No. 21-507

In the Supreme Court of the United States

LAWYERS UNITED INC., EVELYN AIMEE DEJESÚS, AND ALLAN WAINWRIGHT,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR SARKARLAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JULIAN SARKAR
SARKARLAW
345 Franklin Street
San Francisco, CA 94102
(415) 795-8795
jsarkar@sarkar.law

Counsel for Amicus Curiae SarkarLaw

QUESTIONS PRESENTED

1. Whether the Local Rules of United States District Courts in California requiring attorneys licensed by other states' agencies to pass the California Bar Exam survive heightened scrutiny or even rational basis under any applicable constitutional challenge.

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INTEREST OF *AMICUS CURIAE*[1]

SarkarLaw is a San Francisco-based law practice that specializes in tenants' rights and attorney admissions. On November 18, 2016, *Amicus Curiae* Counsel Julian Sarkar lost a friend and classmate to self-harm following the State Bar of California's announcement that over 50% of attorney applicants had failed the July 2016 California Bar Exam. Today, he runs the nation's only law practice with a practice area dedicated to abolishing the modern form of the bar exam. The modern bar exam required in nearly every state in the nation is usually produced in part or in whole the National Conference of Bar Examiners ("NCBE"), a private Wisconsin corporation run by attorneys who are uniquely exempt from ever taking their own bar exam through their diploma privilege program.

The work performed by SarkarLaw in this unique practice area extends beyond litigation against the State Bar of California. SarkarLaw also regularly educates the public and judiciary about the white supremacist origins and purpose of the National

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[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief following timely notice by *amicus*. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

Conference of Bar Examiners ("NCBE") and modern bar exam, and the modern bar exam's lack of psychometric validity or reliability for a legitimate purpose. SarkarLaw regularly appears at governmental meetings to oppose unfair, unlawful, and unconstitutional decision making, rule enactment, and private contract grants. SarkarLaw also files appropriate administrative and criminal complaints for unethical and unlawful conduct by the government employees who financially benefit from such conduct and the NCBE's executives and lobbyists.

On a good day, SarkarLaw will successfully obtain reversal by a state appellate court in matters involving the State Bar of California's unlawful concealment of arbitrary printing and scanning errors affecting proper exam grading. On a bad day, such work involves Mr. Sarkar counseling attorney applicants out of taking their own life in response to the immense pressure from the emotional and financial distress experienced in applicant purgatory through the State Bar of California's attorney admissions scheme. Applicants who have sought SarkarLaw's assistance against the State Bar of California include highly accomplished out-of-state attorneys whose achievements are not measured by the California Bar Exam.

As one United States District Court aptly noted, "Anyone with any power in this Bar Bureaucracy is a

lawyer. So, just like an oil or drug cartel, those who are already selling something get to decide who else may sell that same thing. Of course, unlike most cartels, this one is legal… The stress, rigor, and competition can lead to depression, anxiety, and substance abuse. Many students who start school healthy are far from it by the time they graduate. Some kill themselves… It is not a matter of if, but when." *Doe v. Supreme Ct. of Kentucky, 482 F. Supp. 3d 571, 575, 584* (discussing "cruel" and "medieval" investigation of mental health in character and fitness standards context) (W.D. Ky. 2020). But just as the applicant in that case was ultimately denied relief under judicial and legislative immunity, the State Bar of California ends up prevailing in the end even if it loses a motion or appeal in court, as it ultimately remains empowered to generate approximately $20,000,000.00 from recent law school graduates and other attorney applicants each year through the California Bar Exam.

This case presents a question involving a conflict of Local Rules by U.S. District Courts across the nation. Specifically, two-thirds of U.S. District Courts discriminate against attorneys for not having obtained local licensure through completing capricious requirements such as the California Bar Exam. No proper reason has been provided for these courts' requirements. The other third of U.S. District

Courts grant Full Faith and Credit to attorneys licensed by the highest court of any state.

SarkarLaw has a strong interest in this Court's resolution of this arbitrary conflict of U.S. District Courts Local Rules. If this Court merely required Respondent United States to show in any capacity that California's District Courts were justified in treating other states' attorneys as unqualified to practice, the State Bar of California's unlawful practices in administering the California Bar Exam would prohibit Respondent from satisfying such a burden. SarkarLaw's client base includes heavily awarded legal experts licensed outside of California, and this Court's relief could result in such attorneys being allowed to practice in California's District Courts without further participation in the State Bar of California's capricious $20,000,000.00 annual attorney admissions revenue machine.

