

No. 21-547

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

KEVIN K. TUNG, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED, PETITIONER

v.

SUPERIOR COURT OF NEW JERSEY; STUART RABNER,
CHIEF JUSTICE OF THE SUPREME COURT OF NEW JERSEY;
GLENN A. GRANT, ACTING ADMINISTRATIVE DIRECTOR
OF THE NEW JERSEY COURTS; CARMEN MESSANO,
PRESIDING JUDGE FOR ADMINISTRATION FOR THE
APPELLATE DIVISION; JOHN/JANE DOE, ADMINISTRATORS
OF THE NEW JERSEY SUPERIOR COURT

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit affirmed the New Jersey District Court's decision that dismissed the Petitioner Kevin Tung, Esq.'s violation of the constitutional due process claims against the Superior Court of New Jersey and its administrators in their official duties or capacities in charge of managing and supervising of the administration of the Superior Court of New Jersey on the grounds that (1) sovereign immunity shields the defendants and (2) *Ex parte Young*'s exception do not apply to the instant case.

Four questions are presented:

1. Whether the claims of an Officer of the Court with the New Jersey Judiciary System are barred by the Eleventh Amendment when the Officer of the Court's claims allege that the New Jersey Judiciary System violated his constitutional right to due process.

2. Whether Petitioner seeks the type of forward-looking relief under *Bowers v. NCAA* that would make the exception in *Ex parte Young* applicable to the case at hand when the relief sought by the Petitioner requests that the administrators of the New Jersey Judiciary System implement pertinent procedural due process procedures required by federal law to protect Officers of the Court like the Petitioner and other similarly situated attorneys from being maliciously prosecuted as a result of fraud upon the court when the attorney is not a party to the action and is not given an opportunity to defend himself.

3. Whether the ongoing investigation and prosecution by the Office of Attorney Ethics into the Petitioner's alleged misconducts constitutes an ongoing violation of federal law rather than an ongoing effect, thereby making the *Ex parte Young* exception applicable to the instant case, when said Office of Attorney Ethics investigation and prosecution resulted from the Superior Court of New Jersey's violation of the Petitioner's constitutional right to due process.

4. Whether New Jersey Judiciary's treatment of its officers of the court violated the equal protection clause of the constitution when minority attorneys are presumed dishonest and no due process is afforded to protect them, while attorneys deeply connected with the judiciary systems can walk away with no punishment after openly admitting to committing fraud upon the court, which had caused the minority attorney to suffer harms relating to his good name, professional reputation, honor, or integrity in his legal profession.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States District Court for the District of New Jersey's opinion (per Wolfson, Chief Judge) granting Defendant Superior Court of New Jersey's motion to dismiss (Appendix ("Pet. App.") 26a-38a) is not otherwise published. The United States District Court for the District of New Jersey's opinion (per Shipp, District Judge) granting Defendants' motion to dismiss (Pet. App. 5a-22a) is not otherwise published. The opinion of the United States Court of Appeals for the Third Circuit (per Ambro, Jordan, and Bibas, Circuit Judges) affirming the District Court's dismissal (Pet. App. 1a-4a) is not otherwise published. The Order of the Third Circuit denying rehearing and rehearing en banc (Pet. App. 41a-42a) is not otherwise published.

JURISDICTION

The Third Circuit entered its judgment on July 28, 2021. (Pet. App. 39a-40a) A timely petition for panel rehearing was denied on August 27, 2021. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

...[N]or [any person] be deprived of life, liberty, or property, without due process of law; ...

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizen or Subjects of any Foreign State.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

...[N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner, Kevin K. Tung, Esq., is a licensed attorney in the State of New Jersey and an Officer of the Court, thereby he is a part of the New Jersey Judiciary systems pursuant to *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), the Supreme Court of the United States ruled that counselors are officers of court. Officers of Court have legal and ethical obligations. They are tasked to participate to the best of their ability in the functioning of the judicial system, as a whole, in order to forge justice out of the application of the law while engaging in the simultaneous pursuit of the legitimate interests of all parties and the general

good of society. As officers of the court, lawyers have an absolute ethical duty to tell judges the truth. This means that an officer of the court must always avoid dishonesty, must never be evasive when offering reasons as to why the attorney and/or his/her client is not appearing, and must never be dishonest or evasive regarding the location of documents and other matters related to the conduct of the courts. **Therefore, if the Court accuses an officer of the court of being dishonest with the court during the performance of his/her duties throughout the proceedings, then the officer of the court must be afforded the pertinent substantive and procedural due process rights to defend himself prior to the court accusing the officer of dishonesty rendering any decisions or opinions against that officer.**

