In the United States Court of Appeals for the Third Circuit

No. 01–2783

IN RE: ROBERT B. SURRICK

On Appeal from the Disciplinary Order of the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE

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I. INTRODUCTORY STATEMENT

Attorney Robert B. Surrick falsely and recklessly accused two Pennsylvania state court judges of judicial misconduct. Consequently, the Supreme Court of Pennsylvania unanimously decided to suspend him from the practice of law for five years.

Thereafter, in accordance with its local rules, the United States District Court for the Eastern District of Pennsylvania proceeded to determine what reciprocal discipline, if any, it would impose on Mr. Surrick. Concluding that Mr. Surrick had failed to establish any of the extraordinary exceptions necessary to escape imposition of reciprocal discipline, a majority of the entire district court, consisting of all non–recused active and senior judges, voted in June 2001 to suspend him from the practice of law for thirty months retroactive to April 24, 2000.

Mr. Surrick has now appealed from the reciprocal discipline that the district court imposed. As Mr. Surrick's opening brief on appeal concedes, this Court's role is limited to determining whether the district court's decision to impose reciprocal discipline was an abuse of discretion. Although Mr. Surrick's brief wages a spirited collateral attack on the Supreme Court of Pennsylvania's decision to suspend him from the

practice of law, it nonetheless remains clear that the district court did not abuse its discretion in deciding that the imposition of reciprocal discipline was appropriate.

Even if it were somehow possible for Mr. Surrick's collateral attack to precipitate de novo review of the constitutionality of the Pennsylvania Supreme Court's disciplinary order, that court's suspension order did not unlawfully encroach on Mr. Surrick's federal constitutional rights. His right to due process was not violated, because the legal standards applied in deciding whether to discipline him were either in existence at the time of his wrongful acts or were clearly foreseeable then. And his First Amendment rights were not trenched on, because the First Amendment does not protect recklessly false accusations of judicial misconduct.

For these reasons, which are examined in more detail below, this Court should deny the relief Mr. Surrick seeks and should instead affirm the district court's disciplinary order. No abuse of discretion has occurred.

II. INTEREST OF THE AMICUS CURIAE

This Court on April 2, 2002 entered an order appointing appellate attorney Howard J. Bashman to serve as amicus curiae and file a brief supporting the affirmance of the district court's disciplinary order. Amicus, who served from 1989 through 1991 as law clerk to Third Circuit Judge William D. Hutchinson, now chairs the appellate litigation section of the law firm of Buchanan Ingersoll, P.C. He also serves as co–chair of the Appellate Courts Committee of the Philadelphia Bar Association and writes a monthly column on appellate litigation for *The Legal Intelligencer*, Philadelphia's daily newspaper for lawyers. Amicus has no interest in this case other than to comply fully and satisfactorily with the terms of this Court's order appointing him to serve as amicus curiae.

III. COUNTER–STATEMENT OF THE ISSUE PRESENTED

Did the district court abuse its discretion in reciprocally suspending attorney Robert B. Surrick from the practice of law for thirty months after he failed to make the exceptionally rigorous showing necessary to avoid any imposition of reciprocal discipline?

Standard of review: This Court explained in *Richardson* v. *Hamilton Int'l Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), that "[w]e have held that the regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion."

Other federal appellate courts likewise apply the abuse of discretion standard of review in cases such as this. *See*, *e.g.*, *In re Hoare*, 155 F.3d 937, 940 (8th Cir. 1998) ("We will reverse a district court's disciplinary order only when an abuse of discretion has occurred."); *In re Palmisano*, 70 F.3d 483, 488 (7th Cir. 1995) ("The order disbarring Palmisano cannot be called an abuse of discretion and is therefore affirmed."), *cert. denied*, 517 U.S. 1223 (1996).

IV. COUNTER–STATEMENT OF THE CASE

The Supreme Court of Pennsylvania, on March 24, 2000, issued an opinion in which that court unanimously concluded that attorney Robert B. Surrick should be suspended from the practice of law in Pennsylvania for five years because he had falsely and recklessly accused both a trial judge and a Pennsylvania Superior Court judge of

serious judicial misconduct. *See Office of Disciplinary Counsel* v. *Surrick*, 749 A.2d 441 (Pa. 2000). Although Mr. Surrick now maintains that the Pennsylvania Supreme Court's ruling unlawfully infringed his federal due process and freedom of speech rights, he chose not to file a petition for writ of certiorari in the Supreme Court of the United States requesting review of Pennsylvania's disciplinary order.

The disciplinary system of most every federal court—including both the U.S. Supreme Court and the U.S. District Court for the Eastern District of Pennsylvania—presumes that where a state court has disbarred or suspended an attorney, the identical discipline should reciprocally be imposed by the federal court. Yet that presumption is rebuttable. Before imposing reciprocal discipline, the U.S. District Court for the Eastern District of Pennsylvania gives the attorney in question an opportunity to show cause why, in the words of Local Rule of Civil Procedure 83.6(II)(B)(2), "the imposition of the identical discipline by the court would be unwarranted."

Eastern District of Pennsylvania Local Rule of Civil Procedure 83.6(II)(D) describes the showing an attorney must make to avoid the imposition of reciprocal discipline. It provides, in pertinent part:

> [T]his court shall impose the identical discipline unless the respondent–attorney demonstrates, or this court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:
>
> 1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> 2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or
>
> 3. that the imposition of the same discipline by this court would result in grave injustice; or
>
> 4. that the misconduct established is deemed by this court to warrant substantially different discipline.
>
> Where this court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

E.D. Pa. L.R. Civ. P. 83.6(II)(D).

Here, the district court issued to Mr. Surrick an order to show cause under Local Rule of Civil Procedure 83.6(II)(B)(2) on May 10, 2000 after learning that the Supreme Court of Pennsylvania had suspended him. Appendix (App.) 55. Although Mr. Surrick was then, by his own admission, retired from the practice of law, he nevertheless opted to oppose the district court's imposition of reciprocal discipline. Represented by the same lawyer who litigated and lost Mr. Surrick's disciplinary pro-

ceeding in the Supreme Court of Pennsylvania, Mr. Surrick attempted to establish in the district court that the order suspending him from the practice of law for five years in Pennsylvania deprived him of his federal right to due process. App. 1, 56.

The district court initially assigned this matter to a three–judge panel consisting of Senior District Judge Louis H. Pollak and District Judges Stewart R. Dalzell and John R. Padova for the preparation of a report and recommendation. App. 54. That panel appointed the Office of Disciplinary Counsel of the Commonwealth of Pennsylvania, which had brought the disciplinary action against Mr. Surrick in state court, to serve as petitioner in the district court. App. 57.

