No. _____

**In The**
# Supreme Court of the United States

SCOTTLYNN J. HUBBARD

Petitioner

v.

STATE BAR OF CALIFORNIA

Respondents

On Petition for Writ of Certiorari to the California Supreme Court

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether under the First Amendment a mandatory integrated state bar may punish advocacy speech it deems false but also expressly finds to be harmless?

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b)(i), the following list identifies all of the parties appearing before the California Supreme Court:

The petitioner, *viz.*, Scottlynn J Hubbard IV, was petitioner.

The respondent, *viz.*, The State Bar of California, was a non-title respondent.

## STATEMENT OF DIRECTLY RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), the following list identifies all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court:

California Supreme Court, No. S263210, *In the Matter of Scottlynn J. Hubbard IV*, *State Bar No. 212970*, October 21, 2020.

State Bar Court of California, Review Department En Banc, Nos. 16-O-10871 (16-O-14863), *In the Matter of Scottlynn J. Hubbard IV, State Bar No. 212970,* June 3, 2020.

State Bar Court of California, Hearing Department, Nos. 16-O-10871 (16-O-14863), *In the Matter of Scottlynn J. Hubbard IV, State Bar No. 212970,* June 27, 2019.

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## PETITION FOR WRIT OF CERTIORARI

Attorney Scottlynn J Hubbard IV respectfully petitions for a writ of *certiorari* to review the judgment of the California Supreme Court in this case.

## OPINIONS BELOW

The opinion of the Review Department of the State Bar Court of California is unpublished and appears at: 2020 WL 2520270. *Pet.App. 5a.* The California Supreme Court's unpublished order summarily affirming the discipline appears at *Pet.App. 1a.*

## STATEMENT OF JURISDICTION

The judgment of the California Supreme Court issued on October 21, 2020. *Pet. App. 1a.* This petition was timely filed on March 21, 2021. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION

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.

## STATEMENT OF THE CASE

Scott Hubbard has been suspended from the practice of law for making two sets of statements, one to the Ninth Circuit and one to this Court, while defending his father and law partner from allegations of misconduct. *Pet.App. 1a.*

### A. The Statements

In a petition for certiorari from a Ninth Circuit opinion affirming an award of sanctions against his father, Hubbard wrote:

> Throughout [my father's] forty-year career [he] has never . . . *never* . . . been found to have committed professional misconduct . . . ;
>
> and
>
> Everything that [my father] said in this matter was 100% true, 100% of the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone. [Citation omitted.] More importantly . . . [my father] did not come close to (much less cross) the line of professional misconduct, unethical behavior, bad faith, or even recklessness. [Citation omitted.] In fact, after eight years of persecution no one—not [opposing counsel], not the magistrate, not two district [court] judges, not the State Bar of California, not even the Ninth Circuit panel—has identified what duty [my father] supposedly violated.

*Pet.App. 11a-12a.*

This Court denied the petition containing those statements on October 3, 2016, or more than two months before the omnibus state disciplinary proceedings against Hubbard's father became final. *Pet.App. 8a-9a.* But *federal* disciplinary proceedings against the father, based in part on his conduct in the very case for which certiorari was sought, were final at the time Hubbard wrote those words. *Pet.App. 142a-145a.* Thus, if one reads Hubbard's words without an implied "before the misconduct alleged that is the subject of this petition," he arguably misled the Court.

Of the statements to the Ninth Circuit that formed the basis for discipline, some are, like Hubbard's statements to this Court, quite arguably true.[1] Others are, if not understood as confused, able fairly to be construed as misleading.[2]

Fortunately it doesn't matter. The undifferentiated whole of statements formed the basis for discipline, and First Amendment challenges to each, like to the charges based on the statements to

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[1] *E.g.,* "[My father] has practiced law in California for more than thirty-two years without any record of discipline." *Pet. App. 26a-27a.* Again, true if one understood Hubbard to mean "prior to the alleged misconduct at issue in this very appeal."

[2] *E.g.*, the colloquy with Judge M. Smith at oral argument, which appears at *Pet. App. 16a-17a.* Though again, a charitable reading based on any actual experience with being blown hither and thither at oral argument would see this exchange as confused and confusing rather than misleading.

this Court, were rejected under the same legal standard. If any one of the statements to this Court or the Ninth Circuit cannot form the basis for discipline, then at a minimum vacatur and remand are necessary for review of the sanction after reweighing the charges and the aggravating and mitigating circumstances.

