

No. 26-336

In the Supreme Court of the United States

JOHN C. EASTMAN,

Petitioner,

v.

STATE BAR OF CALIFORNIA,

Respondent.

*On Petition for Writ of Certiorari
to the Supreme Court of California*

**Brief of *Amici Curiae* Profs. Rebecca Roiphe,
Nadine Strossen, and Eugene Volokh
in Support of Petitioner**

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Interest of the *Amici Curiae*¹

Rebecca Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School. She has written extensively about the history of the profession and legal ethics, as well as on professional speech and lawyers' First Amendment rights. She was retained as an expert witness by John Eastman in the California bar proceedings; she was not hired to represent Eastman, but rather to provide an impartial expert opinion. The court did not consider her testimony because it concluded that her expertise was on a question of law, which was within the State Bar Court's purview. *In the Matter of John Charles Eastman*, Case No. SBC-23-O-30029-YDR, Order Granting Motion in Limine (Cal. State Bar Ct., Hearing Dep't, May 23, 2023). Portions of this brief are adapted from her article, *Why Courts Should Not Discipline Trump's Lawyers*, 46 Cardozo L. Rev. 1817 (2025).

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¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have received notice of the planned filing at least 10 days before the deadline.

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Summary of Argument

The last ten years have seen many attempts to punish or compel professionals' speech in the service of broader ideological goals. This Court rejected two such attempts, in *NIFLA v. Becerra*, 585 U.S. 755 (2018), and in *Chiles v. Salazar*, 607 U.S. 627 (2026). It should likewise consider the constitutionality of the punishment in this case—a punishment that, if left unreviewed, portends still more such attempts.

Petitioner John Eastman was disbarred in large part based on his public political statements. The State Bar concluded those statements were false, and therefore sanctionable. This raises an important and unresolved question of First Amendment law: When can lawyers be stripped of their livelihoods based on public political speech that is unrelated to any pending judicial proceeding and that is fully protected when said by ordinary Americans?

That question is especially important because it can arise—and indeed is likely to arise—in many cases in the future. “Tit for tat” may well be part of the nature of humanity. See Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 Science 1390 (1981); Herbert Gintis, Samuel Bowles, Robert Boyd & Ernst Fehr, *Explaining Altruistic Behavior in Humans*, 24 *Evol. & Hum. Beh.* 153, 154 (2003). It certainly seems to be part of modern American politics.

The mode of analysis in this case thus seems likely to proliferate in decisions both by deep blue state bars and deep red state bars. It seems likely to arise as to people involved in contentious disputes about federal elections, state candidate elections, state ballot measures, and ideological debates more broadly. In all these contexts, allegations that one's opponents are lying are par for the course: Indeed, another facet of human nature is to assume the worst motivations of one's adversaries and the best motivations of one's allies.

In the past, state bars have sought to punish people they viewed as left-wing extremists who endangered the established constitutional order. See, *e.g.*, James E. Moliterno, *Politically Motivated Bar Discipline*, 83 Wash. U. L.Q. 725 (2005). This case is a reminder that the same approach is being revived today as to lawyers whom some state bars view as right-wing dangers. And, if the decision endures, it will likely be followed by many other such decisions. It is important that this Court make clear what rules govern this area of the law, so that they can be applied as evenhandedly as possible throughout the country.

To be sure, this case also involves other allegations of impropriety, such as alleged false statements to courts, to Eastman's own client (President Trump) and his team, and to Vice President Pence and his team. This *amicus* brief does not opine on those matters. As many cases (see Part IV) have made clear, if a government sanction—whether a criminal sentence, civil liability, dismissal from government employment, or disbarment—rests even in part on constitutionally protected speech, it cannot stand unless the government can show that it would have reached the same result absent the protected speech.

For this reason, this Court should grant certiorari to consider when lawyers can be disbarred for their public political speech.

Argument

I. Eastman’s public statements would have been protected by the First Amendment if said by an ordinary citizen

If John Eastman were not a lawyer, his public statements about the election would have been protected even if they were knowingly false. *New York Times v. Sullivan* expressly held that even deliberate lies about the government cannot be punished, especially on the theory that they damage people’s confidence in the government or its processes (which would logically include elections): “For good reason, ‘no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.’” 376 U.S. 254, 291 (1964) (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601 (1923)). Yet the bar court justified the sanction of disbarment in part precisely because of what it saw as damage to the reputation of the government: Eastman’s “false narrative,” the court stated, “resulted in the undermining of our country’s electoral process, reduced faith in election professionals, and lessened respect for the courts of this land.” Pet. 122a.

