deaner and C.J.I. are not pursuing injunctive relief against Defendant Judge Cheryl Blackburn.

Deaner grew intimately familiar with these problems during her tenure as the head of the Metropolitan Public Defender's Office in Nashville, where she routinely fielded calls from defendants frustrated with their court-appointed counsel. Deaner Decl. ¶ 9. In 2018, Deaner left the Public Defender's Office to found C.J.I., a nonprofit aimed at ending wealth-based disparities in Nashville's criminal legal system. *Id.* ¶¶ 9–10. One of C.J.I.'s central goals is to improve access to effective criminal-defense representation for people who qualify for court-appointed counsel. *Id.* ¶¶ 1, 5, 9–10.

To that end, Deaner developed a program at C.J.I. known as the "Choice Lawyer Project," which aimed to offer poor defendants the ability to select their court-appointed lawyer. Deaner Decl. ¶¶ 10-14. The project attempted to replicate, as much as possible, the way people with money hire their lawyers, and was rooted in the idea that free-market principles of choice and competition will raise the quality of services provided, and in turn improve case outcomes and client satisfaction. The project operated by recruiting local lawyers willing to accept appointments under C.J.I.'s choice-of-counsel model. *Id.* To participate, a lawyer needed to commit to providing high quality, client-centered representation, which C.J.I. defined to mean zealous, constitutional representation that empowers clients to make informed decisions about their cases and respects those decisions. *Id.*

B. Deaner's Representation of Ricky House

In September 2019, C.J.I. received a letter from Ricky House, a defendant incarcerated at the Davidson County Jail. Deaner Decl. ¶ 15. House had apparently learned

about C.J.I. from another detainee at the jail, and reached out to express his frustration with his appointed lawyer and to request C.J.I.'s help. *Id.* After reviewing House's letter and the publicly available documents in his cases, Deaner asked a non-attorney C.J.I. employee to meet with House to learn more about his situation. *Id.* Based on the information House shared with that employee, Deaner believed that House's Sixth Amendment right to counsel was being violated. *Id.*

On October 23, 2019, Deaner met with House at the jail to discuss his request for assistance. Deaner Decl. ¶ 16. At that meeting, House executed a limited-scope representation agreement authorizing C.J.I. to represent him on a motion to appoint substitute counsel in his criminal cases. *Id.* The agreement stated that C.J.I. would represent him on the motion free of charge. *Id.* Consistent with the terms of their agreement, Deaner filed the motion, along with her request to enter a limited notice of appearance, one week later. *Id.*

On November 13, Deaner appeared in court for a hearing on House's motion to appoint substitute counsel. Deaner Decl. ¶ 17. At the start of the hearing, however, the presiding judge, Defendant Cheryl Blackburn, stated that she would not be considering the motion. *Id.* She directed the court officer not to bring House into the courtroom for a hearing because "[Deaner] doesn't represent anybody." *Id.*, Ex. B (Nov. 13, 2019 Hearing Transcript), at 2. Judge Blackburn further stated that the motion was improper because she had yet to rule on House's pro se oral request "to represent himself," which he had made at his last court appearance. *Id.*, Ex. B, at 14–15. Judge Blackburn thus focused exclusively

on Deaner's request to enter a limited appearance, which she ultimately denied from the bench. *Id.*, Ex. B, at 19.

At the conclusion of the hearing, Judge Blackburn issued an order from the bench: "[D]o not talk to any defendant in this court unless you get permission from the attorney. I don't care for what. Just do not do it . . . . You do not talk to anyone who is represented by counsel without that attorney knowing you're doing it." Deaner Decl., Ex. B, at 20. Uncertain of the legal basis for that no-contact order, Deaner asked Judge Blackburn to explain the grounds for the directive in a written order.

On November 25, Judge Blackburn issued a written order styled as a denial of Deaner's request to enter a limited appearance in House's cases. *See* Deaner Decl., Ex. C. The order reiterated Judge Blackburn's ban on Deaner "talk[ing] to any represented defendant in this Court unless she obtains permission from their current counsel." *Id.*, Ex. C, at 22. The order also made clear that Judge Blackburn's no-contact directive was based on her reading of Rule 4.2 of the Tennessee Rules of Professional Conduct (RPC). *See id.*, Ex. C, at 20–22. That Rule reads as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Tenn. Sup. Ct. R. 8, RPC 4.2.