### B. The Proceedings

The Office of Chief Trial Counsel of the State Bar of California commenced these disciplinary proceedings no later than May 5, 2016.[3] *Pet.App. 135a.* After lengthy proceedings, the Hearing Department of the California State Bar Court rejected Hubbard's various—including First Amendment—defenses, found misconduct except as to one statement and recommended suspension. *Pet.App. 88a.* No complaint or testimony from any allegedly misled court or disrespected judge was received, and none of the parties to the underlying acts of misconduct complained or testified.

Hubbard appealed to the Review Department of the State Bar Court, which affirmed the Hearing Department's suspension recommendation. *Pet.App. 36a.* But along the way it made a critical, and from Hubbard's perspective, outcome-determinative change to the Hearing Department opinion. It wrote:

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[3] The State Bar of California was a mandatory, integrated bar until at the earliest January 1, 2018. *See* Cal.Stats.Ann. 2017, c. 422 (S.B.36), § 6, eff. Jan. 1, 2018.

> **The hearing judge found that Hubbard's misconduct harmed the administration of justice** through his repeated misrepresentations to multiple courts and assigned significant weight. **We disagree and find that this circumstance has not been established**. While Hubbard made multiple misrepresentations and a statement impugning the integrity of a federal judge, **the record does not reveal specific evidence that court time or resources were expended as a result.** (*Cf. In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79 [harm to administration of justice where attorney committed multiple acts of misconduct resulting in considerable court resources wasted].)

*Pet.App. 31a-32a* (emphasis added).

Hubbard petitioned for review by the Supreme Court of California of the final recommendation of the State Bar Court.[4] *Pet.App. 89a-134a*. He specifically

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[4] Under California's system, the State Bar Court supposedly only makes recommendations to the Supreme Court of California, whose grant or denial of review becomes the first official act to suspend, disbar, etc. the attorney. Cal. R. Ct. 9.10(a). But the Rules of Procedure of the State Bar Court are adopted by the bar, not the Supreme Court. *See* State Bar Ct. R. Preface ("The Rules of Procedure of the State Bar of California are adopted by the Board of Trustees (formerly Board of Governors) of the State Bar in order to facilitate and govern proceedings conducted through the State Bar Court and otherwise."). Further, the Supreme Court uses

argued that "United States Supreme Court jurisprudence requires a showing of actual harm before imposing discipline for speech-based charges initiated by persons not the subject or recipient of that speech." *Pet.App. 120a.*

The Supreme Court of California summarily denied review on October 21, 2020. This timely petition for certiorari, limited to that First Amendment question, follows.

## REASONS FOR GRANTING THE PETITION

### I. The Supreme Court of California has unconstitutionally limited attorney speech in a dangerous era for advocacy speech.

Let us assume, contrary to the better, or at least more charitable, reading of the facts, that Hubbard did make provably false statements to this Court and the Ninth Circuit. Neither the subjects of the statements nor their recipients complained. And the speech was, per the State Bar Court itself, harmless. First Amendment doctrine as developed since *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), no longer permits an attorney's livelihood to be taken away based on such in-court advocacy speech.

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certiorari-like standards to determine whether to grant review of Bar Court recommendations. Cal. R. Ct. 9.16(a). As a consequence, just four Bar Court recommendations have been reviewed over the past twenty years. *Pet.App. 99a.*

*1. The speech regulation at issue is content-based and therefore subject to strict scrutiny.*

Under the First Amendment, a state actor "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2664 (2011)). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* (emphasis added).

Targeting speech because it is spoken to a court or about judges, or simply because it is false is a content-based regulation of speech under these standards. The Court need look no further than the plurality in *United States v. Alvarez*, 567 U.S. 709, 722 (2012), which "reject[ed] the notion that false speech should be in a general category that is presumptively

unprotected." *See also id.* ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

At the time *Gentile* was decided, the standard of review applicable to content-based speech distinctions was unsettled. It is no longer. *Reed*, 135 S.Ct. at 2226. Further, "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018). "This Court has afforded less protection for professional speech in [only] two circumstances." *Id.* at 2372. First, the Court "h[as] applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978)). "Second . . . States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* Because the speech involved was *advocacy* speech, neither such circumstance applies. "The law here, like the Vermont law in *Sorrell*, does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (internal quotation marks omitted).

*2. The speech regulation cannot survive strict scrutiny.*

Because the Supreme Court of California disciplined petitioner based on the content of his speech, its action must satisfy strict scrutiny. *Reed*, 576 U.S. at 171. This "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011). This the California Supreme Court cannot do.

It is impossible to argue that government has any interest, still less a rational or important one, and certainly not a compelling interest, in banning speech it determines is harmless. It was the prerogative of the State Bar Court's Review Department to assess harm to the interests it saw itself as protecting. It found none, which should be the end of the matter.