Likewise, in *United States v. Alvarez*, 567 U.S. 709 (2012), this Court held that a federal law that criminalized lying about military honors violated the First Amendment. And this was true for a sort of statement—claims that the speaker received a particular

military medal—that was about as objectively verifiable and ideologically neutral as statements can be. There was little risk that the Stolen Valor Act would be interpreted by prosecutors, judges, and jurors differently for Democrats than for Republicans, or that it would unduly chill people’s speech on important political questions. Governmental evaluation of statements such as Eastman’s is far more fraught with peril than decision-making about statements such as Alvarez’s.

Indeed, even the five Justices in *Alvarez* who did not sign on to the plurality opinion agreed that the government cannot be trusted with punishing supposedly false speech about broad “matters of public concern.” Justice Alito’s three-Justice dissent reasoned,

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today’s accepted wisdom sometimes turns out to be mistaken. And in these contexts, “[e]ven a false statement may be deemed to make a valuable contribution

to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? . . . [T]he potential for abuse of power in these areas is simply too great.

567 U.S. at 751-52 (paragraph break added) (Alito, J., dissenting). Justice Breyer’s two-Justice concurrence agreed with the dissent that “there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech” and that therefore “[l]aws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny.” *Id.* at 731-32 (Breyer, J., concurring in the judgment). The plurality Justices had no occasion to reach this question, because they thought even much narrower and politically uncontroversial false statements, such as claims about military medals, were fully constitutionally protected. But it seems that the four Justices in the plurality would have agreed with the dissent and the concurrence on broader statements as well.

And this protection, the concurrence and dissent agreed, even applies to statements that a factfinder decides were deliberate lies. Yet the California State Bar

Court concluded that Eastman’s speech could be punished even if it were *negligently* false. See Pet. 94a (stating that “we examine Eastman’s conduct pursuant to an objective standard, not a subjective one,” and finding Eastman culpable because his statement about a county government’s ballot counting process “was not objectively reasonable”); *id.* at 103a (“in balancing an attorney’s First Amendment rights outside of the courtroom with the public protection components of the attorney disciplinary process, the attorney’s conduct is assessed under an objective, reasonableness standard”).

Likewise, the Court reasoned that Eastman’s statements were based on “little intellectual rigor” and did not sufficiently rely on “true experts.” *Id.* at 119a. Yet the logic of the decisions above shows that government officials cannot punish criticisms of government processes on the grounds that the critics’ analyses were not adequately intellectually rigorous, or that the analyses did not rely on those people that the government officials view as true experts. None of this diminishes the genuine importance of rigor or expertise, but it highlights Justice Alito’s observation that “it is perilous to permit the state to be the arbiter of truth” in such matters.

In highly charged contexts, like politics, people tend to view facts through a partisan lens; government regulators, including bar officials, are no exception. Indeed, they may be more likely to have a biased view—whether because of self-interest or unconscious bias—because of their own connection to politics or membership in a particular stratum of the legal profession. Regulators with certain political views may thus be quick to designate the statements of their opponents

as false and pursue the speakers. Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 Wash. U. J.L. & Pol’y 37, 119 (2022). As Justice Alito noted, “[T]he potential for abuse of power in these areas is simply too great.”

And even if most observers agreed that Eastman lied—something that Eastman of course continues to dispute—giving this power to state bar regulators would open the door to other efforts to suppress unpopular speech. And no doubt at some point the targeted speech will be useful, productive opposition. “Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today’s accepted wisdom sometimes turns out to be mistaken.” 567 U.S. at 752 (Alito, J., dissenting). Without First Amendment protection, the public would be powerless in the face of such an effort to control public discourse.

Indeed, this case helps illustrate Justice Holmes and Brandeis’s conclusions that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” and that “the fitting remedy for evil counsels is good ones.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). People made claims about fraud in the 2020 election. These claims were debated, and were generally rejected through both the legal system and public discussion. To be sure, not everyone was persuaded that the claims were false—but counterspeech and free public debate is not a *perfect* remedy or test of truth, just the *best* test, and the one most *fitting* to a democracy.

In particular, free speech and counterspeech about such matters is better for a democracy than “silence coerced by law—the argument of force in its worst form.” *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring). Free discussion tends to produce, however imperfectly, more trust in the outcome of the discussion. Coercive suppression of one side tends to produce more suspicion.

