No. 22-5117

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

WADE ANTHONY ROBERTSON,

Petitioner,

v.

COMMITTEE ON GRIEVANCES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court's earlier decisions have held that attorney-disciplinary cases that threaten an already-held license to practice law are *quasi*-criminal in nature and, thus, entitled to certain Federal Constitutional protections. In like manner, this Court has extended various Federal Constitutional Due Process protections to other types of administrative deprivations of liberty or property interests by the states. Four Federal Courts of Appeals, and fourteen of the states' highest state-courts, are divided on whether there is a Federal Constitutional right to confront and cross-examine adverse witnesses in attorney-disciplinary cases. The first question presented is as follows:

1. Does the Federal Constitution secure to the holder of a professional license, such as an attorney, the right to confront and cross-examine adverse witnesses in administrative proceedings where the witness' testimony is offered for the purpose of depriving the holder of that license?

This Court's earlier decisions have also held that Federal Constitutional Due Process requires a written statement by the actual decision-maker-- the fact finder with the authority to take action-- as to the evidence relied on, the facts found, and the reasons supporting the action thereupon even in noncriminal proceedings. The second question presented is as follows:

2. Does the Federal Constitution permit summary license-revocation orders, such as attorney-disciplinary orders of disbarment, that contain no findings of fact and no statement or explanation as to the evidence relied upon or how the disciplinary orders came to be?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The judgment and memorandum opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The orders of the United States Court of Appeals denying the petition for panel rehearing and for rehearing *en banc* appears at Appendix C and Appendix D to the petition and are both unpublished.

The final judgment of the United States District Court appears at Appendix B and is unpublished. The prior order of the Supreme Court of California, upon which the final judgment of the United States District Court was based, appears at Appendix E and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals entered judgment in this case was February 11, 2022. Appendix A. A timely petition for panel rehearing and also for rehearing *en banc* were filed and then both denied by the United States Court of Appeals on April 11, 2022, and copies of those orders appear at Appendix C and Appendix D to the petition.

This petition is timely under 28 U.S.C. Section 2101 and Supreme Court Rules 13(1) because it is being filed within 90 days of the entry of the order denying rehearing and rehearing *en banc* sought to be reviewed.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **United States Constitution, Amendment V,** states:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **United States Constitution, Amendment VI**, states::

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. **United States Constitution, Amendment XIV, Sec.1,** states:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 OF THE CASE

The original proceedings, and genesis of this case, in Washington, D.C.:

The instant petitioner, Wade Anthony Robertson ("Robertson"), is an attorney who was admitted to practice law both in the District of Columbia, and the state of California. In 2009, Robertson fell into dispute with a business partner named William C. Cartinhour, Jr. ("Cartinhour") in the District of Columbia over a District of Columbia limited liability partnership named W.A.R. LLP. That dispute resulted in civil litigation in the United Stated District Court for the District of Columbia, case No. 09-cv-01642, short titled as "*Robertson v. Cartinhour*" (hereinafter "*Robertson I*"). All of the events pertaining to W.A.R. LLP and the claims at issue in *Robertson I* occurred entirely within Washington, D.C. Cartinhour was a Maryland resident who lived within the 100-mile jurisdictional reach of Washington, D.C.

Robertson I went to a jury trial and a civil judgment, which was entered in Cartinhour's favor on three claims: (i) for breach of a fiduciary duty as a business partner, (ii) for breach of fiduciary duty as an attorney, and (iii) for legal malpractice. The *Robertson I* jury was also asked to make certain special findings via interrogatories, to which the trial court indicated it would bind itself. In one of the special interrogatories, the jury was asked to find whether or not Robertson had intentionally misrepresented or concealed facts from Cartinhour regarding the status of the partnership's business matters or the partnership's finances up through a specific date. The jury answered "no," but still found a breach a fiduciary duty and legal malpractice. Based in part upon the jury's special findings, the Federal court refused to grant equitable relief to Cartinhour on his claims for fraud, conversion, and even *negligent misrepresentation.* That final judgment was appealed to the Circuit Court of Appeals, which affirmed only as to the breach of fiduciary duty as a business partner in upholding the jury's

award, and explicitly stated that it did "not pass upon Cartinhour's additional claims" pertaining to Robertson's alleged tortious acts *as an attorney*.

The State Bar of California:

Shortly after Cartinhour had asserted his claims in *Robertson I*, Cartinhour and his *Robertson I* trial attorney named Michael Bramnick ("Bramnick") had filed Bar-complaints against Robertson with both the District of Columbia Bar and the State Bar of California. Cartinhour's Bar-complaints were simply an executed complaint form for each Bar to which they had attached an exact copy of Cartinhour's Answer and verified counter-claims that they had filed in *Robertson I*. Cartinhour incorporated by reference his *Robertson I* pleading as his Bar-complaint against Robertson. In his original *Robertson I* counter-claims, Cartinhour had specifically alleged counts that included fraud, conversion, and alleged acts of misappropriation by Robertson. As already noted, the *Robertson I* trial court dismissed all of these claims with prejudice based upon the jury's special findings.

After the entry of the judgment in *Robertson I*, Cartinhour and his attorney Bramnick began soliciting both the District of Columbia Bar and the State Bar of California to take action on Cartinhour's pending Bar-complaints and also, in conjunction therewith, to reimburse Cartinhour a portion of his civil losses in the *Robertson I* judgment from each state Bar's client "security fund"— a type of insurance fund now common to most state bars that exists to reimburse clients for improper losses caused to them by their attorneys. The District of Columbia Bar took no action on either of Cartinhour's requests. By contrast, however, the State Bar of California indicated an interest in doing so, and Cartinhour's attorney Bramnick sent them copies of the pleadings, the civil judgment, and transcripts of all of Cartinhour's trial testimony from *Robertson I*.

