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 OF A*MICUS CURIAE* HERBERT DETRICK, MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of the Rules of this Court, Herbert Detrick, as *amicus curiae*, submits this brief in support of petitioners Lawyers United Inc., Evelyn Aimee DeJesús, and Allan Wainwright (hereafter, "Petitioners")[1]

I. INTEREST OF *AMICUS*

I have been 15 years a member of the bar of this Court, more than 20 years a member of the bars of the U.S. District Courts for the District of New Jersey and the Southern and Eastern Districts of New York, and plenarily admitted to the practice of law in the courts of the states of New Jersey, New York, Connecticut, and Florida.

Early in my legal career, I was even authorized to practice law, in a representative capacity, in all four federal trial courts in New York – this without having been previously licensed, by the Appellate Division of

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[1] Because the parties to this action have given blanket consent to the filing of *amicus* briefs, I did not provide them with at least 10 days notice before filing. In addition, this brief was not authored in whole or in part by counsel for any party. Nor has any person or entity made a monetary contribution to the preparation and submission of this brief, which I prepared without the assistance of any third party, other than the professional printer, Cockle Legal Briefs.

the Supreme Court of the State of New York, to practice law in the New York State Unified Court System.

And therein lies the rub: Pursuant to Local Rules of many U.S. District Courts, plenary right to practice law in those courts is predicated on plenary admission to the practice of law in forum state courts. *See, e.g.*, L.R. 83-2.1.2.1 of the U.S. District Court for the Central District of California ("Admission to and continuing membership in the Bar of this Court are limited to persons of good moral character who are active members in good standing of the State Bar of California.").

For example, were I to seek to have my name added to the roll of attorneys of the U.S. District Court for the Central District of California, I would be barred from doing so by Local Rule 83-2.1.2.1 – notwithstanding that I earned a passing score on the July 2009 California General Bar Examination and have never been subjected to professional disciplinary action in any jurisdiction – because the Supreme Court of California has not expressly authorized me to practice law in California state courts.

Moreover, by moving from New Jersey to California in 2004, I became ineligible for *pro hac vice* admission in some if not all California federal trial courts, by operation of Local Rules that incorporated, verbatim, a state of California court rule barring California residents, not yet licensed by the Supreme Court of California, to appear *pro hac vice* in any California state court. *See, e.g.*, L.R. 83-2.1.3.2(a) of the U.S. District Court for the Central District of California (persons

who reside in California are ineligible for admission *pro hac vice*); compare Cal. Ct. R. 983(a) (applicable at the time I first registered for admission to the State Bar of California) and Cal. Ct. R. 9.40(a) (current, renumbered expression of same rule).

Only upon leaving California and establishing domicile in another jurisdiction – I now reside in New Hampshire – was I again potentially eligible to practice law, on a *pro hac vice* basis, in California federal trial courts. Yet I remain ineligible for plenary admission to the bar of any U.S. District Court located in California, until I am a licensee, in good standing, of the State Bar of California.[2]

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[2] Noteworthy here is that Local Rule 83.1(a) of the U.S. District Court for the District of New Hampshire provides that "Any active member in good standing of the bar of the Supreme Court of New Hampshire is eligible for admission to the bar of this court." In contradistinction to the Local Rules of California federal trial courts, however, New Hampshire federal trial court Local Rules expressly provide that the court, in special circumstances, may admit to the bar of the court persons who are not members of the bar of the Supreme Court of New Hampshire. *See* L.R. 83.1(d) of the U.S. District Court for the District of New Hampshire; *compare, generally*, L.R. 83-2.1.2 ("The Bar of this Court") of the U.S. District Court for the Central District of California (providing no express, categorical exception for relaxation of the court's preclusive bar admission Local Rules relating to California residents, except with respect to legal services attorneys whom the Supreme Court of California has authorized to appear in the state courts pursuant to California Rules of Court, Rule 9.45). Unlike the Local Rules of California federal trial courts, the New Hampshire federal trial court Local Rules expressly allow forum state residents who lack forum state bar admission to be admitted *pro hac vice* in a particular action, provided, among other things, that they associate with a member of the New

Accordingly, I submit this *amicus* brief in support of Petitioners' cause, because, if their petition for writ of review is granted, and this Court ultimately grants, on the merits, the relief they seek, I would no longer need to concern myself with securing yet another state court bar admission in order to exercise my right and privilege to practice law, in a representative capacity, in any federal trial court in the United States, from New Hampshire to California and beyond.