In this instant case, Petitioner Tung, a non-party attorney, was framed by the opposing counsel, James Plaisted, who openly admitted to the investigator from Office of Attorney Ethics that he committed a fraud upon the court. In 2019, attorney James Plaisted appeared before the Disciplinary Investigator Susan R. Perry-Slay and stated on the record that he had made a "misstatement" to Judge Weisberg in the hearing in the matrimonial action Fou v. Fou. James Plaisted further stated to Disciplinary Investigator Susan R. Perry Slay that "he should have said... and he should have said ..." before the investigator. James Plaisted's fraud upon the court resulted in the unconstitutional decision and opinion of Judge Barry A. Weisberg of the Superior Court New Jersey dated September 12, 2012 (Docket No.: FM-12-1685-09E) and the decision and opinion of the Appellate Division of the Superior Court of New Jersey dated July 21, 2016 (Docket No.: A-1569-14T3) in

the matrimonial action Fou v. Fou. Both courts rendered decisions and opinions containing judicial criticisms against Petitioner Tung in the absence of Petitioner Tung's participation in the proceedings. These Judicial criticisms rose to the level of a public reprimand and must therefore be considered as a sanction. Since these judicial criticisms rose to the level of a public reprimand constituting a sanction against Petitioner Tung, due process must have been afforded to Petitioner Tung before the Court rendered such an opinion or decision against him. See, *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007). (The judicial criticism against an attorney in an opinion or order rising to the level of a public reprimand is a sanction, thereby due process must be given before rendering such an opinion.) If Petitioner Tung was afforded an opportunity to participate the proceeding, he would have had the opportunity to defend himself against the "misstatements" made by the attorney James Plaisted and the outcome of the proceeding would have been totally different. However, the end result was that Petitioner Tung was framed by James Plaisted's fraud upon the court.

After the hearing, Judge Weisberg rendered the decision. The essential basis for this decision regarding Petitioner Tung's alleged unethical representation of Mrs. Fou was that Mr. Tung failed to incorporate all the terms in the Chinese Agreements into the English Property Settlement Agreement ("PSA") which was prepared by Mr. Tung. Judge Weisberg condemned Mr. Tung in his decision, stating that the failure to incorporate Chinese Agreements into the English PSA "was a knowing concealment of a relevant fact," which

"rises to the level of a fraud upon the Court". This decision rendered by Judge Weisberg was a direct result of the false statements made by attorney James Plaisted against Petitioner Tung in the absence of Petitioner Tung's participation in the proceeding. Had Petitioner Tung been afforded the opportunity to participate in the proceedings where he was criticized as a result of James Plaisted's fraud, he could have explained that the Chinese Agreements that he allegedly failed to incorporate were never disclosed to him because Janet Fou was attempting to commit Medicaid fraud and did not want to disclose all of her assets so that her attempt to commit Medicaid fraud would not be discovered. However, Petitioner Tung was denied his constitutional right to due process and was not afforded an opportunity to participate in the proceedings where judicial criticisms rising to the level of a public reprimand were levied against him.

Judge Weisberg's opinion has had a significant adverse effect upon Petitioner Tung in all subsequent court proceedings against Petitioner Tung, such as in the Appellate Division, which also rendered an opinion against Petitioner Tung. The clerk of the Appellate Division even referred Petitioner Tung to Office of Attorney Ethics for investigation and prosecution before giving Petitioner Tung an opportunity to rebut the false facts that were levied against him by the attorney James Plaisted. This Office of Attorney Ethics investigation was a direct result of James Plaisted's fraud upon the court as well as the Superior Court of New Jersey's denial of Petitioner Tung's constitutional right to due process. This Office of Attorney Ethics investigation continues to this day and it is a continuing violation of federal law as long as the Office of Attorney

Ethics investigation and prosecution continues. Petitioner Tung was again not notified and was not given an opportunity to defend himself with regards to the allegations levied against him in Appellate Division's proceedings. Said investigation and prosecution of Petitioner Tung by Office of Attorney Ethics is stayed pending the outcome of the Courts' determination whether Petitioner Tung's due process rights were violated. Petitioner Tung was not afforded an opportunity to file a brief on his behalf in the Appellate Division. The conclusions reached in the opinion rendered by the Appellate Division against Petitioner Tung for the alleged unethical representation of Mrs. Fou in her uncontested divorce matter and the referral to the Office of Attorney Ethics rose to the level of a public reprimand and are considered by the courts to be a sanction. Petitioner Tung, an Asian minority attorney, was presumed dishonest by the New Jersey Judiciary, who concluded that no due process was needed before referring him to Office of Attorney Ethics.

