No.

IN THE

Supreme Court of the United States

Paul Viriyapanthu,

Applicant

v.

State of California, State Bar of California, Orange County Bar Association, John Nelson, and Richard Green

Respondents

On Application to Stay Of Mandate

Of The United States Court of Appeals For the Ninth Circuit

APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI AND FOR 30 DAY EXTENSION TO FILE FOR A WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

I respectfully request a stay of the mandate/proceedings, pending petition for certiorari, and for a 30 day extension in this matter. The question presented:

> Where Congress conditioned the Americans with Disabilities Act to the states' receipt of funding under Title IV of the Social Security Act pursuant to 42 U.S.C. §608(d)(3) and where the states have agreed to a "statement of assurances" with the federal government specifically enumerating the ADA in order to receive funding, must a Title II plaintiff demonstrate a 14th Amendment violation under *U.S. v. Georgia*, when the state's waiver of sovereign immunity is by voluntary agreement pursuant to Congress's spending clause powers, and not pursuant to Congress's §5 powers to abrogate sovereign immunity to enforce the 14th amendment as in *Georgia*?

1. ISSUES PRESENTED AND GROUNDS FOR STAY AND EXTENSION

Fourteen years ago in *U.S. v. Georgia* 546 U.S. 151 (2006) the Supreme Court unanimously ruled that Congress validly abrogated states' Sovereign Immunity under Title II of the ADA pursuant to Congress's §5 powers to enforce the Fourteenth Amendment. The Court held that the lower courts should evaluate on a claim by claim basis:

> "(1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid."

In the years following, the lower federal courts have been applying *Georgia* to dismiss ADA suits where the states have violated the ADA but the violation did not arise to the level of being a Fourteenth Amendment violation. Certiorari is sought

because different statutory provisions are applicable here as a result of Congress amending statutes to condition the states' receipt of federal funding to the ADA.

2 years after Georgia, Congress passed the ADA Amendments Act of 2008, Public Law 110-325 in response to the decisions in *Sutton v. United Airlines* 527 U.S. 471 (1999) and *Toyota v. Williams* 534 U.S. 184 (2002). Also in 2008, Congress separately passed Public Law 110-234, 122 Stat. 1109 (May 22, 2008) which amended certain statutes to condition the ADA to the states' receipt of federal funding under specified programs. For example Public Law 110-234 amended payments under the federal Supplemental Nutritional Assistance Program (7 U.S.C. §2011 et seq) to require the states' to comply with the ADA pursuant to 7 U.S.C. §2020(c)(2)(C). The provisions of §2020(c)(2) mirror the provisions of 42 U.S.C. §608(d) at issue here which apply to all funding made pursuant to Title IV of the Social Security Act (42 U.S.C. §601 et seq).

It would be erroneous for a lower federal court to apply *U.S. v. Georgia* to dismiss ADA suits for lack of a 14th Amendment violation where the state consented and voluntarily waived sovereign immunity by accepting federal funding specifically conditioned to the ADA and further agreed to the ADA as a part of the statement of assurances made to the federal government. In such a case a claimant should not be required to demonstrate a 14th Amendment violation because sovereign immunity had already been waived—irrespective of a 14th Amendment violation—by the states' voluntary agreement for funding.

42 U.S.C. §2000d-7(a)(1) contains a "catch all" provision which states:

> "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of...title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."

The "provisions of any other statute prohibiting discrimination by recipients of federal financial assistance" is 42 U.S.C. §608(d) which applies to all federal funds provided under Title IV of the Social Security Act. For example §608 (entitled "Prohibitions; requirements") makes reference to different portions of Title IV funding. §608(a)(1) references payments made under §603 of Title IV. §608(a)(2) references payments made under part D (42 U.S.C. §651 et seq). The placement of §608 among the other provisions of Title IV which generally pertain to all funding made in subsequent sections makes it clear that this section applies to all funding under Title IV. For reference, I have attached the section headings as Appendix 13.

42 U.S.C. §608(d) states:

> **Nondiscrimination provisions**
> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
> (1) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.).
> (2) Section 794 of title 29.
> (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

The ADA itself states at 42 U.S.C. §12202:

> "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter...."

The term "program or activity" denotes all activities of a department of a state which receives federal funding and results from Congress enacting the Freedom

Restoration Act of 1987, in response to the decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) which previously limited the scope only to the activities of the specified program receiving funding. Congress enacted 102 Stat. 28, Public Law 100-259 and modified the definition of "program or activity" to mean all activities of a recipient which is codified at Chapter 21 "Civil Rights", Subchapter V "Federally Assisted Programs", 42 U.S.C. §2000d-4a "Program or activity" or "program" defined, and which states:

> "For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—
> **(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government;"

See *Thomlison v. City of Omaha*, 63 F. 3d 786, 789 (CA8 1995):

> "Although the Fire Division did not receive any federal assistance directly, other Public Safety Department divisions...received federal funds. Because the definition of program or activity covers all the operations of a department...the entire Department is subject to the Rehabilitation Act."

Federal funding agencies are requiring the state to sign a "statement of assurances" specifically enumerating the ADA and representing to the federal government that the ADA will be complied with. When the disabled—who are essentially third party beneficiaries of the agreement between the federal government and state—attempt to enforce the ADA in court, the states are reneging on their agreement and moving to dismiss on sovereign immunity grounds so the disabled cannot enforce the protections of the ADA. To allow the state to avoid ADA compliance after specifically agreeing to the contrary would be to allow the states' to

perpetrate fraud on the federal government by making misrepresentations to obtain funding while not fulfilling the benefit of the bargain on the states' part.

28 CFR § 42.105 requires a personal representative of the state to physically sign a "statement of assurances" to the federal funding agency that the state will comply with the terms and conditions of the grant program being administered, and states in pertinent part:

> (a)(1)"as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this subpart... Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement."

Private parties have the right of judicial enforcement in addition to the United States. *Barnes v. Gorman*, 536 US 181, 184 (2002).

Appendix 14 contains a sample Statement of Assurances from a sister Department, the California Department of Transportation, which specifically identifies Title VI of Civil Rights Act of 1964, 28 C.F.R. §50.3 and the ADA as requirements. Said Statement of Assurances would be similar if not identical to the one signed here. Federal law pertaining to grants to the states for public roadways and transportation also have the same prohibitions as 42 U.S.C. §608(d) against race discrimination (at 23 U.S.C. §140 and 49 U.S.C. §5332) and requires compliance with the ADA by grant recipients at 49 U.S.C. §5302(3)(I) and Section 223 of the ADA, 42 U.S.C. §12143.