Judge Blackburn also filed a separate disciplinary complaint with Tennessee's Board of Professional Responsibility based on her view that Deaner's contact with House violated Rule 4.2. *See* Deaner Decl., Ex. D (Dec. 4, 2019 Letter). House's previously appointed

counsel subsequently filed a complaint with the Board based on the same conduct. *See* Deaner Decl., Ex. E (Dec. 17, 2019 Letter).

C. The Board's Response to the Disciplinary Complaints

On January 9, 2020, Deaner wrote to the Board in response to both complaints. *See* Deaner Decl., Ex. F. She argued, among other things, that she did not violate Rule 4.2 because she was not representing any other party in House's case when she communicated with him. *Id.*, Ex. F, at 7–10. Citing the plain text of the Rule and extensive authority construing it, Deaner explained that Rule 4.2 does not forbid attorneys from communicating with prospective clients who are currently represented by attorneys; rather, she explained, the Rule's purpose is to protect represented parties from overreaching by lawyers *representing other parties in the same matter*. *Id.*

The Board adopted a different reading of the Rule. On July 10, 2020, it sent Deaner a letter stating that, in the Board's view, she "communicated with a represented criminal defendant without the permission of his counsel in violation of RPC 4.2." Deaner Decl., Ex. G, at 1. The Board's letter acknowledged that Deaner's conduct had "caused no harm to the defendant [i.e., House], their counsel, or the proceedings." *Id.* And it further noted that Deaner had "no prior discipline in twenty-four (24) years of practice." *Id.* Based on those factors, the Board offered Deaner "diversion" of both disciplinary complaints. *Id.* at 2. The diversion would result in no formal disciplinary charges being filed against Deaner, provided that she agree to take an approved ethics course and refrain from future contact

with represented defendants. *Id.* Since sending that letter, the Board has not yet instituted any charges or formal disciplinary proceedings against Deaner.

The looming threat of disciplinary sanctions has had an acute impact on Deaner's ability to operate C.J.I.'s Choice Lawyer Project. Deaner Decl. ¶¶ 25–27. In particular, the Board's reading of Rule 4.2 precludes Deaner from advising or offering any assistance to indigent defendants without running afoul of the Rule. *Id.* Deaner firmly believes that her actions did not constitute professional misconduct, and she intends to engage in similar conduct in the future if not forbidden to do so. *See id.* She therefore filed this lawsuit to prevent the Board from sanctioning her for her conduct in violation of her First Amendment rights.

LEGAL STANDARD

"District courts consider four factors in deciding whether to issue a preliminary injunction: '(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.'" *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 615 (6th Cir. 2018) (citation omitted).

ARGUMENT

I. Deaner and C.J.I. are likely to prevail on their First Amendment claim against the Board.

The First Amendment protects an attorney's right to solicit a client for non-pecuniary purposes, such as to pursue litigation to promote social change. The government

may not restrict that right absent a compelling state interest, and any restriction it seeks to impose must be narrowly drawn to advance that interest. Here, the Board's reading of Rule 4.2 cannot satisfy that demanding standard.

A. Because Deaner's and C.J.I.'s communications with prospective clients are protected by the First Amendment, any restrictions on those communications must satisfy strict scrutiny.

The Supreme Court has recognized that lawyers who pursue litigation to vindicate civil liberties are engaged in a form of "constitutionally protected expression." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). These protections encompass not only the act of initiating the litigation itself, but also the antecedent act of "advis[ing] [someone] that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance." *In re Primus*, 436 U.S. 412, 432 (1978) (citation omitted); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977) ("[C]ollective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment."). Indeed, "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Primus*, 436 U.S. at 431.

