No.

IN THE

SUPREME COURT of the UNITED STATES

JULIE M. SOWELL and GEORGE E. MENDILLO,

Petitioners,

v.

TINLEY, RENEHAN & DOST, LLP, ET AL.,

Respondents,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

John Gordon Manning
20 Munson Road
Middlebury, CT 06762

George Eli Mendillo
Counsel of Record
190 Carmel Hill Road
Woodbury, CT 06798
(203) 263-2910
gmendillo@aol.com

Counsel for Petitioners

QUESTIONS PRESENTED

I. In the district court petitioners sought prospective declaratory relief, pursuant to 42 U.S.C. § 1983, from a Connecticut Superior Court protective order that violated their First Amendment right to free speech. The district court dismissed the action under the *Rooker-Feldman* doctrine. The Second Circuit panel affirmed in a summary order.

The First Question Presented is:

Does the *Rooker-Feldman* doctrine apply to interlocutory orders that are entered in state court proceedings that end after the federal court action is commenced?

II. Under state law, state judges who violate constitutional rights while acting in their official capacity are subject to suit in an action for declaratory relief. *Pamela B. v. Ment*, 244 Conn. 296 (1998). In the district court petitioners alleged that practices adopted by the judicial respondents in *Sowell v. DiCara*, 161 Conn. App. 102, *cert. denied*, 320 Conn. 909 (2015), are unconstitutional and that petitioners' challenges to the practices in the state courts were dismissed as being barred by

Rule 72-1(b) of the Connecticut Rules of Appellate Procedure and Connecticut "binding precedent" doctrine. The district court dismissed petitioners' claim for declaratory relief under the *Rooker-Feldman* doctrine. The district court and the panel concluded that the claim was barred even though there was no state court judgment determining the issue and even though petitioners had *no* opportunity to have the claim determined on the merits in the state courts.

Petitioners also alleged that they were denied procedural due process of law under the Fourteenth Amendment when the judicial respondents invoked Rule 72-1(b) and Connecticut "binding precedent" doctrine to bar their constitutional claims. The district court and the panel concluded that the procedural due process claim was barred even though there was no state judgment determining the claim and even though the claim did not arise until the Connecticut Supreme Court denied petitioners' access to the courts to litigate petitioners' constitutional claims.

The Second Question Presented is:

Does the *Rooker-Feldman* doctrine bar district court jurisdiction over claims petitioners did not have a full and fair opportunity to litigate in the state courts?

III. Petitioners sought damages from the respondent lawyers, pursuant to 42 U.S.C. § 1983 and state law, for the violation of their First Amendment rights. The district court concluded that the respondent lawyers were not state actors under § 1983. The panel affirmed without specifically addressing the issue.

The Third Question Presented is:

Is a lawyer who is authorized by the State to regulate the speech of an adverse party a state actor under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants below, are Julie M. Sowell and George E. Mendillo,

Respondents, who were Defendants-Appellees below, are Tinley Renehan & Dost, LLP, Douglas S. Lavine, Honorable Judge of the Connecticut Appellate Court, in his official capacity, Eliot D. Prescott, Honorable Judge of the Connecticut Appellate Court, in his official capacity, Nina F. Elgo, Honorable Judge of the Connecticut Appellate Court, in her official capacity, Richard A. Robinson, Honorable Chief Justice of the Connecticut Supreme Court, in his official capacity, Jeffrey J. Tinley and John P. Majewski.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

STATUTES

CONNECTICUT CONSTITUTION

CONNECTICUT GENERAL STATUTES

CONNECTICUT RULES OF APPELLATE PROCEDURE

CONNECTICUT RULES OF PROFESSIONAL CONDUCT

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The order of the United States District Court appears at Appendix B to the petition and is reported at 2019 WL 3552405, 2019 U.S. Dist. LEXIS 130267. The order of the United States Court of Appeals denying panel rehearing and rehearing *en banc* appears at Appendix C.

JURISDICTION

The United States Court of Appeals entered judgment on April 17, 2020 and denied rehearing and rehearing *en banc* on June 9, 2020. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

42 U.S.C. § 1983; Connecticut Const., Art. I, § 10; Rule 4.2 of the Connecticut Rules of Professional Conduct; and Rule 72-1(b) of the Connecticut Rules of Appellate Procedure.

STATEMENT OF THE CASE

This action was filed in the federal district court pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1367(a), 2201 and 2202. When the action was filed petitioners had been subject to a state court protective order for more than four years. [1] The district court and the Second Circuit panel concluded that the *Rooker-Feldman* doctrine applied to the protective order even though the state court proceedings had not ended when the federal action was filed, [2] and even though the order was not appealable in the State courts [3] or reviewable by this Court under 28 U.S.C. § 1257. App. A and App. B.

---

[1] *Sowell v. DiCara, et al.,* Conn. Superior Court Doc. No. UWY-CV-12-6016087-S.

[2] This action was filed in the federal district court on October 4, 2018. *Sowell, et al., v. Southbury-Middlebury Youth and Family Services, Inc., et al.,* Case 3:18-cv-01652. Six months later, on April 8, 2019, *Sowell v. DiCara, et al.*, was settled and withdrawn.

