5/22/19

No. 18-1467

In The
Supreme Court of the United States

TY CLEVENGER,

Petitioner,

v.

MELANIE LAWRENCE, IN HER OFFICIAL CAPACITY AS INTERIM CHIEF TRIAL COUNSEL FOR THE STATE BAR OF CALIFORNIA, AND STACIA L. JOHNS, IN HER OFFICIAL CAPACITY AS DEPUTY TRIAL COUNSEL FOR THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The *Younger* abstention doctrine "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Trainor v. Hernandez*, 431 U.S. 434, 441, 97 S. Ct. 1911, 1917, 52 L. Ed. 2d 486 (1977), quoting *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973). Although California flatly prohibits its administrative hearing officers from considering federal claims, the Ninth Circuit has held that *Younger* applies anyway because parties *might* have a subsequent chance to present constitutional issues in "wholly discretionary" review by the California Supreme Court. *See, e.g.*, *Canatella v. California*, 404 F.3d 1106, 1111 (9th Cir. 2005) ("Although judicial review is wholly discretionary, its mere availability provides the requisite opportunity to litigate"). In California, no such review has been granted in the 19 years since judicial review became "wholly discretionary."

> QUESTION: Where a state administrative hearing officer is prohibited from hearing a party's federal claim, may a federal court abstain from hearing that claim on the grounds that the party *might* be able to raise it later *if* judicial review is granted by a state court? In other words, is a remote *possibility* of state court judicial review sufficient for purposes of *Younger* abstention?

QUESTION PRESENTED – Continued

2. Several circuits permit staff attorneys to perform adjudicatory functions traditionally reserved for Article III judges, and that has prompted considerable criticism from legal academics, practitioners, and even some judges. The Ninth Circuit is perhaps the most extreme, as its General Order 6.5 permits judges to resolve cases without reading the briefs or the record. Instead, a staff attorney summarizes the arguments and recommends a decision in a five- to ten-minute oral presentation conducted behind closed doors.

> QUESTION: Does a federal appellate court deny due process when it requires litigants to present their arguments to staff attorneys rather than Article III judges?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff below) is Ty Clevenger. Respondents are Melanie Lawrence, in her official capacity as Interim Chief Trial Counsel for the State Bar of California, and Stacia L. Johns, in her official capacity as Deputy Trial Counsel for the State Bar of California.

Defendants in the trial court were Gregory P. Dresser, in his official capacity as Interim Chief Trial Counsel; Stacia L. Johns and Kimberly G. Kasreliovich, in their official capacities as deputy trial counsel; and the State Bar of California. In the Court of Appeals, then-Chief Trial Counsel Steven Moawad replaced Mr. Dresser.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ty Clevenger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Pet. App. 1, can be found at 746 Fed.Appx. 645. The order of the United States District Court for the Northern District of California granting the Respondents' motion to dismiss, Pet. App. 5, can be found at 2017 WL 6551154.

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 2018. The Petitioner's petition for rehearing and petition for rehearing *en banc* were denied on February 21, 2019. This Court has jurisdiction under 28 U.S.C. §1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

INTRODUCTION

The Petitioner, Ty Clevenger, is an attorney and blogger who often writes about legal and judicial misconduct at LawFlog.com. In 2016, he blogged about California bar prosecutors who withheld exculpatory evidence from a respondent attorney (who happened to be the Petitioner's former client). The Petitioner filed grievances against the bar prosecutors and also reported the misconduct to the San Francisco County District Attorney's Office, triggering an inquiry from a

criminal prosecutor. Shortly thereafter, the California Bar re-opened a *closed* disciplinary case against the Petitioner under a new case number. At the same time, the chief bar prosecutor refused to appoint a special prosecutor (as required by the bar's own rules) to investigate the Petitioner's grievances against the bar prosecutors. Instead, his deputy dismissed the grievances without an investigation.

