

No.24-36

In the Supreme Court of the United States

SPENCER F. SMITH,
PETITIONER,

v.

THE STATE BAR OF CALIFORNIA,
RESPONDENT.

*ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA*

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, “Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.”

**A. The State Bar of California Demands
\$40,000 In Discipline Costs Be Paid By
Petitioner After the Petition for Writ of
Certiorari Was Filed In The Instant
Action**

On July 25, 2024, three weeks after the present Petition was filed, the State Bar of California informed Petitioner in writing, that he owed the State Bar \$40,817.90 in disciplinary costs. The State Bar further informed Petitioner that he had 30 days to pay the above amount before the State Bar would submit the outstanding balance to the California Franchise Tax Board for collection.

On August 9, 2024, Petitioner contacted the State Bar in writing and requested a detailed accounting of how the disciplinary costs were determined. Petitioner further advised the State Bar that Petitioner’s State Bar discipline was currently subject to a pending United States Supreme Court appeal.

On August 9, 2024, the State Bar confirmed in writing that the State Bar did not incur any investigation costs, witness fees, fees of expert witnesses, nor deposition expenses, related to the State Bar’s discipline of Petitioner. The State Bar further informed Petitioner that the disciplinary costs

were calculated pursuant to a Base Charge pursuant to (Bus. & Prof. Code §6086.10(b)(3)).

On August 12, 2024, Petitioner informed the State Bar in writing that he believed that the base costs calculated pursuant to the formula approved by the Board of Trustees (Bus. & Prof. Code §6086.10(b)(3)) were unconstitutional and punitive in nature. Petitioner further requested clarity on whether the State Bar's collection efforts via the Franchise Tax Board would be suspended pending the resolution of his Supreme Court appeal. On August 12, 2024, the State Bar filed its Waiver of Right to Respond to Petitioner's petition for writ of certiorari.

On August 14, 2024, the State Bar informed Petitioner that its collection efforts would continue while Petitioner's appeal to the US Supreme Court was pending, unless the State Bar received a court order instructing them to do otherwise.

B. Can the State Bar Constitutionally Enforce Disciplinary Civil Penalties While Petitioner Seeks Supreme Court Review as They Are Designed to Punish and Deter, Not to Compensate

In June of this year, the United States Supreme Court held in *Sec. & Exch. Comm'n v. Jarkesy*, No. 22-859 (June 27, 2024), that the SEC did not have the Constitutional authority to implement civil penalties that are designed to punish and deter, and not to compensate. The Court's analysis in *SEC v. Jarkesy*, strongly suggests that an enforcement action by an administrative agency that is designed to punish and

deter an individual or entity violates the Seventh Amendment if it proceeds through agency tribunals and not a court of competent jurisdiction.

Just as Congress established the SEC to oversee and regulate securities, the State of California created the State Bar as an administrative agency to oversee the practice of law within its jurisdiction. However, and more importantly, the California Supreme Court has expressly distanced itself from endorsing the State Bar's role as a government decisionmaker. The California Supreme Court has said that the "State Bar is not in the same class as state administrative agencies placed within the executive branch." *In re Rose*, 22 Cal. 4th 430, 439, (2000) (simplified). This is because the "State Bar Court *exercises no judicial power.*" *Id.* at 436, (emphasis added). Rather, the State Bar "makes recommendations" to the California Supreme Court, "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.* Accordingly, the State Bar's recommendation is merely recommendatory in character and has no other or further finality in effecting the disbarment, suspension or discipline of those persons who may be brought before said board. . ." (*In re Shattuck* (1929) 208 Cal. 6, 12).

In the present case, the State Bar, despite having no judicial power acted with unchecked autonomy, when it suspended the Petitioner in 2016 without affording him a hearing. The State Bar despite having no judicial power then acted autonomously to keep the Petitioner suspended for

four years without a hearing. The State Bar despite having no judicial power then conducted an inherently unfair disciplinary hearing based solely on stale uncorroborated hearsay testimony from a witness not listed in the State Bar's own witness list. Now, as a direct consequence of the Petitioner challenging the State Bar's arbitrary, non-judicial, and autonomous actions, the State Bar demands over \$40,000 in disciplinary costs—despite having never conducted any investigation, or even one deposition, related to the underlying facts purportedly justifying Petitioner's discipline.

