No. _____

In The
Supreme Court of the United States

MICHAEL EISENBERG,

***Petitioner*,**

v.

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, "OLDC", ALSO KNOWN AS OFFICE OF LAWYERS DISCIPLINARY COUNSEL; RACHAEL L. FLECHER CIPOLETTI, CHIEF DISCIPLINARY COUNSEL, OLDC; JESSICA H. DONAHUE RHODES, LAWYER DISCIPLINARY COUNSEL, OLDC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLOMBIA

PETITION FOR WRIT OF CERTIORARI

Michael D.J. Eisenberg
COUNSEL OF RECORD
LAW OFFICE OF MICHAEL D.J. EISENBERG
700 12th Street, NW, Suite 700
Washington, DC 20005
(202) 558-6371
Michael@Eisenberg-Lawoffice.com

Pro Se Petitioner ***Dated: October 25, 2021***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

The question presented is whether the *Younger* abstention doctrine applies when a state has indicated it will disregard the Supremacy Clause of the Constitution and this Court's *dicta* in *Sperry*, when it attempts to regulate a non-state party who has no significant ties to a state, other than representing a resident of that state before a federal agency based in D.C., given the clear federal objectives that Congress wants no state lawyer's bar regulation over those representing federal employees before a federal agency.

LIST OF PARTIES TO THE PROCEEDING

All the parties are listed out in the Caption on the cover.

STATEMENT OF RELATED CASES

There are no related cases.

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Eisenberg v. W. Va. Office of Disciplinary Counsel, 856 F. App'x 314 (D.C. Cir. 2021), represents the District of Columbia Circuit's final decision on Mr. Eisenberg's case and was decided on April 16, 2021. This decision appears at Appendix page 1a. Then the District of Columbia Circuit denied Mr. Eisenberg's petition for rehearing *en banc* (Docket No. 1900188) on May 26, 2021. This denial appears at Appendix page 24a. *Eisenberg v. W. Va. Office of Disciplinary Counsel*, Civil Action No. 19-3006 (ABJ), 2020 U.S. Dist. LEXIS 114419 (D.D.C. June 30, 2020), represents the decision from the District of Columbia. Decided June 30, 2020, this decision appears at Appendix page 9a.

STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia had jurisdiction over this action under 28 U.S.C. § 1331, which vests district courts with original jurisdiction of all civil actions arising under the Constitution, federal laws, or treaties of the U.S. Proper venue was laid in the District Court under 28 U.S.C. § 1391(c)(2), as that is the judicial district in which a substantial part of the events giving rise to this claim occurred. The United States Court of Appeals for the District of Columbia Circuit had subject matter jurisdiction over the resulting appeal under 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered on April 16, 2021. By order on March 19, 2020, this Court extended the deadline for all petitions for *writ of certiorari* due on or after the Court's order to 150 days from the lower court's judgment or order denying a timely petition for

rehearing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2.

> This Constitution, and the Laws of the [U.S.] which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the [U.S.], shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.S. Const. Art. IV, § 2, Cl 1, Privileges and immunities of citizens.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

U.S.C.S. Const. Amend. 1, First Amendment rights to free speech, free association, and petition:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.S. Const. Amend. 5, Fifth Amendment rights to equal protection and due process:

> 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.

U.S.C.S. Const. Amend. 11, Suits against states—Restriction of judicial power.

> The Judicial power of the [U.S.] shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the [U.S.] by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.S. Const. Amend 14, § 1,

> 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.

West Virginia Rules of Professional Conduct Rule 1.

West Virginia Rules of Professional Conduct Rule 8.5.

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal prove otherwise; and
> >
> > (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

STATEMENT OF THE CASE

This case concerns the lower courts' power to enter an injunction when a state entity acts outside its jurisdiction to regulate a party who has no significant ties to the state except for appearing before a federal agency based in D.C. Here, the federal courts' power must be assessed within the framework established by *Younger v. Harris*, 401 U.S. 37, 41 (1971), and *Sperry v. Florida,* 373 U.S. 379 (1963), which the state has indicated it will not follow.

The District erred by not applying *Sperry*. A panel in the Court of Appeals further erred in its application of *Sperry* and in citing *State ex rel. York v. W. Va. Off of Disciplinary Counsel,* 744 S.E.2d 293, as primary case law supporting Respondents' position. The Court of Appeals' application of *York*, a WV Supreme Court case, contradicts this Court's ruling in *Sperry*. The Panel further erred in denying Petitioner's request for reconsideration and hearing *en banc*. In the District Court's June 30, 2020, decision employing *Younger* to Petitioner's request for an injunction, dismiss Respondents' state action against Petitioner, and dismiss related causes of action against Petitioner, and the Circuit Court's April 16, 2021, decision upholding that order and denial for request for reconsideration, should be overturned and remanded with orders consistent with Petitioner's brief(s).

I. Factual Background

Before May 21, 2019, Petitioner, an attorney with an office and licensed only in Washington, DC, was retained by a West Virginia (WV) resident (Resident) to represent the Resident before several

federal agencies regarding a separate federal agency. J.A. Vol 1 at 60, ¶¶3, 7, 9, January 28, 2021, (ECF # 1882443). The various federal agencies are based in D.C. During his representation, Petitioner visited the subject federal agency whose target office is in WV. These trips were only for matters before several federal agencies based in D.C. with no relevant offices in WV. *Id.*, ¶9. Petitioner does not practice in a WV state court nor is a member of any federal court in WV. Petitioner has never maintained an office in WV, never resided in WV, and does not advertise in WV. Petitioner's sole connection to WV is that he had to travel through it for work-related activities at the building of the federal agency subject to the other federal agencies who have no relevant footprint in WV.

On or about May 21 - 23, 2019, Respondent Rhodes contacted Petitioner to inform him that a Resident and her husband had filed individual complaints against him with WV's Office of Lawyer Disciplinary Counsel ("OLDC"). OLDC is an administrative arm of WV Supreme Court of Appeals. J.A. Vol I at 60-61, ¶¶4, 11. Petitioner inquired with Rhodes about OLDC's lack of jurisdiction over a party who had never been a member of WV's State Bar, does not practice before WV state courts, and does not practice before a federal court in WV. She responded by citing *York* as a case that supported her alleged position. J.A. Vol I at 61, ¶¶12–14.

After reviewing the case, Petitioner informed Rhodes that the case did not apply because Petitioner does not: "a) maintain an office in [WV]; b) regularly conduct business in [WV]; c) practice Patent Law[] in [WV], and; . . . d) practice in [WV] agencies, state, or

federal courts." *Id.* ¶15. In response, Rhodes "merely repeated Rule 8.5 of the [WV] Rules of Professional Conduct ("Rule 8.5")." Model Rules of Prof'l Conduct R. 8.5; *see also* J.A. Vol I at 62,¶16.

From on or about September 30, 2019, Petitioner communicated with Respondent Flecher-Cipoletti at to "explain the situation" and "discuss the law and the facts." *Id.* ¶17. Petitioner "reminded . . . Cipoletti that this matter falls under [*Sperry*]," and he transmitted his previous communications with Rhodes. *Id.* ¶¶18–19. Respondents cited other cases allegedly supporting their position but failed to respond to Petitioner after he refuted, distinguished, and dismissed each cited case. Memo. Opp. at 2; *see also* J.A. Vol I at 86. Instead, Flecher-Cipoletti replied by repeating Rule 8.5 without commenting on Petitioner's discussion of relevant case law. *Id.* at 81-82.

II. Procedural Background

Petitioner filed the original complaint, along with a motion for a preliminary injunction, with the District Court. on October 7, 2019. Compl.; *see also* J.A. Vol I at 10-14.; Mot. for Prelim. Inj.; J.A. Vol I at 17-24. Respondents moved to dismiss on November 8, 2019. *See J.A.* Vol I at 22-40. On December 2, 2019, Petitioner filed the Amended Complaint. He sought, and still seeks, declaratory and injunctive relief in an order directing the Respondents to dismiss OLDC's case, among other forms of relief. *See J.A.* Vol I at 63, ¶¶30–34. Respondents moved to dismiss on December 16, 2019. Defs. 'Mot. *See* JA Vol I 65-68.

The District Court granted Respondents' Motion to Dismiss and dismissed Petitioner's Motion

for a Preliminary Injunction June 30, 2020, *See* J.A. Vol I at 159. Petitioner then timely filed for appeal of that order before the U.S. Court of Appeals for D.C. See J.A. Vol I at 173. The Circuit Court affirmed the lower court's decision on April 16, 2021. Cert. App. at 1a. Petitioner then filed a petition for rehearing and rehearing *en banc* on May 17, 2021, which was denied. Cert. App. at 24a. Petitioner now timely files for appeal of the order granting Respondents' Motion to Dismiss before this Court.

SUMMARY OF THE ARGUMENT

This Court's jurisprudence in *Younger v. Harris*, 401 U.S. 37, 41 (1971) ensures state court proceedings are not unduly interrupted by federal court action. *Younger's* abstention doctrine requires federal courts, based on principles of equity and comity, to abstain from ruling on cases involving state proceedings where specific criteria are met. However, applying the *Younger* abstention doctrine is inappropriate here because the circumstances do not fulfill the requisite elements. First, this matter does not involve an ongoing state procedure that is judicial in nature. Instead, this matter involves an investigatory process under a state bar complaint. This Court has concluded, in cases such as *Steffel* and *Doran,* that investigations lacking procedural protection are immune from *Younger* abstention doctrine.