For that reason, state-bar rules that restrict a public-interest lawyer's ability to communicate with prospective clients are generally subject to strict scrutiny under the First Amendment. Although an attorney's solicitation of a client for *pecuniary* purposes may be regulated as commercial speech, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995), an attorney's solicitation of a client for *ideological* (or other non-pecuniary) purposes is entitled

to greater First Amendment protections.[2] Specifically, a state's effort to restrict attorney communications with prospective clients for non-pecuniary purposes must satisfy the more stringent standard applicable to content-based restrictions on non-commercial speech. Under that standard, the state "must 'prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Thomas v. Bright*, 937 F.3d 721, 733 (6th Cir. 2019) (citation omitted). The Supreme Court has repeatedly invoked that standard in striking down attorney-discipline measures that proscribe attorney communications with prospective clients about civil-liberties litigation.

In *NAACP v. Button*, for instance, the Court struck down a Virginia statute that prohibited all lawyers—including pro bono civil-rights lawyers—from advising people that their "legal rights have been infringed" and referring such individuals "to a particular attorney or group of attorneys." 371 U.S. 415, 434 (1963). As the Court reasoned, "a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear." *Id.* at 435–36; *see also id.* (noting that Virginia's law posed the "gravest danger of smothering all discussion looking to the eventual institution of [civil-rights] litigation"). Given that threat, the Court held that "the serious encroachment worked by [the statute] upon protected freedoms of expression" could be justified only by "a compelling state interest in the regulation . . . ." *Id.* at 438. Virginia's stated interest in "regulating the traditionally illegal practices of barratry,

---

[2] This case does not present the question whether solicitation for purposes neither ideological nor pecuniary is similarly protected because Deaner and C.J.I. seek to solicit clients for indisputably ideological purposes.

maintenance and champerty" did not satisfy that standard, the Court explained, because the state proscribed various communications that were not financially motivated: indeed, the statute reached the conduct of civil-rights lawyers who solicited clients for purely political reasons. *See id.* at 439–44. Given the statute's sweeping breadth, the Court concluded, Virginia could not show that the solicitation ban was actually designed to address the "substantive evils" the state had identified. *Id.* at 444.

The Court relied on similar logic in *In re Primus*, 436 U.S. 412 (1978). In that case, an attorney sent a letter to a Medicaid recipient to inform her that the ACLU was willing to represent her—free of charge—in challenging South Carolina's practice of sterilizing Medicaid recipients. *Id.* at 416–17. The South Carolina bar publicly reprimanded the attorney for violating its prohibition on solicitation. *Id.* at 417–21. The Supreme Court held that the reprimand was unconstitutional. Citing *Button*, the Court explained that the "First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance.'" *Id.* at 432 (citation omitted; alterations in original). And, relying on *Button*, the Court held that the state's "action in punishing appellant for soliciting a prospective litigant . . . must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.'" *Id.* (citation omitted); *see also id.* ("South Carolina must demonstrate 'a subordinating interest which is compelling,' and that the means employed in furtherance

of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" (citations omitted)).

Critically, the Court in *Primus* rejected South Carolina's assertion that its disciplinary regime was necessary to prevent "undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients." 436 U.S. at 432. The Court cited the evidentiary record, which showed that the attorney's letter "was not facially misleading," "involved no appreciable invasion of privacy," and posed no "serious likelihood of conflict of interest or injurious lay interference with the attorney–client relationship." *Id.* at 435–36. Absent evidence of such harms, the Court held, the state's disciplinary sanctions violated the attorney's First Amendment right to advise and solicit prospective clients in pursuit of her own political and ideological goals. *See id.* at 437–38.

The Board's actions in this case violate the same First Amendment rights. The Sixth Circuit has expressly recognized that the First Amendment protects public-interest lawyers' efforts to communicate with prospective clients—even when those clients are incarcerated. In *ACLU v. Livingston County*, 796 F.3d 636 (6th Cir. 2015), the ACLU sued a Michigan jail for refusing to deliver letters in which the organization offered to represent the jail's inmates for free in litigation against the jail. *Id.* at 640–41. The Sixth Circuit affirmed a preliminary injunction directing the jail to deliver the letters, holding that the letters constituted a form of protected speech. *Id.* at 638. Relying on *Primus* and *Button*, the court

explained that "[p]recluding this pre-litigation correspondence and investigation, at the very least, chills important First Amendment rights." *Id.* at 645.