[3] *State v. Curcio*, 191 Conn. 27 (1983). An order, otherwise interlocutory in nature, is a final judgment for purposes of appeal if "the order or action so concludes the rights of the parties that further proceedings cannot affect them." *Id.* at 31. The inquiry "is not whether [the individual] has a right which has been injured, but whether that right can be affected by later trial level proceedings, or by an appeal from a final judgment on the merits." *Burger & Berger, Inc. v. Murren*, 202 Conn. 660, 667 (1987). Because the trial court could have vacated the protective order at any time, the order was not an appealable final judgment.

1. The State Court Protective Order

The state court protective order prohibited petitioner Mendillo from communicating with members of the Southbury-Middlebury Youth and Family Services, Inc. ("YFS") board of directors. [4] Mendillo wished to communicate with unrepresented members of the YFS board of directors regarding their individual liability for a false counterclaim filed by YFS against Sowell without their knowledge, authorization or consent. *Complaint ¶¶ 44-46.* App. 88-89. That matter was not before the court and could not have been adjudicated in the pending action. [5] The protective order was issued after Mendillo sent a claim letter regarding the false counterclaim to the unrepresented board members. The Superior Court issued the protective order after it found that the claim letter violated Rule 4.2 of the Connecticut Rules of Professional

---

[4] YFS is a dissolved, insolvent, non-profit Connecticut corporation. *Sowell v. DiCara, et al.,* was commenced *after* YFS was dissolved. The YFS board of directors did not participate in winding up the affairs of the corporation.

[5] In a vexatious litigation action, it is necessary to prove want of probable cause, malice and a termination of the suit favorable to the defendant therein. *QSP, Inc. v. Aetna Casualty & Surety Co.*, 256 Conn. 343, 361 (2001). Thus, Sowell could not have sued the YFS board members for vexatious litigation until the counterclaim filed against her by YFS was resolved in her favor.

Conduct. App. J. Rule 4.2 captioned "Communication with Person Represented by Counsel" provides in pertinent part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [6]

Mendillo challenged the Superior Court finding that he violated Rule 4.2 by writ of error. See *Sowell v. DiCara,* 161 Conn. App. 102, *cert. denied*, 320 Conn. 909 (2015). App. D. The Appellate Court dismissed the writ. The Court did not address the constitutionality of

---

[6] It is widely acknowledged that Rule 4.2 "is inadequate to address many situations that arise in modern legal practice. Some of these problems arise because the rule's proper application is unclear, others because the rule's application is undesirable. All of these problems are rooted in the breadth of [the] prohibition and the open-ended terms of its exceptions." Hazard and Irwin, *Toward a Revised 4.2 No-Contact Rule,* 60 Hastings L.J. 797, 844-845, March 2009; see Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2* (Part III), 70 Tenn. L. Rev. 643, 659 (2003) ("[T]here is sufficient uncertainty with respect to the constitutional issues raised by the no-contact rule… to suggest the wisdom of saying less rather than more about the constitutional boundaries beyond which the rule cannot legitimately be applied."). See also *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) ("The terms "party" and "matter" are vague… and should be construed narrowly in the interest of providing fair notice to those affected by the Rule and ensuring vigorous advocacy not only by defense counsel, but by prosecutors as well.").

Rule 4.2 nor did it address the propriety of the protective order. [7] The parties to the writ of error were Mendillo and the Superior Court. Sowell was not a party. The Appellate Court decision is a final judgment. The decision is relevant in this case only as an authoritative precedent.

The protective order "permanently enjoin[ed] Plaintiff's counsel, Attorney George Mendillo, from having any further contact of any kind with members of the Board of Directors of YFS without prior permission of counsel." [8] District Court, Doc. No. 34-2, p. 109; *Complaint ¶ 2.* App. 82. The Superior Court concluded that Rule 4.2 prohibited contact of any kind between Mendillo and the unrepresented YFS board members

---

[7] The Court concluded that "*Although the writ of error arises from the underlying Sowell action, the Sowell action is not before us. The propriety of the protective order, therefore, is not properly before us." Sowell v. DiCara,* 161 Conn. App. 102, n.1 (emphasis added). App. 30.

[8] Thus, the protective order authorized the respondent lawyers to prohibit *any and all* speech between petitioners and the unrepresented YFS board members whether or not the speech was prohibited by Rule 4.2. As applied in the protective order, Rule 4.2 is an unconstitutional prior restraint on speech under the First Amendment because it placed the burden on petitioners to obtain prior approval before engaging in speech not prohibited by Rule 4.2. *Complaint ¶¶ 97-110, 129.* App. 100-103 and App. 107.

without regard to the subject matter or the purpose of the contact. [9] *Complaint ¶ 103.* App. 102.

2. The State Court § 1983 action

Rule 4.2 as applied in the protective order barred petitioners' First Amendment speech. Mendillo filed a First Amendment pre-enforcement challenge to Rule 4.2 in the Connecticut Superior Court pursuant to 42 U.S.C. § 1983. The Superior Court dismissed the action as not justiciable. Notwithstanding the Supremacy Clause of the United States Constitution, [10] the Connecticut Supreme Court affirmed. *Complaint ¶¶ 71- 82.* App. 95-98. The district court action followed.