While this Court recognized bar proceedings may constitute ongoing state proceedings, e.g., *Middlesex*, here Respondents have brought no charge against Petitioner. Since there is no codified procedural process to follow, Respondents fail to

provide procedural due process protections during their OLDC investigations. Thus, *Steffel* and *Doran* serve as a bar to the applicability of *Middlesex*. This Court could not have based *Middlesex* on the principle that criminals under investigation are afforded more due process rights than ordinary citizens, especially those who advocate on their behalf. Finally, Respondents lack jurisdiction since their investigation is extra-judicial in nature. Respondents lack jurisdiction to interfere with Petitioner's practice before a federal agency[1], as this Court's decision in *Sperry* confirms federal authorization supersedes a state's attempted interference based on the Constitution's Supremacy .

The second requirement for invoking *Younger* abstention doctrine, the existence of an important state interest, is also not met. While WV undoubtedly maintains a valid interest in protecting their citizens from erroneous attorneys practicing law within their jurisdiction, that interest is irrelevant where WV's jurisdiction is lacking.[2] Petitioner has no *significant contacts* with WV including noting living or advertising in WV. As a Pennsylvania District Court reasoned in *Greensberg*, a state bar association cannot infringe upon an attorneys' constitutional rights.

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[1] Respondents failed to provide any disciplinary action they can actually pursue against Respondent, other than to claim they will not interfere with Petitioner's federal practice. Given the lack of available regulatory action it can take, Respondents' actions are suspect at best.

[2] Congress has not relinquished to the states its power to regulate professionals who appear before federal agencies. See § V, infra.

The third requirement for invoking *Younger* abstention doctrine is not met here. The extra-judicial investigatory process to which Petitioner is being subjected lacks any procedural safeguards. Respondents have been uncomfortably forthcoming about the fact that they will not give Petitioner's federal claims due consideration, specifically refusing to apply *Sperry*, which contains this Court's *dicta* and reasoning critical in matters involving representatives before federal agencies.

Even if this Court finds the requisite elements for invoking *Younger* abstention doctrine exists, *Younger* abstention still may not be employed because both exceptions are satisfied. First, Respondents are investigating in bad faith, as evidenced by the rule Respondents assert to claim jurisdiction requires the attorney to be (1) a member of WV's State Bar or (2) practice in WV. Petitioner does not meet either requirement. Thus, WV is acting beyond the scope of its state constitution.

Petitioner's conduct falls within the scope of *Sperry,* and Respondents cannot cite a single case affirming jurisdiction over attorneys from another state practicing exclusively before federal agencies. Instead, Respondents argue that Petitioner should submit to a frivolous proceeding which will ultimately be found invalid by this Court. In *Dombrowski*, this Court already determined petitioners in such a position need not succumb to substantial loss or impairment while waiting for the ultimate review of this Court.

Second, Respondents' investigation is flagrantly unconstitutional because they invoke Rule

8.5, which expressly governs lawyers admitted to practice in the jurisdiction and those offerings and providing legal services in WV jurisdiction. The application of such a rule to Petitioner is absurd. He does not maintain *significant contacts* with WV. Petitioner's single connection to WV is occasionally visiting a federal building located in WV regarding federal issues for other federal agencies not located in WV. Petitioner's office is in D.C. Therefore, unjustified attempts to regulate Petitioner by OLDC interfere with Petitioner's constitutional right to travel between states, as guaranteed by the Privileges and Immunities Clause.

Similarly, this Court's *dicta* in *Sperry* confirm that Respondents' investigation is improper. *Sperry* permeates every aspect of this case: (1) *Younger* abstention does not apply because the investigation is extra-judicial by impeding federal power to authorize representation before federal entities; (2) the jurisdictional issues in *Sperry* confirm that WV has no valid state interest in regulating Petitioner; (3) Petitioner's federal claim arises under *Sperry* and Respondents have made clear they will ignore *Sperry* in any future proceedings. *Sperry* also confirms the exceptions to the *Younger* abstention doctrine are satisfied because: (a.) Respondents persist despite *Sperry* and (b.) Respondents' conduct is unconstitutional by running afoul of *Sperry*. The courts cannot accurately adjudicate this case without rectifying the erroneous application and disregard for *Sperry*.

York, cited by Respondents and used by the Circuit Court to facilitate Respondents' mistaken jurisdiction over Petitioner, does not apply here.

While the petitioner in *York* was an attorney under a bar complaint, that attorney was also a resident of WV, maintained an office in WV, and was formally charged by LBD. Imperatively, the resolution over York was based on the location of his patent law office in WV. Thus, *York* simply cannot be likened to the present circumstances, as the primary basis upon which Petitioner challenges Respondents' investigation, Respondents' jurisdiction (or lack thereof), was clearly established in *York* via factors which do not exist for Petitioner. Allowing this flawed interpretation to persist will have significant consequences for a host of representatives nationwide, e.g., union leaders appearing before federal agencies, attorneys and other professionals representing Veterans before the Department of Veterans Affairs ("VA"), JAG lawyers appearing before Article I courts, and many others.

Finally, the Eleventh Amendment does not insulate Respondents Flecher-Cipoletti or Donahue from these proceedings. Where state government actors are not acting in the scope of their state's jurisdiction, they can be sued in their individual capacities. See *Ex parte Young* and *Kentucky* discussed in § VI, *infra*. Petitioner has successfully named these Respondents in their individual capacity; thus dismissal against them was improper.

Petitioner respectfully asks this Court to overturn the decision of the Circuit Court and remand for declaratory and injunctive relief in an order directing the Respondents to dismiss OLDC's case and other relief consistent with this *writ*.

REASON FOR GRANTING THIS *WRIT OF CERTIORARI*

The lower courts erred by incorrectly applying the *Younger* abstention doctrine to Petitioner's case, thereby abstaining from this critical matter when the grounds for abstention are not satisfied. Even if this matter did satisfy the criteria for *Younger* abstention, the lower courts were wrong to abstain because both exceptions to *Younger* are satisfied. Further, the lower Courts erred in their flawed applications of *Sperry* and *York*. Finally, the Eleventh Amendment does not insulate Respondents Flecher-Cipoletti or Donahue from this action.

I. Application of *Younger* Abstention Doctrine Is Improper Because None of the Necessary Conditions for *Younger* Abstention are Satisfied.

A. The *Younger* Abstention Doctrine Prevents Federal Courts from Inappropriately Intervening in Pending State Court Proceedings.

The *Younger* abstention doctrine requires that "except under special circumstances," a federal court should not "enjoin pending state court proceedings." *Younger* at 41; see *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626–27 (1986) (extending *Younger* to a pending state administrative proceeding); *Huffman v. Pursue*, Ltd., 420 U.S. 592, 594 (1975) (extending *Younger* to pending civil state court proceedings). The doctrine is based upon principles of equity and comity, precluding federal intervention where three criteria are met: (1) there are ongoing state proceedings that are judicial in nature, (2) the state proceedings

implicate important state interests, and (3) the proceedings afford an adequate opportunity to raise federal claims. See *Younger* at 43–44; *Hoai v. Sun Ref. Mktg. Co.*, 866 F.2d 1515, 1518 (D.C. Cir. 1989), citing *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982). Extraordinary circumstances may supply grounds for a federal court to intervene when a state action was brought in bad faith or where a state law is flagrantly unconstitutional. *JMM Corp. v. Dist. of Columbia*, 378 F.3d 1117, 1127 (D.C. Cir. 2004), citing *Younger*, 401 U.S. at 41, 53–54.

This Court has reasoned that the *Younger* abstention doctrine applies to noncriminal judicial proceedings, including pending administrative proceedings, where important state interests are involved. See *Moore v. Sims*, 442 U.S. 415, 423 (1979); *Middlesex* at 434. Petitioner acknowledges that the Court has specifically extended this reasoning to cover state bar disciplinary proceedings. See *Middlesex* at 434. But none of the *Younger* abstention criteria bar the lower courts from interceding.

B. There is No Ongoing State Procedure that is Judicial in Nature.

The *Younger* abstention doctrine requires there be an ongoing state procedure that is judicial in nature. *Sub judice*, no such procedure is ongoing. First, Respondents have not yet started any formal disciplinary process. OLDC's conduct remains only investigatory. Second, judicial procedure cannot begin with filing a disciplinary complaint when a party is not afforded due process protections during the investigation, as this precise issue has not been

previously contemplated by the Court. Third, even had OLDC started a formal disciplinary process, i.e., beyond its investigation, such a process would be so lacking in jurisdiction it would be extra-judicial in nature and thus, not qualify as an ongoing state judicial process.

1. The Investigatory Stage Is Distinct from, and Antecedent to Any State Judicial Procedure to Which *Younger* Might Apply.

The Supreme Court in *Steffel* and *Doran* determined that disciplinary proceedings are akin to criminal proceedings with all of their procedural protections but that investigations lacking any procedural protections are immune from the *Younger* abstention doctrine. *See Steffel v. Thompson,* 415 U.S. 452, 462 (1974); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 930-31 (1975). This Court's findings were premised that such investigations lack the procedural protections that might attach later once the investigatory stage gave way to formal proceedings. *Id.*

Then this Court concluded, by analogy, that a state bar complaint process has similar protections to a criminal process. *Middlesex,* at 432. Based on this *stare decisis*, we must use a similar analogy to determine (1) when a state bar complaint process begins and (2) whether this court could intervene in an analogous criminal investigation. The Supreme Court has found federal court intervention acceptable when there are no actual ("criminal") court proceedings.

In *Steffel*, this Court found that "[w]hen no state criminal proceeding is pending when the federal

complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system." *Steffel* at 462. Absent a pending state proceeding, federal court action cannot "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." Chemerinsky, Erwin. *Aspen Treatise for Federal Jurisdiction* (Aspen Treatise Series) (p. 912), Wolters Kluwer. Kindle Edition.

