

Case No. 07-2213

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**UNITED STATES COURT OF APPEAL  
FOR THE SIXTH CIRCUIT**

(On Appeal from the United States District Court,  
Eastern District of Michigan, Civil Action No. 06-011684  
the Honorable Arthur J. Tarnow)

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GEOFFREY NELS FIEGER; RICHARD L. STEINBERG,

Plaintiffs-Appellees,

vs.

MICHIGAN SUPREME COURT; CLIFFORD W. TAYLOR,; MAURA D.  
CORRIGAN; ROBERT P. YOUNG, JR.; STEPHEN J. MARKMAN,

Defendants-Appellants

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**PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC***

**CERTIFICATE OF SERVICE**

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**STATEMENT IN SUPPORT OF PETITION**  
**FOR REHEARING *EN BANC***

Mr. Fieger, Appellee in this matter, respectfully requests that this Honorable Court grant the instant Petition for Rehearing *en banc* where a two-judge majority panel of this Court ignored the Supreme Court decision in *MedImmune Inc. v. Genentech*, 549 U.S. 118 (2007), and eviscerated the doctrine of “standing” in order to create a constitutional conundrum whereby Michigan’s Rules of Professional Conduct which impose sanctions on attorneys for “discourteous” conduct can never be challenged as unconstitutional.

The two-judge majority panel decision also conflicts with this Court’s jurisprudence on standing as set forth in *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) and *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998). In a vigorous dissent, Judge Merritt extrapolates the untenable analysis of the majority’s tortured analysis of standing as well as its profound misunderstanding of “as-applied” versus “facial” challenges. See Slip Op. at 34 (J. Merritt)(dissenting) (“The standing question here is not close or subject to reasonable debate among lawyers who understand the law;”).

In addition to ignoring Supreme Court precedent and this Court’s prior decisions on standing in the context of a declaratory judgment action, this Court

should rehear this matter *en banc* because this case presents a question of exceptional importance; that is, whether an attorney has a First Amendment right to publicly express non-defamatory personal criticism of a judge when that criticism could not affect any pending trial. At least six state supreme courts and two federal circuits have split over this issue.

Here, the district court held that because Petitioner Fieger has been twice cited (and once reprimanded) for criticizing judges, he has standing to bring an action for prospective, declaratory relief to challenge the facial constitutionality of the rules. On the merits of Mr. Fieger's claims, the district court concluded that Michigan's "courtesy" rules are unconstitutional because they were limitless in their reach and potential sweep of attorney speech. However, a two-judge majority panel of this Court held that Mr. Fieger does not have standing to bring this action because he has suffered no injury (overlooking his two entanglements and one reprimand imposed under the rules) and because he did not tell the court what criticisms he now wishes to express. By so holding, the two-judge majority panel in this case created novel law which can only be described as "First Amendment by permission slip" jurisprudence.

Because the panel's decision conflicts with Supreme Court precedence, and because the question presented is of exceptional importance to **both** the bench and bar, Petitioner Fieger respectfully requests that this Honorable Court grant the instant

Petition for Rehearing *En Banc* and give this matter the attention of the full court for further, thoughtful, consideration.

### **RELEVANT FACTS SUPPORTING PETITION**

On many occasions, Petitioner Fieger, a licensed Michigan attorney, has engaged in robust criticism of members of the judiciary. In return, he has found himself entangled for violations of the “courtesy” provisions of Michigan’s Rules of Professional Conduct. The “courtesy” provisions allow attorneys to be disciplined for “discourteous” conduct “toward” the tribunal. Because the meaning of “discourteous” remains a mystery, attorneys, like Petitioner Fieger, risks discipline each time he criticizes a judge.

In one particular instance, Mr. Fieger, who hosted a Detroit-area radio show, compared certain Michigan judges to Nazis. He was later cited for being “discourteous” toward the tribunal. In a sharply divided 4-3 decision by the Michigan Supreme Court, Mr. Fieger was ultimately reprimanded for his “discourteous” comments. *Grievance Adm’r v. Fieger*, 719 N.W. 2d 123 (Mich. 2006). The dissenting Justices each concluded that Mr. Fieger’s non-defamatory, public criticisms of the judiciary, expressed while he was on a radio show were squarely protected by the First Amendment.