Other circuits have similarly applied *Button* and *Primus* to invalidate no-contact rules forbidding attorneys from soliciting represented clients for non-pecuniary purposes. In *Bernard v. Gulf Oil Co.*, for example, the Fifth Circuit held that a federal-court order forbidding class counsel in a race-discrimination case from soliciting prospective class members in person violated the First Amendment. 619 F.2d 459, 471–72 (5th Cir. 1980) (en banc) (citing *Button*, 371 U.S. 415, and *Primus*, 436 U.S. 412).[3] The court in *Bernard* invalidated the no-contact order even though that order—unlike the Board's interpretation of RPC 4.2 in this case—permitted contact "between attorney and prospective client when initiated by the prospective client." *Id.* at 465; *compare Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985) (court may constitutionally forbid counsel *for a party* to pending litigation from communicating with represented party for pecuniary gain).

Similar reasoning applies here. The communications Deaner and C.J.I. intend to pursue fall within the "generous zone of First Amendment protection" recognized by *Button*, *Primus*, *Livingston County*, and other cases. *Primus*, 436 U.S. at 431. Deaner and C.J.I. seek no pecuniary gain for their advice to prospective clients, and if retained by them would represent them entirely free of charge. *See* Deaner Decl. ___ & Ex. F (Jan. 9, 2020 Response

---

[3] The Supreme Court upheld the judgment of the *Bernard* court on non-constitutional grounds, noting that "[f]ull consideration of the constitutional issue should await a case with a fully developed record . . . ." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981).

to Board), at 24. What's more, they seek to undertake these actions for the express purpose of furthering their broader ideological goal: "to end wealth-based disparities in Nashville's criminal legal system through education, advocacy, and direct legal representation." Deaner Decl., Ex. F, at 2. Deaner and C.J.I. seek to use "litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public," just like the plaintiffs in past cases. *See Primus*, 436 U.S. at 431. The Board may not sanction Deaner or other C.J.I. employees for that activity unless it can demonstrate that the sanction is narrowly tailored to serve a compelling state interest. The Board cannot make that showing here.

B. The Board's contemplated disciplinary action is not narrowly tailored to serve any compelling state interest.

As the Board has informed Deaner, it construes Tennessee Rule of Professional Conduct 4.2 to bar her from communicating with any criminal defendant represented by court-appointed counsel—communications that are central to her and C.J.I.'s mission. *See* Deaner Decl. ¶¶ 5, 10–14 & Ex. F, at 2-3. The Board's interpretation of the Rule does not survive strict scrutiny for two independently sufficient reasons. First, Deaner's and C.J.I's conduct falls entirely outside the scope of Rule 4.2, and any effort to sanction them under the Rule would therefore fail to serve the Rule's purposes. And, second, even if their conduct could violate Rule 4.2, the Board cannot discipline them for violating that Rule absent proof that their speech posed a risk of actual harm.

1. Deaner's and C.J.I's speech falls outside the scope of Rule 4.2. As noted above, Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about

the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Thus, under the plain text of the Rule, a lawyer's communications with a represented party are not prohibited unless the communications occurred *in the course of that lawyer's representation of a client in the same matter*. Any other reading of the Rule would render the Rule's prefatory clause—"[i]n representing a client . . ."—entirely superfluous.[4] Not surprisingly, courts have roundly rejected efforts to read that language out of the Rule.