The Petitioner filed suit in the Northern District of California under 42 U.S.C. § 1983, seeking injunctive relief on the grounds of selective prosecution and First Amendment retaliation. He argued that *Younger v. Harris* abstention was improper for several reasons, including the fact that California law prohibited him from asserting federal claims before the state bar's hearing officers and appellate panels.[1] The Petitioner further explained that the California Supreme Court had never permitted an attorney respondent to present a constitutional claim since it made judicial review discretionary 19 years earlier. In fact, the California Supreme Court has never granted relief *of any kind* to a disciplinary respondent since judicial review became discretionary. The district court nonetheless dismissed the case on *Younger* abstention grounds, holding that judicial review was adequate. On appeal, the Ninth Circuit canceled oral argument pursuant to its General Order 6.5, permitting the case to be resolved by an

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[1] California calls its disciplinary hearing system the "State Bar Court," but it also recognizes that the hearing system is not really a court. *In re Rose*, 22 Cal. 4th 430, 438, 993 P.2d 956, 961 (2000), citing California Const. Art. 6.

anonymous staff attorney. The appellate opinion rejected a facial challenge to California law, citing prior Ninth Circuit holdings, but it ignored the fact that the Petitioner presented an as-applied challenge. Indeed, the staff attorney's opinion ignored or misrepresented most of the issues on appeal.

STATEMENT OF THE CASE

1. Factual Background: On May 9, 2016, the Petitioner first blogged about a senior California bar prosecutor, Cydney Batchelor, who withheld exculpatory evidence in a disciplinary case against Wade Robertson, the Petitioner's former client. *See* "State bar prosecutor who investigated prosecutorial misconduct is accused of prosecutorial misconduct," http://lawflog.com/?p=1185; *see also* "California bar prosecutor implicates herself in crime," June 1, 2016, http://lawflog.com/?p=1221. Ms. Batchelor had, ironically, chaired the California Bar's task force on prosecutorial misconduct, and she had personally prosecuted criminal prosecutors for withholding exculpatory evidence. The Petitioner also filed a bar grievance against Ms. Batchelor and her co-counsel, as well as a criminal complaint with the San Francisco County District Attorney's Office, citing CALIFORNIA PENAL CODE §135 (criminalizing the concealment of evidence) and CALIFORNIA BUSINESS & PROFESSIONS CODE §6128 (criminalizing deceit by an attorney). Despite the fact that California Bar rules mandated the appointment of a special counsel, *see* CALIFORNIA STATE BAR RULE OF PROCEDURE 2201(a)

and (c)(1), the bar grievances were assigned to Mr. Dresser's deputy, who then dismissed them without an investigation.

Shortly thereafter (the exact date is uncertain), the California Bar opened Case No. 16-J-17320, which was premised on events in Texas and the District of Columbia that had happened nearly four years earlier. The California Bar had already considered those events in Case No. 13-O-1016, and that case was closed after the Petitioner accepted a reprimand from the State Bar of Texas for the same events. In other words, the California Bar reopened a closed case in 2016 after the Petitioner blogged about corruption in the California Bar and filed complaints against bar prosecutors. On April 5, 2017, California bar prosecutors notified the Petitioner that they intended to file disciplinary charges against him. The Respondents said they intended to seek his disbarment for events that occurred in other jurisdictions, *i.e.*, Texas and D.C., even though (1) the Petitioner was an *inactive* member of the California Bar, (2) he had not practiced in California for almost a decade, and (3) the jurisdictions where he was actively practicing were *not* seeking reciprocal discipline, much less disbarment.[2]

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[2] The Petitioner should, at least briefly, summarize the events in Texas and D.C. The Texas bar first investigated a 2011 sanctions order from the Western District of Texas and a 2012 sanctions order from the D.C. district court wherein the Petitioner was accused of multiplying proceedings. The Petitioner produced evidence that the sanctions in D.C. were the result of a fraud on the court perpetrated by his opposing counsel, and that the presiding judge in D.C. had been communicating ex parte with his opposing