Due to the fact that this case was dismissed on FRCP 12(b)(6) without discovery on grounds that the violation of the ADA did not violate the 14th

Amendment under Georgia, it was not possible to obtain the actual statement of assurances that was agreed to by the state here. It is hoped on Certiorari petition a Call for the View of the Solicitor General would be made because the actual statement of assurances is in the possession of the federal government which the solicitor general has access to.

Appendix 15 contains the records of federal financial grants made to the Judicial Council (which is a subunit of the state judicial branch), on behalf of the California Courts. The budget of the state judicial branch of which the State Bar is a subunit, makes it clear that Title IV funding to which §608 applies was received.

Appendix 16 are excerpts of the California Judicial Branch budget which demonstrates receipt of Social Security Title IV funding:

> "Additionally, the recent federal Families First Prevention Services Act expanded the list of eligible Title IV-E reimbursable activities to include court-appointed dependency counsel costs. The Budget includes $1.5 million ongoing General Fund for the Judicial Council to administer these federal reimbursements, which are estimated to be $34 million annually."

Appendix 17 is the Orange County Superior Court budget which states:

> "The Child Support Commissioner unit shares responsibilities with the Orange County Department of Child Support Services (DCSS) in relation to the Child Support Enforcement Program under Title IV-D of the Social Security Act. It ensures sufficient Court calendar time and compliance with timeframes for case processing as established by state and federal laws and regulations."

The "Families First Prevention Services Act" refers to Public Law 115-123, which made amendments to Title IV-E of the Social Security Act (42 U.S.C. §670 et seq) to provide funding to the states to prevent children from being placed into foster care.

Racial preferences had been given to whites for dependency council positions, commissioner positions and for judicial appointments of which federal funding was used to finance the discrimination.

> 28 CFR § 42.104 states:
> (1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program)....

Because the funding under the Families First Prevention Act was specifically to provide employment, the racial preferences given to whites for dependency counsel positions, commissioner positions, and appointment of judges is actionable under Title VI of the Civil Rights Act of 1964.

> The first sentence of the first page of the judicial budget Appendix 17 states:
>
> "The Judicial Branch consists of the Supreme Court, courts of appeal, trial courts, and the Judicial Council. The Judicial Council is responsible for managing the resources of the Judicial Branch."

The Judicial Council is a subunit of the courts responsible for the receiving and distributing the federal grants to the State Courts. As a subunit of a department, the Judicial Council's receipt of funds waives sovereign immunity for the entire department—and the State Bar is a subunit in the same department. The position of the Judicial Council within the state courts as a unitary "department" is defined under the California Constitution.

The California Supreme Court is created under Article VI §1 of the California Constitution and the Judicial Council is created under §6. §1 states:

> "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."

§6 states:

> "The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, two nonvoting court administrators, and any other nonvoting members..."

Because the California State Bar is a subunit of the state judicial branch and oversees the admission of attorneys, the State Bar may also be sued under the ADA and Title VI.

The State Bar states in its Answering brief at Appendix 6 page 4:

> "The State Bar of California ("State Bar") is a constitutional entity, expressly acknowledged as an integral part of the judicial function of the State. *See* Cal.Const., art. VI, § 9; Cal. Bus. & Prof. Code § 6001; *In re Rose*, 22 Cal.4th 430, 438 (2000). It is a public corporation created as an administrative arm of the California Supreme Court for the purpose of assisting in matters of admission and discipline of attorneys. *See In re Attorney Discipline Sys.*, 19 Cal.4th 582, 598-99 (1998)."

As an administrative arm of the Supreme Court, which is part of the judicial branch as a department, the Judicial Council's receipt of funding effectuates waiver for the entire department including the State Bar as a subunit.

Appendix 18 contains a portion of the USDOJ Title VI Manual which explains:

> "An entity may receive grant money directly from an agency or indirectly through another entity. In either case, the direct recipient as well as the secondary or subrecipient are considered to have received federal funds....For example, a college or university receives federal financial assistance indirectly where it enrolls United States military veterans for whom the federal government provides tuition payments. Although federal payments go directly to the veterans and indirectly to the university, the university is receiving federal financial assistance that neither it nor the students would

have received but for students' enrollment and entitlement. See *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (superseded by statute on other grounds by Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988));"

In addition to being a subunit, the State Bar is a direct subrecipient of federal funding. The Judicial Council obtains federal grants for legal aid programs statewide and distributes the aid—because the Judicial Council lacks its own staff attorneys—through the State Bar and reimburses the bar for its administrative expenses.

The State Bar's Budget at Appendix 19 states:

"State Bar staff, together with the California Commission on Access to Justice and the LAAC [Legal Aid Association of California], also worked to unlock new federal funding sources for legal aid. As a result, over $20 million in new Requests for Proposals were issued...The funds are in the budget of the State Judicial Council for grants to be administered by the State Bar's Legal Services Trust Fund Commission through the Equal Access fund. The Judicial Council contracts with the State Bar for the administration of these funds, which currently consist of grants to approximately 100 nonprofit legal aid organizations, and reimburses the State Bar for its administrative expenses."

The State Bar's distribution of funds from the Judicial Council meets the definition of a recipient as the State Bar financially benefits from the grants by keeping a portion of the funds for "administrative expenses". 28 C.F.R. §42.102(f):

"The term ***recipient*** means any State...any public...agency, Institution, or organization...to whom Federal financial assistance is extended, directly or through another recipient...but such term does not include any ultimate beneficiary."

By virtue of the State Bar's position as a subunit in a department which receives Title IV funding, and the State Bar's receipt of funding as a subrecipient, sovereign

immunity does not bar suit for violations of the ADA or for race discrimination under Title VI.

Previously the Supreme Court had allowed suit under the ADA against a state court in *Tennessee v. Lane*. The U.S. DOJ intervened on behalf of the plaintiffs in *Lane* and also in *Georgia*. The United States simply does not have sufficient resources to prosecute every race or disability discrimination suit but selects a few cases to set precedent so that private enforcement, which is authorized by Congress, could occur.

There is no purpose to having federal race or disability discrimination law if the lower federal courts refuse to enforce. The forthcoming petition for certiorari is necessitated by the Ninth Circuit refusal to enforce federal law and summarily dismissing each and every suit against the State of California and State Bar on grounds of sovereign immunity, without regards to whether sovereign immunity had been abrogated.