In *United States v. Gonzalez-Lopez*, for instance, the Eighth Circuit construed a Missouri rule of professional conduct (which is identical to Tennessee's Rule 4.2) to apply only to communications between attorneys and parties in the same case. 403 F.3d 558, 565 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006). The court based its reading on the rule's plain language: "It is evident from the inclusion of the words 'In representing a client' that the remainder of the text of [the rule], which prohibits unauthorized communication with represented parties in a matter, is *limited to attorneys who are involved in the matter* and does not apply to an attorney not so involved." 403 F.3d at 565 (emphasis added). The court stressed the importance of that prefatory clause, explaining that, without it, the rule would effectively "prevent parties in litigation from freely consulting with outside attorneys to obtain additional advice about their cases, hire additional counsel, or even hire different

[4] For ease of reference, the full text of Rule 4.2 (including all of the comments to the Rule) is included in an addendum to this brief.

counsel." *Id.* Construing the rule to preclude such conduct would not only be unreasonable, the court concluded, but also raise serious Sixth Amendment concerns in criminal cases. *See id.* at 565–66.

The comments to Rule 4.2 only reinforce this plain-text reading of the Rule. The first comment states that the purpose of the Rule is to "protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers *who are participating in the matter*, interference by *those lawyers* with the client–lawyer relationship, and the uncounseled disclosure of information relating to the representation." RPC 4.2, cmt. [1] (emphasis added). And the fourth comment unequivocally states that the Rule does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." RPC 4.2, cmt. [4]. In other words, the Rule is intended to protect a party in litigation from contact with only a specific type of attorney: one who currently represents another party in the same litigation. *Accord Mirabella v. Ward*, 853 F.3d 651, 652 (3rd Cir. 2017) (rejecting a defendant's argument that an identical Pennsylvania rule prohibited a pair of attorneys from communicating with certain local officials because the attorneys were not involved in litigation with the officials). Deaner and C.J.I. do not fall into that category here because they do not intend to contact parties who are involved in matters in which any C.J.I. attorney already represents a party.

Given that Deaner's communications are not proscribed by Rule 4.2, the Board's efforts to sanction her for those communications are—by definition—not tailored to

advance the Rule's purposes. For that reason alone, the Board's proposed disciplinary measures cannot satisfy strict scrutiny.

2. Even if Deaner's and C.J.I.'s conduct fell within the scope of Rule 4.2, the Board may not discipline them absent proof that the conduct actually poses a risk of concrete harm. The Supreme Court made clear in *Primus* that a state may not restrict "all solicitation activities of lawyers [merely] because there may be some *potential* for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman." 436 U.S. at 437 (emphasis added). Rather, if the state seeks to restrict solicitation for political or ideological purposes, it must demonstrate that the restriction is necessary to prevent actual harm of some kind. *See id.* at 434 ("Although a showing of *potential* danger may suffice in the [commercial-speech] context, appellant may not be disciplined unless her activity *in fact* involved the type of misconduct at which South Carolina's broad prohibition is said to be directed." (emphases added)); *Button*, 371 U.S. at 442–43 ("There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent.").

The Fifth Circuit's decision in *Gates v. Cook* illustrates this point well. 234 F.3d 221 (5th Cir. 2000). In *Gates*, the district court issued a "no-contact" order barring certain ACLU attorneys from communicating with members of a settlement class in a suit against a Mississippi prison. *Id.* at 226. The class members had been represented by a non-ACLU attorney but were disappointed with his representation and, thus, sought to consult with

the ACLU attorneys. *Id.* The Fifth Circuit vacated the no-contact order, holding that "findings in the record below do not establish the necessity for the order issued." *Id.* at 227. The court explained that any order restricting contact between the ACLU and represented class members would need to be "narrowly drawn to minimize prior restraints on speech, association, and the inmates' rights to counsel." *Id.*; *see also id.* ("Any infringement of such rights must be strictly limited only to that which is determined necessary after sufficient findings have been established in the record."). Because the no-contact order "d[id] not satisfy these requirements," the court held that it was invalid. *Id.*

Here, the Board's proposed disciplinary measures rest on similarly anemic explanations. The Board has not—and cannot—identify any actual harm that resulted from Deaner's communications with House. To the contrary, the Board openly acknowledges that Deaner's "conduct caused *no harm* to [House], their counsel, or the proceedings." Deaner Decl., Ex. G (Jul. 10, 2020 Letter), at 1 (emphasis added). The Board's actions rest instead on its (erroneous and unelaborated) view that Deaner "communicated with a represented criminal defendant without the permission of his counsel in violation of RPC 4.2." *Id.* The Board has never alleged that Deaner—who offered her services to House free of charge—sought to defraud, mislead, or otherwise take advantage of House. Nor has the Board ever claimed that Deaner's communications with House created a "serious likelihood of conflict of interest." *Primus*, 436 U.S. at 436.