2. District court proceedings: On May 15, 2017, the Petitioner filed *Ty Clevenger v. Gregory Dresser, et al.*, Case No. 3:17-cv-02798 (N.D. Cal. 2017), alleging selective prosecution and seeking injunctive relief against Mr. Dresser, who was then the interim chief bar prosecutor, and bar prosecutors Stacia L. Johns and Kimberly G. Kasreliovich. The Petitioner requested a preliminary injunction, but the Respondents argued that the federal court was required to abstain for the reasons set forth in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). At a June 1, 2017 hearing on the preliminary injunction, District Judge William H. Alsup noted that disciplinary

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counsel when she covered up that fraud. After producing that evidence, the Texas bar dropped all charges arising from the D.C. sanctions, and the Petitioner voluntarily accepted a reprimand pertaining to the Texas sanction. Apparently dissatisfied with that result, the D.C. court opened its own disciplinary proceeding, but it refused to permit discovery and it refused to permit witness testimony at "trial" on the disciplinary charges, so the Petitioner agreed to a $5,000 fine and a 180-day suspension, followed by the Petitioner's voluntary resignation. The jurisdictions wherein the Plaintiff is an active member and actively practicing, *e.g.*, the Fifth Circuit and the Southern District of Texas, have flatly refused to reciprocate the discipline imposed by the D.C. court since the matter had already been considered and rejected by the State Bar of Texas. Conversely, California is seeking the Petitioner's outright disbarment even though he has not practiced in California for almost a decade, and even though none of the alleged misconduct occurred in California. To be clear, this is now the third time in six years that the Petitioner has been prosecuted for *the exact same events*. In support of his selective prosecution claim, the Petitioner asked the Respondents to identify other instances in which the California Bar sought to impose more severe discipline on an *inactive* member than what had been imposed where he or she was active, but the Respondents have ignored that request.

charges had not been filed as of that date, ergo *Younger* abstention was not required. Judge Alsup further said he was inclined to allow the Petitioner to conduct a deposition in support of his claims. In an attempt to prevent that discovery, counsel for the Respondents, Suzanne Grandt, assured Judge Alsup that the Petitioner would be permitted to (1) assert his constitutional claims in the state bar proceedings and (2) conduct discovery in support of those claims. Judge Alsup accepted those representations:

> Motion for Preliminary Injunction denied. And the main reason I'm denying it is because Ms. Grandt has represented to me that plaintiff will be able to take all the discovery necessary or that he wishes. He will have a fair opportunity in the state bar court to subpoena appropriate people to show that he's being retaliated against. And if that turns out not to be true, you may come back and see me and maybe we will give a preliminary injunction at that point.

June 1, 2017 Hearing Transcript 22, Pet. App. 49. As set forth below, those representations were completely false.

Shortly after the preliminary injunction hearing, the Petitioner learned that California law did not grant discovery rights in reciprocal discipline proceedings, and it flatly prohibited the Petitioner from presenting his federal constitutional claims in State Bar Court. The Petitioner demanded that Respondents' Counsel notify the district court that its representations at the

June 1, 2017 hearing – which had caused the district court to deny discovery and deny injunctive relief – were untrue. Respondents' Counsel initially balked, then filed an obscure pleading that did not disclose the misrepresentation.

On June 12, 2017, the Petitioner notified the district court that Respondents' Counsel made false representations about the availability of discovery and the opportunity to assert federal claims in the State Bar Court. In response, the district court issued an order outlining the false representations and setting a hearing for July 20, 2017. *See* June 19, 2017 ORDER SETTING HEARING, Pet. App. 11. At that hearing, Judge Alsup learned that just days after the Respondents told him that discovery would be available to the Petitioner in the State Bar Court, the Respondents had urged the State Bar Court to block the Petitioner's request for discovery on the grounds that it was *prohibited* by state law. July 20, 2017 Hearing Transcript 8, Pet. App. 16. In other words, the Respondents told Judge Alsup one thing and told the State Bar Court the exact opposite. Judge Alsup angrily accused Respondents' Counsel of misleading him, and he sanctioned the Respondents by permitting the Petitioner to conduct a single, two-hour deposition of Mr. Dresser. *Id.* at 8-9. This resulted in even more bad publicity for the scandal-ridden California Bar and its prosecutors. *See* James Getz, "US judge sanctions State Bar," July 21, 2017, *Los Angeles Daily Journal*, Pet. App. 66. The Petitioner, meanwhile, presented an as-applied challenge to California disciplinary procedures, noting that the

California Supreme Court had never allowed an attorney to present federal constitutional claims since judicial review became discretionary.