The panel heard oral argument on September 20, 2000. *Id.* Then, on February 7, 2001, the panel issued a 35–page report and recommendation that the district court should impose no reciprocal discipline on Mr. Surrick because Pennsylvania's disciplinary order, while perhaps not so unfair as to actually violate Mr. Surrick's federal due process rights, was too unfair to merit any reciprocal discipline. App. 54–58.

The panel gave two reasons for its conclusion. First, according to the panel, Pennsylvania law did not provide Mr. Surrick with sufficient

notice in 1992, when he committed his disciplinary infractions, that reckless falsehoods could lead to the imposition of discipline. App. 82–83.

Second, the panel concluded that it was unfair for the Supreme Court of Pennsylvania to apply its ruling in *Office of Disciplinary Counsel* v. *Price*, 732 A.2d 599 (Pa. 1999), which clarified the parties' burdens of production in a disciplinary proceeding, to Mr. Surrick's case, because the record in his case was created before *Price* issued. App. 83. Although the panel recognized the force of disciplinary counsel's argument that Mr. Surrick's counsel had waived any challenge based on *Price* by not seeking a remand from the Supreme Court of Pennsylvania to supplement the record with new evidence supposedly pertinent under *Price*, the panel viewed that argument to be irrelevant: "Even if Mr. Surrick could be found, as a matter of Pennsylvania law, to have 'waived' his due process rights, codified in Rule II(D)(1), to 'notice' and 'opportunity to be heard,' Mr. Surrick has not waived his right to be treated fairly by this court." App. 85–86.

Judge Dalzell issued a concurring opinion in which he wrote that he agreed with the panel's decision not to address the First Amendment

implications of Mr. Surrick's case because "[i]n two Delphic references in the text of Surrick's brief, his able lawyer raised the First Amendment as an issue but then elected not to press it." App. 90 (footnote omitted). Notwithstanding Judge Dalzell's expression of agreement that Mr. Surrick's counsel had waived any arguments arising under the First Amendment, Judge Dalzell proceeded to discuss in his concurring opinion the First Amendment concerns that he had. App. 90–91.

Copies of the panel's report and recommendation, along with Judge Dalzell's concurring opinion, were then distributed to all non–recused active and senior District Judges serving in the Eastern District of Pennsylvania. App. 92. On April 2, 2001, Chief Judge James T. Giles issued an order stating that the entire district court had voted to reject both the report and recommendation and the concurring opinion. App. 94. The order further provided that the only question that remained to be considered was the severity of the reciprocal discipline that the district court should impose. App. 94–95.

At that point, Mr. Surrick elected to oppose the imposition of a five–year suspension, chose to submit additional materials under seal, and requested a hearing. App. 4–5. The district court thus appointed a

second three–judge panel, which consisted of District Judges Ronald L. Buckwalter and Anita B. Brody and Senior District Judge Lowell A. Reed, Jr. App. 4.

The panel reviewed the parties' submissions and held oral argument on May 22, 2001, where it heard from Mr. Surrick's attorney, the attorney for the disciplinary board, and Mr. Surrick himself. App. 95–122.

In early June 2001, the second panel issued a report and recommendation concluding that Mr. Surrick should be suspended from the practice of law in the U.S. District Court for the Eastern District of Pennsylvania for a 30–month period, retroactive to April 24, 2000. App. 124–27. That was the date on which his suspension from practice in the Pennsylvania courts began to run.

A majority of the non–recused active and senior judges in the district approved the second panel's report and recommendation on June 11, 2001. App. 128. Chief Judge Giles on that date therefore entered an order "suspend[ing Mr. Surrick] from practice before this court for a period of thirty (30) months, commencing April 24, 2000." *Id.*

The district court's decision to suspend Mr. Surrick from the practice of law for thirty months, retroactive to April 24, 2000, was not unanimous. Nine of the district court's thirty active and senior judges recorded their dissents from the order and would have favored the imposition of no discipline, as the first panel had recommended. App. 134, 135, 150. Another four judges reportedly recused themselves. *See* Shannon P. Duffy, "A Divided Federal Bench Votes to Suspend Surrick," *The Legal Intelligencer* (June 18, 2001) (available on Westlaw at 6/18/2001 TLI 1).

It thus appears that the district court's vote to suspend Mr. Surrick was 17 judges in favor and 9 against. Nearly two–thirds of the non–recused active and senior judges on the district court voted to suspend Mr. Surrick, a ratio that contrasts starkly with Judge Dalzell's assertions in his dissenting opinion that only "a narrow majority" or "the narrowest majority" of the district court's judges voted in favor of imposing discipline. App. 136, 142.

In light of the dissents that his colleagues had issued, on June 14, 2001 Chief Judge Giles issued an opinion explaining why a majority of the district court's judges had voted to impose a thirty–month suspen-

sion on Mr. Surrick. App. 129–33. After recounting the standards contained in Local Rule of Civil Procedure 83.6(II)(D) for determining whether, and to what extent, reciprocal discipline should be imposed, Chief Judge Giles's opinion explained:

> The court determined that there was no clear deprivation of due process of law. Significantly, while critical of the approach of the Pennsylvania Supreme Court, even Judge Pollak, the author of the panel report of February 7, 2001, acknowledged that the report had not concluded that Mr. Surrick was deprived of his federal constitutional right to due process. The court found there was no infirmity of proof. Indeed, Mr. Surrick admitted at state disciplinary proceedings that he had no objective factual basis for the accusations he made in his sworn affidavit to the state court about purportedly corrupt conduct by a state judge.

App. 130 (footnotes omitted).

In a footnote at the conclusion of the quoted passage, Chief Judge Giles wrote: "In view of that admission, the court was particularly unpersuaded by the contention that Mr. Surrick was denied an opportunity to present evidence to the contrary under what some perceived to be a 'new procedural regime' adopted by the State Supreme Court." App. 130.

On the issue of the First Amendment, Chief Judge Giles's opinion stated:

> [A]t disciplinary proceedings before a panel of this court, Mr. Surrick's attorney expressly declined to pursue a First Amendment claim when pressed by Judge Dalzell on that subject. In fact, there is no First Amendment right to defame another or willfully to disregard the professional and ethical obligations reasonably imposed upon members of the bar.
>
> * * *
>
> Judge Dalzell may be correct when he suggests that it takes courage for a lawyer to accuse a judge of misconduct but surely that does not justify a reckless and irresponsible allegation of misconduct.
>
> * * *
>
> Judge Dalzell states that "the conduct of which Surrick complained * * * involves the heart of the judicial branch of government." So, however, does the type of conduct for which Mr. Surrick has been disciplined. Nothing is more corrosive to public confidence in the judicial branch than claims of case fixing. For a lawyer recklessly to make such a claim is highly improper.

App. 131–32 (footnotes omitted).

Because the district court made its thirty–month suspension of Mr. Surrick retroactive to April 24, 2000, the suspension is due to expire on October 24, 2002. Whether this case will be moot after Mr. Surrick's suspension from practice in the Eastern District of Pennsylvania expires is a question this Court must consider if its ruling on this appeal does not issue before that date.

