No. 20-594

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD S. BERRY, PETITIONER

vs.

STATE BAR OF ARIZONA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

Richard S. Berry
Box 26222
Tempe, AZ 85285
480/966-0926
berrs2@cox.net

Petitioner Pro Se

October 28, 2020

QUESTIONS PRESENTED

A) IS A COURT RULE DEFINING AND PROHIBITING THE UNAUTHORIZED PRACTICE OF LAW ("UPL") AN UNCONSTITUTIONAL ABRIDGMENT OF COMMERCIAL SPEECH WHEN a) IT IS VAGUE AND OVERBROAD AND b) IT FOSTERS NO "SUBSTANTIAL STATE INTEREST" [Bates v. State Bar of Arizona, 433 U.S. 350 (1977)] WHEN THE CHARGING OF A FEE IS BY THE RULE THE SOLE DETERMINANT IN FINDING UPL EXTANT IF THE FEE IS PAID TO A NONLAWYER AND NOT A LAWYER?

B) WHILE A STATE MAY LEGISLATIVELY MONOPOLIZE A MARKET FOR A SERVICE (HERE, LIMITING RENDITION OF LEGAL SERVICES TO MEMBERS OF A BAR), MAY THE BAR POLICE UPL WHERE THE MEMBERSHIP OF THE GOVERNING AGENCY ARE PRACTICING LAWYERS IN COMPETITION WITH THE NONLAWYERS TO BE REGULATED [North Carolina State Board of Dental Examiners v. FTC, 574 U.S. ___, 135 S. Ct. 1101 (2015)]?

LIST OF PARTIES

The parties are:

Richard S. Berry, petitioner

The State Bar of Arizona, respondent

RELATED CASES

None.

JURISDICTION

The date on which the last state court ruled in this matter (the Arizona Supreme Court) was July 29, 2020, Appendix C. No motion for rehearing, was filed, and none is required by state law to exhaust state court remedies.

The date on which the last state court ruled on the merits was March 18, 2020 (the Arizona state court of appeals), Appendix B. Timely review was sought from that opinion to the Arizona Supreme Court, which denied review without opinion, Appendix C.

The trial court judgment is Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, U.S. Constitution (Freedom of Speech)

Fourteenth Amendment, U.S. Constitution (Due Process)

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Rule 31 of the Rules of the Arizona Supreme Court

TABLE OF AUTHORITIES

OTHER

OPINIONS BELOW

An Arizona state trial court found Petitioner guilty of the Unauthorized Practice of Law ("UPL") on an Arizona State Bar Complaint in state superior court for violation of Arizona Supreme Court Rule 31, in a trial without a jury. This decision is unpublished; it is Appendix A.

The Arizona Court of Appeals, in a decision by the highest state court on the merits, affirmed that trial court order finding Petitioner guilty of the UPL, on March 18, 2020. See Appendix B. The opinion is unpublished.

The Arizona Supreme Court denied review of the Arizona Court of Appeals without opinion or review of the merits on July 29, 2020. See Appendix C. The denial of review is unpublished.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review and vacate the judgments of the state courts of the State of Arizona.

STATEMENT OF THE CASE

Defendant was disbarred 43 years ago by the Arizona Supreme Court. In 1989, when there was no Arizona rule or statute defining UPL, an earlier statute forbidding UPL sunset in 1985, Petitioner set up an independent paralegal business and firm, complete with a federal trade name ["Why Pay A Lawyer?" ("WPAL")]. Its purpose was to provide to the general public, without employing a lawyer, help with basic legal services and forms such as divorce, eviction, wills, etc. WPAL charges fees for its customers, who opt to appear pro se in court (if the service involves a court), or in their doing their own legal work, fees that are generally much less than those charged by a licensed attorney for the same legal work.

In 2003, the Arizona Supreme Court promulgated Rule 31 (Appendix D)

defining the "practice of law" and UPL. (The Rule as enforced here as in Appendix D has been modified, effective January 1, 2020; see Arizona Supreme Court R-20-0034, "Petition to Restyle and Amend Rule 31 . . ."; the revisions are immaterial to the issues in this petition.) The Bar sued petitioner below for committing UPL under that Rule in 2017.

The trial court found defendant guilty on four UPL claims. Appendix A. Petitioner posited as defenses to these UPL claims the two constitutional Questions Presented above, among other defenses not here material. As to the first issue (unconstitutional vagueness and speech abridgement by Rule 31 under Bates, infra) the trial court found no vagueness or improper abridgement. As to the second Question Presented (NCDental, infra), the trial court did not rule.