---

[9] Rule 4.2 is intended to shield the client-lawyer relationship. In this case it was used as a sword. Sowell filed two settlement offers in the State trial court. Neither settlement offer was presented to the YFS board. See *Sowell, et al., v. YFS*, District Court Case 3:18-cv-01652-JAM, Doc. 40-1, p.5. "The primary way in which [Rule 4.2] elevates lawyers' interests above clients' is by enabling a lawyer to prolong a case by withholding a settlement offer." Hazard and Irwin, supra note 6, 60 Hastings L.J. at 827-828 (citing Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. Rev. 683, 690 (1979)).

[10] Under the Supremacy Clause states may not deny a federal right when the parties are properly before it, in the absence of a valid excuse. *Howlett v. Rose*, 496 U.S. 356, 367 (1990). The adequacy of the state law grounds to support a judgment precluding litigation of a federal claim is a federal question which the Supreme Court reviews *de novo*. Id. at 36. See *Complaint ¶¶ 165-170.* App. 115.

3. The District Court § 1983 action

Count One of the Complaint is a First Amendment pre-enforcement challenge to Rule 4.2. [11] *Complaint ¶¶ 110-115.* App. 103. Petitioners allege Sowell has a First Amendment right to communicate through her lawyers with unrepresented YFS board members with respect to her claim and that the protective order is barring the exercise of that right. [12] *Complaint ¶ 111.* App. 103. Mendillo is engaging in self-censorship of his First Amendment right to communicate with unrepresented YFS board members under threat of enforcement of Rule 4.2. *Complaint ¶ 114.* App. 103. Mendillo brings this pre-enforcement challenge because he seeks to exercise his clients' First Amendment

---

[11] State court judges are not immune from suit in an action brought under 42 U.S.C. § 1983 challenging the court's disciplinary rules governing the conduct of attorneys where the State courts have inherent authority to regulate and discipline attorneys and authority to promulgate and amend rules and regulations prescribing a code of ethics governing the professional conduct of attorneys. *Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980).

[12] The panel concluded that Sowell did not have standing to make a First Amendment pre-enforcement challenge to Rule 4.2 because she is not a lawyer. App. 8. Sowell's standing to challenge Rule 4.2 is based on her allegation that the rule was a proximate cause of the violation of her First Amendment right to free speech. Likewise, she has standing to challenge the rule based on her allegation that the enforcement of Rule 4.2 by the Tinley firm, Tinley and Majewski for more than four years after the protective order was issued, violated her First Amendment rights. See *Complaint ¶¶171-197.* App. 116-120.

rights and his First Amendment rights by communicating with unrepresented corporate constituents on behalf of his clients without threat of enforcement of Rule 4.2. Such conduct is proscribed by Rule 4.2, as applied, and there exists a credible threat that he will be sanctioned by the Connecticut grievance committee and/or by the Connecticut courts when he does so. *Complaint ¶ 115.* App. 103. [13]

Count Two of the Complaint incorporates the preceding paragraphs and alleges that the unrepresented YFS board members have a First Amendment right to communicate with, and to receive communications from, Sowell's attorneys with respect to a claim that exposes them to personal liability and that the protective order bars the exercise of that First Amendment right. *Complaint ¶ 117.* App. 104. [14]

Count Five of the Complaint alleges that the state judicial officers use unconstitutional practices to determine the existence of a client-lawyer relationship under Rule 4.2. *Complaint ¶¶ 134-141.* App. 108-109. The first practice treats a lawyer's court appearance on behalf of a

---

[13] See Prayer for Relief ¶¶ A. (k), A. (l), A. (n), A. (o), A. (q), A. (r). App. 122-126.

[14] See Prayer for Relief ¶ A. (m). App. 124.

corporation as giving rise to a *conclusive* presumption that the lawyer was authorized by the corporation to represent it. Thus, a lawyer charged with violating Rule 4.2 may not present evidence that the lawyer who filed the appearance was *not* authorized by the corporation to represent it. *Complaint ¶¶ 53(a), 53(c).* App. 91. The second judicial practice applies the retroactive effect of ratification doctrine to the formation of a client-lawyer relationship under Rule 4.2. Under the second practice, a lawyer who communicates with an unrepresented corporation pertaining to a matter will have violated Rule 4.2 if the corporation subsequently becomes represented in that matter by corporate ratification. The retroactive effect of ratification, when applied to the formation of a client-lawyer relationship under Rule 4.2, punishes speech that was permitted by Rule 4.2 when spoken.