The California State Bar has a 100% success rate, with no one having ever been allowed to bring suit, even when the suit is authorized by statute and there is no grounds for dismissal. Appendix 20 is the first page of the search results of a case search of all cases in which the State Bar was named as a Defendant. There are 240 cases, each of every one was dismissed in the Bar's favor. The Ninth Circuit has never allowed *any* suit against the State Bar to proceed, even when sovereign immunity poses no obstacle.

The threat and possibility of lawsuits has a deterrent effect in curtailing prohibited conduct. Discrimination based upon race is prohibited conduct, as is failure to provide reasonable accommodation due to disability. Because the Ninth Circuit has dismissed all suits against the State Bar irrespective of merit there is no incentive for the state to comply.

A prima facie demonstration under the *McDonnell Douglas* test was made in this case. Neither the State of California nor the State Bar of California challenged that a prima facie showing of disparate treatment was made. The documents showing that whites had been given racial preference for appointment are being presented here and can be seen by comparing the racial makeup of the Orange County bench against the Los Angeles and San Francisco bench's which have 3 times more minority judges. I have included a report from the State Bar itself that shows that nonwhites are facing discipline at rates 2-3 times higher than whites. Despite the showing, the Ninth Circuit nonetheless affirmed dismissal of the case and completely bypassed any discussion whatsoever of the race discrimination claims or the ADA abrogation of sovereign immunity per §608(d).

This case is more than correcting injustice to one litigant, this is about the ability of the state's 250,000 attorneys to file suit against the State Bar when an actual demonstration of race discrimination/ADA violations can be made. As it stands now, the Ninth Circuit's dismissal of all suits against the State Bar has resulted in nonwhite attorneys simply having to tolerate disparate treatment with no recourse.

In addition, this matter is of national importance. Whether Title II of the ADA is abrogated by receipt of Title IV social security funding per §608(d) (or other provisions) affects all future Title II ADA claims. The dismissal here did not involve unique or unusual facts specific to the case, but has been repeated to other ADA dismissals. There are over 1,400 citations *to U.S. v. Georgia*, in both federal and State courts (which are also authorized to hear ADA suits). A cursory review of any of the cases will show that the cases for which there was no 14th Amendment violation resulted in dismissal. A portion of these dismissals are unwarranted on grounds the state had received federal funding conditioned to the ADA.

For example in *Gattuso v. New Jersey Dept. of Human Services* 881 F.Supp.2d 639 (2012) the Title II ADA claim was dismissed under *Georgia*, but the receipt of funding under SNAP or Social Security Act funding for aid to needy families with children by the Department would most likely have waived ADA sovereign immunity under §608(d). The following Title II ADA suits were dismissed under Georgia for lack of a 14th Amendment violation when the operations and functions of the governmental department means it most likely received funding under Title IV of the Social Security Act:

> *Levy v. Kansas Dept of Social and Rehabilitation Services* 789 F.3d 1164 (CA 10 2015), *Nichols v. Alabama State Bar* 2:15-cv-179-WMA, April 15, 2015, (N.D. Alabama), *Vantanian v. State Bar* 5:18-cv-00826-EJD, June 6, 2016, (N.D. Cal), *Richter v. Connecticut Judicial Branch*, March 27, 2014. (D. Connecticut), *Draper v. State of Maine Dept. of Health and Human Services* 2:13-cv-00028-JAW, August 27, 2013 (D. Maine) and *Brooks v. Onondaga County Dept. of Children & Family Services* 5:17-CV-1186 (GLS/TWD), April 9, 2018, (N.D. NY).

Due to the dismissal, I am respectfully requesting a stay of the mandate or recall of the mandate until a petition for certiorari can be filed and evaluated by the Supreme Court. The request for stay is made out of fear of retaliation by the State Bar for complaining of the race and disability discrimination.

Federal law prohibits retaliating or intimidating against a party for complaining of discrimination. See 42 U.S.C. §12203 ("Prohibition against retaliation and coercion"), 42 U.S.C. §1985(2) ("Intimidating a Party, Witness, or Juror") 28 C.F.R. § 35.134 ("Retaliation or coercion"), 28 C.F.R. § 36.206 ("Retaliation or coercion"), 29 C.F.R. § 1630.12 ("Retaliation or coercion"). A request for stay is necessitated by the fact that the Ninth Circuit was unwilling to enforce the underlying discrimination when it dismissed the case when it was clear that there was a spending clause waiver involved for both the ADA and Title VI. If the Ninth Circuit would not enforce the law the first time, it would not enforce any subsequent retaliation.

During the course of the litigation, the State Bar had threatened me with disciplinary proceedings as a result of the lawsuit. The threats made were also reiterated in the pleadings where the State Bar states in the Answering brief (Appendix 6) at pg. 43:

> "Not content to limit his complaint to OCBA and its members, or even to various arms of state government, Viriyapanthu has now widened the web of the alleged conspiracy against him to include the district court as well. Viriyapanthu sees fit to malign the district court solely because Judge Selna ruled against him, thus "demonstrate[ing] that the District Court was not in support of the idea that nonwhites should be given equal consideration for

> judicial positions, or that state law should be evenly applied to nonwhites." AOB 66, Dkt. Entry 76 at 67. From nothing more than Judge Selna's adverse rulings, Viriyapanthu deduces that the district court is fatally biased against him on the basis of race, and therefore the matter must be reassigned on remand. *Id.* at 10. As a licensed California attorney, Viriyapanthu should know better than to level such serious accusations against a judge without evidence. (*See* Cal. Bus. & Prof. Code, § 6068(b) ("It is the duty of an attorney . . . [t]o maintain the respect due to the courts of justice and judicial officers.")"

To provide some context, California is a majority nonwhite state where non-Latino whites only comprise 36.5% of the population. Nonwhites comprise half of the graduates of California's law schools. Orange County, where this case arises, is 54% nonwhite, with 52% of Orange County's population being Asian or Latino. There are 133 trial judges on the Orange County bench, and whites comprise 92% of the County's trial judges and 100% of Orange County's appellate bench. The allegations of the complaint are that racial preferences had been given to whites for judicial positions. The District Court judge, James Selna, had been appointed to the federal bench from the Orange County Superior Court, which is where the allegations of race discrimination are being directed.

Federal law prohibits "intimidation" or "threats" directed towards a complainant of discrimination. Placing it pleadings that I have violated a state rule for which I could be subject to disciplinary proceedings in complaining to a reviewing appellate court of conduct of the District Court is a "threat" or use of "intimidation". Cal. Bus. & Prof. Code §6068 is not pertinent to the appeal but was to intimidate in retaliation for complaining of race discrimination.

