No. 23-855

IN THE
Supreme Court of the United States

RICHARD ABBOTT,
Petitioner,

v.

SUPREME COURT OF DELAWARE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Petitioner asserts that this case presents several constitutional questions about due process in attorney discipline proceedings and the free speech rights of lawyers. This case does not present any such questions. If this Court were to grant review, the question presented instead would be:

Whether Petitioner, who had already been previously disciplined, made misrepresentations to the Delaware Court of Chancery regarding a sham transaction he devised to get his client out of complying with a court order that were sufficient to justify the Delaware Supreme Court's decision to disbar him for violating Delaware professional conduct rules prohibiting attorneys from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" and conduct "prejudicial to the administration of justice."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION AND RULES

OTHER MATERIALS

INTRODUCTION

This case involves an order of the Delaware Supreme Court disbarring a Delaware lawyer for violating the Delaware Lawyers' Rules of Professional Conduct. After a seven-day evidentiary hearing, a panel of the Delaware Supreme Court's Board on Professional Responsibility found that Petitioner intentionally made misrepresentations to the Delaware Court of Chancery about a sham transaction he devised to get his client out of complying with a court order. At issue are the Delaware Supreme Court's conclusions that the evidence was sufficient to find Petitioner had violated the rules prohibiting attorneys from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" and conduct "prejudicial to the administration of justice," and that those violations justified his disbarment. Those fact-bound determinations do not warrant this Court's review.

Petitioner urges this Court to grant review of statements in the Delaware Supreme Court's opinion that rejected constitutional arguments he made below. But this Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). None of the issues raised in the petition is reviewable because they had no effect on the Delaware Supreme Court's decision to disbar Petitioner. Moreover, the petition should be denied because none of the constitutional arguments warrants review.

STATEMENT

A. Factual Background

1. Petitioner is a former Delaware lawyer who was disbarred for advising and assisting his client to violate a court order and making misrepresentations to the Delaware Court of Chancery in connection with a land-use dispute. This was not his first run in with

Delaware's disciplinary system; years before, he had been publicly reprimanded for making statements degrading to a tribunal. Pet. App. A at *31.

More recently, in 2014, Petitioner represented a landowner, Marshall Jenney, in a dispute with a homeowners' association called Seabreeze. *Id.* at *2. The dispute was about Jenney's failure to trim trees and shrubs that overgrew two properties he owned on Delaware's Rehoboth Bay. *Id.* In December 2012, before Petitioner started representing Jenney, Jenney agreed to trim the trees and shrubs in a settlement agreement with Seabreeze. *Id.* Jenney did not comply with the agreement, forcing Seabreeze to file a new Court of Chancery action in June 2013 to enforce the agreement. *Id.* Jenney and Seabreeze resolved that dispute in a stipulation and consent order entered by the Court of Chancery in July 2014, which required Jenney to trim the trees and shrubs by October 31, 2014. *Id.* Jenney failed to do so. *Id.* At the time Petitioner started representing Jenney in December 2014, Seabreeze was seeking relief for Jenney's breach of the consent order. *Id.*

The Court of Chancery held a hearing in February 2015 regarding Jenney's breach. *Id.* at *3. At that hearing, the court directed the parties to submit a proposed order setting forth a work plan and the attorneys' fees to be awarded to Seabreeze. *Id.* The court granted the proposed form of order submitted by Seabreeze's counsel before Petitioner objected that Seabreeze's counsel had misrepresented his agreement to the form of order and incorrectly included language that the court had found Jenney to be in contempt. *Id.* Following motion practice and another hearing, the court modified the order to delete the contempt language, but denied Petitioner's request

for attorneys' fees. *Id.* The court found that, while Seabreeze's counsel had performed "less than precise or best practice legal work," counsel did not make an intentional misrepresentation. *Id.* The court ordered Jenney to complete the trimming by April 22, 2015. *Id.*

On March 7, 2015, Petitioner emailed Jenney that he "came up with [a] theory" for Jenney to avoid having to comply with the consent order by titling the properties in his wife's name. *Id.* According to Petitioner's theory, Jenney could transfer the properties to his wife and Petitioner would then "advise the Court and [Seabreeze's counsel] that there is no need for any further activity in the case since it is now moot—i.e.[,] you are no longer the title owner AND the Settlement Agreement and Consent Order are purely personal obligations of yours that it would then be impossible for you to perform." *Id.* (brackets in original). Petitioner predicted that "[Seabreeze's counsel] will kick and scream that the transfer is a sham" and "might file a new action against [your wife], but then we would have a clean slate to fight against them and get the case tossed out." *Id.* at *4 (brackets in original). Petitioner assured Jenney that he could "just wait a few years and then have [your wife] convey the parcels back to you, at which time Seabreeze would likely do nothing (and if they did they would probably have to file a new case against you)." *Id.* (brackets in original).