And the Board has never even suggested that Deaner's contact with House caused "injurious lay interference," *id.*, to his relationship with his previously appointed counsel.[5]

The Board's concession that House was not harmed by Deaner's purported violation of Rule 4.2 is hardly surprising. After all, Deaner's and C.J.I.'s communications with indigent defendants—even represented defendants—*cannot* violate Rule 4.2. In addition to falling outside the scope of the rule, *see supra* Part I.B.1, these communications simply cannot cause the kinds of "substantive evils" that Rule 4.2 is designed to prevent: namely, overreaching, undue influence, or conflicts of interest. Once again, Deaner's and C.J.I.'s communications are not motivated by a desire for financial gain but, rather, by their ideological mission. As such, they cannot cause the specific harms Rule 4.2 aims to thwart.

Nor does Deaner's and C.J.I.'s consultation with prospective clients pose a serious risk of "interference" with existing attorney–client relationships, much less a severe enough risk to justify suppressing constitutionally protected conduct. A criminal defendant always has the right to decide whether or not to fire his current attorney. If the defendant is poor, his decision to fire his attorney might require him to proceed pro se—but that nevertheless remains his right and his decision. *See Faretta v. California*, 422 U.S. 806, 834–36 (1975). An attorney who offers free advice to the defendant about the quality of his current lawyer

---

[5] Moreover, even if the Board had raised an allegation of such interference, the record here would plainly refute it. Even before Deaner ever communicated with House, House already had asked the court for new counsel and, when that request was denied, asked for leave to represent himself. *See* Deaner Decl., Ex. B (Nov. 13, 2019 Hearing Transcript), at 14–15. Deaner could not undermine the already-broken relationship between House and his previously appointed counsel.

does not "interfere" with the existing attorney–client relationship but, rather, empowers the defendant to make an informed decision about how to exercise his Sixth Amendment rights. *See* John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice* § 17:6 (3d ed. 2019) ("The client's right to consult with another lawyer is implicit in Rule 4.2 and the Sixth Amendment, and the second lawyer does not act unethically in talking with the client."). As long as that advice is competent—as Deaner's advice was here and will be in the future—a state may not constitutionally preclude the lawyer from offering it unless it has evidence that the lawyer is seeking to enrich herself. As explained, no such evidence exists here.

II. Deaner's and C.J.I.'s mission, message, and reputation will suffer irreparable harm if injunctive relief is not granted.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Thus, if a party "has established a substantial likelihood of success on the merits of its First Amendment claims, [that party] also has established irreparable harm." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014).

Here, Deaner and C.J.I. have established a likelihood of success on their First Amendment claims, *see supra* Part I, and that alone is enough to establish irreparable harm. But the Board's actions have done more than simply infringe Deaner's individual

expressive and associative freedoms: they have fundamentally undermined her ability to carry out her and her organization's broader mission. Among other things, the Board's (erroneous) reading of Rule 4.2 makes it impossible for Deaner to advise criminal defendants about their Sixth Amendment rights and precludes her from offering them free services. Deaner Decl. ¶¶ 25-27. And, critically, the Board's reading of the Rule makes it impossible for Deaner to engage in that activity *anywhere* in Tennessee—not just in Judge Blackburn's courtroom (where she could be subject to contempt sanctions). These consequences of the Board's actions—which continue to harm Deaner—underscore the need for swift injunctive relief here.

III. The balance of harms and public interest both favor the issuance of an injunction.

The "public interest is served by preventing the violation of constitutional rights." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004); *see also Libertarian Party*, 751 F.3d at 412 ("[T]he determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" (citation omitted)). Thus, because the Board's actions violate Deaner's and C.J.I.'s First Amendment rights, *see supra* Part I, the public interest would be served by enjoining the Board from disciplining them here.