In *Sowell*, the Appellate Court applied both practices to Mendillo. First, the Appellate Court found that Mendillo could not present evidence that the respondent lawyers did not represent YFS when he sent the claim letter because the court appearance by the respondent lawyers gave rise to a conclusive presumption that the

lawyers were authorized by YFS to represent it. Second, the Court found that Mendillo's claim letter to unrepresented YFS board members, eleven days *before* the purported YFS ratification, violated Rule 4.2. *Complaint ¶ 53(b).* App. 91. The judicial practices denied Mendillo the opportunity to vindicate the injury to his professional reputation caused by the finding that he violated Rule 4.2 when he sent the claim letter. [15] The practices denied Mendillo access to the courts, [16] free speech, [17] due process of law, [18] and equal protection of the laws. [19]

---

[15] Conn. Const. Art. 1, § 10 provides: "All courts shall be open, and every person, for injury done to him in his person, property or ***reputation***, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." (Emphasis added). App. G. Mendillo alleged that the unconstitutional practices injured his professional reputation. *Complaint ¶ 140*. App. 109. Prayer for Relief A. (w). App. 125.

[16] Count Five ¶¶ 140, 141. App. 109. Prayer for Relief ¶¶ A. (s) - A. (w) and D. App. 125-126.

[17] Count Six ¶¶ 143-144. App. 109. Prayer for Relief ¶¶ A. (t) and D. App. 125-126.

[18] Count Seven ¶ 151. App. 111-112. Prayer for Relief ¶¶ A. (u) and D. App. 125-126. To make out a Fourteenth Amendment due process claim for deprivation of a liberty interest in reputation a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest. *Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005). An injury to a property interest in a license to practice law is a sufficient "plus," as is an injury to a liberty interest under the First Amendment. *Greenwood v. New York*, 163 F.3d 119, 124 (2d Cir. 1998).

[19] Count Eight ¶¶ 154-155. App. 112. Prayer for Relief ¶¶ A. (v) and D. App. 125-126.

Prospective declaratory relief from unconstitutional judicial practices or rules is within the *Ex Parte Young* exception to the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908). [20]

The Appellate Court established the practices in *Sowell v. DiCara*, 161 Conn. App. 102, *cert. denied*, 320 Conn. 909 (2015). App. D. The Connecticut Superior Court and the Connecticut Grievance Committee are required to follow the practices in applying Rule 4.2. [21] The federal district court has jurisdiction to declare the practices unconstitutional pursuant to 42 U.S.C. § 1983. *Pulliam v. Allen*, 466 U.S. 522 (1984). [22]

---

[20] A judicial declaration that Rule 4.2 and the state judicial practices violated Mendillo's constitutional rights would abate the continuing injury to his professional reputation. See *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007) (citing every Circuit that had considered the issue, held that claims for reinstatement to positions of previous employment allegedly terminated in violation of the Constitution satisfied the exception to Eleventh Amendment sovereign immunity first set forth in *Ex Parte Young*).

[21] Complaint ¶¶ 21, 23, 61-62. App. 85 and App. 93.

[22] The Federal Courts Improvement Act of 1996 ("FCIA") partially abrogated *Pulliam*. After FCIA, judicial immunity bars claims for injunctive relief against judicial officers acting in their judicial capacity unless a declaratory decree is violated or declaratory relief is unavailable. FICA also abrogated *Pulliam* to the extent that it permitted plaintiffs to obtain attorneys' fees from judicial officers. Pub. L. 104-317, § 309(a), 110 Stat. 3847 ("Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in

Count Nine of the Complaint alleged that Rule 72-1(b) of the Connecticut Rules of Appellate Procedure [23] and Connecticut "binding precedent" doctrine denied Mendillo access to the courts pursuant to Conn. Const. Art. 1, § 10 and procedural due process of law under the Fourteenth Amendment. [24] The justices of the Connecticut Supreme Court make the rules governing appeals and writs of error. [25]

After the Connecticut Supreme Court denied certification to appeal the Appellate Court's dismissal of the writ of error, Mendillo challenged the constitutionality of the practices adopted by the

---

any action brought against such judicial officer for an act or omission taken in such officer's judicial capacity, unless such action was clearly in excess of such officer's jurisdiction."). This provision is important because it has created a substantial disincentive to actions against judges. A plaintiff who seeks prospective declaratory relief from an unconstitutional judicial practice must pursue the relief at his or her own expense.

[23] Rule 72-1(b) provides in pertinent part that "[n]o writ of error may be brought in any civil or criminal proceeding for the correction of any error where…the error might have been reviewed by process of appeal, or by way of certification." *Complaint ¶ 69.* App. K.

[24] *Complaint ¶¶ 69-70, 76-82, 156-164.* App. 94, App 96-98, and App. 113-114.

[25] Conn. Gen. Stat. § 52-264. App. I. Judges of the Connecticut constitutional courts have inherent and statutory power to promulgate and adopt rules regulating pleading, practice and procedure. However, "such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of the courts." Conn. Gen Stat. § 51-14(a). App. H. See *State v. King,* 187 Conn. 293, 297 (1982).