Many Circuit Courts view that the attorney referral to the disciplinary committees amounts to a sanction. See, *Walker v. Mesquite Tex.*, 129 F.3d 831, 832-833 (5th Cir. 1997) ("The importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct."), *United States v. Talao*, 222 F.3d 1133, 1137-38 (9th Cir. 2000) (Appellate jurisdiction was proper where the district court found violation of specific rule of professional conduct, an action which "carries consequences similar to the consequences of a

reprimand") In the Second Circuit, the Court held "that we have jurisdiction over Goldstein's appeal of the referral to the disciplinary committees. The referral was included in the court's judgment and was to be implemented by the Clerk of Court. It was in the nature of a sanction. Even though appellant was not in any way foreclosed from explaining or justifying his actions to the disciplinary authorities or from arguing that no disciplinary action was appropriate, such an order has reputational consequences and potential costs in responding to the referral." "Therefore, the court's referral amounted to much more than implied criticism, and, like other sanctions, we deem it reviewable." *Goldstein v. St. Luke's Roosevelt Hosp. Center*, 430 F.3d 106, 112 (2nd Cir. 2005)

All of the false accusations against the Petitioner Tung could have been avoided if there were appropriate pertinent due process procedures implemented as outlined in *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007). The lack of such pertinent due process procedures in the Superior Court of New Jersey administrative system is extremely evident, as more than ten (10) judges in the Superior Court of New Jersey handled the Fou v. Fou matters and none of these ten (10) judges were alerted that the decisions and opinions rendered by the Courts against the non-party attorney were in violation of the non-party attorney's due process rights. As a result, Petitioner Tung has suffered great harm in all subsequent proceedings against him as well as in his daily practice. For example, one of the opposing counsels in an unrelated litigation case attached Judge Weisberg's opinion to convince the court that Petitioner Tung is not a trustworthy attorney. Petitioner Tung does not

wish to see these same wrongs be repeated in the future against himself and other similarly situated attorneys because society as a whole will be forced to suffer the consequences resulting from the Court's failure to implement said due process rights contemplated by the founding Fathers of this country.

Furthermore, the Investigative Report of the Office of Attorney Ethics of James Plaisted, Esq. sends a clear and important message to the public that an attorney lying to court is tolerated in the New Jersey Judiciary systems. Mr. Plaisted did not receive any punishment, not even a modest admonishment simply stating, "Do not do it again." The official reasoning was that there was no clear and convincing evidence. When the wrongdoer has already admitted making misstatements to the court, what else could possibly be required to prove the case with clear and convincing evidence? Meanwhile, Petitioner Tung was criticized, sanctioned, and referred to the Office of Attorney Ethics for discipline as a result of the fraudulent actions of James Plaisted and Janet Fou. Publicly available documents may provide insight into how such an injustice has occurred. Mr. Plaisted works for a law firm by the name of Pashman Stein Walder Hayden, P.C. The founders of the Pashman law firm are deeply connected with the New Jersey Judiciary systems in several ways. Mr. Louis Pashman was the former Chair of the Disciplinary Review Board of the Supreme Court of New Jersey. Mr. Pashman worked closely with Charles Centinaro, Director of the Office of Attorney Ethics, who is supervising the investigation and prosecution of Mr. Tung and Mr. Plaisted's alleged ethics violations. The rest of the founding partners are all retired judges and law clerks from Supreme Court of

New Jersey and Superior Court of New Jersey. On the other hand, Mr. Tung, a minority Asian attorney and an out-of-state attorney, has no connection with the New Jersey Judiciary other than being admitted to practice law in the State of New Jersey. These improper connections have led to the issues presented in the instant matter at hand. Currently in the New Jersey Judiciary system, connected attorneys can openly admit to committing fraud upon the court without facing any consequences whatsoever. On the other hand, Petitioner Tung, who is an out-of-state minority Asian attorney, must face the consequences resulting from James Plaisted's actual fraud upon the court without even being afforded an opportunity to defend himself. Unfortunately, it may very well be that the New Jersey Judiciary system is protecting the Pashman Law firm and its attorneys due to their personal connections and relationships by denying Petitioner Tung his constitutional right to due process.

One only needs to look at the Pashman Stein Walder Hayden P.C. website to know that something is not right within the New Jersey Judiciary System. On the website, it is actually listed as a point of pride how the Pashman law firm has regularly represented judges over the years when faced with their own legal problems. The website states in relevant part, "We take great pride in the fact that other leading law firms, judges and lawyers have repeatedly turned to us over the years when faced with their own legal problems." This statement contained on Pashman Stein Walder Hayden P.C.'s website raises the question, why have New Jersey judges needed to be regularly represented by private law firms in their own personal legal matters over the years? The Pashman law firm further

advertises their connection with the New Jersey Judiciary system when they state, "Judges know us well, for our insight, our thoughtful analysis, and our creativity." "With a deep bench of carefully selected lawyers that includes a retired New Jersey State Supreme Court justice, a retired Presiding judge of the Appellate Division of the New Jersey Superior Court, a retired New Jersey Superior Court judge, ..., it is no wonder why our firm is admired and respected by our peers." These connections are in plain sight for all to see. Meanwhile, Petitioner Tung is an out-of-state Minority Asian attorney and has no such connections with the New Jersey judiciary system.

