

No. 26-336
IN THE
Supreme Court of the United States

JOHN C. EASTMAN,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

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

**BRIEF OF THE OVERSIGHT PROJECT
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

JEFFREY BOSSERT CLARK, SR.
Counsel of Record
JOSEPH SCHMITZ
ANTHONY CHARLES LICATA
THE OVERSIGHT PROJECT
211 North Union Street
Alexandria, VA 22314
(202) 279-1396
Jeff@itsyourgov.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. In Light of Exclusive Federal Jurisdiction Over This Case and Eastman’s Presidential Pardon, Certiorari Should Be Granted and This Case Should Be Dismissed.	4
A. Under <i>In re Loney</i> , Policing Conduct in Federal Proceedings—and Adjudicating Federal Offenses— Belongs Exclusively to the Federal Sovereign.	4
B. Under <i>Ex Parte Garland</i> , a Presidential Pardon Forbids Disbarment “by Reason of” the Pardoned Offense, and <i>In re Ruffalo</i> Confirms That Disbarment Is Punishment.	8
II. The Decision Below Subverts the Supremacy of the Constitution by Refusing to Apply This Court’s First Amendment Precedents.	13
A. The Supremacy Clause Binds State Disciplinary Tribunals to This Court’s First Amendment Holdings.	13

B.	The Review Department Formalistically Doffed Its Hat to Strict Scrutiny But Then Declined to Apply It.	14
III.	California’s Disciplinary Standards, as Applied, Gave No Fair Notice in a Quasi- Criminal Proceeding Targeting Core Political Speech.	16
IV.	The Decision Below Breaks with the Nation’s History and Tradition of Protecting Lawyers Who Press Contested Claims and Petition the Government.	19
	CONCLUSION.....	23

TABLE OF CITED AUTHORITIES

Page(s)

CASES

<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011)	22
<i>Brown v. Entertainment Merchants Ass’n</i> , 564 U.S. 786 (2011)	15
<i>Bush v. Gore</i> , 531 U.S. 98 (2000) (per curiam)	23
<i>Carlesi v. New York</i> , 233 U.S. 51 (1914)	12
<i>Chiles v. Salazar</i> , 607 U.S. 627 (2026)	9, 14–15
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958)	13
<i>Cummings v. Missouri</i> , 71 U.S. (4 Wall.) 277 (1867)	10
<i>Ex Parte Garland</i> , 71 U.S. (4 Wall.) 333 (1867)	2-3, 4, 8–12
<i>Fitzgerald v. Green</i> , 134 U.S. 377 (1890)	8
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	15
<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030 (1991)	16
<i>In re Abrams</i> , 689 A.2d 6 (D.C. 1997) (en banc)	11–12
<i>In re Loney</i> , 134 U.S. 372 (1890)	2, 4–5, 7–8
<i>In re Ruffalo</i> , 390 U.S. 544 (1968)	3, 6, 8–9, 16–19
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	13
<i>McDonald v. Smith</i> , 472 U.S. 479 (1985)	22

<i>NAACP v. Button</i> , 371 U.S. 415 (1963) ..	13, 15, 21–22
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	15
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	14, 20
<i>NIFLA v. Becerra</i> , 585 U.S. 755 (2018).....	14
<i>Sacher v. Ass’n of the Bar of N.Y.C.</i> , 347 U.S. 388 (1954)	21
<i>Sperry v. Florida ex rel. Florida Bar</i> , 373 U.S. 379 (1963)	6
<i>State v. Eastman</i> , No. 23SC188947, slip op. (Ga. Super. Ct. Fulton Cnty. Sept. 12, 2024)	8
<i>Texas v. Pennsylvania</i> , No. 22O155 (U.S.).....	5, 18
<i>Webster v. Comm’n for Lawyer Discipline</i> , 704 S.W.3d 478 (Tex. 2024).....	18–19
<i>Woods v. Interstate Realty Co.</i> , 337 U.S. 535 (1949)	12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 2, cl. 1	11
U.S. Const. art. VI, cl. 2.....	3, 6, 10, 13, 16
U.S. Const. amend. I.....	3, 11, 13–16, 20, 22
U.S. Const. amend. VI	20
U.S. Const. amend. XII.....	5, 17
U.S. Const. amend. XIV, § 1	17

STATUTES

3 U.S.C. § 15.....	7, 18
--------------------	-------

18 U.S.C. § 371.....	2, 7, 11–12
18 U.S.C. § 3231.....	7
Act of Jan. 24, 1865, 13 Stat. 424.....	9
Cal. Bus. & Prof. Code § 6068(a).....	17–18
Cal. Bus. & Prof. Code § 6106	8, 17