At the July 20, 2017 hearing, Judge Alsup stated in open court that he did not believe the Petitioner would get a fair hearing in State Bar Court. *See* July 20, 2017 Hearing Transcript at 9 ("I don't believe you'll get a fair hearing in the State Bar Court. I think the way this thing has been presented to me, that they're going to shortchange you"). Nonetheless, he rejected the Petitioner's attempts to conduct discovery, including a list of proposed interrogatories for the Respondents, *e.g.*, "Identify all cases (if any) in the last fifteen ten years wherein the California Bar prosecuted an inactive member for acts that occurred in another jurisdiction in which the attorney was admitted to practice."[3]

The district court authorized a two-hour deposition of Mr. Dresser as a "sanction" for counsel's misrepresentations, but that too was a fiasco. Shortly before the deposition, the Petitioner sent Mr. Dresser's attorneys a list of questions related to the Petitioner's equal protection claims, namely the interrogatories identified

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[3] That question has never been answered even though it is critical to establishing a selective prosecution claim. *See United States v. Ness*, 652 F.2d 890, 892 (9th Cir. 1981) ("To succeed on a claim of selective prosecution a defendant has the burden of establishing that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was based on an impermissible motive.") The Petitioner cannot identify similarly-situated respondents without answers to such questions.

above. At the deposition, one of the bar attorneys revealed that he had never shared the questions with Mr. Dresser. Mr. Dresser nonetheless admitted he had seen the questions previously when the Plaintiff proposed them to the court as interrogatories, but he claimed to have no answers to any of the questions. *See* JOINT STATUS REPORT, Pet. App. 31 (summarizing the deposition and citing the reporter's record). He went a step further in "playing dumb" when he testified that, even though he was the chief prosecutor, he did not know who in his office would have the answer to the Petitioner's questions. *Id.*

One might have expected the district judge to be outraged by Mr. Dresser's evasions and bad faith, but the judge instead directed his ire toward the Petitioner, falsely alleging that the Petitioner had asked "unreasonable questions" and "squandered" the deposition. ORDER GRANTING MOTION TO DISMISS at 1, 4. (In the Court of Appeals, the Petitioner defied the Respondents to identify any such "unreasonable questions," but they could not identify a single one. *Compare* APPELLANT'S BRIEF, 2018 WL 986582 at 33, *with* APPELLEE'S BRIEF, 2018 WL 1791737).[4] To this day, the Respondents have never been forced to answer basic questions about selective prosecution, *e.g.*, whether they have previously sought disbarment of an *inactive* member

[4] The Petitioner can only wonder whether the court's protectiveness toward Mr. Dresser was related to a belated disclosure from Judge Alsup: Eighteen days after denying the request for a preliminary injunction, Judge Alsup disclosed that Mr. Dresser was his former law partner.

based on (1) events that occurred in another jurisdiction and where (2) discipline was adjudicated in that other jurisdiction. Likewise, they have never been required to disclose who made the decision to re-open Case No. 13-O-1016 as Case No. 16-J-17320, or who made the decision to seek disbarment (in his deposition, Mr. Dresser claimed he did not know the answer to those questions).