After having twice defended himself for publicly criticizing members of the

judiciary, Mr. Fieger filed the instant action under the Declaratory Judgment Act seeking prospective, declaratory relief that Michigan's "courtesy" rules were unconstitutionally overbroad in violation of the First Amendment, and unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment. In order to demonstrate standing for purposes of Article III, Mr. Fieger emphasized that he had been recently and publicly reprimanded for violation of the rules, and that he had been previously cited for similar conduct.

After extensive briefing and multiple oral arguments, the district court concluded that Mr. Fieger had standing to present his claims based on his prior entanglements with the rules. Relying on this Court's decision in *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006), and *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998), the district court concluded that "Plaintiff Fieger has a reasonable belief that there is a significant possibility of future harm to him based on these rules."

In finding that Mr. Fieger had standing, the district court also relied on *Steffel v. Thompson*, 415 U.S. 452 (1974). In *Steffel*, plaintiff was threatened several times with prosecution for trespassing after distributing handbills in a shopping center. After being threatened again with arrest and prosecution, plaintiff filed an action in federal court seeking declaratory relief and the district court dismissed the suit for

lack of standing. In a unanimous decision, the Supreme Court reversed and found that based on his past entanglements with the police, plaintiff's threat of prosecution was sufficient to invoke jurisdiction under the Declaratory Judgement Act.

The district court also found controlling the Supreme Court's standing analysis in *MedImmune, Inc. v. Genetech, Inc.*, 127 S. Ct. 764, 772 (2007) in which the Court emphasized that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminated the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction."

The district court went on to quote from *MedImmune* that "[t]he dilemma posed by that coercion – putting the challenger to the choice between abandoning his rights or risking prosecution – is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 773.

Having concluded that Mr. Fieger had standing to present his claims, the district court went on to address the merits and concluded that Michigan's "courtesy" rules are overly broad and vague in violation of the United States Constitution. Specifically, the district court pointed out that the "courtesy" rules are limitless in

their reach and scope and fail to provide any guidance as to what forms of speech are permissible under the rules.

**Panel Decision by this Court on Appeal and Arguments in Support of Rehearing En Banc**

On appeal to this Court, a two-judge majority panel reversed the district court and concluded that Mr. Fieger lacked standing to complain about Michigan’s “courtesy” rules. Joined by Chief Judge Boggs and writing for the majority, Judge Griffin treated as *de minimis non curat lex*<sup>1</sup> the fact that Mr. Fieger “has *only* twice been ‘subjected to disciplinary proceedings’ under the [courtesy] provisions.” Slip Opinion, pg. 14 (attached as Addendum A)(emphasis added).

According to the majority decision, two entanglements under the arguably unconstitutional “courtesy” rules is not enough to allow Mr. Fieger to come into this Court for relief. In order to avoid any semblance of *stare decisis* arising from the Supreme Court’s decisions in *Steffel* and *MedImmune*, the two-judge majority panel in this case simply distinguished superficial facts from those cases.

For instance, on page 21 of the majority opinion, the Court notes that “[t]he plaintiff in *Steffel*, unlike the plaintiffs here, was unambiguous in his intended speech – distributing handbills in a shopping center.” So if Petitioner Fieger wrote out his

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<sup>1</sup> The law is not interested in trivial matters.

criticisms of the judiciary in handbills and attempted to pass them out at a shopping mall, he would have standing under *Steffel*?

The instant panel also attempts to distinguish *MedImmune* by pointing out that

Plaintiff's intended conduct in *Genetech* – making or refusing to make royalty payments under an agreement – was obvious and the threat of injury was imminent and concrete. Here, plaintiffs make vague, non-specific allegations of their intended speech and conduct . . . .

Slip Op. at 22. So a plaintiff who contests royalty payments can bring suit, but an attorney who is disciplined for criticizing the judiciary cannot. While the facts in *MedImmune* may be different, the dissent correctly quotes *MedImmune* where the Supreme Court addressed standing as follows, “the question in each case is whether the facts alleged, *under all circumstances*, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Slip Op. at 32 (J. Merritt)(dissenting)(emphasis added).