This Court's ruling in *Doran* bolsters this Court's intervention. In *Doran*, the Court found that petitioners, the two not in state court proceedings, should receive an injunction issued by the federal court "...because there is no available forum in which to raise the constitutional claims [as they were being threatened with state prosecution]." *Id*. at 889. Just as here, Petitioner is being threatened with state prosecution, but no actual prosecution is taking place; thus, this Court's intervention is not barred.

In both *Steffel* and *Doran*, the successful parties defeated the *Younger* argument because the respective state was only *investigating* the matters. The state officials were not prosecuting the matters in court, nor were their investigations, in-and-of-themselves, appealable to a state court. There were no procedural protections, i.e., hearings, oversight by a judge, ability to appeal, at the investigation stage, just as there are none available to Petitioner. Thus, the present investigation of Petitioner is not the sort of judicial procedure courts have found deserving of *Younger* abstention or contemplated in *Middlesex*.

2. Judicial Procedure Does Not Dispel Petitioner's Due Process Rights when a Disciplinary Complaint is filed. The Facts of *Middlesex* and its Progeny do Not Contemplate the Present Issue Before this Court.

The Appeal Court's Panel cited *Middlesex* to support that a judicial proceeding begins with filing a complaint. The court then concluded federal court intervention here would be inappropriate because a state court could adequately adjudicate constitutional issues. But the facts in *Middlesex* are markedly different from the facts *sub judice*. Forced application of *Middlesex* in Petitioner's case is not consistent with this Court's decisions, detailed above, in *Steffel* and *Doran*.

Contrary to Respondents' facts, the bar associations in *Middlesex* and similar cases had filed formal charges against Middlesex, *et al*. The investigation had concluded, and the accused party had an opportunity to respond to formal charges. *Sub judice*, no formal charges have been filed against Petitioner. Respondents are still only in their investigation stage. The investigation stage is precisely what Petitioner is petitioning this Court against. There is no codified process to allow an appeal of the investigation itself or hold a hearing to stop or end this action. **The right to appeal or be heard by a disciplinary body's investigation stage, i.e., activity before the filing of formal charges, was not contemplated by the Court in *Middlesex*.** Disregarding this distinction contradicts the Supreme Court's prior rules in *Steffel* and *Doran*.

The extension of *Younger* to cases where a state is only investigating the matter without due process rights cannot be the intent of this Court's decision in *Middlesex*. Due Process should not fall prey to circumvention when a state actor places an "investigation stage" under the "judicial process" and prevents a party from seeking relief during unconstitutional investigation. Attorneys are entitled to the same Due Process rights as those under criminal investigation: They should have the same right to seek court intervention when their constitutional rights are being violated by an investigation that lacks jurisdiction.

3. Any Ongoing State Procedures by OLDC Are so Lacking in Jurisdiction that they Are Extra-Judicial in Nature.

Even if Respondents' investigation of Petitioner qualifies as an ongoing state procedure, Respondents' lack of jurisdiction renders any investigation of Petitioner extra-judicial and thus, not subject to *Younger* abstention doctrine. Under *Sperry* and its progeny, it is well established by this Court that states may not interfere with regulations of practice before a federal agency. Thus, Petitioner's practice before federal agencies based in D.C., e.g., EEOC, MSPB, OWCP, on behalf of a WV resident cannot, standing alone, serve as a basis of jurisdiction for Respondents.

The Circuit Court misdirected focus on one aspect of *Sperry* to bestow WV non-existent jurisdiction over Petitioner. In *Sperry,* Sperry was registered to practice before the U.S. Patent Office ("USPTO") while not admitted to practice law before

the Florida. *Sperry*, at 381. When the Florida Bar instituted proceedings to enjoin Petitioner from representing Florida clients before the USPTO, rendering opinions as to patentability, and preparing various legal instruments, this Court concluded that, "the law of the state . . . must yield when incompatible with federal legislation." *Id,* at 384. The Court then reaffirmed the Patent Commissioner's power to proscribe regulations, stating where, "authorization is unqualified, then, by virtue of the Supremacy Clause Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority." *Id*, at 385.

Just as the petitioner in *Sperry* could represent clients before the USPTO, Petitioner is authorized by Congress to practice before the Office of Workers Compensation (OWCP), the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), and any Federal Government administrative board. The Circuit Court was correct in asserting that *Sperry* held, "federal regulations allowing non-lawyers to appear before the Patent Office preempted state regulations to the contrary." [3] Cert. App. at 4a. By limiting its consideration of *Sperry* illustrates, the Circuit Court disregards *Sperry's* relevancy.

While the federal agency before which Petitioner appeared does not require representatives

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[3] Respondents have failed to show where Congress has relinquished its control of licensure before federal agencies. See §V, *infra*, for in-depth discussion. Further, Respondents failed to discuss how they have any jurisdiction over Petitioner if this bar did not exist. See §I.B.4, *supra.*

to pass a separate bar examination, federal agencies have their own explicit requirements for representatives appearing before them. For instance, the VA accreditation program requires an attorney to complete 3 hours of qualifying continuing legal education ("CLE") requirements during the first twelve-month period following the date of initial accreditation, an additional three hours of CLE within three years of accreditation, and an additional three hours of CLE every two years thereafter, as well show an annual certification of good standing for any court, bar, or Federal or State agency to which the attorney is admitted to practice.[4] Such requirements are separate and distinct from those for obtaining certification with the WV State Bar. Petitioner possessed the requisite authorization to represent WV's Resident before the federal agencies, and this Court's *dicta* in *Sperry* indicates state actors may not impede such authorization. As discussed above and in § V, *infra*, there is no indication that Congress has relinquished its authority to the states for admission and discipline of professionals before federal agencies. Impediment of Petitioner's federally authorized acts by a state lacking jurisdiction over him violates the Supremacy Clause: Violating Petitioner's Constitutional Rights cedes any application of *Younger*.

[4] For requirement by other federal agencies, see https://www.va.gov/ogc/accreditation.asp. (last viewed on October 18, 2021).

4. The cases cited by Respondents required more than just mere practice before a Federal Agency to provide it jurisdiction over a party.

In Respondents cited cases, the courts found jurisdiction on grounds separate to mere practice before a federal agency. *See* J.A. Vol I at 131-151. (Providing in-depth analysis of, and distinguishing from, each case presented by Respondents); *see Gillette v. N. Dakota Disciplinary Bd. Counsel*, 610 F.3d 1045 (8th Cir. 2010)(Holding plaintiff attorney liable due to their former membership in N.D. State Bar, as opposed to finding liability for practice on tribal land.); *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004)(Finding that plaintiff attorney was an active member of relevant state bar association.); *Ziankovich v. Large*, Civil Action No. 17-cv-02039-CMA-NYW, 2019 U.S. Dist. LEXIS 159924 (D. Colo May 31, 2019)(Noting, though plaintiff attorney was not a member of state bar association in question, they were practicing in federal court within the state at the time.). *Middlesex* at 432 (Noting that plaintiff attorney was a member of the state bar association.).

No such additional grounds exist here. Respondents are bereft of jurisdiction. Jurisdiction is the start and end of this matter. No investigation of Petitioner can be allowed to continue if no authority existed for that investigation to begin. Respondents' conduct is extra-judicial and not subject to *Younger*, which requires that a legitimate ongoing state procedure be judicial in nature.

C. Regulating an Attorney Over Which the State Has No Jurisdiction Does Not Constitute an Important State Interest for WV.

Respondents have a state interest in protecting their citizens from alleged erroneous attorneys practicing law within their jurisdiction, including members of WV's state bar and out-of-state attorneys appearing before state agencies, state courts, and federal courts in WV. But Petitioner has no *significant ties* to WV[5]. It is not WV's place to regulate Petitioner's conduct which occurs outside of WV's jurisdiction. Petitioner cannot be restrained where the state has no jurisdiction to act.

Petitioner does not practice law in WV. Respondents assert they have interests in protecting WV citizens and maintaining the standard of professional ethics and conduct of the bench and bar. But WV is exceeding the limits of its Constitution, and WV Rule 1: Petitioner does not appear before that bench, nor is he a member of that bar. His appearances are before federal agencies based in D.C. WV's "interest" and state rule do not create jurisdiction where none exists. Respondents have failed to produce a suitable tie to Petitioner to grant it jurisdiction over him. Even compelling state interests do not trump the Supremacy Clause. See *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

In *Greensberg,* an attorney moved for a preliminary injunction based on the state's amended Pennsylvania Rule of Professional Conduct 8.4. The

[5] See § II.B, *supra*.

amended Rule, based on the *American Bar Association Model Rule of Professional Conduct* 8.4(g), was too broad as it infringed upon Greenberg's Constitutional Right of Free Speech. U.S. Const. amend. I. *Sub judice*, Rule 8.5 is being interpreted so broadly it will allow states to regulate federal agency practice where Congress or *Sperry* has not invited them. This will have a chilling effect on out-of-state parties, both attorneys and non-attorneys, discouraging them from taking cases for WV citizens when a D.C.-based federal agency is investigating a separate federal agency with a building in that client's state. Besides defying this Court's *dicta* in *Sperry,* this interferes with Petitioner's Constitutional Rights of Free Speech (to advocate on behalf of parties before the federal government wherever the federal office is located), Freedom to Travel between states to represent parties before federal agencies in D.C, Freedom to Assemble/Associate with WV citizens, and Freedom to Contract without State interference. Article I and Article IV, § 2, cl. 1.