The State Bar has on other occasions pursued disciplinary charges against attorneys who have made complaints. Appendix 21 contains the state bar decision imposing discipline on attorney Lenore Albert, who I know personally. Ms. Albert had filed suit against the State Bar in state court. (At page 2, ¶3 "Albert was engaged in civil litigation against the State Bar, claiming retaliation for exposing its purported practice of prosecuting consumer advocates for revenue".) After the litigation was concluded the State Bar then pursued disciplinary proceedings against Albert, per the disciplinary decision.

The scenario I wish to avoid is that after the mandate issues, the State Bar will create a very high bill of costs that I will be unable to afford. The State Bar will then move for disciplinary charges for not complying with a court order by paying costs (noncompliance with a court order is a disciplinary violation as explained in the decision of Albert), and also add the violation of §6068 among the charges. I have attached the disciplinary decision of Lenore Albert because this actually occurred to her. After her suit was dismissed, the State Bar then initiated disciplinary proceedings for not complying with the order requiring payment of money incurred as a result of the suit. By way of this application, I am hoping to avoid the same outcome.

If complainants of discrimination face adverse consequences and reprisals as a result of making complaints in federal court this will have a chilling effect on the ability to make complaints of discrimination that actually occurred.

I am also respectfully requesting a 30 day extension to file for a petition for writ of certiorari. This is necessitated by the recent Covid pandemic. I am disabled (as discussed supra), and am conducting legal research by going to the Orange County law library. However due to the pandemic, the library was shut down and I was unable to conduct research. I respectfully request an additional 30 days to file the certiorari petition. Specifically what I would like to do is go through more of the 1,400 cases citing to Georgia to demonstrate that this is a significant issue which has resulted in numerous cases being erroneously dismissed on sovereign immunity when the state waived by receiving conditioned funding. For such research I will need additional time and access to the resources of the law library which has Lexis and Westlaw.

2. OPINIONS BELOW

The decision of the Ninth Circuit is contained at Appendix 4. A Petition for Rehearing and Rehearing En Banc was filed and denied on August 28, 2020. The State Bar filed a motion to publish the decision, and I made a motion for stay of the Mandate. Both were denied on October 6, 2020. Appendix 1.

3. JURISDICTION

This Court has jurisdiction to recall and enter a stay of the Ninth Circuit's judgment pending review on a writ of certiorari. *See* 28 U.S.C. §§ 1254(1), 2101(f).

4. STATEMENT OF THE CASE

This is a race and disability discrimination suit against the State of California and State Bar of California. The State/State Bar delegates authority to private county bar associations to select candidates for judicial appointment and to conduct compulsory fee arbitrations which are enforced through license suspension. Under California law, the arbitrations are not reviewable for errors of fact or law. As a result bar association were falsifying the basis of the decisions and ordering refunds when no attorney's fees were charged. Members conducting the proceedings were using the proceedings to revoke the licenses of nonwhites and were receiving payment out of the awards under the attorney's fees provision of the statute.

In this case I was ordered to pay $17,758 in refunds when I had never charged any attorney's fees, and requested an ADA accommodation in the form of an extension to pay due to treatment for thymus cancer. A suspension under the MFAA is deemed an administrative suspension, and is not considered "discipline". Appendix 38 is my State Bar profile showing the suspension as "non disciplinary". White members of the Orange County, specifically the named Defendants and Appellees Richard Green and John Nelson were allowed to provide the same services while I lost my license for the same conduct.

That racial preferences had been given to whites for positions is apparent by comparing the racial demographics of the population and percentage of qualified nonwhite attorneys to the racial composition of the Orange County judicial bench, and in comparison to other California counties which have 3 times more nonwhite judges than Orange County.

Under the C.F.R. provisions pertaining to Title VI and the ADA, the state may not disavow its obligations to ensure nondiscrimination.

28 C.F.R. 42.104(b)(1):

> "A recipient to which this subpart applies may not, directly or through contractual or other arrangements, discriminate on the ground of race, color, or national origin".

28 C.F.R. § 35.130(b)(1)

> "[A] public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, discriminate against individuals with disabilities."

The discrimination complained of is part of a "practice or pattern" of discrimination that nonwhite attorneys have been facing. Appendix 22 contains a report from the State Bar itself which conducted an investigation into the disparity between whites and nonwhites in the disciplinary system which begins with the following sentence:

> "For years the State Bar has heard anecdotes regarding the over-representation of people of color in the attorney discipline system."

The State Bar's own report (infra) shows that Afro-American attorneys faced discipline at rates three times higher and Latinos two times higher than whites.

Supreme Court review ordinarily will not lie simply to correct injustice to one person. The fact that there were enough complaints about disparate treatment of nonwhite attorneys for the State Bar to conduct an investigation means that I am not the only nonwhite attorney complaining. The State Bar has 250,000 attorneys. None could bring suit because the Ninth Circuit refuses to enforce race

discrimination law by dismissing the suits on sovereign immunity when the state had waived by receiving federal funding.

California is a majority nonwhite state with Latinos being the largest racial group (Appendix 23) at 39%. Per the census, non-Latino whites are 36.5%, Asians 15%, and Afro-Americans 6%.[1]

Appendix 24 contains the printout of the percentages of nonwhites at California law schools:

> Stanford-40%, UC Berkeley-46%, UCLA-41%, UC Irvine-48%, USC-47%, UC Davis-56%, UC Hastings-52%, Loyola Law School-46%, Santa Clara University Law-57%.

Orange County is where a large number of Southeast Asians immigrated following the Vietnam war, of which I am one, and has one of the largest populations of Vietnamese in the nation. The racial demographics of Orange County are (Appendix 25) are 43.5% white, 33.6% Latino, 18.3% Asian, 1.6% Afro-American.

Appendix 26 is the Judicial Roster of the Orange County Judicial bench which has 133 trial judges. There are only 11 Judges whose surname identifies them as Asian or Latino. [2] There are 3 Asian judges and 8 Latino out of 133 or 8%. Appendix 27 is the Appellate Court for Orange County, 4th District Court of Appeals Division 3. While other Division 3 courts have nonwhites, Orange County's Appellate Court is 100% white.

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[1] See also https://en.wikipedia.org/wiki/Demographics_of_California
[2] Due to the difficulty in identify who is Afro-American based on surname, Asians and Latinos are focused on.