Judge Alsup nonetheless dismissed the case on *Younger* abstention grounds on October 19, 2017. *See* ORDER GRANTING MOTION TO DISMISS, Pet. App. 5. Among other reasons, Judge Alsup indicated that there had been no "proceedings of substance on the merits" when disciplinary charges were filed. *Id.* at 2. At the time of dismissal, however, the district court had already conducted two hearings, including a preliminary injunction hearing, it had issued several orders, and it had sanctioned the Respondents for their fraud. More shocking was the fact that Judge Alsup had literally *rewarded* the Respondents for their fraud by dismissing the case. Recall his statement on June 1, 2017 that "the main reason I'm denying [the preliminary injunction] is because Ms. Grandt has represented to me that plaintiff will be able to take all the discovery necessary or that he wishes." A preliminary injunction would have been "a proceeding of substance on the merits" *per se* and would have foreclosed *Younger* abstention. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 728 (9th Cir. 2017) ("the grant of a preliminary injunction is always a proceeding of substance on the merits") *cert. denied sub nom.*

Nationwide Biweekly Admin., Inc. v. Hubanks, 138 S. Ct. 1698, 200 L. Ed. 2d 953 (2018), citing *Hous. Auth. v. Midkiff*, 467 U.S. 229, 238, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). The Respondents thus thwarted the preliminary injunction by lying about the availability of discovery in State Bar Court, and Judge Alsup gave them the very objective of their fraud when he dismissed the case anyway.

3. Ninth Circuit. In the Ninth Circuit, the Respondent again asserted an as-applied challenge to California's judicial review procedures (among several other issues on appeal). He acknowledged that the Ninth Circuit had repeatedly rejected facial challenges to those procedures, but the Ninth Circuit had never before addressed an as-applied challenge. A three-judge panel canceled oral argument on December 6, 2018, and on December 26, 2018 the Court of Appeals affirmed the district court in a four-page opinion that treated the as-applied challenge as a facial challenge. *See* MEMORANDUM OPINION, Pet. App. 1. On January 9, 2019, the Petitioner filed a petition for rehearing and rehearing *en banc*, noting that only the *en banc* panel would be able to consider both a facial challenge and an as-applied challenge to California's judicial review procedures. The Petitioner also challenged Ninth Circuit General Order 6.5, which had permitted a staff attorney to adjudicate the case pursuant to the Ninth Circuit's "oral screening" procedures. The petition for rehearing was denied without explanation.

REASONS FOR GRANTING REVIEW

"Wholly discretionary review" is inadequate for purposes of *Younger* abstention.

It is "extraordinarily common" for states to prohibit consideration of constitutional questions during administrative proceedings, *see Alleghany Corp. v. Haase*, 896 F.2d 1046, 1051–52 (7th Cir. 1990) (Easterbrook, J., concurring and citing cases), *cert. granted, judgment vacated sub nom. Dillon v. Alleghany Corp.*, 499 U.S. 933, 111 S. Ct. 1383, 113 L. Ed. 2d 441 (1991), thus the first question raised by the Petitioner is one of great legal and practical importance.

In *Younger v. Harris*, the Court held that federal courts should abstain from interfering in state criminal prosecutions so long as criminal defendants have an opportunity to litigate their federal claims in state court. 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The Court extended that rule to attorney disciplinary proceedings in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, holding that federal courts should not intervene so long as respondents have an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. . . ." 457 U.S. 423, 437, 102 S. Ct. 2515, 2524, 73 L. Ed. 2d 116 (1982). The Court has never elaborated on what an "opportunity to raise and have timely decided" means, but the Ninth Circuit and the California Supreme Court have long perverted that phrase beyond any reasonable interpretation. *See, e.g., Canatella v. California*, 404 F.3d 1106, 1111 (9th Cir. 2005)

("Although judicial review is wholly discretionary, its mere availability provides the requisite opportunity to litigate [federal claims]"); *see also In re Rose*, 22 Cal. 4th 430, 993 P.2d 956 (2000) and *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708 (9th Cir. 1995).