Two days later, on March 9, Petitioner alerted Jenney to "some unfortunate language in the Consent Order" making it "binding on [your] heirs, successors, [and] assigns." *Id.* Petitioner told Jenney that he nonetheless "hop[ed] the Court wants to be rid of the matter and shoots [Seabreeze's counsel] down." *Id.*

Jenney agreed to follow Petitioner's advice, and, on March 12, Petitioner assisted Jenney with deeding the properties to his wife for $10.00. *Id.* Afterwards, Jenney continued to pay taxes, bills, and maintenance costs for the properties and to collect rent. *Id.* at *6.

Four days after the transfer, on March 16, Petitioner notified the Court of Chancery that the action was "legally moot." *Id.* at *4. Petitioner stated: "Mr. Jenney no longer has any ownership interest in the properties and is therefore relieved of the purely *in personam* obligations under the Settlement Agreement." *Id.* Petitioner did not mention the contrary language in the consent order that he pointed out to Jenney or that Jenney would continue to control the properties. *Id.* at *5.

On Seabreeze's motion, the Court of Chancery held an evidentiary hearing regarding the legitimacy of the title transfers in April 2015. *Id.* Jenney testified that Petitioner advised him to transfer the properties to his wife "so that [he] didn't have to comply with the court order." *Id.* Following the hearing, the court found that the transfer was a "sham" and awarded Seabreeze fees and costs. *Id.* at *6. According to the vice chancellor:

> It is shocking to me. . . . It is unacceptable behavior for a litigant in this Court. It is unacceptable behavior for an attorney in this Court. So it's clear to me there was contempt of my bench order and of the stipulation and order of this Court.

Id.

On June 10, 2015, the vice chancellor referred Petitioner to Delaware's Office of Disciplinary Counsel ("ODC") to review his conduct. *Id.* The referral enclosed the electronic record in the Seabreeze litigation. *Id.*

2. In June 2015, Petitioner filed a complaint against the vice chancellor with the Delaware Court on the Judiciary. Pet. App. A at *7. He alleged that the vice chancellor harbored prejudice against him and showed favoritism toward Seabreeze's counsel. *Id.* The former Chief Justice of the Delaware Supreme Court dismissed the judicial complaint because the Seabreeze litigation record did not reveal any evidence of bias against Petitioner. *Id.*

Petitioner continued to file documents attacking the vice chancellor after his judicial misconduct complaint was dismissed. *Id.* at *9-10. For example, Petitioner asserted in filings with the Delaware Supreme Court, its Board on Professional Responsibility ("Board"), and the Delaware State Public Integrity Commission that the vice chancellor "manufacture[d] a record to further his diabolical plot to destroy [Petitioner] for purely personal reasons," *id.* at *9; "spouted out wildly unsupported and false statements in an effort to gin-up a record," *id.* at *8; and had "[p]sychological conditions such as mental transference, delusional episodes, memory lapses, or other disorders," *id.* at *10. Petitioner also attacked the integrity of the Delaware Supreme Court in submissions to that court and its Board, alleging, for example, that the court turned "a blind eye to corruption." *Id.*

B. Procedural Background

1. On February 5, 2020, a three-person preliminary review committee found that there was probable cause to file the ODC's disciplinary petition against Petitioner. Pet. App. A at *11. The petition charged Petitioner with three forms of misconduct. First, misleading the Court of Chancery by "making affirmative statements to the [c]ourt . . . , including but not limited to statements in his March 16, 2015 Letter, that

were contrary to his legal strategy, advice to Jenney, and understanding of the facts and law," in violation of Delaware Lawyers' Rules of Professional Conduct 8.4(c)[1] and 8.4(d).[2] *Id.* Second, "advising and assisting Jenney to disobey the [c]onsent [o]rder," in violation of Rules 3.4(c),[3] 8.4(a),[4] and 8.4(d). *Id.* And, third, making unfounded accusations against the vice chancellor and the Delaware Supreme Court in violation of Rules 3.5(d)[5] and 8.4(d). *Id.*

In October 2020, during the discovery process preceding a hearing before a panel of the Board, Petitioner subpoenaed 13 Delaware judges and administrative officials. BIO App. 1a-3a. Among them were the vice chancellor who referred him for discipline and Delaware Supreme Court justices who ruled on motions filed in connection with his disciplinary proceedings. *Id.* at 2a-3a, 17a-20a. Petitioner sought to depose the vice chancellor to show that his "true motivation" for referring Petitioner for discipline was that he disliked Petitioner; he also sought to obtain

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[1] Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[2] Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

[3] Rule 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

[4] Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another."

[5] Rule 3.5(d) states that a lawyer shall not "engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."

the vice chancellor's medical records to show that he was "lacking capacity or harbored personal animus." *Id.* at 3a-4a, 10a-16a. Petitioner also sought discovery from justices of the Delaware Supreme Court so that he could show that the Delaware judiciary is "corrupt." *Id.* at 5a-7a, 17a-20a.

The chair of a three-judge panel of the Board quashed Petitioner's subpoenas as seeking privileged and irrelevant information. The panel chair's 118-page opinion explained, in relevant part, that a judge's mental process in arriving at a decision is privileged and that medical records are confidential, absent exceptions Petitioner could not invoke. *Id.* at 8a-16a, 20a. The chair further explained that the discovery Petitioner sought was irrelevant because the disciplinary charges against him were based on his own conduct and statements, not on any extra-record statements made by the targets of his subpoenas. *Id.* at 11a-12a. Petitioner later served numerous, similar subpoenas that were quashed as well. Pet. App. A at *12-13.