RULES

S. Ct. R. 8.2	6
S. Ct. R. 37.2	1
S. Ct. R. 37.6	1
Fed. R. Civ. P. 11	6, 17

OTHER AUTHORITIES

1 ANNALS OF CONG. 738 (1789)	22
J. Clark, <i>The Right Finally Gets a Law Firm of Its Own</i> , AMERICAN MIND (Oct. 8, 2026), https://tinyurl.com/3ppcwn72	1
Cong. Rsch. Serv., R43626, <i>The Voting Rights Act of 1965: Background and Overview</i> (July 20, 2015), https://docdepot.itsyourgov.org/document/ 7712c5553809c868a27615f35f119594	10, 21–22
Cong. Rsch. Serv., R48309, <i>Joint Session of Congress for Counting Electoral Votes for President</i> (Dec. 10, 2024), https://docdepot.itsyourgov.org/document/ 887bbcb0e732b5af732809c4ef9fabc5	18, 21

Cong. Rsch. Serv., RL32717, <i>Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress</i> (Dec. 8, 2020), https://docdepot.itsyourgov.org/document/5ce0b6b07b6c7c77761dfd22a4551fbf	7, 18, 21
Alan M. Dershowitz, <i>I Will Defend Any Lawyer Targeted by McCarthyist ‘65 Project,’</i> BREITBART (Mar. 10, 2022)	23
Edward B. Foley, <i>Congress Must Fix This Election Law—Before It’s Too Late</i> , WASH. POST (Dec. 1, 2020)	18
Historical Soc’y of the N.Y. Courts, <i>John Chambers</i> , https://history.nycourts.gov/figure/john-chambers/ (last visited Oct. 9, 2026).....	19–20
John H. Langbein, <i>et al.</i> , HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009)	19–20
Lachlan Markay & Jonathan Swan, <i>Scoop: High-Powered Group Targets Trump Lawyers’ Livelihoods</i> , AXIOS (Mar. 7, 2022), https://tinyurl.com/ybapwa6k	6
Proclamation 6518, <i>Grant of Executive Clemency</i> (Dec. 24, 1992), https://www.presidency.ucsb.edu/documents/proclamation-6518-grant-executive-clemency	22

Proclamation No. 10,989, <i>Granting Pardons for Certain Offenses Related to the 2020 Presidential Election</i> , 90 Fed. Reg. 51,071 (Nov. 14, 2025).....	2, 10–11, 22–23
Kimberly Strawbridge Robinson, <i>Supreme Court Asked to Disbar John Eastman Over Jan. 6 Role</i> , BLOOMBERG LAW (July 28, 2022), https://tinyurl.com/3yhze64m	6
Antonin Scalia, <i>The Rule of Law as a Law of Rules</i> , 56 U. CHI. L. REV. 1175 (1989)	16
THE SUPREME COURT OF THE STATE OF NEW YORK, 1691-1941: EXERCISES UPON THE OCCASION OF THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF ITS FOUNDING (1941)	20
2 Lawrence E. Walsh, <i>Final Report of the Independent Counsel for Iran / Contra Matters</i> (1993), https://docdepot.itsyourgov.org/document/240492b3f9e6c93f02b255a0122be622	11
Samuel Williston, <i>Does a Pardon Blot Out Guilt?</i> , 28 HARV. L. REV. 647 (1915).....	11-12

INTEREST OF *AMICUS CURIAE*¹

The Oversight Project is a Section 501(c)(4) nonprofit organization dedicated to holding government accountable to the people through investigation, education, and legal advocacy. Much of that work concerns government weaponization against citizens for political ends—including “Lawfare” and its professional-discipline variant, “Barfare,” where state or local bar authorities are pressed into service by politicians or NGOs to punish lawyers for the clients they represent and the arguments they make.

In September 2026, The Oversight Project announced its new in-house law firm (The Oversight Project Law Firm) to defend targets of Lawfare, including lawyers facing politically charged disciplinary proceedings. Undersigned Counsel of Record has explained its purpose judged against Anglo-American legal history.²

The Oversight Project has a direct interest in the questions presented. The lawyers it employs and defends must be free to advise clients and press contested constitutional positions in federal forums without fear that a State will later find them culpable

¹ Pursuant to Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made such a monetary contribution. Counsel of record for all parties received timely notice of amicus curiae’s intent to file this brief. *See* S. Ct. R. 37.2.

² *See* J. Clark, *The Right Finally Gets a Law Firm of Its Own*, AMERICAN MIND (Oct. 8, 2026), <https://tinyurl.com/3ppcwn72>.

of federal crimes, quasi-crimes, or other regulatory infractions that no federal court has adjudicated—or will disregard a presidential pardon of the very conduct at issue.

SUMMARY OF ARGUMENT

California disbarred a lawyer for what he advocated to this Court, a federal district court, the Vice President, and the public about a hotly disputed presidential election. Its centerpiece charge goes further still. The State found, by “[c]lear and convincing evidence,” that John Eastman committed a federal felony—conspiracy to defraud the United States in violation of 18 U.S.C. § 371—although no federal grand jury indicted him and no federal petit jury convicted him. 96a-98a nn.87-88, 99a. The President has since pardoned the conduct underlying that charge. Proclamation No. 10,989, 90 Fed. Reg. 51,071 (Nov. 14, 2025). Each feature would warrant review. Together, they make this petition exceptionally important. And because the same advocacy produced no discipline in Texas, Utah, or Georgia, Pet.4-5, only this Court can supply a uniform national ruling.