It is also worth noting that Mr. Surrick wrote an essay published in *The Legal Intelligencer* on September 7, 1999 to address the state court disciplinary proceedings then pending against him. In the essay, he stated that he was “a full–time resident of Florida whose [law] practice has been closed.” *See* Robert B. Surrick, “What’s Wrong With This Picture,” *The Legal Intelligencer* (Sept. 7, 1999) (available on Westlaw at 9/7/1999 TLI 7). That commentary and a news article, which ran in the same publication on June 18, 2001, stating that Mr. Surrick “is retired and living in Florida” (*see* Shannon P. Duffy, “A Divided Federal Bench Votes to Suspend Surrick,” *supra*) call into question Mr. Surrick’s standing to challenge, and purpose in challenging, the district court’s imposition of reciprocal discipline.

V. COUNTER–STATEMENT OF FACTS

The relevant facts of this case are straightforward. On August 11, 1992, attorney Robert B. Surrick filed a motion in the Superior Court of Pennsylvania that stated:

> It is believed and averred by Movant Surrick that Judge Bradley [who presided at trial over the case then on appeal in which Mr. Surrick filed this motion] was “fixed” by the Delaware County Republican Organization as a result of a deal between that organization and Justice Larsen whereby Justice Larsen would again exert his political influence on behalf of Judge McEwen who

> was again seeking to fill a vacant Supreme court seat and, in return, the Delaware County Republican Organization, through its control of the Delaware county Judges, would fix this case.
>
> In litigation arising out of the termination of the Surrick/Levy law practice * * * . Upon appeal to the superior court, judge Olszewski dismissed the appeal not on the basis of anything in the record *or any issue raised by opposing counsel* but on the basis of an alleged procedural defect in the record. Even the most cursory examination of the record will reflect that the alleged defect in the Record relied upon by Judge Olszewski does not and did not exist. It is the belief of Movant Surrick that the decision of Judge Olszewski was based upon outside intervention, as it could not have resulted from any rational legal analysis of the Record.

Office of Disciplinary Counsel v. *Surrick*, 749 A.2d 441, 443 (Pa. 2000).

The appeal in which Mr. Surrick filed this recusal motion arose from a case by the name of *Leedom* v. *Spano*. *See Surrick*, 749 A.2d at 442–43. Plaintiff Leedom filed that case in the Court of Common Pleas of Delaware County, Pennsylvania, and the case was assigned to Common Pleas Court Judge Harry J. Bradley. *See id.* at 442. Mr. Surrick was named as a defendant in that mortgage foreclosure suit because he and his wife were sureties on the mortgage. *See id.* Mr. Surrick did not serve as his own lawyer in the trial court. *See id.* On appeal to the Superior Court, however, Mr. Surrick entered an appearance as counsel before he filed the above–quoted recusal motion. *See id.*

In November 1994, the Office of Disciplinary Counsel of the Commonwealth of Pennsylvania initiated a disciplinary proceeding in which Mr. Surrick was charged, as a result of having filed the recusal motion, with violating a handful of the Rules of Professional Conduct that govern the conduct of attorneys in Pennsylvania. App. 58.

Among the rules that Mr. Surrick was charged with violating was Rule 8.4(c), which provides: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Pa. R.P.C. 8.4(c); *see Surrick*, 749 A.2d at 443 n.2.

In July 1995, a special hearing committee of the Disciplinary Board of the Supreme Court of Pennsylvania held three days of hearings in the disciplinary proceeding against Mr. Surrick. App. 61. In January 1997, the hearing committee recommended the dismissal of all charges. *See Surrick*, 749 A.2d at 443. In October 1997, after further briefing and oral argument, the entire Disciplinary Board adopted the committee's recommendation to impose no discipline. *See id.*

The Office of Disciplinary Counsel appealed from that decision to the Supreme Court of Pennsylvania. On April 14, 1998, the Supreme Court remanded Mr. Surrick's disciplinary proceeding to the Disciplinary

Board for further consideration in light of the Supreme Court's ruling in *Office of Disciplinary Counsel* v. *Anonymous Attorney A*, 714 A.2d 402 (Pa. 1998). *See Surrick*, 749 A.2d at 443. In *Anonymous Attorney A*, the Supreme Court made clear that reckless misrepresentations violated R.P.C. 8.4(c). *See* 714 A.2d at 407.

After hearing additional argument from the parties, the Disciplinary Board in April 1999 issued a decision in which it concluded that Mr. Surrick's false allegations against Pennsylvania Superior Court Judge Peter Paul Olszewski violated R.P.C. 8.4(c). *See Surrick*, 749 A.2d at 443. As the Board explained in its decision:

> In the Judge Olszewski matter, however, the record demonstrates that Respondent ignored facts which refuted his beliefs. Indeed, Respondent had no direct information that the Judge was influenced by outside forces as he alleged. In fact, when Respondent was asked at the disciplinary hearing for the basis of his beliefs regarding Judge Olszewski, he stated that his beliefs were based on conjecture and theory. This alone establishes Respondent's recklessness.
>
> Petitioner established the fact that the decision at issue was made by a three member panel of the Superior Court. Further, there was no evidence that Judge Olszewski improperly influenced his fellow panel members. Accordingly, we find that Respondent's allegation was reckless in that it was based on conjecture and ignored facts that demonstrated his assertions were baseless. Therefore, he violated Rule 8.4(c).

App. 223–24 (citation omitted).

The Disciplinary Board next addressed Mr. Surrick's argument that it would be unlawful to apply the recklessness standard that the Supreme Court of Pennsylvania announced in 1999 to his case. The Board explained that "no clear precedent that only intentional conduct violates 8.4(c)" existed in Pennsylvania before 1999. App. 228. The Board also observed that it would have been "unreasonable for an attorney to assume that a misrepresentation, made with reckless disregard for its truth or falsity, would not violate 8.4(c)" and that "it was not unforeseeable that the Court would interpret 8.4(c) as covering statements made with reckless ignorance of the truth or falsity thereof." App. 228.

The Board concluded that because "[t]he standard announced by the Court is not a fundamental or abrupt break with precedent, but rather is the emergence of a standard which has never been fully explicated," the recklessness standard could lawfully be applied in Mr. Surrick's case. *Id.* The Board therefore recommended discipline in the form of a public censure. App. 230.

Both parties then filed cross–petitions for review in the Supreme Court of Pennsylvania. *See Surrick*, 749 A.2d at 443. The Supreme

Court granted the parties' cross–petitions in an order that directed the parties to address the applicability of that court's even more recent decision in *Office of Disciplinary Counsel* v. *Price*, 732 A.2d 599 (1999). *See Surrick*, 749 A.2d at 443.