Appellate Court in *Sowell* by a second writ of error. [26] The Appellate Court moved to dismiss on the ground that Rule 72-1(b) barred the writ because the Connecticut Supreme Court had denied certification to appeal. The Supreme Court dismissed the writ without opinion. *Complaint ¶ 70.* App. 95

After the Connecticut Supreme Court dismissed the writ, Mendillo filed an action in the Connecticut Superior Court seeking declaratory relief from Rule 4.2 and the practices adopted by the Appellate Court in *Sowell,* pursuant to 42 U.S.C. § 1983 and the Connecticut Declaratory Judgment Act, Conn. Gen. Stat. § 52-29. *Complaint ¶¶ 71-73.* App. 95-96. The Superior Court dismissed the action on the ground that "the concept of binding precedent prohibits a trial court from overturning a prior decision of an appellate court." *Complaint ¶ 74.* App. 96. The constitutional claims presented in the action had not been decided by any court. *Complaint ¶¶ 74-75*. App. 96. The Supreme Court affirmed on the ground that the Appellate Court's

---

[26] *Julie M.Sowell v. Deirdre H. DiCara, et al.,* No. SC 19628 (Conn. filed Feb. 4, 2016).

decision in *Sowell* was precedent binding on the Superior Court. [27] *Mendillo v. Tinley, Renehan & Dost, LLP, et al,* 329 Conn. 515 (2018); *Complaint ¶¶ 76.* App. E. The Supreme Court did not apply collateral estoppel or any other preclusion doctrine in finding that *Sowell* was binding precedent precluding jurisdiction in *Mendillo*. *Complaint ¶¶ 77-79.* App. 96-97. The Supreme Court denied rehearing *en banc.* *Complaint ¶¶ 81-82.* App. 97-98.

Count Eleven of the Complaint is a claim for damages against the respondent lawyers pursuant to § 1983. Citing *Polk County v. Dodson*, 454 U.S. 312 (1981), the district court dismissed the claim on the ground that the respondent lawyers were not state actors. The district court also cited *Betts v. Sherman*, 751 F.3d 78 (2d Cir. 2014) and *Milan v. Wertheimer*, 808 F.3d 961 (2d Cir. 2015). The Second Circuit panel did not specifically address the issue in its summary order.

---

[27] The Appellate Court decision in *Sowell* raised substantial constitutional questions as to the proper application of Rule 4.2. Section 73-1 of the Connecticut Rules of Appellate Procedure provides for reservation of such questions from the Superior Court to the Connecticut Supreme Court for its determination. *Complaint ¶ 73.* App. L. The Superior Court declined to seek reservation of the questions.

The district court did not address the scope of the protective order or the authority delegated to the respondent lawyers by the protective order. The protective order prohibited *any and all* speech by petitioners to the unrepresented YFS board members without prior permission of YFS' counsel. *Complaint ¶¶ 2, 4, 47, 48.* App. 82 and App. 89. The prohibition included communications by petitioners to the YFS board members in their individual capacity. The protective order delegated to a party's lawyer the *unlimited* authority to regulate the speech of an adverse party. The protective order was an unconstitutional prior restraint on speech under the First Amendment because it placed the burden on petitioners to obtain the court's prior approval before engaging in speech that was not prohibited by Rule 4.2. *Complaint ¶¶ 97-110, 129.* App. 100-103 and App. 107.

REASONS FOR GRANTING THE PETITION

1. The Circuits are split on whether the *Rooker-Feldman* doctrine applies to interlocutory orders.

The "*Rooker-Feldman* doctrine continues to wreak havoc across the country." [28] Whether *Rooker-Feldman* applies to interlocutory orders is an unresolved question. [29] Before and since the Court's decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005), the circuits have examined the question whether interlocutory state court orders are subject to the *Rooker-Feldman* bar. The circuits are split on the question. The Second, [30]

---

[28] *VanderKodde, et al., v. Mary Jane M. Elliott, P.C., et al.,* 951 F.3d 397 (6th Cir. 2020) (Sutton, J., concurring) (citing cases and one empirical analysis that suggests the doctrine proliferated *even more* after *Exxon Mobil's* attempt to limit it). "Notwithstanding *Exxon Mobil's* efforts to return *Rooker-Feldman* to its modest roots, lawyers continue to invoke the rule and judges continue to dismiss federal actions under it. Here's to urging the Court to give one last requiem to *Rooker-Feldman." Id. Rooker-Feldman* should be limited to "claim[s] seeking review of a final state court judgment." *Id.*

[29] *See* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System (7th ed. 2015) at 1411.

[30] See *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 138 (2d Cir. 1997); *Campbell v. Greisberger*, 80 F.3d 703, 707 (2d Cir. 1996); *Gentner v. Shulman,* 55 F.3d 87, 89 (2d Cir. 1995); *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1142-43 (2d Cir. 1996), *rev'd on other grounds*, 481 U.S. 1 (1987). But see *Green v. Mattingly*, 585 F.3d 97, 102-103 (2d Cir. 2009) (holding that plaintiff's inability to seek Supreme Court review of a temporary order confirmed that her federal action does not 'invite district court review and rejection' of that order).

Fourth, [31] Sixth, [32] and District of Columbia Circuits [33] have applied the doctrine to interlocutory orders and decisions by lower state courts. Courts within these circuits have applied the doctrine broadly even after the Court's decision in *Exxon Mobil*. [34] The Fifth Circuit does not appear to apply *Rooker-Feldman* to interlocutory orders that are non-

---

[31] See *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 320 (4th Cir. 2003); *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 199 (4th Cir. 2000); *Jordahl v. Democratic Party of Va.,* 122 F.3d 192, 199 (4th Cir. 1997). But see *Martin v. Ball*, Civil Action No. 5:06 Cv85, 2008 WL 2120931, at *7 (N.D.W. Va. May 20, 2008) (applying an intermediate approach (citing *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 24 (1st Cir. 2005)).