2. In November 2021, the panel of the Board held a seven-day evidentiary hearing to determine whether Petitioner had violated the rules as alleged in the petition for discipline. Pet. App. A at *13.[6] Petitioner, Jenney, and Seabreeze's counsel testified at the hearing. *Id.* Jenney testified as he had in the hearing before the vice chancellor, admitting that Petitioner advised him to transfer the properties to his wife to force the homeowners' association to restart the case.

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[6] The petition's factual statement is padded with rhetoric. *See, e.g.*, Pet. 10 (characterizing Petitioner's seven-day evidentiary hearing before a three-judge panel as "the Soviet Style Show Trial"). Respondents in no way endorse the petition's spin on the factual record.

Id. at *5. Jenney further testified that he exercised the same level of control over the properties before and after transferring them to his wife, paying bills, taxes, and other expenses. *Id.* at *6. Petitioner cross-examined Jenney at length, eliciting that Jenney had not told Petitioner that he paid those expenses after the transfer. BIO App. 29a-32a. Jenney also testified that, shortly after the Seabreeze litigation ended in 2015, he had his wife transfer the properties back to himself. Pet. App. A at *6.

Petitioner cross-examined Seabreeze's counsel, too. Petitioner asked him about his personal relationship with the vice chancellor (none) and professional relationship (several appearances in his court). BIO App. 21a-25a. Petitioner also asked Seabreeze's counsel about representations he made about Petitioner in court filings. *Id.* at 25a-32a.

3. On July 11, 2022, the board panel recommended that Petitioner be disciplined for violating Delaware's professional conduct rules in an opinion setting forth its findings of fact and conclusions of law. Pet. App. A at *13-14. The panel made its factual findings under a clear-and-convincing-evidence standard. *Id.* Citing Petitioner's and Jenney's testimony, the panel found that Petitioner made "two material misrepresentations." BIO App. 36a-42a. He told the court that Jenney "no longer ha[d] any ownership interest" even though Jenney "continued to hold de facto ownership" and "intended in the near future to reconvey legal title back to himself." *Id.* at 37a. He also said that the case was "now moot" under the settlement agreement even though, as he advised Jenney, it was not moot under the consent order. *Id.* at 37a-42a. The panel likewise found that Petitioner devised the sham transfer for the "sole purpose" of avoiding Jenney's obligations under the consent order. *Id.* at 37a-38a. Finally, the

panel found that Petitioner made numerous accusations degrading to the judiciary that lacked a "factual basis." *Id.* at 46a-51a.

Although a "close call," the panel concluded that the sham transfer did not itself violate any rules of professional conduct because the Court of Chancery "took action to stop Jenney and [Petitioner's] fraudulent conduct" before the time to comply with the order had run out. *Id.* at 33a-35a. The panel found that Petitioner fell within Rule 3.4(c)'s "open refusal" exception because he did not cause Jenney to "disobey" the order, strictly speaking. *Id.* at 34a-35a.[7]

Following a one-day hearing, the panel recommended sanctions for Petitioner's misrepresentations and degrading statements. Pet. App. A at *14-15. The panel analyzed each allegation of misconduct separately, guided by the American Bar Association's ("ABA") *Standards for Imposing Lawyer Sanctions* ("ABA Standards") and Delaware common law. *Id.* at *14.[8] The panel unanimously agreed that Petitioner's conduct was pre-planned and intentional. *Id.* With regard to Petitioner's misrepresentations, however, the panel majority recommended that the ABA's presumptive standard of suspension or reprimand should apply because the consequences of his misconduct were not serious or significant. *Id.* at *15.[9] The panel

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[7] The panel found that, because the sham transfer did not violate Rule 3.4(c), it also did not violate any other rules. BIO App. 33a-34a.

[8] ABA, *Standards for Imposing Lawyer Sanctions* (Feb. 1992), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf.

[9] Those panel members relied on ABA Standards 5.13 and 6.12. Standard 5.13 provides that "[r]eprimand is generally appropriate when a lawyer knowingly engages in any other [non-

chair recommended that the ABA's presumptive standard of disbarment was more appropriate because Petitioner's misrepresentations "seriously" adversely reflected on his fitness to practice law and caused, or potentially caused, "serious" or "significant" injury to Seabreeze and the Court of Chancery proceeding. *Id.* at *14.[10] The panel unanimously agreed that suspension was the appropriate sanction for Petitioner's degrading statements under the relevant ABA Standard. *Id.* at *15 (citing ABA Standard 8.2).

Both Petitioner and the ODC filed objections to the panel majority's recommendations. *Id.*

4. On November 9, 2023, the Delaware Supreme Court reviewed the panel's recommendations *de novo* and disbarred Petitioner for his professional misconduct. Pet. App. A at *16. The court agreed with

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criminal] conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Standard 6.12 provides that "[s]uspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding."