The four claims of UPL substantively involved a) WPAL drafting and mailing a "cease and desist" type letter for a customer in 2013, b) drafting a form promissory note complaint for an Arizona superior court filing (trial court level court), c) reviewing with the ultimate filer bankruptcy pleadings typed by another nonlawyer (the State Bar bought no charge under 11 U.S.C. 111, and the trial court did not rule under that statute), and d) discussing and advising a landlord as to an eviction need and action. The trial court held petitioner in contempt and ordered him (for WPAL) to repay approximately $950, total, to

some of the above customers.

The Arizona Court of Appeals (Appendix B) found petitioner's acts of UPL to fit "squarely within the 'hard core' of the statute's proscription", citing and quoting Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973), Appen. B at para. 10, and thus determined that defendant could not avail himself of any "overbroad and vague", id., "exemption" or argument of vagueness or overbreadth.

As to the second Question Presented above, the state court of appeals refused to apply North Carolina State Board of Dental Examiners v. FTC, 574 U.S. ___, 135 S. Ct. 1101, 191 L.Ed. 2d 35 (2015) ("NCDental"),which held that when a state controls a market, it may do so, i.e., enable a monopoly, only [see Parker v. Brown, 317 U.S. 341, 350-1 (1943)] a) by delegating control of the market to an agency (in this case, a non-sovereign actor such as the State Bar), but only b) if the controlling agency or actor is "actively supervised by the [s]tate", quoting other cases citing Parker (see, para. 12, Appen. B). Incredibly, on facts nowhere argued by either Petitioner nor the Bar, the state court of appeals found that petitioner's NCDental argument was raised against the members of the Arizona Supreme Court (para. 15, id.) as supposed active practitioners of law, and not the Bar's board members as practicing lawyers which as a board is the governance in enforcement of Rule 31 UPL matters (see

Arizona supreme court Rule 75ff), and that since the members of the Court itself were "not engaged in the practice of law", NCDental did not apply. No one, certainly not Petitioner, had ever argued that in the lower court or the court of appeals briefing. There has never been a NCDental analogy made to the Arizona Supreme Court members. Obviously, it was the bar's governance to which the NCDental argument was directed and not the members of the state supreme court.

Petitioner appealed in the state courts only the constitutional aspects of the case; he did not appeal on the sufficiency of the evidence at trial on the four instances of UPL. See Appen. B, paras. 7-8.

The Arizona Supreme Court denied review, a discretionary review proceeding under Arizona law, of the Arizona Court of Appeals' opinion on the merits without any opinion on the merits. Appendix C.

All Questions Presented here were raised in the trial court by summary judgment prior to trial (which the trial court declined to rule upon), and by motion for directed verdict during trial (which the trial court denied), and in the brief of Petitioner (appellant there) to the state court of appeals.

REASONS FOR GRANTING THE PETITION

a) Arizona Supreme Court Rule 31 (Appendix D) is out of constitutional and rational step with established law and, frankly, the times and the legal needs of society. It restricts speech commercially, but entirely without any legitimate state interest to serve save to assure lawyers' fees (witness that one half of the exceptions in the Rule already exceptions if a nonlawyer seeks a fee for performing the service). The constitutional precepts of state regulation of commercial speech in a legal context were established in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) sit four square here and oblige the intervention of this Court.

No one today can make an intelligent case for outlawing the commercial speech as done by Rule 31. The definition of "the practice of law" ("POL") in Rule 31(a)(2)(A) is arbitrary, irrational, conclusory and tautological. The Restatement (Third) of the Law Governing Lawyers, 4, cmt. c, concludes that

> "[t]he definitions and tests employed by courts to delineate unauthorized practice by non-lawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas."

In this case, the vagueness and overbreadth is enhanced when on its face, the Rule, has half its exemptions turn on whether a fee is charged by a

nonlawyer! The Rule's exceptions are in subsection d) and baldly state that the distinguishing fact in finding UPL or not is only if a "fee" (or "compensation" in the 2020 amendment of the Rule) is to be paid, and if, so it has to go into the pocket of a lawyer. There is no compelling commercial policy advanced by this paternal protection of legal fees to be reaped by lawyers that could be said to be a compelling or legitimate state interest.

b) Guaranteeing lawyers' fees aside, Rule 31(a)(2)(A)'s language defining POL is so broad and inclusive that 31 exceptions at subsection 31(d) are needed to restrain the Rule's reach to matters but for section d)'s express exceptions would otherwise be POL on the broad express language in the (a)(2)(A) definition. The definition of the POL at (a)(2)(A) catches far more activity for fear of UPL than the Bar generally or (a)(2)(A) wanted to be commercially or reasonably included. Hence, multiparagraphed subsection d). That is quintessential over-breadth and vagueness. Broadrick v. Oklahoma, 413 U.S. 601 (1973). Nowhere in the law has there been found any state licensing system that turns on whether a fee is paid or not, and one that has to have 31 exceptions to ferret out what is verboten and what is not.