At a minimum, requiring Respondent to demonstrate that some semblance of a rationale exists for California's District Courts to require completion of the California Bar Exam would enhance the public's trust in the judiciary. At present, the State Bar of California appears entitled to arbitrarily tamper with applicants' exam scores retroactively without consequence. After a century of hiring experts, it has no credible evidence that the California Bar Exam serves a legitimate purpose. Instead, year after year,

the State Bar of California grants a contract to develop most of the California Bar Exam to a private Wisconsin corporation run by attorneys who are too "privileged" for the requirement of their very own bar exam. SarkarLaw has a strong interest in requiring, at the very least, the California judiciary to explain its continued reliance on an exclusionary system with white supremacist origins and purposes.

SUMMARY OF ARGUMENT

Petitioners argue in detail why this Court should apply heightened scrutiny should apply to the Local Rules of California's U.S. District Courts requiring licensed out-of-state attorneys to become members of the State Bar of California, which requires passage of the California Bar Exam.

Amicus writes separately to explain excluding licensed attorneys from admission to U.S. District Courts based upon the California Bar Exam cannot survive even the rational basis test. The District Court below has pointed to the ruling in *Howell*, which in turns relies on this Court's decision in *Schware* reversing an attorney admission agency's capricious denial of a qualified applicant. Like in the *Schware* case, Respondents' reliance upon the California Bar Exam is unfounded.

As shown by judicially noticeable information, the California Bar Exam was developed for the improper purpose of excluding the "overcrowded condition of the bar," and is unrelated to "minimum competence" or "public protection." The State Bar of California impermissibly violates California's separation of powers doctrine in using the California Bar Exam as a vehicle for tens of millions in taxation. Further, its active concealment of human and mechanical errors in the grading process and post facto employee tampering of applicant scores render it fundamentally capricious.

Requiring licensed, out-of-state attorneys to complete the California Bar Exam for admission to U.S. District Courts cannot survive a constitutional challenge on any level of scrutiny. To do so would require Respondents to actively ignore the overwhelming evidence that the California Bar Exam is no more a valid measure of attorney competence than an arbitrary roll of dice. The courts below have avoided this material issue, thus protecting Respondents from needing to offer a basis for their requirement. At a minimum, this Court should require the court below to consider whether Respondents can offer a rational basis for requiring already-licensed attorneys to complete the California Bar Exam for admission.

ARGUMENT

I. This case presents an opportunity for the Court to resolve capricious United States District Courts Local Rules which impose the unreasonable requirement that licensed out-of-state attorneys complete the California Bar Exam for District Court admission

A. As further argued by Petitioners, this Court has applied strict scrutiny and intermediate scrutiny to restrictions on professional speech, and should apply heightened scrutiny in the instant matter where the United States District Court Local Rules restrict the professional speech of licensed attorneys seeking to bring their clients' cases in California's District Courts. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2366, 2382 (2018). Presently, the four United States District Courts for California each restrict full admission only to attorneys licensed by the State Bar of California, meaning that they must have passed the California Bar Exam. N.D. Cal. R. 11-1; C.D. Cal. R. 83-2.1.2; E.D. Cal. R. 180; S.D. Cal. R. 83.3. Cal. Bus. & Prof. Code § 6060. But as elaborated below, the State Bar of California's administration of the California Bar Exam cannot even survive the rational basis standard set forth in *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239 (1957), which in turn is relied upon by the ruling in *Nat'l Ass'n for Advancement of*

Multijurisdiction Prac., (NAAMJP) v. Howell, 851 F.3d 12, 20 (D.C. Cir. 2017) cited by the District Court below.

In *Schware*, this Court found that the attorney admissions agency violated the applicant's due process rights by invidiously discriminating against him for the past use of aliases and a specious record of arrests. *Schware*, 353 U.S. at 238-241. "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 241. Whether this Court applies heightened scrutiny or the rational basis standard, this Court should follow its rationale in *Schware* and prevent Respondents from excluding licensed attorneys from practicing in California's District Courts merely because they have not completed the State Bar of California's California Bar Exam.