First, two of this Court’s precedents form a syllogism that disposes of this case. *In re Loney* holds that the power to punish falsehood in a federal proceeding “belongs peculiarly to the government in whose tribunals that proceeding is had.” 134 U.S. 372, 375 (1890). States cannot intrude through prosecutions “instigated by local passion or prejudice.” *Id.* *Ex Parte Garland* holds that a pardon places the offender “beyond the reach of punishment of any kind,” so that excluding him from the bar “by reason of that offence” is forbidden. 71 U.S. (4 Wall.) 333, 381

(1867). And *In re Ruffalo* confirms that disbarment is *punishment*, imposed in “adversary proceedings of a quasi-criminal nature.” 390 U.S. 544, 551 (1968). This case belonged exclusively to the federal sovereign, whose pardon thus controls; it should thus be dismissed. At a minimum, this Court should grant, vacate, and remand in light of the pardon.

Second, the decision below subverts the Supremacy Clause. The Review Department conceded that strict scrutiny governs Eastman’s core political speech, then announced that the standard mattered only “[t]o the extent” it was “relevant.” 102a n.92. State tribunals cannot demote this Court’s First Amendment holdings to optional reading.

Third, California’s open-ended standards—a duty to “support the Constitution and laws” and prohibitions on “moral turpitude”—gave no fair notice that advising a client on a contested reading of the Electoral Count Act (one consistent with then-extant academic scholarship) could end a storied career. In a quasi-criminal proceeding targeting speech, that vagueness is fatal.

Fourth, the decision breaks with tradition running from the *Zenger* Case through Reconstruction, the disputed elections of 1876, 1960, 2000, and the McCarthy era. Our history treats punishing lawyers for their advocacy as a cautionary tale, not a model.

ARGUMENT

I. In Light of Exclusive Federal Jurisdiction Over This Case and Eastman’s Presidential Pardon, Certiorari Should Be Granted and This Case Should Be Dismissed.

The petition’s third question asks whether *Loney* vests jurisdiction over allegedly false statements in federal court filings exclusively in the federal tribunal. Pet.ii. The answer is yes. But the principle reaches further than the petition suggests, and the President’s intervening pardon concretizes its stakes. *Loney* establishes that the federal sovereign alone may police conduct in federal proceedings and adjudicate offenses against the United States. *Garland* establishes that, in that federal domain, a pardon forbids exclusion from the bar by reason of the pardoned offense. Put together, California had no authority to disbar Eastman on this record. Because the jurisdictional objection cannot be waived, Pet.7, this case cleanly presents the issue.

A. Under *In re Loney*, Policing Conduct in Federal Proceedings—and Adjudicating Federal Offenses—Belongs Exclusively to the Federal Sovereign.

Loney arose from a contested election for a seat in the House of Representatives. A witness gave a deposition before a Virginia notary public under the federal statutes governing such contests, and Virginia charged him with perjury. 134 U.S. at 372–74. This Court held that Virginia’s courts lacked jurisdiction and affirmed his discharge on habeas corpus. *Id.* at

376. Although the officer was a state notary, he acted “solely under the authority conferred upon him by congress, and in a matter concerning the government of the United States.” *Id.* at 374. And “the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.” *Id.* at 375. The reason was structural. Witnesses in federal proceedings must be able to testify freely, “unrestrained by legislation of the State, or by fear of punishment in the state courts,” rather than face charges “preferred by a disappointed suitor or contestant, *or instigated by local passion or prejudice.*” *Id.* (emphasis added). Such a witness is accountable “to the United States only.” *Id.*

Every disciplinary count here grew from the same federal soil. Eastman’s engagement covered “federal litigation matters in relation to the 2020 presidential general election, including election matters related to the Electoral College.” 21a. Count Two punished a motion filed in *this Court*, seeking to intervene for the President in an original action, *Texas v. Pennsylvania*, No. 22O155—a motion this Court dismissed as moot. Pet.8; 4a, 21a-24a, 29a-31a, 157a-164a & n.35. Count Four punished a verified complaint filed in federal district court. 4a, 24a-27a, 38a-41a. Counts One, Three, Six, Eight, and Ten punished advice to and advocacy before the Vice President concerning the joint session of Congress—a proceeding created by the Twelfth Amendment and federal statute, which the Review Department itself called “a lawful government function.” 43a-71a, 95a-99a. Counts Five, Seven, and Nine punished public commentary on the same federal controversy. 71a-78a, 86a-95a. No federal court sanctioned Eastman, referred him for discipline,

or even issued a show cause order. Pet.36-37. Federal tribunals hardly lacked tools; they may police filings through Federal Rule of Civil Procedure 11, inherent authority, contempt, and disciplinary referral. Pet.37-38. They used none of them. Nor did this Court, which has its own rule for “conduct unbecoming a member of the Bar.” S. Ct. R. 8.2.³ California nonetheless appointed itself monitor of this Court’s docket.

The Supremacy Clause forbids that arrangement. A State “may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State’s licensing board a virtual power of review over the federal determination” that a person may perform federal functions. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963) (cleaned up). State discipline, moreover, “is not conclusively binding on the federal courts,” which superintend their own bars. *Ruffalo*, 390 U.S. at 547. If the federal sovereign has exclusive authority to judge candor in its own proceedings, a state bar cannot sit in review of what a lawyer told this Court, a federal district court, or the number two federal Executive Branch officer presiding over the Electoral College count.