To be clear, Petitioner Tung in this appeal does not allege that any wrongdoing is discovered on the part of the Pashman law firm other than the actions of Mr. Plaisted, who has already admitted to making misstatements to Judge Weisberg. Judge Weisberg then rendered an unconstitutional decision against Petitioner Tung based on the fraud upon the court committed by Mr. Plaisted. The point raised by the Petitioner here is that the court administrators of the New Jersey Judiciary should be concerned about creating a justice system that can be equally accessed by all with clear due process procedures implemented to eradicate any possibility of unfairness in handling the administration of justice. In the instant matter at hand, the New Jersey Judiciary has presumed that Minority out-of-state attorneys are dishonest and are not worthy of the constitutional protections afforded by pertinent due process procedures. Situations such as this can no longer continue, especially while New Jersey attorneys deeply connected with the judiciary system can walk away with no punishment after they have openly

admitted that they have committed fraud upon the court. To achieve the goal of fairness in the administration of justice, the court administrators of New Jersey Judiciary shall implement pertinent due process procedures to ensure that all have equal access to the justice system. Whenever conflicts of interest arise, the appropriate procedures shall be implemented to avoid such a conflict of interest. In the case at bar, the New Jersey Judiciary shall implement due process procedures to safe guard the officers of the court, such as, the Petitioner or attorneys similarly situated in the future from being maliciously prosecuted by fraud upon the court where Petitioner or attorneys similarly situated are not a party to the action and are not given opportunity to defend themselves. When the Director of the Office of Attorney Ethics overseeing the investigation of an attorney's alleged wrongdoings in a case has a relationship with the partners of a law firm which operates as the opposing counsel in the same malpractice case, the investigation of wrongdoing of an employee of the law firm should be conducted by an independent committee. The failure to do so has severe consequences as can be seen in the instant matter at hand. For example, Petitioner Tung's law firm was forced to file for bankruptcy to avoid the immediate enforcement of a wrongful judgment. The professional reputations of Petitioner Tung and his law firm have been impaired and damaged. The New Jersey Judiciary's position that Petitioner Tung was able to defend himself in the malpractice action and in the Office of Attorney Ethics' investigation and prosecution later after an unfair decision was rendered against Petitioner Tung in the absence of participation by the Petitioner is in contravene with the current due process law. The disparity in the treatment of Minority

attorneys with no connections with the New Jersey Judiciary System in comparison to the treatment of attorneys with deep connections with the New Jersey Judiciary System demonstrated that the New Jersey Judiciary System has a systematic policy that violates the equal protection clause of the constitution of the United States.

In order to correct the wrongs committed upon the Petitioner, Petitioner Tung made motions to intervene in both the Appellate Division of the Superior Court of New Jersey and the Superior Court, Middlesex County in Fou v. Fou matrimonial matter attempting to set aside the unlawful decisions or opinions against Petitioner, because Petitioner was not a party. Petitioner was never served with the decision or opinion of Judge Weisberg. The Appellate Division first denied the access for Petitioner Tung to intervene without legal analysis and explanations. In a recent decision, the Appellate Division upheld the decision rendered by the Superior Court of New Jersey, Middlesex County on the ground that the Petitioner Tung does not have an interest in the Fou v. Fou matter to intervene.

The Appellate Division affirmed the Trial Court's decision to deny Petitioner Tung's motion to intervene on the ground that "Tung does not claim 'an interest relating to the property or transaction which is the subject of the transaction,' as required by Rule 4:33-1. Namely, Tung's ability to practice law in New Jersey is unrelated to the Fou's original divorce proceeding." Basically, the Appellate Division narrowly interpreted the requirement in Rule 4:33-1 to mean that the interest must be related to the division of marital

properties in the Fou v. Fou matrimonial action. The Appellate Division opined that, since Tung's property interest to practice law in New Jersey has nothing to do with the division of the Fou's matrimonial action and Tung's claims are not against plaintiff or defendant in the Fou action because they involve the actions of the trial judge, the intervenor Tung failed to meet the first and most fundamental requirement of Rule 4:33-1. Petitioner Tung appealed to the Supreme Court of New Jersey, which denied the Petition for Certification. Petitioner Tung filed a petition for a writ of certiorari with the Supreme Court of the United States. The said petition is still pending under Case No. 20-1711.