In California, the Supreme Court of California has sole power over admission and discipline of attorneys admitted to practice law in that state. *See Brydonjack v. State Bar*, 208 Cal. 439, 443 (1929); *Craig v. State Bar*, 141 F.3d 1353, 1354 (9th Cir. 1998); *Conservatorship of Becerra*, 175 Cal. App. 4th 1474, 1483 (2009). Notwithstanding, in California the California Legislature is also permitted to exert "a reasonable degree of regulation and control over the profession and practice of law" in California. *In re Attorney Discipline System*, 19 Cal. 4th 582, 599-600 (1998) (internal quotes and citations omitted). The California Legislature has done so with the California "State Bar Act," California Business and Professions Code, section §6000, *et. seq*. As relevant here, one regulatory provision of the California State Bar Act is California Business and Professions Code, section §6106 (entitled "Moral turpitude, dishonesty or corruption irrespective of criminal conviction"). That state regulation, §6106, sets forth grounds for which an attorney may be subject to professional discipline in California, including by way of suspension and disbarment of their license to practice law in California. But §6106 does not provide for any extraterritorial application of its terms, nor is there any evidence that it was intended by the California legislature to be operative as to acts or occurrences outside of the geographic bounds of the state of California.

The State Bar Act also created the State Bar of California as a public corporation to function as an administrative entity to the Supreme Court of California in matters pertaining to admissions, discipline, and regulation of the practice of law. *See* Cal. Bus. & Prof. Code §6087; *Emslie v. State Bar*, 11 Cal.3d 210, 224-225 (1974); *Conservatorship of Becerra*, 175 Cal. 4th 1474, 1483 (2009). To enable the State Bar of California to carry out its administrative functions related to the discipline of attorneys in California, the State Bar Act also created an administrative "State Bar Court" with the State Bar. *See* Cal. Bus. & Prof. Code §6086.5; *see*

also California Rules of Court, rule 9.10. However, notwithstanding its title as an alleged "court," the California State Bar Court is not actually a "court" vested with any judicial power, but instead only conducts administrative proceedings and makes recommendations to the Supreme Court of California. *See In re Rose*, 22 Cal.4th 430, 436-439, 93 Cal.Rptr.2d 298 (Cal. 2000) ("The State Bar Court **exercises no judicial power, but rather makes recommendations to this court [i.e., the Supreme Court of California]**, which then undertakes an independent determination of the law and the facts, exercises its inherent jurisdiction over attorney discipline, and enters the first and only disciplinary order." *Id.* at 436) This passage in particular from *Rose* is apt:

> **This limitation upon the State Bar's authority distinguishes the State Bar Court from other quasi-judicial or administrative agencies rendering initial decisions--rather than recommendations— that subsequently may be reviewed by courts of record** ...

In re Rose, supra, 22 Cal.4th at 439. (emphasis added; internal citations omitted); *see also In re Shattuck*, 208 Cal. 6, 12 (1929).

After the State Bar of California makes a recommendation of attorney discipline, the Supreme Court of California has plenary review of that recommendation, provided that a request (petition) for review is made. *See* California Rules of Court, rule 9.13; Cal. Bus. & Prof. Code §6084(a). If no request for review is made, the State Bar recommendation is entered as an order pursuant to the California Supreme Court's authority. *See* Cal. Bus. & Prof. Code §6084(a). Where review is sought, the Supreme Court of California may summarily deny a petition of review by a California attorney of a disciplinary recommendation from the State Bar of California. Its summary denial of such a petition for review "shall constitute a final judicial determination on the merits"; and the State Bar Court's recommendation "shall be filed

as an order of the Supreme Court" of California. California Rules of Court, rule 9.16(b); *see also* Cal. Bus. & Prof. Code §6084(a).

The California State Bar's deprivation of constitutional minimum due process.

Notwithstanding that the District of Columbia Bar had taken no disciplinary action against Robertson on Cartinhour's Bar-complaint, the State Bar of California commenced proceedings predominantly alleging violations of California Business and Professions Code, §6106, based upon the same set of facts that had already been adjudicated in *Robertson I,* along with related subsequent federal litigation proceedings in Washington, D.C.. By contrast, none of the State Bar of California's allegations were related to anything that had happened or transpired in California.

Robertson denied all the material allegations of alleged wrongdoing. In addition, Robertson filed pre-trial motions to dismiss in the California State Bar's administrative proceedings and objected on federal Constitutional Due Process grounds, and on subject matter jurisdiction grounds due to the fact that the events at issue had all transpired in Washington, D.C. and were unrelated to California. But Robertson's motions to dismiss were denied.

Then, in order to prepare for administrative trial proceedings, Robertson served and filed discovery requests and formal notices to appear at trial (in lieu of subpoenas, per its rules) upon the State Bar of California which demanded that Cartinhour and his attorney Bramnick appear at the California Bar's administrative trial for examination as the complaining witnesses.