c) But it is worse. All of the subsection d) exceptions are not on the list of 31. For example–

I) John Blackacre is an elderly man with a senile wife. He has been made her guardian. Both are titleholders to a townhouse. Blackacre has been aggrieved by the HOA administering the townhouse. He writes a letter of demand for himself and his wife complaining to the HOA. Can he sign the demand for her as the co-owner, or as guardian?. Likely not. Byers-Watts v. Parker, 199 Ariz. 466, 18 P.3d 1265 (App. 2001), as amended; Kadota v. Hosagai, 125 Ariz. 131, 608 P.2d 68 (App. 1980). While his guardianship may allow him to be a party to a suit for her (Rule 17, Arizona Superior Court), he cannot do legal work for her–such as write a letter of demand. Rule 31(a)(2) (A).

II) In re Estate of Shumway, 197 Ariz. 57, 3 P.2d 977 (App.1999) rev. gr. in part, opin. vac. in part o.o.g., 198 Ariz. 323, 9 P.3d 1062 (2000), held that a nonlawyer can prepare a will, and that is not POL. Preparing a will is not referenced in 31(d), but Rule 31(a)(2)(A)'s language envelops that activity as POL. There is not much money to be made in drawing a will, however. Lawyers know this. (The largest pre-paid legal firm in Arizona gives a free will for the price of joining the plan or doing other initial work.) Since little is typically charged for a will, so it would seem, the bar grants a pass here to allow nonlawyers to prepare wills. (WPAL has prepared about two wills a week for 30 years, without complaint by anyone, including respondent bar.)

III) There is in Arizona the office and profession of Certified Legal Document Preparer, created in Rule 31(d)(24). A CLDP cannot practice law, of course [Rule 31(a)(2)(A)], but in the balance of the overall rule there is no demarcation between POL and UPL as to what a CLDP can do [and we know that a CLDP cannot even decide what goes into a blank in a bankruptcy form, see In re Gabrielson, 217 B.R. 819 (Bkrtcy.D.Ariz. 1998), another case involving petitioner here]. A CLDP can charge a fee, of course, but for what? Just typing? Was not the office of CLDP created to enable some POL? See Arizona Code of Judicial Administration, sec. 7-208(A) wherein the office of CLDP is created "to prepare or provide legal documents without the supervision of an attorney for . . . the pubic who is engaging in self representation.". WPAL employs a CLDP.

IV) Suppose free legal advice is given by a neighbor (say, a lawyer retired to Arizona) to an Arizona resident over their mutual back fence. That is UPL. What if the recipient of the advice promised to paint the advice-provider's house in return for him for the legal advice. That is really UPL–painting costs money; someone unlicensed in Arizona thus got paid for POL. What about just taking the unlicensed neighbor to lunch–much less payment--to repay his kindness? If it is a minimal amount paid, would the bar and court administration

of the Rule be ignored?. In re Estate of Shumway, supra.

V) Rule 31 includes arbitration participation as POL, when it is generally accepted that arbitration participation is not UPL. See Restatement (Third) of the Law Governing Lawyers, sec. 4 (cmt c), Bennett, Arbitration: Essential Concepts, May, 2002, pgs. 175-8.

d) Bates v. State Bar of Arizona, 433 U.S. 350 (1977) held that lawyer advertising is commercial speech, protected by the First Amendment, and that a state cannot ban that type of speech. Rules 31(a)(2)(A), 31(a)(2)(B), and 31(d) regulate commercial speech without any compelling state policy interest to be served. As discussed in Bates, the constitutionality of that regulation turns on whether the regulation, or ban on the speech advances a substantial state governmental interest. Bates found all sorts of beneficial, societal benefits to enable lawyers to advertise. Rule 31 fails constitutional muster since it can claim no such laudatory impact on society with UPL proscription. Preserving lawyers' fees is without any significant societal importance or governmental interest constitutionally. The practice of law, certainly today, is a business, pure and simple. Lawyers' fees should be set in the marketplace.

Consistent with Bates is Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), which held that

"government restraints on commercial speech . . . should be narrowly tailored to advance a substantial government interest" (holding summarized in Shely, "From Bates to Blogging; 40 Years of Lawyer Advertising", Arizona Attorney, Dec., 2017, p. 30). Central Hudson declared violative of the First and Fourteenth Amendments a regulation completely banning advertising by a utility. Id. at 558. Rule 31 is also a complete ban. Since Rule 31's policy falls, and fails, under Central Hudson not Bates, it should be constitution-ally banned.

e) Rule 31 merely protects fees and insures a monopoly. Rule 31 construed as a whole is meant to create a monopoly for lawyers by jettisoning certain "small" acts with little fee upside from what is otherwise POL by definition, and the logic of the definition. If the client pays a fee, small act or not however, that act is POL if not done by a lawyer. Of the 31(d) exceptions, 14 are only exemptions to POL if no fee is charged for the act done. If the actor charges a fee, UPL occurs unless the actor is a lawyer (who can charge that fee). If the actor charges no fee, the activity is not UPL whether done by a lawyer or not. Charging a fee is a criterion having no relevance logically or grammatically in POL; see 31 (a)(2)(A). While earning a fee is not even part of the POL definition, that is what Rule 31 substantively promotes–fees for only lawyers, and no one else.