Under California law, the Petitioner is plainly prohibited from raising federal issues in state bar proceedings. *In re Rose*, 22 Cal. 4th at 438, 993 P.2d at 961 (2000), citing California Const. Art. 3.5. Like any other respondent, he must first endure a *de facto* trial before an administrative hearing officer, whose powers include the right to immediately and indefinitely suspend him from the practice of law pending disbarment. *See* CALIFORNIA STATE BAR RULE 5.111(D)(1). The Petitioner must endure that suspension while he appeals to the bar's administrative appeals panel, but he still cannot raise federal issues, *i.e.*, he cannot assert his claim that he is being selectively prosecuted in retaliation for exercising his First Amendment rights. Only after the administrative panel has recommended disbarment to the California Supreme Court can the Plaintiff *request permission* to raise his federal claims for the first time. *Canatella*, 404 F.3d at 1111.

On its face, California law cannot withstand constitutional scrutiny. This Court has consistently recognized First Amendment rights as among the "most precious" rights guarded by the Constitution, *see Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954, 201 L. Ed. 2d 342 (2018), elsewhere holding that "the loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976). Furthermore, *Middlesex* mandates an "opportunity to *raise* and have *timely decided*" a constitutional claim, 457 U.S. at 437, 102 S. Ct. at 2524 (emphasis added), yet California makes its lawyers run a prolonged administrative gauntlet – and endure severe disciplinary penalties – before they can even *request permission* to raise their First Amendment or equal protection rights.

More than 100 years ago, this Court held that judicial review of state administrative decisions must be more than theoretical: "[I]n whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available . . . " *Wadley S. Ry. Co. v. State of Georgia*, 235 U.S. 651, 661, 35 S. Ct. 214, 218, 59 L. Ed. 405 (1915). It is self-evident that "the right to a judicial review" is not a "right" if the reviewing court has no obligation to provide such judicial review. As a practical matter, constitutional rights are not worth much at all when one is denied a forum to vindicate those rights.[5] And while this is not a case about

[5] Even the State Bar Court seems to have acknowledged that the Petitioner deserved a forum wherein he could present his constitutional claims. After acknowledging that it would be unable to hear the constitutional claims, the State Bar Court took the unusual step of abating the disciplinary case while the Petitioner presented his claims in federal court, and even on appeal to the Ninth Circuit. *See* November 11, 2017 STATE BAR COURT ORDER, Pet. App. 17 ("Abatement is generally contrary to public protection. However, here, on balance, the factors weigh in favor of abatement of the case pending the outcome in the Ninth Circuit."). As

procedural due process *per se*, it should be obvious that the third prong of *Younger* is not satisfied by state procedures that fail to afford basic due process.

The facial shortcomings of California's judicial review procedures are clear enough, but they become even clearer when one considers the law as applied. Not long after the California Supreme Court made judicial review discretionary, two dissenting justices warned that judicial review would be illusory at best. *See In re Rose*, 22 Cal. 4th at 460 *et seq.*, 993 P.2d at 976 *et seq.* (J. Kennard and J. Brown, dissenting). Their words were prophetic. Since *Rose* was decided, the California Supreme Court has never afforded any kind of relief to a disciplinary respondent, much less relief founded on federal constitutional claims. Furthermore, the California Supreme Court has never before in its 170-year history permitted an appellant to conduct discovery for the first time on appeal. If due process includes a "right to fully and fairly litigate each issue" in a party's case, *duPont v. S. Nat. Bank of Houston, Tex.*, 771 F.2d 874, 880 (5th Cir. 1985), citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965), that can hardly be reconciled with a proceeding that provides no discovery whatsoever.

"The core of due process is the right to notice and a *meaningful* opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 756, 139

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noted above, the district judge also stated on the record that he did not believe the Petitioner could obtain a fair trial in State Bar Court.

L. Ed. 2d 695 (1998) (emphasis added), citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985). A theoretical, one-in-a-million chance to assert a constitutional claim – and an even smaller chance of obtaining discovery to support that claim – cannot be reconciled with that standard. Whether considered facially or as-applied, California's administrative procedures and the Ninth Circuit's supportive case law are constitutionally indefensible, and they cry out for this Court's supervisory jurisdiction.