The structural stakes are enormous. Electoral vote counting is a single national proceeding governed by

³ Indeed, the “65 Project” sought to disbar Eastman in this Court in 2022. Kimberly Strawbridge Robinson, *Supreme Court Asked to Disbar John Eastman Over Jan. 6 Role*, BLOOMBERG LAW (July 28, 2022), <https://tinyurl.com/3yhze64m>. Founder David Brock candidly “told Axios in an interview that the idea is to ‘not only bring the grievances in the bar complaints, but shame them and make them toxic in their communities and in their firms.’” Lachlan Markay & Jonathan Swan, *Scoop: High-Powered Group Targets Trump Lawyers’ Livelihoods*, AXIOS (Mar. 7, 2022), <https://tinyurl.com/ybapwa6k>.

federal law. At the time, Congress prescribed how disputes over electoral votes were to be raised and resolved—by written objections signed by a Senator and a Representative, separate deliberation in each House, and statutory rules for competing certificates. 3 U.S.C. § 15; Cong. Rsch. Serv., RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress* 6–9 (Dec. 8, 2020), <https://tinyurl.com/2xyjhnnb>. If California may adjudicate what a lawyer told the Vice President and Article III courts about that proceeding, so may every other State—each applying its own rules, standards of proof, and politics to the same federal events. *Loney* rejected that prospect for a single contested House seat. 134 U.S. at 375. The case for exclusivity is stronger still when the federal proceeding is the election of the President.

Count One makes the jurisdictional defect unmistakable. The Review Department explained that the hearing judge “found Eastman culpable only for his failure to support the federal criminal prohibition against conspiring to defraud the United States (title 18 U.S.C. § 371),” and that it would “utilize the elements of that federal offense.” 96a. It then found an agreement, obstruction of a federal function by dishonest means, and overt acts—by “[c]lear and convincing evidence.” 97a-99a & n.87. Congress, however, has given the federal district courts “original jurisdiction” over “all offenses against the laws of the United States,” “exclusive of the courts of the States.” 18 U.S.C. § 3231; *see Loney*, 134 U.S. at 373 (relying on predecessor statute). California law purports to dispense with that inconvenience: “conviction . . . in a criminal proceeding is not a condition precedent to disbarment” for felonious acts.

Cal. Bus. & Prof. Code § 6106. The upshot is that a tribunal describing itself as “sui generis—neither criminal nor civil,” 96a n.85, found a lawyer guilty of a federal felony without a grand jury, without a petit jury, without proof beyond a reasonable doubt, and without the United States. That is *Loney*’s nightmare scenario—complete with a prosecution set in motion by complaints from dodgy advocacy groups, like the 65 Project, that had never been adversaries with firsthand knowledge in any of Eastman’s litigation. Pet.7-8.

Fitzgerald v. Green, 134 U.S. 377 (1890), decided the same day as *Loney*, is not to the contrary. It upheld state jurisdiction over illegal voting for presidential electors—an offense committed at a State’s own polls—not conduct in federal courts, before the joint session of Congress, or constituting a federal crime.

Even Judge Scott McAfee, who presided over District Attorney Fani Willis’s prosecution of President Trump and Eastman, *et al.*, applied *Loney* to quash the counts charging false filings in federal court as “beyond this State’s jurisdiction.” *State v. Eastman*, No. 23SC188947, slip op. at 15–20, 22 (Ga. Super. Ct. Fulton Cnty. Sept. 12, 2024).

B. Under *Ex Parte Garland*, a Presidential Pardon Forbids Disbarment “by Reason of” the Pardoned Offense, and *In re Ruffalo* Confirms That Disbarment Is Punishment.

Disbarment is not a regulatory abstraction. “Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer,” and disciplinary hearings are “adversary proceedings of a

quasi-criminal nature.” *Ruffalo*, 390 U.S. at 550–51. For the first proposition, *Ruffalo* cited *Garland*. *Id.* at 550. California’s insistence that its proceedings are “sui generis—neither criminal nor civil,” 96a n.85, changes nothing; constitutional protections “cannot be renamed away.” *Chiles v. Salazar*, 607 U.S. 627, 645 (2026).

Garland answers the question the pardon presents. Augustus Garland, admitted to this Court’s bar in 1860, served in the Confederate Congress and received a full pardon from President Andrew Johnson in July 1865. 71 U.S. at 375. His pardon recited no conviction—only that he “had made himself liable to heavy pains and penalties.” *Id.* at 336–37. Congress had meanwhile barred any lawyer from practicing in the federal courts without swearing an oath that Garland could not truthfully take, and this Court had adopted the oath by rule. *Id.* at 374–75; see Act of Jan. 24, 1865, 13 Stat. 424. The Court held that Garland could continue to practice. Exclusion “from any of the professions . . . for past conduct can be regarded in no other light than as punishment for such conduct.” *Id.* at 377. The pardon power “extends to *every offence known to the law*, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment”; it “is not subject to legislative control.” *Id.* at 380 (emphasis added). A full pardon “releases the punishment and blots out of existence the guilt,” and if granted before conviction, it “prevents any of the penalties and disabilities consequent upon conviction from attaching.” *Id.* Most important here, “to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right is to enforce

a punishment for that offence notwithstanding the pardon”—an evasion that would allow the pardon to be “avoided,” and “that [would] accomplish[] indirectly [that] which cannot be reached by direct legislation.” *Id.* at 381.