In comparison, Appendix 28, contains the demographics of the County of San Francisco, along with the county Judicial Roster (Appendix 29) with the names of Asian and Latino judges highlighted. San Francisco has virtually identical racial demographics as Orange County, with only the percentage of Latinos to Asians reversed; whites are 41.2%, Asians are 33.3% and Latinos 15% of the population. San Francisco has 52 Trial Judges, 13 are Asian or Latino, or 25%, which is three times the percentage of Orange County.

Appendix 30 is the Judicial Roster of Los Angeles County, which shares a border with Orange County and also has similar demographics. The Los Angeles Superior Court has 460 judges, 127 of which are either Asian or Latino (highlighted) or 27% Asian or Latino.

The fact that other counties with similar racial demographics have three times the percentage of Asian or Latinos is indicative that racial preferences had been given to whites in Orange County.

Appendix 31 is the biography of Lara Callas which states,

> "Ms. Callas served on the Orange County Bar Association's Judiciary Committee from 2008-2013, culminating with her service as chair of that committee charged with making recommendations to the Governor' concerning the qualifications of judicial candidates."

The members of the bar association were selecting their own white members for appointments which led to the lower rate of minority judges in Orange County compared to other counties in California.

Appendix 32 is the biography of Sheri Honer, one of the arbitrators in my matter who was subsequently appointed a family law judge (based upon Callas's recommendations) in 2013. A review of the biography shows that Honer had graduated from a school that was not ABA accredited at the time, and had no experience actually practicing family law before her appointment as a family law judge. Appendix 33 also contains the complaints made by litigants and attorneys regarding her conduct on the bench and lack of knowledge of family law. Because the State had delegated authority to the local bar associations, less qualified whites were being given preferences over more qualified nonwhite applicants.

As further illustration Appendix 34 contains Board of Directors of the Orange County Bar association, including the names and photographs of the officers, who are predominantly white. In contrast are the board of directors/officers of the Bar Association of San Francisco which are predominantly nonwhite. Appendix 35. Because the BASF was majority nonwhite it had been giving consideration to nonwhites, while the OCBA was predominantly white and had been giving preferences to white members. Previously I had sought a judicial position, but the racial preferences that had been given to whites I was passed over for selection, which was alleged in the complaint.

The State Bar delegates to private county bar associations to conduct arbitrations under the State's Mandatory Fee Arbitration Act (Cal. Bus. & Prof. Code §6200) which—as the name implies—is compulsory rather than by private

contractual agreement. Awards are enforced through license suspension until they are paid.

Under the California Supreme Court's ruling in *Moncharsh v. Heile & Blaise* 3 Cal. 4th 1 (1992) mistake of law or fact is not grounds for vacating an arbitral award. *Moncharsh* 3 Cal. 4th at 11:

> "Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law."

If error of fact or law is not reviewed, that means that the arbitrators are free to apply the law disparately to nonwhites; the same conduct when done by a white OCBA members will have no adverse consequences, but the same conduct by a nonwhite leads to loss of license.

There were actually three arbitrations involving John Nelson and the Orange County Bar association. Two of the arbitration awards were simply paid, the one leading to suspension occurred in 2007, when the client, Cesar Viveros, contracted with *another* attorney, Kenneth Teebken to perform a PERM immigration adjustment of status through sponsorship by his employer La Rana Restaurant. Appendix 36 is the arbitration award.

Viveros made all payments to Teebken in 2007. The contracted price was $4,500. Teebken submitted the application in 2007. In 2008, the labor certification submitted by Kenneth Teebken was *approved*, and an I-140 was submitted by Teebken. In late 2008, Teebken ceased practicing law, and I agreed to assume

handling of a portion of his immigration practice and hire his staff, including his paralegal Marisela Dangcil who is Latino (Mexican).

The USCIS PERM guide outlining the process is at Appendix 37 and states:

> "...the process begins when the employer obtains an approved Application for Permanent Labor Certification from the U.S. Department of Labor (DOL)...the employer continues the process by filing Form I-140....The foreign national's place in line... will be based on the date you file the labor certification with DOL"

Defendant/Appellee Richard Green of the OCBA advertises performing the same PERM immigration applications that the arbitrators found wouldn't work. Green's biography Appendix 39:

> "Whether you are an employer or employee seeking an employment based visa for a highly skilled employee...Green puts his years of experience into play to assist his clients..."

In other words, I lost my license for offering the same services that supposedly would not work, that white members of the OCBA were performing.

In 2009, the I-140 application for adjustment of status was denied for Teebken's failure to attach proof the employer's ability to pay. Viveros was contacted to authorize the filing of an appeal with the required proof of ability to pay. Viveros was given a blank copy of the retainer to sign as authorization to file on his behalf. The retainer agreement was never signed by anyone from the office. Viveros was not charged, with the cost of the appellate filing fee paid for by the employer. The appeal was still pending at the time of the arbitration. Viveros claims to have paid $10,010, but never attached an proof of any such payment in the arbitration petition, or appeared at arbitration to testify or offer proof.

After the appeal was submitted, the employer filed for Chapter 13 bankruptcy/reorganization. Viveros quit his job with the sponsoring employer and refused to return to work. An employer sponsored PERM is non transferrable to a new employer, and after Viveros quit, the work that had gone into the application was no longer useable.

The OCBA operates a telephone referral service by which anyone who telephones is referred to an OCBA member attorney. Cesar Viveros contacted the OCBA and was referred to John Nelson.

The biography of Nelson (Appendix 40) states:

> "Mr. Nelson co-founded the Immigration Law Section of the Orange County Bar Association in 1982. He served as the 1st Chair, and has continued to chair as well as hold numerous other officer positions."

It is alleged that Nelson, as well as other OCBA members, had been taking turns between acting as an arbitrator, and arguing before the same members of the OCBA. The biography of defendant Richard Green, Appendix 39, who is also a chair of the OCBA immigration law section who substituted in later on the case to confirm the award, states that Green also serves as an OCBA arbitrator. Appendix 41 is a picture of the OCBA arbitration group, which is only comprised of 11 people, and includes the same arbitrators who participated in the three arbitrations conducted in this case. The pool of arbitrators is small, and it is alleged that members were taking turns between arguing as attorneys and acting as arbitrators in the proceedings. It is alleged that members acting as arbitrators were agreeing to

render awards in each others' favor in quid pro quo return for favorable rulings when they were arguing before the bar association.

The OCBA operates a telephone referral service which connects potential clients to OCBA members. In 2009, Nelson instructed Viveros to file a petition in the OCBA against me, for the attorney's paid to Teebken in 2007. The Declaration of Cesar Viveros Appendix 42 states:

> "In early November, 2009, I consulted with Jon C Nelson...With Mr. Nelson's assistance, or about November 30, 2009, I filed a Petition to Arbitrate...In this petition, I sought to obtain a refund of funds I paid to Ms. Dangcil from Paul Viriyapanthu."