II. SUMMARY OF ARGUMENT

A. Issue of Great National Importance

It is my personal view and professional opinion that preclusive U.S. District Court Local Rules that predicate federal trial court bar admission on forum state bar admission are so wrong, in so many ways, that an amicus brief limited to 6,000 words cannot exhaustively explain all of the constitutional and other legal infirmities of state bar admission schemes that, in effect, such Local Rules incorporate by reference. Nor can I fairly evaluate herein the economic and political violence that preclusive state and federal bar admission policies and procedures do to lawyers and

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Hampshire federal court bar. *See* L.R. 83.2(b) of the U.S. District Court for the District of New Hampshire (*pro hac vice* admission rule for private lawyers imposing no New Hampshire residency disqualification). In effect, as petitioners have suggested, preclusive bar admission-related Local Rules have balkanized the U.S. District Court system – with the result that forum state bar admission passports are now being required to get past federal court border patrol guards.

clients nationwide (*e.g.*, by restricting interstate professional mobility of legal services providers and widening the so-called "justice gap" whereby persons of scarce economic means are unable to afford to pay lawyers whose fees would be lower in a truly competitive legal services marketplace).

One thing is so clear, however, that it needs little elaboration: Petitioners' challenge to preclusive Local Rules presents an issue of great national importance, because the U.S. Congress not only authorized the implementation of Local Rules by U.S. District Courts nationwide, but also expressly prohibited the promulgation and implementation of Local Rules that infringe any substantive right, no matter where those U.S. District Courts may be located. *See* 28 U.S. Code § 2071(a) (authorizing this Court and all inferior federal courts to "prescribe rules for the conduct of their business") and 28 U.S. Code § 2072(b) (providing that Local Rules "shall not abridge, enlarge or modify any substantive rights").

B. Summary of Matters Not Raised in Petitioners' Submissions But Raised in This Brief

There are at least six grounds, or arguments, not expressly stated in Petitioners' submissions, from which at least four members of this Court, or even a majority of this Court, could choose in order to justify granting some or all of the relief that Petitioners have requested:

1. Judicial review of state and federal governmental policies and procedures that are alleged to infringe on the free exercise by attorneys of the fundamental rights protected by the First and Fourteenth Amendments to the U.S. Constitution should proceed using a higher or more exacting standard of scrutiny that the rational basis scrutiny previously used in such cases.

2. In at least one case, the highest court of a state in which four U.S. District Courts are located has itself ruled that state court bar admission rules are applicable to state courts only, suggesting that the tacit incorporation of forum state bar admission rules into federal trial court Local Rules is highly suspect, especially when self-interested forum state lawyers sit on the federally-established committees that assist those courts in making such rules.

3. By compelling an applicant for U.S. District Court bar admission first to take and subscribe to an oath pledging to support the constitution of government of a forum state, the preclusive Local Rules challenged by Petitioners essentially create an unconstitutional condition that violates fundamental principles of federalism.

4. To the extent that the various "oath tests" that forum states use to determine whether a person is competent and fit to practice law work the same denial of the right to practice

law as constitutionally-prohibited "test oaths" they are likewise constitutionally void.

5. The state bar admission status upon which preclusive Local Rules rely, in order to exclude some and admit others to the federal trial court bar, is typically, if not invariably, determined in the first instance based on pseudo-scientific evidence, admitted in state proceedings, that would not satisfy the federal scientific evidence admissibility standards set forth in Federal Rule of Evidence 702.

6. The shifting onto state bar admission applicants of the burden of proof of competency and fitness to practice law – which leads to the logically untenable practice of compelling applicants to disprove the negative – is something that this Court should not allow to be incorporated into Local Rules governing admission to the bar of federal trial courts.