Even if that were not the case, however, there are significant tailoring problems here. It is possible to imagine regulating false but harmless speech out of a concern for some diffuse injury to the integrity of the profession. Falsity *qua* falsity was not enough in *Alvarez*, and *Nat'l Inst. of Family & Life Advocates* strongly suggests that outside of *commercial* attorney speech—e.g., cases of advocacy speech like those here—the professional context does not modify that rule. But if it could, then limiting regulation to situations where judges and litigants—that is, the subjects and recipients of attorney speech—file complaints about harmless speech would serve this interest in a more narrowly tailored way.

This approach accommodates the government's heightened interest in regulating attorney speech by not requiring actual harm in every case, or even the great majority of cases, as *Alvarez* held must be true to regulate garden-variety false speech. And it accommodates First Amendment principles by barring the most problematic kinds of prosecutions that, as in this case, allow members of a powerful interest group (the corporate defense bar) to weaponize quasi-criminal administrative proceedings against a disfavored group (disability rights lawyers).

For it is surely true that, if a determined member of the defense bar succeeds in felling a top plaintiff-side ADA lawyer based on harmless statements about which no judge or party objected, there will surely be copycats. The lesson will be that any member of the wider world—read: a legion of low-paid paralegals employed by the corporate community—can comb through, line by line, every pleading any targeted attorney has ever filed, tie the attorney up in disciplinary proceedings for years, and maybe even eventually rid themselves of that meddlesome advocate, certainly for a time and perhaps forever. Limiting the class of persons eligible to seek discipline based on an attorney's harm-free speech prevents incentivizing this behavior while ensuring attorneys are still subject to discipline by those with a good-faith basis for complaining about unsuccessful false statements.

Government is too poor a judge of truth and falsity, of separating opinion from fact, to entrust its coercive powers to any private party that has the money and the influence to command, and the ax to grind, to

command governmental attention.

*3. Better protection of attorney speech is urgently needed.*

Litigation-by-discipline has a long and sordid history. A new sordid history of discipline-as-political-theater is just beginning. In this case, longstanding personal and professional bad blood presaged the proceedings. Given our current toxic culture, it is not merely conceivable but likely that discipline across the nation will be weaponized to suppress political speech or to punish dissident or disfavored attorneys and causes. When not just a case but one's license is at stake, only the rich or the foolish will take on unpopular clients.

This Court's First Amendment jurisprudence is all that stands in the way of politicized state bars. In a marketplace of ideas where objective truth is hard to find, is the California State Bar to be its primary arbiter, even when the speech is concededly harmless and the charges are brought by a stranger to the proceedings out of spite or to neutralize an effective opponent?

## II. The First Amendment problems presented by integrated state bars need resolution, and this is well suited to provide guidance.

Mandatory integrated bars, which force attorneys to associate with and fund political speech with which they may disagree in order to earn a living, should become a thing of the past. Indeed, just last Term Justices Thomas and Gorsuch observed that the persistence of mandatory integrated state bars is

inconsistent with the Court's overruling of *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), in *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). *See Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020) (Thomas, J., dissenting from the denial of cert.).

The problem in most cases is that to invalidate a state bar's organization would be to throw that state bar into chaos. Present testing, licensing, and disciplinary matters would all come to a halt without any clear rule as to how they may be resumed, at least until the state legislature acts. In this case, the legislature has already acted and is well along in the transition to a less monopolist, regulation-only mandatory bar. *See* Lyle Moran, *California Split: 1 year after nation's largest bar became 2 entities, observers see positive change*, ABA J. (Feb. 4, 2019), *available at* https://www.abajournal.com/web/article/california-split-1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes.

Yet these disciplinary charges were instituted by a mandatory integrated state bar. If such a creature is, as Members of the Court have already suggested, unconstitutional, then these proceedings were carried out by an incompetent tribunal. Thus, the change in California law *after* commencement of these disciplinary proceedings does not moot the First Amendment issues presented by giving government sanction and the ability to force membership in (and submission to discipline from) bar associations that also serve as political advocacy groups.

Separate and apart from this case presenting a clean and narrowly-focused opportunity to address this issue,[5] there is good reason to address it as to this bar in particular. Recent investigations have revealed the old unified California bar to be, in a word, corrupt. No one raised questions when a prominent plaintiff's lawyer, who was ostensibly under investigation by the state bar, bought and paid for a state bar investigator and then bankrolled a lavish retirement party for the Chief Justice of California. Harriet Ryan & Matt Hamilton, *Vegas Parties, Celebrities, and Boozy Lunches: How Legal Titan Tom Girardi Seduced the State Bar*, Los Angeles Times (Mar. 6, 2021), at A1. The details of this exposé, amassed through "months of interviews and reviews of documents," are astonishing—a man known, quite literally, to rob widows and orphans kept an active law license. His purchasing power at the old unified bar even allowed him to keep a spotless state bar record after the Ninth Circuit disciplined him for submitting a forged document to the federal courts. *In re Girardi*, 611 F.3d 1027, 1034 (9th Cir. 2010). It is little wonder that the old unified bar found it necessary to come down so hard on people like Petitioner, even though no judge complained and the bar expressly found no one got hurt. *See Bracy v. Gramley*, 520 U.S. 899, 905-07 (1997).