The reason that arbitration was initiated against me was that there were very few attorneys in the Orange County area practicing immigration law in the area. After Teebken retired, I was Nelson's primary business competitor in the area, and as such Nelson was instigating multiple arbitrations in an attempt to put me out of business.

The arbitration petition contains a section to identify the attorney representation during the proceeding. Appendix 43 is the petition, where the section is left purposely blank, so that I could not perform a conflicts check before the arbitration.

OCBA Rule 7E Appendix 44 incorporates the disclosure standards of CCP §1281.9, and requires disclosure of "any circumstance which might reasonably be the basis for a claim of bias or an appearance of bias." No disclosures was made of Nelson being an OCBA member/immigration chair, nor any other disclosures made.

The California Courts have held that it creates an appearance of bias requiring vacatur when a member of the arbitration organization argues before the same arbitration provider without disclosure. See *Gray v. Chiu* 212 Cal.App.4th 1355, 1358 (2nd Dist. 2013):

> "Subsequent to commencing arbitration proceedings but prior to the hearing, counsel for the defendant doctor affiliates with the firm providing the arbitrator. Neither counsel nor the arbitrator discloses that relationship…section 1286.2, subdivision (a)(6) compels a trial court to vacate the arbitration award if the arbitrator fails to disclose that information."

Under the MFA statute(s) arbitrators are prohibited from awarding "affirmative relief" for "malpractice" or "professional misconduct".

Cal. Bus. & Prof. Code §6200(b)(2):

> "This article shall not apply to any of the following: Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct"

§6201(d)(2):

> "A client's right to request or maintain arbitration under the provisions of this article is waived by the client commencing an action or filing any pleading seeking either of the following : Affirmative relief against the attorney for damages or otherwise"

The arbitrators bypassed the statutory provisions against awarding "affirmative relief" when I had not been paid by altering the contract and applying state contract law disparately.

It should be noted that members of the OCBA were financially benefitting from the arbitration scheme as OCBA attorneys were receiving payments out of the awards, as the arbitration statute authorizes attorney's fees awards. OCBA

attorneys were revoking the licenses of nonwhite attorneys and forcing payment back to themselves. Appendix 52 is the original arbitration award along with the State Bar order suspending my license which identifies the total amount at $17,758.38. The $13,000 difference is due to the attorneys fees.

At the arbitration hearing, John Nelson appeared to argue, while Cesar Viveros himself never appeared to testify. Nelson was asked at the arbitration if he was a member of the OCBA, which he denied.

The OCBA arbitrators then held that I had "agreed" to assume liability for all fees paid to Teebken, and the arbitrators indicated that they were making the award as disciplinary punishment. That the award was the result of punishment can be found in the following passages Appendix 36 pg.6¶2:

"Mr. Nelson argued that both Mr. Teebken and Mr. Viriyapanthu have been assisting Ms. Dangcil in the unauthorized practice of law. In support of his contention, Mr. Nelson attempted to submit evidence that disciplinary charges were filed against Mr. Teebken by the State Bar, in part, for aiding Ms. Dangcil in the unauthorized practice of law, and Mr. Teebken "retired" with disciplinary charges pending. The arbitrators, however, refused Mr .. Nelson's request to submit the evidence, because the evidence had not been served on the arbitrators or Mr. Viriyapanthu prior to the arbitration, and Mr. Teebken was not present to counter the charges."

"As for Mr. Nelson's contention with respect to Mr. Viriyapanthu, the arbitrators note that Mr. Teebken was the one who provided the legal services at issue, not Mr. Viriyapanthu. That being said, it was apparent to the arbitrators that Mr. Viriyapanthu relies very heavily on Ms. Dangcil in helping him understand immigration law. Indeed, it is somewhat troubling that at the time Mr. Viriyapanth acquired Mr. Teebken's full-time immigration law practice, he had relatively no experience practicing immigration law, and his lack of experience was evident from his testimony and continual deference towards Ms. Dangcil with respect to questions concerning the imniigration process. One wonders how an attorney can be

> responsible for supervising and/or controlling the work of his paralegal when the attorney is relying on the paralegal to inform him on the law. Although Ms. Dangcil may have a Juris Doctorate, she is not a licensed attorney."

The only testimony that was provided was by John Nelson as Viveros never appeared. Nelson has never been to my office and has no basis of knowledge to testify that I was aiding and abetting the unauthorized practice of law. If there was a reliance on Ms. Dangcil in answering questions, that was due to the fact that I had no involvement with the case prior to filing the appeal and lacked knowledge of what had transpired previously, while Dangcil was present in 2007.

The Supreme Court has previously held that arbitrators may not impose awards as "punishment". See *Steelworkers v. Enterprise*, 363 U.S. 593, 597 (1960)

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."

In response to the allegations above, should be noted that the discipline against Teebken was for another case involving another client which occurred in 2001. I was not admitted to practice law until 2002. It should also be noted that I had employed six attorneys (myself included) at the office, including Rita Melnyk who is a retired U.S. Dept. of Homeland Security Immigration prosecutor who had over 20 years experience with the Department. Appendix 45 contains the records. None of arbitrators had any experience in immigration law. The biography of Sheri Honer has previously been referenced and shows no experience in immigration law. Charles Larson's biography and firm profile is attached as Appendix 46 and

demonstrates he does not list immigration as a practice area and graduated from "Northwestern California School of Law", which is an unaccredited internet based law school. Appendix 46 Arbitrator Raymond Kaldenbach is a non-lawyer, "Lay Arbitrator" who has never attended law school.

The award states at page 5 ¶2-3:

> "Although it could be argued that it is highly unlikely Mr. Viveros's petition, even if corrected, would ever be approved19, no evidence was submitted establishing that it was an impossibility....Mr. Nelson testified it should take approximately 2 hours ...Based on the evidence submitted, the arbitrators find the reasonable value of services rendered was $687.50....the arbitrators find that Immigration West Law should be responsible for the application fee of $475."

If it is "highly unlikely" that the petition would not be approved then Richard Green should not be advertising performing the same employer sponsored immigration applications. Appendix 47 is the results when the terms "PERM Immigration Adjustment of Status" are imputed into google with over 11,000,000 results. Literally thousands of attorneys nationwide are providing the same services that "wouldn't work".