[32] See *Pieper v. Am. Arbitration Ass'n, Inc.,* 336 F.3d 458, 462 (6th Cir. 2003). But see *Quality Assoc. v. Proctor & Gamble Distributing,* 949 F.3d 283, n.5 (6th Cir. 2020) (*Pieper* "has been displaced by *Exxon*, where the Supreme Court confined the application of the *Rooker-Feldman* doctrine to cases resembling *Rooker* and *Feldman* where state proceedings have ended.").

[33] See *Richardson v. D.C. Court of Appeals*, 83 F.3d 1513, 1515 (D.C. Cir. 1996).

[34] E.g., *Vizgrand, Inc. v. Supervalue Holding, Inc.,* No. 07-13430-BC, 2007 WL 2413102, at *3 (E.D. Mich. Aug. 21, 2007); *Delmarva Power & Light Co. v. Morrison,* 496 F. Supp. 2d 678, 685 n.11 (E.D. Va. 2007); *Hann v. Michigan,* No. 05-CV-71347-DT, 2007 WL 892413, at *6 (E.D. Mich. Mar. 2, 2007); *Field Auto City, Inc. v. Gen. Motor Corp.,* 476 F. Supp. 2d 545, 553 (E.D. Va. 2007); *Galtieri v. Kelly*, 441 F. Supp. 2d 447, 458 n.9 (E.D.N.Y. 2006); *Sinclair v. Bankers Trust Co.*, No. 5:05-CV-072, 2005 WL 3434827, at *3 (W.D. Mich. Dec. 13, 2005). But see *Phillips ex rel. Green v. City of New York*, 453 F. Supp. 2d 690, 714-15 (S.D.N.Y. 2006).

appealable. [35] The First, [36] Third, [37] Seventh, [38] Eighth, [39] Ninth, [40] Tenth, [41] and Eleventh [42] Circuits have adopted an intermediate approach holding that the *Rooker-Feldman* doctrine bars some, but not all, interlocutory orders.

---

[35] See, e.g., *Union Planters Bank Nat. Ass'n v. Salih*, 369 F.3d 457, n.25 (5th Cir. 2004) ("Our ruling today should not be interpreted as necessarily allowing the *Rooker-Feldman* doctrine to defeat inferior federal court jurisdiction over federal challenges to state court orders that are interlocutory *and* non-appealable." (emphasis in original)).

[36] See *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 23-25 (1st Cir. 2005).

[37] See *Malhan v. Secretary U.S. Dept. of State*, 938 F.3d 453 (3d Cir. 2019).

[38] See *Bauer v. Koester*, 951 F.3d 863 (7th Cir. 2020).

[39] See *Dornheim v. Sholes*, 430 F.3d 919, 924 (8th Cir. 2005) (applying *Federacion* test). But see *Friend of Eudora Pub. Sch. Dist. of Chicot County v. Beebe,* No. 5:06-CV-0044SWW, 2008 WL 828360, at *6 (E.D. Ark. Mar. 25, 2008) (stating that *Rooker-Feldman* applies to interlocutory orders, without mentioning the intermediate approach from *Federacion*).

[40] See *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 604 n.1 (9th Cir. 2005) (applying the *Federacion* test).

[41] See *Guttman v. Khalsa*, 446 F.3d 1027, 1032 & n.2 (10th Cir. 2006) (applying *Federacion* test). But see *Tal v. Hogan*, 453 F.3d 1244, 1257 (10th Cir. 2006) ("The state condemnation proceedings need not be final in order to serve as grounds for *Rooker-Feldman* preclusion.").

[42] See *Nicholson v. Shafe*, 558 F.3d 1266, 1279 (11th Cir. 2009) (confining the scope of the *Rooker-Feldman* doctrine to instances where state proceedings have ended).

Seven circuits have concluded that interlocutory orders are "judgments" subject to the *Rooker-Feldman* doctrine only when they are effectively final. *Malhan v. Secretary of U.S. Department of State*, 938 F.3d 453 (3d Cir. 2019). The foundational case is *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17 (1st Cir. 2005). *Federacion* began with the premise that "*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when 'the state proceedings [have] ended.'" *Id.* at 24 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 291 (2005)). The Court held that state proceedings have "ended" under *Rooker-Feldman* in three situations. First, state proceedings have ended "when the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved." *Id.* In other words, *Rooker-Feldman* undoubtedly applies when there is a final state court judgment under 28 U.S.C. § 1257. *Id.* Second, state proceedings have ended where the state lower court issues "an interlocutory order and the parties then voluntarily terminate the litigation." *Id.* at n. 10. In

such a case, the First Circuit went on to conclude, the *Rooker-Feldman* doctrine would preclude either party from ***later*** challenging the order in federal court. *Id.* (emphasis added). Third, state proceedings have ended when they "have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated." *Id.* at 25. This third situation relies on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *Cox Broadcasting* outlined four categories of cases in which non-final state court judgments are considered "final" for purposes of § 1257 because all federal issues have been resolved.