“[F]ear breeds repression,” “repression breeds hate,” “hate menaces stable government,” and “the path of safety lies”—not perfectly, but more successfully than the alternatives—“in the opportunity to discuss freely supposed grievances and proposed remedies.” *Id.* at 375. However much we may regret the degree to which our country is riven by partisan strife, that strife would be even greater if one side believed that a supposed consensus had been achieved through coercion rather than persuasion.

II. Lawyers’ public speech remains fully protected, unless it risks “materially prejudicing an adjudicative proceeding” in which the lawyer is involved as a lawyer

Eastman’s speech as a citizen is thus fully protected, and it remained so against bar discipline as well as against fines or civil liability. The California bar court’s decision argued, though, that a lawyer could be disbarred for such speech, precisely because he is a lawyer. See Pet. 100a (holding that “The First Amendment rights of attorneys” “must be calibrated to align with the unique role attorneys play in the administration of justice”).

Yet as *Chiles*, *NIFLA*, and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), make clear, profession-

als retain broad First Amendment rights even when they are speaking to clients. *A fortiori*, they even more clearly retain such rights when speaking to the public.

“As *Holder* indicates, . . . the First Amendment’s protections extend to licensed professionals much as they do to everyone else. It’s a point we have since discussed at length in *NIFLA*.” *Chiles*, 607 U.S. at 642-43. And this is especially important as to lawyers’ speech on the great political and legal debates facing the nation, because the perspective of lawyers—based on their experience with and study of the legal system—is often so essential to such debates.

To be sure, this Court has “acknowledged two kinds of content-based restrictions that can apply to professional speech without triggering strict scrutiny.” *Id.* at 643:

First, courts generally deploy less searching review when faced with laws that require speakers to disclose only factual, noncontroversial information in commercial speech. Second, laws regulating conduct in ways that incidentally sweep in speech may also generally avoid strict scrutiny. But, we stressed, neither [category] turns on the fact that a licensed professional happens to be speaking.

Id. (cleaned up). Eastman’s public statements do not fall into either of these two categories; instead, they constitute core political speech.

This Court has also held that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than” strict scrutiny, and, in particular, that it can be restricted to prevent speech that poses a “substantial likelihood of material

prejudice” to the proceeding. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074, 1075 (1991). But unlike in *Gentile*, Eastman’s words ran no risk of interfering with an ongoing proceeding, because there was no “pending case[.]”

Rather, Eastman’s speech was classic political commentary critical of some government actors (though in defense of another government actor). Such speech by lawyers must remain constitutionally protected against government sanctions that destroy the speaker’s livelihood, just as ordinary citizens’ speech is protected against civil fines and damages liability. *Green & Roiphe, supra*, at 42-66 (arguing that there is no reason to treat lawyers differently from others when the administration of justice is not at issue).

III. Eastman’s speech did not lose its protection on the theory that it sought to undermine democratic processes

Nor could Eastman’s speech be sanctioned on the theory that it sought “to actively undermine the results of an election to the most powerful office in the United States with the goal of delaying or invalidating the lawful installation of his client’s electoral opponent and thereby keep his client in office,” Pet. 3a. The whole question in the dispute was what the true results of the election were. Eastman had a right to make the argument that certain government processes failed to properly determine those results.

More broadly, lawyers do not have a general obligation to advance democracy; instead, they protect our democratic system by engaging in adversarial debate, representing clients diligently within the bounds of the law. Indeed, because regulators and critics have their

own definitions of democracy that are inevitably shaped by political bias, relying on such definitions can lead to unconstitutional sanctions of lawyers for legitimate advocacy or political speech. Whatever one thinks of these lawyers or their clients, many of these sanctions threaten to chill political speech; deter lawyers from representing controversial clients; and invite regulators to act when there is a very real danger that their own political bias will dictate the result. This potential downside is, as a structural matter, a greater threat to democracy than the lawyers' conduct and speech itself. See generally Roiphe, *supra*, at 1819-22.