In *Price*, the Supreme Court of Pennsylvania reaffirmed that "[t]he burden of proving professional misconduct lies with the Office of Disciplinary Counsel" and that "[t]he Office of Disciplinary Counsel must prove the misconduct by a preponderance of the evidence and the proof must be clear and satisfactory." *Price*, 732 A.2d at 603.

The Supreme Court in *Price* then clarified the opposing parties' respective burdens of production under this standard. *Cf. St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506–08 (1993) (discussing the allocation of the burdens of production and proof in a race discrimination case). As the *Price* opinion explains, the Office Disciplinary Counsel can meet its burden of production:

> by presenting documentary evidence or testimony from the victims of the allegations stating that the allegations are false. The burden then shifts to respondent to establish that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry.

Price, 732 A.2d at 604.

Although Mr. Surrick questioned the lawfulness of applying the *Price* burden–shifting approach to his case before the Supreme Court of Pennsylvania and again when seeking to avoid the imposition of reciprocal discipline in the district court, he did not ask the Supreme Court of Pennsylvania to allow the reopening of the record in his case to enable him to introduce any additional evidence that he believed might be relevant under *Price*. App. 84–85. Indeed, Mr. Surrick's failure to seek a reopening of the record was the basis for the comment of the original district court panel that, while Mr. Surrick may have waived his right to due process in the Pennsylvania court system, he did not waive his right to be treated fairly in the reciprocal disciplinary proceeding in federal court. App. 85–86.

As the Supreme Court of Pennsylvania noted in its opinion in Mr. Surrick's case: "In attorney disciplinary matters our review is de novo. This Court is not bound by the findings or the recommendations of the Disciplinary Board, although we give those findings substantial deference." *Surrick*, 749 A.2d at 443 (citation omitted). Based on its de novo review of the record, the Supreme Court upheld the Disciplinary Board's finding that Mr. Surrick's false accusations against Judge

Olszewski contained in the recusal motion violated Rule 8.4(c). *See Surrick*, 749 A.2d at 447–49. The Supreme Court also found that Mr. Surrick's false accusations against Judge Bradley likewise violated Rule 8.4(c). *See Surrick*, 749 A.2d at 446–47.

In so concluding, the Supreme Court noted that "[r]espondent does not argue that the allegations [against either Judge Olszewski or Judge Bradley] are true, but that he reasonably believed the statements were true at the time he submitted the motion." *Surrick*, 749 A.2d at 446. After closely examining the intricately detailed factual record in this case, the court ruled that Mr. Surrick had no objectively reasonable grounds for the false accusations of judicial misconduct that he made in his recusal motion against Judges Olszewski and Bradley.

Based on its conclusion that Mr. Surrick's recklessly false accusations of case–fixing against two lower state court judges violated R.P.C. 8.4(c), the Supreme Court explained that "[t]he conduct of respondent in this case merits a severe sanction" and ordered a five–year suspension from the practice of law. *Surrick*, 749 A.2d at 449. Toward the end of its unanimous opinion, the Supreme Court explained:

> Respondent's predilection to unprovoked character assassination whenever he receives an adverse ruling exhibits conduct that is

> clearly unprofessional and calls into question his ability to continue practicing law in a fit manner. * * * *
>
> The purpose of our system of professional responsibility and disciplinary enforcement is to protect the public, the profession and the courts from unfit attorneys. An accusation of judicial impropriety is not a matter to be taken frivolously. An attorney bringing such an accusation has an obligation to obtain some minimal factual support before leveling charges that carry explosive repercussions. When an attorney makes an accusation of judicial impropriety without first undertaking a reasonable investigation of the truth of that accusation, he injures the public, which depends upon the unbiased integrity of the judiciary, the profession itself, whose coin of the realm is their ability to rely upon the honesty of each other in their daily endeavors, and the courts, who must retain the respect of the public and the profession in order to function as the arbiter of justice. * * * * When a lawyer holds the truth to be of so little value that it can be recklessly disregarded when his temper and personal paranoia dictate, that lawyer should not be permitted to represent the public before the courts of this Commonwealth.

Surrick, 749 A.2d at 449.

Although Mr. Surrick now asserts that the Supreme Court of Pennsylvania's disciplinary order unlawfully infringed on his rights to due process and free speech, he did not request review of the disciplinary order by filing a petition for writ of certiorari in the U.S. Supreme Court. App. 12–13.

The U.S. District Court for the Eastern District of Pennsylvania, instead of imposing the identical discipline that the Supreme Court of

Pennsylvania imposed, ordered a suspension that was half the length of the Commonwealth's suspension. App. 128. Moreover, the district court announced its thirty–month suspension of Mr. Surrick on June 11, 2001 but made the suspension retroactive to April 24, 2000 even though Mr. Surrick had retained his ability to practice in that court between those two dates. *Id.* Because the district court's suspension of Mr. Surrick was made retroactive to a date nearly fourteen months before its imposition, the district court's actual thirty–month suspension was in fact a suspension for sixteen months. A little more than five months from now, the district court's suspension of Mr. Surrick will expire.

VI. STATEMENT OF RELATED CASES AND PROCEEDINGS

Amicus is aware of no cases or proceedings related to this appeal.

VII. SUMMARY OF THE ARGUMENT

The U.S. District Court for the Eastern District of Pennsylvania did not abuse its discretion in concluding that attorney Robert B. Surrick should be reciprocally suspended from the practice of law for thirty months for having falsely and recklessly accused two Pennsylvania state court judges of judicial misconduct.

In 1992, when Mr. Surrick made his recklessly false accusations of judicial misconduct, it was neither unexpected nor indefensible by reference to then–existing law that the Supreme Court of Pennsylvania would define "misrepresentation" for purposes of Rule of Professional Conduct 8.4(c) to include false statements made in reckless disregard of their truthfulness. As a result, Mr. Surrick's retroactivity–based due process argument must fail.

Similarly unmeritorious is Mr. Surrick's contention that a supposedly shifting burden of proof disadvantaged him and thus violated his right to due process. First, Mr. Surrick never bore the ultimate burden of proof in his disciplinary proceeding, and thus his argument arises from a mistaken premise. Second, he never asked for the opportunity to present additional evidence that might have altered the outcome under this supposedly new procedural regime, and thus his challenge is waived. Third, when Mr. Surrick made his recklessly false accusations of judicial misconduct, Pennsylvania law clearly put the burden on him to have an objectively reasonable basis for his assertions. And, finally, there is absolutely no basis on which to conclude that the supposedly shifting burden had any effect on the Supreme Court of Pennsylvania's

adjudication of Mr. Surrick's case. The record already contained all relevant evidence, and Mr. Surrick does not now identify any additional evidence that he was unable to present. For these reasons, Mr. Surrick's challenge based on the allocation of the burden of production likewise fails.