That *Garland* involved an Act of Congress rather than a state law only strengthens the point. The Court explained that a State could not inflict such punishment “indirectly . . . under the form of creating qualifications,” citing the companion case that invalidated Missouri’s test oath, and held that the same reasoning “applies equally” to Congress. *Id.* at 380 (citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867)). If Congress cannot eject a pardoned lawyer out of the profession, then California—a State bound by the Supremacy Clause—cannot do so either. History explains the Court’s insistence. Presidents Lincoln and Johnson extended amnesty to former Confederates who swore loyalty oaths, while excepting certain classes of Confederate officials. Cong. Rsch. Serv., R43626, *The Voting Rights Act of 1965: Background and Overview* 1–2 (July 20, 2015), <https://tinyurl.com/f35ryt56>. Garland’s own pardon took effect upon his taking the oath prescribed in Johnson’s proclamation of May 29, 1865. 71 U.S. at 337. *Garland* ensured that bar discipline could not become an end run around executive clemency.

Here, the President expressly granted Eastman, *et al.* “a full, complete, and unconditional pardon” for “conduct relating to the advice, . . . support, . . . or advocacy for or of any slate or proposed slate of Presidential electors . . . in connection with the 2020 Presidential Election, as well for any conduct relating to their efforts to expose voting fraud and vulnerabilities in the 2020 Presidential Election.” 90

Fed. Reg. at 51,071. The pardon power reaches “Offences against the United States.” U.S. Const. art. II, § 2, cl. 1. Count One adjudicates Eastman’s commission of precisely such an offense—a § 371 conspiracy built on his advice and advocacy regarding competing slates and the electoral count. 96a-99a, 104a-05a. Indeed, the Proclamation’s reference to “advice” maps onto the State’s theory that Eastman’s speech in “assisting and advising President Trump” was criminal. 105a. Disbarring him on that basis enforces “punishment for that offence notwithstanding the pardon.” *Garland*, 71 U.S. at 381. Nor is the taint confined to Count One. The Review Department invoked the Section 371 predicate to defeat Eastman’s First Amendment defense, 104a-05a, treated Count Ten as duplicative of Count One, 99a, and rested disbarment on “the totality of the evidence,” 119a. A pardon that California may disregard at its pleasure is no pardon; it is a suggestion.⁴

⁴ The divided court in *In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), held that President George H.W. Bush’s pardon of Elliott Abrams—who pleaded guilty to two misdemeanor counts of withholding information from Congress about Iran-Contra—did not foreclose professional discipline. See 2 Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters* (1993) (prosecution summaries). The 5-4 majority reached that result erroneously by adopting a law review article, Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915), and dismissing *Garland*’s pardon holding as “dictum.” 689 A.2d at 11, 16, 19. Williston’s view—that a pardon removes disabilities flowing from conviction but frees courts to disqualify for the underlying conduct—restates Justice Miller’s *Garland* dissent, which this Court rejected. Compare 71 U.S. at 396–97 (Miller, J., dissenting), with *id.* at 381. Nor was the pardon holding dictum: this Court held that the oath “could not be exacted even if that act were not subject to any other objection

California will respond that a presidential pardon reaches only federal offenses and that attorney discipline is a state prerogative. Both points could be conceded, *arguendo*, and yet remain beside the point. Count One *is* a federal offense—the tribunal found every element of § 371, 97a-99a—and a State may no more punish a pardoned federal offense through its licensing power than Congress could through its power over the federal bar. *Garland*, 71 U.S. at 380–81. Any other rule would let every State nullify every federal pardon simply by relabeling punishment as professional discipline.

Carlesi v. New York, 233 U.S. 51 (1914), is not to the contrary. It permitted a State to treat a pardoned federal conviction as an aggravating circumstance when sentencing a later state offense. *Id.* at 59. Here, California did not punish a new state offense; it adjudicated and punished the federal offense itself.

At a minimum, the Court should grant, vacate, and remand. The only reasoned decision below—the Review Department’s—predates the pardon, and the

than the one thus stated.” *Id.* at 381. “[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.” *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

As the *Abrams* dissenters observed, the majority was “led astray by the assertions of Bar Counsel and the wishful thinking of Professor Williston.” 689 A.2d at 39 (Terry, J., dissenting). And even on its own terms, *Abrams* cannot save Count One. The OLC memorandum upon which it relied recognized that a pardon relieves an attorney of “all consequences that attached solely by reason of his commission of the offense,” and that discipline survives only where the bar has not “based its decision . . . on the fact that the attorney had violated the criminal laws of the United States.” *Id.* at 16 (citation omitted). *But here, Count One rests on exactly that fact.* 96a.