I would respectfully point out that finding the value of the services at $687.50 including the application fee of $475 would leave the portion paid to the attorney for services at $212.50 which no attorney would charge so little for a PERM application because it would cause them to go out of business.

The basis for imposing liability is found at p.6 ¶1:

> "Although Mr. Viriyapanthu did not provide the legal services at issue, his retainer agreement evidences an intent to assume liability for the services rendered. Specifically, both retainer agreements cover the exact same legal

> services. Additionally, both agreements identify Immigration West Law as the attorney and indicate that the attorney received a $4.500 deposit from Mr. Viveros. Most importantly, both agreements indicate that "any unused deposit at the conclusion of the Attorney's services will be refunded." Based on the above, Mr. Viriyapanthu is responsible for the reimbursement of any unused deposit to Mr. Viveros."

This is also disparate application of state contract law. Under California law (the arbitrators make no citation to law), successor liability *only arises* when a successor makes recovery against the original party impossible. *Ray v. Alad Corp* 19 Cal.3d 22, 31 (1977 Cal. Sup Ct.) See *Lundell v. Sidney Mach. Tool Co.* 190 Cal. App. 3d 1546, 1553 (2nd Dist. 1987):

> "The successor, to be liable, must have "'played some role in curtailing or destroying the [plaintiff's] remedies.'" (*Kaminski v. Western MacArthur Co., supra*, 175 Cal.App.3d 445, 458, quoting *Hall v. Armstrong Cork, Inc.* (1984) 103 Wn.2d 258, 265-266 [692 P.2d 787].) In *Nelson v. Tiffany Industries, Inc.* (9th Cir. 1985) 778 F.2d 533, for example, the Ninth Circuit found that if a predecessor's good faith, voluntary reorganization petition destroyed plaintiff's remedies, a successor later purchasing predecessor's assets in a bankruptcy, court-approved sale was not liable..."

In this case, I had not destroyed any remedies available. There was nothing preventing Viveros from requesting arbitration as to Teebken for the funds he had paid to Teebken, and that is noted in the arbitration award at pg.4 final paragraph.

The disparate application of state contracts law establishes a prima facie case of race discrimination under the McDonnell Douglas test, and directly violates clear statutory and C.F.R. provisions against race discrimination under Title VI.

I can demonstrate a prima facie case under McDonnell Douglas as (1) I am a member of a protected class (nonwhite); (2) was "qualified" as I had (a) graduated an ABA law school (b) passed the bar examination (c) has violated no rule of

professional conduct/is discipline free since admission (d) performed services to Cesar Viveros competently (the I-140 petition was still pending at the time of the arbitration and the reason it was not granted was because Viveros quit his job and refused to allow further representation); (3) I was excluded as my license was suspended; and (4) whites had been more favorably treated.

A demonstration that whites had been more favorably treated is that Appellees John Nelson and Richard Green were allowed to provide the same employer sponsorship PERM applications that the OCBA arbitration panel said "would not work". A further demonstration that whites had been more favorably treated is that the law that a successor is not liable for the acts of a predecessor was applied disparately to me.

The disparate treatment provided to me in comparison to white attorneys violates the C.F.R. provisions applicable to Title VI of the Civil Rights Act of 1964.

28 CFR § 42.104

(b) Specific discriminatory actions prohibited.
(1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;
(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;
(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or
(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

The State Bar's arbitration program also violates 42 U.S.C. §1981. As stated, 42 U.S.C. §2000d-4a makes all operations subject to Title VI, which would include the arbitration program. 28 C.F.R. §50.3 is the provision of law that was circulated to Congress for the passage of Title VI and is specifically identified in the aforementioned statement of assurances. 28 C.F.R. §50.3 authorizes a court under Title VI:

"(2)...to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination"

42 U.S.C. §1981 states:

(a)Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b)"Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
(c)Protection against impairment
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

California's arbitration laws which allows the contracts of minorities to be treated disparately from whites violates and is conflict preempted by 42 U.S.C. §1981 which is authorized by the 28 C.F.R. §50.3 to be enforced under Title VI.

In this case, I was unable to pay the $17,758.38 award due to disability. The State Bar demanded that I pay the amount in one lump sum. I had been diagnosed with Brugada Syndrome which is a cardiac arrhythmia which causes "syncope" or loss of consciousness and meets Social Security Disability Criteria 4.05 ("Cardiac Arrhythmia with Recurrent Syncope") as a permanent disability. As I potentially could lose consciousness while driving, it limits my ability to work. Also during this time period I was undergoing treatment for Thymus cancer, which also prevented me from working. The medical records are at Appendix 45, and the Social Security disability transmittal forms identifying the cancer as "malignant neoplasm of the thymus" is dated within 6 months of the license suspension.

I made an ADA accommodation request to the State Bar in the form of an extension to make payment due to inability to work. The request was denied.

This violates 42 U.S.C. § 12132:

> "no qualified individual with a disability shall, by reason of such disability,[3] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity..."

28 C.F.R. §35.130

[3] The ADA employs a "motivating factor" standard by its use of the term "by reason of" which differs from the Rehabilitation Act §504 which uses the term "solely by reason of". Title VI also employs a "motivating factor" standard.

> "(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability..."

The Ninth Circuit's Refusal to Enforce Federal Race or Disability Law

In this case the Ninth Circuit purposely overruled prior U.S. Supreme Court precedent in order to dismiss this case. I informed the District Court, and the Ninth Circuit of the receipt of federal funding which abrogates sovereign immunity and that I wished to amend the complaint to allege funding as well as amend pursuant to FRCP 15 to allege Title VI claims. This was specifically raised to the district court. See October 26, 2018 (Appendix 49) transcript which states:

> MR. VIRIYAPANTHU: Well, that's what I was going to explain. The State Bar also receives federal funds, and that is another exception to sovereign immunity, which was not considered and was not fully raised in the Complaint because I believed I had adequately pled the Eleventh Amendment, pled enough facts to overcome the Eleventh Amendment.

Appendix 50 are written pleadings where I informed the district court that the federal funding waived sovereign immunity and requested leave to amend to address it.

The Ninth Circuit's decision states that leave to amend for §504 of the Rehabilitation Act would be futile, but completely disregards the second issue of Amendment under Title VI. This is a complete overruling of the Supreme Court's precedent in *Foman v. Davis* 371 U.S. 178 (1962) which held that FRCP 15 is to be

applied liberally to allow amendments. The dismissal was on the FAC only after one amendment.