The Ninth Circuit's "oral screening" procedures deny due process.

In its seminal 2011 opinion on the limits of bankruptcy court jurisdiction, this Court held that Congress could not delegate Article III powers to persons other than Article III judges. *Stern v. Marshall*, 564 U.S. 462, 484, 131 S. Ct. 2594, 2609, 180 L. Ed. 2d 475 (2011). The circuit courts have had no difficulty applying that principle in other settings, *see, e.g.*, *Lawson v. Stephens*, 900 F.3d 715, 718 (5th Cir. 2018) ("Magistrate judges operate as ancillary Article I judicial officers. They support, but cannot supplant, district judges"), yet surprising difficulty in applying that principle to themselves.

Several circuits now delegate significant and even primary adjudicatory responsibilities to staff attorneys, and the Ninth Circuit's practices are perhaps the best analyzed (and most widely criticized) in academic literature. *See, e.g.*, Penelope Pether, "Sorcerers, not

Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law," 39 Ariz. St. L.J. 1 (Spring 2007) and David S. Law, "Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit," 73 U. Cin. L. Rev. 817 (Spring 2005). Judging from the text of Ninth Circuit General Order 6.5 alone, judges are not expected to read the briefs or otherwise hear argument from the actual parties during "oral screening" dispositions (which account for 100-150 dispositions each month), and Ninth Circuit judges themselves have confirmed that such is indeed the practice. *See* Judge Alex Kozinski and Judge Stephen Reinhardt, "Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions," Cal. Law., June 2000, at 43-44 (copy available at http://www.nonpublication.com/don't%20cite%20this.htm).

In a letter to then-Judge Samuel Alito, former Ninth Circuit Chief Judge Alex Kozinski wrote that screening opinions are "drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case." *See* David S. Caudill, "Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy," 62 Wash. & Lee L. Rev. 1653, 1660 (2005) (quoting Jan. 16, 2004 Letter from Judge Kozinski to Judge Alito, Chairman, Advisory Comm. on Appellate Rules 7) (hereinafter "Kozinski Letter"). "During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings." *Id.* Chief Judge Kozinski defended that practice to Judge Alito, *id.*, but elsewhere admitted just how profoundly deficient it is:

> Ninth Circuit judges generally have four law clerks, and the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening" – oral, because *the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition*. After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.

Alex Kozinski, "The Appearance of Propriety," *Legal Affairs*, Jan.-Feb. 2005, at 19. In other words, Article III judges never receive any input from the actual litigants, but only a five- or ten-minute oral summary from an anonymous staff attorney who has already drafted the disposition.[6] Writing in 2007, the late Professor Penelope Pether noted that other Ninth Circuit judges largely confirmed these practices in anonymous survey responses compiled by the Federal Judicial Center. Pether, 39 Ariz. St. L.J. at 13, citing Robert

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[6] It is also worth noting that staff attorneys – not judges – decide which cases the staff attorneys will handle and which cases they will forward to a merits panel for disposition. *See* General Order 6.5.

Timothy Reagan et al., Fed. Judicial Ctr., *Citing Unpublished Opinions in Federal Appeals* 66 app. (2005).

In *Stern*, this Court held that the job of adjudication – "resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law'" – belongs solely to Article III judges. *Stern*, 564 U.S. at 484 (internal citations omitted). That principle cannot be squared with General Order 6.5, which permits a staff attorney to fully adjudicate an appeal with no oversight other than a five- or ten- minute session with judges who have never read the briefs nor the record.