However, neither Cartinhour nor attorney Bramnick ever personally appeared in the California Bar proceedings for any examination or cross-examination. The State Bar of California refused to produce them. Instead, on the eve of the administrative trial, the State Bar of California introduced the transcripts (and videotapes) of Cartinhour's prior *Robertson I* trial

and deposition testimony in Washington, D.C., "in lieu of live witness testimony" from Cartinhour at the subsequent administrative trial in California. Robertson objected but was overruled.

Then during the administrative Bar trial, Robertson produced evidence that the *Robertson I* proceedings had been tainted by perjured testimony by Cartinhour, and that the civil judgment in *Robertson I* had been procured by a fraud on the court in which Cartinhour's attorney, Michael Bramnick, must have been complicit. Specifically, Robertson's proffered evidence regarded Cartinhour's perjuriously undisclosed mental illness of chronic paranoid schizophrenia, Cartinhour's impaired competency to testify in *Robertson I* because of his active schizophrenia, and Cartinhour inability to competently testify in *Robertson I* about historical events due to numerous past instances of his active schizophrenia during the relevant historical periods of time. Robertson also proffered evidence demonstrating that Cartinhour's attorney, Michael Bramnick, must have been complicit in concealing that information from the judge and jury in *Robertson I* in order to fraudulently obtain the civil judgment.

The State Bar of California, however, ignored all of Robertson's proffered evidence, and then relied entirely upon Cartinhour's prior testimony in *Robertson I*, based on the transcripts, to conclude that Robertson had violated California Business and Professions Code, section §6106. Based upon that conclusion, the State Bar of California recommended that Robertson be disbarred from the practice of law in California. Robertson, however, timely filed a petition for review to the Supreme Court of California from the California State Bar Court's recommendation of disbarment. In his petition, Robertson objected that, among other things, he "did not receive a fair hearing;" and, that the "State Bar Court ha[d] acted without or in excess of jurisdiction." Robertson objected that he had been denied his "most basic protections guaranteed by law,"

including his rights per the "Federal Constitutional guarantee of Due Process."

Robertson specifically objected that he had been denied his due process rights to "cross-examination and confrontation" as guaranteed to him under the United States Constitution. On this objection, Robertson asserted as error that he had been denied the opportunity to confront and examine (or cross-examine) the California Bar's complaining witnesses--- Cartinhour and Bramnick— due to their non-appearance at the Bar trial. And furthermore, that by the California Bar's use of Cartinhour's prior *Robertson I* testimony and trial exhibits to prove Robertson's culpability in the California Bar proceedings, that Robertson had been denied the opportunity to "examine, or cross examine, or to even impeach" Cartinhour about the falsity of his prior testimony in *Robertson I.* Robertson likewise objected that he was denied the opportunity to demonstrate through confrontation and examination of Cartinhour at the Bar trial that Cartinhour's prior testimony in *Robertson I* had been false, that the *Robertson I* civil judgment had been fraudulently procured by him and Bramnick, and that Cartinhour was not (and had not been) competent to testify as a consequence of his serious mental illness of paranoid schizophrenia. Robertson further objected that the California court and its State Bar were without jurisdiction to impose liability upon Robertson based upon California Business and Professions Code, section §6106, a state law without extraterritorial application, for what had transpired in Washington, D.C.

Notwithstanding Robertson's objections, on March 1, 2017, the Supreme Court of California summarily denied Robertson's petition for review and filed the recommendation of the State Bar Court as an order of the Supreme Court of California. However, the Supreme Court of California order of disbarment contains no findings of fact, and no statement or explanation as to the evidence relied upon or how the order came to be. A copy of that order appears in the

Appendix to this petition at "Appendix E."

Back to D.C. for "reciprocal" attorney discipline.

The entry of the attorney-disciplinary order in California triggered "reciprocal" attorney-disciplinary proceedings in Washington, D.C.; in particular, in the federal district court in D.C. where Robertson was admitted to practice as an attorney—and also, where *Robertson I* had originally transpired. "Reciprocal" attorney discipline is summary in nature, and based upon the findings and results of the foreign proceedings. In the D.C. district court, such "reciprocal" discipline is commenced by the court's own "Committee on Grievances," or "COG" for short, and the COG is the prosecuting party, or plaintiff, and the proceedings are adjudicated by a panel of three district court judges. These were the procedures followed in Robertson's case.

But Robertson objected to reciprocal attorney discipline in the D.C. federal district court, based upon this Court's holdings in *Selling v. Radford*, 243 U.S. 46, 51 37 S.Ct. 377, 379, 61 L.Ed.585 (1917) (reciprocal discipline should not be imposed where it appears, based upon an intrinsic consideration of the state record, that state procedure, from want of notice or opportunity to be heard, was wanting in due process). This Court reaffirmed the standards of *Selling* in its subsequent decision in *In Re Ruffalo*, 390 U.S. 544, 550, 554, 88 S.Ct. 1222, (1968). *Selling* imposes an affirmative duty upon federal courts to undertake an "intrinsic consideration" of the state record, and that a state court disbarment should not be accorded federal effect if it appears from an intrinsic consideration of the state record that the state procedure, from want of notice or opportunity to be heard, was wanting in due process. *Selling,* 243 U.S. at 51, 37 S.Ct. at 379.

Robertson objected that California had deprived him of his constitutional due process rights to a meaningful opportunity to be heard in the California state disciplinary proceedings by disallowing him from presenting necessary evidence to his defense and from cross-examining

adverse witnesses. Robertson also objected to the lack of subject matter jurisdiction by California and its state bar to discipline Robertson for his actions as an attorney in D.C., and to the summary nature of the Supreme Court of California's order.