[10] The panel chair relied on ABA Standards 5.11(b) and 6.11. Pet. App. A at *15. Standard 5.11(b) provides that "[d]isbarment is generally appropriate when . . . a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that *seriously* adversely reflects on the lawyer's fitness to practice." (Emphasis added). Standard 6.11 provides that "[d]isbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes *serious or potentially serious* injury to a party, or causes a *significant or potentially significant* adverse effect on the legal proceeding." (Emphases added).

the panel's findings that Petitioner intentionally committed all the conduct alleged and that his misrepresentations and degrading statements violated Delaware's professional conduct rules. *Id.* at *16-25. The court also determined, contrary to the panel's recommendation, that Petitioner violated Rule 3.4(c) when he devised and implemented the sham transaction and that the "open refusal" exception to that rule did not apply because Petitioner and Jenney hid their intention not to comply with the court order. *Id.* at *16-19.

The Delaware Supreme Court agreed with the panel chair that the actual or potential consequences of Petitioner's misrepresentations were "serious" and "significant," making disbarment the appropriate remedy under the ABA Standards. *Id.* at *29-30. As the court explained: "Seabreeze had to spend additional time and incur additional legal fees to enforce rights it had previously bargained for," and the Court of Chancery "had to expend scarce judicial resources resolving multiple motions and holding multiple hearings." *Id.* at *30. And "[i]f [Petitioner's] tactics had worked as he intended, the Court of Chancery would have dismissed the Seabreeze Litigation for mootness and Seabreeze would have been forced to initiate and pursue another legal action," burdening that court "with yet another case." *Id.* The court further ruled that Petitioner's sham transfer warranted disbarment as well, while his degrading statements warranted suspension. *Id.* at *30-31.[11] Disbarment, therefore,

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[11] In concluding that disbarment was the appropriate remedy for the sham transfer, the Delaware Supreme Court relied on ABA Standard 6.21, which provides that "[d]isbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or

was the appropriate sanction because the ABA Standards provide that the ultimate sanction should at least be consistent with the sanction for the most serious misconduct. *Id.* at *29 & n.143 (citing ABA Standards, II).

The Delaware Supreme Court also considered and rejected Petitioner's constitutional challenges. Disciplining Petitioner for his accusations against that court and the vice chancellor did not pose a First Amendment problem, the court explained, because his statements lacked any "factual basis," as the panel had found. BIO App. 3a (citing *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995)). There was no due process issue with prosecuting Petitioner for the sham transaction pursuant to Rule 3.4(c), which prohibits a lawyer from "knowingly disobey[ing]" an "obligation under the rules of a tribunal," because the ABA Standards, together with case law in Delaware and other jurisdictions, interpret the phrase "rules of a tribunal" to encompass court orders. Pet. App. A at *18 & n.73. And even if Petitioner had misled only by omission, rather than by affirmatively misrepresenting Jenney's ownership interests, the Delaware Supreme Court would have found that he had violated Rule 8.4(c)'s prohibition of conduct involving dishonesty, fraud, deceit, or misrepresentation. *Id.* at *20 & n.78. Further, the court held that Petitioner did not have a Sixth Amendment right to confront adverse witnesses because attorney disciplinary proceedings are non-criminal; in any case, the court concluded that the discovery he sought was privileged and irrelevant,

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another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding." *See* Pet. App. A at *30, *33.

as the panel chair had explained in his decision quashing Petitioner's subpoenas of the judiciary. *Id.* at *27-28. Finally, the record was "devoid of any credible evidence" that Petitioner was prosecuted based upon animus or retaliation for the exercise of his constitutional rights. *Id.* at *28.

REASONS FOR DENYING THE PETITION

I. NONE OF THE CONSTITUTIONAL ISSUES THE PETITION ASSERTS WAS NECESSARY TO THE DELAWARE SUPREME COURT'S JUDGMENT

As set forth above, the Delaware Supreme Court agreed with the panel's chair that Petitioner's misrepresentations to the Court of Chancery about the sham transaction he devised to evade that court's consent order and bench rulings independently justified his disbarment. *See supra* pp. 9-12. Although the Delaware Supreme Court correctly concluded that Petitioner had also committed other acts of professional misconduct, the judgment in this case – and the sanction of disbarment – would have been the same had the court not even considered those other acts. Review of this case, therefore, is not warranted because the Delaware Supreme Court's conclusion that Petitioner's misrepresentations constituted professional misconduct was correct as a matter of fact and law and implicates none of the constitutional questions raised in the petition.