California Supreme Court's summary order does not mention it. 1a-2a. A GVR is appropriate where "recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). A presidential pardon of the very federal offense on which the centerpiece count rests *is* such a development, and the equities favor allowing California's courts to confront it in the first instance.

II. The Decision Below Subverts the Supremacy of the Constitution by Refusing to Apply This Court's First Amendment Precedents.

California demoted the First Amendment to second-cousin status beneath state ethics law—naked disobedience to supreme federal constitutional law.

A. The Supremacy Clause Binds State Disciplinary Tribunals to This Court's First Amendment Holdings.

The Constitution and federal law are "the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Because "the federal judiciary is supreme in the exposition of the law of the Constitution," this Court's interpretations bind state tribunals (including bar apparatuses). *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). A State "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963). This

Court “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.” *NIFLA v. Becerra*, 585 U.S. 755, 771 (2018). Last Term, this Court again rejected the notion that “professional speech” is a separate category entitled to diminished protection, reminding States that “[t]he First Amendment is no word game.” *Chiles*, 607 U.S. at 645.

**B. The Review Department
Formalistically Doffed Its Hat to Strict
Scrutiny But Then Declined to Apply
It.**

The Review Department agreed “that strict scrutiny is the applicable standard when examining core political speech and that Eastman’s charged statements involved core political speech.” 102a. Then it dropped a footnote that gave the game away: “To the extent that the correct analytical standard is relevant, we believe the applicable standard is one of strict scrutiny. *Regardless*, our focus remains on Eastman’s false statements and whether or not they violate the rules and statutes governing attorney conduct.” 102a n.92 (emphasis added). The tribunal then described its actual method—“*balancing* an attorney’s First Amendment rights outside of the courtroom with the public protection components of the attorney disciplinary process”—under “an objective, reasonableness standard.” 103a (emphasis added). It rejected as “misplaced” the subjective standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). 103a n.95. It refused to “compartmentalize” Eastman’s conduct in assessing his intent. 9a. It never identified a compelling interest served by punishing any particular statement, or explained why disbarment

was narrowly tailored to such interest. It simply announced, talismanically, that it “ha[d] applied the strict scrutiny standard.” 104a.

Strict scrutiny “[t]o the extent . . . relevant” is not strict scrutiny; it is the First Amendment on probation, *the First Amendment-Minus*. Under strict scrutiny, the State “must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.” *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 799 (2011) (citations omitted). An “objective, reasonableness” test is a *negligence standard*, yet the principles securing free expression “preclude attaching adverse consequences to any *except the knowing or reckless falsehood*.” *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (emphasis added). Where charged conduct occurs in the context of constitutionally protected activity, “‘precision of regulation’ is demanded”—the very statement-by-statement analysis the tribunal refused to undertake. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *Button*, 371 U.S. at 438).

The sanction analysis repeated this error. The tribunal faulted Eastman for applying “little intellectual rigor” and for failing to consult “true experts.” Pet.27 (citing 119a). But as *Chiles* explained, “[a] prevailing standard of care may reflect what most practitioners believe today, but it cannot mark the outer boundary of what they may say tomorrow.” 607 U.S. at 654. An advocate’s duty is to press his client’s position, not to poll experts preferred by one side and adopt their “consensus.”

Nor can this result be defended on a theory that lawyers, as officers of the court, enjoy diminished speech rights. The Review Department did so by

invoking authorities addressing speech that obstructs or prejudices the administration of justice—*Gentile v. State Bar of Nevada* sustained a rule aimed at a “substantial likelihood of material prejudice,” 501 U.S. 1030, 1063 (1991), to pending proceedings. 100a-01a. Counts Five, Seven, and Nine charged no prejudice to any adjudicative proceeding; they charged “moral turpitude.” 6a, 71a-78a, 86a-95a.

The speech at issue “lies at the very center of the First Amendment”: commentary on the conduct of a presidential election and critical advocacy directed at the public officer authorized to preside over the electoral count. *Gentile*, 501 U.S. at 1034 (opinion of Kennedy, J.). When a state tribunal acknowledges the governing rule of federal constitutional law and then declares its “focus” lies elsewhere, the Supremacy Clause is not merely implicated; it is defied. That alone warrants this Court’s intervention.

III. California’s Disciplinary Standards, as Applied, Gave No Fair Notice in a Quasi-Criminal Proceeding Targeting Core Political Speech.

“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). Since disbarment proceedings are quasi-criminal, lawyers are “entitled to procedural due process, which includes fair notice of the charge.” *Ruffalo*, 390 U.S. at 550. When a professional rule reaches speech, the demand for clarity peaks: this Court has held an attorney-speech rule void for vagueness as-applied for failing to give fair notice and creating a risk of discriminatory enforcement. *Gentile*, 501 U.S. at 1048–51.