Furthermore, prior to the completion of the California Bar proceedings and the Supreme Court of California's final order of disbarment, on October 14, 2016 in the same district court for the District of Columbia, in case D.D.C. No. 1:16-mc-02240, which was a related case to *Robertson I*, the district court's own Committee on Grievances judicially admitted to a panel of three district judges that: (i) Mr. Cartinhour was indeed mentally ill with paranoid schizophrenia; and (ii) that Cartinhour's schizophrenia had been unlawfully not disclosed in *Robertson I* through perjuriously false written responses to discovery interrogatories; and (iii) that the claim made by Robertson's prior attorney, Ty Clevenger, that there had been a fraud on the court in *Robertson I* by Cartinhour's attorneys may have in fact been true.

Notwithstanding Robertson's objections, and notwithstanding the judicial admissions that had already been made by the district court's own COG to a panel of its judges, on November 27, 2018 a panel of three district court judges summarily ordered Robertson reciprocally disbarred based upon the California disbarment. And although the district court panel expressly relied upon the "March 10 [sic, 1st], 2017" Supreme Court of California order of disbarment, the panel's order and decision contained no findings of fact. A copy of that order appears in the Appendix to this petition at "Appendix B."

The appeal to the Court of Appeals for the D.C. Circuit

Robertson appealed the summary order of reciprocal discipline by the federal district court. First, Robertson objected that the federal district court order imposing *reciprocal* attorney discipline could not be sustained because it was based upon an original disbarment order by a

state court where the state court's order of disbarment made no findings of fact and contained no statement or explanation as to the evidence relied upon, and the federal district court's own reciprocal disbarment order had likewise failed to include any findings of fact.

Second, Robertson objected that *reciprocal* attorney discipline could not be properly imposed because the California state court order of discipline was predicated entirely on state proceedings that had denied Robertson the opportunity to present necessary evidence to his defense and to cross-examine adverse witnesses— most particularly, to confront and cross-examine Cartinhour. Even though the Court of Appeals for the D.C. Circuit had previously rejected "confrontation clause" arguments based upon the Sixth Amendment, Robertson emphasized that the opportunity for "cross examination" in this particular context is a function of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

But the Court of Appeals rejected these contentions. This petition followed.

REASONS FOR GRANTING THE PETITION

1.) In its prior rulings, this Court has clearly held that the right to confront and cross-examine adverse witnesses is required by Constitutional Due Process in administrative proceedings, including in attorney-licensing matters.

This Court has previously held that: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011 (1970) Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. *Id.* at 270 (quoting *Greene*, 360 U.S. at 496-497) Indeed, this Court "has been zealous to protect these rights from erosion. It has spoken out not only in criminal

cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." *Id.* (quoting *Greene*, 360 U.S. at 497) These constitutional standards are equally applicable to all administrative proceedings, and attorney-license proceedings are necessarily included.

In 1968, this Court, in its seminal decision of *In re Ruffalo*, held with indisputable clarity that attorney-disciplinary proceedings are "adversary proceedings of a *quasi-criminal* nature," and that Federal Constitutional Due Process requirements must be observed. *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, reh. denied, 391 U.S. 961, 88 S.Ct. 1833, modified on other grounds, 392 U.S. 919, 88 S.Ct. 2257 (1968). Moreover, only one year before *Ruffalo*, this Court vacated a state-court order of disbarment against an attorney for his invocation of his Fifth Amendment rights against self-incrimination. *See Spevack v. Klein*, 385 U.S. 511, 514–16, 87 S.Ct. 625, 627–29 (1967). Overruling a much earlier precedent, this Court stated that "the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514

Even in the context of persons seeking admission to practice law, but who had not yet been admitted, this Court had held that such Constitutional Due Process protections as the right to confront adverse witnesses was required. *See Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175 (1963). In *Willner* this Court found that a bar applicant who was denied admission by the Committee of Character and Fitness without a hearing or even an explanation was denied due process because he was given no opportunity to confront his accusers or dispute their accusations.

Furthermore, specifically as to matters concerning the professional licensure of attorneys,

this Court has held: "[w]e have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. *See Greene v. McElroy*, 360 U.S. 474, 492, 496-497... We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this." *Willner v. Committee on Character*, 373 U.S. 96, 103–104, 83 S.Ct. 1175, 1180 (1963) (citing *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413 (1959)) (reversing state court order denying applicant's admission to a state bar because the state had not provided applicant a requested opportunity to be heard on his application and to confront and cross–examine his "accusers" who were persons that had submitted adverse statements against the applicant which the state had relied upon in denying him admission)

Disbarment is, by definition, the complete revocation of an attorney's right to practice their profession of law— it is the revocation of an attorney's livelihood in the legal profession. But attorneys, such as Robertson here, have a well "recognized [] property interest in an attorney's license to practice law that cannot be taken away 'in a manner or for reasons that contravene the Due Process' protection of the Constitution." *Partington v. Houck*, 723 F.3d 280, 288 (D.C. Cir. 2013) (citation omitted) This Court recognized in *Green* that the right to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. *See Greene*, 360 U.S. at 492.

Accordingly, it must necessarily follow as a matter of law that attorneys faced with disciplinary proceedings, particularly where the license to practice law is at risk, should be entitled under the U.S. Constitution to confront and cross-examine adverse witnesses offering testimony against them. Whether construed as arising under the Fifth, Sixth, or Fourteenth Amendment to the U.S. Constitution, the right to confront and cross-examine such adverse

witnesses as to their testimony against the attorney seems indisputable. Yet, the Federal Courts of Appeals are actually split on this question. Indeed, four Federal Court of Appeals answer this question in the negative (no right of confrontation), while only one Court of Appeal has answered it in the positive.