B. The District Court below declined to reach the issue of whether Respondents involved in excluding licensed attorneys from California's District Courts possessed a rational basis for imposing the additional requirement of completing the California Bar Exam. In fact, neither Respondents nor the State Bar of California have credibly shown a legitimate basis reasonably related to government interests for requiring the California Bar Exam—as administered by the State Bar of California—for attorney admission.

Here, the question is whether United States District Courts are entitled to prohibit licensed out-of-state attorneys from admission on grounds that they are not members of the State Bar of California, which in turn requires passage of the California Bar Exam. Cal. Bus. & Prof. Code § 6060.

The principle that validity, "the degree to which evidence and theory support the interpretations of test scores for proposed uses of tests" is "the most fundamental consideration in developing tests and evaluating tests… [a] necessary condition for the justifiable use of the test" is now universally recognized in the realm of testing. AERA, APA & NCME, *Standards for Educational and Psychological Testing* (2014) ("*Standards*"); *see* 34 C.F.R. § 668.148 (codifying *Standards* for purposes of educational testing).

In insisting that Petitioners' Counsel refrain from ever drawing comparisons between the contested barriers to attorney admission, the District Court below impermissibly restrained counsel from referencing the original purpose of modern bar exams as promulgated by the NCBE and its partner agencies. The NCBE was formed in 1931, in the aftermath of the American Bar Association's accidental admission of three Black lawyers and the resulting "question of keeping pure the Anglo-Saxon race." *See* Jerold S. Auerbach, *Unequal Justice: Lawyers and Social*

Changes in Modern America 65 (1976). The NCBE's express purpose was to limit the "overcrowded condition of the bar." Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 413–14 (2008); *Editorial*, 1 B. EXAM'R 211, 211 (1932) ("The present situation emphasizes the overcrowded condition of the bar."); Philip J. Wickser, Ideals and Problems for a National Conference of Bar Examiners, 1 B. EXAM'R 4, 7 (1931) ("We know, for instance, that the Bar, today, is overcrowded, and is becoming more so."); Susan K. Boyd, *The ABA's First Section: Assuring a Qualified Bar* 38 (1993) (quoting former chairman of NCBE that "the main emphasis of the bar [in 1931] was on limitation, on overcrowding").

The slogan of "minimum competence" and "public protection" did not quietly surface until much more recently in history—though they were not accompanied by any meaningful changes to the modern bar exam. But the most telling evidence of the modern bar exam's lack of validity is none other than the CEO and other executive attorneys who run the NCBE, yet are too privileged to take any bar exam themselves. Wis. Sup. Ct. R. 40.03 (diploma privilege). They are living, breathing proof that their very own bar exam is neither a measure of minimum attorney competence nor a means of protecting the public. The NCBE's studies of its own bar exams found that they test "arcane, obscure, or trivial aspects of the law that

new practitioners should not be expected to know and are not reflective of minimum competence… does not mimic real practice because lawyers would look up the law and not rely only on memory in representing clients… tests only memorization and no skills… questions are full of red herrings and intentionally tricky… written in such a way that there is not a clearly correct answer choice… not realistic or an effective way to test what lawyers do.” NCBE Testing Task Force, *Phase 1 Report of the Testing Task Force* 9–10 (2019).

The State Bar of California’s studies—including those performed jointly with the NCBE—have long shown the same of its California Bar Exam. “…In short, it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law…” Stephen P. Klein, Ph.D. & Roger E. Bolus, Ph.D. *An Analysis of the Relationship Between Clinical Legal Skills and Bar Examination Results* 1 (1982). In other words, any evaluation of the California Bar Exam that considers its original purpose or measure as a valid test of attorney competence reveals that it is not related to a legitimate government interest.

C. The public record reflects ample evidence that the California Bar Exam was not created for a legitimate purpose, nor does it presently serve one. But even more troubling than these findings is the

State Bar of California's capricious manner of administering the California Bar Exam. The State Bar of California actively prevents the public from learning about the actual operations which produce its published passage rates of as low as 26.8%. The State Bar of California refuses to return successful applicants' scores and essays, preventing the public from comparing the performance of passing applicants from those required to retake the exam. Cal. St. B. R. 4.62(b). ("Applicants who pass the California Bar Examination are not entitled to receive their examination answers or to see their scores.") Such transparency might reveal that the State Bar of California, as a practice, conceals human and mechanical errors in its grading process. "It seems doubtful that an explanation of the nature of a 'printing error' would affect the security of the administration of the examination or otherwise affect the public interest…" wrote one California appellate court in a California Public Records Act case. *Christine Tuma v. State Bar of California,* No. A161037, 2021 WL 2154030 at 12, fn. 5 (Cal. Ct. App. May 27, 2021) (discussing declarations of admissions employee admitting to additional errors such as missing pages and printer ink problems at 2-3).