The issue of federal funding waiving sovereign immunity in the AOB at pg.41, the ARB at pg.24. It was raised again on the first page of the Petition for Panel Rehearing and En Banc Rehearing:

> "The State Judicial Branch and the State Bar both receive federal funding, thus 11th Sovereign Immunity does not pose a bar under §504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964 (race discrimination), and Petitioner argues under Title II of the ADA pursuant to 42 U.S.C. §608(d)(3) (which applies to Title-IV funding at issue here)"

The Ninth Circuit decision states:

> "The district court correctly dismissed Viriyapanthu's § 1981 claim against the Orange County Bar Association. The OCBA is entitled to immunity for decisional acts taken within its jurisdiction....Viriyapanthu's assertion that the OCBA discriminated against him in judicial nominations was not raised before the district court and is therefore waived."

The §1981 cause of action against the OCBA was for giving racial preferences to white OCBA members which frustrated my ability to obtain a position. Essentially the lower courts held that arbitrator immunity attaches to non-arbitral functions of vetting candidates for judicial appointment. Contrary to the Ninth Circuit's assertion that the issue was not raised before the district court, the allegations were contained in the operative FAC which referenced the racial demographics and judicial bench rosters as exhibits to the complaint. The FAC states at page 4, beginning at line 7 (Appendix 51):

> "The OCBA had been given authority by the State of California to make nominations/recommendations for judicial appointments, and maintains a judiciary committee for that purpose. The OCBA had been nominating less

> qualified white applicants over more qualified minority applicants seeking judicial appointment....The result is that the racial composition of the Orange County judicial bench is not representative of the actual racial makeup of the Orange County area."

If there were any deficiencies in the pleadings as to what was being alleged, the proper course of action would be to allow amendment, rather than dismissal without leave to amend.

The Ninth Circuit decision also states:

> "The district court correctly dismissed Viriyapanthu's claim that John Nelson and Richard Green conspired in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 15....The substance of his claim is fraudulent conduct. However, Viriyapanthu's "averments of fraud" failed to meet Fed. R. Civ. P. 9(b)'s particularity requirement....All that remains are conclusory accusations of conspiracy, which fail to state a claim....The denial of leave to amend was an appropriate exercise of discretion because it was done at Viriyapanthu's request."

The district court had held that the Noerr-Pennington doctrine applied to the arbitration proceedings conducted by the OCBA and barred any claims against Nelson and Green pertaining to the arbitration. If the complaint was that the allegations were insufficiently plead, the response is that the district court's order prohibited me from making additional allegations. The district court only allowed amendment for additional harassment (such as posting derogatory reviews of my office) that did NOT arise from the arbitration. I waived further amendment only as to Nelson and Green as to additional allegations to the other harassment, but as

for the allegations I was prohibited from making additional allegations by the District Court and could have been sanctioned for violating the order.

The district court's September 24, 2018 Order (Appendix 11) states at page 12 under the heading "The Noerr-Pennington Doctrine Bars Viriyapanthu's Claims Against Nelson and Green" the district court held that the arbitration conducted by the OCBA (which is private, nongovernmental entity) constituted a "Petition to Government":

> "The Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress... *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 392–93 (E.D. Va. 2002) (holding that Noerr-Pennington applies to the initiation and maintenance of World Intellectual Property Organization ("WIPO") arbitration proceedings, even though WIPO is only a quasi-public entity, because it is part of the adjudicatory process and warrants immunity)."

Whether Noerr-Pennington applies to arbitrations conducted by a nongovernmental entity (such as OCBA) is a matter for which there is a split of authority over. See *Ford Motor Co. v. Nat'l Indem. Co* 972 F.Supp.2d 862 (2013 E.D. Virginia) at 868:

> "The institution of private arbitration before a private organization does not implicate the First Amendment's prohibition against establishing laws that abridge "the right of the people . . . to petition the Government for a redress of grievances" for the threshold reason that the arbitration here does not petition the Government at all."

The District Court then held at the final paragraph of the order:

> "The Court denies Nelson's motion to strike, and grants Nelson's and Green's motions to dismiss without prejudice. Viriyapanthu may file an amended complaint addressing the deficiencies identified in this order with

> respect to Defendants Nelson and Green....Viriyapanthu may not plead new legal claims against Defendants Nelson or Green; he may only replead the claims in this FAC if he shows that Noerr-Pennington immunity does not apply."

Thus the district court dismissed the allegations pertaining to the arbitration on Noerr-Pennington, and only gave leave to amend to the non-arbitration conduct. It is unclear whether the fraud allegations pertaining to the arbitration were sufficiently plead or not because it was not addressed as it was dismissed on Noerr-Pennington. The Ninth Circuit did not address at all the issue of whether Noerr-Pennington applies to arbitrations conducted by private, non-governmental entities, and whether such constitutes a "petition to government".

5. CONCLUSION

For the foregoing reasons, I respectfully request stay (or recall of the mandate) pending certiorari petition and a 30 day extension to file a certiorari petition. I thank you for your attention to this matter.

Dated:

By: 

Paul Viriyapanthu, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

No.:_____

Paul Viriyapanthu,

Applicant

v.

State of California, State Bar of California, Orange County Bar Association, John Nelson, and Richard Green

Respondents

Certificate of Service

I, Paul Viriyapanthu, Applicant Pro Se, hereby certify that on this 12th day of October 2020, I caused copies of the Application for Stay and 30 Day Extension, the Appendix and the Application for In Forma Pauperis to be served by first class mail delivery and electronic service on the following parties through their attorneys:

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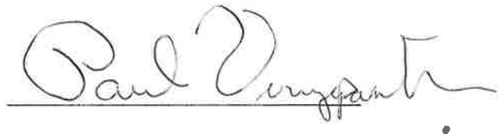
I further certify that all parties required to be served have been served. Executed under penalty of perjury under the laws of the United States.



Paul Viriyapanthu, Declarant

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APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 6 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PAUL VIRIYAPANTHU,

Plaintiff-Appellant,

v.

STATE BAR OF CALIFORNIA; et al.,

Defendants-Appellees.

No. 18-56527
19-55482

D.C. No.
8:17-cv-02266-JVS-JDE
Central District of California,
Santa Ana

ORDER

Before: O'SCANNLAIN, TROTT, and N.R. SMITH, Circuit Judges.

Appellant Paul Viriyapanthu's Motion for Stay, filed with this court on August 31, 2020, is DENIED. Appellee State Bar of California's Motion to Request Publication of Memorandum Decision, filed with this court on September 8, 2020, is also DENIED.

APPENDIX 2