Mr. Surrick's last argument contends that First Amendment concerns should cause this Court to reverse the district court's imposition of reciprocal discipline. Unfortunately for Mr. Surrick, the district court found that his attorney there affirmatively waived any First Amendment challenge, and Mr. Surrick does not challenge that finding of waiver on appeal. Moreover, the First Amendment does not provide any protection for recklessly false accusations of judicial misconduct, so Mr. Surrick's First Amendment argument would fail even if it were not waived.

For all of these reasons, this Court should hold that the district court did not abuse its discretion in reciprocally suspending Mr. Surrick from the practice of law for thirty months.

VIII. ARGUMENT

The District Court's Imposition Of Reciprocal Discipline, Suspending Mr. Surrick For Thirty Months, Did Not Constitute An Abuse Of Discretion

A. Because it was foreseeable in 1992 that recklessly false misrepresentations could lead to discipline under R.P.C. 8.4(c), Mr. Surrick had no due process right to be punished only for intentional falsehoods

1. In August 1992, attorney Robert B. Surrick made false and reckless accusations of judicial misconduct against two Pennsylvania state court judges, and his actions in that regard led the Supreme Court of Pennsylvania to suspend him from the practice of law for five years. *See Office of Disciplinary Counsel* v. *Surrick*, 749 A.2d 441, 442–43, 449 (2000).

The Supreme Court of Pennsylvania concluded that Mr. Surrick had committed two violations of Rule of Professional Conduct 8.4(c). *See* 749 A.2d at 449. That rule provides: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." R.P.C. 8.4(c). The Rules of Professional Conduct took effect in Pennsylvania on April 1, 1988, more than four years before Mr. Surrick engaged in the misconduct that gave rise to his suspension.

2. Ten years after the Rules of Professional Conduct took effect, the Supreme Court of Pennsylvania issued its decision in *Office of Disciplinary Counsel* v. *Anonymous Attorney A*, 714 A.2d 402 (1998). The court granted review in that case to decide the level of scienter necessary to establish a violation of Rule 8.4(c) where misrepresentation was alleged.

After noting the absence of any earlier Pennsylvania case that conclusively resolved this issue—either under Rule 8.4(c) or its predecessor, Disciplinary Rule 1–102(A)(4) (which also prohibited "conduct involving dishonesty, fraud, deceit, or misrepresentation")—the court decided to follow the holdings of other state courts that had allowed discipline to be imposed for reckless misrepresentation. *See* 714 A.2d at 405–07. Thus, *Anonymous Attorney A* held that misrepresentations made in reckless ignorance of the truth violated Rule 8.4(c). *See* 714 A.2d at 407. Moreover, the court ruled that that standard applied to Attorney A's conduct, which, of course, predated the court's decision there. *See id.*

3. Mr. Surrick's principal argument on appeal is that the Supreme Court of Pennsylvania deprived him of due process when it applied the reckless ignorance standard announced in 1998 to acts he took in 1992.

Because no Pennsylvania case in 1992 had construed R.P.C. 8.4(c) to prohibit recklessly ignorant misrepresentations, Mr. Surrick maintains that his misconduct could not lawfully be punished. It is equally true, however, that in 1992 no case had construed R.P.C. 8.4(c) to exempt recklessly ignorant misrepresentations from the scope of the conduct the rule prohibits.

Mr. Surrick's retroactivity argument is hopelessly misguided. To begin with, it entirely ignores the two governing U.S. Supreme Court decisions that determine what constitutes the impermissible judicial application of a newly announced interpretation of a statute or the common law: *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Rogers* v. *Tennessee*, 532 U.S. 451 (2001). The holdings of these cases make clear beyond peradventure that the Supreme Court of Pennsylvania's suspension ruling did not deny due process of law to Mr. Surrick.

Then, to confound matters further, Mr. Surrick plucks the definition of a "new rule of law" from the Supreme Court's decision in *Teague* v. *Lane*, 489 U.S. 288, 301 (1989), a decision that broadly defined that term to narrow the instances in which convicted state court criminal

defendants could challenge their convictions under federal habeas corpus law. *See* Amended Brief for Appellant at 26. *Teague*, however, simply has no application where a later court construes the law to more firmly establish a defendant's guilt. *See Lockhart* v. *Fretwell*, 506 U.S. 364, 372–73 (1993); *Free* v. *Peters*, 12 F.3d 700, 703 (7th Cir. 1993) (citing *Lockhart* to support its conclusion that "The Supreme Court deems *Teague* a one–way street: designed as it is to protect the state's interest in the finality of criminal convictions, it entitles the state, but not the petitioner, to object to the application of a new rule to an old case."), *cert. denied*, 513 U.S. 967 (1994). Accordingly, *Teague* affords Mr. Surrick no basis for relief.

Finally, Mr. Surrick cites the U.S. Supreme Court's decision in *In re Ruffalo*, 390 U.S. 544, 551 (1968), for the proposition that disbarment is a quasi–criminal proceeding. Yet, as the Seventh Circuit explained in a case that upheld a district court's imposition of reciprocal discipline on a lawyer disbarred by the Supreme Court of Illinois for having made recklessly false allegations of misconduct against state court judges, "the characterization in *Ruffalo* does not require courts to employ the

procedures of the criminal law in disbarment matters." *In re Palmisano*, 70 F.3d 483, 486 (7th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1996).

Amicus now turns to demonstrate that, under the law that actually governs this case, the Supreme Court of Pennsylvania's decision to discipline Mr. Surrick for making recklessly false charges of judicial misconduct did not infringe his due process rights.

4. The proper question to ask, even if this *were* a criminal case, is not whether the Supreme Court of Pennsylvania had previously held that R.P.C. 8.4(c) prohibited recklessly false statements. Rather, the issue is whether that court's holding to that effect in 1998 "was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him." *Bouie*, 378 U.S. at 354. Or, stated another way, "[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Id.* (internal quotations omitted).

As the Court further explained in its recent decision in *Rogers*, "[w]e found [in *Bouie*] that the South Carolina court's construction of the statute violated this principle because it was so clearly at odds with the

statute's plain language and had no support in prior South Carolina decisions." *Rogers*, 532 U.S. at 457–58.

Here, the Supreme Court of Pennsylvania disciplined Mr. Surrick for violating R.P.C. 8.4(c), which prohibits "misrepresentation." The misrepresentation that Mr. Surrick made was the recklessly false assertion of judicial misconduct against two lower state court judges. Although the Supreme Court of Pennsylvania, as of August 1992, had yet to define "misrepresentation" for purposes of R.P.C. 8.4(c), Pennsylvania appellate courts had defined and applied that term numerous times in other contexts. In those other cases, Pennsylvania courts repeatedly defined the term "misrepresentation" to include recklessly false statements.