Likewise, the highest state courts in the U.S. are deeply divided. Indeed, six states have answered this question in the positive— that is, that there is a Constitutional right of confrontation and cross-examination of adverse witnesses. While eight states, including California, have answer this question in the negative. This extraordinary split between the states and Federal Courts over this interpretation of Federal Constitutional law is sufficient to warrant this Court's review. But there is also a split between a Federal Court of Appeals and two of the highest state courts within its jurisdiction— an intolerable conflict, and one which can only be resolved by this Court. Furthermore, because the trend of the divisions appears to be headed in the wrong direction— i.e., denying such a right—there is a heightened need for this Court's immediate resolution.

2.) Notwithstanding this Court's prior rulings, the Federal courts of appeals and state supreme courts below are deeply divided on the question of whether the Federal Constitutional rights to confront and cross-examine adverse witnesses apply in these *quasi*-criminal proceedings.

The split among the Federal Courts of Appeals was recently recognized by the Tenth Circuit in the attorney-disciplinary case of *In re Harper*, 725 F.3d 1253, 1260 (10th Cir. 2013). As that Court recognized:

> **Courts are divided over the applicability of the right to confrontation in disciplinary proceedings.** *Compare In re Sibley*, 564 F.3d 1335, 1341 (D.C.Cir.2009) (holding that the right to confrontation does not apply in attorney disciplinary proceedings), *In re Stamps*, 173 Fed.Appx. 316, 318 (5th Cir.2006) (per curiam) (unpublished op.) (stating that the right to confrontation of witnesses does not apply in attorney disbarment proceedings), *In*

> *re Marzocco*, No. 98–3960, 1999 WL 968945, at *1 (6th Cir. Sept. 28, 1999) (unpublished op.) ("The Confrontation Clause does not apply to a disbarment case." (citation omitted)), and *Rosenthal v. Justices of the Supreme Court of Cal.*, 910 F.2d 561, 565 (9th Cir.1990)(stating that the confrontation clause "does not apply to a disbarment case"), with *In re Peters*, 642 F.3d 381, 385 (2d Cir.2011) (per curiam) (holding that the right to confrontation applies in attorney disciplinary proceedings).

Harper, 725 F.3d at 1260. Although recognizing the division, the Tenth Circuit reserved its resolution of the question for another day. *Id.*

Indeed, the Court of Appeals for the Second Circuit is the only Federal Court of Appeals to have found a Constitutional right to confrontation and cross-examination in attorney-disciplinary proceedings. In *In re Peters*, *supra*, 642 F.3d 381, the Second Circuit vacated an disciplinary order by a Federal court's grievance committee which had suspended an attorney for seven years. Citing in part to this Court's holding in *In re Ruffalo*, *supra*, 390 U.S. 544, the Circuit Court held as follows:

> Because an attorney disciplinary proceeding is quasi-criminal in nature, the Due Process Clause entitles the charged attorney to, inter alia, adequate advance notice of the charges, and the opportunity to effectively respond to the charges and confront and cross-examine witnesses. *See In re Ruffalo*, 390 U.S. 544, 550–51, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2d Cir.1972) ("[A] court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding.")

Peters, *supra*, 642 F.3d at 385.

By contrast, the Courts of Appeals for the Fifth, Sixth, Ninth, and District of Columbia Circuits have all held to the contrary—that is, that there is no Constitutional right of confrontation and cross-examination. *See In re Sibley*, *supra*, 564 F.3d at 1341 (D.C.Cir.2009); *In re Stamps*, *supra*, 173 Fed.Appx. at 318 (5th Cir.2006); *In re Marzocco*, *supra*, No. 98–3960, 1999 WL 968945, at *1 (6th Cir. Sept. 28, 1999); *Rosenthal v. Justices of the Supreme Court of Cal.*, *supra*, 910 F.2d at 565 (9th Cir.1990).

Similarly, but to a far greater degree, the highest state courts in the U.S. are deeply divided; for as noted above, six states hold in the affirmative, while eight hold in the negative. Those states holding affirmatively that a Constitutional right of confrontation and cross-examination exists in attorney-disciplinary proceedings are the states of Colorado, Louisiana, Maine, Mississippi, Oklahoma, and South Carolina. *See Matter of Olsen*, 326 P.3d 1004, 1013 (Colo. 2014) ("While we disagree with Olsen' s argument that his due process rights were violated, we do recognize his right to confront and aggressively cross-examine the witnesses against him in a disciplinary proceeding."); *Louisiana State Bar Ass'n v. Levy*, 292 So.2d 492, 494 (La. 1974) ("The Due Process Clause of the United States Constitution, as well as that of the Louisiana Constitution, requires only that one be apprised of the charges and be given a fair opportunity to defend himself by confronting and interrogating the witnesses."); *In re Jonas*, 2017 ME 115, 2017 WL 2484936 at *7 (Me. June 8, 2017) ("We have previously held that due process in the context of bar proceedings consists of notice of the proceedings and an opportunity to be heard, including the right to confront and cross-examine witnesses."); *Harrison v. Mississippi Bar*, 637 So.2d 204, 218 (Miss. 1994) ("This Court has held that bar disciplinary matters are of a 'quasi-criminal nature' ...Accordingly, attorneys accused in such matters are entitled to due process of law under U.S. Const. Amend 14, § 1 ... In *Netterville*, the Court held that an attorney subject to a complaint investigation is entitled to 1) confrontation and cross-examination of his accusors; 2) offering witnesses on his own behalf; and 3) proof of the charges against him by clear and convincing evidence." (*Id.*, citing *Netterville v. Mississippi State Bar*, 397 So.2d 878, 884 (Miss.1981)) (internal citations omitted)); *State ex rel. Oklahoma Bar Ass'n v. Seratt*, 66 P.3d 390, 392 (Okla. 2003) ("Due process must be afforded an accused attorney in bar disciplinary proceedings. ... Due process in disciplinary proceedings contemplates a fair and

