No. 21-1345

In The
Supreme Court of the United States

JEFFREY B.C. MOORHEAD,

Petitioner,

v.

GLENDA LAKE, Clerk Of The District Court
Of The Virgin Islands, and
THE HONORABLE MICHAEL A. CHAGARES,
Chief Judge Of The Third Circuit,

Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING OF ORDER DENYING THE PETITION FOR WRIT OF CERTIORARI

Pursuant to S. Ct. R. 44, Petitioner petitions for rehearing of this Court's June 21, 2022, Order denying the Petition For Writ of Certiorari. The basis for this request is to address other substantial grounds not previously raised, as permitted by S. Ct. R. 44, based on Circuit Court opinions issued after this appeal.

In this regard, an *en banc* panel of the Third Circuit, sitting as District Court Judges, held that its Order suspending the Petitioner from the practice of law was "administrative" in nature and, hence, not an appealable Order. App. 38-39. The Petitioner believed the Order was appealable, as such orders have *always* been previously deemed to be final Orders under 28 U.S.C. §1291 by the Third Circuit, as noted in the original petition. Indeed, jurisdictional issues are routinely raised on appeal.

The denial of certiorari foreclosed the requested option to address this issue that involves the most critical property right of every lawyer who practices in any federal court, all of which have local disciplinary rules similar to the one involved in this case.

Thus, whether a district court order suspending a lawyer from the practice of law can be deemed a "judicial action" or an "administrative action" by a Circuit Court remains an unresolved issue, which satisfies the Rule 44 "substantial grounds" for rehearing that was "not previously presented."

Four cases decided by four Federal Circuit Courts since the filing of the original petition in this case on March 2, 2022, demonstrate this point. First, in *Scott v. Mei*, 2022 WL 1055576 (5th Cir. April 8, 2022), the Fifth Circuit heard an appeal regarding sanctions entered against a lawyer by the U.S. District Court of Northern Texas, noting at *2:

> On the law, the court cited Local Rule 83.8(b) as the basis for its show cause order and the sanction. It provides that a court may, "after giving opportunity to show cause to the contrary, . . . take any appropriate *disciplinary* action" against an *attorney* for, *inter alia*, failing to comply with court orders. *N.D. TEX. CIV. R. 83.8(b)*.

That rule, N.D. Tex. Civ. R. 83.8(b), provides as follows:

> (b) **Grounds for Disciplinary Action.** A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for:
>
> 1. conduct unbecoming a member of the bar;
> 2. failure to comply with any rule or order of this court;
> 3. unethical behavior;
> 4. inability to conduct litigation properly;
> 5. conviction by any court of a felony or crime involving dishonesty or false statement; or

> 6. having been publicly or privately disciplined by any court, bar, court agency or committee.

This local court rule is almost identical to Local Rule 83.2(b) of the Virgin Islands District Court. App. 121 of the original petition.

Thus, the Fifth Circuit heard this appeal from a sanction imposed under a local district court rule without any concern for whether it had jurisdiction to do so. This is directly contrary to what occurred in this case when the Third Circuit denied the Writ of Mandamus, finding the disciplinary action taken below to be administrative in nature. Clearly this case and the recent Fifth Circuit case cannot be reconciled, since both involve disciplinary action based on identical district court rules.

The distinction between the two holdings, and the clear error in the ruling below in this case, is best understood by reviewing a very recent Seventh Circuit case, *In Re Shalaby*, 2022 U.S. App. LEXIS, 18439 (7th Cir. July 5, 2022). In that case, a lawyer appealed several district court orders, one denying his admission to the Northern District Court of Illinois and two related to certain court conduct. In addressing its appellate jurisdiction, the Seventh Circuit held at *4-5:

> We have jurisdiction to hear Mr. Shalaby's appeal from the denial of his application for bar admission. As we said in his prior appeal, we treat filing restrictions and denials of bar memberships **as judicial actions, not**