For example, in *Bower* v. *Fenn*, 90 Pa. 359, 1879 WL 11544, at *3 (1879), the Supreme Court of Pennsylvania wrote: "The best, indeed, that can be said for Bower is, that he asserted for truth what he did not know to be so, but this, as is ruled in the case above cited, is equivalent to the assertion of a known falsehood." Ten years later, in *Griswold* v. *Gebbie*, 17 A. 673, 674 (Pa. 1889), the court began its opinion by observing: "There can be no question at this date that, in an action of

deceit, the *scienter* must not only be alleged, but proved, and the jury must be satisfied that the defendant made a statement knowing it to be false, or with such conscious ignorance of the truth as to be equivalent to a falsehood."

More recently, in *Highmont Music Corp.* v. *J.M. Hoffmann Co.*, 155 A.2d 363, 366 (Pa. 1959), Pennsylvania's highest court explained that "[a] material misrepresentation may be found whether Hoffmann actually knew the truth or not, especially where, as here, it was bound to ascertain the truth before making the representation." And, in 1985, the Supreme Court of Pennsylvania reaffirmed its 1889 holding in *Griswold*, *supra*, that false statements made recklessly in ignorance of fact constituted misrepresentation. *See Aiello* v. *Ed Saxe Real Estate, Inc.*, 499 A.2d 282, 286 (Pa. 1985).

When this Court had occasion in 1989 to describe the elements of a claim for misrepresentation arising under Pennsylvania law, it explained that "scienter * * * may be either actual knowledge of the truth of falsity of the representation, reckless ignorance of the falsity of the matter, or mere false information where a duty to know is imposed on a person by reason of special circumstances." *Berda* v. *CBS Inc.*, 881

F.2d 20, 27 (3d Cir. 1989) (internal quotations omitted), *cert. denied*, 493 U.S. 1062 (1990).

Indeed, it remains the case today under Pennsylvania law that an intentional misrepresentation consists of a statement "made falsely, with knowledge of its falsity or recklessness as to whether it is true or false." *Bortz* v. *Noon*, 729 A.2d 555, 560 (Pa. 1999) (internal quotations omitted). *Bortz* also cites to Section 525 of the Restatement (Second) of Torts, which addresses liability for fraudulent misrepresentations. The comment to Section 525 defines "misrepresentation" without any scienter requirement at all: "Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist." Restatement (Second) of Torts §525, comment b (1977).

In *Fiore* v. *White*, 757 A.2d 842 (Pa. 2000), a unanimous Supreme Court of Pennsylvania said this about its decision that suspended Mr. Surrick from the practice of law in Pennsylvania for five years:

> [T]he appellant [Mr. Surrick] argued that *Anonymous Attorney A* added recklessness as a new element. We held that *Anonymous Attorney A* did not create a new standard of law; it merely clarified existing law. Our rationale was that there was no precedent that restricted the scienter element to intentional acts, and, prior to *Anonymous Attorney A*, it had been foreseeable that we would find that the rule defined professional misconduct to include mis-

> statements made with reckless disregard for the truth or falsity of the contents.

Id. at 847–48.

It is thus clear that long before August 1992, when Mr. Surrick violated R.P.C. 8.4(c), Pennsylvania law firmly established that the term "misrepresentation" included statements made in reckless ignorance of their truth. In this respect, Pennsylvania was far from unique.

American Bar Association Revised Formal Ethics Opinion 346, issued on January 29, 1982, concluded that reckless disregard for the truth in formulating a tax shelter opinion violates DR 1–102(A)(4), R.P.C. 8.4(c)'s predecessor. And, the Supreme Court of Colorado on January 13, 1992 issued a decision rejecting the contention "that actual knowledge or intent to deceive must be shown" to establish a violation of DR 1–102(A)(4). *People* v. *Rader*, 822 P.2d 950, 953 (Colo. 1992). Rather, "[u]nder certain circumstances, an attorney's conduct can be so careless or reckless that it must be deemed to be knowing." *Id.* The Court gave the specific example of an attorney who "recklessly stated as facts things of which he was ignorant" as conduct that would violate DR 1–102(A)(4). *Rader*, 822 P.2d at 953 (internal quotations omitted).

What, if anything, does Mr. Surrick's opening brief on appeal offer to counter this overwhelming array of authority that requires rejection of his retroactivity–based due process argument? Not much. The only Pennsylvania case he cites that seems to say anything favorable to his cause on this issue is *Office of Disciplinary Counsel* v. *Shorall*, 592 A.2d 1285 (Pa. 1991), and even there the passage on which he relies is taken entirely out of context.

In *Shorall*, as in many other reported opinions in the common era, the court set forth the procedural and factual history of the case before addressing the parties' arguments. In the course of recounting the case's procedural history, the Supreme Court of Pennsylvania wrote:

> The Disciplinary Board rejected the Hearing Committee's conclusions, finding that since Respondent had not been charged with the underlying felony, or with perjury, his conduct did not amount to knowing misrepresentations as required by [DR 1–102(A)(4)] but stemmed from poor judgment rather than dishonesty.

Id. at 1289 (internal quotations omitted). This sentence, in its actual context, simply relates the Disciplinary Board's decision in Mr. Shorall's case, but it does not represent the Supreme Court of Pennsylvania's endorsement of the view that DR 1–102(A)(4) required *knowing* misrepresentations. Moreover, as discussed earlier, Pennsylvania courts from

time immemorial have viewed misrepresentations made in reckless disregard or ignorance of the truth to be the legal equivalent of knowing misrepresentations.

Mr. Surrick's reliance on the procedural history recounted in *Shorall* is further undermined by the fact that the Supreme Court of Pennsylvania, based on its de novo review of the record in that case, held that Mr. Shorall in fact had violated DR 1–102(A)(4). *See Shorall*, 592 A.2d at 1292–93. The Court explained that "[r]espondent's repeated and evasive concealment of his client's fraudulent activity to investigative authorities did constitute dishonesty, deceit and misrepresentation within the ambit of DR 1–102(A)(4)." *Id.* at 1293. As a result, the Supreme Court of Pennsylvania suspended Mr. Shorall from the practice of law for three years. *See id.* at 1294.

5. Because it is patently clear that the Supreme Court's construction of recklessness in R.P.C. 8.4(c) was not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie*, 378 U.S. at 354, this Court should hold that the district court did not abuse its discretion in rejecting Mr. Surrick's retroactivity–based due process challenge.

B. Mr. Surrick's challenge to Pennsylvania's purported change in the allocation of the burden of proof in disciplinary proceedings is both waived and without merit

1. Mr. Surrick aims the next arrow in his appellate quiver at the Supreme Court of Pennsylvania's decision to apply its ruling in *Office of Disciplinary Counsel* v. *Price*, 732 A.2d 599 (Pa. 1999), when resolving his case the next year. According to Mr. Surrick, *Price* announced a new burden of proof in attorney disciplinary proceedings. He claims both that this supposed new burden of proof was itself unconstitutional and that Pennsylvania's highest court violated his right to due process when it applied *Price*'s holding on a record created before the decision in *Price* issued.