The provisions applied here supply no such clarity. Cal. Bus. & Prof. Code § 6068(a) declares it “the duty of an attorney . . . [t]o support the Constitution and laws of the United States and of this state.” Section 6106 makes “any act involving moral turpitude, dishonesty or corruption” a ground for disbarment, “whether the act is committed in the course of his relations as an attorney or otherwise.” *Id.* § 6106. That reach, joined to an undefined standard, leaves every public statement of every California lawyer exposed. No lawyer reading the first would understand that a duty to “support” federal law empowers their bar tribunal to adjudicate a federal conspiracy under a civil standard of proof. And no lawyer could know, before advising his client, that a contested reading of the Twelfth Amendment and Electoral Count Act would be adjudged “moral turpitude” as opposed to a “nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Fed. R. Civ. P. 11(b)(2). The Review Department compounded the problem by sustaining culpability where Eastman either knew his statements were false “or had no reasonable factual or legal basis for making them”—a negligence standard. 104a.

Count Five charged Eastman with claiming “massive evidence” of “fraud.” The Review Department acknowledged the charge was “not technically accurate”—Eastman had spoken of “massive evidence that the election was . . . conducted illegally”—yet it sustained culpability anyway, reasoning that his words “inextricably linked ‘massive evidence’ to illegal conduct.” 90a. *Ruffalo* forbids that kind of moving target under the Due Process Clause, U.S. Const. amend. XIV, § 1: the charge “must be

known before the proceedings commence,” lest the proceedings “become a trap.” 390 U.S. at 551. The tribunal cited *Ruffalo* for its notice rule even as it sustained a charge it conceded was inaccurate. 90a.

The underlying legal question was genuinely open. In December 2020, a leading election-law scholar described the Electoral Count Act’s dispute-resolution provision as “impenetrable or, at the very least, indeterminate.” CRS RL32717, *supra*, at 9 n.25 (quoting Edward B. Foley, *Congress Must Fix This Election Law—Before It’s Too Late*, WASH. POST (Dec. 1, 2020)). After January 6, 2021, Congress amended the statute, 20a n.13, to provide that the presiding officer’s role is “limited to performing solely ministerial duties” with “no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes” over electors. 3 U.S.C. § 15(b)(1)-(2); *see* Cong. Rsch. Serv., R48309, *Joint Session of Congress for Counting Electoral Votes for President* 13 (Dec. 10, 2024), <https://tinyurl.com/yc2v88m6>. Congress rarely clarifies the obvious. Yet the Review Department treated Eastman’s contrary position as knowing deceit. 105a. It acknowledged that good-faith mistake of law is a defense to Section 6068(a), but held that Eastman had not raised it because he insisted—“erroneously,” in the tribunal’s view—his positions had “substantial historical and scholarly support.” 96a n.83; *cf.* Pet.26-27 & n.4 (collecting scholarship). That is a Catch-22: a lawyer may invoke his good faith only by conceding the error his good faith denies.

Responsible lawyers did differ. Texas’s highest court rejected discipline premised on the same *Texas v. Pennsylvania* pleadings in this Court, and authorities in Utah and Georgia declined to pursue related complaints. Pet.4-5 (citing *Webster v. Comm’n*

for *Lawyer Discipline*, 704 S.W.3d 478 (Tex. 2024)). When the same advocacy yields professional extinction in one State and nothing in three others, the standard is not a standard. Justices White and Marshall would have held that a federal court cannot disbar an attorney “on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.” *Ruffalo*, 390 U.S. at 556 (White, J., concurring in result). Due process demands no less of a State conducting *quasi-criminal proceedings*. Otherwise, the next lawyer asked to advise a presidential candidate—of either party—in a close election will have to weigh not only the merits of his client’s position but the politics of his state bar(s).

IV. The Decision Below Breaks with the Nation’s History and Tradition of Protecting Lawyers Who Press Contested Claims and Petition the Government.

History supplies the measure of these rights, and it points in Eastman’s direction. The American bar’s independence was forged in the 1735 New York trial of John Peter Zenger for seditious libel, which Gouverneur Morris later dubbed “the germ of American Freedom.” John H. Langbein, *et al.*, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 475 (2009) (citation omitted). After Zenger’s lawyers challenged the commissions (and hence, judicial power) of the presiding judges, Chief Justice James De Lancey disbarred them. *Id.* at 477; Historical Soc’y of the N.Y. Courts, *John Chambers*, <https://tinyurl.com/2zp6vr6j> (last visited Oct. 9, 2026). Philadelphia’s Andrew Hamilton, “[r]eputedly the best lawyer in America”

at the time, took up Zenger's defense. Langbein, *supra*, at 477 (citation omitted). Against the court's instructions and overwhelming weight of contemporaneous legal authority, drawing the Chief Justice's ire and rebuke, Hamilton defended Zenger by arguing to the jury that: criticism of a government official must be false to be libelous (truth is a defense); and the jurors (in lieu of the bench) have the right to decide matters of both fact and law in rendering Zenger's verdict, and ought to do so. *See id.* at 477–79.