Throughout the proceedings before the lower courts, Respondents failed to produce one case demonstrating their power to regulate an attorney who represented a WV citizen before a federal agency based solely on the subject federal agency building being in their state. *Sperry* was clear when it provided:

> While acknowledging that prosecution and preparation of patent applications for others constituted the practice of law and that Florida had "a substantial interest in regulating the practice of law within the State," the Supreme

> Court invalidated the Florida law, because Florida could not "enforce licensing requirements which, **though valid in the absence of federal regulation**," imposed "additional conditions not contemplated by Congress."

Id. at 384-85 (emphasis added). *Sperry* is the controlling law of the land. Respondents must establish jurisdiction for any enforcement, but they provided no congressional regulation permitting them to act against Petitioner's federal agency practice. See also § V, *infra*. Likewise, they have offered no examples of what it can do beyond interfering with Petitioner's federal agency practice. The Supremacy Clause of the U.S. Constitution supplants state law. Article VI, ¶2. Therefore, Respondents can have no compelling state interest where they lack jurisdiction.

D. Petitioner has no Adequate Opportunity to Raise Federal Claims During the Investigation and Subsequent Bar Complaint Process.

The investigatory stage of the disciplinary process offers no opportunity to raise federal claims. As discussed in § I.B.1, *supra.*, the pre-investigation and investigation portion of Respondents' action provides no proceeding for Petitioner to raise his federal "jurisdictional" claims. Respondents assert that the Investigative Panel of the Lawyer Disciplinary Board ("LBD") reviewed the matter and decided that WV Rule 8.5(a) solely applied. *See* J.A. Vol II at 169. Petitioner was not provided any notice of the Panel's meeting, an opportunity to appear or be heard before the Panel, or a copy of their alleged

decision. Without an opportunity to bring forth Petitioner's constitutional claims during the investigation, abstention under *Younger* is improper and seriously prejudicial to Petitioner.

WV's Supreme Court of Appeals has made clear that it will not give Petitioner's claims fair consideration. Petitioner will not get a fair and unbiased hearing from Respondents after they conclude their investigation. Respondents are the regulatory body of WV's Supreme Court of Appeals. As an administrative arm of the state court, Respondents have signaled, with no process for Petitioner to participate, that their State Supreme Court will find *Sperry* does not apply in Petitioner's situation: This is bolstered by Respondents' proclamation that after Petitioner has been through its state Supreme Court, **then** he can seek redress before this Court. *See* Defs.' Memo at 10, n. 7; *see also* Vol I at 39. By such time, the underlying allegations of this case will have been made public in the state process, and the defamation to Petitioner's professional reputation will have been done. When it comes to defamatory falsehoods, "the truth rarely catches up with a lie," so the "opportunity for rebuttal seldom suffices to undo harm." *Gertz v. Robert Welch*, 418 U.S. 323, 394, 94 S. Ct. 2997, 3033 (1974); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988) (explaining that defamatory falsehoods "cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective"). The harm caused by defamation is thought to be *irreparable* even when the truth is brought to light." *U.S. v. Alvarez*, 617 F.3d 1198, 1211 (9th Cir. 2010). Thus, the proceedings

during the investigation phase fail to provide adequate opportunity to raise federal claims.

Because there is no ongoing federal constitutionally valid state procedure that is judicial in nature, regulating an attorney over which the state has no jurisdiction does not constitute an important state interest for WV, and Petitioner has no adequate opportunity to raise federal claims during the investigation process, *Younger* abstention doctrine does not apply.

II. Even if *Younger* Applies, Both Exceptions to *Younger* Abstention Doctrine Are Satisfied.

Younger is not an absolute shield such that states may commit any evil free from federal interference. Extraordinary circumstances may supply grounds for a federal court to intervene when a state action was brought in bad faith or where a state statute is flagrantly unconstitutional. *JMM Corp. v. Dist. of Columbia*, 378 F.3d 1117, 1127 (D.C. Cir. 2004), *citing Younger* at 41, 53–54. These extraordinary circumstances are manifest as Respondents' actions are being conducted in bad faith and Respondents' authorizing state law (Rule 8.5), if interpreted to allow OLDC's conduct, is flagrantly unconstitutional.

A. OLDC Is Conducting their Investigation in Bad Faith.

Respondents have maintained that Rule 8.5 grants them authority to conduct disciplinary proceedings against Petitioner. However, Rule 8.5 requires that a lawyer be a member of WV's State Bar

or practice in WV. [6] Petitioner meets neither requirement. It is undisputed that Petitioner is not a member of WV's State Bar. Rule 8.5 and WV's constitution can exert control only over attorneys falling under the jurisdiction of WV, i.e., a member of WV's State Bar and attorneys practicing either before WV's state courts or state agencies, or before a federal court in WV. Petitioner's practice before federal agencies based in D.C., under *Sperry*, does not trigger WV jurisdiction. Instead, Petitioner's only connection to WV is that he represented a WV citizen who had matters before federal administrative bodies based in DC about her former federal agency of employment with an office in WV. Petitioner did not practice law in WV's jurisdiction but rather in a distinct legal sphere.

Petitioner's conduct fell within the scope of *Sperry*. As discussed above in § I.B.4, Respondents cannot cite a single case affirming jurisdiction of a state bar association over attorneys from another state practicing exclusively before federal agencies. The Circuit Court was in error when it stated in its Opinion denying Appellant his Requests for Reconsideration or for *En Banc* Hearing by citing *York* as on point to be supporting Appellee's claim to jurisdiction over Appellant. The crux to *York* is that York had an office in WV and lived in WV. See § I.B.4,

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[6] Further, the jurisdiction of a state's constitution is limited to its jurisdiction. *See generally Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). Petitioner does not have "... certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citations omitted). Respondents' jurisdiction cannot intrude in other states' or federal jurisdiction.

supra. Respondents specifically lack precedent supporting their jurisdiction over an attorney without *significant contacts* with it. Respondents' inability to refute this most fundamental issue of jurisdiction shows that OLDC knew or should have known that their case against Petitioner could not ultimately succeed on the merits.

Respondents' actions constitute bad-faith prosecution. "[A] bad-faith prosecution is when 'a prosecution has been brought without reasonable expectation of obtaining a **valid** conviction.'" *Aspen Treatise Series* (p. 905-906) (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975) (emphasis added)). Respondents know the controlling nature of Sperry, i.e., they lack jurisdiction over Petitioner. This implies that either Respondents intend to pursue their course of action knowing it is futile or Respondents anticipate an unconstitutional ruling from the WV Supreme Court of Appeals, which this Court must then overturn. [7] In either event, Respondents know they fight from a false position yet persist regardless, in bad faith.

The case of *Dombrowski v. Pfister* provides further support Respondents are acting in bad faith. The *Younger* Court, "distinguished [*Dombrowski*] by observing that the latter case involved successive state court prosecutions for the purpose of harassment and not conviction." *Aspen Treatise* at 906 (internal citation omitted). In *Dombrowski*, the Court found that the petitioners faced "substantial

[7] Even if Petitioner is 100% accurate on the facts and case law in this matter (which he asserts he is), there is no guarantee this Honorable Court will take the case given its discretion to grant *certiorari*.

loss or impairment of [Constitutional Rights] ... if [petitioners] must await the state court's disposition and ultimate review in this Court of any adverse determination. [Their] allegations, if true, clearly show irreparable injury." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *See also Gibson v. Berryhill*, 411 U.S. 564 (1973). Respondents do not provide a meaningful process to appeal their unconstitutional assumption of jurisdiction during their "pre-investigation" and "investigation phase." Recall, no charges have been brought whereupon then he would redress. But currently, Petitioner has no statutory right to appeal.

At the lower courts, Respondents have argued Petitioner should submit to a frivolous proceeding that will ultimately be found by this Court to be fatal for their position. Respondents' investigation provides no due process to afford any protection of Petitioner's jurisdictional, constitutional rights. This only serves as evidence that Respondents are acting in bad faith. Respondents infer that Petitioner can file a *writ* with its supreme court. *See* J.A. Vol I at 148. But the option is neither provided in its regulations nor be fruitful as discussed above. By Respondents' logic, they would first professionally, economically, and emotionally harm him once posting its decision on the internet; it will never be erased regardless of a later correction. Respondents are running Petitioner through a pre-determined state process. Only then could Petitioner hope this Court grant *cert* and WV be corrected by this

Court via *Sperry,* long after that process has irrevocably injured Petitioner.[8]

Respondents' lack of enforceable sanctions over Petitioner further reflects Respondents' bad faith motives. Respondents' counsel provides "[v]arious disciplinary sanctions are available .... [that] would not affect Petitioner's practice of [federal agency law]." Respondents' Br., J.A. Vol I at 137. But Respondents provide no example of what action they could take, if any. Respondents only proffer that "[WV] citizens filed complaints with [OLDC] against Eisenberg arising from his representation before a federal agency in [WV]." Actually, Petitioner's representation is before the EEOC, OWCP, and MSPB, based in D.C. with no offices in WV. Further, Petitioner does not have *significant contacts* with WV.

Last, Respondents provide no federal regulation permitting them to act. See § I.B.4, *supra*. Thus, they have no form of punishment or regulatory action to exude upon Petitioner without imposing regulations outside their jurisdiction and not contemplated by Congress. Respondents' only available course of action is to run him through an embarrassing public inquisition. This will tarnish Petitioner's reputation through a process that lacked jurisdiction to start and failed to provide him due process rights.

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[8] Petitioner has made no defense of any charges Respondents have raised against Petitioner. Doing so could admit WV has jurisdiction and waive Petitioner's argument before this Court.