Petitioner argues that he did not violate Rule 8.4(c) because the statements in his letter were omissions, not "affirmative statements." Pet. 34-36, 59. But Rule 8.4(c) does not make any distinction between the two; it proscribes all conduct "involving dishonesty, fraud, deceit, or misrepresentation." And a statement can mislead by affirmation or omission, as the Delaware

Supreme Court explained. Pet. App. A at *20 & n.78. In addition, based on the evidence adduced at Petitioner's seven-day hearing, the panel found, and the Delaware Supreme Court agreed, that Petitioner did in fact make affirmative statements in his March 16, 2015 letter that were misleading. *See supra* pp. 8, 10-11. They found that Petitioner knew or recklessly disregarded that Jenney would retain "de facto" ownership over the properties and planned to transfer them back to himself, as Petitioner had recommended, yet he affirmatively stated in his letter that Jenney did not have "any ownership interest." Pet. App. A at *19-20. They also found that Petitioner affirmatively misled by representing that the action was "legally moot" because the settlement agreement just bound Jenney personally, when Petitioner had advised Jenney just a few days before that the consent order also bound Jenney's "heirs, successors, [and] assigns." *Id.* at *4. Petitioner's challenge to his disbarment, therefore, is a fact-bound disagreement with the Delaware Supreme Court's conclusions that he violated Rules 8.4(c) and 8.4(d) and that the consequences were sufficiently "serious" and "significant" under the ABA Standards and Delaware common law to warrant disbarment. Those discretionary assessments do not warrant this Court's review.

Although the Delaware Supreme Court correctly rejected Petitioner's constitutional challenges as well (*see supra* pp. 12-13), those rulings had no effect on the judgment and therefore are not reviewable. This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Where "the same judgment would be rendered by the state court after [this Court] corrected its views

of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Id.* at 126; *see also*, *e.g.*, *Wilson v. Loew's Inc.*, 355 U.S. 597, 598 (1958) (per curiam) (dismissing writ of certiorari as improvidently granted where judgment rested on adequate state ground); *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956) (same). Consequently, none of the four questions the petition frames as constitutional violations is presented in this case. *See* Pet. i.

II. NONE OF THE CONSTITUTIONAL QUESTIONS RAISED IN THE PETITION INDEPENDENTLY WARRANTS REVIEW

A. Petitioner's First Amendment Question Does Not Merit This Court's Review

1. The petition fails to identify a split among the courts over the free speech rights of attorneys to make baseless allegations of judicial wrongdoing

Petitioner erroneously claims that such speech is "constitutionally protected" by the Sixth and Ninth Circuits and the Supreme Courts of Colorado and West Virginia, but not by the Seventh Circuit or the Delaware Supreme Court. Pet. 22-24. Lawyers can be disciplined for unfounded accusations against the judiciary in all those jurisdictions. None of them would apply First Amendment protection to Petitioner's accusations for the simple reason that Petitioner's assertions lacked a factual basis.

In *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995), the Seventh Circuit held that a lawyer's accusations need "some factual basis" before First Amendment protections will apply. *Id.* at 487. Applying that rule, the Seventh Circuit rejected the First Amendment claim of an attorney disciplined for making claims that almost every Illinois judge he ever dealt with was

corrupt. *Id.* at 485-87. That court deferred to the state court's findings that the attorney lacked a factual basis for his claims because he made them "with actual acknowledge of falsity, or with reckless disregard for their truth or falsity." *Id.* at 487.

In this case, the Delaware Supreme Court rejected Petitioner's First Amendment claim using the same analysis. Pet. App. at *25. Petitioner's statements were not protected speech because, like the attorney in *Palmisano*, he lacked any "factual basis" to make his accusations. Petitioner offered no facts to support his allegations that the vice chancellor was mentally delusional and fabricated the record in the Seabreeze litigation, and that the justices of the Delaware Supreme Court ignored ODC's purported corruption. *Id.* As the panel explained: the vice chancellor's findings that the property transfer was a sham were "fully supported by the factual record and not based on an inappropriate favor of Seabreeze counsel," and there was "*no* evidence that the [v]ice [c]hancellor fabricated the record or acted with personal bias or animus when making these findings." BIO App. 46a-47a.

Petitioner's First Amendment claim would come out the same way in the jurisdictions he identifies as more protective of lawyers' First Amendment rights. In the Ninth Circuit, for example, lawyers do not have a First Amendment right to make unsupported claims of judicial wrongdoing. The Ninth Circuit affirmed the suspension of a lawyer who, like Petitioner, accused a judge of intentionally fabricating the record because he "had no reasonable basis in fact" to make that claim. *United States Dist. Ct. for the E. Dist. of Washington v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993). Petitioner cites the Ninth Circuit's subsequent decision in *Standing Committee v. Yagman*, 55 F.3d

1430 (9th Cir. 1995), as creating a "heightened lawyer speech standard" under which lawyers have greater First Amendment protection. Pet. 24. But *Yagman* did no such thing. *Yagman* reaffirmed *Sandlin*'s holding that an attorney must have "a reasonable factual basis" for making statements critical of the judiciary – and made clear that "*Sandlin* st[ood] firmly in the way" of expanding lawyer speech protections. 55 F.3d at 1437.

Petitioner's accusations likewise would not escape discipline in West Virginia. Petitioner faults the Delaware Supreme Court for not taking the approach of West Virginia's Supreme Court of Appeals in *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988). Pet. 23-24. But that court also held that lawyer criticism of the judiciary that "lacks any factual basis" is not protected. 370 S.E.2d at 328. The court reviewed a disciplinary charge against a lawyer for making an "abusive attack" against a judge and remanded so that the lower court could determine whether the lawyer made the statements "knowingly" or "with a reckless disregard of the truth." *Id.* at 328, 332-33. The West Virginia Supreme Court of Appeals therefore made (and deferred to) the same determination that the lower court had made in the Seventh Circuit's decision in *Palmisano*. *See id.* at 328, 332-33.