**THE DISTRICT COURT DECISION BY HON.
WOLFSON**

After the state courts denied Petitioner Tung's access to the state courts to correct the wrongs committed against him, Petitioner Tung commenced a federal action in the district court, alleging that the Superior Court of New Jersey violated his Fourteenth Amendment due process rights during a series of legal disputes stemming from Petitioner Tung's representation of a client in a divorce action. Defendant moves to dismiss Petitioner Tung's claims under Federal Rule of Civil Procedure 12(b)(1) based on Eleventh Amendment Sovereign Immunity, the *Rooker-Feldman* doctrine, and the *Younger* abstention doctrine. In an opinion, Chief Judge Wolfson of the District Court of New Jersey granted Defendant's motion to dismiss. (26a-38a)

However, the Chief Judge Wolfson pointed out in her opinion that Petitioner Tung "also seeks to enjoin

the 'Presiding Administration Judge of the Superior Court of New Jersey' to implement pertinent due process procedures to protect non-party attorneys like Plaintiff from criticism in an opinion or order, without due process. **In that regard, it may be that Plaintiff's potential amendment, regardless of the merits, seeks the type of forward-looking relief permitted under *Young*.**" See *Am. Exp. Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 568 (D.N.J. 2010), *aff'd sub nom. Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012) ("it has long been established by the Supreme Court that the Eleventh Amendment does not preclude lawsuits against state officials in their official capacities to enjoin violations of federal law even where the remedy would enjoin enforcement and implementation of an official state policy"). In this regard, Chief Judge Wolfson permitted Petitioner Tung thirty days to file a motion for leave to file an amended complaint. (36a-37a) Petitioner Tung thereafter amended the complaint, naming the Chief Justice of the New Jersey Supreme Court and other Presiding Judges in their official capacity for the administration of the Superior Court of New Jersey as Defendants. (23a-24a)

THE DISTRICT COURT DECISION BY HON. SHIPP

Defendants moved to dismiss the Amended Complaint on the same grounds under Federal Rule of Civil Procedure 12(b)(1) based on Eleventh Amendment Sovereign Immunity, the *Rooker-Feldman* doctrine, and the *Younger* abstention doctrine. (10a) On November 10, 2020, District Court Judge

Shipp granted the motion to dismiss, stating that the *Ex parte Young* Exception to Eleventh Amendment Immunity does not apply to Petitioner Tung's claims, because Tung does not allege a violation of federal law. Nor did Tung allege that a violation of federal law is continuing. Therefore, Petitioner Tung's due process claims are barred by the Eleventh Amendment and do not properly fall within *Ex parte Young*'s exception to Defendants' immunity to suit. (20a)

THE THIRD CIRCUIT DECISION

Petitioner Tung appealed the decision of Judge Shipp to the Third Circuit. On July 28, 2021, the Court of Appeals for the Third Circuit affirmed the District Court's decision on the ground that Petitioner Tung failed to allege the Defendants continue to violate his due process rights. (2a) The Third Circuit concluded that "[t]he judge criticized him years ago. Any violation is over and done." (3a) The Third Circuit, however, overlooked that the Office of Attorney Ethics' investigation and prosecution, which resulted from the original unconstitutional court decision of Judge Weisberg, is currently stayed pending a determination by the Court regarding whether or not Petitioner Tung's constitutional right to due process was violated. (38a)

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted for the following reasons:

First, the Third Circuit recognized in its opinion in the topic sentence: "Not every wrong has a federal remedy." This is correct for the instant case. This case should have been resolved by the State Court proceedings. However, as demonstrated in the related petition for a writ of certiorari pending before the Supreme Court of the United States under Docket No. 20-1711, the New Jersey Judiciary denied Petitioner Tung access to the State Court to intervene. After Petitioner Tung had exhausted state court's remedies, Tung was forced to commence the federal action for readdressing the wrong committed against him. Surprisingly, the New Jersey Judiciary, now in federal court, asserted the defense that the Eleventh Amendment shields the Defendants. The New Jersey Judiciary's act of blocking Petitioner Tung's access to the State court for resolution and while also now asserting sovereign immunity defense has created a situation where there is a clear wrong but no remedy.

Second, the Courts below ducked an issue raised by the Petitioner Tung regarding whether the Eleventh Amendment bars Petitioner's due process claims against the New Jersey Judiciary. Petitioner is a citizen of a foreign state but more importantly he is also an officer of the court of the New Jersey Judiciary. As an officer of the court, Petitioner Tung is a part of the New Jersey Judiciary systems pursuant to *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). (41a at ¶13 and 67a at ¶92) In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), the Supreme Court of the United States ruled that counselors are officers of court. Specifically, the Supreme Court held in *Ex parte Garland* that:

Attorneys and counsellors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. The order of admission is the judgment of the court that the parties possess the requisite qualifications and are entitled to appear as attorneys and counsellors and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court **after opportunity to be heard has been afforded.** *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 374 (1867).

The Supreme Court made Clear in *Garland* that officers of the court have legal and ethical obligations. They are tasked to participate, to the best of their ability, in the functioning of the judicial system as a whole in order to forge justice out of the application of the law while simultaneously pursuing the legitimate interests of all parties and the general good of society. As officers of the court, lawyers have an absolute ethical duty to tell judges the truth, including avoiding dishonesty or evasion about (i) reasons the attorney or his/her client is not appearing, (ii) the location of documents and (iii) other matters related to conduct of the courts. In exchange for upholding these honorable obligations to the Court, officers of the Court must always be afforded an opportunity to be heard should they ever be accused of dishonesty or fraud upon the court by the court they work for. In other words, **if the**

Court accuses an officer of the court of being dishonest during the performance of his duty in the court proceedings, then the officer of the court must be given pertinent and substantive procedural due process rights to defend himself before the court renders any decisions or opinions against that officer of the court.