Judge Richard Posner has criticized UPL codification as an attempt to perpetuate a monopoly to the disadvantage of consumers. He has observed that the legal profession is a "cartel of providers of services relating to society's laws" which cartel's focus is to restrict entry into providing even basic legal services. See McCarter, "The ABA's Attack on 'Unauthorized' Practice of Law and Consumer Choice", Federalist Soc. For Law and Pub.Pol Studies, May, 2003.

The practice of law is societally changing. Law is a business as much as a profession, nay, today even morese. See Pearce, "The Professional Paradigm Shift; Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar", 70 N.Y.U.L.Rev.1229. Witness the recent proposed changes in Arizona Supreme Court R-20-0034 (effective 1-1-20), "Petition to Restyle and Amend Rule 31 . . ." which literally creates an entirely new type of business entity to engage in POL (read, fee splitting, and another exemption) without being UPL within the POL definition in Rule 31. Rule 31 is outside the First Amendment under any analysis.

f) The second question presented for review is the application of North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. ___, 135 S. Ct. 1101, 191 L.Ed. 2d 35 (2015) (NCDental) to bar govern-

ance, which case, applied, renders Rule 31 enforcement unconstitutional. The Arizona trial court should have dismissed the entire case for lack of procedural due process for violation of antitrust law as prosecuted by the bar governance as now constituted.

NCDental found violative of federal antitrust law governance by a state agency of competitors when the agency's professional members in governance consisted of "active participants" in the same profession as those being governed. UPL enforcement under Rule 31 violates antitrust law for the same reason.

By Arizona Supreme Court Rule 32(e), the state bar is governed by a Board of Governors, 26 of them, 19 of whom must be "active members" of the state bar, meaning, of course, that they are actively involved publically in POL. This Board thus supervises UPL by other "active market participants" (nonlawyers) who may act in competition with Bar members. There can be no question the Bar as now governed, and in how Rule 31 works in determining UPL, anti-competitively, and under NCDental, is violative of the constitution and antitrust law with such parochial policing for UPL. NCDental is, of course, applicable to this state under the Supremacy Clause. There is no exception for any "profession" under the "Clause". As is said in NCDental:

> "When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest."

NCDental, case syllabus, para. b(3)].

NCDental recognized that certain monopolistic activities of a state can exist in a federalist system, and be farmed out to an administrative agency. There must be "realistic assurance", however, that the agency's noncompetitive conduct "promotes a [legitimate] state policy, rather than merely the [regulating] party's individual interests." NCDental, syllabus, para. c. Here, the only policy served, as Rule 31 is now phrased, is to safeguard lawyer income and eliminate competition. There is no redeeming state policy at all for Rule 31. Without a "redeeming policy", NCDental prohibits this conflicted governance. The Rule in providing UPL governance renders sacrosanct the POL, and does so anti-societally and unreasonably

CONCLUSION

Arizona Supreme Court Rule 31 is concerned not with POL but only, if someone other than a lawyer is to make a dollar at what is spoken or written, placing that act or word within a POL definition to assure that a lawyer gets the lucre for doing it. Just as medical doctors learned to first live with osteopaths, and then both learned to live with chiropractors, and all three learned to live with naturopaths, all survived, and all have distinct parts of the medical market, engendering the privilege in the public of allowing a choice in who renders the service. No one can seriously contend that the doctrine of UPL, codified in Rule 31, is not constitutionally vague, overbroad. It supports only a policy of monopoly, and not any commercially reasonable public policy.

This court should take review. It should vacate the opinion of the Arizona court of appeals, vacate the trial court's judgment and remand. UPL has no place in a modern society. Particularly does it have no place when it is based solely on the premise that only a lawyer must have a fee if whatever speech is uttered, if when paid for by the service's recipient, could be defined as POL That is what now exists under Arizona Supreme Court Rule 31.

Apart from the above, NCDental is indistinguishable from the case at bar.

There is nothing about a dental disciplinary board that is not also true of a state bar association on the facts here. If nothing else, this court should vacate and remand for want of a disciplinary process that comports with procedural due process and oust the legal fox from the public's henhouse.

Dated this 27 day of October, 2020.

Richard S. Berry
Defendant/Appellant Pro Se