The jury adopted Hamilton's arguments and acquitted Zenger in an outcome inspiring ratification of the First and Sixth Amendments and establishment of an independent bar. *Id.* at 478–79; Historical Soc'y, *supra*. Hamilton's ambitious, albeit good faith arguments in zealous defense of his client, which required modification of then-existing law, were victorious not only in the *Zenger* court but in the court of American legal history. *See generally Sullivan*, 376 U.S. at 273–285. The New York judges could not disbar Hamilton for pressing them since he was a Philadelphia attorney. THE SUPREME COURT OF THE STATE OF NEW YORK, 1691-1941: EXERCISES UPON THE OCCASION OF THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF ITS FOUNDING 38 (1941). Had Hamilton been a member of today's California Bar, however, he would have assuredly been placed on its disbarment chopping block for "seeking to mislead the [New York] Court." 4a, 107a.

A generation later, John Adams defended British soldiers charged in the Boston Massacre despite intense public hostility, a representation remembered for the "independence" it required. Pet.29 (citation omitted). These colonial-era episodes teach that lawyers in our system of republican government must

be free to advocate creatively and ambitiously in pursuit of justice for clients that officials and majorities despise.

Disputes over electoral votes are equally woven into our history. The 1876 outcome turned on contested electoral votes from Florida, South Carolina, and Louisiana amid “fraud, intimidation, and other illegal practices on both sides,” and Congress created an electoral commission to break the deadlock. CRS R43626, *supra*, at 7. In 1960, Hawaii produced two slates of electors; both met and voted on the prescribed day, and Vice President Nixon—presiding over the count of an election he had lost—proposed accepting the later-certified Kennedy slate “without the intent of establishing a precedent.” CRS RL32717, *supra*, at 9; CRS R48309, *supra*, at 11, 13 n.76. Members of Congress objected to electoral votes in 1969; in 2001, Vice President Gore ruled on objections to Florida’s votes; and in 2005, House and Senate Members challenged Ohio’s electors over “reported voting irregularities.” CRS RL32717, *supra*, at 7. Debate, objection, and adjudication—not disbarment—are the Constitution’s answers to disputed electoral claims.

The twentieth century’s lessons are the same. This Court set aside, as unnecessarily severe, permanent disbarment of a lawyer for his conduct defending Communist Party leaders in the *Dennis* trial. *Sacher v. Ass’n of the Bar of N.Y.C.*, 347 U.S. 388, 388–89 (1954) (per curiam). And when Virginia turned its professional-conduct rules against the NAACP’s litigation program, this Court refused to let professional regulation override protected advocacy. *See Button*, 371 U.S. 415; Pet.30.

The right to petition was similarly designed so that the people “may communicate their will” to legislators and officials, *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting 1 ANNALS OF CONG. 738 (1789)), entitling citizens “to express their . . . concerns to their government and their elected representatives,” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). The Review Department brushed that right aside because Eastman acted for a client rather than “as a private citizen.” 106a. But this Court has long recognized that advocacy and litigation conducted through counsel are protected avenues of expression, petition, and association. *Button*, 371 U.S. at 429–31. Nothing in the Petition Clause conditions protection on proceeding *pro se* or *pro per*.

Finally, our history treats clemency as a means of closing bitter political chapters—not an irrelevancy for state bars to disregard. Lincoln’s plan to “bind up the nation’s wounds” began with an amnesty proclamation, *supra* R43626, at 1–2. President George H.W. Bush’s 1992 Iran-Contra pardons were a response to “the criminalization of policy differences.” Proclamation 6518 (Dec. 24, 1992), <https://tinyurl.com/zmv8nmey>. The 2025 Proclamation likewise continues “the process of national reconciliation” post-2020 election. 90 Fed. Reg. at 51,071. A State that disbars a lawyer for his pardoned conduct reopens a door which the Constitution already nailed shut.

* * *

The unlawful pillorying of Eastman for political purposes must end. He is an eminent constitutional scholar, former clerk for a Justice of this Court, and a litigator never questioned ethically before the nuclear

winter brought on against President Trump's lawyers post-2020 election. David Boies made a critical concession in *Bush v. Gore* that led this Court to hold Florida's 2000 recount unconstitutional. 531 U.S. 98, 106 (2000) (per curiam). No one, in a more magnanimous age, brought ethics charges against him (nor should they have):

It was only 22 years ago when lawyers like me sought to block the election of President George W. Bush, believing as we did that Al Gore actually received more votes than Bush in Florida and was the rightful winner. We lost in court. But back then no one suggested going after the hundreds of lawyers who tried to prevent Bush's certification.

Alan M. Dershowitz, *I Will Defend Any Lawyer Targeted by McCarthyist '65 Project*, BREITBART (Mar. 10, 2022).

Restore parity across the partisan divide in the treatment of zealous advocacy. Call for the views of the Solicitor General and a response from California.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below vacated with instructions to dismiss. In the alternative, this Court should grant the petition, vacate the judgment, and remand for further consideration in light of Proclamation No. 10,989.

Respectfully submitted,

JEFFREY BOSSERT CLARK, SR.

Counsel of Record

JOSEPH SCHMITZ

ANTHONY CHARLES LICATA

THE OVERSIGHT PROJECT

211 North Union Street

Alexandria, VA 22314

(202) 279-1396

Jeff@itsyourgov.org

Counsel for Amicus Curiae

The Oversight Project

October 13, 2026