open hearing before a trial panel with notice and an opportunity to present evidence and argument, representation by counsel, if desired, compulsory process for obtaining favorable witnesses, information concerning the claims of the opposing party, reasonable opportunity to be heard, and the right to confront the unfavorable witnesses." (internal citations omitted).); *In re Dickey*, 395 S.C. 336, 359 (S.C. 2011) ("When the State seeks to revoke a professional license, procedural due process rights must be met. ... Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." (*Id.*, quoting, in part, *In re Vora*, 354 S.C. 590, 595 (S.C. 2003) (internal citations omitted).)

By contrast, the eight (8) states holding in the negative—that there is no Constitutional right of confrontation and cross-examination in attorney-disciplinary proceedings-- are the states of California, Kansas, Massachusetts, Missouri, Oregon, Virginia, Washington, and the District of Columbia. *See Rosenthal v. State Bar*, 43 Cal.3d 612, 633 (Cal. 1987) ("Petitioner's citations to criminal cases and attempted invocation of a 'quasi-criminal' talisman do not support his confrontation-clause claims. Petitioner's only due process entitlement is a 'fair hearing,' and the rules of criminal procedure do not apply in State Bar disciplinary proceedings."); *State v. Turner*, 217 Kan. 574, 582 (Kan. 1975) ("Respondent next complains he was not afforded the right to confront his accusers. ... We have already said a proceeding in discipline is not a criminal proceeding... In the California case ... the respondent urged he was denied his constitutional right of confrontation since whoever verified the complaint was not called as a witness. As to this claim the court said: We deem the contention of little merit. No authority supports the claim.

Appellant cites the time-honored provision of the Constitution to the effect that every person accused of crime shall have the right to be confronted with the witnesses against him. Without further comment we hold the argument unsound." (internal citations and quotations omitted).); *In re Abbott*, 437 Mass. 384, 391, 393 (Mass. 2002) ("It is well settled that attorneys facing bar discipline proceedings are entitled to due process protections. ... Among these protections are the right to fair notice of the charges and the right to be heard. ... However, as bar discipline proceedings are civil, not criminal matters ... the respondent is not entitled to the full panoply of constitutional protections afforded to criminal defendants....Abbott claims that his rights to confrontation and due process were violated when the committee admitted Atehortua's videotaped deposition in lieu of his live testimony. ... However, as the single justice pointed out, there is no established right to confrontation in a bar discipline proceeding." (internal citations and quotations omitted).); *In re Sanai*, 360 Or. 497, 525-527, 529 (Or. 2016) (rejecting confrontation clause applicability to attorney disciplinary proceedings, and stating as follows: "we reject those arguments as they apply to Oregon's disciplinary proceedings for the same reason that we reject the accused's confrontation arguments regarding his Washington disciplinary proceedings," (*id.* at 526), and "it is important to understand that many of the rights that inure to criminal defendants are largely inapplicable in proceedings such as these, because attorney discipline matters are not criminal prosecutions." (*Id.* at 530).); *Tucker v. Virginia State Bar*, 233 Va. 526, 532 (Va. 1987) ("The complaint of lack of due process based on alleged self-incrimination and lack of confrontation is without merit. A proceeding to discipline an attorney is civil, not criminal in nature. ... Therefore, the state and federal constitutional provisions granting protection against self-incrimination and providing the right to confront witnesses were inapplicable."); *In re Disciplinary Proceeding Against Sanai*, 177 Wash.2d 743, 762-763 (Wash.

2013) ("But failure to apply confrontation clause protections in a lawyer discipline proceedings cannot be considered a 'manifest' error. A confrontation clause error can be raised for the first time on appeal in a criminal case under the manifest error rule because the confrontation clause is a constitutional protection that clearly applies at the trial of a criminal defendant. ... But this is a bar disciplinary proceeding, not a criminal trial. This court has never addressed whether attorney-respondents in bar disciplinary proceedings have a Sixth Amendment right to confront and cross-examine the witnesses against them. Instead, our prior cases note that the text of the Sixth Amendment explicitly applies to criminal prosecutions. ... Thus, the denial of Sixth Amendment confrontation clause rights at a discipline proceeding does not constitute manifest constitutional error." (internal citations and quotations omitted).) *In re Sibley*, 990 A.2d 483, 492 (D.C. 2010) ("Another of respondent's due-process claims is that he was not permitted to confront his accusers, because the Referee did not grant his request for subpoenas to compel the testimony of the Florida Family Court judge and judges of the Third District who sanctioned him. Although respondent suggests that his inability to obtain subpoenas implicates the Sixth Amendment Confrontation Clause, it is well-settled that there is no confrontation right in an attorney discipline case. ...The confrontation clause is a criminal law protection. Therefore, it does not apply to a disbarment case." (internal citations and quotations omitted).); *In re Mills*, 539 S.W.2d 447, 450 (Mo. 1976) (en banc) ([Respondent alleges error under] "the Sixth and Fourteenth Amendments to the Constitution of the United States. He bases this contention on his assertion and argument that a disciplinary proceeding is quasi-criminal in nature and involves a valuable property right, the 'right' to practice law; that therefore the rights of confrontation and procedural due process guaranteed by the state and federal constitutions apply fully. The 'confrontation' guarantee of the state and federal constitutions relates to criminal prosecutions;