Here, the two-judge majority in this matter resorted to strained interpretations and superficial distinctions of Supreme Court precedent in order to avoid the merits of this case. Under the approach used by the majority in this case, *stare decisis* would sink into the abyss simply by distinguishing any number of irrelevant and extraneous facts (i.e., the plaintiff in *Steffel* wore black shoes and the plaintiff in the instant case

wore brown shoes so the Supreme Court's decision in *Steffel* is not binding here). The panel's decision in this case does well to exemplify this point.

As Judge Merritt notes in dissent, “[t]he majority blurs these requirements [of standing] by demanding that plaintiffs demonstrate a pattern of disciplinary actions so consistent that we can infer inevitable and imminent future harm.” Slip Op. at 31 (J. Merritt)(dissenting). The dissent further correctly notes that “[t]he fact that disciplinary action has “only” been brought against him twice does not undermine standing in this context, as the majority contends; it buttresses it.” Slip Op. at 33.

Even more absurd, the majority underscores that “Fieger no longer hosts the radio show which served as the medium for his sanctioned comments and that the Michigan Supreme Court has changed as a result of the recent election.” Slip Op. at 14. So because Mr. Fieger no longer hosts a radio show, he will no longer be able to criticize members of the judiciary? And because the composition of the Michigan Supreme Court has changed Mr. Fieger will stop criticizing members of the judiciary?

These facts, relied upon by the majority, are extraneous and have no relevance to the important constitutional question presented by this case; that is, whether Mr. Fieger has standing to present his claim and whether attorneys have a First Amendment right to express non-defamatory personal criticism of a judge when that criticism could not affect any pending trial.

The two-judge majority decision also conflates, sorely, the concepts of an “as-applied” versus a “facial” constitutional challenge. This case presents a facial challenge to the “courtesy” rules; that is, whether the rules are overly broad and vague on their face. The majority completely ignores this basic tenet of the law by treating this case as an “as-applied” challenge and then faulting Mr. Fieger for failing to tell them what exactly he wishes to say.

Throughout the majority’s decision, the panel insists that Mr. Fieger cannot satisfy standing without first explaining to the Court, in detail, what he wishes to say or how he wants to criticize the judiciary. *See* Slip Op. pg. 11, 13 (“plaintiffs here make no attempt to articulate, with *any* amount of specificity, their intended speech or conduct.”)(“plaintiffs do not suggest that they . . . intend to make vulgar, crude, or personally abusive remarks . . .”)(“In fact, plaintiffs do not allege any intended speech or conduct at all.”). Under the two-judge majority’s panel decision, attorney free speech is governed by permission slip and not the First Amendment.

Contrary to the panel’s decision, the basis of this lawsuit is that neither Mr. Fieger nor any other licensed attorneys know the limits of permissible conduct under the courtesy rules. As Judge Merritt emphasized in his dissent:

Saying that a judge is a ‘jackass’ appears to be impermissible []. But would it would permissible to vary the “form and manner” and say that he is a “stubborn

idiot,” a “right-wing radical,” a “doctrinaire ideologue,” or “driven by party politics”? Or, for that matter, to say that he is an incompetent jurist whose presence on the bench is a disgrace?

Slip Op. at 30 (J. Merritt)(dissenting). Mr. Fieger is challenging the facial validity of the “courtesy” rules which regulate *any and all* conceivable forms of public criticisms of the judiciary.

As Judge Merritt points out, “[i]t is also worth noting that the majority’s apparent demand for detailed allegations about the sorts of decisions that Fieger will criticize and the specific language that he will use is particularly inappropriate in a suit for a declaration concerning the *facial* validity of the rules.” *Id.* at 33 (J. Merritt)(dissenting). Judge Merritt goes on to distinguish as elementary the differences between an “as-applied” and “facial” challenge and the majority’s apparent misunderstanding of such concepts:

If plaintiffs had sought a declaration that certain specific actions could not be punished under the Rules – that is, “a pre-application, as-applied challenge,” *Adult Video News Ass’n v. U.S. Dep’t of Justice*, 71 F.3d 563, 567 (6th Cir. 1995) – it would be appropriate to require that they allege the behavior with a high degree of specificity and demonstrate the likelihood that they will undertake that behavior in the future. But where they seek a declaration that the law, on its face, is unconstitutionally vague and overbroad, what is the point of having plaintiffs’ standing turn on the specificity of their planned conduct? A facial challenge to the Rules will be resolved by reference to the

text of the Rules and any limiting constructions Michigan courts have given them; the specific conduct that gave rise to the facial challenge is of little relevance and should not be determinative of the existence of a case or controversy.