> **administrative actions**, so appeal offers an appropriate remedy. . . .
>
> The unusual order that Mr. Shalaby be accompanied by U.S. Marshals is another story. It does not actually limit his access to the courts and their power to adjudicate cases in which Mr. Shalaby is a party or counsel. He still has access to the courts, but with an escort for security reasons. . . . We therefore do not have appellate jurisdiction to consider the escort order. To the extent Mr. Shalaby also challenges a separate order requiring him to communicate with the court by U.S. mail rather than electronic mail, **we similarly lack appellate jurisdiction to review such an administrative order**. (Citations omitted) (Emphasis added).

This distinction between what constitutes "judicial action" that is appealable as of right, and what is "administrative" and not appealable, explains why certiorari should be granted in this case to address the substantial issue of when a lawyer can and cannot appeal an order regarding one's ability to practice of law by a district court.

Two other recent cases are also helpful in understanding this point. In *Wisconsin Voters All. v. Harris*, 28 F. 4th 1282 (D.C. Cir. March 22, 2022), the D.C. Circuit held that a district court order referring a lawyer to the court's Committee on Grievances for possible discipline was not appealable, as a referral for possible discipline is not a final order. In this regard, the D.C. Circuit held in part that "the referral order does

nothing more than refer the matter to the Committee on Grievances. It fixes neither Kaardal's rights nor obligations, so there is no final decision over which we have jurisdiction." *Id.* at 1285. In short, this holding confirms that if one's rights are in fact affected, as opposed to simply being investigated, the an appeal would lie over such "judicial action."

Similarly, in *In Re Boy Scouts of America*, 35 F. 4th 149 (May 24, 2022), the Third Circuit itself took jurisdiction over an appeal from the District Court of Delaware which had affirmed an order by the U.S. Bankruptcy Court for Delaware that denied a motion to disqualify a lawyer in the case. In doing so, the bankruptcy court had applied the ABA Model Rules of Professional Conduct, which had been adopted by it local rules, Bankr. D. Del. Ct. R. 9010-1(f).[1] On appeal, the Third Circuit had to first decide if it had jurisdiction to hear this appeal, as the lawyer had withdrawn as counsel in the case. In addressing this issue, the Third Circuit held that it did have jurisdiction if the "Potential appellants are 'persons aggrieved' . . . if they can show that 'the order of the bankruptcy court 'diminishes their property, increases their burdens, or impairs their rights.'' " *Id.* at 157 (citations omitted). After noting that "The conduct of attorneys practicing

[1] Rule 9010(f) states: *Standards for Professional Conduct*. Subject to such modifications as may be required or permitted by federal statute, court rule or decision, all attorneys admitted or authorized to practice before this Court, including attorneys admitted on motion or otherwise, shall also be governed by the Model Rules of Professional Conduct of the American Bar Association, as may be amended from time to time.

in federal court is governed by the local rules of the court," *id.* at 159, the Third Circuit then applied the Model Rules as adopted by the bankruptcy court's local rules and upheld the decision below denying the disqualification motion. Again, this recent case is helpful in explaining why it is "black letter" law that an order suspending a lawyer from the practice of law is not an administrative order, but one that "impairs a lawyer's rights" so that it is an appealable, final order.

CONCLUSION

As such, it is respectfully requested that the rehearing of the denial of the petition of the writ of certiorari be granted so that the substantial grounds for rehearing raised herein---whether an order suspending a lawyer form the practice of law under a local district court rule---can be resolved.

Respectfully submitted,

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Dated: July 14, 2022

S. CT. R. 44 CERTIFICATION OF COUNSEL

I hereby certify pursuant to S.Ct.R. 44 that this Petition for Rehearing is restricted to the grounds permitted by S.Ct.R. 44.2, as it is based on substantial grounds not previously presented, and is being submitted in good faith and is not being taken for the purpose of delay.

JOEL H. HOLT