not to proceedings to discipline a lawyer for professional misconduct."); *see also Matter of Cupples*, 952 S.W.2d 226, 233 (Mo. 1997) (en banc) ("Cupples alleges that the inclusion of Edward Mullen's prior testimony in the record before the Master and before this Court violated his right to due process... disciplinary proceedings are not criminal trials in which a defendant has a constitutional right to confront witnesses.")

These above-noted cases demonstrate abundantly that both the Federal courts of appeals and state supreme courts below are deeply divided on this question of Federal Constitutional law. No further delay in resolving this Constitutional question would serve any reasonable purpose, and this Court should grant the instant petition for a writ of certiorari and resolve this conflict.

3.) Moreover, a Federal Court of Appeals, and two of the highest state courts within its jurisdiction have reached opposition conclusions on this same question of Federal Constitutional law.

As noted above, the Court of Appeals for the Fifth Circuit has held that there is no Federal Constitutional right to confrontation and cross-examination in attorney-disciplinary proceedings. *See In re Stamps*, *supra*, 173 Fed.Appx. at 318 (5th Cir.2006). Although *Stamps* is an unpublished case, it is recent and its language is harsh, to wit:

> Regarding their rights to cross-examination and confrontation of witnesses, the Stampses ask this court to announce a new rule of law granting such rights to attorneys facing disciplinary action. As stated above, we have never required more than notice and an opportunity to be heard in these cases. It is undisputed that the Stampses received notice and a hearing at the state court and federal district court levels. There is no justification to depart from our precedent. The Stampses were afforded all the process that is due to attorneys facing disbarment.

Stamps, 173 Fed.Appx. at 318. Because attorney-disciplinary cases are rare (and disfavored) in the Federal Courts of Appeals, it is doubtful that a published opinion would issue. However, the strong language of *Stamps* is noteworthy, and as the Rules of Appellate Procedure permit citation to such recent cases, it is likely that *Stamps* will be held with regard in that Circuit.

Yet, the highest state courts of two states located in the Fifth Circuit's jurisdiction have ruled exactly the opposite—that is, the Supreme Court of Mississippi, and the Supreme Court of Louisiana. *See Harrison v. Mississippi Bar*, *supra*, 637 So.2d at 218 (Miss. 1994); *Louisiana State Bar Ass'n v. Levy*, *supra*, 292 So.2d at 494 (La. 1974); *see also Netterville v. Mississippi State Bar*, supra, 397 So.2d at 884 (Miss.1981).

This conflicting interpretation on a question of Federal Constitutional law between a Federal Court of Appeal and two of the highest state courts in its jurisdiction is an intolerable conflict which can only be resolved by this Court. Accordingly, for this additional reason, this Court should grant the instant petition for a writ of certiorari to resolve this conflict.

4.) The question of what Federal Constitutional rights apply to these types of *quasi*-criminal proceedings is an important question of national significance because of the interlocking reciprocal-licensing rules established between each licensing jurisdiction.

It is a common fact of the modern-day practice of law that attorneys in the United States are typically admitted into more than one licensing jurisdiction with respect to the practice of law. Indeed, even for attorneys who confine their law practices to the geography of but a single state, for them to practice law in the Federal courts of that state they must be separately admitted. In part due to historical abuses by attorneys shuffling their legal practices to a new jurisdiction after having been disbarred in their original jurisdiction, an interlocking set of reciprocal-licensing rules for the practice of law have developed across the United States. But what these rules of reciprocity give, they also take away. *See* Alan M. Colvin, *Reciprocal Discipline: Double Jeopardy or a State's Right to Protect its Citizens*?, 25 J. Legal Prof. 143 (2001). And it is for this reason— the set of interlocking reciprocal attorney licensing and disciplinary rules— that uniformity in interpreting the Federal Constitutional requirements for attorney-disciplinary proceedings is of national significance. Otherwise, a patchwork of conflicting rules that deprive

attorneys of their Federal Constitutional protections in one particular jurisdiction can have dramatically negative consequences in other jurisdictions that would have protected those same rights had the attorney-disciplinary proceedings been first conducted there. The issue is not one of comity, but instead of securing nationwide those Federal Constitutional rights which this Court's decisions already demonstrate should apply.

This Court too is already familiar with this territory, as its own reciprocal attorney-discipline rules demonstrate. *See* Rules of the Supreme Court of the United States, rule 8 (Disbarment and Disciplinary Action) ("Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record ...").

Accordingly, for this additional reason, this Court should grant the instant petition for a writ of certiorari to resolve this conflict.

5.) The Decision below cannot be reconciled with this Court's prior rulings regarding Federal Constitutional rights to confront and cross-examine adverse witnesses.