B. OLDC's Investigation Is Flagrantly Unconstitutional Under *Sperry*.

Petitioner's matter meets the second exception to the *Younger* abstention doctrine because Respondents' application of Rule 8.5 is flagrantly unconstitutional. "Justice Rehnquist concluded [in *Moore v. Sims*, 442 U.S. 415] that a federal court should abstain as long as proceedings exist in the state system to adjudicate the constitutional claim. He wrote that 'abstention is appropriate unless state law clearly bars the interposition of the constitutional claim.'" *Aspen Treatise* at 70. Respondents rest their argument solely on WV Rule 8.5. Respondents' rules are based on WV legislation and its constitution. If its rules and legislation under its constitution were strictly enforced to its licensed members, business entities, attorney-residents, and attorneys with routine contacts to its state, then it may not be flagrantly unconstitutional.

But such an application is starkly different from this case: Petitioner is not a member of WV's Bar, is not a resident of WV, does not have an office in WV, and does not maintain regular contacts with the state. When Respondents attempt to use state law to encroach upon areas of federal law solely administered by the federal government [9], as precluded by *Sperry*, then that application of state law cannot stand. Thus, meeting the *Younger* exception and is ripe for this Court to hear and strike down.

Further, Respondents' actions amount to violating Petitioner's right to travel between states

[9] See also §V, *infra*.

freely. The Fourteenth Amendment's "Privileges and Immunities" clause guarantees citizens of one state to pass into any other state to engage in lawful business, without molestation. *See also* U.S. Const. Art. IV, § 2, cl. l; *Ward v. Maryland*, 79 U.S. 418, 20 L. Ed. 449 (1871). Petitioner should be able to freely travel between states and practice before a federal agency without (regulatory) interference by a state where he has no meaningful contacts otherwise. Last, Respondents' actions infringe upon Petitioner's Constitutional Right to freely assemble and associate with WV citizens.

III. *Sperry* Confirms Respondents' Investigation Lacks Jurisdiction in its Entirety.

Sperry permeates every aspect of this case. *Younger* abstention doctrine does not apply because: (1) OLDC's investigation is extra-judicial due to impeding federal authority articulated in *Sperry*; (2) the jurisdictional issues raised by *Sperry* clarify that WV has no jurisdiction and thus has no valid state interest in regulating Petitioner; and (3) Petitioner's federal claim arises under *Sperry,* and he knows WV will not provide an adequate forum for raising this claim at this investigation stage (and later if need be) because Respondents have already declared that they (and WV's Supreme Court of Appeals by extension) will ignore *Sperry*. The *Younger* exceptions are satisfied because: (1) Respondents persist in their action despite *Sperry* rendering their investigation meritless; and (2) Respondents' conduct is flagrantly unconstitutional because it runs afoul of *Sperry*. Perhaps with the sole exception of *Younger*, *Sperry* is the most important case to this entire issue.

The lower courts failed to invoke *Sperry* appropriately. It is unconscionable that the District Court made no discussion of *Sperry* in its opinion. J.A. Vol I at 160-172. (The word "*Sperry* appears only once and in a quote of Petitioner's words, not in the main body of the text). The Circuit Court's Panel Decision interprets the Supreme Court's decision in *Sperry,* contrary to decades of interpretation across the circuits with no case law to support its actions. The Panel's discussion of *Sperry* is significantly flawed: (1) The Respondents' actions cannot be jurisdictional in nature where the federal Congress and WV's state constitution have not provided it jurisdiction to act. At minimum, this is extra-jurisdictional. See §§ I.B.3-4, *supra*. (2) state proceedings cannot implicate important jurisdiction where the federal government or a state constitution has not given it authority (let alone authorize the use of state funds) to act. (3) Petitioner is not afforded due process when he cannot appeal the investigation stage itself: Suspected criminals should not have more protection during an investigation than attorneys do during a bar association's investigation. See § I.B.1, *infra.* discussing *Steffel* and in *Doran*. As detailed in § V, allowing this interpretation to stand will create an artificial ban for union officials, Judge Advocate Generals, non-profit organizations, and others to appear on behalf of others in matters before federal agencies.

This Court cannot accurately adjudicate this case without rectifying the erroneous disregard for and mischaracterization of *Sperry* in the lower courts, as this Court's holding and *dicta* in *Sperry* permeate every aspect of the jurisdictional issue now before this Court.

IV. WV's State Supreme Court case *York* Does Not Apply, and the Circuit Court Misapplied *York* When Concluding it Created Jurisdiction for Respondents Over Petitioner.

The Circuit Court's Panel decision proclaims *York* provides the very basis upon which Respondents may act: "The [WV] Rules of Professional Conduct apply to 'an attorney who, 'like [Petitioner], 'provides or offers legal services in th[e] state, even where such attorney's entire practice consists of federal agency matters." March 16, 2021, Court of Appeals Judgment at 2. *York* does not apply here. A thorough review of *York* reflects the Panel's error.

York filed a *writ of prohibition* against OLDC and LDB. OLDC and LDB had issued a statement of charges against York. WV's Supreme Court explained, "…resolution of the jurisdictional question hinges upon a determination of whether the petitioner's practice of patent law in an office located in Huntington, [WV], constituted the 'practice of law in [WV]'." *York*, at 188. York's WV office is precisely what gave OLDC and LDB jurisdiction over him. Petitioner is neither a resident nor maintains an office in WV; thus, the threshold basis for *York* is not met!

The Circuit Court created jurisdiction where none exists. If this flawed interpretation is allowed to proceed, representatives, attorneys, federal employee union representatives who represent federal employees before their respective agency, attorneys who represent Veterans before the VA for VA benefits appeals, JAG lawyers solely appearing before Article I courts, *inter alia,* could be regulated by state bar

associations for actions solely before the federal government. This flawed interpretation could subject these and others to Unlicensed Practice of Law Claims by a state.

As *York* is inapplicable to this case, there is not one case on record in this matter that supports the Circuit Court's decision. Further, Petitioner does not have significant contacts with WV. Respondents have nothing to regulate Petitioner for except his federal agency activities, primarily based in D.C. Because Respondents provided no relevant federal regulations allowing it to tread into Petitioner's federal agency practice, its spurious actions must end.

V. Congress has clearly indicated its federal objectives of not requiring state bar regulation in the area Petitioner represented Complainant.

The Circuit Court opined that Petitioner raised no federal objective that Congress contemplated to that conflict with WV Rules. Cert. App. at 4a. The public record is inapposite to this premise:

A. Congress has implied authority to (solely) discipline attorneys and other professionals before it.

The Circuit Courts have upheld an agency's "implied authority" to discipline professionals even though Congress did not statutorily approve. 15 U.S.C § 78w(a)(1) (1982) (SEC), *upheld in Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979); 29 U.S.C. § 156 (1976) (NLRB), *upheld in Camp v.*

Herzog, 104 F. Supp. 134 (D.D.C. 1952).[10] Moreover, attorneys are not even "officers of the state court to which they are licensed" when they act in a capacity before a federal agency.[11] Public law appears void that Congress has relinquished its authority to state regulations, and the Respondents have failed to prove otherwise.

Scholars have opined that Congress, in crafting the APA, kept the regulation of those practicing before federal government agencies to the sole discretion of the agencies.[12] "[Congress decided that] the subject should be covered by separate legislation." Cox, *supra* at 174-175 (internal citations omitted). This may create a "jurisdictional gap" where an attorney may escape disciplinary action by a bar association where an attorney practices before an agency. *Id.* at 178. But there is no implied delegation by Congress that states may step in where the agencies have sole discretion to act (or not act).

Respondents' failed to provide any federal legislation removing disciplinary authority from

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[10] See generally Michael P. Cox, Regulation of Attorneys Practicing before Federal Agencies, 34 Case W. Rsrv. L. Rev. 173 (1983-1984).

[11] See Cox, *supra* note 10 at 203-204, *referencing In re Griffiths*, 413 U.S. 717 (1973). The majority and dissenting members agreed on this point. C.J. Berger even wrote "In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is . . . alien to our system " *Id*. at 732, 733.

[12] Moreover, states lack the expertise of practice before federal agencies. *Id. citing* ABA Standing Comm. on Professional Discipline, Report to the House of Delegates 4 (Aug. 1980).

federal agencies. The federal agencies have not acted to permit concurrent jurisdiction over attorneys, let alone any professionals, before them. Without it, states cannot intrude on a professional's activity before a federal agency. As Congress has exclusive (federal) powers to regulate its agencies, states have no business attempting to regulate professionals practicing before federal agencies.[13]

B. The Court has not granted states the ability to regulate a non (bar) member for their activities solely before a federal agency based in D.C.

This Court's *dicta* in *Sperry* has long held that "... activities relating to federal administrative practice are clearly preempted by the federal government." William H. Sager & Leslie S. Shapiro, *Administrative Practice Before Federal Agencies*, 4U. Rich. L. Rev. 76 (1969). There are exceptions to this rule.[14] See § I.B.4, *supra.* None of the cases Respondents have proffered to

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[13] WV State Law appears void authorizing the use of state funds to regulate federal professional standards. Respondents' fail to provide what regulatory actions they can do given the only tenuous connection Petitioner has to WV is the fact that the complaining party is a resident of WV and the federal agency subject to other D.C. based federal agencies' jurisdiction has a building located in its state. See § I.B.4, *supra.* This is why the investigation must stop!

[14] Troubling, the Respondents claim they have no intention of regulating Petitioner's federal agency activities. But the record is void of what they assert they can do, if anything, to Respondent. Petitioner has no *significant ties* to or minimum contacts with WV. See § I.B.4, *supra.* Thus, supporting Petitioner's premise that the only purpose of this ill-gotten process is to publicly embarrass Petitioner and tarnish his professional reputation.