In the instant case, the state proceedings had not "ended" under *Federacion* because the state court action had not been settled and withdrawn when the federal action was commenced. See *Exxon Mobil*, 544 U.S. 280 (2005); note 2, *supra,* at p. 2. Moreover, under the third situation described in *Federacion,* the state proceedings had not "ended" because the constitutionality of Rule 4.2, and the practices adopted by the state courts for its enforcement, have not been determined by the state's highest court or by any other state court.

2. The Circuits are split on whether there is a 'reasonable opportunity' exception to the *Rooker-Feldman* doctrine

The question whether the *Rooker-Feldman* doctrine bars federal court jurisdiction over claims that a plaintiff has not had a full and fair opportunity to litigate in state court is a question of exceptional importance for two reasons. First, barring a claim the plaintiff has not had a full and fair opportunity to litigate in the state courts implicates the Fourteenth Amendment procedural due process rights of all litigants. For example, in this case the state courts applied Rule 72-1(b) to bar Mendillo's challenge to the constitutionality of the judicial practices adopted by the Connecticut Appellate Court in *Sowell v. DiCara*. The constitutionality of the practices has not been determined by any court. The state courts also applied Connecticut "binding precedent" doctrine to bar petitioners' First Amendment pre-enforcement challenge to Rule 4.2 notwithstanding the fact that there is no state court precedent determining the constitutionality of Rule 4.2 under the First Amendment.

Second, authoritative decisions of the Courts of Appeals are split on the question. Compare *Gulla v. North Strabane TP.*, 146 F.3d 168 (3d Cir. 1997) (Alito, J.) (Plaintiffs "are not precluded from bringing their federal claims because the state court could not and did not adjudicate the merit of the constitutional claims. Rather, the state court noted that the [plaintiffs] lacked standing to raise their constitutional claims… Since the [plaintiffs] could not obtain an adjudication of their claims in state court, they are not precluded from raising their constitutional claims in the federal forum."); *Guarino v. Larsen*, 11 F.3d 1151 n.8 (3d Cir. 1993) ("Since the United States Supreme Court is very unlikely to grant certiorari in any particular case, finding that an adjudication exists where a litigant has been unable to present his or her claim means that a litigant can lose his claim without ever having a chance to justify it to a court. Policy considerations such as these have led us to assert that *Rooker-Feldman*… only applies when litigants have had a *full* and fair opportunity to litigate their claim in state court."); *Dell Web Communities v. Carlson*, 817 F.3d 867, 872 (4th Cir. 2016) ("[T]he

Petition does not challenge the state court decision. Rather, it disputes… questions that were never litigated in the state court"); *Stinnie v. Holcomb*, 534 Fed. Appx. 858 (4th Cir. 2018) (Gregory, C.J.) (dissenting on grounds not addressed by the court) ("Because the [*Rooker-Feldman*] doctrine guards against district courts serving a forbidden appellate function, it cannot preclude jurisdiction over issues and claims which have never been ruled on by a state court… Such cases simply lack a relevant state decision subject to reversal."); *Jakupovic v. Curran*, 850 F.3d 898, 904 (7th Cir. 2017) (claims are barred under *Rooker-Feldman* only if plaintiff had a reasonable opportunity to raise the issues in state court proceedings); *Taylor v. Federal Nat. Mortgage Ass'n,* 374 F.3d 529, 534-535 (7th Cir. 2004) (the reasonable opportunity inquiry focuses on difficulties caused by factors that precluded "a plaintiff from bringing federal claims in state court, such as state court rules or procedures."); *Friends of Lake View School District 25 v. Beebe*, 578 F.3d 753, 758 (8th Cir. 2009) ("*Rooker-Feldman* doctrine does not bar federal claims brought in federal court when a state court previously presented with the same claims declined to reach

the merits."); *Target Media Partners v. Specialty Marketing Corp.,* 881 F.3d 1279 (8th Cir. 2018) (a federal claim is not 'inextricably intertwined' with a state court judgment when there was no 'reasonable opportunity to raise' that particular claim during the relevant state court proceeding); *Powell v. Powell*, 80 F.3d 464, 466-67 (11th Cir. 1996) (*Rooker-Feldman* does not apply to claims that litigant had no reasonable opportunity to raise in state court); and *Cervantes v. City of Harvey*, 373 F. Supp. 2d 815, 820 (N.D. Ill. 2005) ("*Exxon Mobil* reiterated the 'independent claim' exception to the *Rooker-Feldman* doctrine… However, a claim is considered 'independent' only when there was no 'reasonable opportunity' to raise the claim in the state court proceedings."); with *Abbott v. Michigan*, 474 F.3d 324 (6th Cir. 2007) ("We believe that the Supreme Court's recent decisions do not support the plaintiffs' asserted reasonable opportunity exception to the *Rooker-Feldman* doctrine."); *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600, 607 (7th Cir. 2008) (After *Exxon Mobil* there is no need for a 'reasonable opportunity' exception to the *Rooker-Feldman* doctrine); *Kenmen Engineering v. Union*, 314 F.3d 468, 478 (10th Cir. 2002)

(*Rooker-Feldman* applies even if state court did not provide full and fair opportunity to litigate claim).