To be sure, the West Virginia Supreme Court of Appeals indicated that a lawyer's subjective intent may be relevant to determining whether an accusation should receive First Amendment protection. *See id.* at 328, 332. The Ninth Circuit applies "an objective standard, pursuant to which the court must determine 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or

similar circumstances.'" *Yagman*, 55 F.3d at 1437 (quoting *Sandlin*, 12 F.3d at 867). But both courts agree with the basic proposition that attorney accusations lacking any "factual basis" are not protected speech. *See Committee on Legal Ethics*, 370 S.E.2d at 328, 332; *Yagman*, 55 F.3d at 1437. To the extent there is tension between the subjective and objective standards, it could well become insignificant, as courts that have taken sides following *Sandlin* apply the purely objective approach.[12]

In any case, the choice between an objective and subjective approach rarely makes a difference in the outcome. Courts can – and often do – resolve First Amendment challenges by attorneys accused of making degrading statements about the judiciary without deciding whether the lawyer lacked a factual basis as an objective or subjective matter. For example, the Second Circuit rejected the First Amendment claim of an attorney disciplined for filing a complaint accusing several judges of conspiring to conceal the facts concerning an alleged murder, without weighing in on the precise standard. *See In re Whiteside*, 386 F.2d 805, 806 & n.4 (2d Cir. 1967) (per curiam). The Second Circuit explained: "Surely to make such accusations – with no facts to substantiate them – simply because the judges ruled against his clients, exhibits a reckless disregard of the truth which would preclude protection under [a subjective standard]." *Id.*

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[12] *See*, *e.g.*, *In re Cobb*, 838 N.E.2d 1197, 1212-13 (Mass. 2005); *Florida Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001) (per curiam); *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996). Indeed, even before *Sandlin*, the "majority view" rejected the subjective approach. *See Cobb*, 838 N.E.2d at 1212-13 (collecting cases).

So, too, here: Petitioner's reckless disregard for the truth is evident from his failure to adduce any facts supporting his claim that the "emotionally unhinged" vice chancellor falsified the record in a "diabolical" plot against him. This case is therefore an especially bad vehicle to decide how to analyze a First Amendment claim premised on attorney accusations against the judiciary because Petitioner would lose regardless of whether a subjective or objective standard applies.

Petitioner's other cases demonstrate the point. *See* Pet. 24. Far from showing a "split," they highlight that the Sixth Circuit and the Colorado Supreme Court agree that the First Amendment does not protect baseless accusations of judicial misconduct and that the choice between an objective or subjective standard rarely makes a difference in the outcome. *See Berry v. Schmitt*, 688 F.3d 290, 302 (6th Cir. 2012) (observing that *Sandlin* "compellingly articulated" an objective test, but it was "not necessary" to endorse that approach because the case would come out the same way under a subjective approach); *In re Green*, 11 P.3d 1078, 1085, 1086 & n.7 (Colo. 2000) (per curiam) (choosing between objective or subjective approach was unnecessary). To be sure, those courts found that the statements at issue were protected under the First Amendment. *See Berry*, 688 F.3d at 303-04; *Green*, 11 P.3d at 1085-87. But those statements, unlike Petitioner's, were based on facts conceded to be "true," *Berry*, 688 F.3d at 303, or supported by observed, disclosed facts, *Green*, 11 P.3d at 1085. Petitioner's reliance on those cases shows that, at most, he disputes the Delaware Supreme Court's application of an accepted First Amendment rule to the facts of this case. That routine analysis does not warrant review.

2. The petition fails to show a conflict with this Court's First Amendment cases

Petitioner's argument that his statements were "absolutely privileged" because he made them as a private citizen, rather than as a lawyer participating in a pending case, rests on a misreading of *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). *See* Pet. 22, 27-29. *Gentile* held that a lawyer's freedom to comment on his client's pending case is extremely circumscribed, but may increase once the case is over. 501 U.S. at 1073-76. That judgment was merely a particularized application of this Court's balancing approach, which "weigh[s] the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech . . . at issue." *Id.* at 1073. In applying that test, this Court stressed that a lawyer's speech can be regulated even when uttered in contexts "far from the courtroom and the pendency of a case." *Id.*[13]

Indeed, this Court's cases have assumed for more than a century that lawyers can be disciplined for making spurious accusations against judges because

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[13] Citing *Gentile*, Petitioner also claims that Rule 3.5(d)'s prohibition of "undignified or discourteous conduct that is degrading to a tribunal" is unconstitutional as applied to him under the void-for-vagueness doctrine. Pet. 29-31. In addition to the other reasons discussed above, Petitioner waived that claim, so it is not properly before this Court. Petitioner erroneously asserts that he preserved the claim in the briefing below, but the pages he cites, *see* Pet. 14-15, argue merely that his statements were confidential and absolutely privileged. *See Webb v. Webb*, 451 U.S. 493, 495-502 (1981) (dismissing writ of certiorari for lack of jurisdiction because petitioner failed to preserve federal claim that state supreme court did not have opportunity to address); *see also OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) (this Court "will not entertain arguments not made below" absent "unusual circumstances").

such discipline protects a State's interest in preserving the integrity of its judiciary. As this Court explained in *In re Snyder*, 472 U.S. 634 (1985), "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." *Id.* at 644-45 (reviewing discipline imposed on attorney for sending private letter disrespectful to court). As a consequence of that license, a lawyer's "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring in the result); *see also Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1872) (stating that a lawyer's "obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts"). Petitioner instead errs in relying on *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), but that case did not address lawyer speech, much less the interaction between such speech and professional conduct rules. *See* Pet. 25-27.

