# RECORD NO. 19-2419

In The

# United States Court Of Appeals

## For The Fourth Circuit

**GLEN K. ALLEN,**

***Plaintiff - Appellant,***

**v.**

**HEIDI BEIRICH; MARK POTOK;**
**THE SOUTHERN POVERTY LAW CENTER, INC.,**

***Defendants - Appellees,***

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**DEFEND LIFE, INC. OF MARYLAND; FITZGERALD GRIFFIN FOUNDATION;**
**THE HON. LARRY PRATT; THE H.L. MENCKEN CLUB;**
**PUBLIC ADVOCATE OF THE UNITED STATES, INC.,**

***Amici Supporting Appellant.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND AT BALTIMORE (1:18-CV-03781-CCB)**

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# PETITION FOR REHEARING *EN BANC*

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**APPELLANT'S PETITION FOR EN BANC REHEARING PURSUANT TO FRAP 35 AND LR 35**

**RULE 35(b) STATEMENT OF NEED FOR EN BANC CONSIDERATION**

The panel decision conflicts with:

a. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967);
b. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991);
c. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Consideration by the full court is therefore necessary to secure and maintain the uniformity of the court's decisions.

**ARGUMENT**

**I. THE PANEL DECISION, WITHOUT ACKNOWLEDGING IT, CONFLICTS WITH *KEYISHIAN v. BOARD OF REGENTS,* 385 US 589 (1967) AND ENDORSES PERSECTION FOR THOUGHT CRIME.**

In a casual manner better suited to persiflage, the panel decision presents a breathtaking departure from long settled First Amendment jurisprudence:

> We reject as frivolous Allen's assertion that his membership in the NA, as reflected in the Dilloway documents, was not a matter of public concern. An attorney's involvement in a white supremacist organization while representing the City, particularly in a case involving a Black citizen's claim of wrongful conviction and incarceration, plainly is "fairly considered as relating to any matter of political, social, or other concern to the community" and is "a subject of general interest and of value and concern to the public." Snyder v. Phelps, 562 U.S. 443, 453 (2011) (citations omitted).

*Pace* Judge Keenan, there is nothing "plain" about this revolutionary conclusion, and no *ipse dixit* assertion will make it so. For example, why and how are personal beliefs a matter of public concern? If those who join an organization, but do not

share all its purposes and who do not participate in all its activities pose no threat, either as citizens or as public employees, how and why are such beliefs a matter of public concern? Does the public have an unlimited right to idle talk?

The panel decision cannot be squared with *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), where the Supreme Court had again stressed that "beliefs are personal" and "mere knowing membership without a specific intent to further the unlawful aims of an organization" [Allen is not conceding the National Alliance ever had any unlawful purposes] is not a sufficient basis to tar a man with guilt by association. *Id.* at 606. *Keyishian* built upon and quoted from *Elbrandt v. Russell*, 384 U.S. 11, 19 (1966), noting that "the doctrine of 'guilt by association'… has no place here." *Keyishian* at 607. Accordingly, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id*. at 606, quoting *Elbrandt v. Russell* at 17.

The panel's brusque dismissal of Allen's stance flies in the face of well-settled First Amendment principles. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (citations omitted). But this is apparently not true. We are not free to even consider ideas that

the courts strongly disfavor (and make no mistake: the mere consideration of ideas is all that the record against Allen shows). The panel decision shows that if we even consider ideas that are disfavored, we do so at the risk of public humiliation, censure, and loss of job – without redress from the Fourth Circuit.

This is, to invoke a famous dissent, "typical of what happens in a police state." *Adler v. Board of Ed*, 342 U.S. 485, 510 (1957) (Douglas, J. dissenting) . The Fourth Circuit is, in effect, saying that some ideas are too dangerous, and those who even consider them do so at their peril. Yet no independent mind is satisfied with dogmatic pronouncements. Searching out alternative explanations often entails communicating and considering arguments raised only among fringe elements. That, too, however, reflects a substantial First Amendment interest, as Justice Breyer noted in his concurrence in *Bartnicki v. Vopper*, 532 U.S. 514, 536-537.