3. A lawyer authorized by the State to regulate the speech of an adverse party is a state actor and the speech regulated is entitled to First Amendment protection.

The panel did not address with any discussion or citation of authority whether the respondent lawyers were State actors under 42 U.S.C. § 1983. The cases relied on by the district court are inapposite. *Milan v. Wertheimer*, 808 F.3d 961 (2d Cir. 2015), citing *Polk County v. Dodson*, 454 U.S. 312 (1981), as analogous authority, held that law guardians appointed by a state court to represent the interests of children in custody proceedings were not state actors, notwithstanding that they were supplied and funded by the state, because they acted according to the best interests of their clients with no obligation to the mission of the state. *Betts v. Sherman*, 751 F.3d 78, 85 (2d Cir. 2014), held that a private actor can only be a willful participant in joint activity with the state or its agents if the two share some common goal to violate the plaintiff's rights. None of the cases cited by the district court describe the gravamen of the claim here, namely, that an *express*

delegation of State authority to the respondent lawyers is fairly attributed to the State.

West v. Atkins, 487 U.S. 42 (1988), however, is apposite. In *West* the question presented was whether a physician who was under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts "under color of state law," within the meaning of 42 U.S.C. § 1983. *Id.* at 43. The Court stated that "[i]t is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *Id.* at 49-50 (citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). *West* made clear that *Polk County v. Dodson*, 454 U.S. 312 (1981), does *not* stand for "the general principle that professionals do not act under color of state law when they act in their professional capacities." *West v. Atkins*, 487 U.S. at 51. The Court concluded that "[i]f Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue

independent of the State to obtain needed medical care." *Id.* at 55. The Court stated that "[i]t is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." *Id.* at 55.

Petitioners complaint alleged that the violation of their constitutional rights was caused by Rule 4.2, a rule of conduct imposed by the State of Connecticut. *Complaint ¶ 172.* App. 116. The respondent lawyers acted jointly with the State of Connecticut. *Complaint ¶ 173.* App. 116. The respondent lawyers exercised the authority of the Superior Court in obtaining and enforcing the protective order. *Complaint ¶ 174.* App. 116. The respondent lawyers enlisted the help of judicial officers in taking advantage of the state's procedures for obtaining protective orders and were at all times state actors with respect to the disciplinary proceedings initiated and prosecuted by them. *Complaint ¶ 175.* App. 116. The respondent lawyers have at all times since the protective order was issued denied Sowell her First Amendment right to communicate through her lawyers with the unrepresented YFS board members with respect to a matter

involving their personal liability. *Complaint ¶ 185.* App. 118.

Enacting and enforcing rules of professional conduct regulating lawyers in the practice of their profession is a quintessential public function because that function subsumes, in particular, the quasi-criminal role of prosecuting lawyers who are charged with professional misconduct. See *In re Ruffalo*, 390 U.S. 544, 551 (1968) (citing *In re Gault*, 387 U.S. 1, 33 (1967)). To determine whether the respondent lawyers are state actors we begin "by identifying 'the specific conduct of which the plaintiff complains.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999). In this case, petitioners have alleged two distinct complaints. Petitioners' first complaint is that the respondent lawyers initiated disciplinary proceedings against Mendillo alleging that he violated Rule 4.2 by sending a claim letter to unrepresented YFS board members. When the respondent lawyers initiated the disciplinary proceedings they did not represent YFS or the members of the YFS board to whom the letter was sent. Petitioners' second complaint is that the respondent lawyers enforced the protective order against petitioners to prohibit communications not prohibited by Rule 4.2.

The respondents Tinley, Majewski, and the Tinley firm prosecuted the disciplinary proceedings against Mendillo both in the Superior Court and in the Connecticut Appellate Court. The Connecticut State Attorney General did not participate in the proceedings. The prosecution of disciplinary proceedings is a function traditionally and exclusively reserved to the State. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state).

The enforcement of the rules of professional conduct is traditionally and exclusively reserved to the State courts. That authority was delegated to the respondent lawyers by the protective order. Where a lawyer's use of State procedures violates an adverse party's civil rights, the Court has found the lawyer to be a state-actor. [43] In this case, the constitutional harm to petitioners was authorized by Rule 4.2 and the protective order. The delegation of functions

---

[43] See, e.g., *Edmonson v. Leesville Concrete*, 500 U.S. 614, 111 S. Ct. 2077, 2087 (1991); *Georgia v.* McCollum, 505 U.S. 42, 112 S. Ct. 2348, 2357 (1992).

traditionally and exclusively reserved to the state are of special concern when the function delegated implicates the exercise of the First Amendment rights of an adverse party.

The State's regulation of petitioners' speech must comply with First Amendment standards. Whether a lawyer who is authorized by the State to regulate the speech of an adverse party is a state actor is an important question that has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John Gordon Manning
20 Munson Road
Middlebury, CT 06762

George Eli Mendillo
Counsel of Record
190 Carmel Hill Road
Woodbury, CT 06798
(203) 263-2910
gmendillo@aol.com

Counsel for Petitioners

September 2020