Petitioner applies to him. Respondents simply do not have jurisdiction over Petitioner.

C. A federal, let alone state judiciary, is not the place to discipline an attorney for his activities before a federal agency.

"Delegation to the ... judiciary would be inappropriate, despite that branch's experience with attorney discipline. The issue in question is not misconduct by judicially admitted attorneys before federal [or state] courts, but rather misconduct by congressionally admitted attorneys before federal agencies." Cox, *supra* note 10 at 207. Remember, "[a]lthough the Agency Practice Act, 5 U.S.C. § 500 (1982), provides that an attorney licensed by and currently in good standing with a state court may practice before federal agencies, a state license is not in and of itself the authority enabling an attorney to practice before federal agencies. Congress theoretically could have set some other requirement, such as a federal bar examination. Indeed, a state license to practice law does not entitle a person to practice before the Patent and Trademark Office; Congress empowered that agency to impose its own requirements." *Id*. fn 150 *referencing* 5 U.S.C. § 500(e) (1982). Thus, Respondents' attempt to regulate Petitioner, with only tenuous connections to the state, encroaches on federal congressional powers.

VI. Respondents Are Not Immune from Petitioner's Action Under the Eleventh Amendment.

Respondents Flecher-Cipoletti and Donahue do not have immunity under the Eleventh Amendment. *Ex parte Young* and *Kentucky* indicate state government actors can be sued in their individual

capacity. *Ex parte Young,* 209 U.S. 123, 155-56 (1908); *Kentucky v. Graham,* 473 U.S. 159, 169 (1985). If these parties are not acting in the scope of their state's jurisdiction, then they cannot be deemed acting in their state government job. *Fla. Dep't of State v. Treasure Salvors*, 458 U.S. 670, 102 S. Ct. 3304 (1982). Petitioner is suing Flecher-Cipoletti and Donahue in their individual capacities. The Eleventh Amendment immunity with which Respondents formerly sought to cloak themselves is nonexistent.

Plaintiff has filed his claims against Flecher-Cipoletti and Donahue under 42 U.S.C. § 1983 in their individual capacity. See Compl., J.A. Vol I at 11, 60. The Eleventh Amendment does not bar suits for injunctive or declaratory relief against individual state officials acting in violation of federal law. See *Ex parte Young* at 155-56. However, to fall within the *Ex parte Young* exception to sovereign immunity, a plaintiff must name individual state officials as defendants in their individual capacities. *See Kentucky* at 159 ("In an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants."). Thus, as Flecher-Cipoletti and Donahue are named in their individual capacity, the *Ex parte Young* exception to sovereign immunity applies. This Honorable Court should find the lower courts erred in dismissing this action against Flecher-Cipoletti and Donahue.

CONCLUSION

As this matter raises important Constitutional issues regarding Federalism and States Rights and the upholding of this Court's *dicta*, Petitioner respectfully asks this Court to Grant *Certiorari*.

Respectfully submitted,

/s/ Michael D. J. Eisenberg
Michael D. J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 5586371
michael@eisenberg-lawoffice.com

Pro Se Petitioner

APPENDIX

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[ENTERED: April 16, 2021]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-7070 **September Term, 2020**
FILED ON: APRIL 16, 2021

MICHAEL D.J. EISENBERG,

APPELLANT

v.

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, "OLDC"; RACHAEL L. FLECHER CIPOLETTI, CHIEF DISCIPLINARY COUNSEL, OLDC; JESSICA H. DONOHUE RHODES, LAWYER DISCIPLINARY COUNSEL, OLDC,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-03006)

Before: SRINIVASAN, *Chief Judge*, WILKINS and WALKER, *Circuit Judges*.

J U D G M E N T

This appeal from the United States District Court for the District of Columbia was considered on the record and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). The court has

accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is hereby

ORDERED AND ADJUDGED that the decision of the district court be **AFFIRMED**.

Appellant Michael Eisenberg, an attorney based in Washington, D.C., was retained by a West Virginia resident to represent her in a matter before a federal agency in West Virginia. In 2019, Eisenberg's client filed a formal complaint against Eisenberg with the West Virginia Office of Lawyer Disciplinary Counsel (OLDC). The OLDC ordered Eisenberg to respond to the complaint, but he refused, contending that the OLDC lacks jurisdiction over him because he is not a member of the West Virginia State Bar and does not regularly conduct business in the State. The OLDC's Investigative Panel found that it possesses jurisdiction over Eisenberg and again asked for his response.

Eisenberg then filed suit in the district court. He contends that the OLDC's exercise of jurisdiction over him violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and he seeks (among other relief) declaratory and injunctive relief in the form of an order directing the OLDC to dismiss the case against him. Am. Compl. at 1, ¶¶ 30–34, *Eisenberg v. W. Va. Off. Of Law. Disciplinary Counsel*, No. 19-cv-3006 (D.D.C. Dec. 2, 2019). The district court dismissed the complaint based on principles of *Younger* abstention, i.e., the abstention doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971).

We review the district court's application of *Younger* abstention de novo. *See Statewide Bonding,*

Inc. v. U.S. Dept. of Homeland Sec., 980 F.3d 109, 114 (D.C. Cir. 2020). *Younger* abstention is grounded in considerations of federalism and comity. Under *Younger* abstention, when a party seeks injunctive or declaratory relief in federal court against an ongoing, parallel state proceeding, the federal court will abstain from resolving the suit in recognition of the "longstanding public policy against federal court interference with state court proceedings." *Younger*, 401 U.S. at 43–44; *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). *Younger* abstention applies when, as here, the ongoing state proceedings are state bar disciplinary proceedings. *See Middlesex Cnty Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Younger abstention is called for when three conditions are satisfied: "first, . . . there are ongoing state proceedings that are judicial in nature; second, the state proceedings must implicate important state interests; third, the proceedings must afford an adequate opportunity in which to raise the federal claims." *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518–19 (D.C. Cir. 1989) (citing *Middlesex*, 457 U.S. at 432). All three conditions are met here.

First, the OLDC proceedings are judicial in nature, and Eisenberg does not argue otherwise. *See Middlesex*, 457 U.S. at 433. Eisenberg instead contends that, because the OLDC's actions remain in an investigatory phase, the proceedings do not qualify as ongoing. That is incorrect. A formal complaint (which must be sworn by the complainant) has been made against Eisenberg, and the filing of a formal complaint marks the commencement of West Virginia state bar disciplinary proceedings. *Cf. Middlesex*, 457

U.S. at 433 ("From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint.").

Eisenberg next contends that *Younger* abstention is unwarranted because the OLDC lacks jurisdiction over him under *Sperry v. Florida*, 373 U.S. 379 (1963). That, too, is incorrect. Even assuming a federal plaintiff could overcome *Younger* abstention by demonstrating a jurisdictional problem in the ongoing state proceedings, there is no reason to doubt the OLDC's exercise of jurisdiction over Eisenberg. The West Virginia Rules of Professional Conduct apply to "an attorney who," like Eisenberg, "provides or offers to provide legal services in th[e] state, even where such attorney's practice consists entirely of federal matters." *State ex rel. York v. W. Va. Off. of Disciplinary Counsel*, 744 S.E.2d 293, 301–02 (2013). Such a rule is entirely consistent with *Sperry*, which merely held that federal regulations allowing non-lawyers to appear before the Patent Office preempted state regulation to the contrary. 373 U.S. at 384–87. Indeed, *Sperry* emphasized that "the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives." *Id.* at 402. Here, Eisenberg has not alleged that West Virginia's disciplinary rules conflict with any federal regulations.

Second, the OLDC proceedings "implicate important state interests." *Hoai*, 866 F.2d at 1518. In particular, West Virginia has an important state interest in protecting its citizens from attorney misconduct within its jurisdiction regardless of whether the lawyer in question belongs to the state

bar. "States traditionally have exercised extensive control over the professional conduct of attorneys" to ensure "the protection of the public." *Middlesex*, 457 U.S. at 434. Even if Eisenberg is not a West Virginia bar member and does not regularly practice in the State, the State retains an interest in protecting its citizens from attorney misconduct in its jurisdiction.

Third, Eisenberg has not alleged that state procedures bar presentation of his federal claims. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14–15 (1987). Rather, he contends that the OLDC process affords him an inadequate opportunity to raise his claims, noting that his jurisdictional challenge was rejected without notice or an opportunity to appear before the OLDC investigative panel. But if the OLDC recommends formal charges against Eisenberg, he will have the opportunity to be heard by the West Virginia Supreme Court of Appeals. W. Va. R. of Law. Disciplinary P. 3.10, 3.13. Eisenberg has not suggested that his federal claims would receive inadequate consideration at that stage. In fact, when a similarly situated plaintiff raised an identical jurisdictional argument before the West Virginia Supreme Court of Appeals, the court addressed and resolved the claim. *See York*, 744 S.E.2d at 302–04. *Cf. JMM Corp. v. Dist. of Columbia*, 378 F.3d 1117, 1127 (D.C. Cir. 2004) (finding *Younger* abstention appropriate because, even if federal plaintiff could not raise his federal claims in administrative proceedings, he would have an adequate opportunity to raise them on appeal to the D.C. Court of Appeals).