B. Petitioner's Fair-Warning Question Does Not Warrant Review

This Court should not review Petitioner's "fair warning" question because the Delaware Supreme Court correctly concluded that Petitioner had notice of the Rule 3.4(c) and Rule 8.4(c) charges. *See* Pet. i, 32-36, 40-44. As set forth above, Petitioner's argument that he did not have notice of the Rule 8.4(c) charge for conduct "involving dishonesty, fraud, deceit, or misrepresentation" fails because ODC's petition alleged, and the courts below found, that Petitioner made "affirmative statements" that were misleading. *See*

supra pp. 5-6, 8, 10-11. The notice Petitioner received of the Rule 3.4(c) charge – that he stood accused of knowingly disobeying "an obligation under the rules of a tribunal" – also was consistent with constitutional due process.

Petitioner's fair-warning challenge errs in relying on *In re Ruffalo*, 390 U.S. 544 (1968). *See* Pet. 32-36, 40-44. *Ruffalo* held that an attorney was denied due process because he was disbarred with "no notice" that his conduct "would be considered a disbarment offense." 390 U.S. at 550. Disciplinary counsel had composed a new charge – alleging different conduct – based on the attorney's testimony at the very hearing in which he defended himself against the original charges. *Id.* at 549-50. The new charge violated due process because the attorney was "trap[ped]" into admitting he committed conduct for which he did not know he could be disciplined. *Id.* at 551.

In this case, by contrast, Petitioner had ample notice of the charged conduct and that it violated Delaware's disciplinary rules. The disciplinary petition put him on notice of the conduct that formed the basis for each charge: misleading the court about the effect of Jenney's properties transfer through "affirmative statements to the [c]ourt . . . in his March 16, 2015 Letter" (Rules 8.4(c) and 8.4(d)) and "advising and assisting Jenney to disobey the [c]onsent [o]rder" (Rules 3.4(c), 8.4(a), and 8.4(d)). Pet. App. A at *11. The Delaware Supreme Court did not "re-write[] the language of Rule 3.4(c)" to cover Petitioner's conduct, contrary to his contention. *See* Pet. 34 (capitalization omitted). The Delaware Supreme Court had held – in several cases pre-dating the charges filed against Petitioner – that Rule 3.4(c) prohibits lawyers from knowingly disobeying court orders as well as court rules. *See*

Pet. App. A at *17-18 & n.73 (citing cases and ABA Standards); *see also Gentile*, 501 U.S. at 1048-49 (disciplinary rule provides "fair notice" if its terms have a "settled usage or tradition of interpretation in law," including by reference to a "clarifying interpretation by the state court").

Because Petitioner's due process claim would not succeed in any lower court, this Court has no reason to review it. *See*, *e.g.*, *In re Demetriades*, 58 F.4th 37, 48 (2d Cir. 2023) (attorney who "received notice of the *core* of attorney misconduct to be proven" could not "complain that the Committee's proof at the evidentiary hearing was not a precise replica of the charges contained in the Statement of Charges") (cleaned up); *In re Surrick*, 338 F.3d 224, 234, 236-37 (3d Cir. 2003) (rejecting attorney's due process claim where "even a cursory review of the state of the law at the time of the conduct in question" showed that the conduct was subject to discipline); *In re Slattery*, 767 A.2d 203, 208-12 (D.C. 2001) (no due process violation where attorney was charged with theft by "forgery" but "Bar Counsel, without notice, allegedly changed his theory . . . to one of theft by conversion," because attorney was "aware of the nature of the charges against him (theft), and therefore was not lulled into a false sense of security and, thereby, trapped"); *In re Suárez-Jjiménez*, 666 F. App'x 2, 5 (1st Cir. 2016) (per curiam) (attorney's "argument that he received insufficient notice of the charges against him relies upon an overly narrow reading of the grievance, and an unduly broad application of *In re Ruffalo*").

C. This Court Has No Reason To Review Petitioner's Confrontation Question

Petitioner says that this case offers the Court the chance to resolve a conflict over whether lawyers

have the right to confront adverse witnesses during attorney disciplinary proceedings. Pet. 38. But the asserted split is far from entrenched, and this case does not present an opportunity to resolve the issue in any event.