The State Bar of California has not credibly addressed the wildly inconsistent and unreliable grading of attorney applicants' exam essay answers.

Public records reveal that the State Bar of California places a value of approximately $3.25 on the grading of each essay answer. Uncontested Brief for Petitioner at 32, *In re California Bar Examination*, No. S264254 (Cal. S. Ct. Sept. 30, 2021) (summarily denying writ relief with no rationale). In other words, the contested Local Rules require attorneys who have demonstrated the necessary fitness in competence and other states are presently required to make a successful roll of arbitrary and capricious dice in order to attain admission.

Because the State Bar of California's administration of the California Bar Exam is performed in a flagrantly unlawful manner, our U.S. District Courts cannot require out-of-state licensed attorneys to complete it with a rational basis. The Supreme Court of California has ruled that the California Constitution's separation of powers doctrine prohibits the State Bar of California from charging fees which "exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes," as such income-generating activities are taxes, not fees. *In re Att'y Discipline Sys.*, 19 Cal. 4th 582, 595 (1998). Yet the State Bar of California generates tens of millions of dollars from the California Bar Exam each year, spending only a fraction of these revenues on the

exam's administration. Uncontested Brief for Petitioner at 12, *In re California Bar Examination*, No. S264254 (Cal. S. Ct. Sept. 30, 2021) (summarily denying writ relief with no rationale).

Most troubling is the State Bar of California's practice of tampering with applicants' "scaled" scores as the agency sees fit. Shortly after the Supreme Court of California ruled that the cut score for the California Bar Exam be lowered, employees for the State Bar of California surreptitiously entered the exam score database and began lowering applicants' previous scores to prevent the new cut score from being applied retroactively. Administrative Order 2021-01-20, No. S266547 (Cal. S. Ct. Jan. 28, 2021); Uncontested Brief and Declarations for Petitioner at 37, *In re California Bar Examination*, No. S264254 (Cal. S. Ct. Sept. 30, 2021) (specifically showing employee's email stating, "After a complete review of your examination materials and investigation into the incident you described of your February 2020 Bar Exam, it is concluded that the Total Scaled Score reported to you in 'the original results' is correct... After manually recalculating your total scaled score, there is no error in the calculation.") If the State Bar of California itself cannot hypothesize a legitimate rationale for manually altering applicants' scores in defiance of the Supreme Court of California's order, Respondents in the instant matter must not have any

rational basis for requiring licensed attorneys to undergo this capricious process.

D. The District Court below relies heavily upon the ruling in *Howell*. The *Howell* ruling, in turn, relies upon this Court's ruling in *Schware*, where this Court reversed an admissions agency's capricious exclusion of a deserving attorney applicant. Petitioners detailed arguments on their entitlement to heightened scrutiny will not be repeated here—it is unnecessary where the California District Courts' exclusion of licensed attorneys cannot survive the rational basis test.

In *Schware*, this Court found that "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." *Schware*, 353 U.S. at 241. Similarly here, the mere fact that a licensed, practicing attorney has not passed California's bar exam has very little, if any, probative value in showing their fitness to practice in California's U.S. District Courts. In order for Respondents to hypothesize a rational basis for doing so, they would have to actively pretend that the State Bar of California does not administer the California Bar Exam in an unlawful, arbitrary, and capricious manner.

Accordingly, this Court should require the courts below to—at a minimum—ask Respondents to express a rational basis for requiring licensed attorneys to undergo this capricious process.

Conclusion

For the reasons stated in the Petition for Writ of Certiorari and this *amicus curiae* brief, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

JULIAN SARKAR
Counsel of Record
SARKARLAW
345 Franklin Street
San Francisco, CA 94102
(415) 795-8795
jsarkar@sarkar.law

Counsel for Amicus Curiae

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