It seems problematic to say that the government can deprive an attorney of his license, his money, substantial sums, in a tribunal that is at least perceived as not being impartial in the sense that it's an in-house administrative agency where the State Bar starts the enforcement process, oversees the enforcers, and then appoints the adjudicators and reviews the adjudication. As Justice Kavanaugh pointed out at oral argument in *SEC v. Jarkesy* this type of administrative process doesn't seem like a neutral process.

Given that the State Bar incurred no actual costs in prosecuting the Petitioner—having conducted no independent investigation or even a single deposition—the imposition of over \$40,000 in civil penalties appears motivated solely by a desire to punish. Moreover, it is undisputed that these disciplinary penalties are not intended to restore any supposed victim. This raises a critical question for the Court: Are such punitive measures legal rather than equitable? If deemed legal, they should not be left to the discretion of the State Bar. It is essential for this

Court to provide the necessary guidance to ensure that civil penalties against attorneys are imposed fairly and justly, benefiting not just the Petitioner, but all attorneys in California.

C. The State Bar of California's Disciplinary Decision and Internal Practices Demand Rigorous Scrutiny in Light of Unethical Actions by State Bar Leadership Uncovered After the Petition for Writ Was Filed In The Instant Action

The Petitioner is being recommended for disbarment for conduct unrelated to the practice of law. Specifically, Petitioner is being recommended for disbarment for his role in a motor vehicle accident. The State Bar has been clear that this level of discipline for a motor vehicle accident is unprecedented, and the procedures set up by the bar to cover its decade long disciplinary process deviated from established legal norms.

The questions to be resolved herein are concerned with whether the State of California exceeded the scope of its statutory authority and violated the procedural due process clause of the United States Constitution when it allowed the State Bar to:

1. Suspend Petitioner from the practice of law without a hearing and failed to provide notice to Petitioner of when a prompt post-suspension hearing would take place.

2. Require Petitioner to wait four years before he was granted a post-suspension hearing.
4. Consider hearsay evidence without an independent investigation of the facts of the case.
5. Recommend Petitioner be disbarred from the practice of law without giving Petitioner written notice of what specific conduct he was facing possible discipline.
6. Wait three years to render its final decision on discipline after conducting the post suspension hearing.

Despite the State Bar acknowledging that this case presents a matter of first impression with no precedent to justify disbarment, it has yet to provide a Constitutional basis for its procedures, which deviated from established legal norms that the State Bar utilized during Petitioner's disciplinary process. Furthermore, the California Supreme Court has declined to undertake a transparent, substantive, and independent review of the State Bar's unprecedented procedures.

This suggests that the State of California operates under the presumption that the Petitioner is not entitled to the fundamental protections of procedural due process before being indefinitely stripped of his license. However, the philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government.

Jones v. Securities Commission, 298 U.S. 1, 27-28 (1936)

“Exercise of such a power would be more pernicious to the innocent than useful to the public; and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two.”

Id.

As this Court held *Boyd v. United States*, 116 U.S. 616, 635 (1886), over a century ago, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

This is because "the regular and impartial administration of public rules governing these interests, as required by due process, prohibits the subtle distortions of prejudice and bias as well as gross governmental violations exemplified by bribery and corruption and the punishment of political and economic enemies through the administrative process." *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (procedural due process violated by Alabama State Board of Optometry because those "with substantial pecuniary interests in legal proceedings should not adjudicate those disputes").

Accordingly, the issues raised by this appeal must be examined in the context of the State Bar's unethical conduct during the events at issue. For instance, the leadership of the California State Bar has been exposed as a corrupt administrative body,

where individuals in positions of authority accepted bribes, thereby undermining the very public they were charged with protecting. This corruption not only eroded trust but also allowed the misappropriation of settlement and judgment proceeds, leaving the public vulnerable and deprived of justice.

For example, on July 26, 2024, after the Petitioner filed the instant action, former State Bar Executive Director Joe Dunn¹ was found to have violated professional ethics when he lied about the use of funds for overseas travel while working as the executive director of the State Bar of California. The State Bar found “[Dunn’s] misrepresentation to the Board amounts to a significant ethical violation.” Although his actions were not directly related to the practice of law, they were made in his crucial role as a leader of the organization that governs the practice of law in California, thereby undermining the integrity of the legal profession.” Dunn’s law license, was given one year of probation.

Dunn was closely aligned with Thomas V. Girardi who misappropriated millions from his clients with the State Bar’s help. Dunn flew on the Girardi’s private jet before, during and after he ran the State Bar. Dunn’s deputy who accompanied him on the overseas trip, was later found to have received more than \$1 million in gifts and payments from Girardi, who was misappropriating millions of dollars from his clients without fear of discipline from the State Bar.