Indeed, during the McCarthy era, state bar associations followed the lead of federal authorities and targeted lawyers who represented communist or socialist clients for what was, in essence, their failure to uphold "constitutional governance." See, e.g., *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957). The National Lawyers Guild, an organization of leftist lawyers, was nearly destroyed on such grounds. Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 231-62 (1976); James E. Moliterno, *Politically Motivated Bar Discipline*, 83 Wash. U. L.Q. 725 (2005) (cataloging the politically motivated disciplinary proceedings in American history). While some of these lawyers may have posed a threat to democracy, most did not. Civil rights lawyers, anti-poverty lawyers, and lawyers who protected detainees in the war against terror faced similar threats. Moliterno, *supra*, at 741-44. The ideological position of the bar regarding unpopular defendants may have shifted, but the underlying danger has not.

Funneling challenges to accepted understandings of the Constitution and democracy into peaceful debate—in courtrooms, in legislatures, and before the public—is the safest way to ensure the longevity of American institutions. And giving lawyers leeway to challenge the status quo is the only way to accomplish that. This means that we must tolerate and give wide latitude to lawyers in politically charged contexts, even when the positions the lawyers take on behalf of clients appear to us to be socially dangerous and destructive. It is far more dangerous to stifle dissent than to let it make its way through the justice system and the political system.

IV. A sanction that rests even in part on protected speech is constitutionally impermissible

As the Introduction noted, the *amici* focus only on Eastman’s speech to the public and take no position as to his speech to the Pence or Trump camps, or his statements in legal proceedings. But if this Court grants certiorari and concludes that Eastman’s speech to the public was constitutionally protected, that is a sufficient reason to vacate the judgment below.

As this Court noted in *Street v. New York*, even if a conviction “could have been based upon *both* [defendant’s constitutionally protected] words and his [potentially unprotected] act,” the conviction must be reversed. 394 U.S. 576, 587 (1969). When the sentence is “a single penalty,” “unless the record negates the possibility that the conviction was based on both alleged violations,” “[t]he judgment . . . must be affirmed as to both or as to neither.” *Id.* at 588.

[W]hen a single-count indictment or information charges the commission of a crime by virtue of the defendant’s having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as “intertwined” and have rested the conviction on both together.

Id. This reasoning is directly applicable to this case, because the sanction of disbarment was indeed based on Eastman’s “intertwined” actions—the public speech as well as the private speech and the courtroom filings. Pet. 111-12a. See also *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (reversing a contempt conviction because the Court had “no basis to conclude with any degree of certainty” that the conviction “rests solely on” unprotected speech); *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970) (“since petitioners’ convictions may have rested on an unconstitutional ground, they must be set aside”).

To be sure, unlike in *Street*, the decision below considered a multiple-count accusatory instrument. But the ultimate decision, a disbarment, rested on the aggregate of all of Eastman’s conduct, with no separate sanction indicated for each count. The bar court stressed that it “[did] not compartmentalize Eastman’s conduct into isolated events when examining the record for evidence of his knowledge and intent.” Pet. 19a. And its discussion of the sanction expressly referred to Eastman’s public speech as well as his advice to his client, his negotiation with Pence, and his statements in court. Pet. 120a.

The reasoning of *Street* applies to civil cases as well. Thus, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the NAACP and others organized a boycott of white-owned businesses in Claiborne County, demanding various concessions. The businesses sued on a tort theory of intentional interference with prospective business advantage, pointing to various behaviors that interfered with their business—political statements exhorting solidarity, threats of social ostracism of boycott violators, threats of violence, and even actual violence. The state courts held for the businesses, concluding that, put together, the behavior was indeed tortious.

The Court reversed. Violence, the Court held, was indeed constitutionally unprotected, but much of the other behavior—including threats of social ostracism—was constitutionally protected speech. And because “the nonviolent elements . . . are entitled to the protection of the First Amendment,” they did not lose this protection just because of the presence of unprotected behavior. *Id.* at 915. While the violent actors might have been subjected to liability based only on the unprotected behavior, liability could not constitutionally be imposed based on a combination of the unprotected behavior and the protected speech.

Likewise, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court made clear that the First Amendment is violated whenever protected speech makes a difference in deciding a speaker’s fate. If protected speech is a “motivating factor” in a government decision—even when other factors are also present—the decision is unconstitutional unless the government shows that it would have reached the same decision without considering

the speech. *Id.* at 287. That is true for the decision to fire someone from a particular job; it must be equally true for the decision to completely eject the person from an entire profession.

Conclusion

Decisions to disbar lawyers based on their political advocacy are likely to arise again, both from the left and from the right. American democracy needs a clear rule for when, if ever, such decisions are permissible. This Court should grant certiorari in this case to help set forth such a rule.

Respectfully submitted,

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