If "freedom of speech needs 'breathing space to survive,'" *Abbott v. Pastides*, 900 F.3d 160, 179 (4th Cir. 2018), *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963), then there must be breathing space for such private speech, and smear merchants such as the SPLC Appellees, who resemble something out of Orwell right down to the "amateur spies and nosers-out of unorthodoxy" (George Orwell, 1984 Penguin Random House: 1961, p. 10), need to be reigned in, rather than covered by the panel decision's protective cloak.

## II. THE PANEL DECISION BREAKS WITH *COHEN v. COWLES MEDIA CO.*, 501 US 663 (1991), BY READING FIRST AMENDMENT STANDARDS INTO ALLEN'S CLAIM FOR ECONOMIC DAMAGES.

The *Cohen* majority held that a plaintiff was not burdened with First Amendment standards and defenses insofar as he seeks pecuniary damages:

> Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $ 50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress. *Cohen v. Cowles Media Co*., 501 U.S. 663, 671 (1991).

This rule from *Cohen* has been the subject of criticism, *e.g*. "One of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses." Alan E. Garfield, "The Mischief of *Cohen v. Cowles Media Co*.," 35 GA. L. REV. 1087 (2001). Nevertheless, it is the majority holding. If it were wrong, the dissents would have prevailed.

The panel decision creates the false dichotomy that, unlike in *Cohen*, Allen was fired because of the harm to his reputation. This sidesteps the obvious: Cohen, too, was undoubtedly fired because of the harm to his reputation when the newspaper published facts showing that he had leaked information to the press. But Cohen was still permitted to seek economic damages that resulted from that true publication. The breach of the defendant newspapers' contractual promises (usually only

considered a civil matter) were enough to render such action "unlawful" in the judgment of the *Cohen* majority. How much stronger then is Allen's case, where the publications resulted from the breach of several criminal statutes.

## III. THE PANEL DECISION MISREADS AND EXTENDS *BARTNICKI v. VOPPER*, 532 US 514 (2001).

The panel decision wrongly focused on whether or not Allen had adequately pled that the SPLC Appellees were complicit in the initial theft of the Dilloway Stolen Documents. Such rigorous scrutiny is directly at odds with *Twombly/Iqbal* pleading, but even by a stricter pleading standard Allen's pleading is more than adequate. In the procedural posture of this appeal, it is undisputed that the SPLC Appellees also:

a) breached a confidentiality agreement (as in *Cohen, supra*.);

b) broke Alabama's receipt of stolen property act;

c) broke Alabama's criminal bribery of a fiduciary act;

d) violated numerous Alabama Rules of Professional Conduct, including 4.1, 4.4, 5.3, and 8.4.

Thus, whether or not Allen had adequately pled that the SPLC Appellees were complicit in the initial theft of the Dilloway Stolen Documents, they would still be implicated under two criminal statutes, an unlawful breach of a civil agreement (unlawful in Justice White's sense in *Cohen, supra*.), and several ethical breaches under Alabama's Rules of Professional Conduct.

These several criminal and ethical transgressions mean that unquestionably the SPLC Appellees flounder under the second prong of *Bartnicki:* they did not acquire the information lawfully. *Bartnicki v. Vopper*, at 525. This places their conduct outside of the protective cover of *Bartnicki*.

## CONCLUSION

Based on the foregoing arguments, Appellant Allen respectfully requests that this Court grant his motion for rehearing *en banc*, ultimately reverse the grant of dismissal pursuant to Rule 12(b), and remand his case to district court for further proceedings consistent with that relief.

This the 26th day of July, 2021

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## CERTIFICATE OF COMPLIANCE

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This the 26th day of July, 2021

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