Furthermore, throughout all of the proceedings relevant to this matter, all Petitioner Tung has been asking for is to be afforded his long overdue due process rights recognized by the Third Circuit in *Bowers v. NCAA*. Thirteen years ago, the Third Circuit in *Bowers* reversed an order entered by the District Court of New Jersey, which granted the motion for sanctions against the plaintiff and plaintiff's counsel, on the ground that the District Court violated the procedural due process rights and liberty interests of attorneys for the plaintiff. In *Bowers*, this Court ruled that, when a judicial criticism contained in a decision or opinion rises to the level of a public reprimand against a non-party attorney, **the non-party attorney must be given an opportunity to defend himself before rendering such opinions and decision against the non-party.** See, *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007). Now however, the panel presiding over the instant action seeks to either ignore or overrule the 3rd Circuit's own decision in *Bowers v. NCAA* by refusing to acknowledge that Petitioner Tung's constitutional due process rights were violated when he was not afforded an opportunity to defend himself as an officer of the court first before being sanctioned when he was referred to the Office of Attorney Ethics.

Petitioner Tung simply asks this court to recognize the established case-law by following the 3rd Circuit's ruling in *Bowers v. NCAA*, in addition to the Supreme Court's ruling in *Ex parte Garland*, by acknowledging that Petitioner Tung is constitutionally entitled to be afforded an opportunity to defend himself before a negative ruling constituting a sanction against him is rendered. It is truly shameful to our judicial system that Petitioner Tung is forced to fight so vigorously to vindicate such a basic and fundamental constitutional right that is unequivocally recognized by both the Supreme Court and the 3rd Circuit. Should the 3rd Circuit continue to shield the Defendants from the consequences of their unconstitutional actions, they are sending a clear message that the 3rd Circuit not only permits unconstitutional actions, but they actively reward it at the expense of the constitutional rights of Petitioner Tung and all other attorneys similarly situated. Therefore, the petition for writ of certiorari should be granted so that proper guidance will be provided to the Courts below for once and all whether it prioritizes upholding the constitutional rights of its officers of the court or if it prioritizes rewarding attorneys with improper connections to the New Jersey Judiciary system who openly commit fraud upon the court.

Third, the Third Circuit's decision that the exception laid out by the Supreme Court in *Ex parte Young* does not apply to the instant lawsuit was erroneous because the panel overlooked the fact that Appellant Tung alleged a continuous ongoing violation rather than an ongoing effect. The Third Circuit's decision merely offers conclusory justifications for affirming the district court's decision. For example, in

its decision, the panel merely states that "a 'narrow exception' [to the Eleventh Amendment] lets Plaintiffs sue state officials to stop ongoing violations of federal law." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996); See *Ex parte Young*, 209 U.S. 123, 155-56 (1908). The panel then goes on to state in conclusory fashion that "[T]his case does not fit the exception. The Judge criticized him [Appellant Tung] years ago. Any violation is over and done with." Lastly, the panel opines that "[H]e [Appellant Tung] is suing New Jersey officials in their official capacities, so he must allege that they *continue* to violate his rights. Because he has not done so, we [the panel] will affirm the District Court's dismissal."

This conclusory explanation, in addition to it lacking any kind of meaningful analysis, is entirely erroneous in that it completely ignores and overlooks the fact that Petitioner Tung unequivocally did allege that the Defendants to this action **continue** to violate his rights. Specifically, the panel's decision ignores the fact that Petitioner Tung alleged that he is currently subject to an ongoing Office of Attorney Ethics investigation and prosecution which is presently stayed at this moment pending the Courts' determination regarding whether Petitioner Tung's due process rights were violated. Petitioner Tung's Office of Attorney Ethics investigation and prosecution is a direct result of the referral by the Appellate Division based upon the affirming of Judge Weisberg's unconstitutional decision. Therefore, Judge Weisberg's decision was not just a one-time, past violation. Rather, Petitioner Tung's rights continue to be violated by Defendants because these state officials continue to take actions

against Petitioner Tung based upon the unconstitutional decision of Judge Weisberg.

Furthermore, the Third Circuit should have directed the Chief Justice of the Supreme Court, which directly oversees the operations of the Office of Attorney Ethics, to dismiss the ongoing Office of Attorney Ethics investigation and prosecution because this on-going investigation and prosecution is a continuing violation of Petitioner Tung's constitutional due process right. In the alternative, the Third Circuit must, at a minimum, vacate Judge Weisberg's unconstitutional decision to allow Petitioner Tung to have the opportunity to present his defense before first rendering a decision and referring Petitioner Tung to the Office of Attorney Ethics.