Finally, this case does not involve "extraordinary circumstances warranting equitable relief" notwithstanding the applicability of abstention

principles. *JMM Corp.*, 378 F.3d at 1127 (quoting *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977)). Eisenberg has not shown that "the pending state action was brought in bad faith or for the purpose of harassing" him. *Id.* As the district court determined, nothing in the record suggests any desire on the part of the OLDC to threaten or intimidate Eisenberg. Nor is the West Virginia provision allowing for disciplinary proceedings against out-of-state attorneys "flagrantly and patently" unconstitutional. *Id.* As a result, the district court was correct to dismiss Eisenberg's complaint based on principles of *Younger* abstention.

Pursuant to D.C. Cir. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

[ENTERED: June 30, 2020]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL D.J. EISENBERG,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-3006 (ABJ)
WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, *et al.*,	)	
Defendants.	)	

ORDER

Pursuant to Federal Rules of Civil Procedure 12 and 58, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Motion to Dismiss the Amended Complaint [Dkt. # 14] is **GRANTED**. It is further

ORDERED that plaintiff's Motion for Leave to File a Second Amended Complaint [Dkt. # 22] is **DENIED** as futile. And it is further

ORDERED that plaintiff's Motion for a Preliminary Injunction [Dkt. # 2] is **DENIED** as moot. This is a final appealable order.

SO ORDERED.

/s/
AMY BERMAN JACKSON
United States District Judge

DATE: June 30, 2020

[ENTERED: June 30, 2020]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL D.J. EISENBERG,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-3006 (ABJ)
WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff Michael D.J. Eisenberg, a lawyer, has sued the West Virginia Office of Lawyer Disciplinary Counsel ("OLDC"); Rachael L. Fletcher Cipoletti, the Chief Disciplinary Counsel of the OLDC who is named in her personal and official capacity; and Jessica H. Donahue Rhodes, a lawyer at the OLDC who is also named in her personal and official capacity. Am. Compl. [Dkt. # 13] ¶¶ 3–6. Eisenberg objects to the defendants' efforts to investigate a complaint that was lodged against him by a client, a West Virginia resident who alleged that he violated the West Virginia Rules of Professional Conduct. *See generally* Am. Compl. He submits that the defendants' actions were arbitrary, capricious, contrary to federal law, and unsupported by substantial evidence. Am. Compl. ¶¶ 11, 26. In

particular, he alleges that defendants have violated the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and that they have intentionally caused him emotional distress. Am. Compl. at 1. He seeks injunctive relief in the form of a Court order requiring defendants to dismiss the pending West Virginia matter, as well as declaratory relief and other forms of relief. Am. Compl. ¶¶ 30–34. Defendants have moved to dismiss the amended complaint on the grounds that the Court is precluded from entertaining the case under the *Younger* abstention doctrine. Defs.' Mot. to Dismiss the Am. Compl. [Dkt. # 14] ("Defs.' Mot."); Defs.' Mem. in Supp. of Defs.' Mot. [Dkt. # 14-1] ("Defs.' Mem."). The Court agrees that the doctrine applies, and it will decline to intervene in pending state bar disciplinary proceedings and dismiss this case.[1]

BACKGROUND

Before May 21, 2019, plaintiff, an attorney based in Washington, D.C., was retained by a West Virginia resident to represent the Resident in a matter before a federal agency. Am. Compl. ¶¶ 3, 7, 9. In the course of the representation, plaintiff appeared before a federal agency that was located in West Virginia. Am. Compl. ¶ 9.

On or about May 21 and May 23, 2019, defendant Rhodes contacted plaintiff to inform him that the Resident and her husband had filed a complaint against him with the West Virginia Office

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[1] Because the Court will dismiss this case based on the *Younger* doctrine, it does not need to take up defendants' other objections to the complaint.

of Lawyer Disciplinary Counsel ("OLDC"),[2] a West Virginia State government agency. Am. Compl. ¶¶ 4, 11. When plaintiff inquired with Rhodes about the OLDC's jurisdiction over an attorney who had never been a member of the West Virginia State Bar, she responded by citing *State Ex. Rel. York v. W.Va. Office of Disc. Counsel*, 744 S.E.2d 293 (W. Va. 2013), as a case that supported what plaintiff describes as "her alleged position." Am. Compl. ¶¶ 12–14.

After reviewing the case, plaintiff informed Rhodes that in his view, the case did not apply because: "a) [plaintiff] does *not* maintain an office in West Virginia; b) [plaintiff] does *not* regularly conduct business in West Virginia; c) [plaintiff] does *not* practice Patent Law[] in West Virginia, and; . . . d) [plaintiff] does *not* practice in West Virginia agencies, state or federal courts." Am. Compl. ¶ 15. In response, according to the complaint, Rhodes "merely repeated Rule 8.5 of the West Virginia Rules of Professional Conduct ("Rule 8.5")." Am. Compl. ¶ 16.

From on or about September 30, 2019, plaintiff communicated with defendant Cipoletti at the OLDC to "explain the situation" and "discuss the law and the facts." Am. Compl. ¶ 17. Plaintiff "reminded . . . Cipoletti that this matter falls under *Sperry v. Florida*, 373 U.S. 379 [] (1963)," and he transmitted his previous communications with Rhodes. Am. Compl. ¶¶ 18–19. Cipoletti allegedly responded by repeating Rule 8.5 without commenting on plaintiff's position. Am. Compl. ¶ 20. When plaintiff asked for

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[2] The Court notes that the proper name of the agency is the Office of Disciplinary Counsel not the Office of Lawyer Disciplinary Counsel. *See* Office of Disciplinary Counsel, http://www.wvodc.org/ (last visited June 23, 2020).

Cipoletti's response position regarding his filing a preliminary injunction, Cipoletti purportedly responded, "how could she provide her position when she had yet received the 'injunction?'" Am. Compl. ¶¶ 21–22.

Plaintiff filed the original complaint in this matter, along with a motion for a preliminary injunction, on October 7, 2019. Compl. [Dkt. # 1]; Mot. for Prelim. Injunction [Dkt. # 2]. Defendants moved to dismiss on November 8, 2019. *See* Def.'s Mot. to Dismiss [Dkt. # 8]. On December 2, 2019, plaintiff filed the Amended Complaint. He seeks declaratory and injunctive relief in the form of an order directing the defendants to dismiss the OLDC case, among other forms of relief. *See* Am. Compl. ¶¶ 30–34. Defendants moved to dismiss on December 16, 2019, Defs.' Mot., and the matter is fully briefed.[3]

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal citation omitted), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979); *see also Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011), quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (applying principle to a Rule 12(b)(1) motion). Nevertheless, the Court need not accept

[3] *See* Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss [Dkt. # 20] ("Pl.'s Opp."); Defs.' Reply in Supp. of Defs.' Mot. to Dismiss [Dkt. # 24] ("Defs.' Reply").

inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (rule 12(b)(6) case); *Food and Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (rule 12(b)(1) case).

I. Subject Matter Jurisdiction

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction, and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). "[B]ecause subject-matter jurisdiction is 'an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

When considering a motion to dismiss for lack of jurisdiction, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court "is not limited to the allegations of the complaint." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, "a court

may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

II. Failure to State a Claim

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In *Iqbal*, the Supreme Court reiterated the two principles underlying its decision in *Twombly*: "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 678–79, citing *Twombly*, 550 U.S. at 555–56.

A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678, citing *Twombly*, 550 U.S. at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*, quoting *Twombly*, 550 U.S. at 556. A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *id.*, quoting *Twombly*, 550 U.S.

at 555, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*, citing *Twombly*, 550 U.S. at 555.

When considering a motion to dismiss under Rule 12(b)(6), the Court is bound to construe a complaint liberally in the plaintiff's favor, and it should grant the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), citing *Schuler*, 617 F.2d at 608. Where the action is brought by a *pro se* plaintiff, a district court has an obligation "to consider his filings as a whole before dismissing a complaint," *Schnitzler v. United States*, 761 F.3d 33, 38 (D.C. Cir. 2014), citing *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999), because such complaints are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *See Kowal*, 16 F.3d at 1276; *see also Browning*, 292 F.3d at 242. In ruling upon a motion to dismiss for failure to state a claim, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002), citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624–25 (D.C. Cir. 1997).

ANALYSIS

I. The *Younger* Doctrine

The *Younger* doctrine requires that "except under special circumstances," a federal court should not "enjoin pending state court proceedings." *Younger v. Harris*, 401 U.S. 37, 41 (1971); *see Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626–27 (1986) (extending *Younger* to a pending state administrative proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975) (extending *Younger* to pending civil state court proceedings). The doctrine is based upon principles of equity and comity, *see Younger*, 401 U.S. at 43–44, and it precludes federal intervention where three criteria are met: 1) there are ongoing state proceedings that are judicial in nature, 2) the state proceedings implicate important state interests, and 3) the proceedings afford an adequate opportunity to raise the federal claims. *Hoai v. Sun Ref. Mktg. Co.*, 866 F.2d 1515, 1518 (D.C. Cir. 1989), citing *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982). Extraordinary circumstances may supply grounds for a federal court to intervene when the state action was brought in bad faith or where a state statute is flagrantly unconstitutional *JMM Corp. v. Dist. of Columbia*, 378 F.3d 1117, 1127 (D.C. Cir. 2004), citing *Younger*, 401 U.S. at 41, 53–54.

The Supreme Court has reasoned that the *Younger* doctrine applies to noncriminal judicial proceedings, including pending administrative proceedings where important state interests are involved. *See Moore v. Sims*, 442 U.S. 415, 423 (1979); *Middlesex*, 457 U.S. at 434. The Court has specifically

extended this reasoning to cover to state bar disciplinary proceedings. *See Middlesex*, 457 U.S. at 434.