My further elaboration of these six points follows.

III. ARGUMENT

Petitioners' submissions identify reasons why the challenged Local Rules governing eligibility for federal trial court bar admission should not, on the merits, be enforced – most importantly, because the rational basis standard of review is inapplicable to the case at hand, and therefore respondents cannot meet their burden of showing that preclusive Local Rules serve a compelling governmental interest, nor constitute the least restrictive means for protecting that interest. *See*

generally Janus v. AFSCME, 138 S.Ct. 2448 (2018) (cited passim by petitioners for the proposition that a higher level of judicial scrutiny than rational basis applies to Petitioners' case); *compare National Ass'n of Multijurisdiction Practice v. Howell*, 851 F.3d 12 (D.C. Cir. 2017), cert. denied (applying to an attorney regulatory matter a rational basis standard of review that Petitioners argue should no longer be used).[3]

But there are also matters, not raised in petitioners' submissions, that lend support to Petitioners' threshold request that this Court either issue a writ of review to the federal appeals court that rendered the decision below, or summarily abrogate such rules.

A. Bundle of Fundamental Rights

For example, not to be found within Petitioners' submissions, *in haec verba*, is the potentially dispositive argument that, without even considering herein the applicability of the heightened standard of review set forth in *Janus*, the practice of law, in a

[3] Petitioners' analysis in this regard makes perfect sense and, if accepted by the Court, would likely be outcome determinative if this case reaches the merits stage. Simply put, because Congress has delegated to inferior federal courts of its own creation the power to establish Local Rules, it follows that those Local Rules ought be analyzed, and their impacts on substantive rights evaluated, by this Court, using no less than the level of judicial scrutiny applicable to other cases in which substantive fundamental rights of speech, assembly, petition, and belief, guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, are alleged to have been infringed by other acts of Congress.

representative capacity, in any court, state or federal, generally consists of the overlapping exercise, by attorneys, on behalf of clients, of constitutionally-guaranteed fundamental rights of political speech, peaceable assembly, petition to government, and expression of belief. *See* U.S. Const. amend. I ("Congress shall make no law . . . "), Cal. Const. art. I, §§ 2-4 (declarations of rights of speech, petition, and creed), *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, n.5 (1957) ("Certainly the practice of law is not a matter of the State's grace.") and Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois*, January 27, 1838 (enunciating the aspirational goal of letting "law be the political religion of the nation") (available online at http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm).

B. Alternative View from America's Left Coast

Second, with respect to Local Rules of California federal trial courts that limit plenary admission to the bars of those courts to persons authorized on America's "Left Coast," by the Supreme Court of California, to practice law in California state courts, that state high court, were it to find itself in the position of this Court today, might very well conclude that, at least in California, forum state bar admission and admission to the bar of a federal trial court located within a state should not be linked one to the other:

> The State Bar Act and other statutes enacted for the purpose of regulating the practice of law in this state are applicable to our state courts only. The federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct. This state, should it attempt, and we do not think it has, to regulate the practice of law in the federal courts or to place any restrictions or limitations upon the persons who might appear before the federal courts within this state, would be acting entirely without right and beyond its jurisdiction.

In re McCue, 211 Cal. 57, 66 (1930) (essentially enunciating an opinion that also supports the corollary view that federal courts should not attempt to limit federal court bar admission based on whether an individual is licensed to practice in a forum state court system). In sum, for a California federal trial court to swallow, hook, line and sinker, preclusive California bar admission rules, creates a reasonable suspicion that California lawyers who sit on Local Rule making panels, throwing State Bar public policy bait in federal waters are not acting above-board, and instead are acting, contrary to California Supreme Court doctrine, out of self-interest in restricting competition in the marketplace for federal court legal services. *Cf.* 28 U.S. Code § 2073(a)(2) (requiring that such panels include representatives of the "professional bar" of forum states, thus giving the state camel's nose entry into the federal court's tent).