Enjoining the Board would also benefit the public by restoring Deaner's and C.J.I.'s ability to advise criminal defendants of their Sixth Amendment rights and help them obtain constitutionally adequate counsel. As explained, one of C.J.I.'s central goals is to improve

the quality of legal representation for indigent defendants in Nashville. That work benefits the local community in concrete ways. Recent data shows how disparities in the quality of defense counsel has a direct impact on the City's indigent defendants: between 2016 and 2018, defendants who were represented by private appointed counsel spent nearly twice as long in pretrial detention (on average) than defendants represented by public defenders. Deaner Decl., Ex. A (Criminal Justice Planning Statistics). This data highlights the value of Deaner's work to the community—as well as the pressing need to remove the barriers that the Board has placed in her way.

At the same time, the issuance of a preliminary injunction would not cause the Board any discernible harm. Indeed, more than nine months have already elapsed since the Board first learned of Deaner's communications with House, and the Board has declined to institute any formal disciplinary proceedings during that period. An order preventing the Board from instituting such proceedings while the Court determines the constitutionality of the Board's application of Rule 4.2 is reasonable and in the public interest.

IV. Rule 65(c)'s security requirement should be waived in this case.

Federal Rule of Civil Procedure 65(c) generally requires a party seeking an injunction to post security in order to protect the opposing party against any financial harm it might suffer if the injunction later proves to be improper. District courts, however, enjoy broad discretion to determine the security amount or to waive the security requirement altogether. *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("[T]he rule

in our circuit has long been that the district court possesses discretion over whether to require the posting of security.").

In this case, the security requirement should be waived because the Board will not suffer any financial harm from any injunction forbidding them from instituting disciplinary proceedings for the duration of this lawsuit. *See Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 816 (6th Cir. 1954) (permitting waiver of Rule 65(c) security where it "appear[s] that no material damage will ensue" to the enjoined party); 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2954 (3d ed. 2020) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). Again, more than nine months have already elapsed since the Board learned of Deaner's communications with House. The lack of formal proceedings during that period makes clear that the Board will not suffer any financial harm if it is enjoined from instituting such proceedings at this point.

Furthermore, Deaner and C.J.I. are "engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement." *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981). The nature of their work thus provides further reason to waive the security requirement here.

CONCLUSION

For the foregoing reasons, Deaner and C.J.I. respectfully ask that this Court issue a preliminary injunction forbidding the Board from sanctioning Deaner or any other C.J.I. attorney under Rule 4.2 for communicating with represented parties for the purpose of

representing them pro bono. Deaner further requests that Rule 65's security requirement be waived in this case.

Respectfully submitted,

/s/ Charles Gerstein
CHARLES GERSTEIN
Civil Rights Corps
1601 Connecticut Ave. N.W., Suite 800
Washington, DC 20009
202-894-6128
charlie@civilrightscorps.org

/s/ Seth Wayne
SETH WAYNE *
NICOLAS Y. RILEY *
Institute for Constitutional Advocacy & Protection
Georgetown University Law Center
600 New Jersey Avenue N.W.
Washington, DC 20001
202-662-4048
sw1098@georgetown.edu
nr537@georgetown.edu
* Pro hac vice motions forthcoming.

September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I electronically filed the foregoing brief with the Clerk of the U.S. District Court for the Middle District of Tennessee by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served via the CM/ECF system; all other participants will be served by first-class mail (or e-mail, by consent).

/s/ Charles Gerstein
CHARLES GERSTEIN
Counsel for Plaintiffs

ADDENDUM: TEXT OF RULE 4.2

Tennessee Rule of Professional Conduct 4.2: Communication with a Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. *See* RPC 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, by

applicable judicial precedent, or by court order. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances. By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Consent of the organization's lawyer is not required for communication with a former agent or employee. *See* RPC 4.4 (regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney–client privilege or as work-product of the organization's lawyer). In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. *See* RPC 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the

representation, but such actual knowledge may be inferred from the circumstances. *See* RPC 1.0(f).

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to RPC 4.3.