¹ Dunn served as Executive Director of the State Bar of California from 2010-2014. The State Bar opened a disciplinary file against Petitioner in 2012.

Dunn's discipline came a little over a year after the State Bar of California admitted on March 10, 2023, that State Bar employees in positions of leadership and State Bar investigators were involved in corruption and bribery schemes. Specifically, the Chairman of the State Bar of California Ruben Duran and Executive Director Leah T. Wilson publicly admitted that the State Bar leadership engaged in systemic failures, widespread corruption, and bribery.

In the first half of 2024, the State Bar has attempted to distance itself from the bribery scandal by imposing lenient disciplines on Girardi's co-conspirators. This strategy appears more focused on damage control than on accountability, further eroding public trust in the integrity of the State Bar's disciplinary process. For example, in January of 2024, State Bar Judge Phong Wang² ruled that two former attorneys at the Girardi Keese law firm should be disciplined for their alleged roles in the misappropriation of tens of millions of dollars from clients. State Bar Court Judge Phong Wang recommended a six-month suspension of Keith D. Griffin's license and ordered David R. Lira - Girardi's son-in-law - to practice with limitations as he awaits criminal prosecution alongside Girardi in federal court in Chicago.

This handling of disciplines of individuals involved in the Girardi bribery scandal, highlights a stark and disturbing disparity in the State Bar's disciplinary actions. Caucasian attorneys involved in a multi-million dollar bribery scheme, who even

² Phong Wang was the Hearing Officer who recommended Petitioner be disbarred in the instant action.

attempted to deceive the system to evade discipline, receive mere probation. On the other hand, an African American attorney with a vision impairment faces disbarment for a motor vehicle accident involving an intoxicated pedestrian who meandered into the roadway. These inconsistent and unequal disciplines raise serious concerns about the fairness and integrity of the State Bar's processes.

Adherence to constitutional law is designed to root out corruption and unfair government decisions. The State Bar's bribery scandal demonstrates that the State Bar is not interested in protecting the public. In fact, the State Bar's disciplinary actions over the past decade, have demonstrated a hostility to attorneys who take on public policy cases to benefit the public.

This troubling disparity is, unfortunately, not an anomaly. It is well-documented that the State Bar of California has historically imposed lenient disciplinary actions on Caucasian attorneys involved in fraud and misconduct while concentrating its punitive efforts on minority attorneys who often lack the resources, support, or political connections to mount an effective defense. The vast majority of the State Bar's disciplinary cases target solo practitioners and small firms—those who primarily represent plaintiffs and defendants alleging civil rights violations against the State of California.

Despite the pervasive bribery and corruption that tainted the leadership, investigators, and the Office of Chief Trial Counsel at the State Bar during the pendency of this action, the California Supreme Court continued to rubber-stamp the State Bar's disciplinary decisions without offering any

admonitions or guidance. This passive endorsement by California's highest court highlights a glaring need for greater scrutiny and accountability within the disciplinary process.

The Supreme Court's routine rubber stamp of approval, of State Bar disciplines, without oversight, is particularly surprising given United States Supreme Court's directive in *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), that deference should not be granted to an unconstitutionally biased administrative tribunal. The lack of critical examination by the Supreme Court of California in the face of such evident bias only underscores the urgency for reform.

In a day and time where attorneys defending those labeled as enemies of the state are increasingly targeted for removal from the legal profession, the need for rigorous constitutional protections has never been more urgent. These attorneys are the initial gatekeepers in the fight to safeguard citizens' fundamental rights, and any effort to strip them of their ability to practice law must be subjected to the strictest constitutional scrutiny.

Based on the foregoing, California must be unequivocally reminded that it cannot selectively adhere to the Constitution, especially when the rights of attorneys who defend citizens against governmental overreach are at stake. Disbarment, though intended to protect the public, is ultimately a punishment or penalty imposed on the lawyer. *Spevack v. Klein*, 385 U.S. 511, 515. Accordingly, this punitive measure must be applied with strict adherence to constitutional safeguards. Without these protections, the very foundation of justice and

the role of the attorney as an advocate for the people are at grave risk.

CONCLUSION

The petition for a writ of certiorari should be granted, and the unconstitutional decision of the State of California must be summarily reversed. Furthermore, this Court should order the State Bar of California to cease all collection efforts until the resolution of these proceedings. The integrity of the judicial process demands that any punitive measures be halted while this Court reviews the serious constitutional violations at issue.

Respectfully submitted.

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