In the proceedings below, the Petitioner challenged General Order 6.5 on due process grounds, but the end result is the same. "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance*, 522 U.S. at 266. A "meaningful opportunity to be heard" necessarily implies a "meaningful opportunity to be heard" by the constitutionally-designated adjudicators of the case. In an adversarial system, the parties must be allowed to present their own arguments *directly* to Article III judges. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued *by the parties* before them." *Carducci v. Regan*, 714 F.2d 171, 177 (C.A.D.C. 1983) (opinion for the court by Scalia, J.) (emphasis added), quoted with approval in *Nat'l Aeronautics & Space*

Admin. v. Nelson, 562 U.S. 134, 147 n.10, 131 S. Ct. 746, 756, 178 L. Ed. 2d 667 (2011).[7]

This is an issue of great consequence, particularly in those circuits (like the Ninth) wherein judges purport to adjudicate appeals without reading the briefs or otherwise hearing from the parties. The proponents of these shortcuts argue that they are necessary to keep pace with an ever-increasing appellate workload, *see, e.g.*, Kozinski Letter at 5, quoted in Pether, 39 Ariz. St. L.J. at 13, but at some point the shortcuts must be constrained by the Constitution. "It goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Stern*, 564 U.S. at 501, 131 S. Ct. at 2619, quoting *INS v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).[8]

That said, the Petitioner's objections to "oral screening" are not made in the abstract, as the opinion below is exactly what one would expect from judges

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[7] One observer noted almost 30 years ago that increased reliance on staff attorneys was driving the Ninth Circuit from a common-law adversarial system to a civil-code inquisitorial system. *See* John B. Oakley, "The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties," 1991 BYU L. Rev. 859, 922 (1991).

[8] Even the practicality argument is eviscerated by the fact that judges in other circuits handle comparable *per capita* caseloads and yet still find time to read the parties' briefs. *See* Marin K. Levy, "The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts," 61 Duke L.J. 315 (November 2011).

who did not read the briefs nor the record. According to the appellate opinion, for example, there was no evidence of bad faith on the part of bar prosecutors, MEMORANDUM OPINION 3-4, Pet. App. 3-4, even though the Petitioner presented uncontested documentary evidence that the Respondents reopened a *closed case* from 2013 under a new number in 2016, shortly after the Petitioner exposed criminal misconduct by bar prosecutors. To this day, the Respondents have not offered a plausible reason for reopening the case years after it was closed.[9]

And it was more than a little disingenuous to find "no evidence" of bad faith when the district court had denied the Petitioner's requests for discovery.[10]

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[9] That fact alone should have weighed heavily against dismissal:

> If the plaintiff shows that the State responded to his exercise of a constitutionally protected right by bringing the prosecution, he may of course rely upon an inference of impermissible purpose. The strength of this inference will depend upon the particular circumstances. If the State advances no other explanation for so responding to the conduct, for example, the inference will almost certainly carry the day.

Wilson v. Thompson, 593 F.2d 1375, 1387 (5th Cir. 1979).

[10] The district judge went so far as to prohibit the parties from filing motions without advance permission from the court. *See* June 19, 2017 Order Setting Hearing, Pet. App. 11. The Petitioner asked the district court for permission to update his request for a preliminary injunction, *see* September 6, 2017 PRECIS, Pet. App. 43, and the Respondents did not object, *see* September 15, 2017 STATEMENT OF NON-OPPOSITION, Pet. App. 47, yet the district court never allowed the Petitioner to file the updated motion. Needless to say, it is hard to litigate one's case when the district court arbitrarily forbids the parties from filing motions.

At the very least, the Petitioner presented a *prima facie* case that merited reasonable discovery in support of his claims. Likewise, it was disingenuous to dismiss the case on the grounds that it was in the "embryonic stages" when the Respondents had perpetrated a fraud on the court for the purpose of keeping it in the "embryonic stages."

The Petitioner does not ask the Court to sort out these matters, as that was the job of the Court of Appeals. Instead, the Petitioner asks the Court to ensure that he and others like him are afforded due process in the Court of Appeals. Where, as here, the issues and facts are complex, an appellate case cannot be understood – much less accurately decided – based on a five-minute presentation from a staff attorney. Given the sheer number of cases being decided by staff attorneys in the Ninth Circuit alone, the threat to due process rights is an enormous one that merits the attention of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should summarily vacate the opinion below and remand it with directions to consider the issues raised herein.

Respectfully submitted,

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