2. Mr. Surrick's contention that *Price* unlawfully allocated the burden of proof to the attorney in disciplinary proceedings can be dispensed with easily, because it simply is not true. The Supreme Court of Pennsylvania, in both *Price* and *Surrick*, made clear that the ultimate burden of proof in attorney disciplinary proceedings remains on the Office of Disciplinary Counsel.

In *Price*, the Court explained:

> We first address a preliminary matter regarding the placement of the burden of proof in such circumstances. We note that the

> burden of proving professional misconduct lies with the Office of Disciplinary Counsel. The Office of Disciplinary Counsel must prove the misconduct by a preponderance of the evidence and the proof must be clear and satisfactory. * * * *
>
> Thus to establish a prima facie case of making false statements or accusations as set forth in Rules 3.3(a)(1) and 8.2(b), the Office of Disciplinary Counsel bears the initial burden of establishing that an attorney, based upon his own knowledge, made false allegations in a court pleading. This can be accomplished by presenting documentary evidence or testimony from the victims of the allegations stating that the allegations are false. The burden then shifts to the respondent to establish that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry.

Price, 732 A.2d at 603–04 (citations and footnotes omitted).

Similarly, in *Surrick*, the Supreme Court of Pennsylvania reiterated that "Disciplinary Counsel has the burden of proving, by a preponderance of the evidence, that respondent's actions constitute professional misconduct." *Surrick*, 749 A.2d at 444.

It is thus readily apparent that *Price* did not shift the ultimate burden of proof from Disciplinary Counsel to the respondent attorney. Indeed, the discussion in *Price* of a burden that moves from one party to another simply approximates the shifting burden of production that exists under federal employment discrimination law. *See St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506–08 (1993) (discussing the

allocation of the burdens of production and proof in a race discrimination case). Although the burden of production may shift from one party to another under *Price*, the burden of proof remains on Disciplinary Counsel at all times, as both *Price* and *Surrick* make clear.

3. Mr. Surrick's main *Price*–based argument is procedural. Due process, he contends, required Pennsylvania's disciplinary system to give him an opportunity to reopen the record in his case to allow him to introduce evidence relevant to the supposedly new burden of proof. Unfortunately, Mr. Surrick's argument in this regard suffers from a fatal defect—it is waived.

Mr. Surrick never asked the Supreme Court of Pennsylvania, which gave him notice that the court would be considering in his case whether *Price* applied, for the opportunity to introduce additional evidence if the court found *Price* applicable. App. 84–85. Both the original district court panel and Chief Judge Giles's opinion recognized that Mr. Surrick's failure to request such a reopening of the evidentiary record from the Supreme Court of Pennsylvania was a waiver that insulated Pennsylvania's disciplinary proceeding from any federal due process challenge. App. 85–86, 129–30.

As the Supreme Court of the United States explained in *Yakus* v. *United States*, 321 U.S. 414, 444 (1944), "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

4. Furthermore, there is no reason to believe that *Price* established a rule of law that could not fairly be applied in disciplinary proceedings whose records were created before the decision issued.

First, *Price* applied its holding to the attorney in that case. There, a majority of the court voted to suspend the respondent for five years, with the three remaining Justices dissenting in favor of total disbarment. *See Price*, 732 A.2d at 606–07.

Second, as *Price* explains, *see* 732 A.2d at 603–04, its burden–shifting paradigm was not "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354). The comment to R.P.C. 3.3(a)(1)—a rule enacted in 1988 that prohibits a lawyer from making false statements of material fact to a tribunal—states that "an asser-

tion, purporting to be on the lawyer's own knowledge * * * may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." And, under longstanding Pennsylvania law, "the pleader in a court proceeding bears the burden of establishing a factual basis upon which his allegations are based." *Price*, 732 A.2d at 603.

By filing his recklessly false recusal motion in August 1992, Mr. Surrick accepted the burden of having to prove that its allegations either were true or that he reasonably believed the allegations to be true based on a diligent inquiry. *Price*, in short, imposed no burden on Mr. Surrick that he did not already bear in August 1992.

5. While Mr. Surrick's opening brief on appeal argues that due process required that he be given a chance to reopen the record—even though he never asked the Supreme Court of Pennsylvania for that relief—the brief entirely fails to identify any additional evidence that he would have introduced in such a remand proceeding. This Court should thus conclude that Mr. Surrick has failed to demonstrate any adverse effect from the application of *Price* to his case.

Moreover, *Price* could not have had any effect on the Disciplinary Board's decision in April 1999 that Mr. Surrick's recusal motion violated R.P.C. 8.4(c) insofar as it accused Judge Olszewski of case–fixing, because the ruling in *Price* did not issue until June 24, 1999. Nor is it discernible from a close reading of the Supreme Court of Pennsylvania's ruling in *Surrick* that placement of the burden of proof in any way influenced the Court's conclusion that Mr. Surrick violated R.P.C. 8.4(c) by making recklessly false accusations of judicial misconduct against both Judge Olszewski and Judge Bradley.

The Supreme Court explained in *Surrick* that "[r]espondent [Mr. Surrick] does not argue that the allegations are true * * * ." *Surrick*, 749 A.2d at 446. Nevertheless, Mr. Surrick now disputes Chief Judge Giles's statement that "Mr. Surrick admitted at state disciplinary proceedings that he had no objective factual basis for the accusations he made in his sworn affidavit" about Judge Olszewski's supposed misconduct. App. 130; Amended Brief for Appellant at 48.

Yet, the record supports Chief Judge Giles. As the Disciplinary Board's report issued in April 1999 explains, "when Respondent was asked at the disciplinary hearing for the basis of his beliefs regarding

Judge Olszewski, he stated that his beliefs were based on *conjecture and theory*." App. 223–24 (emphasis added).

In Mr. Surrick's case, the Supreme Court of Pennsylvania examined in excruciating detail the grounds and theories on which he relied in making his accusations of case–fixing against Judges Olszewski and Bradley, to see if the evidence established any objectively reasonable basis for those accusations. *See Surrick*, 749 A.2d at 446–49.

Given the record before the Supreme Court of Pennsylvania, which contained Mr. Surrick's intricately detailed "justifications" for his false allegations of judicial misconduct, it is difficult to envision that he had some other evidence to justify his accusations that the original disciplinary proceedings failed to disclose. Because Mr. Surrick's opening brief on appeal neglects to identify any such additional evidence, this Court should reject his argument that *Price*'s shifting burden of production somehow prejudiced him.