According to Petitioner, the Fifth, Sixth, Ninth, and D.C. Circuits all have held that there is no Sixth Amendment right to confrontation in attorney disciplinary proceedings. Pet. 38; *see In re Stamps*, 173 F. App'x 316, 318 (5th Cir. 2006) (per curiam); *In re Marzocco*, 1999 WL 968945, at *1 (6th Cir. Sept. 28, 1999) (judgment noted at 194 F.3d 1313 (table)); *Rosenthal v. Justices of the Sup. Ct. of California*, 910 F.2d 561, 565 (9th Cir. 1990); *In re Sibley*, 564 F.3d 1335, 1341 (D.C. Cir. 2009). Only the Second Circuit has concluded that such a right exists. *See In re Peters*, 642 F.3d 381, 385 (2d Cir. 2011) (per curiam).

Even if this were an issue that might one day warrant this Court's attention, it should wait for a case in which the question is cleanly presented. In this case, even if Petitioner had a constitutional right to confront adverse witnesses in disciplinary proceedings, there is no reason to conclude that he was denied that right. During his seven-day disciplinary hearing, Petitioner cross-examined his former client and his opposing counsel in the Seabreeze litigation. *See supra* p. 8. Petitioner complains that he did not have the opportunity to cross-examine judges and quasi-judicial officers who "rendered decisions on" matters pertaining to his disciplinary proceedings. Pet. 38-39. But Petitioner cites no authority to support his claim that the right to confront witnesses includes the right to probe judges or quasi-judicial officers about their decisions. Indeed, this Court has expressly held that it does not. In *United States v. Morgan*, 313 U.S. 409

(1941), this Court held that an administrative official "should never have been subjected" to a deposition and in-court cross-examination concerning an order he issued. *Id.* at 422. The Court explained that "prob[ing]" the official's "mental processes" was inappropriate because the "proceeding . . . ha[d] a quality resembling that of a judicial proceeding." *Id.* (cleaned up).

Like in *Morgan*, Petitioner sought discovery into the mental processes of decision-makers who ruled against him. His subpoenas were appropriately quashed. As the courts below found, the subpoenas sought privileged information that was in any case irrelevant. *See supra* pp. 7, 12. The judges and administrative officials whom Petitioner subpoenaed gave their reasons for ruling against him on the record; none of these persons made out-of-court statements that ODC used to prove Petitioner violated Delaware's professional conduct rules. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) (Sixth Amendment's Confrontation Clause applies only to "testimonial statements"); *Williams v. Illinois*, 567 U.S. 50, 57-58 (2012) (Confrontation Clause "has no application to out-of-court statements that are not offered to prove the truth of the matter asserted"). Further, Petitioner had no need to ask whether they felt "degraded" by his accusations because Delaware's disciplinary rules punish making baseless allegations of misconduct to protect the judicial system, not the feelings of individual judges. *See* Pet. App. A at *23; BIO App. 17a-19a, 42a-45a.

Other courts agree that disciplined attorneys have no right to seek privileged or irrelevant discovery from judicial officers. *See*, *e.g.*, *In re MacNeil*, 266 F.2d 167, 171-72 (1st Cir. 1959) (no due process violation where disciplined attorney was denied the opportunity to cross-examine judges); *In re Fletcher*, 424 F.3d 783,

794-95 (8th Cir. 2005) (same). The petition's third question does not merit this Court's review.

D. Petitioner's Selective-Prosecution Question Does Not Raise an Issue of Sufficient Importance To Justify This Court's Review

Petitioner asks this Court to find that he was disbarred for retaliatory and discriminatory reasons and that the entire Delaware attorney disciplinary system is unconstitutional. *See* Pet. i, 45-52. That baseless claim does not warrant review.

Petitioner was not disbarred for protected speech, as he claims. *See* Pet. 49-52. Petitioner's accusations of judicial misconduct were not protected under the First Amendment because they lacked any factual basis. *See supra* pp. 12, 15-19. Nor was he even disbarred for those accusations, as explained above. The Delaware Supreme Court made clear that Petitioner's disbarment was appropriate for the sufficient reason that he devised a plan to help his client evade a court order, assisted his client to violate the order, and misrepresented that plan to the Court of Chancery. *See supra* pp. 11-12.

In addition, there is no evidence supporting Petitioner's claim that Delaware's attorney disciplinary system discriminates against sole practitioners like him in favor of big law firms and the government. *See* Pet. 45-49. Petitioner says that he was prosecuted based on "extra-legal standards," while at least six lawyers who practice in larger firms were not prosecuted for ethical violations. Pet. 47. But there was nothing "extra-legal" about Petitioner's prosecution; Petitioner violated longstanding disciplinary rules that the Delaware Supreme Court repeatedly has found apply to conduct just like Petitioner's. *See supra* p. 12.

Petitioner's discrimination allegations are legally insufficient as well. Attorneys, much less sole practitioners, are not a suspect class for purposes of an equal protection claim. *See*, *e.g.*, *Giannini v. Real*, 911 F.2d 354, 359 (9th Cir. 1990) (rejecting bar applicant's equal protection claim because lawyers are not among the suspect classes this Court has identified). And his allegations are no more actionable when cast as a novel claim that sole practitioners have a First Amendment right to "not associate" (Pet. 45) with other lawyers. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983) (allegation of differential treatment that was not cognizable under the First Amendment necessarily failed when framed as an equal protection claim).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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