In *Middlesex*, the Court held that state bar disciplinary proceedings underway in New Jersey against a New Jersey-licensed attorney constituted a "judicial" action because the Supreme Court of New Jersey, which was vested with "the authority to fix standards, regulate admissions to the bar, and enforce professional discipline among members of the bar," recognized the "local District Ethics Committees . . . as the arm of the court in performing the function of receiving and investigating complaints and holding hearings." 457 U.S. at 433. The Court found that the State had "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses," and it recognized that "[s]tates traditionally have exercised extensive control over the professional conduct of attorneys," because "[t]he judiciary as well as the public is dependent upon professional ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Id*. at 434–35.

The Court also addressed the respondent's claim that a federal court should hear the matter because he had no opportunity to raise federal constitutional claims in the state disciplinary proceedings. It found that because the respondent had "failed to respond to the complaint filed by the local Ethics Committee," and the record did not indicate that the members of the Ethics Committee would have refused to consider a constitutional claim, it was "difficult to conclude that there was no adequate opportunity for respondent [] to raise his constitutional

claims." *Middlesex*, 457 U.S. at 435–36. The Court reiterated its instruction in *Younger* that "'the accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Id*. at 435, quoting *Younger*, 401 U.S. at 45.

Since *Middlesex*, the D.C. Circuit has upheld a district court's invocation of the abstention doctrine in cases involving an action by the District of Columbia Bar, where an appellant "has not demonstrated changed or extraordinary circumstances that would warrant federal intervention in the state court proceedings." *Lawrence v. Carlin*, No. 13-7017, 2013 WL 6801204, at *1 (D.C. Cir. Dec. 11, 2013). And courts in this district have held that boards of professional responsibility created by state courts, have "inherent power over members of the legal profession." *Ford v. Tait*, 163 F. Supp. 2d 57, 65 (D.D.C. 2001) (internal quotation omitted); *see also Lawrence v. Carlin*, 541 F. Supp. 2d 189, 193 (D.D.C. 2008). In a case similar to this one, a court in this district also abstained from intervening in a state bar proceeding in Florida against an attorney who was based in the District of Columbia. *See Richardson v. The Florida Bar*, Civ. Action No. 90-0984, 1990 WL 116727, at **1, 4 (D.D.C. May 15, 1990).

II. Application of the *Younger* Doctrine and its progeny to this case

To determine whether defendants have properly invoked the abstention doctrine as grounds to dismiss a plaintiff's claims, a court must undertake the three-part analysis set forth by the Supreme Court in *Middlesex*: first it must determine if there

are ongoing state proceedings that are judicial in nature, second it must consider whether the state proceedings implicate important state interests, and finally, it must be satisfied that the proceedings afford an adequate opportunity to raise the federal claims. *Middlesex*, 457 U.S. at 432.

With respect to the first question, the West Virginia OLDC proceeding is judicial in nature. Like the District Ethics Committees in *Middlesex*, the Lawyer Disciplinary Board in West Virginia was established by the Supreme Court of Appeals of West Virginia

> to investigate complaints of violations of the Rules of Professional Conduct promulgated by the Supreme Court of Appeals to govern the professional conduct of those admitted to the practice of law in West Virginia *or any individual admitted to the practice of law in another jurisdiction who engages in the practice of law in West Virginia* and to take appropriate action in accordance with the provisions of the Rules of Lawyer Disciplinary Procedure.

W. Va. R. of Law. Disc. P. 1 (emphasis added). Under Rule 2 of the West Virginia Rules of Lawyer Disciplinary Procedure, the Investigative Panel of the Lawyer Disciplinary Board is charged with determining "whether probable cause exists to formally charge a lawyer with a violation of the Rules of Professional Conduct," W. Va. R. of Law. Disc. P. 2, and pursuant to Rule 3, "[t]he Hearing Panel . . . shall conduct hearings and make findings of fact,

conclusions of law, and recommendations of lawyer discipline to the Supreme Court of Appeals on formal charges filed by the Investigative Panel." W. Va. R. of Law. Disc. P. 3. In addition, Rule 8.5 of the West Virginia Rules of Professional Conduct specifically provides that "[a] lawyer not admitted in [West Virginia] is also subject to the disciplinary authority of the jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." As was the case in *Middlesex*, these rules show that the Supreme Court of West Virginia has conferred on the OLDC the power to carry out "judicial" actions to ensure that attorneys who practice in West Virginia abide by that state's professional rules.

And the case here is certainly ongoing. According to the complaint, the OLDC complaint was filed on or about May 21, 2019, and the OLDC has issued an order directing plaintiff to respond. *See* Am. Compl. ¶¶ 11, 23. The whole point of the lawsuit is to have this Court direct the defendants to "dismiss their alleged case," Am. Compl. ¶ 32, so the complaint is premised on the fact that the case is ongoing. The first prong of the test is, therefore, met.

With respect to the second prong of the test, whether the proceedings implicate important state interests, Comment One to Rule 8.5 states that "[e]xtension of the disciplinary authority of the jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction." And both the Supreme Court in *Middlesex* and courts in this district have found that ensuring that practicing attorneys abide by the ethical rules in the jurisdictions where they practice is a significant state interest. *See*

Middlesex, 457 U.S. at 434; *Lawrence*, 541 F. Supp. 2d at 193; *Richardson*, 1990 WL 116727, at *4. West Virginia shares that same interest in this case.

So the Court will move on to the final step in the test: assessing whether plaintiff is afforded an adequate opportunity to raise his federal claims in the pending state proceeding. Importantly, although the OLDC is charged with investigating complaints of attorney misconduct, holding hearings, and making findings of fact and conclusions of law, it ultimately does not have the power to make final determinations about formal charges against attorneys. *See* W. Va. R. of Law. Disc. P. 3. Instead, that power falls to the Supreme Court of Appeals. *See id.* (explaining that the Hearing Panel of the Lawyer Disciplinary board "shall . . . make recommendations of lawyer discipline to the Supreme Court of Appeals on formal charges filed by the Investigative Panel."). Indeed, cases from the Supreme Court of Appeals reinforce that "the exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals." *State ex rel. York v. W. Va. Office of Disciplinary Counsel*, 744 S.E.2d 293, 298 (2013); *see also Lawyer Disciplinary Bd. V. Allen*, 479 S.E.2d 317, 324 (1996) (holding that attorneys who solicit clients within West Virginia but are not barred in and do not practice in the state are subject to discipline by the Court). And *Middlesex* instructs that "[m]inimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." 457 U.S. at 431.

Like the claimant in *Middlesex,* plaintiff has not yet answered, and he has not even tried to assert

a constitutional claim. Nor has he alleged any facts to show that if the OLDC recommended action against him, he would be precluded from presenting constitutional arguments to the West Virginia Supreme Court of Appeals. For those reasons, the Court finds based on the information before it that plaintiff's right to raise his federal claims in West Virginia is adequately protected.

III. *Younger* exceptions

In *Younger*, the Supreme Court advised that there may be "extraordinary circumstances" in which a plaintiff will suffer irreparable injury by being foreclosed from obtaining injunctive relief in federal court. 401 U.S. at 53. And the D.C. Circuit has explained that "[s]uch extraordinary circumstances include situations in which 'there is a showing of bad faith or harassment by state officials . . . or where the state law to be applied . . . is flagrantly and patently violative of express constitutional prohibitions.'" *JMM Corp.*, 378 F.3d at 1122 (D.C. Cir. 2004), quoting *Trainor v. Hernandez*, 431 U.S. 434, 443 n.7 (1977).

Plaintiff alleges that defendants should be held liable for "harassing and intimidating [him] by mailing threatening communications and causing substantial emotional distress." Am. Compl. ¶ 29. But neither the OLDC officials' tone nor the fact that plaintiff understandably found the pendency of this investigation to be stressful is relevant to the availability of the *Younger* exception; the Supreme Court has instructed that harassment is found when a court determines that the state proceeding "is *motivated by* a desire to harass." *Huffman*, 420 U.S. at 611 (1975) (emphasis added). Here, plaintiff has

failed to allege any facts that give rise to a plausible inference that defendants – who allegedly received the complaint brought by plaintiff's client and undertook to process it – were motived by a desire to harass him. In the communications recounted in the complaint, the defendants are quoted as seeking plaintiff's response in accordance with OLDC procedures and responding to plaintiff's inquiries about the scope of their jurisdiction. So plaintiff has not identified any basis to invoke any exception to the *Younger* doctrine.

CONCLUSION

For the foregoing reasons, the Court finds that the *Younger* doctrine applies to this case and plaintiff has failed to demonstrate any circumstances that would warrant the Court's intervention in the state proceedings. For that reason, the Court will abstain for reasons equity and comity and dismiss the action.[4] A separate Order will issue.

/s/
AMY BERMAN JACKSON
United States District Judge

DATE: June 30, 2020

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[4] Based on the Court's determination that the *Younger* abstention doctrine applies to this case, defendant's Motion for Leave to File a Second Amended Complaint [Dkt. # 22] is denied as futile. *See Atchinson v. District of Col*umbia, 73 F.3d 418, 425-26 (D.C. Cir. 1995) ("futility of the amendment" is one of the factors a court must consider in evaluating whether to grant leave to amend). *See also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) ("Courts may deny a motion to amend as futile . . . if the proposed claim would not survive a motion to dismiss.").

[ENTERED: May 26, 2021]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-7070 **September Term, 2020**
1:19-cv-03006-ABJ
Filed On: May 26, 2021

Michael D.J. Eisenberg,
Appellant

v.

West Virginia Office of Disciplinary Counsel, "OLDC", also known as Office of Lawyers Disciplinary Counsel, et al.,
Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Kathryn D. Lovett
Deputy Clerk