C. Compulsory Oath to State Constitutions

Third, I am unaware of any U.S. District Court where the oath of attorney required for admission to the bar of such court includes an oath to uphold the constitution of the forum state. Indeed, consistent with the standard form of oath of attorney for federal court practitioners, none of six oaths of attorney taken and subscribed by me in connection with admission to the bar of five U.S. District Courts and of this Court mention any constitution of government other than that of the United States of America. Therefore, it could be argued that requiring that an applicant first swear an oath of attorney pursuant to state bar admission procedures, in order to gain admission to a federal trial court bar, would constitute an unconstitutional condition for federal trial court bar admission that violates fundamental principles of federalism.

D. Test Oaths and Oath Tests – Two Sides of Same Coin

Fourth, writing for a majority of this Court, Mr. Justice Field called to the attention of all lawyers in the United States a general objection to an 1865 act of Congress that required anyone seeking to be admitted as an attorney of the bar of this Court, or of any inferior federal court, first to subscribe to an oath whereby the affiant disclaimed involvement in acts of rebellion (or any other forms of direct support for such rebellion) against the United States. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 345 (1866). Although the question

presented in that case was decided, in favor of the petitioner, based on the holding that Congress cannot punish a person for a crime that has been pardoned, Justice Field's *obiter dicta* answer to the question "What right has Congress to prescribe other qualifications than are found in the Constitution; and what is the limit of the power?" supports the legal theory that any federal bar admission scheme that requires an applicant to take a preclusive "oath test" (*i.e.*, any of the many different written examinations and moral character reviews that are integral to most if not all state bar admission regimes) is as constitutionally void as the federal bar admission regime that required petitioning lawyer A. H. Garland to take a preclusive "test oath" (*i.e.*, deny past misconduct that could not honestly be denied) in order to be re-admitted to the bar of this Court:

> Congress can exercise none but actually delegated powers, or such as are incidental and necessary to carry out those expressly granted. If this act is constitutional, then there is no limit to the oaths that may be hereafter prescribed. The whole matter rests in the discretion of Congress. A law requiring every public officer to swear that he voted for a particular candidate at the last election, or leave his office, would be more wanton, but not less constitutional, than the one we are considering; for if it is in the constitutional power of Congress to require these disfranchising oaths to be taken, then Congress alone can determine their nature. There is no appeal from

> its determination of any matter within its constitutional province.

Ibid. at 346.

E. Scientific Evidence or Pseudo-Science?

Fifth, assuming that federal bar admission proceedings are judicial in character (and even if they are in point of fact merely ministerial proceedings conducted under the purview of judicial branch officers), the state bar admission status upon which the challenged Local Rules rely in order to exclude some and admit others to the federal trial court bar is typically, if not invariably, determined in the first instance based on inadmissible pseudo-scientific evidence (*e.g.*, scores on written bar examinations) that has not been subjected, at either the state or federal level, to the evidentiary admissibility standards described in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993) (Blackmun, J., writing for a unanimous Court in Section II A of the opinion) (observing that Rule 702 of the Federal Rules of Evidence, with respect to testimony by experts, says: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). By way of further explanation, Justice Blackmun's opinion in Section II A continues:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" [592] standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Ibid. n.9 at 591-592. However, with respect to the evidentiary bases and principal conclusions upon which state bar admissions are usually predicated, including administrative or judicial determinations that an individual is minimally competent to practice law, U.S. District Courts that promulgate the preclusive Local Rules challenged by Petitioners seem largely if not entirely to disregard Rule 702 when enforcing those Local Rules. In other words, garbage in, garbage out, with many federal courts wallowing in a pseudo-scientific information dump.

F. The Impossible Burden of Disproving the Negative

Lastly, there is the issue of states imposing upon state bar admission applicants a burden of proof that requires them to disprove a negative.

By way of comparison to a subject with which at least some of the current members of this Court are undeniably familiar, one of the commonalities between state bar admission moral character determination proceedings and U.S. Senate confirmation hearings is that bar admission applicants and judicial nominees are both often placed in a position where they must disprove the negative.

For bar admission applicants, disproving the negative means, among other things, that one must rebut a presumption of bad moral character, in order to receive a positive moral character determination from bar examiners.

For nominees to the federal bench, disproving the negative can mean a prolonged, contentious battle over who said what or did what and when, which can leave a nominee feeling like throwing in the towel.