In *In re Ruffalo*, *supra*, 390 U.S. 544, this Court held plainly that attorney-disciplinary proceedings are *quasi*-criminal nature, and that Federal Constitutional Due Process requirements must be observed. In fact, as traversed above, this Court's subsequent decisions have clearly held that in all types of administrative deprivations of liberty or property interests by the states—including, arguably, attorney-disciplinary proceedings-- the rights to confront and cross-examine adverse witnesses are required by the Due Process clause of the Fourteenth Amendment. *See Goldberg v. Kelly*, *supra*, 397 U.S. 254, 269; *Greene v. McElroy*, *supra*, 360 U.S. 474, 497.

But the Decision below has sanctioned a gross departure from these standards by rubber-stamping a summary reciprocal disbarment order based upon a state disbarment order that contained no findings of fact or conclusions of law, and that was entered only after Robertson had been deprived of the opportunity to confront, examine, and cross-examine the very same

testifying witness against him, Mr. Cartinhour. More remarkably, the federal district court which was imposing the reciprocal discipline had already judicially admitted in prior related proceedings that Mr. Cartinhour's prior testimony in *Robertson I* had been perjurious; in addition, his prior testimony was clearly tainted by his undisclosed lack of competency caused by his mental illness of chronic paranoid schizophrenia. Respectfully, this result cannot be sustained.

Respectfully, therefore, this case is an excellent vehicle for the Court to grant the instant petition for a writ of certiorari to resolve the conflict of Federal Constitutional law and to vacate the erroneous decision below which derives from the wrong interpretation of that law.

6.) The Decision below is also a gross and extreme departure from the accepted and usual course of judicial proceedings because it ratifies and implicitly approves of summary attorney-disciplinary orders of disbarment that contain no findings of fact, and no statement or explanation as to the evidence relied upon or how the disciplinary orders came to be.

The instant petition for a writ of certiorari should also be granted because the Decision by the Court of Appeals cannot be a valid substitute for what the district court failed to do in the first instance, and likewise what the Supreme Court of California also failed to do in the first instance; that is: to actually render a written decision with findings of fact and conclusions of law which can be reviewed and either sustained or overruled. Neither of those predicate acts occurred here, but the Court of Appeals, apparently intent on avoiding the embarrassing problems presented here as to a prior fraud on the court and a mentally ill litigant, completely sidestepped these omissions and attempted to fill in the holes in order to affirm the reciprocal discipline order. This action by the Court of Appeals, indeed by any court sitting in review, is such a gross and extreme departure from the accepted and usual course of judicial proceedings, or a sanctioning of such a departure by a lower court, as to call for the exercise of this Court's

supervisory powers.

Federal Constitutional Due Process requires a written statement by the actual decision-maker-- the fact finder with the authority to take action-- as to the evidence relied on, the facts found, and the reasons supporting the action thereupon to be taken even in noncriminal proceedings. *Wolff v. McDonnell*, 418 U.S. 539, 556-565, 94 S.Ct. 2963 (1974); *accord Morrissey v. Brewer*, 408 U.S. 471, 480-489, 92 S.Ct. 2593 (1972); *accord Goldberg v. Kelly*, 397 U.S. 254, 256-271, 90 S.Ct. 1011 (1970) (due process requires that the decision-maker "demonstrate compliance with this elementary requirement" by "stat(ing) the reasons for his determination and indicat(ing) the evidence he relied on." *Id.* at 271) As the Court further explained in *Wolff*: "there must be a 'written statement by the fact finders as to the evidence relied on and reasons' for the disciplinary action, ... because the actions taken at such proceedings may involve review by other bodies.") *Wolff*, 418 U.S. at 564-565. This basic requirement is intrinsically part of both the "notice" and "opportunity" components of due process, because "the decisionmaker's conclusion ... must rest solely on the legal rules and evidence adduced at the hearing." *Goldberg,* 397 U.S. at 271.

The November 27, 2018 district court order of reciprocal attorney-discipline, although expressly relying upon the "March 10 [*sic*, 1st], 2017" Supreme Court of California order of disbarment, notwithstanding contains no findings of fact. And looking "through" to the actual text of the March 1, 2017 Supreme Court of California order of disbarment, that order also contains no findings of fact, and no statement or explanation as to the evidence relied upon or how the order came to be. There is no evidence that the district court even applied the required *Selling* analysis. Furthermore, both the district court's order, and March 1, 2017 Supreme Court of California order are constitutionally infirm under *Wolff,* 418 U.S. at 556-565; *Morrissey,* 408

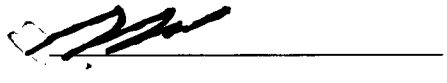
U.S. at 480-489; and *Goldberg*, 397 U.S. at 256-271. The Supreme Court of California plainly did not provide Robertson with due process notice and opportunity because its summary order of disbarment is obviously deficient per Federal Constitutional minimum due process requirements.

For the district court to ignore these gross due process deficiencies in the California order, and yet to still enter its own summary order that was likewise constitutionally infirm, is a gross and extreme departure from the accepted and usual course of judicial proceedings. Furthermore, for the Court of Appeals to simply ignore these deficiencies, and then seek to fill in the omissions by what is essentially improper fact finding on review, is likely unprecedented, an abrogation of its responsibilities as a court sitting in review, and likewise a gross and extreme departure from the accepted and usual course of judicial proceedings.

CONCLUSION

Respectfully, the petition for a writ of certiorari should be granted so that this Honorable Court can consider the merits of the questions for review.

Respectfully Submitted,



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