Additionally, the Third Circuit's decision offers a puzzling hypothetical scenario in an attempt to provide a justification for its reasoning. For example, the panel's decision offers a hypothetical scenario whereby the panel states, "Imagine that the police unconstitutionally searched a man's home, sparking gossip among his nosy neighbors. They might shun him for a time, even after he was cleared of all charges. No one would say that the police continue to search his home just because his embarrassment endures. So too here. Even if Tung feels lasting shame, any deprivation of process ended years ago."

It must be stated from the outset that the reason why the panel's decision uses this hypothetical factual scenario is because, had the panel analyzed the true facts of this case, the true facts do not align with their reasoning. This hypothetical scenario greatly

mischaracterizes the events that are the subject of this action. A more appropriate hypothetical scenario would have been as follows: Imagine the police unconstitutionally search a man's home in search of narcotics. The police find no evidence of narcotics, yet somehow, the man whose home was searched finds himself referred to a mandatory substance abuse/narcotics anonymous program by a judge without ever being present in the courtroom. This would have been a far more accurate and appropriate hypothetical characterization of the events giving rise to the instant action.

Furthermore, the Supreme Court's Ruling in *Ex parte Young* declared that, if government officials attempt to enforce an unconstitutional act, sovereign immunity does not prevent people that are harmed from suing those officials in their individual capacity for injunctive relief. This is because they are not acting on behalf of the state in this situation. Therefore, the petition for writ of certiorari should be granted so that Petitioner Tung might receive an actual substantive rebuttal of the valid legal arguments raised in this Petition.

Fourth, the Courts below also ducked an issue raised by the Petitioner Tung whether the New Jersey Judiciary system provides a pertinent substantive and procedural due process procedure to safe-guard non-party attorneys against improper judicial criticism. Petitioner seeks in his complaint the exact type of the forward-looking relief required by the Court in *Ex parte Young* to qualify for the exception to Eleventh Amendment as Chief Judge Wolfson pointed out in her opinion when she stated that Petitioner Tung "also

seeks to enjoin the 'Presiding Administration Judge of the Superior Court of New Jersey' to implement pertinent due process procedures to protect non-party attorneys like Plaintiff from criticism in an opinion or order, without due process. In that regard, it may be that Plaintiff's potential amendment, regardless of the merits, seeks the type of forward-looking relief permitted under *Young*." In other words, Chief Judge Wolfson has already agreed on the record that Petitioner Tung seeks the type of forward-looking relief required by the Court in *Ex parte Young* to qualify for the exception to Eleventh Amendment. This fact, in conjunction with the continuing and ongoing Office of Attorney Ethics investigation and prosecution of Petitioner Tung more than warrant that this petition for writ of certiorari be granted.

Petitioner Tung has since filed an Amended Complaint, naming judges and court administrators as Defendants in their individual capacity rather than the Superior Court of New Jersey itself. (23a-24a) In the Amended Complaint, Petitioner Tung alleged that three court officials are responsible for overseeing the administration of the New Jersey court systems and, therefore, are responsible for the policies that injured his constitutional right to substantive and procedural due process. Petitioner Tung also seeks an injunction requiring "the New Jersey State Court system[s] to implement pertinent substantive and procedural due process procedures" to ensure "plaintiff or attorneys similarly situated ... [are] given an opportunity to defend themselves in the future" when matters of attorney discipline come up in cases where they are not a party to the action. However, at this point in the proceedings, the issue **still** remains regarding whether

the New Jersey Judiciary system already has such a pertinent substantive and procedural due process procedure in place.

At this point in the proceedings, both the Defendants and the Courts in their decision have utterly failed to address this extremely simple issue. Incredibly, the record to this matter is still devoid of any showing that the New Jersey Judiciary system possesses the requisite substantive and procedural due process procedure that would align with the Third Circuit's own ruling in *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007) by affording a non-party attorney an opportunity to be heard before an opinion is rendered containing a judicial criticism rising to the level of a public reprimand. Such a failure by this panel is inexcusable because, **as a matter of law, when the record is devoid of the existence of such a pertinent substantive and procedural due process procedure in place, the State has not satisfied a clear and convincing standard of proof that such a due process procedure is in place.** Clearly, the panel's decision must be reversed, because Plaintiff's Amended Complaint, regardless of the merits, seeks the exact type of forward-looking, prospective relief permitted under *Ex parte Young*.