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[5] Petitioner is not aware of any other California disciplinary cases both so old (pre-split) and already final (meaning no opportunity for self-correction) yet still alive for purposes of certiorari. If such exists, it is a rarity.

Apart from this frank corruption, the Court is also well aware of the California bar's extensive politicization. *See Keller v. State Bar of California*, 496 U.S. 1, 3 (1990). Significant capture by various sections of the profession finally drove it into the ditch—to the point that the legislature or governor suspended its authority to collect fees several times. *See* Bob Egelko, *Judgment Time For State Bar*, Los Angeles Daily News (June 21, 1998), at N9; Sherri M. Okamoto, *Schwarzenegger Vetoes State Bar Membership Dues Bill*, Metropolitan News-Enterprise (October 13, 2009), at 1; Lisa Renner, *State Bar facing fiscal crisis*, Capitol Weekly (September 26, 2016). The result was a breakdown in even the disciplinary process. *In re Attorney Disciplinary System*, 19 Cal. 4th 582, 584 (1998).

More, these evils occasioned by the mandatory and integrated character of the bar have had an immediate and palpable effect in this disciplinary matter. The politicization of the bar rendered it, per the California State Auditor, inefficient and unresponsive to its members. *California State Auditor's Report* No. 2015-047, *available at* https://www.auditor.ca.gov/pdfs/reports/2015-047.pdf. Those imperious tendencies no doubt account for the dreadfully slip shod and procedurally irregular way this case and many others have been handled. *Pet.App. 124a-130a* (detailing the many state law violations in Petitioner's proceeding). That a particularly well-funded section of the old integrated organization—the corporate defense bar—was able to weaponize it with ease against a civil rights lawyer is another consequence. The rapacious appetite of the old bar for money for lobbying and other political activities also created an incentive to

punish trivial misconduct such as that involved here, as suspension generates huge fees from the required additional ethics coursework, repeated bar and ethics exams, as well as costs. *Pet.App. 41a-47a* (detailing, over more than 5 pages, all the conditions and requirements imposed during the term of suspension).

That the theoretical availability of review by the Supreme Court of California did not mitigate these evils is apparent not just from their persistence, but from the fact the Supreme Court granted review in but four cases over twenty years, with two of those four being nearly twenty years old. The California Supreme Court left the State Bar Court, as run by a mandatory, integrated state bar, entirely to its own devices.

This case thus does not merely offer a convenient opportunity to pass on the First Amendment issues inherent in the forcible association of a person to a political organization that then punishes his advocacy speech. It presents an opportunity to clarify the law without risking the disruption that would normally follow such a ruling.

## III. Certiorari is the only opportunity for federal review of the California State Bar's uninvited involvement in federal proceedings

Every single statement underlying the discipline against Hubbard was made to a federal court—including this Court—in connection with a federal proceeding on federal claims. Yet no federal judge complained, none was called as a witness or presented a declaration and (insofar as petitioner is aware) none was even made aware of the proceedings. And no federal court has had the opportunity to pass on the charges or the serious First Amendment concerns they occasion. The doctrines of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (*Rooker-Feldman*), and *Younger v. Harris*, 401 U.S. 37 (1971), ensure such review will never happen in the lower federal courts. Thus, review by this Court on writ of certiorari presents the only opportunity for a federal court to address these uniquely federal issues, which have arisen in a uniquely federal factual context.

It would in fact be rather strange if the mandarins of the California bar could take umbrage on behalf of the federal courts, even though those same federal courts did not themselves choose to discipline that person and the State Bar did not inform them of these proceedings, yet that hapless target could find no federal forum for his federal claims. The California bar and its supreme court have acted in a manner contrary to the Federal Constitution, and they have done so ostensibly in the name of this Court and the Ninth Circuit. It therefore seems this Court's special responsibility to concern itself with these claims.

## CONCLUSION

Nobody likes discipline cases because they have the whiff of scandal. Yet more and more it is cases such as this, ones where government hides behind regulation of a putative "privilege" in fact necessary to someone's livelihood, that present the conflict between our Nation's commitment to debate that is "uninhibited, robust, and wide-open" and the forces of political censorship. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). As such, Hubbard respectfully prays that the Court grant this petition for certiorari to rein in the excesses of California's speech police.

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