Finally, even the original district court panel, which recommended that no reciprocal discipline be imposed, refused to condemn the state court disciplinary proceedings as violative of Mr. Surrick's due process rights based on which party bore the burden of proof. App. 85–86.

Instead, the panel merely suggested that the district court should exercise its discretion to reach a different result. App. 86.

6. For these reasons, this Court should hold that the district court did not abuse its discretion in concluding that Mr. Surrick's burden allocation arguments failed to establish "that the procedure [in state court] was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." E.D. Pa. L.R. Civ. P. 83.6(II)(D)(1).

C. The imposition of reciprocal discipline on Mr. Surrick raises no First Amendment concerns

1. In his final argument on appeal, Mr. Surrick attempts to invoke the First Amendment as a reason why the district court should have concluded that imposing reciprocal discipline on him would "result in a grave injustice." *See* E.D. Pa. L.R. Civ. P. 83.6(II)(D)(3). Mr. Surrick's argument in this regard faces two insurmountable obstacles. First, the district court properly treated this argument as waived. And, second, the First Amendment does not protect recklessly false accusations of judicial misconduct.

2. The three district judges on the first panel assigned to make a recommendation concerning reciprocal discipline agreed that Mr. Surrick's attorney, at oral argument, waived any First Amendment–based chal-

lenge to the district court's imposition of reciprocal discipline. App. 90, 131. Chief Judge Giles, in his opinion explaining the full court's reasons for imposing reciprocal discipline in the form of a thirty–month suspension, likewise treated Mr. Surrick's First Amendment challenge as waived. App. 131.

As this Court has explained, "[i]t is well established that failure to raise an issue in the district court constitutes a waiver of the argument." *Brenner* v. *Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991).

Perhaps recognizing this insuperable waiver problem, Mr. Surrick's brief on appeal does not raise the First Amendment issue directly. Instead, he argues that First Amendment concerns make reciprocal discipline a grave injustice. While, as explained below, this argument would fail on its merits even if it had not been waived, on this record no conclusion other than waiver is tenable.

But there is more. Mr. Surrick's opening brief on appeal does not challenge the district court's finding that he waived reliance on the First Amendment. Thus, Mr. Surrick has independently waived in this Court any challenge to the district court's finding of waiver. *See Abdul–*

Akbar v. *McKelvie*, 239 F.3d 307, 316 n.2 (3d Cir.) (en banc), *cert. denied*, 533 U.S. 953 (2001).

This Court should therefore follow the district court in holding that Mr. Surrick has waived any argument against reciprocal discipline based on the First Amendment.

3. The U.S. Supreme Court has held, in a case involving a public figure, that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964). Thus, even if Mr. Surrick's First Amendment argument were not waived, it would nonetheless fail, because that constitutional provision does not protect him from discipline for making recklessly false accusations of judicial misconduct.

In *In re Palmisano*, *supra*, the Seventh Circuit upheld a district court's reciprocal disbarment of an attorney who had falsely accused various Illinois state court judges of misconduct. As Judge Easterbrook explained in his opinion for the unanimous panel:

> Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the

> Constitution would permit a sanction. False statements, made with reckless disregard of the truth, do not enjoy constitutional protection. Federal courts are no more willing to tolerate repeated, false, malicious accusations of judicial dishonesty than are state courts.

70 F.3d at 487–88 (citations and internal quotations omitted).

Similarly, in *Committee on Legal Ethics* v. *Farber*, 408 S.E.2d 274 (W. Va. 1991), *cert. denied*, 502 U.S. 1073 (1992), the Supreme Court of Appeals of West Virginia reiterated that "[w]hen a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth." *Id.* at 285 (internal quotations omitted). Earlier in that opinion, the court observed:

> Respondent appears to be one of those people who thinks that a conspiracy theory explains absolutely everything. Such a view can be harmless enough. The man on the bar stool may do little harm when he says that fluoridated water is a communist plot, or that the moon landing was a hoax. However, when an officer of the court makes reckless accusations against judges and just about everyone else who does not let him have his way, he then harms innocent people and threatens the integrity of the legal system.

Id. at 284.

As New York's highest state court explained in *In re Holtzman*, 577 N.E.2d 30 (N.Y.) (per curiam), *cert. denied*, 502 U.S. 1009 (1991):

> It follows that the issue raised when an attorney makes public a false accusation of wrongdoing by a Judge is not whether the target of the false attack has been harmed in reputation; the issue is whether that criticism adversely affects the administration of justice and adversely reflects on the attorney's judgment and, consequentially, her ability to practice law.

Id. at 34; *see also State ex rel. Oklahoma Bar Ass'n* v. *Porter*, 766 P.2d 958, 969 (Okla. 1988) ("There is no First Amendment protection afforded remarks critical of the judiciary when those statements are false."); *Ramirez* v. *State Bar of California*, 619 P.2d 399, 404 (Cal. 1980) (holding that recklessly false accusations of misconduct against judges may be punished without running afoul of the First Amendment).

Not only does Mr. Surrick's opening brief incorrectly assert that the First Amendment protects his ability to falsely and recklessly accuse judges of judicial misconduct, but the brief also entirely ignores the disciplinary system's compelling countervailing interest in prohibiting such recklessly false accusations. According to the Supreme Court of Pennsylvania, "[t]he primary purpose of our system of lawyer discipline is to protect the public from unfit attorneys and to maintain the integrity of the legal system." *Office of Disciplinary Counsel* v. *Stern*, 526 A.2d 1180, 1186 (Pa. 1987).

In *In re Palmisano*, the Seventh Circuit explained how attorneys who recklessly and falsely accuse judges of misconduct harm the integrity of the legal system:

> Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning—for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct.

70 F.3d at 487. The Supreme Court of Pennsylvania expressed similar concerns about the harm that indiscriminate accusations of judicial misconduct inflict on our system of justice at the close of its decision in *Surrick*, 749 A.2d at 449.

4. For these reasons, this Court should reject Mr. Surrick's attempt to cloak his recklessly false accusations of judicial misconduct within the protection of the First Amendment. The First Amendment provides no warrant for recklessly false charges of judicial misconduct, and this Court should make that principle unambiguously clear in its decision here.

IX. CONCLUSION

The district court did not abuse its discretion in reciprocally suspending attorney Robert B. Surrick from the practice of law for thirty months. Its order should therefore be affirmed.

Respectfully submitted,

Dated May 13, 2002

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Amicus Curiae in
Support of Affirmance

CERTIFICATION OF TYPE–VOLUME COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type–volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and contains 10,119 words.

On April 30, 2002, amicus filed in this Court an uncontested motion for leave to file a brief containing no more than 14,000 words. This Court's docket, as of today's date, shows that this motion remains pending before the Court.

Dated May 13, 2002

____
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated May 13, 2002

____
Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing document were served via hand delivery upon the person, at the address, and on the date that appear below.

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Dated May 13, 2002

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