Such was the case with my own application for a positive determination of good moral character, submitted in November 2009 connection with an application for certification to the Supreme Court of California for attorney admission and a license to practice law. Because of one false accusation, made some four or five years previously, that I had held myself out to be a California attorney, when I was not in fact a member of the State Bar of California, the California Committee of Bar Examiners launched a heightened review of my application, in an attempt to determine whether I had engaged in a criminal act, contrary to the California State Bar Act. *See Cal. Bus. & Prof. Code* §§ 6125 &

6126. As a result, my moral character determination application languished for 18 months, followed by an additional seven months of further grilling, in State Bar Court proceedings, by State Bar officials hell-bent on ferreting out details of my professional activities while a California resident. In the end, I threw in the towel, but not without taking the opportunity, at an informal conference with members of the Committee of Bar Examiners' moral character subcommittee, held in August 2011, to characterize the moral character determination process as something akin to an abusive Hollywood casting couch interview, and the members of the moral character subcommittee as bullies.[4]

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[4] There is actually an audio recording of this informal conference, made on behalf of the Committee of Bar Examiners, pursuant to Rule 4.46(c) of the Rules of the State Bar of California, during which one of the non-attorney "public" members of the subcommittee justified the long delay in processing my application by turning hundreds of years of Anglo-Saxon jurisprudence on its head, saying:

> Isn't it true in the law, that it is better that 20 innocent lawyers get delayed, than one potentially harmful lawyer get past? You haven't been denied, you've been delayed for justifiable cause from what I've seen and as a member of the public, for the sake of my mom, and all moms out there, I want to make sure you aren't going to go out and screw her if we let you in.

Coupled with badgering by the subcommittee chair, an experienced California trial attorney, aimed at convincing me to release copies of five years of my wife's and my federal and state tax returns, and, when I declined, portions thereof, and other sarcastic or sanctimonious remarks by various subcommittee members (including by a Ph.D. psychologist who gave an off-the-cuff assessment of my conduct and character, saying, in sum and substance, that I would never become an attorney in California unless I

IV. CONCLUSION

In light of the above, it stands to reason that state bar admission procedures are little more than quota schemes masquerading as meritocracies, and that the pseudo-scientific means used to exclude certain persons from state bar admission provide just cause for anger on the part of those so excluded.

One is reminded of a certain Gospel passage about the Christ becoming angry at the moneychangers who were defiling the Temple in Jerusalem, one American translation of which is rendered as follows:

> Den Jedus gone eenside God House. E staat fa dribe out dem people wa beena sell ting eenside dey. / E tell um say "God say een e wod, 'Me house gwine be place weh people pray ta

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figured out what was causing me not to cooperate with the moral character determination process), the true character of the California moral character determination process as a place where personal opinions, rather than rule of law, reigns supreme – just as in U.S. Senate judicial confirmation hearings – was plainly evident. In addition, the prevailing judicial opinion that bar examining committees are not impeded, by constitutional limitations, from launching background investigations of bar admission applicants as a matter of course, including requests for copies of tax returns and membership lists of political associations with which applicants are affiliated, as happened in my case, has never been fully harmonized with this Court's ruling in *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 557 (1963) (holding that "an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities"). For this Court to countenance state bar moral character determination fishing expeditions and witch-hunts like what that I endured smacks of abdication of federal judicial authority.

> me!' Bot oona done ton um ta place weh tief dem da hide!"

De Nyew Testament: The New Testament in Gullah Sea Island Creole with Marginal Text of the King James Version (2005) 286 (modern translation of 1769 Oxford King James version of Luke 19:45-46).

This Court has an opportunity, with this case, to handle the constitutional problem of "state tails wagging the federal dog" in either of two ways: (1) By summarily abrogating (or at least suspending, pending further administrative review), Local Rules that require state bar admission as a prerequisite to federal trial court bar admission; or (2) By granting Petitioners' application for writ of review, and hearing the case on the merits.

Failure to do either of these can only further erode public confidence in the federal judicial system.

Respectfully submitted,

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