Slip Op. At 33-34 (J. Merritt)(dissenting).

In the end, the two-judge majority buries the merits of this important First Amendment case under a heap of judicial boondoggles. There should be little doubt that the constitutional question presented in this appeal is extraordinarily important to both the bench and bar.

As Chief Judge Boggs (who joined the majority decision in this case) recently pointed out in another free speech case, “[u]nder these circumstances, I believe that significant First Amendment principles [] are at stake and that rehearing en banc is warranted. If *Tinker* is to remain the law, it should not be used as a sword for some expression but as a shield for those who would suppress some unpopular opinions.” See *Barr v. Lafon*, 538 F.3d 554 (6th Cir. August 20, 2008), *reh’g en banc denied*, 2009 U.S. App. LEXIS 1287 (January 23, 2009)(C.J., Boggs dissenting from denial of petition for rehearing *en banc*).

Furthermore, the Ninth Circuit and the supreme courts of Colorado, Oklahoma, and Tennessee have held that attorneys have a First Amendment right to publicly express non-defamatory personal criticism of a judge when that criticism could not

affect any pending trial. *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437-40 (9th Cir. 1995)(First Amendment protected attorney’s published statements characterizing judge who had sanctioned him as anti-Semitic and dishonest); *In re Green*, 11 P.3d 1078, 1083-87 (Colo. 2000)(First Amendment protected attorney’s statements that judge who was considering pending motion was racist); *Oklahoma Bar Ass’n v. Porter*, 766 P.2d 958, 964-70 (Okla. 1988)(First Amendment protected attorney’s statements to news media, made immediately after sentencing of client, characterizing judge as racist); *Ramsey v. Bd of Professional Responsibility*, 771 S.W.2d 116, 120-22 (Tenn. 1989)(First Amendment protected prosecutor’s “disrespectful” statements to news media, including statement criticizing judge).

By contrast, the Seventh Circuit and the supreme courts of Michigan, Mississippi, and Missouri have held otherwise. *See Matter of Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995)(holding that attorney may be disciplined for stating “I think that Judge X is dishonest”), *cert. denied* 517 U.S. 1223 (1996); *Mississippi Bar v. Lumumba*, 912 So.2d 871, 883-84 (Miss.)(First Amendment did not protect attorney’s published statement that judge had “judicial temperament of a barbarian”), *cert. denied* 126 S. Ct. 363 (2005); *Matter of Westfall*, 808 S.W.2d 829, 833-38 (Mo.)(First Amendment did not protect prosecutor’s televised statement criticizing appellate judge’s ruling as “a little bit less than honest”), *cert. denied* 502 U.S. 1009 (1991).

As these cases demonstrate, there is a deep split of authority among the federal circuit and state supreme courts as to an attorney's First Amendment right to criticize members of the judiciary. Given this split, and the two-judge majority's misapprehension of "as-applied" versus "facial" claims and standing, Petitioner respectfully requests that this Honorable Court rehear this matter *en banc* and give this exceptionally important case the full and thoughtful attention of this Court.

Respectfully submitted,

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Dated: February 3, 2009

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Defendants-Appellants

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Plaintiff-Appellee's Petition for Rehearing  
*En Banc* complies with the type-volume limitation, word count, and fonts as  
provided in the Federal Court Rules.

s/ Michael R. Dezsi (P64530)

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CERTIFICATE OF SERVICE

Michael R. Dezsi hereby certifies that on February 3, 2009, he caused to be served on all attorneys registered and participating in the electronic (ECF) filing of the above document in compliance with the Federal Court Rules.

s/ Michael R. Dezsi

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