The instant case presents an important issue concerning the organization of the judiciary system to provide equal access to judiciary system. The instant case at hand demonstrated the importance to implement pertinent and clear due process procedures to eradicate any possibility of unfairness in handling administration of justice. The New Jersey Judiciary cannot automatically assume that minority attorneys

are dishonest and not entitled to due process of the law like everyone else. This is especially so as long as attorneys deeply connected with the judiciary systems can walk away with no punishment whatsoever even after openly admitting to the Office of Attorney Ethics that they committed fraud upon the court. To achieve the goal of fairness in administration of justice, New Jersey judiciary must implement pertinent due process procedures to ensure that all have equal access to the justice system. Whenever conflicts of interest arise, the appropriate procedures shall be implemented to avoid such a conflict of interest. Only by doing so will the public's confidence in justice system be restored and the integrity of the judiciary systems will be protected. Therefore, the petition for writ of certiorari should be granted.

Fifth, in the instant case, the judicial criticisms against Petitioner Tung were more much than a mere judicial criticism or admonishment. This is because Petitioner Tung was referred to Office of Attorney Ethics for investigation and prosecution by the Appellate Division of New Jersey Superior Court without first being afforded an opportunity to present a defense to the allegations leading to his referral to the Office of Attorney Ethics. The decision to refer Petitioner Tung to the Office of Attorney Ethics was based solely on the "factual" findings against Petitioner Tung that resulted from James Plaisted's fraud upon the court in the absence of Petitioner Tung's participation in the process. Many Circuit Courts view that the attorney referral to the disciplinary committees amounts to a sanction. See, *Walker v. Mesquite Tex.*, 129 F.3d 831, 832-833 (5th Cir. 1997) ("The importance of an attorney's professional

reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.”), *United States v. Talao*, 222 F.3d 1133, 1137-38 (9th Cir. 2000) (Appellate jurisdiction was proper where the district court found violation of specific rule of professional conduct, an action which “carries consequences similar to the consequences of a reprimand”)

In the Second Circuit, the Court in *Goldstein v. St. Luke's Roosevelt Hosp. Center*, 430 F.3d 106, 112 (2nd Cir. 2005) held “that we have jurisdiction over Goldstein’s appeal of the referral to the disciplinary committees. The referral was included in the court’s judgment and was to be implemented by the Clerk of Court. **It was in the nature of a sanction.** Even though appellant was not in any way foreclosed from explaining or justifying his actions to the disciplinary authorities or from arguing that no disciplinary action was appropriate, such an order has reputational consequences and potential costs in responding to the referral.” **“Therefore, the court’s referral amounted to much more than implied criticism, and, like other sanctions, we deem it reviewable.”** *Goldstein v. St. Luke's Roosevelt Hosp. Center*, 430 F.3d 106, 112 (2nd Cir. 2005)

In their Brief, New Jersey Judiciary argued that Petitioner Tung was referred to the Office of Attorney Ethics by the Appellate Division. “Obviously, in the OAE proceedings, Tung could present his arguments that he did nothing unethical in his representation of Mrs. Fou. Thus, to the extent that this present suit

relies on the notion that Tung has been deprived of the ability to defend claims that he engaged in any unethical conduct in representing Mrs. Fou, in violation of his constitutional rights, such an assertion is unfounded." New Jersey Judiciary' proposition is clearly in contravene with the current due process law. This is exactly what the other Circuit Courts wanted to prevent from happening. "Even though appellant was not in any way foreclosed from explaining or justifying his actions to the disciplinary authorities or from arguing that no disciplinary action was appropriate, such an order has reputational consequences and potential costs in responding to the referral." *Goldstein v. St. Luke's Roosevelt Hosp. Center*, 430 F.3d 106, 112 (2nd Cir. 2005). Since referral to disciplinary authorities amounts to a sanction, any argument that Petitioner Tung did not sufficiently plead enough facts to show a public reprimand constituting a sanction cannot be taken seriously and must be disregarded.

Both of the above-mentioned unconstitutional decisions or opinions are still in public domain and remain uncorrected, which are affecting the professional reputation of the Petitioner and additionally violate the liberty interests of the Petitioner on a daily basis. Said opinion or decision contains negative judicial criticisms against Petitioner, a non-party attorney to the matrimonial matter, by Judge Weisberg in the absence of the participation in the proceeding by Petitioner. Petitioner was falsely accused of being dishonest with the court during his performance of his duty as an officer of court in the representation of Janet Fou in the uncontested matrimonial matter. The decision granted Mrs. Fou's motion to set aside the divorce judgment and it was

based on a false accusation and undisputed fraud upon the trial court that was committed by the attorneys for Mrs. Fou. The negative judicial criticism against Petitioner Tung rose to a level of a public reprimand, which is a sanction pursuant to *Bowers v. NCAA*, 475 F.3d 524 (3rd Cir. 2007) In *Bowers*, the Third Circuit ruled when judicial criticism contained in a decision or opinion rises to the level of a public reprimand against a non-party attorney, the non-party attorney must be given an opportunity to defend himself before rendering such opinions and decision against the non-party attorney. The decision of Judge Weisberg falsely accused Petitioner of being dishonest with the court this is still affecting Petitioner Tung's liberty interest in his profession as a lawyer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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